Legal Pluralism and the Universality of Freedom of Conscience: A Comparative Historical Sociology of the Secular State in the Euro-American and Sinitic Worlds[1]

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Abstract

The paper uses the framework of multiple modernity to present a robust defense of the universality of human rights, focusing on the idea of freedom of conscience. The normative stand that human rights are universal can be reinforced by a comparative historical sociology that shows concepts such as pluralism and respect for different worldviews are best explained as the result of endogenous evolution rather than an imposition from outside. The article also explains that the framework of multiple modernity is not a reification of different civilizations with fixed characteristics, but rather different historical trajectories that have each produced a variety of institutional forms. This last point will be emphasized by demonstrating the variety of approach to the relations between states and religions in East Asia, and even within the polities that claim a Chinese cultural identity.

Introduction

In response to its critics in matters of human rights' violations and religious persecution, the CCP claims that China and other Asian societies have their own culture and religions, and as a result, they have developed their own concepts of human rights, which do not necessarily agree with those of the West. (CHR, 2011) Never mind that Marxism and Leninism are non-Chinese theories, or that Zhang Pengchun, China's delegate, played a pivotal role in the drafting of the UN declarations on universal human rights in 1948. (Twiss, 2008) Still, in this essay I have chosen to take seriously Chinese authorities' argument about the specificity of their cultural values and traditions, as a matter of principle based on respect for cultural diversity, which implies respect for differences of opinions based on belief, whether religious or not. It is a position that recognizes the importance of culture as the foundation of identity, even as I guard against the reification of culture as a fixed category and look instead at culture as a semiotic practice that gives meaning to social action. (Wedeen 2002) As such, I consider culture as changing and adapting to its environment, a point made by Schmuel Eisenstadt, one of the founders of the concept of multiple modernities. (Eisenstadt, 2000a; 2000b; 2003)

In this essay the emphasis on culture leads me to pay attention to religions because they often stand as the foundation from which emanate values, and I have decided to focus on the institution of the secular state, which has emerged as the instrument to reconcile differences over religions and the values they support, and as such one of the most important instrument to promote freedom of conscience. In doing so, I will consider the religious origins of legal thinking in China, and in particular on ethics, public morality, and views on justice and retribution. This examination will also requires that we adopt a comparative posture that avoid the pitfall of ethnocentrism, which would define religion, for example, as something that looks like the Abrahamic religions. I rest on the shoulder of my colleagues in history, anthropology, and sociology, who understand religion in China as a system that is more encompassing than the forms of religion we are accustomed to in the West, and which were dismissed by scholars abroad and in China, as

superstitions. This approach will help us to understand better the issue of the secular state as a guarantor of human rights in the Chinese context, with respect to the right to believe and the right not to believe.

Against the two extremes of persecution against religions and persecution in the name of religion, the institution of the secular state represents one of the most robust instruments available. The object of this essay is looking at the secular state in a comparative perspective, and I want to argue that although it has emerged as an institution along with Western European modernity to overcome divisions along religious lines in Europe between Christian monarchs, it also belongs to the heritage of other parts of the world, such as India, for example, at the time of Ashoka (304-232 BCE) and the Moghul emperor Akbar (1542-1605). In that case, the secular state appeared as the result of empire building, the emperors promoting religious plurality and tolerance to consolidate unity. (Bhargava 2013) In China, the secular state also appeared in relation to empire building, with the state patronizing a diversity of local religions, but under the authority of an imperial ritual, Thus, the principle of the secular state, in its diverse shapes and origins, is a truly universal principle that can be embraced in other parts of the world, and the task of legal experts everywhere is to ensure that it resonates with different people's own history and traditions, to ensure that it makes sense to them. In other words, I argue that a legal pluralist approach implicit in the idea of multiple modernities makes it possible to think of the universal relevance of fundamental rights despite the plurality of the genealogies revealed in a comparative historical sociology of secular states across different cultures.

I will establish this by making four separate points. First, I will make the case for the universality of the secular state as an ideal-type of constitutional principle to ensure the mutual respect of different world-views within contemporary nation-states. Then, I will use the perspective of multiple modernities to underline the necessity to think of the secular state as a variety of institutional possibilities reflecting the world's variety of cultures. Then, I will sketch the outline of a comparative historical sociology of the secular state in the Euro-American and Sinitic worlds to make the important point that this diversity exists also within each civilizational area. Finally, I will expand on the last point with a specific reference to the existence of specifically Chinese perspectives on law that have emerged in its traditional beliefs, and at the same time evoke the diversity of approaches to the

regulation of religions adopted by states influenced by the same traditions.

The Secular State As An Uncompleted Universal Project

The dominant narrative foisted on the minds of people in the Western world is the idea of freedom of conscience is one the two important principles proclaimed after the Peace of Westphalia in 1648 that would later on spread all over the world.[2] Freedom of conscience, that is, the right to believe or not to believe, to convert to a religion or to abandon one, is an important part of the edifice of human rights worldwide, enshrined in Article 18 of the *Universal Declaration of Human Rights*. However, the point I am making in this essay is that the principle of the idea of freedom of conscience can also be understood as the product of other historical trajectories. I have chosen to make this point by focusing on the case of China, simply because this is the area I am familiar with through my research on religion and politics in China and Taiwan, In making the case that the principle of freedom of conscience has emerged in other societies, I am aware that everywhere, it also comes with its own specific contradictions, Hence, in Euro-American countries,[3] religious rights compete with other rights, and it is a challenge for legal experts to determine when religious rights infringes on other rights such as gender equality, protection against discrimination on the basis of sexual orientation, and the right to express dissent within religions. In China, the issue is not so much the challenge of religious rights to other rights, but rather than often the state has too much authority over religion and other aspects of social life.

In societies all over the different civilizational area, people are persecuted because of their beliefs or lack thereof, their religious practice, or simply because they belong to a community targeted by another. Freedom of conscience, it should be clear, is also about freedom from persecution or prejudice based on religious grounds. People suffer from discrimination based on differences of interpretation of sacred scriptures, and their behavior, preferences, or personal choices can be attacked because of some idea of religious purity. Protection against such form of intolerance is an issue in all societies, regardless of their traditions. Although many scholars debate the universality of the secular state in its existing modalities, only doctrinaire

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2　The other principle being, of course, that of national sovereignty.

3　A cultural reference rather than a geographical one, it includes Australia and Pacific Ocean islands as well as Latin America and the Caribbean.

extremists deny the universal value of freedom of conscience that it seeks to uphold.

The secular state as we know it in the West results from centuries of conflict between the authority of the churches and that of secular leaders in emerging modern states. It became a hallmark of liberal democratic societies in Western Europe and the New World as mass movements for the expansion of the electoral franchise and the welfare state until the 1960s often found ecclesiastical authorities opposed to them. By the time liberal protestant churches stood behind the civil right movement in the United States and the Latin American Catholic episcopate espoused liberation theology, the principle of the right to dissent on religious issue without any sanction from the state or society was enshrined. For many post-colonial leaders in Asia and Africa, the achievements of liberal secular states in the West coincided chronologically with their own struggle for national liberation. As Bertrand Badie demonstrated in his comparative study of the two shores of the Mediterranean, however, while the secular state in France and Italy represented the culmination of long internal democratic struggle, this was not the case in the former colonies of Algeria and Tunisia. There, many saw in the secular state a foreign graft and a bitter legacy of colonial domination imposed on society, including the local religious authorities. (Badie, 1997) In China, the idea of the secular state came from two different directions: as part of the emancipatory modernist discourse of nationalists and communists, but also as a legacy of the religious diversity existing in imperial China.

Theoretically speaking, the principle of secularism means that the state shall remain neutral on matters related to religion. We can describe a majority of states in contemporary society as secular in that sense, even when they exhibit the remnants of established religions, such as the UK and Scandinavian countries. There is no original model of the secular state, but rather different historical trajectories and institutional outcomes that have provided benchmarks for what Alfred Stepan has called the principle of 'twin toleration.' For Stepan, this principle means non-interference of the state in the affairs of religious institutions, and freedom from the influence of religious institutions in the affairs of the state. The latter, he adds, does not exclude the involvement of religion in politics, such as lobbying and even the creation of a political party. (Stepan, 2001) Although the definition of Stepan is inspired by the historical experience of the separation between 'church and

state' in the West, and may appear as too local to be universally applicable, I think it still relates to China and the societies it has influenced because the separation between church and state is not a constant in the history of the West, and it is often breached; and because religion, from the Yellow Turbans Rebellion (185-204) to the Taiping Rebellion (1850-1864), has often challenged the authority of the state in Chinese history.

There is a growing consensus in comparative political science and in international relations theory that the process of secularization, or what Jose Casanova called 'functional differentiation, privatisation of religion and decline of religious beliefs (Casanova 2001), is in doubt. There is also plenty of empirical evidence that many people oppose the related political ideology of secularism and want to remove the inscription in a national constitution of the secular state principle. The arrival to power of Hindu nationalism in India, the resilience of the Christian religious right in the USA or the Falungong among Chinese communities around the world, and, four decades after the Islamic Revolution in Iran, the emergence of a rival Islamic State in Syria and Iraq, have led many to question the consensus over secularism as a political programme, and have even challenged the resilience of the secular state as an institution. The noted British sociologist of religion Grace Davie (2007) and the German philosopher Jurgen Habermas (2006) have coined the term postsecular societies to describe our current condition.

The same is true for China, where the process of secularization in their country has not followed the modernist script of religion withering away. The Communist Party itself recognizes that religion matters, and the director of the State Administration for Religious Affairs Wang Zuo'an has argued that it is important to achieve stability in a socialist society and promote the progress of both material and spiritual civilization. (Wang, 2010: 2) The international theory scholar Elizabeth Shakman Hurd has observed in her study on the politics of secularism in international relations that the conventional wisdom that religion has been privatised and marginalised and replaced by a secular ethics is flawed. (Hurd, 2008: 3) But the resilience of religion in the public sphere in contemporary societies, I would like to argue, does not mean that the secular state is threatened or that it is losing its reason d'être. On the contrary, with my colleagues Rajeev Bhargava and Bruce Berman, I have argued that it is more necessary than ever, because of the conditions of cultural and religious diversity that our post-secular societies are facing.

(Berman, Bhargava, Laliberté, 2013) What needs to be recognized, however, is that the secular state will have to better reflect the religious-political realities of the societies where it is implemented.

One difficulty faced by the supporters of the secular state in many non-Western societies is the claim that the secular state is a cultural import from the West, if not an outright form of cultural imperialism. This objection points to a real issue. As the Canadian political philosopher Charles Taylor has argued, the idea of secularism has emerged within a context of ensuring coexistence between different Christian churches, not between different religions. (Taylor, 1998: 32) As the sociologist Talal Asad noted, it is also true that the secular state acceptance of religious diversity in many Western countries is put to the test when religiosity expresses itself outside of the realm of the Christian tradition, especially when it is faced with Muslim minorities. (Asad, 2003) Such critiques raise a valid point, in light of the anti-immigrant tensions visible in most contemporary Western societies.

Moreover, there is little doubt that in most non-Western societies, the conditions of emergence for the secular state are radically different from those that prevailed when the secular state struggled to assert itself in the Western World against the power of established churches. Western secular states emerged organically within the trajectories of modernity in Europe and its former settler colonies in the Americas and Oceania, as a result of internal tensions, conflicts, major settlements, and finally agreements on rules of engagements in cases of dispute. The secular states in African and Asian societies, however, have often emerged suddenly via the institutional legacies that were bequeathed by colonial powers, sometimes directly, sometimes indirectly. (Madan, 1987) In societies like China and Japan, another situation presented itself, as the emergence of the secular state followed from local circumstances. In the worst cases, as we are seeing with reference to many post-colonial societies and China during the early Republican period and during the Cultural Revolution, secularism as a political program has been imposed by authoritarian governments that sometimes directly attacked religious institutions. We need to bear these conditions in mind when we think of the secular states in the plural. It is in this context that the idea of a variety of paths to modernity is relevant.

Multiple Modernities and the Comparative Historical Sociology of Secular States

Major sociologists such as Max Weber, Karl Marx, Emile Durkheim have long looked at modernity as a Western invention. They saw Western modernity as revolutionary because, among others, it put an end to the idea of the unquestioned authority of the Church in the affairs of society. This idea spread through colonialism in the Americas, then in Asia and Africa, making Western modernity global in scope. The reflective turn in social sciences pioneered by, among others, the School of Frankfurt and post-colonial studies, however, has questioned this optimism about modernity, which it sees as defined by uncertainty, and whose trajectory is undetermined. There is no long march to modernity but a succession of crises, changes, and ruptures. That is, modernity advances by leaps and bounds as a number of opposition between sacred authority vs. secular power, enlightened despotism vs. popular sovereignty, state dirigisme vs. market economy, laissez-faire vs. welfare state. Modernity includes all of these elements in constant tension and is not fixed. The wide range of different societies between the liberal United States and the social democratic Sweden all express this diversity within Western modernity. From Latin America to Central Europe and Oceania, it stretches a vast space, and its influence, because of colonialism, has been global in its reach. But by its very nature as a succession of conflict, contemporary modernity can only be multiple, and cannot adequately be captured by the experience of the Western world only.

The sociologist Schmuel Eiesenstadt coined the concept of multiple modernities to capture this reality. (Eisenstadt, 2000a) Inspired by the sociology of Weber and his view of the Protestant reformation in the 'disenchantment of the world', he looked at the separation between spiritual authority and political power as a key tension in the emergence of Western modernity, with consequences that still resonates today, in the continuing tensions between religious movements and the variety of secular states within Western Europe and North America that I had described before. But Eisenstadt took distance from mainstream theories with his argument that in societies where Christianity was not part of ancient history, the trajectories of modernity experienced in these various parts of the world were bound to be different. Here, Eisenstadt picked upon the philosopher Karl Jaspers' idea of axial religions and their influence in shaping different civilizations,

and how they have continued to affect them as they faced the challenge of Western civilizations. (Eisenstadt, 2000b) Hence, he looked at the traditions of Islam, Hinduism, Buddhism, and Confucianism, as sources of public morality and normative ideas. Most importantly, however, he looked at each of these civilisations as a series of contradictions, conflicts, crises, and disagreements over the practical consequences of their central spiritual, ethical, and philosophical core traditions. (Senghaas, 2002) In other words, for him and other promoters of this concept of multiple modernities, each of these civilisations had gone through its own process of change. Civilisations, spreading wide in time and space, have influenced each other, and all of them have been in contact with Western modernity. The global modernity that is unfolding before our eyes is not converging to an agreed upon script. It is likely to remain plural and diverse. And it is not also expected to end up fixed in any form.

The resilience and importance of the various spiritual traditions of the world outside of the West will see to that. As the remarks above on the secular state have made clear, they are still shaping the nature of politics today. Whether it is the idea of the nation and its values, the views on the role of government in providing social services to the poor and the vulnerable, the acceptance of diversity, or the ends and means of society at large, they are influencing the public discourse, through the selective use of traditions by governments and their opponents. The impact of Western modernity remains important as a major "other" in relation to which other forms of modernity interacts. One striking characteristic of the present age that stands in contrast to the last century is that this interaction cannot be defined anymore by a process of catching up. Islamic, Indic, Chinese, and other forms of modernity, are defining themselves according to their own logic, sometimes against Western modernity, sometimes by borrowing from it. In sum, the concept of multiple modernities offers an important corrective to the idea of a hegemonic and unchallenged Western modernity asserting its supremacy over non-Western civilisations that stood by passively.

The view of civilisation adopted here is open-ended and totally opposite to the thesis of a 'clash of civilisation' proposed by the late Samuel Huntington (1996) and borrows more from the approach of Fernand Braudel (1994). Civilisations are not monolithic blocs in opposition to each other but they constantly interact through the links of trade and cultural exchanges. That

being said, I also do not make claims about multiple modernities converging into what the German philosopher Gadamer called a fusion of horizons. As Peter Katzenstein argued, "modern societies are not converging on a common path." (Katzenstein, 2010: 17) Each forms of modernity will continue to change in response to transformations in the economic, social, political sphere on the global stage, but also in relation to the path dependency of its own historical trajectory of struggles, debates and contradictions. And this will be especially true in the realm of ideas.

Going back to my original topic of the secular state, I have underlined above that for Eisenstadt secularisation was one of the principal elements of the Western programme of modernity, and the secular state its institutional expression in the political and legal sphere. (Eisenstadt, 2003) If we agree with the perspective of multiple modernity, it is easy to see that the secular state as a model of interactions between governments and religious authorities, which has emerged in the context of conflicts between the competing authorities of monarchs and churches in the West, was bound to be seen through very different lenses in societies where there was no functional equivalent to churches, where the state and religious authority had, for millennia, been fused together, or when the state asserted its authority over beliefs, and promoted specific rituals and ethics, a situation that capture well China. Each of the non-Western civilisations had developed over millenia different configurations of relations between the political and the spiritual sources of authority before Western secular states imposed their norms through colonialism. In the remnant of this essay I will focus on Sinitic East Asia, where societies have historically been primarily influenced by Confucianism and a Chinese version of Mahayana Buddhism on top of indigenous ritual, spiritual, moral, and ethical traditions.

One central difference between the West and East Asia is the existence, in the former, of a single, hegemonic monotheistic tradition, broadly defined as Judeo-Christian, distinct from political authority, sometimes in more or less serious conflicts with it, sometimes in relations of mutual support. As we have seen in the first section, the present situation in this relationship can be best described as a negotiated mutual accommodation in most societies in the West. East Asia, on the other hand, does not have a monotheistic tradition. Each country in the region have had long traditions of rituals and world-views, supported by the political authorities, that also regulated the

few religious specialists of Buddhism, Taoism, Shinto, and other local belief systems, and sometimes even tolerated the activities of clerics from foreign religions like Christianity and Islam. However, in East Asia, no spiritual authority comparable to the Church has ever been strong enough to challenge durably that of the supreme state authority, whether it is the monarch of the different kingdoms in ancient East Asia, from Chinese and Japanese emperors to Vietnamese and Korean kings, or more recent Republican governments. Of course, there were upheavals throughout East Asian history by groups of people claiming to have the mandate of heaven, (DuBois, 2011) but in these cases, their claims were both political and religious. Thus, the notion of separate religious and political authorities in China and the neighboring countries was not part of their tradition up until the late nineteenth Century. Interestingly, as I will discuss below in relation to the religious dimensions of China's legal thinking, while there was no religious hegemony opposite the state, as in the West, a religious-political hegemony has prevailed in the region, China providing the model to its neighbours.

This was the case with Japan before it imported from the West the idea of the secular state during the Meiji era of reform and modernisation, and adapted it to its own condition. In 1871, alongside the constitutional provisions that guaranteed freedom of conscience, the government declared all Shinto shrines to be property of the state and after 1890, it proclaimed an imperial cult that worshiped the emperor and led that nation and the entire region to disaster. This catastrophe led to American occupation and its imposition of a radical change in 1947 when Japan adopted Article 20 of the Constitution, which proclaimed, among others, that "No religious organization shall receive any privileges from the State, nor exercise any political authority." That straightforward implementation of the secular state, turned out to be approved by the majority of the population after decades of existence and stand today as a very good example of the versatile nature of Japanese modernity. Korea, which was freed from Japanese colonial rule in 1945, chose two different paths following the division of the peninsula. Like Japan and China, Korean society had also been religiously plural, and the government had long dominated religious affairs. This latter tradition still persists, albeit in different form, in the Democratic People's Republic of Korea, but it has been abandoned totally in the Republic of Korea. Today, the two starkly different approaches of the two Korean governments illustrate how widely divergent the concept of the secular state can be interpreted even within a single nation.

The religious-political hegemony of traditional China and its neighbours was not always clearly seen abroad as such because it has also adopted ritual practices, world-views, ethical systems and cosmologies that do not fit within what followers of the Abrahamic religions understood to be a "real religion." The states in East Asian societies have responded in different ways to their religious plurality. In the Japanese Empire, at the height of the military regime, the sacralization of the Tenno as the head of Shinto coincided with the pledge of allegiance to him by all subjects, regardless of their religious views. More recently, in liberal democratic societies like post-war Japan, South Korea and Taiwan since the lift of martial law, and to some extent Hong Kong and Singapore, the state is getting away from regulation for religious affairs. Apart from the PRC, only Vietnam and North Korea have yet to go that way. The evolution of liberal East Asia suggests the adaptability of societies influenced by the Chinese traditions of Confucianism and Mahayana Buddhism, and this adaptability cannot be explained only by a direct imposition of Western modernity: after all, Korea and Taiwan were Japanese colonies. Looking at the secular state in East Asia, and in particular in the societies that claim a Chinese cultural identity, begs the question of the extent to which local religions and the values they support have contributed in shaping the legal traditions through which the institutions of the secular state rules. This requires looking at the religious origins of the legal system, and in particular in China, which has influenced most of the religious heritage in Taiwan, Vietnam, Korea, and Japan.

The Religious Origins of China's Distinctive Legal Traditions

Legal scholars have taken for granted the religious origins of Western legal thinking for over eight hundred years until the twentieth century, when the intimate connection between Western legal tradition and the Western religious traditions of Roman Catholicism, Protestantism and Judaism, broke down. (Berman, 1983: 3) We would have difficulty in finding an equivalent legacy of religious and ethical belief in Chinese laws today if we were to limit our investigation to a Chinese version of Western religions, that is, world-views about ultimate realities based on the uncontested authority of sacred scripture, and an ecclesiastical hierarchy independent from the state. We should try to avoid the worst form of comparative law, which Jerome Cohen describes as comparing our theories with others' practices. (Cohen, 2008; in Katz 2009: 3) We should especially guard against the view that ancient China

never had a religion defined in the narrow terms just outlined, and therefore, that legal thinking in China either results from a long development by rational individuals, or by the incorporation of foreign concepts into an 'under-developed' legal system. Missionaries and earlier social scholars held this opinion previously, albeit for radically different reasons: the former looked at China as a society ripe for conversion, many among the second looked at it as a society that illustrated the virtue of humanist rule. (Yang, 2012) Both, however, deplored the impact of superstitions in Chinese societies. Many Chinese intellectuals also espoused these views at the beginning of the Twentieth Century, at a time when the theory of secularisation, used to account for changes in Western societies, acquired the status of teleology relevant for the whole world.

The study of Chinese societies has made enormous strides since then, and there is a growing recognition that religion has always been an important feature of Chinese societies throughout centuries. (Yu, 2005; Yang, 1961) After a succession of crises and turmoil spanning a century after the Hundred Days reform of 1898, (Goossaert, 2006) religion as a social fact is reasserting again its presence in contemporary Chinese society. Religion has perhaps lost its centrality for social life in China, but it certainly matters for security issue and as a component of the social changes incurred by the policy of reform and opening. (Yang, 2012) Many also recognize that China's path to modernity is different from that of Western societies in some important and fundamental ways. The process of secularisation, in particular, unfolds in very different ways than in the West where, beyond differences in institutions, there are some basic similarities, in particular the existence of churches whose authority until very recently rivalled with that of the state. A central difference between the Western and Chinese societies is the existence, in the former group of societies, of a single, hegemonic monotheistic tradition, broadly defined as Judeo-Christian, distinct from the political authority, sometimes in more or less serious conflicts with it, sometimes in relations of mutual support. Chinese societies have never experienced such a duality between a religious authority independent from the state and rivalling with it in a sustained way.

The enmeshment of religion in all aspects of society, and with the exception of monastic movements in Buddhism and Taoism, its lack of separation from the sphere of the economy, government, and law, characterised China. The

underworld reproduced the bureaucracy in this world, and every guild, craft, and social grouping, as well as cities and villages, had their own deities. The imperial authority, whose mandate of heaven ensured symbolically coherence to the whole, sanctioned on top of this system this dizzying array of practices. The descriptions of these rituals and practices by Maspero (1951) and Granet (1921), and the other fathers of modern sinology, present to us the era before the Republican revolution, and one can legitimately ask whether they have survived the challenges of the Taiping Rebellion, Western powers' humiliations, and the Republican Revolution. The evidence presented by Yang Ching-kun in his classical study of Chinese religions written half a century ago, suggest that they did. Yang offered the closest thing to a systematic description of religious practices at the beginning of the twentieth century throughout the country that decades of strife and conflict during the Republican period undermined. In his survey of temples, Yang explained that because of the permeation of religion in Chinese society, temples served a wide range of functions, and "people prayed to different gods for different purposes." (Yang, 1961: 7) Temples, accordingly, emphasized certain functions, ranging from the integration of well-being to general order, economic prosperity, health, public and personal welfare. Temples for the deities of justice, but also for underworld authorities and devil dispellers, ensured a general moral order. (Yang, 1961: 8-9)

Paul Katz's research on judicial rituals in Taiwan and in overseas Chinese communities has revealed that this reality exists today. The importance of religious beliefs and practices in the development of a Chinese legal culture stems from his interest in the study of beliefs and practices related to the cults of underworld deities. (Katz, 2009: ix) He noted the importance in Taiwan of religion and rituals in the pursuit of justice, illustrated by oaths of innocence performed by politicians and underworld indictments filed against enemies by ordinary citizens embroiled in financial and commercial disputes. (Katz, 2009: 2) Other examples included petitions to bureaucratic deities of the underworld to settle domestic matters, settle family feuds, punish cheating husbands, etc. (Katz 2009: 2). Katz develops the idea of a judicial continuum whereby this system coexists with the formal one, and gives example of policemen and judges making offering in temples to obtain from deities of the underworld their help in solving difficult cases. (Katz, 2009: 2) What Katz shows is two Chinese forms of overlap between law and religion: the ideology of justice and the performance of judicial rituals. (Katz, 2009: 3)

The popular imagination of the world of the death proposes "what the world of the living could be if it had (the former's) rationality, order, and systematic moral logic. (Bourgon, Brook, and Blue, 2007: 126; in Katz, 2009: 4)" Paul Katz's observations came from his study of Chinese societies in Taiwan and among Chinese overseas communities, but although they do not pay as much attention to the People's Republic of China today, they confirmed other observations that conveyed the point that religions have influenced Chinese legal concepts before 1949 and still do today outside of the PRC.

John Lagerwey has made a path-breaking series of ethnographic observations of judicial ritual practices in Fujian, which reveal that the practices studied by Paul Katz in Taiwan remain alive in contemporary China, despite decades of persecution against "feudal superstitions." (Lagerwey, 2010: 125-128) Other recent surveys by Dean (2003; 1998), Chau (2005), Tsai (2012; 2002), and many others confirm that finding that many of the practices mentioned above are even experiencing a resurgence in new forms and in different contexts in Mainland China today. These observations make Katz's observation of judicial rituals all the more relevant for the study of legal pluralism in China today. Nevertheless, the important issue is whether they work as semiotic practices that give meaning to those who perform their rituals, and in particular, how much the perception of their efficacy trumps what the modern state asserts. The diversity of religions in China is bound to have an effect on legal pluralism. Although the practices of folk beliefs mentioned above are almost universally recognised, there are important variations to keep in mind. These variations depend on the environmental surroundings, such as political and legal framework, economic and social conditions, and local histories. As Dean, Lagerwey, Chau, and many others have mentioned, there is a wide diversity of forms taken by festivals across China, and even within provinces and across different counties, each likely to influence slightly differently norms and expectations.

We can find a dramatic illustration of the notion of retribution in the other world for misdeeds in this world in the websites operated by the new religious movement Falungong, Minghui, a site dedicated to the coverage of persecution against practitioners of that religion. For example, the site lists the names of people who persecuted Falungong, and then goes on to meticulously describe cases of karmic retribution concerning the tormentors. (FDMH, 2012) They noted that judges who sentenced to jail followers of Falungong died of cancer

prematurely, suffered from long illness, perished in car accident, or died suddenly of undisclosed cause. That is, practitioners of that religion, who sees themselves as peaceful and their practice useful for public health, find solace in what they perceive as a form of retribution that is beyond mere earthly state authority to challenge. They see an ultimate form of justice in these deaths that does redress to the unfairness of state officials imposing stiff sentences and inflicting the pains of torture on fellow practitioners whom they believe innocent of any crime. An established and institutionalised religion such as Buddhism is not openly in conflict with authorities, and the state has successfully managed to blunt its social impact via its institutionalisation and by co-opting its clergy. Yet, with their precepts, religious observations, and ritual obligations, the five official religions of China can present a potential to challenge authorities. Christianity, especially the Catholic kind, presents a specific problem, with its supreme authority residing outside China.

Once we see some of the religious sources to Chinese societies' legal thinking, we can better appreciate the implications for the secular state and relevant human rights. It is most apparent when this concerns the rights of religious minorities, which are often more visible and therefore can be easy targets for discrimination. The diets of different religions may demand, at a minimum, forms of accommodations to believers in public institutions such as schools, hospitals, and retirement homes. The same is true for the Buddhist and Islamic religious calendars that seldom coincide with the official calendar, which, as we have seen, happens to coincide with the calendar of popular religious beliefs. The feelings of exclusion generated by official practices can be tolerable when the states make "invisible" its religious nature, through its official proclamation of being "secular", and this reaffirmation that the atheist CCP leads society. However, when a state that proclaims neutrality on matters of conscience decides on religious matters, this neutrality appears as a charade. We do not know to what extent the close connection between the state and religious authority for millennia has hindered the transition to a genuine regime of separation between religion and state. Will that connection impede the development of a regime where the state guarantees freedom of conscience? We need to understand this connection to better grasp the challenges of establishing such a regime.

Variety of Secular States in Modern Chinese Societies

We have seen above that for many among the religious elites in the colonial world, the secular state was experienced as a foreign imposition of authority. In China after 1911, when the Manchu dynasty was overthrown, a different situation presented itself. There was no religious authority comparable to the Catholic Church to rival that of the state, and despite the regime of unequal treaties imposed by Western and Japanese powers, Chinese officials in the new regime did not look at the ideal of the secular state as a foreign imposition. Modernizing elites saw in it a way for China to achieve progress. The situation in Taiwan, Hong Kong, and Macau under colonial rule was different. The imposition of the Japanese, British and Portuguese norms of relations between religious authority and state, as part of the legal systems in the metropole, followed from their situations as colonies. Although the secular state did result from foreign domination, the population did not reject it once they achieved self-determination, in the case of Taiwan, or fell under the control of the PRC, in the case of Hong Kong and Macau. In those cases, the embrace by state elite of the modernizing agenda and the achievements of these societies in the world economy, relative to other postcolonial societies, may help explain this different outcome. That is, at the elite and official levels, all societies with a Chinese cultural heritage approve the principle of the secular state.

China had experimented with a variety of approaches in the design of secular institutions. The effort by a number of Chinese governments to establish a secular state after the fall of the Qing dynasty can be compared with similar attempts in other parts of the world since the twentieth century. The Republican regime in Mainland China (1911-1949) was putting in place the elements of a secular state in the twentieth century while the governments of Mexico, Turkey, and the Soviet Union, where doing the same in their respective countries. One crucial difference existed between these countries and China, however: all the new revolutionary movements were dealing with a majoritarian religion in their respective countries. The Mexican revolutionary were dealing with the Catholic Church, the most important religion of the world, in number of followers; Mustapha Kemal in Turkey removed the influence of the caliphate, a unique institution for Sunni Muslims in the country; and the Communist Party of the Soviet Union annulled the privileges of the Orthodox Church. The Republican government in China faced a very

different situation: there was no single church or religious institution that competed with the authority of the state. As the sociologist Yang Chin-kun explained in his study of Chinese religions, until the Republican period most people did not question the principle that the government held the "monopoly of the worship of heaven and the interpretation of celestial portents." (Yang, 1961: 183) Only he had the power to decide what "(…) practices, beliefs, and institutions were orthodox (zheng), that is, moral, legal, and mandatory." (Goossaert and Palmer, 2011: 27)

We should keep in mind that there is a controversy among scholars on whether Chinese since 1911 have lived in a secular state. This is not surprising when we think that there exists no agreement on some of the institutional characteristics of the secular state, including the nature of religion itself. As is the case with most societies influenced by Indian traditions, religion is deeply embedded in the fabric of social, political, and even legal spheres of societies influenced by Chinese traditions. (Katz, 2003) In this case, the model of relations between religion and state based on Christianity's institutional features, as the historian Daniel Overmyer demonstrated in his study of ancient China, appears inappropriate. (Overmyer, 2009: 4-5) Although this may be less visible in cities like Beijing, this is clear in Taiwan and many overseas communities. (Weller, 2006) And yet, China since 1949 has adopted an approach that represents an important break from its past: it grants formal recognition to religious identities distinct from the state, with its institutionalization of five religions, and thereby appears to mirror the experience of the Western states that have established religions. Yet, as long as the CCP continues to guide religious associations through its united front work department's 'religious work' and the state council's state administration for religious affairs, and forbids the registration of religious movements it does not recognised, China does perpetuate the approach of the imperial regime, which rested on state supremacy over religion.

One approach to the principle of secularism means that the state shall remain neutral on matters related to religion. We can describe a majority of states in contemporary society as secular in that sense, even when they exhibit the remnants of established religions, such as the UK and Scandinavian countries. There is no original model of the secular state, but rather different historical trajectories and institutional outcomes that have provided benchmarks for what Alfred Stepan has called the principle of 'twin

toleration.' For Stepan, this principle means non-interference of the state in the affairs of religious institutions, and freedom from the influence of religious institutions in the affairs of the state. The latter, he adds, does not exclude the involvement of religion in politics, such as lobbying and even the creation of a political party. (Stepan, 2001) The limits imposed to religions' influence on politics, and more broadly on the public interest, as the state defines the latter in democratic society, remains today a contested issue. Controversies in the United States, France, and Canada, over the obligation of hospitals run by religious institutions, or laws and charters about the visibility of religious signs for public servants, remind us that the secular state remains a "work in progress." (Berman, Bhargava, and Laliberté, 2013) Ahmet Kuru has written about the differences between different forms of secular states, whether they are assertive, as in France and Turkey, or passive, as in the United States and Canada. (Kuru, 2009) Assertive secular states have adopted policies and laws that try to limit the visibility of religion in public institutions, passive secular states have a laissez-faire policy in that respect, but like assertive secular states, they claim to maintain state neutrality in religious affairs. These differences do not need to distract us with respect to China because what matter are the few key points they have in common: the principle of freedom of conscience enshrined in the constitution, and the dis-establishment of any official religion. However, they matter to understand better the changes underway in Taiwan, as I will make clear later. I am aware that the reality is never as neat as the ideal-types social scientists use to analyse political systems. In Canada, for example, the commitment to secularism, adopted in practice through tradition, at the level of federal governments, is not observed everywhere at the provincial level, as shown for example by the privileged status of Catholic School boards in Ontario.

Another ideal-type of relationship between religious authority and states better reflect the Chinese reality: that of states with established religions. In such kind of institutional arrangements, the state nominally proclaims one religion or many religions as part of the national heritage, and therefore worthy of privileges such as tax-free status or the right to run their own schools. The Canadian province of Ontario's regime of exception granting a legal status to two religions in its school systems represents such a form of polity with an established religion. Such states could qualify as secular, however, when their constitution or their legal tradition also protects freedom of conscience. As will be discussed below, this form of state with

an established religion, paradoxically, may be more apt than the American or French variants of the secular state in describing some aspects of the state relation with religion today in societies influenced by Chinese culture. It is most relevant in describing Taiwan, the HKSAR, and the MSAR's modalities of relations between governments and religious institutions at different stages of their histories. In sum, China is not a secular state as Stepan understands that concept, while Taiwan, the HKSAR and the MSAR are. In contrast to India, which proclaims secularism as one of its founding principles, China mentions the "right to believe and the right not to believe," but not an explicit reference to secularism. Even if it were to develop into a democracy with the rule of law, it would not qualify as such until it changes its approach to the regulation of religious affairs, which we would best described as a regime of multiple religious establishments.

Chinese societies have adopted - or found themselves left with - a wide variety of legal systems in the Twentieth Century in relations to religion: some have modernized the traditional approach of state control of religion, others have developed the institutions of a secular state, grafting to the Chinese traditions of governance practices imported from the West. After three decades of experiments with 'socialist legality,' it is only in 1979 that the PRC established the basis for a civil law system influenced by the German civil code of the 19th and the 20th Century. Taiwan under the Kuomintang imported to the island the civil law system enforced in the Mainland as soon as it took control of the island in 1945. In the HKSAR, the local authorities, in conformity with the agreements reached between the UK and China, kept in place the institutions of British common law, and likewise, in the MSAR, the local authorities kept the Portuguese civil code. These different institutional arrangements have generated different logics and trajectories of their own, obviously, and the religious influences described before have played themselves differently because of this diversity. One important characteristic shared by all these legal systems, however, is that legal experts and officials embraced a conception of law that it has developed from the agency of rational actors, and they shunned the idea that religious culture and practice would have anything to do with it. As the discussion in the previous section had suggested, China was a religious state until 1911, and its elites during the Republican period had altered radically this fact. They have failed because of a lack of state capacity until 1949. After the arrival to power of the CCP in China, political leaders have struggled to achieve that goal in the PRC,

Taiwan, Hong Kong, and Macau, with varying degrees of success.

The PRC's first three decades after 1949 have gone further than all previous regimes in trying to control religion. The new government emerged with a strong legitimacy but squandered it with disastrous economic and political experiments. It sought early on to impose a firm control on religious affairs with a two-pronged policy. On the regulatory side, it encouraged from 1953 to 1957 the creation of national patriotic associations for the five religions the CCP recognized. The State Council created in 1954 a Bureau for Religious Affairs to ensure that the official religious associations would obey the directives of the state on the nomination of clerics and the interpretation of religious doctrine. On the repressive side, the CCP targeted the unrecognised religious associations such as Yiguandao as "reactionary societies," urging followers to abandon their belief or face punishment. The CCP also attacked the popular religions' festivals and social organisations as "feudal superstitions," closed or destroyed their temples, and persecuted their managing committees during the land reforms and in following campaigns. The PRC had in effect become a state with multiple religious establishments wherein religious institutions were not in position to challenge state authority. This became clear to them during the decade of the Cultural Revolution, when their limited freedom were reduced to nil, as the CCP ordered them to dissolve, and the BRA was closed.

Since 1978, policies on religion have changed substantially and relaxed somewhat, but the principle of state control remains. The CCP has allowed the return to activity of the official religious institutions, and increased in 1998 the powers of the BRA, which became a cabinet-level institution, the State Administration for Religious Affairs (SARA). The state continues its policy of regulating the five officially recognized religions, and clamp down hard on the organizations that it perceive as a source of instability, such as Falungong. However, two innovations have emerged in recent years. First, religious policy has changed from a focus on control and repression to active promotion. The authorities are increasingly tolerating, if not openly promoting, the practices of popular religions that they decried before as "feudal superstitions," and now elevate to the status of "intangible heritage." Moreover, the state is actively supporting the growth of the official religions, in particular Buddhism, which has benefitted from state largesse for the rebuilding of temples. Secondly, it becomes increasingly difficult to speak of an integrated and uniform policy on religious affairs. Practices vary enormously at the local level. Tsai Lilly's

research has shown wide discrepancies among localities in the degree of cooperation between local governments and local religious leaders in the delivery of social services. (Tsai, 2007; 2002) Ken Dean has contrasted the dramatic expansion of religious festivals in the countryside to the limitations imposed on such activities in urban centers. (Dean, 2003; 1998) These findings suggest that judicial rituals used in popular religions, and their implicit questioning of state authority in the administration of justice, remains an important component of contemporary Chinese society.

The Republic of China in Taiwan has moved in a very different direction in the last three decades. The successive administrations of the KMT and the DPP have moved Taiwan from a regime of multiple religious establishments with nine officially recognized religions in 1989 to a passive secular state, wherein the state does not supervise religious affairs and let them express their views in politics. Although the KMT looked down on popular religions in Taiwan during the period of martial law, it did not impose the degree of state monitoring and control experienced by religious institutions in China, especially during the Cultural Revolution. The movement for Taiwanese self-determination supported by the Presbyterian Church during the 1980s indirectly contributed to the revival of popular religions and the embrace of the latter by the DPP administrations between 2000 and 2008. Significantly, legal recognition for religions today does not entail problems for non-recognized religions. The government does not recognize Falun Gong, for example, but this non-recognition is not a rights issue in Taiwan because the organization's members did not ask for that recognition in the first place. Consequently, the practice of that form of qigong is legal and allowed. Taiwan experiences in effect a regime of separation between religion and politics that does not exclude religious participation in the public sphere. It stands as the example of a regime whose policies have changed from within and not because of outside pressures. The lively practice of popular religions and the performance of judicial rituals in that tradition, in that case, is not perceived as a critique of the regime, but as part of a continuum between a rational-legal system meeting international standard and a religious realm where rituals gives some legitimacy to local knowledge. (Katz, 2009: 2) Similar dynamics are at work in the HKSAR, where the open and relatively laissez-faire regime of established religion that prevailed in the UK in colonial times has left the former colony a climate in which the traditional practices of judicial rituals and the modern regime of rule of law are not seen as opposite but complementary.

Conclusion

The CCP under Xi Jinping rejects discussion of sensitive topics such as 'universal values' because it believes that China's specific conditions warrants it a form of dispensation from the respect and implementation of basic human rights. However, even for issues as culturally specific as "religious values," this argument of China's exception does not hold. Taiwan and Hong Kong, two societies where the practice of traditional Chinese religions remains extremely active and meaningful as the expression of belief in otherworldly justice, have embraced from within the view that human rights are universal. We should not read in the fact that Taiwan and Hong Kong have adopted Western legal standards the demonstration that such norms supersede in an evolutionary fashion pre-existing norms. They rather demonstrate that in a society where citizens have agency, they can appropriate these standards because they can make sense of them in their own semiotic practice - in this case judicial rituals and petitions to the underworld. This also should alert us to the necessity of knowing more about the Chinese variants of these rituals and their consequence for the development in China of a legal pluralism that is both responsive to its national conditions and universal standards.

The central task of a comparative sociology of the secular state is to make clear that the secular state in East Asia is bound at the beginning to differ from that of most Western societies because of its fundamentally different departure point. However, such a comparative sociology, which would also reveal the differences among the variety of Western secular states, would also reveal the variety of secular states in societies influenced by the encounter between Chinese and local traditions, and therefore, suggest that the secular state in China and the neighbouring countries today remains an open-ended experiment, like everywhere else, because such is the nature of multiple modernities. To summarise, while East Asian societies influenced by Chinese culture may adopt features of their secular state that borrow from the West, the nature of their religiosities share important characteristics shaping the development of different institutions compatible with these realities. These cultural differences and their institutional expression, as the case of liberal societies in East Asia amply demonstrates, can be entirely reconcilable with universal values.

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法律多元主義與良心自由的普遍性：歐美與中文社會中世俗國家的歷史社會比較研究

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摘要

本文以「多元現代性」為架構，並聚焦在良心自由這個概念，試圖為人權的普世性作有力的辯護。歷史社會學的比較研究顯示，諸如多元主義以及尊重不同的世界觀這些概念，多半不由外部輸入，而是由社群內部發展出來的。這樣的發現，更加強化了普世人權的規範性立場。本文也認為，所謂「多元現代性」的架構並非指稱僵化的不同文明，而是關注產生相異制度型態的各種歷史軌跡。在東亞，國家與宗教間的關係有許多不同的樣貌，甚至在追求中國文化認同的政體間亦是如此。這樣的現象正可說明上述對「多元現代性」架構的看法。

關鍵字

多元現代性、世俗國家、良心自由、東亞