

ChinAmerica: The Inevitable Split

Why the Modern-Day Sino-American Confrontation Has More to Do with Different Law & Society Worldviews than Geopolitics

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Vision & Global Trends. International Institute for Global Analyses
Piazza dei Navigatori 22, 00147 – Rome (Italy)
Analytical Dossier – N. 24/2020 – November 2020

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First Edition: November 2020

Analytical Dossier – N. 24/2020

www.vision-gt.eu

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Abstract

The Sino-American hegemonic confrontation may be the result of elements that go beyond geopolitics, touch a more intimate sphere and have a deeper origin, namely the very social and legal foundations on which the two countries are based and modelled and accordingly shape their worldviews. Assuming the validity of this line of thought, the end of the symbiotic relationship between the two world-largest economies was only a mere matter of time. Indeed, no true strategic partnership can exist between the US, which is politically, culturally and economically liberal and is devoted to the promotion of its system across the globe since the early decades following the independence, and China, whose conception of state role in domestic and world affairs is totally different from the European and American one and is the combination of a millennia-old complex and rich history.

Key words: United States, China, law, society, liberalism, Confucianism

1. Introduction

The arrival of Donald J. Trump at the White House has been a watershed event which marked the official starting point of a new Cold War but this time is not the West against the Soviet empire, it's the West against the People's Republic of China. The Sino-American clash might look like a hegemonic confrontation merely driven by economic and geopolitical reasons but there are other elements equally important to explain the conflict which have been so far widely ignored. The reference here is to the very different legal and social structures of the United States (US) and China; with the former being the self-proclaimed champion of the individual-centered and liberalism-shaped free world and the latter being a community-based entity shaped by both Confucian and communist values. This paper assumes that the confrontation was avoided all these years only because of two factors:

1. At the time of the Cold War, China was a developing country plagued by a lot of internal issues and contradictions which made it much less threatening to the eyes of the West in comparison with the Soviet Union, and its geopolitical ambitions were not so manifested as today or perhaps they were but voluntarily underestimated.

2. The Cold War has been followed by the outbreak of the War on Terror, which has monopolized the attention of European and American strategists and secret services until very recently and therefore has allowed China to grow and flourish in the shadow of the over-exposition of the Jihadi terrorism. Now that the Soviet threat is a memory of an increasingly remote past and that the War on Terror achieved some of its goals and the overall jihadi menace is less worrisome than in 2001 or 2015, the US can concentrate its attention to the containment of China, whose wealth and power have increased dramatically in the last 60 years until the point that today there is no country but China capable of challenging the American primacy and the Western-centered liberal order. Indeed, this is much more than a geopolitical conflict, it is a conflict between two deeply opposite and irreconcilable worldviews.

2. The Sino-American Confrontation

2.1 Understanding the US

With the short paragraph represented by Napoleon and the French revolution, the United States is the Western country that more than anyone else has been trying to sponsor and to export its social and legal model worldwide, even by force. We need to understand why this happened and is still happening. The US is a country born out of a bloody anti-imperialist revolution where legalism (supremacy of law) and belief of being somehow endowed with a God-given mandate to make the world a better place (*Manifest destiny*) are widespread and deep-rooted in its history and keep playing a key-role in culture, society and politics. Even the popular “Farewell Address” (1796) by George Washington is very often misinterpreted since it was a call to avoid entangling permanent alliances but in no way it promoted a 360 degree isolationism, instead, it can be considered the pamphlet of American unilateralism.¹

After this premise, it's possible to contextualize the American Westward expansion, the Monroe doctrine, the 1898 Spanish-American War, the involvement in the World War I, the second postwar hegemony-building of an American-centered and liberalism-promoting world order, and even more recent events like the interventions in Lybia, Syria, the support to anti-government oppositions in several illiberal democracies and dictatorships and, ultimately, the confront with China. The individual and his/her set of rights are considered to be the main pillars of the American free society as it is very understandable by the three unalienable rights stated in the *Declaration of Independence*: “Life, Liberty and Pursuit of Happiness”. In this sentence the seeds of later American interventionism can be found, since those three unalienable negative rights are considered to be God-given to the entire humankind and the natural consequence of such reasoning is that the US has the duty to make them respected across the globe wherever they are violated. This is at least what Thomas Jefferson thought while developing the so-called concept of *Empire of Liberty*, namely the responsibility to spread the American values worldwide envisaging the building of US-friendly regimes.²

Since the US considers itself the champion of freedom, accordingly all those countries which do not conform to liberal-inspired systems are susceptible to be targeted by pressures. Then, there is the imperative to explain what the American system consists of. It has been widely influenced by the European illuminism, from which it has imported many concepts except for the anticlerical and irreligious features.

Accordingly, the US is dominated by the rule of law, the supremacy of Constitution (to which every person is subjected, even the highest-ranked government officers, like the President), power abuses by the three branches (executive, legislative, judiciary) are prevented or fought through a wellfunctioning and efficient check and balance system and, ultimately, the courts are law-makers through their decisions, sentences and legal opinions since the legal system is based on Common law. Each citizen and non-citizen can resort to the courts to have his/her rights respected and often the tribunals don't limit their action to a mere judgement: they make history, paving the way for epoch changes via their world-overturning sentences which have the power to re-write the previous legal framework due to the role played by the judicial precedent. It was the judges to decriminalize and legalize abortion (Roe v. Wade; Doe v. Bolton) and gay marriage (United States v. Windsor; Obergefell v. Hodges), and to legitimize the racial segregation (Plessy v. Ferguson) as well as to put an end to it (Brown v. Board of Education; Heart of Atlanta Motel, Inc. v. United States).^{3 4 5 6 7 8 9} Then, there is the absolute need to speak about the American economic system. The US is the capitalist country by definition: it's the birthplace of modern-day finance capitalism, of the most important laissez-faire schools of thought, and of the world-largest corporations, it's the architect of the postwar liberal order based on the Bretton Woods system, it's home of 8 out of 10 of the world's richest people, and it's the place where Adam Smith's Invisible hand is left unchecked and this leads very often to the outbreak of world-damaging financial crises.¹⁰ The US has historically based its own growth, power and wealth on the benefits deriving from the free market ideology. The Cold War was something more than liberalism vs. communism, it was an existential battle between capitalism and communism. Wherever there are open economies, the US can take advantage of that to purchase assets and firms, to export its goods, and to give rise to forms of economic and financial inter-connection which make an eventual decoupling as difficult as harmful. Indeed, free trade agreements are an important instrumentum regni of the American foreign policy. The power of American hegemony isn't fully explainable and understandable without taking into account this reality.

Lastly, it's noteworthy to underline that over time the space occupied by the negative rights has overshadowed the importance of the positive ones, leading some political scientists to speak on unfavorable terms of the alleged development of a phenomenon renamed “permissive cornucopia“ , that is a disgregating force acting against social cohesion in the name of the allegedly undisputable superiority of the individual and of all its claims of freedom from any obligation and of freedom to have every desire satisfied.¹¹

2.2 Understanding China

The modern-day Communist China is the heir of a millennia-old civilization whose approach to negative and positive rights, vision of state-citizen relationship and conformation of state and law, have historically been much more different in comparison with the West. It's impossible to understand the current situation without having a look at the past since China is at the same time the champion of Marxist ideas as well as the result of a long history shaped by Confucian teachings; indeed the country's nowadays identity is the combination of both elements. The history of Chinese Traditional Law (CTL) begins long before the first codifications of law in the Roman Empire, namely with the Xing Shu (536 BC) and Fa Jing (400 BC). The CTL gave form to an emperor-based highly centralized and bureaucratized government heavily influenced by Confucianism, especially starting from the Han dynasty. For many centuries the political system resembled European feudalism. Two ideas, in particular, shaped China's worldview: continuity and mandate of Heaven. The former is considered the main feature of Chinese civilisation and implies the vision of China as an unchanging monolith.

The repeated dynastic changes, the century of humiliation, the republican period and the communist revolution have to be regarded as a flow of events which has helped the country to preserve itself, eventually. The latter is closely tied to the concept of continuity and provided the justification for the absolute power held and exerted by the emperor, considered to be the guarantor of the continuity and thus possibly victim of dynastic changes and rebellions if failing to fulfill his duty. It's arguable that this latter concept laid the foundations for the widespread historical and popular tendency to idealize the turn leader and build strong personality cults – and the tendency has been inherited by the Communist as it is possible to see by the cult surrounding Mao Zedong and Xi Jinping. Each dynasty added or removed something from the CTL but without touching its basic principles in the name of continuity. The legacy of CTL survived until today and keeps shaping legal thinking and practice in modern-day China, where the law is regarded as an instrument to achieve political, administrative, secondary and social goals. The most considerable attempt of reforming and modernising the law were first made during the late Qing period (19th century) as result of internal (mounting corruption and social unrest) and external pressures (the entrance in scene of European powers and later Japan and the US). European law experts landed China to help reform the legal system, in 1864 Henry Wheaton's “The Elements of International Law” was translated to Chinese, in 1904 the Law Codification Commission was appointed.

Two years later, the Commission suggested to adopt Japan-style constitutional government, with more powers going to the National Assembly but the last say left to the emperor. Interestingly, while studying the Western different approaches to law and society, the Chinese manifested disliking for the Anglo-american common

law due to its over-emphasis on the individual – this was seen as harmful to the family-based Chinese society.¹²

The importance of continuity was highlighted in 1912, that is when emperor Puyi abdicated and a republic was established – it was to last until 1949 and is traditionally divided in two phases. The second phase was pretty different from the previous one since it was marked by the political hegemony of the Nationalist Party (Kuomintang) and its attempts to modernize China both militarily and economically. Interestingly, the Kuomintang chose Nanjing as the capital city to show continuity with the past due to the city's ties with the Ming dynasty. Eventually, the Kuomintang experience failed to endure due to the outbreak of a civil war fought between nationalists and communists. The latter won and seized power officially in 1949, giving rise to a Soviet-modeled regime based on one-party system and military exposition in the public affairs. Justice was subdued to politics, it became an instrument of the ruling communist party, whereas entertainment and education became tools used to indoctrinate the people and make them accept the new order.

The end of Maoism marked the transition to a new economic model (market socialism) and to some other relevant changes at level of civil society and political reform but the essential nature of the revolution was preserved, stressing the importance of continuity and long-term stability through the proper use of law. At least on paper, China became a country “ruled according to law [which] respects and protects human rights”.¹³

In any case, the further developments have shown that China has a very own way to conceive human rights and how to protect them. Human rights activists and lawyers are often jailed and fundamental human rights like the freedom of religion are largely thwarted as seen by the mistreatments towards Christians and Muslims which sometimes end up in real persecutions.^{14 15 16}

Justice keeps being used as a political tool of the Communist Party, which considers itself the one and only legitimate builder of the country's identity, economic prosperity and social stability through top-down coercively-enacted initiatives. As a consequence, citizens resorting to the courts to denounce power abuses allegedly committed by civil servants and officers found in the justice an obstacle rather than an impartial instrument and some Chinese movies and documentaries, like the *Story of Qiu Ju* (1992) and *Hooligan Sparrow* (2016), depict and denounce such reality very well.

Ultimately there is the need to have a look at China's economic system. Mao Zedong saw in the Soviet Union a role model in many issues, including the management of national economy, and hence he designed a planned economy based on collectivization and state ownerships. His efforts are universally considered a failure, they were cause of famines and chronic low productivity, and shortly after his death, the new leadership, led by Deng Xiaoping, started a deep re-thinking of the economic discourse by giving rise to the so-called socialism with

Chinese characteristics, that is a socialist market economy less state-centric, open to foreign investments and private entrepreneurship. This recipe allowed China to turn into the world's main factory of manufactured goods destined to the developed world. However, starting from 2000s several reforms of Xiaoping era have been reversed, first by Hu Jintao and later by Xi Jinping. The economy is now more and more controlled by the state and even the officially private-owned corporations, like Huawei, are allegedly tied to the government and/or the armed forces.^{17 18 19}

This reality is now used by the US to justify in part the ongoing trade war and hegemonic confrontation (let's think about the accusations against Huawei's 5G, whose adoption is considered a security threat). In any case, truly speaking, not even in the US the private big business is free from governmental interferences and conversely the corporations have often proved to be weapons at the service of the government; just let's think about the banana-producing United Fruit Company and its fundamental role in helping the US extend and consolidate its hegemony over Latin America.²⁰

3. Conclusions

The American and Chinese civilizations have always been very distant on many terms but the recent history is being contributed to sharpening such division, which eventually turned it into openly mutual hostility. The so-called century of great humiliation undoubtedly played a fundamental role in increasing the Chinese diffidence towards foreign powers, European and the US in particular, and in driving the Communist Party's domestic and foreign agenda. In China the law is used as a political tool to preserve social order due to the importance historically played by the concept of continuity, whereas the absolutist *modus operandi* of the turn leader has more to do with a deep-rooted tradition, whose origins date back to the centuries-old elaboration of the Mandate of Heaven, rather than the rise to power of communism. In short, the communists inherited an already-existing system based on absolutism, high centralization, heavy bureaucratization, state-citizen relationship based on the submission of the latter, and strengthened and enriched it in accordance with their own goals. The recent reconfucianization attempts are the clearest evidence of the importance played by the concept of continuity which has never been truly abandoned and helped the Chinese civilization strive and return to its peculiar nature every time after national traumas. Furthermore, it should be remembered that China showed its dislike towards the Anglo-American individual-centered social and legal system since the very beginning. This is an element not to be overlooked. The seeds of discord have always been present and not even the “Western-friendly” republican paragraph could prevent them from ripening and eventually bearing fruits in 1949. China sees suspiciously every attempt to interfere in its own internal affairs due to still fresh memory of the legacy left behind by the open door policy pursued by the declining Qing dynasty. The US, on the other hand, tends to interfere worldwide like if it were a global policeman since it considers itself the Empire of Liberty, whose

mandate is to export its legal and social system across the globe. The Trump administration's strong interest in the Uyghur question and Hong Kong protests are the best examples of this deep-seated attitude. In the end, it's arguable that the split was only matter of time since Henry Kissinger's diplomatic revolution had nothing to do with sympathy towards China, it was driven by the need to resize the Soviet empire and make the two champions of communism one against the other. The historical approachment didn't lead to death of mutual suspicions, internal differences and opposite foreign agendas, conversely, they flourished up to the point of urging Washington to rethink its Chinese agenda and opting for the inauguration of a China-targeting new cold war.

Notes

- 1 Transcription of the Farewell Address (1796) by George Washington, American Embassy in Germany, <https://usa.usembassy.de/> (retrieved: 20/05/2020)
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