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Multiple Modernities: An Alternative to Western Economists' Recommendations for China's Private Law

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Summary: The article criticizes the recent World Bank report, "China 2030" which formulates a new development strategy for China to rebalance the role of government and market, private sector and society. The report deals explicitly with the role that private law should play as means of economic modernization. The main thesis of this article is that the World Bank report develops a rather one-sided vision of the future of China's private law based on the prejudice that there is one and only one way to the modernization of Chinese society. In contrast, a sociological view suggests that China's law should develop in a way that is called "multiple modernities". There are two dimensions in which this multiplicity of paths to modernity is realized. One is functional: While the World Bank recommends a unifunctional economic modernization, systems theory would follow a multifunctional approach. The other dimension is historical and cultural: While the World Bank perceives a universal transcultural path to modernity, sociological thinking would take into account the varieties of regional cultures in their specific paths to modernity and would stress that specific Chinese characteristics have a strong influence in this process. The article elaborates the thesis on the following issues which are controversially discussed in China's private law (1) the multidimensional role of private law, (2) the horizontal effect of human rights, (3) the role of the political party.

Key words: Comparative law theory, modernization, systems theory, Chinese private law, legal transplant

Category: comparative law theory

I.

In this article we will criticize some influential Western observers of Chinese law. What kind of ideological prejudices do they import into their recommendations how Chinese law should develop? We will take as a prominent example the recent World Bank recommendations for China's economic development. We will look at the role that law is supposed to play in these recommendations and formulate our alternative views. The report, "China 2030: Building a Modern, Harmonious, and Creative High-Income Society" formulates a new development strategy for China to rebalance the role of government and market, private sector and society, to reach the goal of a high income country by 2030.¹ The report deals explicitly with the role that law should play and recommends that the „rule of law“ should be strengthened for the purpose of economic modernization:

¹ World Bank and the Development Research Center of China's State Council, the People's Republic of China, *China 2030: Building a Modern, Harmonious, and Creative High-Income Society*. World Bank 2012. Available at: <http://www.worldbank.org/en/news/2012/02/27/china-2030-executive-summary>.

„As the government transitions away from direct interventions in enterprise and market activities and toward creating a policy and regulatory environment supportive of free and fair competition, it must also safeguard the rule of law.“²

Our thesis is that the World Bank report develops a rather one-sided vision of the future of China's private law. They recommend legal changes which reveal a profound prejudice – the prejudice that there is one and only one way to the modernization of Chinese society. In contrast, we argue from a sociological view that China's law should develop in such a way that it can react to the challenges of what in sociology is called “multiple modernities”. There are two dimensions in which this multiplicity of paths to modernity is realized. One is functional: While the World Bank recommends a unifunctional economic modernization, systems theory would follow a multifunctional approach. The other dimension is historical and cultural: While the World Bank perceives a universal transcultural path to modernity, sociological thinking would take into account the varieties of regional cultures in their specific paths to modernity and would stress that specific Chinese characteristics have a strong influence in this process.³

1. Functional dimension: Unifunctionality versus multifunctionality

Let us begin with the functional dimension. In the last thirty years Chinese law has been moving away from the domination of Soviet socialist models of law and Chinese lawmakers have been looking for legal experiences all over the world in comparative and international law. Chinese scholars, Lian Huixin for example, are calling the new orientation according to which China's private law is supposed to develop a new “rational law”.⁴ Rational law's role is supposed to provide for a social order which is conducive to the recent economic development. This has been succinctly expressed in Deng Xiaoping's famous “Two hands formula”: “On the one hand the economy must be developed; and on the other hand the legal system must be strengthened”.⁵ The World Bank recommendations support strongly this primarily economic orientation of Chinese private law.

Such recommendations for Chinese law can be traced back to an academic movement, which had spread through all the law schools of North America and is now trying to influence Chinese law with a particular zeal. The argument is that after China's turn toward a “socialist market economy”, it is no longer a centralized political planning rationality but a decentralized economic rationality that is supposed to represent the new universality of law. Theory of transaction costs, theory of property rights, public choice and economic analysis of law are different currents in the broad stream of one movement which is intent on replacing the emaciated concept of a political planning law with the ideal of the economic efficiency of law. This amounts to a new monotheism that speaks with the pathos of natural law in the name of both “nature” and “reason”. The

2 Ibid. 20.

3 For an excellent analysis of intercultural relations, Francois Jullien (2008) *De l'universel, de l'uniforme, du commun et du dialogue entre les cultures*, Paris: Fayard 2008.

4 Jianfu Chen (2008) *Chinese Law: Context and Transformation*, Leiden: Nijhoff, 39 ff., 65 ff.

5 Deng Xiaoping articulated at a meeting of the Standing Committee of the Political Bureau of the Central Committee on January 17th, 1987: To achieve the four modernizations, it is essential to have two hands, not just one. By this he meant that China must promote economic development and at the same time build a legal system. Fengcheng Yang, “The Origin, Connotation and Development of ‘Stress on Both Hands’”, *Guangming Daily*, February 23rd, 2011, 11th layout.

internal laws of the market and of economic organization are in the nature of modern society and private law has to reflect them. The philosophy of "rational choice" elaborates on the principles of reason in this new order and they apply to law as well.⁶

In the new rational law which the World Bank report supports, economic efficiency claims to be the new victorious paradigm everywhere in the world, but now also in China where it replaces more and more older socialist orientations of law, and does not tolerate the co-existence of any other paradigms alongside it. The World Bank justifies the exclusivity of the efficiency claims, with the society-wide, and today almost worldwide institutionalization of economic rationality which ended in their historic victory in modern China. Indeed, the strength of economic theory lies here, without doubt, and in contemporary China the argument has gained strong plausibility that the new society is an economic society and that Chinese modern law has to provide market-adequate, economy-adequate legal rules.⁷

However, there is the danger of falling prey to a profound misunderstanding what modernization of society is about. It is the great weakness of the dominant economic theory, which also underlies the World Bank's recommendations that it purports to become the design for the whole society. They do not limit their recommendations to economic questions in the narrow sense; instead, they express higher ambitions for "Building a Modern, Harmonious, and Creative High-Income Society". However, to identify the modernization of traditional societies with an advanced market economy to which law needs to adapt means to misunderstand the long-term historical process of modernization fundamentally. It needs to be said with all rigor: Economic rationality does not have the privilege of society-wide institutionalization all to itself. There has, indeed, been a paradigm shift in modernity. However, it is heading in a totally different direction - not in the direction of the one economic modernity, but in the direction of multiple modernities.⁸ China's law would succumb to this misunderstanding if it adapted one-sidedly only to economic rationalization. The challenge China's private law is facing today is rather that it needs to reflect a plurality of rationalization processes in different spheres of life. It is not the case of eliminating the old political monotheism in favor of economic monotheism which law needs to internalize. Rather, China's law is exposed to a more complex transformation, from the monotheism of a society wide political rationality to a polytheism of the many discourses in Chinese society. There is a paradigm shift toward the particularistic rationalities of the many gods to which law has to respond in other ways than by just adopting the one new god.

When Max Weber and after him whole generations of sociologists have analysed modernization as a process of rationalization, they were careful not to point exclusively to economic rationality. Modernization means in sociology that a variety of rationalization processes takes place in multiple spheres of life.⁹ Economic rationality is only one among many. Politics, science and technology, the health sector, the media, the law and the morality of lifeworlds have all developed their own self-centered

⁶ For a useful recent overview on legal economics, Kornhauser, Lewis, "The Economic Analysis of Law", *The Stanford Encyclopedia of Philosophy* (Fall 2011 Edition) <<http://plato.stanford.edu/archives/fall2011/entries/legal-econanalysis/>>.

⁷ Chen (fn. 4) 50.

⁸ For a more detailed discussion, Gunther Teubner (1997) "Altera Pars Audiatur: Law in the Collision of Discourses", in: Richard Rawlings (ed) *Law, Society and Economy*, Oxford: Clarendon, 149-176.

⁹ Max Weber (1968) *Gesammelte Aufsätze zur Wissenschaftslehre*, Tübingen: Mohr Siebeck, 603 ff.; Wolfgang Schluchter (1996) *Unversöhnte Moderne: Zwischentexte*, Frankfurt: Suhrkamp, 339 ff.

rationality.¹⁰ They all expose a strange contradiction. On the one hand, none of them can claim to be the one universal rationality; they are all clearly particularistic rationalities. On the other hand, they ask for their society-wide institutionalization and they all demand universal acceptance and they push for their self-regulating autonomy. The overriding logic of modernization is not as is often said the emergence of capitalism – this had been the error of the old adversaries Karl Marx and Adam Smith, this is the error of the new adversaries Antonio Negri and Friedrich von Hayek. Rather, it is functional differentiation, the unleashing of a multiplicity of autonomous rationalities – apart from economic rationality, scientific, educational, legal, political, medical and medial rationality. As a consequence, modernization is successful only when none of these rationalities is allowed to gain primacy; instead, these rationalities need to complement each other in a constructive division of labor among them. The difficult challenge for modern societies is to maintain the high variety of these worlds of meaning and to allow for high self-regulatory autonomy to each of these partial rationalities to develop. And the danger needs to be avoided by all means that one of them gains a totalitarian grip on society.

This is the point where it seems to us, recent Chinese developments show a peculiar asymmetry. In contemporary China, the cost-benefit calculus of economic rationality has now firmly been institutionalized in economic transactions, whether in the state-run or in private enterprises. Moreover, economization expands more and more into other sectors of Chinese society and rational choice makes its claims in all social contexts. Accordingly, rational choice also successfully demands its institutionalization in China's private law. Backed by the strong support of the political party and the government, Chinese private law is now oriented toward economic efficiency instead of the old ideas of political planning. In the future private law is supposed to protect the new autonomy of economic action and to develop legal instruments to facilitate this autonomy. This is what the World Bank recommend for Chinese private law.

What is missing in these recommendations is to take law's relation to non-economic rationalities into account. In an asymmetric fashion, the non-economic sectors of Chinese society dispose of an autonomy similar to that of the economy only in rather rudimentary terms. On the self-regulation of other sectors of society the World Bank recommendations remain silent. And when they refer to other sectors like health, education and the environment, their recommendations are dominated by an economic orientation.¹¹ Each of these sectors are instrumentalized for the functioning of a market economy. They do not understand them in their own right. While the World Bank looks to markets and business organizations and demands from Chinese law specific regulatory measures which have to reflect the universal principles of efficiency, they fail to make recommendations for enhancing the specific rationality of other spheres of Chinese society. Worse, there is a blatant contradiction in the World Bank recommendations. While for the economic sector they are highly critical of a hierarchically organized command economy and argue for legal reforms which increase bottom-up autonomy for enterprises, market activities and the financial system, they argue for a top-down approach for all the other sectors of society – health, social security, education, science – and do not care at all for a high self-regulatory autonomy of the non-economic sectors of Chinese society. While they demand to sharply limit governmental control of economic processes, they recommend increased governmental control in the other sectors of Chinese society.

10 Niklas Luhmann (2012) *Theory of Society*, Palo Alto: Stanford University Press, ch. 4, VIII.

11 World Bank (fn. 1) 35 ff., 39 ff., 46 ff.

At present, China's law does little to support the self-regulatory autonomy of non-economic sectors, including the legal sector itself.¹² Compared to the autonomy of enterprises and market processes there exist much less autonomy and self-regulation in research practices of the universities, in the technologies of research institutes, in information systems of the media, in the aesthetic practices of the art sector, and the agencies of health and social security systems, and in the decisions of the court system.¹³ However, for the completion of the modernization process Chinese law would need urgently to protect the autonomy of self-regulation not only in the economy, but with equal rigour in science, in education, in the news media, in art, in the medical sector, and in law. What has been rather successfully achieved in economic life, would need to be extended to the other sectors of Chinese society. Only once the other spheres of social life achieve a high self-regulatory autonomy comparable to the economy then they will be able to develop their full potential in the societal division of labour between different autonomous social systems. This is what we would call the first dimension, the functional dimension of multiple modernities. And we would criticize the World Bank recommendations because they concentrate one-sidedly on the economic function of society and do not take adequately the functional multiplicity of modernities into account.

2. Historical-cultural dimension: Universal modernity versus culturally specific modernity

Multiple modernities develop a second dimension, which the World Bank recommendations neglect as well. The recommendations fail to take into account a conspicuous phenomenon of the globalization process which is called "varieties of capitalism".¹⁴ **Fehler! Verweisquelle konnte nicht gefunden werden.** The World Bank report gives the impression as if there were only one evolutionary path to efficiency which claims validity for all economic systems in the world. However, the experience of the recent globalization process is the opposite. There is not one exclusive path to a successful market economy as some economists tend to think. Contemporary trends toward globalization do not necessarily result in a convergence of social orders and in a uniformization of law. Rather, new differences are produced by globalization itself.¹⁵ These trends lead to a double-fragmentation of world-society into functionally differentiated global sectors on the one side and a multiplicity

¹² Chen (fn. 4) 50 ff.

¹³ For the universities, Yongliu Zheng (2004) "Academic Freedom and its Enemies - Academic Research in Examination and Approval System, Academic Research in Hierarchy", *Academics in China* 1, 178-186; for technology research, Yaohui Zhang and Weiping Niu (2007) "Demand-induced Innovation, Technology Independence and Industrial Environment - Observation of SMS Industry in China", *China Industrial Economy* 4, 111-118; for the autonomy of media, Ying Chen and Tiance Dong (2010) "Journalistic Objectivity: Context, Process and Future", *Journal of Jinan University (Philosophy and Social Science Edition)* 6, 149-155; Yongxing Sun and Hongqi Di (2012) "From Political Dependence to Formal Independence - Relationship between Media and Politics in a Panoramic View", *Contemporary Communication* 6, 24-25, 30; for the freedom of art, Yuling Wang (2010) "Research on Occupational Groups Who Need Artistic Freedom in the New Social Classes", *Journal of Liaoning Institute of Socialism* 1, 47-50; for judicial independence, Weifang He (2003) "Court Reform in China and Judicial Independence - Observation and Reflection from a Participant", *Zhejiang Social Science* 2, 81-85.

¹⁴ Peter A. Hall and David Soskice (ed) (2005) *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage*. Oxford: Oxford University Press.

¹⁵ Gunther Teubner (1998) "Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergencies", 61 *Modern Law Review*, 11-32.

of global cultures on the other.¹⁶ Accordingly, different regions of the globalized society do not face the same problems for their legal systems to deal with, but highly different ones. This is especially true for China. The result is not more uniform laws but more fragmented laws as a direct consequence of globalising processes.¹⁷

Against all expectations that globalization of the markets will lead to a convergence of legal regimes and to a functional equivalence of legal norms in responding to their identical problems, the opposite has turned out to be the case. Against all talk of regulatory competition, which is supposed to wipe out institutional differences in diverse nation states, legal regimes under advanced capitalism have not converged. Instead, new fundamental differences have been created. Despite liberalization of the world markets, the result of the last thirty years is the establishment of more than one form of advanced capitalism. And the differences in so-called production regimes seem to have increased.¹⁸

Production regimes are the sites where private law comes into play resulting in major binding arrangement between the rules of law and economic transactions. Production regimes are the institutional environment of economic action. They organize the production of goods and services through markets and market-related institutions and determine the framework of incentives and constraints. Production regimes are the 'rules of the game' that govern economic action.¹⁹ Their idiosyncrasies are explained by the fact that single institutions are not isolated from each other but interact as interdependent elements of a stable system. Financial arrangements and corporate governance are strongly influenced by industrial relations, education and training, contracting networks, inter-company relations, standard setting and dispute resolution and vice versa. They constitute an interlocking system that tends to be self-perpetuating.²⁰ The "varieties of capitalism" are explained by the intra-systemic dynamics of production regimes.

Production regimes differ widely from economy to economy. The strongest divide exists between continental European production regimes (Austria, Benelux, Denmark, Germany, Norway, Sweden, Switzerland), their Anglo-Saxon counterparts (Great Britain, USA, Ireland, Canada, Australia, New Zealand) and the Japanese model of capitalism. The last decades have witnessed the emergence of new types of Asian capitalism, particularly the Chinese production regime the contours of which are not yet clearly defined.²¹ Each production regime reacts upon external influences as an interlocking system. This is what the World Bank recommendations fail to take into account. The World Bank has been criticized for this failure: "peripheral economies

16 Niklas Luhmann (1994) "Inklusion und Exklusion", in: Helmut Berding (ed) *Nationales Bewußtsein und kollektive Identität*, Bd. 2. Frankfurt: Suhrkamp, 15-45; idem (1995) "The Paradox of Observing Systems", 31 *Cultural Critique*, 37-55; Surya P. Sinha (1995) "Legal Polycentricity", in: Hanne Petersen and Henrik Zahle (ed) *Legal Polycentricity: Consequences of Pluralism in Law*, Aldershot: Dartmouth, 31-69.

17 Gunter Teubner (2012) *Constitutional Fragments: Societal Constitutionalism and Globalization*, Oxford: Oxford University Press.

18 Soskice and Hall (fn. 14).

19 J. Rogers Hollingsworth (1993) *Comparing Capitalist Economies*, Oxford: Oxford University Press.

20 Michael E. Porter (1990) *The Competitive Advantage of Nations*, London: Macmillan.

21 Some discussion in Stéphanie Balme and Michael W. Dowdle (ed) (2009) *Building Constitutionalism in China*, New York: Palgrave; Albert H.Y. Chen (2010) "Emergency Powers, Constitutionalism and Legal Transplants: The East Asian Experience", in: Victor V. Ramraj and Arun K. Thiruvengadam (ed) *Emergency Powers in Asia - Exploring the Limits of Legality*, Cambridge: Cambridge University Press, 56-88.

clearly have a distinct set of capitalist logics at play: their markets often have different internal structures and a different (and more diverse) set of social functionalities. A 'global competition law' that fails to take this into account is not going to be global at all."²² They failed to reflect that the Chinese production regime is developing a considerable stability in relation to efficiency-driven reform pressures, a remarkable resilience towards changing demands of various markets, a continual resistance against institutional transfers, in short: a considerable historical continuity in its independent development and all this during the age of leveling globalization.²³ China's production regime is a specific structural ensemble of economic institutions which results from a path-dependent evolutionary process. China's production regime links the economy to other social systems. If one wants to understand their evolutionary dynamics then one would have to analyze their long-term history as a linkage institution bridging the Chinese economy to China's political system, to its legal system, to science and education and to the other subsystems of Chinese society.²⁴

Let us just sketch one characteristic trait of the Chinese production regime. It can be traced back to century-old historical traditions and has been translated into China's recent political structures. It is the tradition of "fu min ru fu chizi" ("taking care of the people like of children").²⁵ In the ancient Chinese society is perceived as an enlarged family and the parents – Kainzi, the emperor, and the administrative hierarchies – should take care of society in the same manner as a good father does with his children. Hierarchy and dependency have been central elements of the traditional society as a whole which are in sharp contrast to Western ideas of the separation of state and society and the ideal of autonomous spheres within society. 1949, in the planning economy, the communist regime continued this tradition via centralization of society's concerns in the communist party and the administration. And the new socialist market economy still shows many signs of this tradition.²⁶ This tradition, which is vital still today forms part of the Chinese production regime and needs to be taken into account when institutional transfers from the West are considered.²⁷

II.

²² Dowdle, Michael W. (2012) "Whither Asia? Whither Capitalism? Whither 'Global Competition Law'?", in: Michael W. Dowdle, John S. Gillespie and Imelda Maher (ed): *Asian Capitalism and the Regulation of Competition: Towards a Regulatory Geography of Global Competition Law*. Cambridge: Cambridge University Press, ch. 13.

²³ David Soskice (1997) "Divergent Production Regimes: Coordinated and Uncoordinated Market Economies in the 1980s and 1990s", in: Herbert Kitschelt, et al. (ed) *Continuity and Change in Contemporary Capitalism*, Cambridge: Cambridge University Press, 271-289.

²⁴ An analysis of some characters of China's contemporary production regime can be found in Jacques Delisle, "States of Exception in an Exceptional State: Emergency Powers Law in China", in Victor V. Ramraj, Arun K. Thiruvengadam (ed) (fn. 21), 342-390; a classical analysis of law and society in traditional China, Ch'u T'ung-tsu (1961), *Law and Society in Traditional China*, Paris: Mouton; contemporary discussion, Philip C. C. Huang (2007) *Experience and Theory: Historical Studies on Social, Economic and Legal Practice in China*, Peking: China Renmin University Press.

²⁵ Zhiping Liang (2002) *A Pursuit of Harmony in Natural Orders: A Study on Chinese Traditional Legal Culture*, Peking: China University of Political Science and Law Press, 142-167.

²⁶ Chen (fn. 4) 50 ff.

²⁷ For a case study in institutional transfer, Chunyi Qi (2013) *Rechtstransfer in Chinas Produktionsregime? - Zur Kontrolle der Allgemeinen Geschäftsbedingungen im deutschen und chinesischen Recht*, Diss. Baden-Baden: Nomos Verlag (forthcoming).

Systems theory's message would be to combine these two dimensions of multiple modernities in the analysis of China's private law. Any consideration about its future developments would have to take into account (1) private law's multifunctional relation to different sectors of Chinese society and simultaneously (2) to contextualize private law in the history of Chinese culture, politics and society. In these two dimensions lies the main contrast to the World Bank recommendations. The World Bank aims at a private law that is (1) primarily obedient to the economic function and recommends for this purpose (2) to directly transfer Western legal rules into China's private law. In contrast, systems theory would ask (1) for private law's responsiveness to different functional systems of Chinese society and would (2) simultaneously carefully contextualize the analysis in the history of Chinese culture.²⁸ This is the general research agenda under which systems theory would scrutinize Chinese private law. Let us try to exemplify how these two dimensions, the functional and the cultural multiplicity of modernity, could be taken into account, using two examples of contemporary Chinese debates in private law.

1. Re-introducing the private/public divide?

At present Chinese legal scholars are passionately discussing whether and how to revitalize the distinction between private and public law. Lian Huixin, for example, attacks the fusion of public and private law, which occurred in all socialist countries and denounces it as a totalitarian tendency.²⁹ Li Yongjun asserts that the fusion of public law and private law has seriously affected legislation and judiciary in China.³⁰ Under the influence of the newly developed market economy the argument is advanced that private law has to be separated from public law. Private autonomy needs to be established as the guiding principle in private law.³¹ Chinese private lawyers advance the argument

“... that in order to establish a legal order for a market economy the government must be separated from enterprises, that economic and political functions of government must be distinguished, and that enterprises must become truly independent civil law subjects capable of resisting undue intervention from state administrative authorities”³²

Here lies a paradox. While in the Western legal orders, the distinction of private and public law comes increasingly under attack,³³ in China where the

²⁸ For this type of analysis Teubner (fn. 15). For an application to Chinese private law, Qi, (fn. 27).

²⁹ Huixin Liang (1992), “To Make a Perfect and Modern Civil Law”, *Chinese Journal of Law* 5, 5.

³⁰ Yongjun Li (2002), “Reshaping the Spirits of Private Law in the Bankruptcy Law”, *Tribune of Political Science and Law* 3, 28-34.

³¹ Chenguang Wang and Wen Liu (1993), “Market Economy and Division between Public Law and Private Law”, *Chinese Legal Science* 5, 28-36; Xinhe Cheng (1997), “Public Law, Private Law and Economic Law”, *Peking University Law Journal* 1, 11-15; Wanyi Zhao (2006), “On Basic Concepts and Institutional Framework of Enactment of Chinese Civil Code in the Sight of Relationship between Civil Law and Constitutional Law”, *Chinese Legal Science* 1, 117-127; Mingrui Guo and Hongwei Yu (2006), “A Study of the Division between Public Law and Private Law - Enlightenment on Chinese Civil Law”, *Global Law Review* 4, 425-430. Different conclusions, Shiming Zhen (1997), “Questions and Answers about Public Law and Private Law”, *Contemporary Law Review* 4, 14-18; Yafei Yang (1995), “Enlightenment of the History of Division between Public Law and Private Law”, *Jilin University Journal Social Sciences Edition* 3, 14-20.

³² Huixin Liang (fn. 29) 5.

³³ A good summary of the debate, Anna Gear (2003) “Theorising the Rainbow? The Puzzle of the Public-private Divide”, 9 *Res Publica*, 169-194.

distinction had been discarded for decades, private lawyers argue forcefully to introduce it into the law. To a certain degree they are right, a total fusion of the public and private spheres is indeed inadequate. This has been the painful experience of a thoroughgoing politicization of all aspects of private life that China like many other socialist societies had undergone. And it comes as a liberation to introduce into law distinctions that reflect adequately the differentiation of modern society. However, how adequate is it for the complex Chinese society to use the simple distinction between a private and a public sector and the concomitant simple distinction between private law regulating the pursuit of private interests and public law regulating the state-society relation oriented toward the public interest? Obviously, the public/private distinction is an oversimplified account of contemporary Chinese society. Nevertheless, the division of society in a private and a public sector is a widespread idea, and the World Bank report uses it constantly for the description of Chinese society.³⁴

As an alternative, we do not suggest to abandon totally the distinction, instead we propose two conceptual moves.³⁵ First move: the public/private divide should be replaced by polycontextuality. Second move: It is within each social system of this polycontextural world that a distinction between a private dimension and a public dimension should be re-introduced.

The claim is this: Contemporary social practices can no longer be analyzed by a single binary distinction public/private, neither in the social sciences nor in the law; the fragmentation of society into a multitude of social fields requires a multitude of perspectives of self-description. ³⁶ Consequently, the simple distinction of state/society, which translates into law as public law vs. private law will have to be substituted by a multiplicity of social perspectives which need to be simultaneously reflected in the law.

The new Chinese private law needs to re-enforce its elective affinity to the contemporary plurality of discourses -- not only its affinity to the economy as it is predominantly understood today, but also private law's close relation with the many contexts of intimacy, health, education, science, religion, art, and media. This would lead to a thoroughgoing reflection within private law about the distinctive proper rationality and proper normativity of these various realms of discourse, as opposed to the mere invocation of individual private autonomy.³⁷

In China's present situation the point is not only to de-politicize private law, to strengthen its autonomy in relation to public law, but also to de-economize it, to distance it not only from the so-called public sector, i.e. from institutionalized politics, but also from the so-called private sector, i.e. from rational economic action. While it has become commonplace today to stress the difference of an efficiency-driven private law from the regulatory policies of the state and to underline its autonomy and decentralized rule production, it is much less understood that private law cannot be

³⁴ World Bank (fn. 1) 17ff.

³⁵ For this argument in more detail Gunther Teubner (2012) "Societal Constitutionalism and the Politics of the Commons", 21 *Finnish Yearbook of International Law*, 2-15.

³⁶ Luhmann (fn. 10) 958 ff.

³⁷ For this orientation of private law in general Rudolf Wiethölter (2005) "Just-ifications of a Law of Society", in: Oren Perez and Gunther Teubner (ed) *Paradoxes and Inconsistencies in the Law*, Oxford: Hart, 65-77.

identified simply with the juridification of economic action. This would amount to replacing the historical error of politicizing private law by another historical error of economizing it. One cannot reduce contract law to the law of market transactions. Similarly, the law of private associations cannot be boiled down to the law of business organizations. Property law is much more than the mere basis for market transactions and tort law has a broader meaning than a simple set of policies and rules that internalize economic externalities and eradicate third party effects.

It is the first dimension of multiple modernities, the functional dimension, which suggests that Chinese private law reflect adequately the functional differentiation of society. A non-reductionist concept would identify private law in many social spaces wherever spontaneous norm-creation is the source of law. In sharp contrast to an economic instrumentalization, functional differentiation provides the rich social fabric that serves as the inevitable context for the parties' relationship to which private law needs to be responsive.

At the same time the second dimension of multiple modernities, the historical-cultural specificity of China, comes in. It supports such a contextual approach to law. While the Western tradition of a strict separation between law and morality, between legal rules and social norms has worked as an obstacle against a close relation between private law and social practice, and has produced a highly formalized private law which maintains its distance from social practices, certain traits of the Chinese legal culture which have been cultivated for centuries, from the conflict between the confucianists and the legalist up to recent characteristics of Chinese legal culture, might strengthen such a symbiosis between private law and social orders. In China civil matters and claims between citizens had always been of secondary interest to the state and were largely left to customary law.³⁸ While Western societies are highly litigious societies in which state adjudication resolves private conflicts in a formalized adversary procedure, the Chinese legal culture has always preferred alternative forms of conflict resolution – mediation and arbitration – where the recourse to informal norms of social morality stands in the foreground.³⁹ In the end, the century-old preference of Li-morality as against the Fa-legality, might have an influence on the development of Chinese private law, against an excessive Western formalization and would tend toward a closer relation of law with fundamental moral norms within diverse social fields.

The main challenge for China's private law today, it seems to us, is to intensify private law's relation to the many autonomies of different non-economic social worlds - the autonomy of configurations in intimate life, health care, education, research, religion, art, the media - to whose fundamental principles private law needs to be responsive. This challenge has not been taken up, neither by the Chinese defendants of a high formal legal rationality of an autonomous private law, nor by the

38 Chen (fn. 4) 327 f. with further references.

39 Typical Analysis HSIAO KUNG-CH'ÜAN (1979) *Compromise in Imperial China*, Seattle: School of International Studies, Univ. of Washington; Shiga Shuzo (2003) *Outline of Chinese Law of Clan*, Peking: China Law Press; different summary based on the Practice since Qing Dynasty, Philip C. C. Huang (2007) "Past and Present of Chinese Civil Judgment", "Past and Present of Chinese Court Mediation", 10 *Tsinghua Law Review*; idem (1996), *Civil Justice in China: Representation and Practice in the Qing*, Stanford: Stanford University Press; Philip C. C. Huang and Chenjun You (ed.) (2009) *Research from Archival Case Records - Law, Society and Culture in China*, Peking: China Law Press; criticism for the argument of Huang, Weijiang Pan (2012) *Analysis and Construction of Rule of Law in contemporary China*, Peking: China Legal Publishing House, 219 ff.

World Bank recommendations which reduce private law to a mere instrument of economic rationality.⁴⁰ The central role of private law, it seems to us, is to juridify diverse processes of decentralized spontaneous rule-formation in civil society which are fundamentally different from processes of political regulation by the central authority of the state and which do not coincide with economic market processes. Private law's job in this broader sense is to constitutionalize spaces of social autonomy. Private law should constitutionalize not only economic forms of action but in particular non-economic forms of contracting and other modes of consensual action, idiosyncratic private ordering, standardization, normalization, codes of practices, formal organization and loosely organized networks in different monocontextures of civil society.⁴¹ Private law needs to be responsive to "social values appropriate to the pertinent category of human interaction"⁴² which in our view is neither private nor public, but polycontextural. For this task, Chinese legal traditions of legal informality might be more conducive than the highly formalistic style of Western legal culture.

This then opens the crucial questions: What are the conditions of possibility of private law's responsiveness to social polycontexturality? Under what circumstances will private law develop sensitivity toward spontaneous rule making in different social worlds like education, research, media, art, and health? The answer is: not by choosing some of the diverse state policies, rather by referring to the inner normativity of diverse social institutions which are clearly different from the policies of the state and different from the efficiency requirements of markets. The private autonomy that some Chinese private law scholars in line with the World Bank report demand for economic enterprises needs to be extended to other non-governmental institutions. The private/public duality of market/state is replaced by a plurality of social fields.

Now comes the crucial point: the "public/private" distinction then reappears within each social system as the expression of its intrinsic normativity which private law legitimately takes into account. "Public" in this new sense would refer neither to governmental policies nor to decisions of the political party but to an autonomous internal reflection process within the focal social institution. It is this reflection process which decides on the balance between its social functions and its contributions to other sectors of society. Of course, private law does not and cannot dictate the results of this reflection process, rather needs to be responsive to it and simultaneously contribute to it by judgments in individual litigation.

As to the category of "private", it would neither be given up nor be dissolved in an overarching concept, be it the public or be it the common. The "private" would be re-instated and developed in each social sector to further individual and collective actors' autonomous self-realization. It would protect not only private property in the economy but personal privacy against intrusion by others, space for intimacy in personal relations without society's interference, autonomous pursuit of strictly individual projects against their collectivization, human rights protection for individuals and groups not only against majority politics but also against capillary power relations in different social disciplines, the *Innerlichkeit* of the human mind

40 World Bank (fn. 1) 18, 20, 44.

41 Teubner (fn. 17).

42 Hanoch Dagan (2008) "The Limited Autonomy of Private Law", 56 *American Journal of Comparative Law*, 811.

against communicative intrusion, the spirituality of individual conscience against the domination by public religion and politics. These are all legitimate expressions of the “private” which speak not against but clearly for a reconstruction of the public/private divide, to repeat it again, not as a division of society into a private and a public sector, but as a variety of distinctions within different worlds of meaning.⁴³

All this needs to be worked out in great detail. We cannot do this here but at least we can allude to some examples from private law which the private law experts will recognize as critical cases where a public dimension enters the private:⁴⁴ (1) Expert liability: Its extension to third parties beyond the expertise contract creates a symmetric liability toward both members of the project and thus protects the integrity of expertise as a social institution. Here, private law goes clearly beyond private interest accommodation and exerts public functions. (2) Banks are blocked from striking guarantee contracts with family members of the debtor because the integrity of intra-family communication is protected against the intrusion of economic rationality. Again private law takes over the public function of deciding conflicts between different social systems. (3) Many of the enigmatic “contort” relations are not, as is often claimed, impositions of overzealous judicial activism, rather the legal reformulation of spontaneous orders. Private law refers to the public good that social systems provide, but does not follow a governmental perspective, rather the self-definition of a social system. (4) Good faith obligations do not refer to state policies, rather to the *idées directrices* of multiple social institutions. (5) Horizontal effects of constitutional rights in the “private” sphere are not transfers of state constitutional rights from the vertical relation state-citizen to the horizontal relation between citizens, rather they protect the integrity of individual and social autonomy against anonymous social processes within different sectors of society. All these examples have in common that they make private law responsive to the public dimension of social configurations. We may call these dimensions their “public” responsibilities, but should insist that they are not identical with state policies.

2. Constitutional rights in the private sectors?

Let us take up the last example to clarify how the two dimensions of multiple modernities interact – horizontal effects of constitutional rights within the private sphere. With the expansion of the market economy Chinese law will be more and more exposed to the question whether the requirements of fundamental rights which are guaranteed in the Chinese constitution are directed not only to state agencies but to economic enterprises as well. And with increasing privatization of public tasks the question will extend to private organizations in other sectors of Chinese life.⁴⁵

43 Teubner (fn. 35).

44 Detailed references for these examples can be found in Gunther Teubner (2008) “State Policies in Private Law? Comment on Hanoch Dagan”, 56 *The American Journal of Comparative Law*, 835-844, 843, note 29.

45 For the Chinese discussion of horizontal effects of human rights, Xiuqun Li (2009), *The Study of the Horizontal Effect of Constitutional Rights*, Peking: China University of Political Science and Law Press; Xiang Zhang (2008), *Legal Construction of Fundamental Rights Norms*, Peking: Higher Education Press; Yanhui Lü (2002), “On Direct Effect of Constitutional Rights in Civil Procedure”, *Contemporary Law Review* 3, 138-141; Zhendong Xu (2002), “Effect of Constitutional Rights in Civil Cases”, *Studies in Law and Business* 6, 119-125; Dingjian Cai (2004), “Application of the Constitution as Private Law in China”, *Social Sciences in China* 2, 56-67, 205; Qianfan Zhang (2004), “Taking the Constitution Seriously: On the Demarcation of Legal Effects of the Constitution and Its Influence Over Private Law”, *Journal of Comparative Law* 2, 1-18; Zhigang Liu (2004), “The Legal Analysis on the Application of the Constitution as a Private Law”, *Chinese Journal of Law* 2, 35-49; Xiang Zhang

Western law has responded basically with two legal constructs – “state action” and “structural radiation” of constitutional law into private law.⁴⁶ The result is that collective actors in the private area - and no longer only state institutions in the public area - have to respect constitutional rights. This is how the first, the functional dimension of multiple modernities works in the field of constitutional rights.

But this is also the moment when the second dimension, the cultural-historical dimension of Chinese characteristics, comes in. For horizontal effects of constitutional rights in Chinese law, the main obstacle seems to lie in the resistance against a specific Western concept of human rights, a concept which has been always understood as the rights of the abstract autonomous individual. This reflects the typical Western idealization of the sovereign individual as opposed to its embeddedness in society. Historically, Chinese culture has never accepted the Western hypostatization of the individual. Chinese law has neither been much interested in social regulations among autonomous individuals nor in defending individual rights against the state, and least of all against non-governmental institutions.⁴⁷ And the Chinese had good reasons to resist political instrumentalizations of human rights by Western powers who much too often have used their highly individualistic concept to denounce Asian ideas about the role of the individual in society.⁴⁸ China’s tradition has never been individualistic, but always group-oriented. “The abstract concept of the individual was conspicuously lacking in traditional Chinese law.”⁴⁹ The individual had always been embedded in the hierarchical relation of the family, of the clan, of the village, of the state. This group orientation has even been strengthened by the transformations of China during the communist period when the collective had been given priority to the individual. And in contemporary China as well, the group orientation prevails over individualist concepts. The well-being of the group has always defined the role of the individual.⁵⁰ Of course, this collective embeddedness of the individual has often been used for justifying repressive practices, but the ideological alternative individualism/collectivism should not obscure the fact that there are a variety of ways to realize human rights under different cultural traditions. Thus, the transfer of individualistic human rights concept into China’s private law areas would meet even more obstacles than it does in the public law area. It would not work as a legal transplant, rather like a legal irritant.⁵¹

If one looks closer to the second, the historical-cultural dimension of multiple modernities, one might discover hidden complementarities between Eastern and

(2005), “Dual Characters of Fundamental Rights”, *Chinese Journal of Law* 3, 21-36; Benlian Huang (2011), “New Approach to Remedy for Right to Education - Based on Theory of Third-Person Effect of Constitutional Rights”, *Journal of Hubei Normal University (Philosophy and Social Science)* 6, 19-22; Rongrong Lü (2012), “Theory of Third-Person Effect of Constitutional Rights and the Practice in China”, *Legal System and Society* 2, 265-267.

46 For a comparative law analysis, Stephen Gardbaum (2008) "Human Rights and International Constitutionalism", in: Jeffrey L. Dunoff and Joel Trachtman (ed) *Ruling the World? Constitutionalism, International Law and Global Government*, Cambridge: Cambridge University Press, 233-257.

47 Lucien W. Pye, „The State and the Individual: An Overview Interpretation“, in: Brian Hook (ed), *The Individual and the State in China*, Oxford: Clarendon 1966, 16-24.

48 For an excellent philosophical critique of Western abuse of human-rights-universalism in relation to China, Jullien (fn. 3) ch. 10. While he criticizes the ideological elements of human rights he insists on their unconditional (!) role of resistance against unacceptable repression.

49 Chen (fn. 4) 22.

50 Chen (fn. 4) 129 ff., 134 f.

51 See Teubner (fn. 15).

Western traditions. If one realizes that there are concepts of Western constitutional rights that are formulated not only in an individualistic but as well in a group-oriented version this could resonate with the Chinese tradition of embeddedness of the individual. We could imagine that the Chinese group-orientation of rights could enter a dialogue with a sociologically inspired Western tradition of constitutional rights, a tradition, which goes beyond individualist notions. In the so-called institutionalist concept, constitutional rights protect not only individuals but also the autonomy of groups, organizations and institutions.⁵² In their vertical effect they protect social institutions in their integrity against illegitimate intrusions of the state, and in their horizontal effect they protect social institutions in their integrity against the intrusion of economic rationality. This institutionalist concept of constitutional rights has been developed as an annex to the dominant individualist concept. In a Chinese version of the horizontal effects of constitutional rights which continues the group orientation of the Chinese tradition, the primary focus of rights would be on the integrity of social institutions, on the integrity and autonomy of science, of art, of the health system, of the news media, on their protection against their corruption by the economic system. Such an institutional concept of constitutional rights does not exclude the individual protection, rather is complementary to it. But these rights are no longer focusing on the isolated individual but on the individual embedded in the group structures of modern society.

III.

Given the overriding role that sociological systems theory ascribes to the self-regulating autonomy of various subsystems, it would seem that the „leading role of the Communist party“ is a concern of the past and probably will work as an obstacle to China’s path into modernity. This would be in line with how Western observers usually criticize China’s political system with its duality of government and political party and particularly with the party’s pervasive influence on all sectors of Chinese society. However, if one takes seriously multiple modernities in both dimensions – functional differentiation of society and the cultural-historical identity of China’s developmental path – the picture might look different. Both dimensions tend to suggest that in the very situation of extreme functional differentiation, the political party may play an important role – however, only under the condition that it undergoes a drastic transformation.

For the present transitional period, for the transformation of a centralized planning economy into a decentralized market-driven economy, the important historical role of China’s political party can hardly be overestimated. If one compares Russia’s disaster after the abrupt introduction of capitalism without any political guidance in 1989 with China’s striking success, it is obvious, that for a considerable period of time, the transformation of a socialist economy is in need of a strong political system which controls step by step how the institutions of capitalism complement and replace the institutions of a planned economy. And there is a certain amount of hypocrisy in the Western critique of the party’s dominant role during the

⁵² For an institutionalist version of horizontal human rights Christoph Graber and Gunther Teubner (1998) "Art and Money: Constitutional Rights in the Private Sphere", 18 *Oxford Journal of Legal Studies*, 61-74; Oliver Gerstenberg (2004) "What Constitutions Can Do (but Courts Sometimes Don't): Property, Speech and the Influence of Constitutional Norms on Private Law", 17 *Canadian Journal of Law and Jurisprudence*, 61-81; Karl-Heinz Ladeur (1999) "Helmut Ridder's Konzeption der Meinungs- und Pressefreiheit in der Demokratie", 32 *Kritische Justiz*, 281-300.

transformation. But this is not our main point. The more fundamental question is: Will China's society - after having developed into a mature functionally differentiated society - still be in need of the leading role of the political party? Or will the party become superfluous or even dysfunctional after not only the economy but other social subsystems as well will have achieved high autonomy?

At this point systems theory raises the difficult question whether China will be in a position to cope with the dark side of extreme functional differentiation. Here lies one of the great failures of contemporary Western societies. The advanced capitalist societies have not succeeded in controlling the massive centrifugal movements of functional differentiation that turn out to develop self-destructive tendencies. The financial crisis of 2008 has demonstrated the destructive potential of an expansionist financial system running amok.⁵³ Functional differentiation is simultaneously a blessing and a curse – also China will have to undergo this experience. Through their own operative closure, functional systems create a sphere for themselves in which they are free to intensify internally and to expand externally their own rationality without regard to other social systems or, indeed, regard for their natural or human environment.⁵⁴ Ever since the pioneering analysis of Karl Marx, repeated proof has been furnished for the destructive potential of a globalized economic rationality.⁵⁵ Indeed, contemporary China is experiencing the negative consequences of an accelerated economic development. But it would be wrong to blame only the economy. In his concept of modern polytheism Max Weber identified a similar destructive potential within the other rationalized spheres and analyzed the resulting – and threatening - rationality conflicts which arise.⁵⁶ In the meantime, the human and ecological risks posed by other highly specialized function systems, particularly by science and technology, but also by law, the media and even medicine, have also become readily apparent to a far broader public.⁵⁷ Like Western industrialized nations China is going to experience the real dangers, which are posed by the dynamics of political, legal, economic, scientific, medical and technological rationality spheres that instigate a 'clash of rationalities'.

In Niklas Luhmann's central thesis, the underlying cause for the risks of late modernity is not exclusively the profit-maximization of the economy but the rationality maximization engaged in by different globally active functional systems, which cloaks an enormous potential for the endangering of people, nature and society.⁵⁸ Seen in this light, the problems of global society which become visible in contemporary China as well, that is, environmental degradation, spectacular social under provision and stark discrepancies in life and development potential, have an underlying cause that need to be attributed to modernity itself, to functional differentiation and autonomous systems dynamics. Such problems are not remnants of the past which will be overcome by modernization, but they are indeed caused by the fragmented and operationally closed functional systems of society, which, in their expansionist fervour, create the real problems of the global society, and who at the same time

53 Several analyses of the financial crisis in a systems theory perspective, Poul F. Kjaer, et al. (ed) (2011) *The Financial Crisis in Constitutional Perspective: The Dark Side of Functional Differentiation*, Oxford: Hart.

54 Luhmann (fn. 10) 133.

55 Most impressively by Karl Polanyi (1944) *The Great Transformation: The Political and Economic Origins of Our Time*, New York: Farrar & Rinehart.

56 Weber (fn. 9); on Weber, see Schluchter (fn. 9), 339 ff.

57 Influential in this area, Ulrich Beck (2009) *World at Risk*, Cambridge: Polity Press.

58 Luhmann (fn. 10) 1088 ff.

make use of the law in order normatively to secure their own highly refined sphere logics.

Under functional differentiation, all subsystems of society develop massive growth energies which are excessively ambiguous in their productivity and in their destructiveness. There are good reasons to call these growth compulsions in each functional system collective addiction.⁵⁹ The destructive tendencies have reached their excessive moments in many sites of global society. In the area of politics it was in 1945 that World War Two finished the atrocities of expansive totalitarian regimes. Similar moments of excess occurred in the global economy – 1929 and 2008 when the collapse of powerful banks threatened the breakdown of the global financial system. Recently, science and technology, perhaps, had their self-destructive moment - 2011 when Fukushima signalled the limits to nuclear industry. Even the so-called humanistic discipline of medicine experienced its moment of excess - 1943 when Dr. Mengele performed human experiments on concentration camp inmates, including children. And we are anxiously awaiting the excessive moment to occur in the digital world – Google's and Facebook's data manipulations sound like early warnings. It is much to be doubted whether, via spontaneous coordination, the function systems themselves can ever overcome such negative consequences of social fragmentation that derive from their structural contradictions.

Emile Durkheim, the great French sociologist, provided the decisive insight: The higher social differentiation develops - the higher becomes the need for social integration.⁶⁰ The contemporary crisis that Western late modern societies undergo is due to the lack of strong integrating dynamics that would act as a countervailing force to the massive centrifugal tendencies of expansive social systems. The burning issue is what kind of institution will be in a position to achieve this integration. Durkheim's and Parsons' ideas about the integrating role of the professions and their morality turned out to be an *echec*. Similarly, hopes for an integrating role of the old European aristocracy, or hopes for the *Kaiser-Idee* in Germany, which would work above the destructive cleavages of society, were dashed. The strongest expectations for a strong integrating role had been invested in the political system of the nation states. But due to their lack of steering competence they ended up in various regulatory crises. There is one potential candidate for the integrating role - neo-corporatist arrangements in Northern Europe, especially in the Scandinavian countries. There political institutions and social associations – labor unions, economic associations, professional associations – which are closely cooperating beyond the boundaries of social systems, were at least partially successful in integrating divergent rationalities. These arrangements might explain the present evolutionary advantage of those countries.⁶¹

Now, it would be the usual error of thoughtless institutional transfers neglecting the cultural-political specificities of the receiving region if one were to

59 Gunther Teubner (2011) "A Constitutional Moment? The Logics of 'Hit the Bottom'", in: Poul F. Kjaer, et al. (ed) *The Financial Crisis in Constitutional Perspective: The Dark Side of Functional Differentiation*, Oxford: Hart, 9-52.

60 Emile Durkheim (1933 [1883]) *The Division of Labor in Society*, New York: Free Press.

61 On neo-corporatist arrangements, Wolfgang Streeck and Lane Kenworthy (2005) "Theories and Practices of Neocorporatism", in: Thomas Janoski, et al. (ed) *The Handbook of Political Sociology*, Cambridge: Cambridge University Press, 441-460; Werner Abelshauser (2005), *The Dynamics of German Industry: Germany's Path toward the New Economy and the American Challenge*. New York: Berghahn: New York u. Oxford 2005.

recommend that China should move along the neo-corporatist avenue. The second dimension of multiple modernities comes in again, for China's long-term history and its recent experiences do not suggest that civil society associations will play the central role for integrating contradictions internal to Chinese society.⁶² The strong role the state and the administration has played in China's history, the Chinese cultural orientation of the great unity, the dominant position of the political party in the Communist period lead the search for an integrating institution in a different direction.

These considerations suggest a potential role for the political party to play. The internal differentiation of China's political system in government, administration and political party could produce a specific role to the political party, which has no counterpart in the Western political systems. Its uniqueness lies in the combination of a hierarchical power structure permeating the whole society with an ideology, a *Weltanschauung*, a comprehensive concept of society, which is sponsored by Grand Theory. The question is only whether it is the right choice to replace Karl Marx by Friedrich von Hayek. The political party might have the potential to develop into a relevant societal institution for the urgently needed integration of functional differentiation, something that neo-liberal theorists either ignore or attribute exclusively to the markets. Concentrating on this task the political party could reformulate its role for Chinese society after its transformation.

However, this works only under one condition. The party's leading role can no longer be defined as it had been in the socialist centralized planning society. From the negative experience of totalitarian regimes the political party itself would have to learn: Freedom through self-restraint. And this implies more than the fight against corruption, as important as it is. The leading role of the political party would have to undergo a conflict-ridden process of self-constitutionalization, which would result in a clear-cut self-restraint. The direction would be: No detailed steering of other social systems via command and control, but a restriction to a more indirect mediation of their conflicts as well as carefully calibrated interventions in order to stop excesses of expansive subsystems.⁶³

How probable is such a constitutional self-restraint for a powerful institution in charge? There is one remarkable experience – the political constitutions of Western nation states. They have provided the historical model for the paradoxical

62 This does not exclude strengthening neo-corporatist tendencies in China, for example in the area of consumer protection, see Chunyi Qi, (fn. 27). For studies on corporatism and the relationship between state and society in China, Jing Zhang (2005), *Corporatism and its Differences with Pluralism*, Peking: China Social Sciences Press, 2nd Ed, 159ff.; Lidong Li (2009), *The Corporatism Dimension of Political Development Study*, Zhejiang University; Xin Gu and Xu Wang (2005), "From Statism to Corporatism: Changes in the Relationship between State and Professional Associations in the Transition to Market Economics in China", *Sociological Research* 2, 155-175, 245; Weimin Liu (2005), "Corporatism and New Approach to Political Transformation in China", *Theory and Reform* 4, 5-8; Shenghong Zeng (2007), "'Interest Organizations' in Social Structure Transformation - Review of the Study on Corporatism and Relationship between 'State - Society'", *Hubei Social Sciences* 8, 27-30; Endong Liu (2009), "Relationship between Interest Group and Government in the Sight of Corporatism", *Journal of China National School of Administration* 3, 52-55; Jiajian Chen (2010), "Corporatism and Contemporary Chinese Society", *Sociological Studies* 2, 30-43, 243.

63 For the Western world a comparable role for the state has been developed by Helmut Willke (1997) *Supervision des Staates*, Frankfurt: Suhrkamp, 128 ff.

undertaking of subjecting their own expansion to self-imposed limitations.⁶⁴ One lesson that can be learned from the history of nation-state constitutions is the way in which a social system is capable of effectively constraining its own communicative possibilities using its own resources. Separation of powers, rule of law as barrier to the politicisation of administration and justice, and fundamental rights - these were the great achievements by means of which political actors stopped themselves from politicizing individual and institutional spheres of autonomy in society. Given today's changed conditions, new self-constraints on the part of the political system are emerging. Politics needs to respond with constitutional self-constraints to the notorious "growth acceleration laws" of the welfare state. Guaranteeing the independence of the central banks and setting effective limits on the national debt for this purpose are obviously issues of constitutional import.

Turning back to China, the reforms of the last thirty years may be interpreted as moving toward a certain self-limitation of the political party. In relation to the economy China's political party has made remarkable steps in the direction of an constitutional self-restraint, replacing direct control by more indirect influences on economic action. The open question is whether the party will be able and willing to continue along this line and allow for higher autonomy to the other sectors of society and at the same time restrict its own role to a guardian of societal autonomies.

It cannot be emphasised strongly enough that such self-limitations do not come about through an automatic mechanism resulting from functional imperatives, but rather only under massive external pressure as a result of fierce constitutional battles.⁶⁵ In the foreseeable future China will probably have to go through such constitutional conflicts. The external pressures originate in the structural contradictions between different rationalities in society. They express themselves in spontaneous protest, social movements activities of NGOs, public debates. External pressures stem from international relations as well, particularly from transnational regimes, the WTO among them. And the internet has begun to create a platform for public dissensus, debate and pressure that probably will have dramatic influence on the party's action.

Here the second dimension of multiple modernities may come in again because China's cultural heritage may ease this burden to a certain degree. The old and powerful philosophical idea of "harmony" as a balance between conflicting forces which has found many expressions in China's history may have to be redefined again if one wants to cope with the new rationality conflicts in advanced modernity. Its original formulation in Confucianism resonated the conditions of a stratified society in the balance between the famous five fundamental relations in society.⁶⁶ Subsequent

64 On this thesis with copious historical material Chris Thornhill (2011) *A Sociology of Constitutions: Constitutions and State Legitimacy in Historical-Sociological Perspective*, Cambridge: Cambridge University Press.

65 As an example may serve the dramatic events told by Eva Pils (2009) „Rights Activism in China: The Case of the Lawyer Gao Zhisheng“ in: Stéphanie Balme and Michael W. Dowdle (ed) *Building Constitutionalism in China*. New York: Palgrave, 243-260.

66 In confucian thought ethics is characterized by the promotion of five virtues (Wu Chang): Ren (Humaneness), Yi (Righteousness), Li (Propriety or Etiquette), Zhi (Wisdom), Xin (Loyalty). They are fulfilled in the following basic social relationships (Wu Lun): Ruler and public servants, father and son, husband and wife, senior and junior, friend and friend. This concept dates back to Confucius, see also *Lun Yu*. It has been developed and systematized by Zhongshu Dong in Han Dynasty, see also Zhongshu Dong, *Spring and Autumn Annals*. For the re-evaluation and re-interpretation of *Wu Chang*

formulations found the harmony of social relations in an analogy which compared the state with the hierarchically structured family. Contemporary Chinese attempts have reformulated harmony as a political ideal overcoming ethnic, cultural and political cleavages in the nation. If the trends toward multiple modernities are realized in their two dimensions, a new reformulation may be in sight - translating the old search for harmony into the societal integration of the excessive rationality conflicts that rage between expansive function systems. One institutional basis for this social integration would be a mutual restraint which social systems achieve themselves via their self-reflexion. To the degree that this will not work, another institutional guarantee for social integration could be a new role for the political party. This however implies drastic changes of its internal structure, particularly the explicit institutionalization of internal party democracy, internal opposition and internal group pluralism. Similar changes will have to occur in the party's relation to the existing social associations. A higher degree of their autonomy would mean that an associational pluralism would take over some aspects of the integration task. And the role of the law could be to design a normative framework for social integration, to provide fora, criteria and procedures, for achieving a new constitutional balance between conflicting social rationalities.

and *Wu Lun* in contemporary China, Dainian Zhang (1997) "Wulun and Wuchang - Transformation and Regeneration of Chinese Traditional Ethics", *Chinese Culture: Tradition and Modernization* 4, 3-6; Haifeng Jing (2008) "Reflection on the Idea of 'Wu Lun'", *Philosophical Researches* 5, 51-57, 128; Tianyu Feng (2008) "Doctrine of Five Cardinal Relationships: One of Historical Resources Derived for Construction of Harmonious Society", *Wuhan University Journal (Humanity Sciences)* 2, 209-212; Zhengzheng Yang (2009) "On Modern Construction of Traditional 'Five Lun'", *Journal of Social Science of Hunan Normal University* 3, 128-131. For the influence of *Wulun* on Family Firms in China, Huping Ni and Chaoke Wang (2005) "'Wulun' in Chinese Traditional Family Conception and its Influence on the Family Firms", *Journal of Zhejiang Gongshang University* 2, 77-81.