In Between – Gender, Solidarity and Legality?
Part II: China’s Legal System

In Part II of this two-part analysis, Simona Novaretti investigates the way in which a stronger emphasis on traditional Chinese values has influenced the interpretation given to the concepts of solidarity and gender in China, and how this interpretation is reflected in the most recent Chinese legislation.
The ThinkChina Analysis is written by Simona Novaretti, Associate Professor of Comparative Private Law, School of Law, University of Turin, where she teaches Chinese Law, Comparative Law, and Law and Society in Asia.

The analysis is written in collaboration with Hanne Petersen, Professor of Legal Cultures, Centre for European and Comparative Legal Studies, Faculty of Law, University of Copenhagen.

The analysis was originally published in Studi di Genere, Donne per l'Europa 2, February 2020.

Editor(s): Casper Wichmann and Silke Hult Lykkedatter.

Disclaimer: The views and opinions expressed in this ThinkChina publication are those of the author(s) and not necessarily those of ThinkChina.

Copyright of this publication is held by ThinkChina. You may not copy, reproduce, republish or circulate in any way the content from this publication without acknowledgement of ThinkChina as the source, except for your own personal and non-commercial use.

Any other use requires the prior written permission of ThinkChina or the author(s).

©ThinkChina and the author(s) 2020

Front page picture: “Between” by SagaLun under the CC BY-NC-ND 2.0 license, edited by ThinkChina.
In Between – Gender, Solidarity and Legality?

Part II (of II): China’s Legal System

Simona Novaretti: Associate Professor of Comparative Private Law at the University of Turin, School of Law, where she teaches Chinese Law, Comparative Law, and Law and Society in Asia.

In Part I of this two-part analysis, Hanne Petersen discussed similarities between and social tensions in the EU and China, leading to a development of a neo-Confucian ideology and the ‘Harmonious Society’ in China. In the EU, solidarity was similarly invoked as a means to minimize said tensions.

In Part II, Simona Novaretti investigates the way in which a stronger emphasis on traditional Chinese values has influenced the interpretation given to the concepts of solidarity and gender in China, and how this interpretation is reflected in the most recent Chinese legislation.

Since the beginning of the 21st Century, the increasing “contradictions among the people” caused by China’s tremendous economic development, forced the Communist Party of China (CPC) to rethink the Country’s development pattern, setting up a more sustainable, coordinated, and inclusive model of growth, capable of building a "moderately prosperous society".

Key takeaways:

- Xi Jinping’s call to "achieve the Chinese dream of the great rejuvenation of the Chinese nation” reflects PRC leaders’ will to improve the international image of China, on the one hand, and to re-introduce traditional moral concepts to rebuild the social cohesion apparently lost with the reforms through a “Confucianization of the Law”, on the other.
- The legal re-elaboration and actualization of the traditional concepts of filial piety, benevolence and harmony may prove crucial in realizing some parts of the social dimension of sustainable development, namely intergenerational and intra-generational equity.
- Not all the basic principles of traditional Chinese thought are equally useful to achieve the commitments of sustainable development assumed by PRC at international level.
- References to “traditional family values” embodied in recent PRC’s legal provisions seem to jeopardize the possibility of the PRC achieving the inter-gender equity goal, provided for in the “2030 Agenda” on sustainable development by the UN in September 2015.

Keywords: China, Europe, Gender, Solidarity, Law, Harmonious society, equity, United Nations
In Between – Gender, Solidarity and Legality?

Part II: China’s Legal System

By Simona Novaretti, the University of Turin

NB This is Part II of a two-part analysis. We recommend reading Part I first, in which Professor Hanne Petersen discusses similarities between EU and China in the 21st century; Both parts strongly influenced by neoliberal ideas, inequality and social tensions. In China, this led to a new-found neo-Confucian ideology, and an emphasis on the ‘Harmonious Society’. For EU, the notion of ‘solidarity’ was used to minimize said tensions. Available for download here

Introduction

Part II is a reflection on the way in which, over the last few years, the new emphasis on traditional Chinese values by the PRC leaders has influenced the interpretation given to the concepts of solidarity and gender within China, and how the most recent Chinese legislation reflects this interpretation.

As Petersen pointed out “solidarity and harmony in the 21st century may have many faces”. It seems to me that these faces are closely linked to the loss of trust in the Party and the emergence of social contradictions related to the reforms, on the one hand, and the revival of Confucian principles as a new source of social cohesion, on the other.

The concepts of social in- and exclusion have indeed been introduced in PRC quite recently. Since about the beginning of the XXI Century, when the problems connected to the tremendous social-economic development experienced after the inauguration of the PRC’s ‘reform and opening-up’ policies in 1978 became evident.

The increasing gap between the rich and the poor, the rise of rural/urban and regional disparities, heavy pollution, the unemployed and migrant workers, low coverage of social protection, and – last but not least – the inter-generational gap in living standards, forced the CPC to rethink the development pattern, setting up a more sustainable, coordinated, and inclusive model of growth.

Thus, in 2003 the CPC passed the “Decision upon a Certain Number of Problems with Regard to Consummation of the Socialist Market Economy”, announcing a new policy direction summed up in the notion of “five coordinations” (wu ge tongchou 五个统筹).

The ‘Five Coordinations’

This concept is the coordination between urban and rural development, coordinated regional development, overall economic and social development, coordinate harmonious development of men and nature, coordinated domestic development and opening up.

In 2004, the CPC listed “the capability of building a socialist harmonious society” as one of the five governing capabilities that the CPC endeavors to enhance.

It was during exactly those years that Chinese scholars began showing particular interest in Durkheim’s theory of social solidarity, which
seemed to fit perfectly with the latest Chinese leadership’s catchwords like the ‘harmonious society’, and ‘sustainable development’ – a notion destined to become the model that should have inspired Chinese economic growth, and the way forward for building a moderately prosperous ‘xiaokang’ society (xiaokang shehui 小康社会).

This expression is considered to be the first classical Chinese concept used by the CPC to legitimize its vision for the future of China: Deng Xiaoping mentioned it in 1979 during a meeting with the Japanese Prime Minister, Masayoshi Ōhira, stating that the transformation of China into a ‘well-off society’ was the final goal of Chinese modernization.iv

Klauss Bosselmann asserts that “the principle of equity represents the social dimension of sustainable development.”vii In this way, ‘sustainable development’ refers to an ‘intragenerational equity’, but as shown in the selected SDGs below, the “2030 Agenda” explicitly considers a third kind of ‘equity’ as one of the primary SDGs to be globally achieved: the ‘intergender – equity’.

### Selected Sustainable Development Goals:viii

1. End poverty in all its forms everywhere
2. Ensure healthy lives and promote well-being for all at all ages
3. Ensure inclusive and equitable quality education and promote lifelong learning opportunities for all
4. Achieve gender equality and empower all women and girls
5. Promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all
6. Protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss
7. Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels

In 2014, to “comprehensively build a moderately prosperous society” was included by Xi Jinping in the new slogan indicating the four main goals that PRC has to reach by 2020. Almost in the same period, China committed itself internationally to reaching other, even more ambitious ‘sustainable development’ goals (SDGs), like in the “2030 Agenda for Sustainable Development” (2030 Agenda),vi which sets out 17 SDGs constituting the guideline and the direction of effort for UN member states over the next fifteen years.

Speaking at the 2015 UN Sustainable Summit, Chinese President Xi Jinping said that,

“China makes a solemn commitment that it will shoulder the responsibility of implementing the post-2015 development agenda, and seek solidarity and cooperation to constantly push the cause of global development.”ix

I will examine how China is pursuing the construction of a ‘harmonious society’, on
the one hand, and the implementation of the UN 2030 sustainability goals, on the other. I will give some examples of the way in which the three types of ‘equity’ (inter-generational, intra-generational, and inter-gender equity) have been incorporated and reconstrued in Chinese legislation, in order to fit some of the most crucial Chinese traditional values:

- filial piety (xiao 孝)
- benevolence (ren 仁)
- identity and difference (tongyi 同异)

Solidarity/sustainability and legality: 2004 PRC Constitutional amendments and the ‘moralization’ of law
At the beginning of the new century, Chinese leaders became aware of the need, for PRC, to shift towards a more sustainable model of development. From a legislative point of view, 2004 was a turning point: The National People’s Congress (NPC) amended the PRC Constitution, defining private property as ‘inviolable’ and introducing a provision on the protection of human rights.

Following this, many laws and regulations were amended, such as the “Basic Medical and Health Care Law” (2009), the “Social Insurance Law” (2010), the “Law on the Protection of Mental Health” (2012), the “Civil Procedure Law” (2012, 2017), the “Interim Measures for Social Assistance” (2014), the “Environmental Protection Law” (2014), and the “Charity Law” (2016).

One need only read the titles to make sense of Durkheim’s theory of law as a mechanism of social integration; different forms of law express different forms of cohesion.

Penal and repressive law as exemplified in the legal system of Imperial China, for example, expresses what he refers to as “mechanical solidarity” – a kind of cohesion based on shared beliefs and values among average members of the same society. In other areas of law or in other ages, however, law can convey ‘organic solidarity’. That is, it can work as a ‘moral agency’, becoming the expression of a pre-existing moral milieu that shapes and governs the principles under which social behavior occurs and is enforced.

In my opinion, this is exactly the function attributed to certain provisions passed during the last decade. In particular, Xi Jinping’s call to “achieve the Chinese dream of the great rejuvenation of the Chinese nation” emphasizes the link between Chinese tradition and the national interest, as interpreted by current Chinese leaders.

Undeniably, since Xi Jinping’s seizure of power, not only have the official references to China’s glorious past become more frequent, but the knowledge of Confucian classics has also come back into fashion among Chinese bureaucrats, being critical to understanding the messages - explicit or hidden - contained in the speeches of the new President.

The new emphasis on Chinese traditional culture and values, however, is not only a reflection of PRC leaders’ will to reaffirm Chinese ‘soft-power’ and improve the international image of China; it is also a way of re-introducing traditional moral concepts in order to ‘rebuild’ the social cohesion apparently lost with the reforms.
To this end, the law plays a key role, as evidenced by the new ‘Confucianization of law’, which has been witnessed in recent years, in particular with reference to the areas linked to sustainable development. As ‘filial piety’ (xiao 孝) is considered a core Confucian virtue, I will start my analysis by looking at ‘inter-generational equity’ and the relationship with the principle of xiao in Chinese present legal system.

‘Sustainable development’, legality and morality in the PRC
Intergenerational equity
The Classic of Filial Piety (xiao jing 孝经) defines ‘filial piety’ as the root of all virtue, and the stem out of which all moral teaching grows:

“[P]erfect virtue and all-embracing rule of conduct, through which [the ancient kings] were in accord with all under heaven. By the practice of it the people were brought to live in peace and harmony, and there was no ill-will between superiors and inferiors.”

It is not surprising, therefore, that CPC’ leaders try to ‘re-sew’ the Chinese social fabric through a re-evaluation of this traditional virtue, filling the ideological vacuum that has eroded the popular Party consensus.

The core of filial piety inherited from traditional Chinese culture refers to the duty of the offspring to provide care, respect, and financial support for their parents, and to please them by showing obedience and regards. Nevertheless, filial piety must not only demonstrate a benevolent heart to take care of the parents’ interests: it also requires support for a hierarchically higher status position of the parent versus the child, and the ruler versus his subjects and ministers.

Introducing this principle into the legislation, could therefore help alleviate the pressure on the welfare system, resolving the problem of senior citizens forced to live in conditions of insecurity and loneliness without adequate forms of assistance. Moreover – and more importantly – it could be used to strengthen CPC’s authority, preventing it from being overwhelmed by waves of protests.

China is not alone in using law as a tool to bolster filial and family responsibility. On the contrary, over the last years, many governments around the globe have enacted legal and administrative provisions to enforce filial and family responsibility, and sustain solidarity within the family, in order to relieve their responsibility for eldercare. Neither is it the first time filial piety has appeared in Chinese legislation; In the Qing code “filial piety was expressed partly in terms of punishments for those who do not provide maintenance for parents in old age.”

The most recent Chinese legislation, however, seems to demonstrate a new, original and typically Chinese attitude towards ‘inter-generational solidarity’, interpreted according to the principle of ‘filial piety’. I am referring to the 2012, 2015 and 2018 revisions of the “Law on the Protection of the Rights and Interest of the Elderly” (LPRIE). Since 2012, the legislators have found it necessary to almost double the number of articles, demonstrating the increased importance attributed to the topic by the leadership.
Moreover, the same revision added to the LPRIE provisions, which do not just reaffirm the obligation of children to take care of aged parents from an economic point of view. They also embody other duties, like respect, obedience, greeting and pleasing, traditionally connected to the concept of filial piety, but apparently more relevant to the sphere of private life and morality than to the realm of public regulations and codified norms.

The pressure exerted by Chinese media on citizens to respect these norms, and consequently the principle of filial piety, is strong. It is evident, however, that the goal is not just the return of respect for one's family, but the obligations towards the elderly, the superiors and, ultimately, the government and the Party. Therefore, in terms of the intergenerational solidarity, one can truly say that the law works as a ‘moral agency’; but of a morality, and a ‘solidarity’, once again at the service of power.

**Intragenerational equity**

In to Confucian thought, the foundations of filial behavior are love (ai 爱) and respect (jing 敬). Love, filial respect (xiao 孝) and love and respect for the older brothers (ti 恭) are the foundations of ‘love for the other human beings’ (ren 仁); the ultimate Confucian virtue, and that which comes from the individual person’s love for their fellow men.

As expressed in Confucius’ Analects: “Filial piety and fraternal submission are the root of all benevolent actions.” And “Benevolence (ren 仁) is love all men (ai ren 爱人).” The prevalence of one principle over the other has been differently interpreted throughout Chinese history; but the inter-dependency of ‘benevolence’ and ‘filial piety’ has always been considered the key of ‘harmony’ (he 和) and ‘social order’ (zhi 治).

The goal of moralizing Chinese society, making it more harmonious and “moderately prosperous” through a sustainable development that will not threaten the social stability, can therefore not be pursued without taking into account these two concepts.

In the preceding section we have seen that, since LPRIE’s 2012 revision, all the components of filial piety, including the most ‘private’ ones, have become legal obligations, in order to bring about through law what can be considered as ‘inter-generational equity with Chinese characteristics.’

The relevance of filial piety among Chinese fundamental legal principle was, definitely affirmed in 2017, with the approval of the General Provisions of the Civil Code (GPCC).

The GPCC plays a guiding role for subsequent sections of the Civil Code, including property, contracts, personality rights, torts, marriage, family, and inheritance, and establishes the basic principles of China’s civil law. Among them, we find the principle of xiao as expressed in the LPRIE, as GPCC’s art. 26, paragraph 2, states that “Adult children have the obligations of supporting, assistance, and protection of their parents.” Here, it is worth noticing that, according to orthodox Confucianism, filial piety does not impose duties only on one part of the relationship:
the older generation also has obligations towards the younger.

As remarked by Mencius (IV - III century BC), the philosopher considered the ‘Second Sage’ of Confucianism, after Confucius himself:

“Treat your elders as elders, and extend it to the elders of others; treat your young ones as young ones, and extend it to the young ones of others; then you can turn the whole world in the palm of your hand.”

In this sense, it is possible to say that the concept of xiao is very close to the aforementioned interpretation of ‘inter-generational equity’ as the “rights of future generations.” The latter is generally understood as the

“[C]onstraint on a natural inclination to take advantage of our temporary control over the earth’s resources and to use them only for our own benefit without careful regard for what we leave to our children and their descendant.”

In other words, sustainability compels us to look at the earth and its resources not only as a good to be exploited, but as a sort of ‘trust’, passed on to us by our ancestors for our benefit, and to be passed on to our descendants for their use.

From this perspective, it is easy to see why sustainable development is generally considered “inherently an inter-generational as well as an intra-generational question.” You can also see how useful the concepts of filial piety, benevolence and harmony can be to boost the government’s current policies and goals, especially, in the environmental field.

Renovating these concepts creatively can help the reconstruction of core values in Chinese modern society, promote social stability, and benefit the construction of a harmonious world, as desired by the leaders of the PRC. It is not by chance, therefore, that the Chinese legislators incorporated some of the virtues/duties related to ren in 2017 GPCC, making this concept one of the principles which inspire basic civil law rules related to ‘intra-generational equity’, and (consequently) increasing the space given to morality and solidarity in the Chinese legal system.

The dramatic loss of ‘compassion’ of the people of the PRC has become quite evident in the last decade, mainly due to a series of accidents reported by Chinese and Western media, where people on the streets in need of help, are ignored by the people passing by. According to some, this behavior is not only due to the Chinese people’s loss of moral sense, but also to loopholes in the legislation. The ‘breakdowns in solidarity’ that China has experienced in recent years, would therefore not be anything other than a lack of normative regulation necessary to ensure social integration. This opinion is grounded in legal practice: in several cases, people who had received help had sometimes gone on to sue their rescuer, often in the hopes of winning damages, fueling the perception that offering assistance was too risky.

Not all the basic principles of traditional Chinese thought are useful to achieve the commitments of sustainable development. Sometimes, they constitute the greatest obstacle to their accomplishment. This is, in my opinion, the case of the ‘third pillar’, the inter-gender equity. Reaching this goal seems to have become especially problematic for
China recently, in particular due to the re-Confucianization of law and legal practice that has characterized Chinese policy in particular since Xi Jinping’s seize of power.

The next and final section of the analysis will deal with the multifaceted relationship between legality, morality and ‘inter-gender equity’ in PRC of the XXI century.

**Intergender equity**

As noticed by pre-Confucian scholar-minister, Yan Zi, ‘harmony’ depends on differences – in nature as in social and family life:

“A harmonious world must be a diverse world. As a symphony requires a variety of sounds, and a good soup needs a variety of ingredients, a harmonious relationship presupposes that the parts have different perspectives and different views on various issues. Sameness without adequate differences precludes harmony: in cooking and making music, he (harmony) should not be confused with tong (sameness), and the same applies to the relationship between the ruler and the minister.”

This idea not only reflects the Confucian relationships, it is the underlying concept of all traditional Confucian virtues, whose essential purpose is “[To stabilize] a society that was ordered according to a hierarchy of age, and divided into kin-groups based on male dominance and male descent lines.”

It is not surprising, therefore, that when Confucian thought became the state ideology, the penal sanctions of the law have been adduced to enforce the Confucian morality embodied in the *li*. Since the *li* made fine distinctions based on sex, seniority, and degree of kinship, these distinctions were enshrined in the law as well. Traditional Chinese law was “essentially a moral code calling for social hierarchy and inequality.”

This had an impact on gender issues. In *The Analects*, Confucius mentioned women only once: “Women and small men are difficult to nurture. If you get too close to them, they become uncompliant, and if you stay too distant, they become resentful.”

From this passage, Gao Xiongya concludes that the philosopher considers women as ‘inferior men’, unable to communicate and to understand; moreover, he seems to suggest that they are to be forgotten, or at least ignored. Whether Gao is right or not, based on the above quote Confucius’ followers developed ‘ceremonial rites’ (*li*) for women, which “encourage and teach feminine virtues desirable from the male point of view.”

The first Chinese law to adopt the principle of gender equality was the Guomindang’s Civil Code of 1929-1931. The code was the first to envision women as independent free agents. The law and legal institutions, however, far from reached the Chinese people and had no substantial impact on the society at large, since in practice, for political and historical reasons, they had only been applied in large cities or coastal provinces.

It was, therefore, only after the foundation of the PRC in 1949 that the principle of inter-gender equality really found its expression in the legal system. The Marriage Law of 1950, for example, provided for a complete equality between sexes in marriage and
family life, affirmed the right of women as well as men to divorce and to remarry, and allowed women to own property.xxxviii

However, it seems probable that, despite the declarations of war on the traditional family structure, PCC leaders considered stability and social harmony to be much more important values than gender equality. If, on the one hand, the new ideology urged women to find productive work outside the home in order to help rebuild China, on the other, little attempt was made by the government to provide jobs or relieve them of home responsibilities. For Chinese women, the Maoist era represented a succession of “several confusing decades in which they have sometimes gained rights only to lose them.”xxix

In the last two decades, an improved income and living standards have brought women unprecedented development opportunities, and gender equality has become one of the key state policies for social development.

In 2015, the government incorporated the development of women and girls into the “13th Five Year Plan for Economic and Social Development,” and at the same time, the NPC and its Standing Committee have enacted/reviewed several laws in order to realize equality between men and women, protect women’s rights and interests and eliminate any kind of discrimination against women.

Still, the situation is far more complicated; both judicial reform and political discourse on this subject appear to drive official efforts in a contrary direction.

The fact that contested divorce petitions usually result in court rulings to preserve rather than to dissolve marriages is not surprising: like other parts of the state bureaucracy, courts cannot help but follow the line indicated by the leadership, like when Xi Jinping described the family as “the cell of society” in a speech in 2016.xxx

The insufficient attention (to put it mildly) to the rights of the women who turned to court to get rid of a violent husband, and to whom, often, divorce was often not granted in the name of the higher goal of social harmony, remained limited to the practice of law. It was only in the last several years, due to the revival of Confucianism, that the discourse on ‘traditional family virtues’ came into the Law.

Since harmony depends on differences, in order to maintain harmony at the family level the husband must be superior to the wife. Then, women are ‘by nature’ required to take care of their husband, children, and the family as a whole: those seeking divorce would therefore be ethically stigmatized as selfish or even immoral. Finally, marriage is not a purely private matter: as “the family is the cell of the society”, as stated by President Xi Jinping in the aforementioned speech, divorce evinces the relationship between the state, the law and the society.

In recent years, the development gap between men and women in the PRC has expanded, while the female participation in the labor force has been declining; A situation that unquestionably results from a combination of different factors, in particular gender disparity in incomes, in employment
opportunities, and in unpaid care work. In my view, these aspects have been increased by the recent emphasis on Confucian values, on one side, and ‘solidarity’, intended as a substitute for public services, on the other, especially as both are embodied in the law.

If, under Mao Zedong, women were deemed to ‘hold up half of the sky’ (Funü ding banbianian 妇女顶半边天) in Xi Jinping’s China, they seem to have to carry it all. If and how much this will favour the sustainable development of the country, and the realization of the “Chinese dream of the great rejuvenation of the Chinese nation” can be evaluated only in the future; for now, the only certainty is that is up to women to bear most of the burden of the ‘new’ solidarity and social harmony.

This analysis (Part I & Part II) was originally published in Studi di Genere: Donne per l’Europa 2, February 2020.

---


3 https://bit.ly/33Kr3an


vi https://bit.ly/33Qloj4


x See “art. 13” and “art. 33, paragraph 3” of PRC’s Constitution, respectively.


xii The Classic of Filial Piety: Scope and meaning of the treatise, paragraph 1.


xxi Ibid. P. 117.


xxiii See reference xvii.


xxxiv See reference xxvii.


xxxvi Ibid.

