# The Rule of Law

## Perspectives from the Pacific Rim

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With a Foreword by Jerome A. Cohen

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# FOREWORD: FORWARD!

## Jerome A. Cohen

The Mansfield Center for Pacific Affairs' Rule of Law project, focusing on the Confucian culture area, comes at a good time. There is intense ferment over the Rule of Law (ROL) in every Northeast Asian political community. Even the Democratic People's Republic of Korea is inexorably being drawn to the flame, belatedly driven by the same desire for economic progress that has motivated the neighboring regimes that share its political-legal tradition.

Concern for the ROL is hardly new for Northeast Asia. It has marked the contact, cooperation and conflict between Western nations and the Sinocentric world order since the eighteenth century. The succession of bitter disputes between Manchu China and the West leading up to the Opium War of 1839 in large part arose from dramatically different concepts and practices in the administration of criminal justice.

The differences between East and West had not always been so marked. For example, sixteenth century Catholic missionaries and merchants from the Iberian Peninsula were favorably impressed by their glimpses of criminal justice in Imperial China. Against the background of the Inquisition, Chinese proceedings seemed comparatively rational, fair and, as we say today, "transparent." By the end of the eighteenth century, however, the West had begun to appraise China in accordance with newly-acquired standards—those that had emerged from the seventeenth century English revolutions and their American and French sequels. Chinese law and procedure had altered little during this period but the West had moved the goal posts, and the slogans of the newly-enshrined "rights of man" accompanied, and were often used to justify, the increasing impact of Western imperialism upon the Sinocentric world.

The Opium War forced open China, resulting in the first in a series of what came to be known as "unequal treaties" introducing "extraterritoriality"—the administration of Western justice in the foreign "treaty ports" established on Chinese soil. Soon after, in 1853, the "Black Ships" of Commodore Perry brought the American version of the ROL to Tokyo Bay, imposing extraterritoriality—the symbol of sovereign inferiority—upon a Japan that had long closed itself off from outside influences. Even the "Hermit Kingdom" of Korea, traditionally the sheltered tributary of the "Central Realm" in Peking, began to experience the thrust of Western expansion and values. And the

peoples of what soon came to be known as "Indo-China" had less success than the Koreans in resisting the intrusion of the West. They succumbed to *la mission civilisatrice* of French colonialism, which introduced a harshly-distorted version of the ROL far different from that which had been evolving in the home of "liberty, equality and fraternity."

Yet Korea, like Taiwan, which had earlier experienced Dutch and other Western efforts to establish bases on the island, was soon subjected to newly-minted Japanese colonialism. Japan, the quickest study in East Asia, by the start of the twentieth century not only had put an end to the detested Western extra-territorial regime on its own soil but also had begun the process of imitating the Western imperialism to which it had just been exposed. In both respects Japan made use of its recently assimilated knowledge of Western—largely continental European—law. At home, the government of Emperor Meiji met the Western price for terminating extraterritoriality by erecting, on top of the Confucian-influenced Tokugawa legal tradition, laws, institutions and procedures that were largely borrowed from an imperial Germany that appeared to be Europe's rising power. Abroad, Japan resorted to rule by law, rather than the rule of law, to control its new colonies with skill equal to that of its Western colonial rivals.

China was much slower than Japan to respond to the challenge of Western imperialism and to appreciate the uses of Western law. To be sure, by the 1860s the imperial court in Peking had begun to understand the utility of learning the public international law of the West as an instrument of self-defense against Western demands. Yet it was not until Japan's humiliating defeat of China in 1895, followed by its 1905 victory over Russia, a white imperialist power, that Chinese leaders began to see the need for significant domestic legal change as part of a broad program of reforms. These reforms were designed to strengthen the collapsing Manchu dynasty and to emulate Japan in eliminating the "unequal treaties" imposed by the West.

The Manchu effort, of course, proved too little and too late. Yet spasmodic importation of Western legal forms continued during the turmoil of the Republic of China, which was founded in 1912. After Chiang Kai-shek's Nationalist Party came to power in 1927, it launched an impressive, comprehensive effort to establish a German-style legal system, largely filtered via the Japanese model but importantly influenced by Leninist concepts of State and Law. That system served as an instrument of state control, as a facilitator of economic development and international business and, above all, as the means of ending the "unequal treaties" and especially the hated exercise of foreign judicial power in Chinese territory.

The Japanese invasion that began in 1931 and the civil war between Communists and Nationalists hindered and distorted this budding program. Nevertheless, under the pressure of the need for wartime cooperation, China's Western allies finally agreed to the termination of their extraterritorial treaty rights in 1943, even though they were far from convinced that the administration of justice in Chiang's China met Western standards.

The subject deserves far better than the potted history recited above. I refer to it here to alert newcomers to the field that, in assessing East Asia's understanding of and enthusiasm for the ROL, we have to take account of not only its traditional political-legal culture—the preference for morality over law and for extra-judicial compromise over litigation, the association of law with punishment, the concern for community rather than individuals, the absence of any separation of powers and independent judiciary—but also the historical circumstances in which the perceptions of Western law in each country of the region were shaped. Although many East Asians came to see the ROL in its best sense as holding out the promise of improved government, enhanced protection of individual rights, and greater economic development and international cooperation, for others—especially those who lived under colonialism—Western-style law, like their own traditional legal systems, was seen as an instrument of control and even oppression rather than as the finest achievement of civilization.

To many increasingly nationalistic Japanese and then Chinese, any doubts about the wisdom of importing so alien a product were overcome by their determination to do what was politically required to rid themselves of the incubus of extraterritoriality, so that their countries could join the ranks of sovereign equals in the world community. This was perfectly sensible on their part but suggests a context that was less than optimal for the reception of the ROL. Nevertheless, as the post-World War II history of Japan has demonstrated, in the right circumstances the alien import of the ROL can take root in a Confucian culture, despite—or perhaps because of—Western military domination. Although the ROL that has evolved in Japan since the end of "the Occupation" in 1952 continues to display certain shortcomings that may be attributed to the hold of tradition, it is plainly an impressive achievement that has fostered Japan's version of parliamentary democracy as well as its revered economic prowess and won the respect of East and West. The remarkable recent progress toward the ROL in the Republic of China on Taiwan and in the Republic of Korea has been influenced by the example of Japan, not only by that of the West.

"The West," of course, like "the East" in reality consists of a host of individual countries, each of which continues the daily struggle of perfecting its own distinctive version of the ROL in its particular national context. In pursuing their own efforts, the Western countries can only benefit from an enhanced understanding of how the nations of East Asia are faring in their quests to apply ROL concepts that are increasingly shared. This volume is a valuable contribution to that understanding and offers some basis for hope that progress toward the ROL is even being gradually made in the Communist countries of the region.

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# PREFACE AND ACKNOWLEDGMENTS

It is nearly impossible to have a discussion about the dramatic economic, political and social changes underway in Asia without hearing the phrase "Rule of Law." The "Rule of Law" has become a buzzword of today and an oft-prescribed panacea for the myriad challenges of development faced by Asian nations. Yet seldom in such discussions is the concept of the "Rule of Law" carefully defined. As individuals, political parties and countries consider their progress toward, commitment to, and even the applicability of the Rule of Law, such a careful definition is an increasingly important starting point in the discussion of this issue.

In May of 1999, with support from the Japan-U.S. Friendship Commission, the Mansfield Center for Pacific Affairs co-sponsored with the Global Forum in Japan a symposium on "The Rule of Law and its Acceptance in Asia." In preparation for the symposium, the Center commissioned from Barry Hager, a noted Washington D.C. lawyer and scholar, a lexicon that carefully describes, gives historical background to, and outlines the core components of the Rule of Law from a Western perspective. This publication, *The Rule of Law: A Lexicon for Policy Makers* (the development of which was supported by a grant from the Henry Luce Foundation), proved to be a focal point of our discussions in Tokyo.

The Tokyo symposium made clear that there is an active and vibrant international debate about the Rule of Law in the nations of Asia. While some Asian leaders voice skepticism about how the Rule of Law is relevant or can succeed in their countries, others claim to have attained it in various ways in their nations. At the same time, many Western advocates regard the Rule of Law as the best hope of developing nations in Asia and elsewhere for achieving stable economies and viable, legitimate institutions of governance. With this in mind, the Mansfield Center decided to continue and expand its Rule of Law project, moving beyond general discussion to consideration of the application of the Rule of Law in specific Asian nations.

With the encouragement and support of Dr. Jerome A. Cohen, Professor at New York University Law School and one of the most active and respected scholars in this field, we decided to hold a series of seminars on the Rule of Law in Beijing, Shanghai and Hong Kong in December 1999. Working closely with local co-sponsors, Beijing University Law School, Fudan University Law School and the City University of Hong Kong Law School, the Mansfield Center, with funding from the Maureen and Mike Mansfield Foundation,

solicited papers and participation from many of the outstanding scholars and practitioners in each city. Furthermore, by translating the *Lexicon* into Chinese and distributing it in advance to seminar participants, we were able to considerably sharpen the focus of our dialogues and avoid the vague generalizations that often characterize discussions on this topic among those from differing political and economic systems.

More recently, with the generous support of The Starr Foundation, we have been able to further extend our program on the Rule of Law to include other countries in the region. In September 2000, we co-sponsored similar dialogues in Hanoi, Ho Chi Minh City, Taipei and Seoul. We also organized a retreat and a conference in Montana to which we invited key participants from our various dialogues in Asia. This retreat was followed by a large conference in Washington D.C., co-sponsored by the Asia Program at the Woodrow Wilson Center for International Scholars.

From the outset, the objectives of our efforts on the Rule of Law have been two-fold. The first has been to provide resources, opportunities for dialogue and exchange, and an international forum for the Asian scholars and practitioners who have already been active in promoting the Rule of Law in their home countries. The second objective has been to better inform the policy-making community in the United States about the ongoing activities relating to the Rule of Law in Asia and the level of support for it among the individual nations in the region. It is our hope that both the conference in Washington, D.C. and this compendium will highlight precisely such efforts.

This compendium is a direct result of the Mansfield Center's Rule of Law project. In it we have assembled ten of the most outstanding papers authored by a distinguished group of American and Asian legal scholars and practitioners, all of whom participated in the Mansfield Center's Rule of Law dialogues in Asia during the past 18 months. Together, these scholarly papers provide a fascinating and perceptive analysis of the status of the Rule of Law in Asia; they explore its evolution in the Asian context, factors that may accelerate adoption of legal reforms in Asia, and the key difficulties Asian nations face in establishing a legal system based on the Rule of Law.

We are pleased to begin this compendium with commentary from two legal experts, both highly regarded practitioners and scholars, Jerome A. Cohen and Barry M. Hager. Dr. Cohen's foreword sets the stage for the papers and discussion that follow, highlighting the evolution of the Rule of Law in northeast Asia over the past three centuries and the historical circumstances

that have shaped Asian perceptions of Western law. Mr. Hager, author of *The Rule of Law: A Lexicon for Policy Makers*, introduces the question of how nations can best achieve good governance. Can the nine components of the Rule of Law identified and discussed in his *Lexicon* serve as a scorecard or checklist to measure a nation's achievement of a political, economic and legal system based on the Rule of Law? In addition to discussing several oft-made arguments against the application of Western versions of the Rule of Law in the Asian context, Mr. Hager addresses what he considers to be the three main predicates of the Rule of Law: constitutionalism, the precept that the law governs the government, and the existence of an independent judiciary.

The reader will no doubt notice that what follows are a number of papers—indeed, half the papers in this compendium—on the status of the Rule of Law in China. This is no accident. The Mansfield Center's project confirmed that debates about the Rule of Law in China are some of the most animated and focused in all of Asia. We are pleased to include papers from five distinguished legal experts, all of whom are notable for their knowledge of the theory and evolution of the Rule of Law in China. Albert H. Y. Chen evaluates modern scholarly reflections on the Rule of Law and discusses the developing theory of the Rule of Law in China's complex political environment. In describing what he calls China's "long, uphill journey to achieving the Rule of Law," Professor Chen also reviews alternative perspectives from those who depart from the mainstream. His paper is followed by a perceptive analysis by Peter Corne, who outlines the key problems that China faces in establishing a legal system and offers specific proposals for further legal development and reform. Xixin Wang looks beyond the debates over the "morality of law" to examine administrative rule making and the boundaries of rule-making power in China. His paper is followed by Weifang He's review of the basic structure of China's traditional judicial system. Professor He discusses the advantages and disadvantages of the Chinese model of a highly centralized local government, the traditional "rule of knowledge" selection process of local government officials and the judicial process dominated by laymen. To conclude the papers about the Rule of Law in China, Martin Hu explains why the key legal principles of the WTO will accelerate China's legal reforms.

Next, we turn to the status of the Rule of Law in Taiwan, Vietnam, Japan and Korea. Tsung-fu Chen reviews Taiwan's political and legal transformation from an authoritarian regime to a liberal democratic government. Even as Taiwan has embraced the various components of the Rule of Law, Professor Chen suggests that there is still progress to be made to ensure that access to legal

services is efficient and available to all. Truong Trong Nghia highlights the role of Ho Chi Minh in establishing the Rule of Law in Vietnam, from the 1920s through the creation of the Democratic Republic of Vietnam. Mr. Nghia then examines how the socialist state in Vietnam is converting the Rule of Law concept into laws. Next, Takashi Oshimura discusses the political issues involved in applying Western concepts of the Rule of Law to Asian societies. To conclude, Joon-Hyung Hong highlights what he considers to be certain indispensable elements for the Rule of Law and identifies reform legislation that is expected to contribute to a flowering of the Rule of Law in Korea.

On behalf of the Mansfield Center for Pacific Affairs, I want to take this opportunity to express our thanks to the organizations and individuals who have contributed to the development of this publication. We are most grateful to The Starr Foundation for its support, which has enabled us to continue the Dialogues on the Rule of Law in 2000 and also to produce this compendium. As I consider the many people who have contributed to the Rule of Law project and to this compendium, I want to single out Jerome A. Cohen, whose vast knowledge on this topic and expert guidance have been invaluable. We also appreciate the knowledge and expertise of the other authors of the papers contained herein: Barry M. Hager, Albert H. Y. Chen, Peter Corne, Xixin Wang, Weifang He, Martin G. Hu, Tsung-fu Chen, Truong Trong Nghia, Takashi Oshimura and Joon-Hyung Hong. Their perceptive treatment of the complex topic of the Rule of Law provides a much-needed resource for those participating in the debates and discussions about good governance and legal reform. I want to express special appreciation to Joyce Piquette at the Mansfield Center for Pacific Affairs for her design and layout of the text of the publication and to Mary-Jane Atwater who served as editor and production manager. Thanks also go to Nia Lizanna at the Mansfield Center who has helped organize all the Mansfield Dialogues on the Rule of Law. Finally, I want to express my ongoing appreciation to the Maureen and Mike Mansfield Foundation, which funds the Mansfield Center for Pacific Affairs.

It is my hope that this compendium will make a significant contribution to the ongoing international dialogue about the Rule of Law.

L. Gordon Flake
Executive Director
The Mansfield Center for Pacific Affairs

# THE RULE OF LAW: Defining It and Defending It in the Asian Context

Barry M. Hager[1]

By now we are all familiar with the widespread advocacy of the "Rule of Law." The Rule of Law is being avidly promoted, especially by officials of the United States in both the development and financial communities, and is being supported by the full range of international and multilateral institutions, such as the World Bank and the International Monetary Fund.

The primary reason advanced for the importance of the Rule of Law is that it is inherently necessary to support the emergence of democracy. Since at least the 1950s, when the colonial era began to crumble and new, independent nations emerged in all regions searching for the right formulas for self-governance, the role of law and legal systems in formal democracies has been widely discussed. There has long been a consensus, at least among Western scholars, that it is not possible to have a genuinely functioning democracy without having in place a system that adheres to the "Rule of Law."

More recently, particularly in the wake of the 1997-98 financial crisis in Asia, the Rule of Law has also been prescribed as part of the necessary menu of actions and reforms needed to support sound, market-based economies capable of sustained growth. A sub-rationale of this argument on behalf of the Rule of Law is that foreign direct investment cannot be attracted without assurances being provided to potential investors that their money and their deals will be protected by the Rule of Law. Since one of the major canons of the current global "consensus" promoted by Washington is that foreign direct investment and flows of capital from outside each country are necessary for growth and progress, it necessarily follows that each country should want to put in place whatever is necessary to attract such external flows of capital. Thus, the Rule of Law becomes necessary for modern economic life and inherent in the struggle for economic development.

## SKEPTICISM ABOUT THE RULE OF LAW

Despite that clear and persistent two-pronged argument on behalf of the Rule of Law, it remains apparent that there is skepticism about the Rule of Law and

[1] This paper is based on remarks that Mr. Hager made at the Mansfield Dialogues "Rule of Law and Its Acceptance in Asia," December 1, 3 and 6, 1999, in Beijing, Shanghai and Hong Kong.

its proclaimed virtues. This skepticism is not limited to Asia, but may be particularly pronounced in the Asian region. The genesis of The Mansfield Center for Pacific Affairs' current project on the Rule of Law was the observation that there is skepticism about, and in some cases resistance to, the concept of the Rule of Law among some Asians. The Center believes that skepticism needs to be respectfully addressed, and an open debate held over whether the Rule of Law does, or can, live up to its Western billing.

As I see it, there are three main sources of Asian skepticism regarding the Rule of Law as it is being preached by Western authorities.

First, the plainest criticism is that the virtues of the Rule of Law have been oversold. If the Rule of Law is supposed to be the guarantor of democracy and consistent free market economic policies, then critics observe that there is plenty of evidence in Western, developed societies that the Rule of Law is not getting the job done. As to democracy, it is not just Asian critics who observe that in the United States and European nations there are many examples of imperfect democracies, including an ongoing history of racial discrimination in the United States in particular. As for free market economics, again the critics note that such episodes as the 1998 bailout of Long-Term Credit Management (the U.S. hedge fund) by the U.S. financial and regulatory community looked more like "crony capitalism" than unfettered free markets at work.

Second, a somewhat more suspicious criticism of the Rule of Law is that it is a cloak for the imposition of economic hegemony by the United States. There is little question but that the U.S. model for managing an economy is being aggressively sold to all countries everywhere today. In the context of the end of the Cold War and the perceived victory of the U.S. capitalist model over the Soviet communist model for managing an economy, and bolstered by the remarkable growth and prosperity in the United States during the past decade, there is indeed more than a little hubris in the tone of U.S. preachments on economics. Not surprisingly, such a tone or attitude can breed resentment if not rejection, especially where there is a fear that what is being preached is not disinterested advice, but very much self-interested advocacy. And that fear cannot be dismissed as irrational when the prescription of the Rule of Law is combined with demands for economic policies that plainly advance the interests of the foreign investment community.

Third, a broader philosophical critique of the Rule of Law is that it is a reflection of the American bent for legalism and litigiousness. This is admittedly a characteristic of Americans, made famous at least as long ago as the early nineteenth century when the great French observer of American society and democracy, Alexis de Tocqueville, remarked upon it at some length.

When contrasted with the Asian way of doing things, it frequently is said that the Rule of Law in its American iteration relies too heavily on rules and does not sufficiently trust the capacities of "wise men" or wise persons.

The Confucian tradition in particular is cited as a counterexample of good governance. Because it is impossible to define or predict all circumstances that may arise, the formal legalistic approach is doomed at least to inadequacy, if not failure. Placing society's trust in the wisdom of elites who are capable of making the right decision for each and every case that arises is argued to be the better course.

All three of these bases for skepticism or even rejection of the Western notions of Rule of Law merit respectful discussion; none are frivolous objections. Beyond the merit of those three criticisms, there is another concern about the contemporary discussion of the Rule of Law, which animates the project undertaken by the Mansfield Center to advance the understanding of the Rule of Law. That is, we are concerned that the advocates of the Rule of Law have so completely assumed the rightness of their position that they have taken too little time to parse the actual meaning of what they are advocating. Too often, the Rule of Law is advocated as a conclusory slogan, like one that might appear on a bumper sticker or the ubiquitous T-shirt.

Obviously, exhorting people to accept the Rule of Law without carefully defining what it means leaves open the possibility of misunderstanding and rejection of the concept. This is at the heart of the current Mansfield Center project. We are attempting first to articulate with precision and some detail what is entailed in the concept of the Rule of Law. Then, based on that more complete and careful articulation of the components of the Rule of Law, we have embarked on these dialogues throughout the Asian region to test the validity of the Rule of Law as more fully articulated in the Asian context, with full recognition of the sources of Asian skepticism I have just described.

## THE *LEXICON*

The first step in the Mansfield Center project was thus the creation of our book, *The Rule of Law: A Lexicon for Policy Makers*, first published in spring 1999. In writing the *Lexicon* at the request of the Center, I endeavored to survey the extensive literature on the subject of the meaning of the Rule of Law and to assemble and synopsize the more thoughtful and cogent descriptions of the Rule of Law, its historical antecedents and its plain meaning.

Our hope was to capture in the *Lexicon* a coherent statement of what the Rule of Law means in practice, at least in the Western legal traditions with which the Rule of Law has been associated. Also, we attempted to summarize very briefly

the main features of alternative legal systems. Most importantly, we sought to identify as precisely as possible the consensus view of the "core components" of the Rule of Law. Whether we succeeded is for the reader of the *Lexicon* to judge, but in our view we have identified the nine core components of the Rule of Law that are consistently discussed as necessary—and I would also say, logically sufficient—to constitute the Rule of Law as legal scholars define and advocate it.

These nine components are set forth in the *Lexicon* with a discussion for each one of its practical meaning and its rationale. We will examine just three of the most fundamental of these core components in these remarks, but first let me observe that we see two values to this exercise of identifying and defining the nine core components of the Rule of Law.

First, if our list of nine components of the Rule of Law is valid, it can operate as a checklist or scorecard to permit objective and fair analysis of where each country or legal system stands in the effort to achieve a system that can be said to adhere to the Rule of Law. Of course this can and should lead to a rich analysis of detail about specific practices in each national system with respect to each one of these nine core components. Such an exercise is well worth undertaking precisely because it focuses the discussion on whether each of these elements of the Rule of Law is arguably in place, or whether a distance must yet be traveled to get there. I hasten to add that this exercise is by no means limited to the Asian context. If the *Lexicon* provides a valid checklist or scorecard, it is no less valid for the United States and other Western, developed nations. It can and should be used as a reality check for whether Western nations have implemented the Rule of Law as fully as they claim, and if not, how not.

Second, this process of identifying nine core components of the Rule of Law and assessing the degree to which each has been achieved or not in a specific legal system naturally gives rise to a more precise debate over whether the Rule of Law is in fact well adapted to the particular society or legal system in question. That is, if one of the core components cannot be said to be in place in a country, it is then appropriate to have the debate over whether that component is needed or desired in that country. If a skeptic of the Rule of Law argues that it is not needed or desired, then the fair question to pose is "what is the alternative?" If we have correctly identified a core component of the Rule of Law and explained the rationale for it, then it is fair to ask a critic who rejects the need for that core component what alternative mechanism he or she proposes to achieve the same purposes that we believe are achieved by that core component of the Rule of Law. It is that precise and specific analysis and

debate that the Mansfield Center intends to foster through these dialogues, using the *Lexicon* as a starting point for our discussions.

## THE CORE COMPONENTS OF THE RULE OF LAW

In this discussion, it is important to touch upon all of the nine components of the Rule of Law identified in the *Lexicon*, but in these remarks I will limit my observations to just the first three, which can be said to be the necessary predicates for the others, and therefore for the Rule of Law itself.

First, there is the concept, or core component, of constitutionalism. This is the straightforward idea that there must be some fundamental statement of what a nation or society endorses as its rules and shared values. This constitution, whether captured in one document or a set of documents (as in the British case), becomes the standard against which all subsequent actions of a government or a ruler must be measured. The validity of the constitution rests on the consent of the governed; to be a valid constitution, there must be a credible claim that the people of the nation have accepted it and endorsed it, and intend for it to be used as "the highest form of law to which all other laws and governmental actions must conform," as Professor John Moore has written.[2]

Second, the equally critical threshold component of the Rule of Law is the precept that "law governs the government." As we attempted to explain in the *Lexicon,* it is logically possible, and has historically occurred, to have a finely articulated set of laws and rules that ordinary citizens and individuals are expected to obey, but still lack the fundamental notion that the government itself is bound by those rules and cannot engage in arbitrary conduct. Both the Roman legal system and the Russian Czarist system can be said to be examples of such highly legalistic systems that did not rise to the level of Rule of Law systems.

Third, a core component of the Rule of Law, which I find particularly worthy of emphasis, is that of an "independent judiciary." Frequently, this component of the Rule of Law is confused, particularly by American analysts, with the tripartite system of government articulated by Montesquieu and best realized in the U.S. Constitution: the separation of power among three branches that each check and balance one another. In fact, complete separation between the executive and legislative branches may not be necessary for effective democracy or the Rule of Law, whereas the need for an independent judiciary is crucial.

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[2] John N. Moore, "The Rule of Law: An Overview" (paper presented at the first U.S./Soviet Conference on 'The Rule of Law" held in Moscow and Leningrad, 19-23 March 1990).

I like to point out that in European and other so-called parliamentary systems, the American system of three quite separate branches is not in fact present. There is a commingling of the executive and legislative functions in those systems. Parliaments elect their own as ministers and prime minister, and the executive (prime minister) can be called to account and even forced to resign by the parliament. Meanwhile, the executive simultaneously has the power to dissolve the legislative branch and force elections of a new legislature. This is quite common, and is not inconsistent with either democracy or the Rule of Law.

By contrast, it is hard to imagine a system that meets the standards of the Rule of Law without providing for an independent judiciary. Independence is crucial because of the role ascribed to the judiciary. This branch of government is the one branch that is not entrusted with originating programs or policies or deciding upon the allocation of budgets and other resources. The judiciary is there to resolve disputes and to provide a check on the other branches and actors in government to see that their actions comport with constitutionalism and the concept that the law governs their actions.

A judiciary that is less than independent logically must have a dependent relationship with someone else, whether with another branch of government or with some special group within the society. Whoever that may be, such a non-independent relationship robs the judiciary of the impartiality and objectivity that are required for it to do its job, and it certainly would imperil the public confidence in the judiciary as an institution. And that public confidence is crucial if courts rather than violence or other extra-legal methods are to be relied on to resolve disputes, which inevitably arise in all societies. If these three core components are in place, they provide the framework for the other core components and allow the full construction of a Rule of Law system.

## UNDERSTANDING OBJECTIONS TO THE RULE OF LAW

The Mansfield Dialogues are meant to be true dialogues, which imply two-way, not one-way, communication. So it is important to address the most important objections that have been raised in discussions around the Asian region about the Rule of Law and its nine components as we have tried to articulate them in the *Lexicon* and in these conferences. In my view there are three arguments raised against the Rule of Law that merit the most thoughtful attention.

First, there is the contention already mentioned that the Western Rule of Law emphasis on laws does not accord enough importance to the role of wise men in executing the proper powers of governments. There are two responses to

this concern, which is probably the most frequently aired criticism of the Rule of Law. The first response is that even within the Rule of Law, there is certainly an important role for discretion to be exercised by wise people. Judges, for example, often must make case by case determinations of what the law "means" or how it is to be applied in particular circumstances with possibly unique facts. Not even an elaborate regulatory framework such as that found in the U.S. Code of Federal Regulations can foresee every single circumstance.

Likewise, even in judging the conduct of individuals and determining whether they are abiding by the formal law as written, Anglo-Saxon law is replete with reference to the standard of "reasonableness." Conduct that appears reasonable to the "average" person who might find himself in a similar circumstance will be seen as law-abiding, whereas conduct that is not seen as reasonable to most ordinary people is likely to be found to be outside the law. This is surely a discretionary judgment that requires wisdom.

Similarly, one of the most important standards in modern administrative law for determining whether a government agency has remained within its powers and within the mandate of the law or whether it has strayed outside permissible legal boundaries is the rather flexible concept of "arbitrariness." Courts frequently assess agency actions that are challenged to see whether the agency acted in an "arbitrary or capricious" manner, which is not permitted under our Rule of Law, or whether the agency action was a "reasonable" interpretation or implementation of its legal powers.

In all these respects, the point to emphasize is that even under the Rule of Law, there is considerable flexibility and room for the discretion of reasonable, and hopefully wise, people. But this observation leads to the more important response to this concern about the proper role of "wise men." That is, the core problem in any society that aspires to democracy is that of *selection* (italicized for emphasis) of the "wise men." How do you decide who the wise people are, and how do they get put into positions of legal and governmental authority?

Under the Rule of Law approach, there are merit-based and democracy-based systems for such selection. The key point is that if you eschew violence and military means of determining your national leadership, and if you further reject the hereditary, monarchical method of determining that leadership, then the remaining option, which is consistent with the Rule of Law, is some form of meritocratic process that has the general consent of the people. Thus in the U.S. federal system, legislative and executive authority is vested in those who are democratically elected under a system of universal adult suffrage, and judicial power is entrusted only to those who meet certain qualifications of education

and experience and who are in turn selected by a well-established, transparent process of executive branch nomination and legislative branch "advice and consent," or confirmation.

My point here is that such Rule of Law processes are by no means inconsistent with the ideal of selecting wise men as leaders and judges. Indeed, our contention would be that the Rule of Law offers formal mechanisms, which may be the best guarantor that, over the long haul, the best and wisest among us are selected as our leaders.

That argument leads to the second important critique raised against the Rule of Law, at least as we have articulated it in the *Lexicon* and in our discussions: that is the scholarly, and accurate, critique that ours is a familiar, "formal" approach to the Rule of Law, which may in cases be different from "substantive" approaches that focus tightly on outcomes and ask the question whether the outcomes from a legal and governmental system are just.

This debate between "formal" justice and "substantive" justice is indeed familiar, yet very important. It has been the subject of vigorous debate within U.S. and other legal and academic circles for decades and is by no means resolved. Clearly, even the staunchest advocate of the Rule of Law must admit that there are cases under a Rule of Law system where formal legal requirements are in place to ensure that formal justice is done, but the substantive outcome is plainly wrong.

This is true in every case of a wrongful determination of guilt in a criminal trial. And many would argue, as I would also, that issues of distributive economic justice have not always been satisfactorily resolved via the Rule of Law. In fact, this was frequently noted in important discussions of the Rule of Law that were held at international conferences of Asian jurists in the 1950s and 1960s, at the end of the colonial period. One of the staples of the Asian debate then centered on how colonial powers used the "Rule of Law" to invoke property and status rights which indeed had legal, historical standing but which were not consistent either with the new claims of national independence or with the demand for distributive economic justice. Similarly, the current suspicion that the "Rule of Law" is a stalking horse for the imposition of U.S. economic hegemony is buttressed by the observation that the Rule of Law does not in itself guarantee immediate redress of such economic injustices as the inequitable distribution of wealth in emerging economies.

Again, as in the case of the "wise men" critique, the best response to this concern for substantive justice is that the Rule of Law is indeed a formal approach to justice, but it offers a set of procedural mechanisms that are the

best hope, over time, of achieving substantive justice. An example of how that can work is the issue of the right to legal counsel. In the U.S. system, there was no established right to legal counsel in criminal cases until 1963. Then, in the case of *Gideon v Wainwright*, 372 U.S. 335 (U.S. Supreme Court, 1963), the U.S. Supreme Court held that the constitutional requirements of due process in legal adjudications and the Bill of Rights guarantee against unlawful deprivation of a man's liberty meant that a criminally accused has the right to effective legal counsel. Even this right, plainly a formal procedural right, cannot in every case guarantee substantive justice, but it surely must be recognized as one important element in creating a formal legal system that is most likely, over the long haul, to render substantive justice.

Finally, the third criticism of the Rule of Law is that this formal Rule of Law approach errs in elevating the concern for individual rights to a point that may jeopardize or be inimical to broader communitarian values. Again, this is a debate that most certainly is not limited to Asia. There is considerable concern within the United States today that communitarian values and obligations are being washed away in a culture devoted to individualism and the individual pursuit of prosperity.

But this criticism is closely intertwined with the other two. Underlying this concern is a view that some individual or group among us comprise the wise men who have an enlightened view of what constitutes the greater, communitarian good. In that view, individuals in pursuit of their own selfish "rights" may pay no heed to that greater good, and some system needs to be devised to protect and perhaps enforce that greater good, even where it penalizes individual rights.

Once more, at least in my view, the formal, procedural promise of the Rule of Law is a persuasive response to this concern over communitarian values. The focus of the Rule of Law on individual rights empowers each individual in a society to insist on the communal respect for those rights, and provides the best check against the usurpation of any one individual's rights by another individual, or group, which may indeed be putting its own special interests above those of the common good.

In the aggregate, this empowerment of individuals to protect and defend their own rights and interests within the community is the best avenue we have toward achieving our communitarian values. It would be foolish to argue that the Rule of Law always produces outcomes that are the very best results theoretically possible for a society, but it is not foolish to argue that a fully implemented Rule of Law system is the best method yet devised for ensuring

that a democratic, egalitarian process exists whereby the true communitarian values of a society can first be identified and then maximized.

It is, after all, not so different an argument from that of Adam Smith in the economic context. If it is plausible that under a free market system, the actions of each free individual in pursuit of his own prosperity can result in the maximum prosperity for all, then it is similarly plausible that a Rule of Law system, which offers the structure within which each free member of a democratic society can attempt to maximize his own welfare and his own "pursuit of happiness," may indeed be the system that is the most likely guarantor of the greatest communitarian good for all.

In fact, for those of us who remain more skeptical than most people are today about the virtues of markets and their capacity to produce the greatest good, the argument for the Rule of Law is actually much stronger than that for Smith's "invisible hand." To understand why, we need only to look again at the nine core components of the Rule of Law that we have identified.

Taken together, a constitutional system based upon the consent of the governed, wherein the government itself is bound by the law, where an independent judiciary exists as the arbiter of both the society's and the individual's rights and obligations, where law is transparent to all and fairly and efficiently applied to all, where both property rights and human rights are protected, and where, ultimately, the people have the capability to change the law as experience dictates, there, in such a fully realized system of the Rule of Law, we have the best hope of achieving both the individualistic and the communal goals of democracy.

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# TOWARD A LEGAL ENLIGHTENMENT: Discussion in Contemporary China on the Rule of Law

Albert H.Y. Chen

## A HISTORICAL INTRODUCTION

Although the term "the Rule of Law" (*fazhi*) appeared in a few official documents in the early years of the People's Republic of China (PRC), it soon disappeared from public usage and was substituted by terms such as "revolutionary legal system" and "people's democratic legal system."[1] During and after the Anti-Rightist Movement of 1957, the concept of the Rule of Law was officially rejected as "bourgeois"; those who advocated the authority of the law were purged as attempting to "use the law to resist the Party."[2] In the Cultural Revolution era, Mao Zedong even praised "lawlessness" as something good and positive for society and humanity.[3]

At the watershed Third Plenum of the Eleventh Central Committee of the Chinese Communist Party (CCP) in late 1978, it was decided to rehabilitate the socialist legal system that had undergone a stillbirth in the 1950s. Deng Xiaoping coined a sixteen-character phrase that was to become the battle cry for legality for many years to come: "There must be laws for people to follow,

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[1] This is pointed out in Gu Anliang, "A Commentary on Ruling the Country According to Law and Constructing a Socialist Rule-of-Law State," in *Yifa zhiguo, jianshe shehui zhuyi fazhi guojia* (Ruling the Country According to Law, Constructing a Socialist Rule-of-Law State) 191 at 196-197 (Liu Hainian, Li Buyun and Li Lin, eds. 1996) (the author points out, *inter alia,* that the Work Report of the Peoples' Courts presented at the first national conference on judicial work in 1950 called for the development of "the Rule-of-Law and moral concepts of the New Democracy" and for the courts becoming "the lecterns for propagating our country's spirit of the Rule of Law"); Shen Zongling, "More on the Meaning of the Terms 'Legal System' and 'the Rule of Law'," 10 *Faxue* (Jurisprudence) 4 (1996); Xie Pengcheng and Liu Cuixiao, "A Review of Research in Jurisprudence in 1996," 1 *Faxue yanjiu* (CASS Journal of Law) 3 at 4 (1997).

[2] See Gu, id.; Guo Daohui, "A Fundamental Change in the Mode of Rule," in *Yifa zhiguo*, id., 109. For two decades since 1957, the expression "the Rule of Law" was regarded as embodying "bourgeois ideology."

[3] Guo, id.; Albert H.Y. Chen, *An Introduction to the Legal System of the People's Republic of China* 28-33 (rev. ed. 1998).

these laws must be observed, their enforcement must be strict, and law breakers must be dealt with."[4]

Since 1978, significant progress has been made to rebuild a credible set of laws and legal institutions in mainland China. Legal education and scholarship, which had been neglected for more than two decades, were also revived. Legal scholarship developed not only in areas of substantive and procedural law, but also in the field of legal theory.[5] However, research in legal theory was more constrained by the dogma of Marxism and "forbidden zones" of political sensitivity than other branches of legal scholarship. Legal theorists trod cautiously into new fields, and setbacks were occasionally encountered. For example, after the June 4th events in 1989, there was a backlash against the "bourgeois liberalization" tendency in legal philosophy, and some of the more liberal-minded thinkers were criticized.[6]

Fortunately, the tide soon turned with Deng's trip to southern China in 1992, and the subsequent decision of the CCP at its 14th Party Congress to move China in the direction of a "socialist market economy." This concept, which has far-reaching theoretical and practical implications, found its way into the PRC Constitution in 1993, when the National People's Congress (NPC) adopted a constitutional amendment on the subject.[7] The amendment also stressed the role of economic legislation in facilitating the development of a socialist market economy, and the NPC Standing Committee developed an ambitious program at the end of 1993 to start developing an adequate legislative framework for a socialist market economy.[8]

After the inauguration of the concept of the socialist market economy, there was an outburst of enthusiasm on the part of legal scholars with the idea that the socialist market economy is a "legal system-based economy" or "rule of law economy," the premise being that market transactions can only take place within

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[4] The words were first emphasized in the communiqué of the watershed Third Plenum of the 11th Central Committee of the Chinese Communist Party in December 1978. For further details, see Chen, id. at 33-35.

[5] See, e.g., Albert H.Y. Chen, "Developing Theories of Rights and Human Rights in China," in *Hong Kong, China and 1997: Essays in Legal Theory* 123 (Raymond Wacks, ed. 1993).

[6] See, e.g., the 1989 volume of *Zhongguo faxue* (Chinese Legal Science), the leading law journal in mainland China.

[7] See Chen, supra n. 3, at 209.

[8] Cai Dingjian, "Towards the Rule of Law: Where is the Way?" in *Yifa zhiguo*, supra n. 1, 394 at 395-396.

a framework of legal rules on contract and property rights. The body of literature created by Chinese scholars on this subject has been examined elsewhere.[9] Then there were signs that the top leadership in China had become increasingly sympathetic to this claim about the importance of law in promoting economic development. In late 1994 and 1995, the top leadership of the Party and the State attended two law lectures delivered by leading scholars on the subjects of international economic law and the legal aspects of a socialist market economy respectively.[10] A climax came on February 8, 1996, when the top leaders attended a lecture given by a leading scholar at the Chinese Academy of Social Science on "the theoretical and practical issues relating to ruling the country according to law and building a socialist legal system state."[11] At the end of the lecture, President Jiang Zemin delivered a widely publicized speech on the importance of "ruling the country according to law." The speech was a lengthy one dealing with the legal doctrines in Deng Xiaoping's thought, the relationship between law and the socialist market economy, and the need to raise the legal consciousness of officials and citizens. He concluded by pointing out that

> ruling the country according to law is an important mark of social progress and the civilization of a society; it is a necessary requirement of our construction of a modern socialist state.[12]

Subsequently, when the NPC met in March 1996, it incorporated the objective of "ruling the country according to law and constructing a socialist legal system state" into its Ninth Five-Year Plan and Outline of Objectives for Long-Term Developments towards 2010.[13] Further progress at the conceptual level was achieved when the term *fazhi guojia* ("rule-of-law state," or *Rechtsstaat* in

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[9] Albert H.Y. Chen, "The Developing Theory of Law and Market Economy in Contemporary China," in *Legal Developments in China: Market Economy and Law* 3 (Wang Guiguo and Wei Zhenying, eds. 1996).

[10] As pointed out in *Yifa zhiguo*, supra n. 1, at 1 (extract from *Renmin ribao* (People's Daily), February 9, 1996). Similar lectures organized for top leaders have continued to be held from time to time since 1995.

[11] Id.

[12] Id. at 4.

[13] 4 *Xinhua yuebao* (New China Monthly) 19 at 37 (1996).

German) instead of the more conservative term "legal system state,"[14] was used in General Secretary Jiang Zemin's keynote address at the 15th National Congress of the Chinese Communist Party in September 1997,[15] and in the Work Report of the National People's Congress (NPC) Standing Committee presented by Mr. Tian Jiyun, Vice-Chairman of the NPC Standing Committee, to the first plenary session of the 9th NPC in March 1998.[16] These developments culminated in one of the constitutional amendments adopted by the 9th NPC at its second plenary session in March 1999. This amendment introduced the following sentence at the beginning of article 5 of the Constitution of the People's Republic of China:

> The People's Republic of China shall practice ruling the country according to law, and shall construct a socialist rule-of-law state.[17]

These developments have spawned a lively discussion among legal scholars in China about what is the meaning and significance of "ruling the country according to law" and "the rule of law," and what is to be done if this is the objective to be achieved. The discussion represented the continuation and deepening of the debate among Chinese legal scholars that occurred in the early 1980s on "the rule of law" versus "the rule of men."[18] It can also be interpreted as an offshoot of the discussion dating back to 1995 on Deng's legal thought,[19] as well as the earlier discussion since 1993 on the relationship

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[14] The *pinyin* romanization for both "legal system state" and "rule-of-law state" is *fazhi guojia*, but in fact *zhi* corresponds to two different Chinese characters in the two expressions. The Chinese character romanized as *zhi* in the expression "legal system state" means "system," whereas the character romanized as *zhi* in the expression "rule-of-law state" means "rule."

[15] *Collection of Documents of the 15th National Congress of the Communist Party of China* 1 at 31 (1997) (in Chinese).

[16] *Collection of Documents of the 1st Plenary Session of the 9th National People's Congress of the People's Republic of China* 101 at 102 (1998) (in Chinese).

[17] The remainder of article 5, which has existed since the Constitution was enacted in 1982, provides as follows: "The State upholds the unity and dignity of the socialist legal system. No law, administrative regulation or local regulation may contravene the Constitution. All state organs, armed forces, political parties, social organizations, enterprises and institutions shall abide by the Constitution and the law. Responsibility shall be pursued in respect of all acts that violate the Constitution and the law. No organization or individual has the privilege of being above the Constitution and the law." (my own translation from the Chinese original)

[18] See, e.g., *Fazhi yu renzhi wenti taolun ji* (Essays on the Question of the Rule of Law and the Rule of Men) (Editorial Committee for *Fazhi yu renzhi wenti taolun ji*, eds. 1981).

[19] See, e.g., the 1995 volume of *Zhongguo faxue* (Chinese Legal Science).

between the market economy and the Rule of Law.[20] The body of literature that has appeared since early 1996 on the subject of the Rule of Law can be regarded as the most mature stage so far of modern Chinese scholarly reflections on the question of the Rule of Law. It is the purpose of this article to examine this body of literature and to evaluate it.

## INTELLECTUAL RESOURCES FROM TRADITIONS

We shall begin by looking at the intellectual resources employed by contemporary Chinese thinkers when they embarked on the project of constructing a theory of the Rule of Law for present-day China. By intellectual resources I mean the heritage of intellectual history, particularly the concepts and theories developed by great thinkers in the past. In their discussions on the Rule of Law, contemporary Chinese scholars have reflected on the heritage of both the Chinese and Western traditions in this regard.

In an influential treatise published in 1922, the famous Chinese thinker Liang Qichao used the terms "the rule of men" and "the rule of law" to characterize the political and legal doctrines of Confucianism and Legalism respectively in ancient China.[21] Contemporary Chinese scholars are almost unanimous in rejecting the alleged equivalence between Legalism and the Rule of Law. They point out that Legalism, as enunciated in the pre-Qin period and actually practiced in full during the Qin dynasty (221-207 B.C.), viewed law simply as an instrument of authoritarian and despotic rule. Law consisted of rules prescribing punishment for behavior that was considered undesirable from the ruler's point of view. It emanated from the ruler, was designed entirely to enhance the ruler's power, and the ruler himself was not subject to the law.

Although Legalism as an orthodox ideology was abandoned after the Qin dynasty, the ensuing amalgam of Confucianism and Legalism that survived for almost two millennia was also not conducive to the Rule of Law.[22] Contemporary Chinese scholars have noted that Confucianism advocated rule by virtue and by ethics rather than by law. Rulers were expected to be virtuous

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[20] Chen, supra n. 9.

[21] For the English translation of the condensed version of this book, see Liang Chi-chao, *History of Chinese Political Thought During the Early Tsin Period* (L.T. Chen, tr. 1968, orig. 1930). See also the discussion in Gu, supra n. 1 at 192.

[22] See generally Albert H.Y. Chen, "Confucian Legal Culture and its Modern Fate," in Raymond Wacks (ed.), *The New Legal Order in Hong Kong* (Hong Kong: Hong Kong University Press, 1999), 505-533.

and to behave in an exemplary manner. Scholars-officials were to act as parents of the people. Subjects were to be well educated and morally cultivated, so that they would practice the rites and norms of good conduct voluntarily and in accordance with their conscience. In situations where there were disputes, people were encouraged to compromise and give concessions rather than to assert their self-interest or rights by litigation. In the Confucian vision, social harmony rather than justice is the symbol of the ideal society.

Although it is possible to interpret the Confucian approach in a positive manner and to argue that it represented the best possible option in the kind of pre-modern society that China was, most contemporary Chinese legal scholars depict the Confucian tradition negatively as depriving persons of their autonomy, freedom, individuality and claims to equality.[23] They pointed out that traditional Chinese society was hierarchical and oppressive, most people were in positions of personal dependence on and subordination to some other persons or social groups, that the individual's rights were ignored, that the legal culture was one dominated by rulers' absolute power and subjects' unconditional obligations, and obedience to authority was over-emphasized. Some writers lamented the absence of "civil society" in historical China, and described the traditional Chinese sociopolitical structure as a monolithic one, unifying the family, clan and the political state.[24] Others criticized the traditional attitude of "worshipping" the state and its power.[25] One scholar agreed with Hegel's portrait of traditional China as a system of paternal rule where subjects were treated like children in a family.[26]

Given this grim assessment of the heritage of Chinese civilization as far as the Rule of Law is concerned, it is not surprising that most contemporary Chinese legal thinkers instead look to the Western tradition in order to find the necessary intellectual resources for their theory of the Rule of Law. In this regard, it is noteworthy that they find much that is positive in both the legal

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[23] Id.

[24] See, e.g., Fan Zhongxin, "Civil Society Determines the Rule-of-Law Society," in *Yifa zhiguo*, supra n. 1, 423; Du Wanhua, "The Dualistic Social Structure and Jurisprudential Reflections Thereon," 1 *Xiandai faxue* (Modern Law Science) 5 (1996).

[25] See, e.g., Zhou Yongkun, "Surpassing Oneself: Legal Modernization and Transformation of Legal Culture," 3 *Tianjin shehui keshe* (Tianjin Social Science) 64 (1995), reprinted in 8 *Faxue* (Science of Law) 19 (1995); Zheng Chengliang et al., "The Essence of the Jurisprudence of Ruling the Country according to Law," in *Yifa zhiguo*, supra n. 1, 126.

[26] Chen Duanhong, "Confrontation: The Future of Chinese Constitutionalism from the Perspective of Administrative Litigation," 4 *Zhongwai faxue* (Peking University Law Journal) 1 (1995).

philosophy of classical Greece and in the political thought of the Age of Enlightenment. Even the Middle Ages received some positive evaluation in terms of its theory of a natural or divine law that stood above positive human law,[27] and in terms of the legal tradition developed by the citizens of autonomous towns who epitomized civil society.[28]

In discussing the meaning of the Rule of Law, a significant number of leading scholars in contemporary China found it useful to cite Aristotle's passage in *Politics* that the Rule of Law embraces two meanings: First, there is general compliance with the established laws, and second, the content of the law is good.[29] Some of them also discussed approvingly Aristotle's arguments for the Rule of Law, such as the points that law represents reason and is free of human desires and emotions,[30] that it restrains the exercise of arbitrary power, and that it embodies the judgment of "the many" rather than "the few."[31] These scholars observed that such a philosophy of the Rule of Law could only flourish in the social context of the democracy of the ancient Greek *polis*, which contemporary Chinese scholars wrote about with admiration.[32]

Scholars are even more enthusiastic about and receptive to the political and legal philosophy of the Enlightenment, or what they describe as the period of "the bourgeois revolutions." Contemporary Chinese literature on the Rule of Law abounds with references to the works of classical writers, such as Locke, Montesquieu and Paine, as well as subsequent exponents of the liberal tradition, including Dicey, Hayek and Fuller. It is pointed out that according to Marxism, the transition from feudalism to capitalism, which the bourgeois revolutions completed, was a kind of progress in history, and that there is much that contemporary socialist China can learn and borrow from the political and legal thought of the bourgeois revolutions.[33] Marx was cited in support of the

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[27] Li Lin, "The Concept, Institution and Operation of the Rule of Law," in *Yifa zhiguo*, supra n. 1, 234.

[28] Fan, supra n. 24; Zhou Yongkun, "The Idea of the Priority of Society and the Rule-of-Law State," 1 *Faxue yanjiu* (CASS Journal of Law) 101 at 107 (1997).

[29] See, e.g., Gu Chunde, "Ruling the Country According to Law and the Rule of Law," in *Yifa zhiguo*, supra n. 1, 180; Gu Anliang, supra n. 1 at 192; Zhou Yongkun, supra n. 28 at 101.

[30] Li Lin, supra n. 27 at 235.

[31] Li Buyun, "Ruling the Country According to Law, Constructing a Socialist Rule-of-Law State," in *Yifa zhiguo*, supra n. 1, 46 at 49-50.

[32] See, e.g., Fan, supra n. 24; Zhou, supra n. 28.

[33] Gu Chunde, supra n. 29; Gu Anliang, supra n. 1; Li Lin, supra n. 27; Li Buyun, supra n. 31.

proposition that the encounter between the capitalist West and other civilizations was also a phenomenon of historical progress, and it was suggested that the experience of the legal modernization that started in the West is a common heritage of all humankind.[34]

At the same time, Chinese scholars appreciate that the Rule of Law developed in the West as part of a dynamic historical process, undergoing distinct phases of development. Thus one scholar pointed out that the nature of the Rule of Law has changed as the West moved from the period of *laissez faire* capitalism into the period of monopoly capitalism and welfare states.[35] Another characterized the earlier period as "individuals-oriented" and the later period as "society-oriented."[36] A third writer distinguished the two stages by using the concepts of "a hard rule-of-law" (strict legal rules with little discretion in their administration) and "a soft rule-of-law" (a "living law" administered by the exercise of discretion in search for substantive justice).[37]

Although most Chinese scholars find the theory and practice of the Rule of Law as developed in the West highly relevant to China's contemporary needs, some point out that the paths of legal modernization taken by the West and China have to be very different. In the West, legal institutions grew up side by side with the market economy in a spontaneous and gradual process of evolutionary change, while in contemporary China, legal as well as economic reforms have been pushed through by the state in a top-down direction.[38] From a macro-historical perspective, legal modernization was a result of the internal dynamics of social, economic and political development in the West, but occurred in twentieth-century China only as a response to the external challenge posed by the West. This means that legal modernization in China has to a significant extent been an exercise in legal transplant, accompanied by the

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[34] Gong Pixiang, "Legal Modernization Does Not Equal Westernization," 1 *Faxue* (Jurisprudence) 6 (1997).

[35] Zhu Jingwen, "The Rule of Law is a Historical Category," in *Yifa zhiguo*, supra n. 1, 292.

[36] Hao Tiechuan and Fu Dingsheng, "The Problems and Challenges of China's Legal Modernization," 7 *Faxue* (Jurisprudence) 2 (1995).

[37] Yan Cunsheng, "The Modernization of Legal Ideas," in *Fazhi xiandaihua yanjiu* (Studies on Legal Modernization), vol. 2, 197 (Legal Modernization Research Center, Nanjing Normal University, ed. 1996).

[38] Su Li, *Fazhi ji qi bentu ziyuan* (The Rule of Law and Its Indigenous Resources) 11 (1996).

persistent problem of a gap between local social reality and the imported legal doctrines and norms.[39]

## THE DEVELOPING THEORY OF LAW

### The Meaning of the Rule of Law

We now begin our survey of the contours of the developing theory of the Rule of Law in contemporary China. The first question to be considered is how do scholars understand the concept of the Rule of Law. Here there seems to be a consensus that the Rule of Law connotes the binding authority of democratically generated law on both subjects (citizens) and rulers (government), and submission to such law on the part of all members of the community, including the most senior government officials.[40] Many scholars stressed the intrinsic connection between democracy and the Rule of Law in the modern sense.[41] The law that rules in a state subject to the Rule of Law is the people's law and not the ruler's law as in pre-modern states. While the ruler's law was often imposed by force on the people, the people's law is a product of the people's rational consent to its authority. Through such law, the people establish the government and authorize it to exercise certain powers which are conferred, regulated and limited by law.

Contemporary Chinese theorists associate the Rule of Law with other liberal values such as liberty, equality, human rights, separation of powers, checks and balances and judicial independence. The functions of law in protecting citizens' rights, controlling the exercise of state power and preventing its abuse are particularly emphasized. These theorists point out that although laws often exist in situations of the "rule of men" (rather than the Rule of Law), the difference between the Rule of Law and the rule of men is that in the former case, authority is depersonalized, and where a conflict arises between the authority of the law and the authority of a powerful political leader, the law will

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[39] Jiang Lishan, "An Analysis of the Characteristics of the Project of Chinese Legal Modernization," 4 *Zhongwai faxue* (Peking University Law Journal) 10 (1995).

[40] Zhou Yongkun, "A Commentary on the Conference on the Theory of Ruling the Country according to Law and Constructing a Socialist Rule-of-Law State," 2 *Fazhi yu shehui fazhan* (Legal System and Social Development) 1 (1997); Zheng Chengliang et al., "The Essence of the Jurisprudence of Ruling the Country according to Law," in *Yifa zhiguo*, supra n. 1, 121; Fan, supra n. 24.

[41] Bei Yue, "The Theoretical Basis of Ruling the Country According to Law," in *Yifa zhiguo*, supra n. 1, 143; Gu Chunde, supra n. 29; Xie Pengcheng, "Legal Authority in Contemporary China," 6 *Zhongguo faxue* (Chinese Legal Science) 3 (1995).

prevail.[42] One writer derives two basic principles from the notion of the Rule of Law: First, agencies of public power may not do anything that is not expressly authorized by law. Second, persons exercising private rights may do whatever is not expressly prohibited by law.[43]

Some thinkers find in the notion of reason or rationality the essence of the Rule of Law.[44] It is pointed out that the Rule of Law implies a rational way of doing things, a rational legal system, a rational legal spirit and a rational social order.[45] Rationality includes formal rationality and substantive rationality. The former refers primarily to the process of law enforcement, and requires like cases to be treated alike and legal rules to be administered in a predictable manner. Substantive rationality refers to the content of the law, as well as the objectives to be achieved by the law, the values embodied in it and the consequences of its operation.[46]

## The Ingredients of the Rule of Law

Some scholars further explore the different elements, aspects or levels within the concept of the Rule of Law. The following is a sample of the more influential views:

(a) A distinction can be drawn between the formal and substantive ingredients of the Rule of Law. The formal ingredient is the supremacy of the law (the law being made by the people and being binding on the people as well as the government), whereas the substantive ingredient relates to whether the content of the law is good and protects the people's rights.[47]

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[42] Zheng et al., supra n. 40.

[43] Liu Zuoxiang, "Two Rule-of-Law Principles to be Adhered to in Order to Realize the Rule of Law," 3 *Falü kexue* (Law Science) 19 (1996), reprinted in 7 *Lilun faxue, fashi xue* (Legal Theory and Legal History) 25 (1996).

[44] Yan, supra n. 37; Sun Xiaoxia, "The Choice of Realistic Objectives for the Rule of Law in China," 3 *Falü kexue* (Law Science) 12 (1996), reprinted in 7 *Lilun faxue, fashi xue* (Legal Theory and Legal History) 18 (1996).

[45] Sun Xiaoxia, "The Rule of Law, Rationality and Cost," 1 *Fazhi yu shehui fazhan* (Legal System and Social Development) 1 (1997).

[46] See the works cited in supra n. 44.

[47] Zhou, supra n. 40. See also the more elaborate theorization of the Rule of Law in the formal and substantive senses in Xu Xianming, "The Ingredients of the Rule of Law," 3 *Faxue yanjiu* (CASS Journal of Law) 37 (1996); Gao Hongjun, "Two Modes of the Rule of Law," in *Yifa zhiguo*, supra n. 1, 262.

(b) There are three levels of the Rule of Law. First, there is the Rule of Law in an ideal sense. Second, there is the Rule of Law as prescribed by a particular system of legal norms. Third, there is the Rule of Law as actually practiced in a society—the reality of the existence (or non-existence) of the Rule of Law.[48]

(c) Some writers point out that the implementation of the Rule of Law depends on coordinated efforts on many fronts simultaneously, such as law-making, development of democracy and of institutions for supervising the exercise of power and the protection of rights, effective law enforcement, judicial independence, improvements in judicial procedures and the professional standards of judges, and raising people's legal consciousness.[49]

## The Distinction Between "Legal System" and "Rule of Law."

As mentioned in the first section of this article, an official slogan adopted by the NPC in 1996 in the Ninth Five-Year Plan and Outline of Objectives for Long-Term Developments towards 2010 is "ruling the country according to law and constructing a socialist legal system state." Since then, the term "rule of law" has also received official, and, in 1999, constitutional recognition. What then is the difference between the two Chinese terms, which are both romanized as *fazhi*?

Scholars' understanding of the meaning of the "rule of law" has been discussed above. The problem with the term "legal system," which has been used (for example, in the call for "strengthening the socialist legal system") to the exclusion of "Rule of Law" for many years in the PRC, is that it may be interpreted to mean "rule by law" rather than "rule of law." Rule by law implies that law is merely an instrument that the state uses for the purpose of ruling the people. On the other hand, the Rule of Law requires the democratization of law and the legal institutionalization of democracy.[50]

Thus it is pointed out that while all organized states have legal systems, not all of them practice the Rule of Law.[51] There was also an interesting discussion

[48] Wu Dexing, "The Theoretical Mode and Process of Realization of the Rule of Law," 5 *Faxue yanjiu* (CASS Journal of Law) 97 (1996); Li Lin, supra n. 27.

[49] Li Buyun, supra n. 31; Xu, supra n. 47; Zhou, supra. n. 40 at 15.

[50] See, e.g., Guo Daohui, "A Fundamental Change in the Mode of Rule," in *Yifa zhiguo*, supra n. 1, 109. For more in-depth research, see generally Guo Daohui, *Fa de shidai jingshen* (The Contemporary Spirit of Law) (1997); Guo Daohui, *Fa de shidai huhuan* (Epochal Call for Law) (1998); Li Buyun, *Zouxiang fazhi* (Toward the Rule of Law) (1998).

[51] Li Buyun, supra n. 31; Zhou, supra n. 40 at 12-14.

about who is the subject for the phrase "ruling the country according to law"—who rules the country according to law? Some scholars made the point that it is the people who rule the country according to law, by making law and entrusting to the government the necessary public administrative powers. As far as the government is concerned, the related slogan "using the law to rule the country" (*yifa zhiguo*) is sometimes used, but this slogan is inadequate by itself because it again connotes rule by law rather than rule of law. Therefore, the full notion of the Rule of Law can only be expressed by combining the concepts of (a) the people using law to rule the country (by legally establishing the state and entrusting legal powers to it); and (b) the government (acting under legal authorization by the people) administering the country according to law.[52]

## Socialism and the Rule of Law

The next question to be considered is how contemporary Chinese scholars have shifted away from the former official position that the Rule of Law was a bourgeois concept, and how they now reconcile it with socialism and Marxism. Here a leading scholar employs an analogy with Deng Xiaoping's view that the market economy does not equal capitalism, and it is possible to have a market economy under socialism. Hence it is also said that the Rule of Law is not the monopoly of capitalism, and a socialist Rule of Law is also practicable and desirable.[53] Like the market economy, the Rule of Law is now understood as a product of the historical development of civilization and as part of the common heritage of humankind.[54]

Relying on the Marxist view of historical progress from "slave society to feudalism to capitalism to socialism," some Chinese scholars argue that the Rule of Law in capitalism is superior to legal systems under feudalism, and socialist Rule of Law is a still higher stage of legal evolution compared to the Rule of Law under capitalism.[55] The socialist project is one of human emancipation; socialism enables human beings to develop themselves to the full. While the Rule of Law under capitalism masks the reality of class oppression and

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[52] Guo Daohui, "A Fundamental Change," supra n. 50; Zhou, supra n. 40 at 12; Zhou, supra n. 28.

[53] Liu Shengping, "The Implementation of the Rule of Law is Inevitable in Historical Development," 10 *Faxue* (Jurisprudence) 4 (1996); Gu Anliang, supra n. 1 at 194.

[54] Liu, id.

[55] Li Lin, supra n. 27 at 242-243.

capitalist law primarily serves the interest of capital, socialist law reflects the will and interest of all people in society, and socialist Rule of Law secures the richest degree of freedom, equality and rights.[56]

What, then, are the features specific to socialist Rule of Law? Most scholars stress that it rests on the foundation of the predominance of public ownership of the means of production in society, and that it adheres to the fundamental principle of the leadership of the Communist Party.[57] This means that certain elements of bourgeois Rule of Law, such as the inviolability of private property or political pluralism in the form of multi-party politics, cannot have any place in socialist Rule of Law.[58]

## The Nature of Law

Since the 1980s, the debate about the nature of law has never ceased within the circle of legal philosophers in China.[59] The point of departure for this discussion was the orthodox view, imported from the Soviet Union in the 1950s, that law reflects the will of the ruling class, which in turn is based on the conditions of material life of that class. Such will is elevated to the will of the state through the legislative process. The law that emanates from this process is then a set of behavioral norms backed up by the coercive power of the state.

The continuing debate has been about whether this description or explanation of law in terms of its "class nature" (*jieji xing*) is correct and adequate, and the extent, if any, to which law also has a "social nature" (*shehui xing*)—in the sense that it responds to the common interests, needs and aspirations of all members of society.[60] The recent discussion on the Rule of Law has contributed significantly to this ongoing debate.

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[56] Id; Zhou, supra n. 40 at 14; Zhou, supra n. 28 at 102; Wang Jiafu et al., "On Ruling the Country According to Law, "in *Yifa zhiguo*, supra n. 1, 6 at 11; Ye Feng and Xie Pengcheng, "From 'Having Laws to Follow' to 'Strict Enforcement of the Law'," paper presented at the annual conference of the Legal Theory Research Society of the Chinese Society of Legal Science, Shenzhen University, Shenzhen, November 5-8, 1996.

[57] Li Lin, supra n. 27 at 243-244; Lü Shilun and Peng Hanying, "The Economic Point of Departure of the Rule of Law," in *Fazhi xiandaihua yanjiu*, supra n. 37, 1; Wang et al., supra n. 56 at 11; Zhu, supra n. 35 at 301.

[58] Zhu, id. at 301-302.

[59] See, e.g., Ronald C. Keith, "Chinese Politics and the New Theory of 'Rule of Law',"125 *China Quarterly* 109 (1991).

[60] See generally Chih-yu Shih, "China's Socialist Law Under Reform: The Class Nature Reconsidered," 44 *American Journal of Comparative Law* 627 (1996).

For example, one scholar, who himself works under the Standing Committee of the NPC, states unequivocally his view that the traditional notion of law as the will of the ruling class and an instrument of class dictatorship is inconsistent with the concept of the Rule of Law and the requirements of the market economy.[61] Indeed, a substantial body of scholarly opinion has accumulated in China in recent years that law serves the functional needs of society in terms of coordination of different kinds of interests, regulation of social relationships and providing order and predictability in human affairs (instead of the orthodox view that law is used to suppress class enemies). In this sense law serves the common good of all members of society, expresses the values that they uphold and responds to their needs. The content of law is very much a product of human experience accumulated over many generations, and is inseparable from notions of reason, justice, conscience and morality.[62]

Accompanying this "new view" of law are two sets of critique of ideas associated with the "traditional" or "orthodox view." One is a critique of the instrumental view of law. Increasingly, writers now recognize that law is not merely a means for achieving political and policy ends, but can be understood as a value and an end in and of itself because it expresses the values, needs and aspirations of the community and reflects the ideals of reason, liberty and equality.[63] The second critique is directed against the state-centered view of law. Scholars now stress that the existence of law preceded the rise of states and class rule. The origin of law lies in the customs and conventions that evolve spontaneously in the course of social interaction. When they gain general acceptance and are perceived to be binding on members of the community, they acquire the force of law.[64]

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[61] "Notes on the Conference on *Ruling the Country According to Law and the Construction of Spiritual Civilization*," 3 *Faxue yanjiu* (CASS Journal of Law) 3 at 16 (Cai Dingjian's speech) (1997).

[62] Zheng Chengliang et al., supra n. 40 at 125; Zhou, supra n. 28; Su Li, supra n. 38 at 6-10; Ma Changshan, "Understanding the Nature of Law from the Perspective of Civil Society Theory," 1 *Faxue yanjiu* (Studies in Law) 41 (1995); "Notes," supra n. 61 at 12-13 (Shi Taifeng's speech).

[63] Shen Zongling, "Ruling the Country According to Law, Constructing a Socialist Legal-System State," 6 *Beijingdaxue xuebao: zhesheban* (Peking University Journal: Philosophy and Social Science Section) 4 (1996), reprinted in 1 *Lilun faxue, fashi xue* (Legal Theory and Legal History) 8 (1997); Xie Hui, "On Legal Instrumentalism," 1 *Zhongguo faxue* (Chinese Legal Science) 50 (1994); Zheng et al., supra n. 40 at 124-126.

[64] Zhou, supra n. 28; Yan, supra n. 37; Mi Jian, "Looking at the Nature of Law from the Perspective of Human Nature," 1 *Falü kexue* (Law Science) 3 (1997), reprinted in 4 *Lilun faxue, fashi xue* (Legal Theory and Legal History) 8 (1997); Sun Xiaoxia, "The External Authority and Internal Authority of Law," 4 *Xuexi yu tansuo* 85 (1996), reprinted in 9 *Lilun faxue, fashi xue* (Legal Theory and Legal History) 14 (1996).

## The Functions of the Rule of Law

In contrast with the situation in the early 1980s, when there existed different schools of thought regarding whether the Rule of Law was the best mode of rule relative to other alternatives, there is now a clear consensus among Chinese legal scholars in favor of the Rule of Law. They have articulated various reasons and arguments regarding why the Rule of Law is desirable and how it can make a useful contribution to China. For example, they note that the Rule of Law facilitates the operation of the socialist market economy and is conducive to the development of socialist democracy.[65] It is also an important element of "spiritual civilization" (*jingshen wenming*).[66] Most important of all, it is the key to the long-term stability and prosperity of the nation, and will enable China to escape from its historical dynastic cycles in which each powerful regime ultimately declined and fell.[67]

Other interesting points have also been made. Some scholars use the "new institutional economics" to explain how the Rule of Law can reduce transaction costs and facilitates market expansion.[68] Others point out that modernization releases people from their traditional familial, clan and social linkages and forms a society of isolated individuals, in which the law will have to play an increasingly important role as a medium for social interaction and as the most authoritative norms of behavior.[69] Social and economic change in contemporary China has led to a declining role for administrative, party and ideological means of social control, and has resulted in increased differentiation and diversity of interests and values in society.[70] The demand for legal coordination and regulation increases accordingly.[71] It has also been argued that settlement through the legal system of conflicts generated by the increasing

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[65] Wang et al., supra n. 56; Zhou, supra n. 40.

[66] See the section below of this article on "the rule of law and spiritual civilization."

[67] Liu Zuoxiang and Xiao Zhoulu, "Jumping Out of the 'Periodic Cycle' by Relying on Democracy and the Rule of Law," 2 *Zhongguo faxue* (Chinese Legal Science) 7 (1995).

[68] Liu Yunlong and Li Min'e, 3 *Xiandai faxue* (Modern Law Science) 96 (1996), reprinted in 1 *Lilun faxue, fashi xue* (Legal Theory and Legal History) 31 (1997).

[69] Gao, supra n. 47 at 262; Long Fu and Yan Ping, "Notes on the Conference on the Rule of Law and Spiritual Civilization," 2 *Faxue* (Jurisprudence) 61 (1997).

[70] See also the section below on "the social basis of the rule of law."

[71] Hu Yunteng, "Several Questions Relating to the Rule of Law," in *Yifa zhiguo*, supra n. 1, 156; Xie Hui, "The Rule of Law: The Dominant Value Orientation for the Spiritual Transformation of the Chinese People," 3 *Zhengzhi yu falü* (Political Science and Law) 29 (1995).

social contradictions in China can prevent the escalation of such conflicts into social unrest.[72]

## The Authority of Law and Faith in Law

If law is to perform these important functions which society assigns to it, it must have sufficient authority first. Hence many contemporary Chinese scholars emphasize that the supreme binding authority of the law lies at the core of the notion of the Rule of Law. They point out that a crucial aspect of the supremacy of the law is that "law" rather than "power" must be the ultimate source of political legitimacy. In the traditional Chinese state, there was "worship of power," and any act or decision of a politically powerful person was automatically legitimate. However, in the eyes of modern Rule of Law, power has no legitimacy unless there exists a legal basis for it.[73]

Some scholars study the connection between the supremacy of law and its autonomy. They rely on the American legal philosopher Roberto Unger's analysis of the autonomy of law as consisting of four components—substantive, institutional, methodological and occupational autonomy.[74] Other scholars theorize that the authority of the law consists of external and internal aspects.[75] The external authority of the law depends on its coercive enforcement by the state. On the other hand, the internal influence of the law depends on its content and quality (whether it is good, just and consistent with people's interests), and whether the people believe in, accept and voluntarily comply with it.

The concept of the internal authority of the law leads to the interesting discussion among contemporary Chinese jurists about "faith in law." A significant number quote American law professor Harold Berman's view that without faith in the law, the law is merely dead dogma; law must be believed in,

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[72] Gu Peidong, "Several Questions Relating to the Development of the Legal System in China," in *Fazhi xiandaihua yanjiu*, supra n. 37, 16 at 27-29.

[73] Zheng et al., supra n. 40 at 126-127.

[74] Gao, supra n. 47 at 266-267.

[75] Sun, supra n. 64; Qiao Keyu and Gao Qicai, "On the Authority of Law," paper presented at the 1996 Shenzhen conference, supra n. 56.

otherwise it is empty.[76] They develop this idea further and elaborate on the meaning and significance of faith in the law. Such faith means that people not only understand the law, but respect it, trust it and rely on it for the purpose of defending their interests.[77] It is also an attitude of fidelity to law, a commitment to uphold its values and principles, which manifests itself when people feel strongly about and fight against violations of the law, even to the point of sacrificing themselves in order to defend the law and its values and principles.[78]

Hence it is pointed out that faith in the law is not only a matter of knowledge; it is also a matter of emotions and the will. It is a sublimation of law" reason and passion, or what a scholar describes as "rationalized passion and passionized reason."[79] "After Marxist jurisprudence has taken off the overcoat of law's mystery and destroyed the myth of the sanctity of the law, we must re-establish people's faith in the law."[80] Another scholar refers approvingly to the German legal philosopher Jhering's affirmation of the psychological attitude of actively fighting for one's rights (which means fighting to uphold the law), and his view that the cultivation of "legal feelings" (the right feelings towards the law) among citizens is one of the most important elements of civic education.[81]

## The Social Basis of the Rule of Law

Another area that scholars explore as they attempt to develop a theory of the Rule of Law for China is the social basis of law. Here they rest their hope for the future of the Rule of Law on the developing market economy. As one writer puts it, "the market economy is the soil for the rule of law."[82] Scholars note that the actors in the market economy are autonomous and free subjects

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[76] Sun, id; Zhao Zhenjiang and Fu Zitang, "The Functions of Law and Ruling the Country acording to Law," 2 *Faxue* (Jurisprudence) 12 at 14 (1997); Zhou Yezhong, "The Supremacy of the Constitution: The Soul of China's Path to the Rule of Law," 6 *Faxue pinglun* 1 (1995), reprinted in 1 *Lilun faxue, fashi xue* (Legal Theory and Legal History) 9 (1996); Liu Wanghong, "Faith in Law and Legal Modernization," in *Fazhi xiandaihua yanjiu*, supra n. 37, 226 at 228.

[77] Sun, supra n. 64; Xie, supra n. 71; Li Youxing, "Research on the Problems and Solutions of Chinese Legal Modernization," 2 *Hangzhou shehui kexue* 73 (1997), reprinted in 4 *Lilun faxue, fashi xue* (Legal Theory and Legal History) 21 (1997).

[78] Zhao and Fu, supra n. 76; Liu Wanghong, supra n. 76.

[79] Liu Wanghong, id. at 234 (my own translation).

[80] Id. at 227.

[81] Yan, supra n. 37 at 207-210.

[82] Cai Dingjian, "Legal Evolution and the Transformation of the Chinese Legal System," 5 *Zhongguo faxue* (Chinese Legal Science) 3 at 7 (1996).

competing to further their own interests (which form the basis of legal consciousness and legal rights), and this generates a demand for fair legal rules to govern their dealings with one another.[83]

Two concepts have also been introduced in the discussion for the purpose of elucidating the nature of the social change that China is undergoing and its significance for the Rule of Law. They are the concepts of interest pluralism and civil society. Under the centrally planned economy and rigorous ideological control of pre-reform socialist China, plural interests in society were hardly allowed to exist or hardly recognized. However, economic reforms since 1978 have led to differentiation of social interests, which some scholars believe to be the most important social issue in contemporary China.[84] For example, there are now different regional interests and occupational interests, as well as conflicting interests among different income strata and between urban and rural residents. It is pointed out that interest pluralism in society provides the social basis for a Rule of Law society.[85] There is a crucial role for law to play in coordinating, integrating and protecting the multifarious interests in society.[86] Indeed, it is from society itself, rather than the state, that the strongest demand for the Rule of Law comes.[87]

This logically leads to the second concept mentioned above, that of civil society. The interest in the concept of civil society in contemporary China originated from scholars of social theory,[88] and soon the concept also attracted the attention of legal philosophers. Civil society is understood as a non-governmental or private realm of social life in which autonomous persons freely and voluntarily enter into dealings and interactions with one another for their own purposes.[89] Some contemporary Chinese scholars emphasize that the

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[83] Id.

[84] Xie Hui and Cao Rong, "Interest Differentiation in Contemporary China and its Legal Regulation," 1 *Faxue* (Jurisprudence) 13 (1997).

[85] Huang Jianwu, "Pluralism of Subjects of Interests and the Social Foundation of the Rule of Law," 11 *Faxue* (Jurisprudence) 5 (1996).

[86] Xie and Cao, supra n. 84; Benkan pinglunyuan (this journal's commentator), "Strengthening Research on the Effect on Law of Pluralism of Subjects of Interests," 7 *Faxue* (Jurisprudence) 2 (1996).

[87] Huang Jianwu, supra n. 85.

[88] See, e.g., Deng Zhenglai, *Guojia yu shehui: Zhongguo shimin shehui yanjiu* (State and Society: Studies on Chinese Civil Society) (1997).

[89] Liu Wujun, "Civil Society and the Spirit of Modern Law," 8 *Faxue* (Jurisprudence) 28 (1995), reprinted in 11 *Faxue* (Science of Law) (Renmin University reprint service) 22 (1995).

distinction between civil society and the (political) state is recognized in the writings of Marx.[90] Others trace the evolution of civil society back to medieval European towns.[91]

It is pointed out that in pre-reform, socialist China, state and society were fused together into a monolithic whole.[92] Now economic reforms have ushered in a dual structure of political state and civil society.[93] Some scholars express the same idea using alternative vocabulary, such as the transition from an officials-oriented system to a people-oriented system,[94] or from a state-centered structure to a society-centered structure.[95]

What, then, is the relationship between civil society and the Rule of Law? Some contemporary Chinese scholars believe that civil society is the source of and the motivating force behind the Rule of Law.[96] Others see the Rule of Law as being generated by the reciprocal interaction between civil society and the political state.[97] A leading theorist of the relationship between law and civil society argues that civil society is the cradle of the Rule of Law and embodies the spirit of modern law, which he understands to be the spirit of private law. Private law upholds equality, freedom and private rights, and these have been the products of civil society.[98]

## The Theoretical Presuppositions of the Rule of Law

It is interesting to observe that there has been an active reception in China in recent years not only to the vocabulary of the Rule of Law and related notions in the Western liberal tradition, but also to the deeper theoretical underpinnings of these notions. Two scholars at the Chinese Academy of Social Science have identified the theoretical basis of the Rule of Law in the form of four

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[90] Du, supra n. 24; Ma, supra n. 62.

[91] Fan, supra n. 24; Liu Wujun, supra n. 89.

[92] Guo, supra n. 2; Xie, supra n. 41; Liu, supra n. 89.

[93] Du, supra n. 24; Liu, supra n. 89.

[94] Hao Tiechuan, "A Major Transformation in Rule-of-Law Thinking," 3 *Zhongguo faxue* (Chinese Legal Science) 12 (1996).

[95] Cai, supra n. 82.

[96] Fan, supra n. 24; "Notes," supra n. 61 at 12-13 (Shi Taifeng's speech).

[97] Xie Pengcheng, supra n. 41; Ma, supra n. 62.

[98] Liu Wujun, supra n. 89; Liu Wujun, "A Jurisprudential Perspective on Civil Society," 6 *Zhongwai faxue* (Peking University Law Journal) 30 (1995).

concepts: the natural autonomy and equality of human beings; lawmaking as the rational self-regulation of human beings; the evil propensity in human nature; and the superior wisdom of the masses ("the many" as distinguished from "the few").[99] Another scholar from Peking University has developed a similar formulation consisting also of four elements: the effective control of the weakness in human nature; the rational governance of the social order; the recognition of the masses' intelligence; and justice as the unity of fairness and efficiency.[100]

## The Due Process of Law

As mentioned above in relation to the discussion of the meaning of the Rule of Law, some Chinese scholars draw a distinction between the formal and substantive rationality of the law. One view is that at this stage in the development of the Chinese legal system, formal rationality should be particularly emphasized.[101] The idea of formal rationality is associated with that of just procedure, procedural justice, formal justice or the due process of law. Many contemporary Chinese scholars point out that in traditional Chinese culture as well as previous legal practice in the PRC, procedural justice was much neglected and regarded as of secondary importance compared to substantive justice, and that this approach ought to be changed.[102] A number of scholars quoted the famous American Supreme Court Justice Felix Frankfurter, who said that the history of liberty is one of observing procedural safeguards.[103] Another Western judge was also cited for the proposition that it is procedure that distinguishes between the Rule of Law and the arbitrary rule of men.[104]

The leading theorist of the Rule of Law as a matter of procedure came from the CCP Central Policy Research Unit.[105] He argues that the basic principle of

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[99] "Notes on the Conference on Ruling the Country According to Law and Constructing a Socialist Rule-of-Law State," 3 *Faxue yanjiu* (CASS Journal of Law) 3 at 8 (Zhang Hengshan's speech) (1996); Bei Yue, supra n. 41.

[100] Zheng Qiang, "The Value Foundations of the Rule of Law," paper presented at the 1996 Shenzhen conference, supra n. 56.

[101] Sun Xiaoxia, supra n. 44.

[102] Cai, supra n. 82; Li Youxing, supra n. 77.

[103] Zhou Yezhong, supra n. 76; Wu Dexing, «The Theoretical Mode and Process of Realization of the Rule of Law,» in *Yifa zhiguo*, supra n. 1, 353 at 359.

[104] Zhou, id.

[105] Wu Dexing, supra n. 103 at 353.

the Rule of Law is the procedural principle that justice should be realized through fair procedures. He draws heavily on Rawls' theory of formal justice, and quotes Western thinkers' views that law is procedure, and just procedure is the primary meaning of the due process of law that stands at the heart of Western constitutionalism.[106] In his view, the realization of the Rule of Law is a process moving "from substance to procedure." He advocates the "proceduralization of the rule of law," which consists in the "proceduralization of law" and the "legalization of procedure."

## Judicial independence

For two decades before 1978, the principle of judicial independence, or what the 1954 Constitution of the PRC called the independent exercise of adjudicatory power, was officially rejected as bourgeois and inconsistent with the principle of the leadership of the Communist Party.[107] After 1978, the principle of the independent exercise of the powers of the courts was rehabilitated and stipulated in the 1982 Constitution. In the recent discussion about the Rule of Law, many scholars have continued to call for judicial independence.

These scholars stressed that judicial independence is a fundamental ingredient of the Rule of Law.[108] It is important both to ensure the predictability and security in economic transactions, which the market economy needs, and to guarantee the protection of citizens' rights.[109] The Rule of Law requires the government to be subject to the law, and only independent courts can enforce the law against the government and serve as the arbiter between citizens and government.[110]

One scholar quotes approvingly Ronald Dworkin's language that courts are the capital of the law's empire, and judges its aristocracy.[111] Another scholar tries

[106] Id. at 359.

[107] See generally Chen, supra n. 3, 117-119.

[108] Li Buyun, supra n. 31 at 68; Li Jingbing, "Judicial Independence is Conducive to the Construction of the Rule of Law," 3 *Falü kexue* (Law Science) 15 (1996), reprinted in 7 *Lilun faxue, fashi xue* (Legal Theory and Legal History) 21 (1996); Chen Jinzhao, "A Technical Choice in the Path of the Rule of Law," 3 *Falü kexue* (Law Science) 16 (1996), reprinted in 7 *Lilun faxue, fashi xue* (Legal Theory and Legal History) 22 (1996).

[109] Xie Pengcheng, supra n. 41.

[110] Cai, supra n. 8 at 409.

[111] Ye and Xie, supra n. 56, at 5.

to explain that the practice of judicial independence is not inconsistent with the principle of the leadership of the Communist Party. The Party exercises leadership in governmental affairs, including judicial affairs, by formulating general policies, promoting them through education and propaganda, and by determining appointments to official posts. However, it would be wrong for Party organs or officials to interfere with a court's work in individual cases.[112]

## The Communist Party and the Rule of Law

What, then, are the implications of the Rule of Law for the Communist Party? Many scholars explain that the Rule of Law does not detract from the principle of Party leadership in the state. In relation to lawmaking, the Party's role is to organize and lead the people in forming their common will, and then elevating such will into law through the democratic procedure of legislation.[113] The law that emerges from this process is thus the unity of the Party's policies, the people's wishes and the will of the State.[114]

After the law has been made, the Party should also lead the people in observing the law and in supervising the exercise of legal powers by state organs.[115] The Party itself should operate within the framework of the constitution and law of the state, as provided for in the Constitution of the CCP. The PRC Constitution also requires all political parties, social bodies and individuals to comply with the Constitution and the law.[116]

It is noteworthy that not all scholars believe that the issue of the relationship between the Party and the law has been completely resolved even at the theoretical level.[117] For example, they point out that although the personnel and operations of Party organs are financed by the state budget, these organs are not regulated by state law.[118] The question of the extent to which the Party

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[112] Li Buyun, supra n. 31 at 68-69.

[113] Id. at 65; Xie Pengcheng, supra n. 41.

[114] Li Lin, supra n. 27 at 247.

[115] Guo, supra n. 2 at 120; Sun Guohua, "Ruling the Country According to Law is Needed for the Purpose of Improving and Strengthening Party Leadership," 10 *Faxue* (Jurisprudence) 6 (1996).

[116] See art. 5 of the P.R.C. Constitution and the discussion in Gu Anliang, supra n. 1 at 195-196.

[117] Zhou Yezhong, supra n. 76.

[118] Hao Tiechuan, "Ten Suggestions Regarding Ruling the Country according to Law," 5 *Faxue* (Jurisprudence) 2 (1996).

as an organization should come under the legal control of the state cannot be avoided at some future point in the reform of the Chinese political system.[119]

## Constitutionalism and the Rule of Law

The subject of constitutionalism has been brought into the Chinese discussion of the Rule of Law in recent years. Some scholars are of the view that having the Rule of Law is not sufficient; there should also be constitutionalism, and the Rule of Law is an important element of constitutionalism, which also entails the sovereignty of the people, the separation of powers, democratic government, judicial review, human rights protection, legal control of the armed forces, etc.[120] Another view is that the Rule of Law *is* constitutionalism, and the supremacy of law means first of all the supremacy of the constitution.[121] One scholar stresses that the division of power is the key to constitutionalism, and identifies the orthodox view that sovereignty is non-divisible as a conceptual obstacle to the constitutional division of power in China.[122]

In discussing the supremacy of the constitution, some scholars point out that in practice the status and force of the Chinese Constitution is worse than other ordinary laws, because the doctrine still prevails that the provisions of the Constitution are not justiciable and directly enforceable in the courts.[123] It is now advocated by some that constitutional provisions, particularly those guaranteeing citizens' rights, should be made judicially enforceable.[124] Others suggest the establishment of a general system of review of the constitutionality

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[119] Zhuo Zeyuan, "The Past and Future of the Rule of Law in China," paper presented at the 1996 Shenzhen conference, supra n. 56; Jiang Lishan, "The Basic Framework for China's Legal (Rule-of-Law) Reform and the Steps for its Implementation," 6 *Zhongwai faxue* (Peking University Law Journal) 1 (1995).

[120] Cai, supra n. 61.

[121] Zhou Yezhong, supra n. 76.

[122] Zhou Yongkun, "Separation of Powers: The Point for Strategic Breakthrough for the Rule of Law in China," 3 *Falü kexue* (Law Science) 17 (1996), reprinted in 7 *Lilun faxue, fashi xue* (Legal Theory and Legal History) 23 (1996).

[123] Zhou Yezhong, supra n. 76.

[124] Zhou Yongkun, "The Direct Effect of Basic Constitutional Rights," 1 *Zhongguo faxue* (Chinese Legal Science) 20 (1997); Liu Liantai, "A Positivist Analysis of and Commentary on the Direct Application of Constitutional Norms in the course of Adjudication in China," 6 *Faxue yanjiu* (CASS Journal of Law) 13 (1996).

of laws, administrative regulations and local regulations, which can take the form, for example, of a constitutional committee under the NPC.[125]

One scholar sees the enactment and implementation of the Administrative Litigation Law 1989 as an extremely important breakthrough in the development of constitutionalism in China.[126] The legal drama of administrative litigation enables the subject (citizen), for the first time in Chinese history, to confront the state and its officialdom as an autonomous person with a legitimate private interest, and to enter into a dialogue with the state as his or her equal. This is a revolutionary development in Chinese political culture, under which the individual always had to "kneel before the shadow of the state,"[127] which was always omnipotent, and the idea of the subject suing the official (*min gao guan*) was as unthinkable as that of the son suing the father.[128] This scholar believes that the system and experience of administrative litigation now educate the citizen with the idea that he or she is a subject with rights, and this fact has begun to re-configurate the psychological structure of the Chinese people.

## ALTERNATIVE PERSPECTIVES

I have tried above to draw a picture of what, according to my survey of the literature, I believe to be the mainstream theory of the Rule of Law that has been constructed by Chinese legal scholars during the last few years. However, the survey of the Chinese jurisprudential scene would not be complete without some attention to the alternative visions and views of scholars who stand away from the mainstream. Some of them are skeptical about the whole discourse on the Rule of Law. Some point to its limitations and warn against placing too much hope on the Rule of Law. A few even argue that some of the ideas employed by the discourse run counter to Marxism and are therefore heretical. To these views we now turn.

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[125] Du Gangjian, "The Reform of Constitutional Judicial Review in China and the Construction of a Socialist Rule-of-Law State," in *Yifa zhiguo*, supra n. 1, 458.

[126] Chen Duanhong, supra n. 26.

[127] Id. at 6.

[128] The idea of the son taking the father to court was unacceptable in traditional Confucian culture. See generally Chen, supra n. 22.

First, some scholars caution against what they call the premise of the omnipotence of the Rule of Law[129] or "rule-of-law romanticism."[130] The higher the hopes about the Rule of Law and its benefits, the greater the disappointment of members of the public when they find that problems remain unresolved after a lot of laws have been produced. Some point out that as a means of social improvement, law suffers from a number of inherent limitations and deficiencies. Law is in the form of general rules, and as has been recognized since Aristotle, situations inevitably arise in which the rigid application of the rules is inappropriate. The requirement for law's stability means that the law tends to be conservative. Moreover, in a time of rapid social and economic change such as China is now experiencing, the law often lags behind the changing social reality and the requirements of reform, and may therefore become an obstacle to "reform and progress."[131]

Secondly, it has been argued that not only ordinary laws may hinder economic reform and social progress, but the Constitution itself, if it had been strictly adhered to, would also have been an obstacle to reform. A scholar at the East China Institute of Law and Political Science has advanced an interesting thesis of "beneficial breaches of the Constitution."[132] He points out that grants of land-use rights were already practiced and private enterprises were already operating before the constitutional amendment permitting them was introduced in 1988. Similarly, calls for and moves towards establishing a market economy in 1992 were, strictly speaking, unconstitutional before the constitutional amendment in 1993. Even the assumption of law-making power by the NPC Standing Committee was probably unconstitutional before the 1982 Constitution was passed. He therefore argues that breaches of the Constitution should be allowed if they are "beneficial" in the sense of being conducive to the development of the productivity of society and advancing the fundamental interests of the nation.

Thirdly, the Rule-of-Law discourse, which represents in a sense a wholesale adoption of modern Western liberal thought, has also been criticized for being

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[129] Gao Hongjun, supra n. 47 at 268; Li Youxing, supra n. 77.

[130] Chen Jinzhao, "Moving Out of the Error of the Omnipotence of the Rule of Law," 10 *Faxue* (Jurisprudence) 7 (1995).

[131] Id.; Hao and Fu, supra n. 36.

[132] Hao Tiechuan, "On Beneficial Breaches of the Constitution," 4 *Faxue yanjiu* (CASS Journal of Law) 89 (1996).

detached from Chinese social reality. It is pointed out that many recently enacted laws were drafted on the basis of foreign models without adequate investigation into and consideration of the relevant circumstances in China itself. As a result the laws are ineffective.[133] A legal anthropologist points out that various customary institutions of dispute settlement exist in rural China. They are outside the formal legal system but have a high degree of efficacy.[134] A legal historian suggests that some of the more successful legal institutions in the PRC's history, such as people's mediation and reform through labor, have their roots in Chinese tradition.[135]

The leading theorist of the importance of "local resources" in the development of the Chinese legal system is a Peking University legal scholar.[136] He queries whether " 'modern' rule of law" is what is needed in Chinese rural society, and emphasizes the role of informal communal networks and customary patterns of behavior in contrast to formal legal rules and institutions. He does not believe that a legal system can be rationally and consciously designed and constructed by government or legal experts, or on the basis of some doctrines, concepts or theories. A legal system is the result of the actions, behavior, choices, attitudes, beliefs and values of millions of people in the course of their social interaction and legal dealings with one another. The most valuable resources for the development of the Chinese legal system lie in the informal practices, conventions, customs, norms and arrangements that spontaneously evolve in the course of social life and economic activities. He is therefore skeptical about the state-centered model of legal development that is implicit in the contemporary Chinese discourse on the Rule of Law.

Finally, it should be noted that some of the concepts introduced into the developing theory of the Rule of Law have been attacked from a "leftist" or orthodox Marxist-Leninist perspective.[137] For example, the glorification of the

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[133] Gu Peidong, supra n. 72.

[134] Tian Chengyou, "The Question of Clans in Chinese Villages and the Destiny Of Modern La in the Villages," 2 *Falü kexue* (Law Science) 3 (1996).

[135] Ma Xiaohong, "The Rule of Rites and the Rule of Law," in *Yifa zhiguo*, supra n. 1, 367.

[136] Su Li, supra n. 38.

[137] See generally Sun Guohua, "Several Issues in Jurisprudential Research in Contemporary China," 4 *Faxue* (Jurisprudence) 2 (1996); Zhang Guangbo, "Legal Research and Insisting on the Socialist System," 1 *Dangdai sichao* (Contemporary Thought) 44 (1996), reprinted in 4 *Lilun faxue, fashi xue* (Legal Theory and Legal History) 8 (1996); Lü Shilun, "Several Theoretical Questions relating to the Construction of the Legal System," 4 *Gaoxiao lilun zhanxian* (Colleges Theoretical Front) 42 (1996), reprinted in 7 *Lilun faxue, fashi xue* (Legal Theory and Legal History) 4 (1996); Lü Shilun and Zheng Guosheng, "What Kind of Society is the Society under the Socialist Market Economy?" in *Yifa zhiguo*, supra n. 1, 440.

contract and of private law, and the affirmation of Maine's thesis on "from status to contract" in the context of contemporary China, have been criticized as misguided. Those holding these views point out that the freedom of contract belonged to the age of *laissez faire* capitalism and is already out-of-date even in the West. In the socialist economy, there should only be a limited scope for contractual relations. The predominance of public ownership of the means of production under socialism means also that the thesis of the priority of private law is unacceptable.[138] As regards Maine's thesis, the critics point out that this relates only to the transition from slave society or feudalism to capitalism, and it is not appropriate to apply it to China's present transition from the socialist planned economy to the socialist market economy.

The conservative scholars also attack the use of the concepts of social contract, civil society, the priority of rights and the spirit of modern law. They claim that the ideas of social contract and natural rights were ideological devices used by bourgeois writers to create the illusion of a just social order, to mask the reality of class oppression in the capitalist state and to deceive the proletariat. There is no need for these ideas in the socialist state. "The use of these terms would only serve to beautify capitalism and destroy socialism."[139] "Civil society" is said to be relevant only to bourgeois society in the period of *laissez faire* capitalism. The pillars of civil society are the sanctity of private property and the freedom of contract, so certainly the concept of civil society cannot be accepted under socialism. The use of the concept "the spirit of modern law" is criticized for obscuring the distinction between socialism and capitalism. The "leftist" sentiment of these scholars is vividly reflected in the following passage:

> We must not exchange away Marxist principles when we borrow from, inherit or transplant Western legal and political thought and institutions.[140] ….If we allow a "contract" of exchange between Marxism and non-Marxism, if we let Marxism be auctioned in the market, then this socialist society of ours can no longer be sustained.[141]

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[138] In addition to the works cited in supra n. 137, see also Zhu Jingwen, supra n. 35; Wang Shen, "A Theoretical Exploration into the Characteristics of Chinese Legal Modernization," 11 *Faxue* (Jurisprudence) 2 (1996), reprinted in 1 *Lilun faxue, fashi xue* (Legal Theory and Legal History) 16 (1997).

[139] Zhang Guangbo, supra n. 137 at 49.

[140] Lü Shilun, supra n. 137 at 44.

[141] Lü Shilun and Zheng Guosheng, supra n. 137 at 447.

## THE REALIZATION OF THE RULE OF LAW IN CHINA

Despite the countercurrents mentioned in the previous section, the paradigm of the Rule of Law constructed by the mainstream theorists appears to enjoy supremacy in contemporary China not only among scholars of law but also in the official propaganda about law and legality. But the vibrancy of the theory of the Rule of Law is partly a consequence of the grim reality of the lack of the Rule of Law in contemporary China. Scholars and top leaders call so strenuously for the Rule of Law precisely because flagrant violations of the Rule of Law have been so frequent and extensive, and China is so far away from achieving the Rule of Law. The developing theory of the Rule of Law postulates an ideal to be realized, an objective to be strived for, a goal to be reached. But if we look at the reality of contemporary China, the realization of this dream remains as distant as ever.

One can have a glimpse of this reality just by reading the works of the same scholars who write about the theory of the Rule of Law. There seems to be a consensus about facts such as the following:

(a) The system of laws is far from satisfactory. Many laws on civil and commercial matters and on the implementation of the constitutional rights of citizens are still missing.[142] Among the laws that are in force, many still reflect the thinking and practice of the socialist planned economy, and are inconsistent with the requirements of the developing market economy.[143] Law drafting techniques leave much to be desired; many legal provisions are vague or are merely policy statements, and mechanisms and responsibilities for enforcing them are often not provided.[144]

(b) Many laws, particularly those in the form of departmental and local regulations, are drafted by the central government department or local government concerned with furthering the interests of the department or the region with disregard for the general interest.[145] There is no effective system to check whether legal norms of a lower level (e.g., these regulations) contravene legal norms of a higher level (e.g., the Constitution, laws enacted by the NPC or its Standing Committee and administrative

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[142] Li Shuguang, "The Rule of Law in 1997: Five Problems and Five Trends," 2 *Faxue* (Jurisprudence) 2 (1997).

[143] Hao Tiechuan and Fu Dingsheng, supra n. 36; Cai Dingjian, supra n. 8.

[144] Li Shuguang, supra n. 142.

[145] Li Buyun, supra n. 31 at 60; Li Shuguang, supra n. 142; Hau Tiechuan, supra n. 118; Cai Dingjian, supra n. 8.

regulations made by the State Council). Neither is there any machinery to deal with the inconsistency that often arises between norms at the same level of the legal order.[146] Some local governments only enforce national laws selectively, or introduce protectionist measures contrary to national law and blocking the extension of a nationwide market.[147]

(c) The people's congress system is far from effective in the performance of its constitutional functions of legislation and supervision of government.[148] The quality of the members leaves much to be desired, and the congresses only meet infrequently. To a significant extent they are still rubber-stamp institutions. Furthermore, in practice, the status and authority of the people's congresses relative to other branches of government or the Party are actually much lower than prescribed in the Constitution, under which the people's congresses are the highest organs of state power.[149] They are not taken seriously enough by the people or officials.

(d) The deficiency in the authority of the people's congress system in fact reflects the lack of supremacy of the Constitution. The unenforceability of the provisions of the Constitution has already been mentioned above.[150] An even more serious problem is that the constitutional and legal status of the CCP is still unclear. Although the Party exercises de facto governmental powers, its structure, powers and responsibilities are not regulated by law.[151] The orthodox view, still stated in authoritative textbooks, that Party policy is "the soul of the law"[152] creates the impression that the law may be set aside when it no longer reflects current Party policies. Most people are still confused about whether the law is above the Party, or whether the people's congress (the constitutional organ of state power) is above the Party organ.[153]

[146] Li Shuguang, supra n. 142.

[147] Cai Dingjin, supra n. 8; Gu Peidong, supra n. 72.

[148] Fang Tenggao, "China's Strategic Choice of Sustainable Legal Development," 6 *Zhongwai faxue* (Peking University Law Journal) 11 (1995).

[149] Zhou Yezhong, supra n. 76.

[150] Id.

[151] Id.

[152] Li Buyun, supra n. 31 at 65; Zhou Yongkun, supra n. 40; Fang Tenggao, supra n. 148.

[153] Fang, id.; Li Shuguang, supra n. 142; Zhou Yongkun, supra n. 40.

(e) The de facto supremacy of the Party is one cause for concern as regards the administration of justice.[154] Although in theory the People's Courts should exercise their judicial power independently, in practice they are sometimes subject to pressure from Party organs. Even in theory the Party has legitimate authority to exercise leadership over judicial work by laying down general policies and guidelines, and such general principle of "leadership" can easily be turned into a pretext for interference in individual cases. But most scholars point out that currently the most serious failures in judicial independence are attributable not to "Party leadership" but to corruption among judges and law-related personnel and to the courts' subordination (in terms of financial dependence and appointment of personnel) to local governments. Thus the courts often adopt local protectionist measures in the exercise of their powers by favoring local parties whose interests often converge with those of the local government.[155] And bribery of judges and the use of personal connections to get favorable treatment by judges are so prevalent that they have become the subject of some Chinese popular expressions and jokes that have come into usage in recent years.[156] These problems are compounded by the fact that many judges have poor general educational backgrounds or lack professional legal competence.[157]

(f) Although the legal profession has enjoyed rapid growth in recent years and a sector of private law firms (under the names of cooperative firms and partnerships) has been allowed to develop alongside state law firms, the disregard of professional ethics and the deficiency in professional competence on the part of many lawyers have been a cause for concern.[158] The status of lawyers has not yet been firmly established, and some judicial and law enforcement personnel do not give due respect to lawyers and treat them poorly in their judicial and administrative work.[159]

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[154] See, e.g., Fang, id.; Zhou Yongkun, supra n. 40.

[155] Gu Peidong, supra n. 72; Fang Tenggao, supra n. 148; Cai Dingjian, supra n. 8.

[156] See the works cited in supra n. 155; Li Shuguang, supra n. 142; Hu Yunteng, supra n. 71; Li Youxing, supra n. 77.

[157] Li Lin, supra n. 27 at 258; He Qinhua, "It is Important to Raise the Professional Standards of Law Enforcement Personnel," 3 *Falü kexue* (Law Science) 14 (1996), reprinted in 7 *Lilun faxue, fashi xue* (Legal Theory and Legal History) 20 (1996).

[158] Cai Dingjian, supra n. 8 at 401-402.

[159] Gu Peidong, supra n. 72.

(g) A number of scholars have written about a crisis of the general public's faith in the legal system. The enthusiasm for law and legality that arose in the early years of the reform era seems to have been largely evaporated.[160] People see increasing numbers of laws being enacted, but find that the laws do not seem to be able to solve the mounting social problems. Many laws are not seriously enforced, conflict with one another, and serve only the selfish interests of departments or local governments; in addition, the system for law enforcement and administration of justice is corrupt and inefficient. Given such circumstances, how are people expected to have trust and confidence in laws and the legal system?[161] So when people's interests are infringed upon, they blame the law for failing to protect them, and yet they disregard the law themselves when it is in their interest to do so.[162]

In the face of so many obstacles to the Rule of Law in China, what positive ideas have been developed by scholars regarding how to proceed? They all recognize that the project of realizing the Rule of Law is extremely laborious and long-term, and a long uphill journey lies ahead. Movement towards the Rule of Law will have to be simultaneously promoted by the state and propelled by the civil society that is emerging from the market economy.[163] It is pointed out that the problems have to be tackled on two levels[164]—conceptual or ideological renewal (in the sense of winning widespread acceptance of the doctrines, values and culture of the Rule of Law on the part of officials and citizens who in the past had no concept of the Rule of Law and no experience of practicing it) on the one hand, and institutional innovation on the other. The institutional proposals that have appeared more frequently in the literature include the following.

(1) There should be a clear delineation of the scope of legislative power of the central and local (provincial, municipal, etc.) authorities, as well as that of different state organs at the same level (such as the people's congress, its

[160] Id.

[161] Cai Dingjian, supra n. 8 at 402.

[162] Sun Xiaoxia, supra n. 64.

[163] "Notes on the Conference on Ruling the Country According to Law and Constructing a Socialist Rule-of-Law State," 3 *Faxue yanjiu* (CASS Journal of Law) 3 at 16 (Shu Guoying's speech) (1996).

[164] Sun Guohua and Peng Hanying, "Jurisprudential Research in 1996: Retrospect and Prospect," 1 *Faxuejia* (Jurists' Review) 2 (1997); Zhou Yongkun, supra n. 28; Zhou Yongkun, supra n. 40.

standing committee, the government, the departments of government, etc.). A machinery should be established to deal with the problems generated by inconsistent legal norms enacted by different organs, and to review the validity of lower-level norms on the basis of higher-level norms.[165] It seems that some of these issues raised by scholars have now been addressed in the new Law on Legislation (*lifa fa*), enacted by the NPC in March 2000.[166]

(2) There is also active discussion about the desirability of introducing a system for the review of the validity of legal norms on the ground that they contravene the Constitution, and hence to interpret the Constitution itself.[167] An option favored by many scholars is to establish a constitutional committee under the NPC for this purpose. Another possible option, which is a more radical one, is to set up an independent constitutional court.

(3) To avoid the current problems of government departments drafting laws that reflect their particular departmental interest to the detriment of more overall considerations, it has been proposed that the responsibility for drafting laws should be removed from interested government departments and vested in organs under the central and provincial legislatures (people's congresses) consisting of independent-minded legal experts and officials.[168]

(4) Suggestions regarding improvements in the legislative process have also been made.[169] For example, the public should be allowed to have input into the process, which means the existing practice of only consulting relevant bodies should be changed. Hearings should be held on bills, and their content should be more thoroughly debated in the legislatures. It has even been suggested that non-government bodies should be allowed to draft bills and introduce them in the legislatures.

[165] Cai Dingjian, supra n. 8; Li Shuguang, supra n. 142; Gu Peidong, supra n. 72.

[166] Fang Tenggao, supra n. 148; Li Buyun, 'Several Questions Regarding the Drafting of the PRC Law on Legislation (Experts' Proposed Draft),' 1 *Zhongguo faxue* (Chinese Legal Science) 11 (1997).

[167] Du Guangjian, supra n. 125; Zhou Yezhong, supra n. 76; Tong Zhiwei, "Legal Modernization Requires Eleven Elements of Constitutional Reform," 1 *Faxue* (Jurisprudence) 5 (1997); Zhou Yongkun, supra n. 40.

[168] Hao Tiechuan, supra n. 118; Gu Peidong, supra n. 72.

[169] Cai Dingjian, supra n. 8; Fang Tenggao, supra n. 148.

(5) Institutional reforms of the people's congress system have been proposed.[170] These include extending direct election to people's congresses above the county level (at present these higher level people's congresses are elected by members of the lower-level people's congresses, and only people's congresses at the county level or below are directly elected), reducing the number of deputies to the congresses so that they can work more effectively, lengthening the sessions of the congresses so that they have more time for their work, and institutionalizing and increasing their powers to supervise the work of government organs and officials. The latter point will apparently be addressed by the Law on Supervision, which is in the pipeline.[171]

(6) Effective supervision of the exercise of governmental powers is seen by many scholars as the key to the Rule of Law.[172] In addition to supervision by the people's congresses as representatives of the people as discussed earlier, some scholars also emphasize the important supervisory role of public opinion and the mass media. The people's right to information about governmental affairs and freedom of speech are advocated. For instance, it is argued that "in the domain of the struggle against corruption, there should be no 'forbidden zone' for news media."[173]

(7) As mentioned above, apart from corruption, the most serious problem that plagues the system of the administration of justice results largely from the local courts' subordination to the local government in terms of financial and personnel matters. Hence many scholars advocate a reform of the court system that would de-link the courts from the local governments. Suggestions include the use of the national budget to finance the local courts, the "vertical" administrative leadership of courts (by higher courts) and removal of their "horizontal" linkage to the local government structure, as well as the establishment of a dual court system (national courts and regional courts) in which the national courts (like federal courts in some federal states) have jurisdiction over cases that involve interests in more than one province or region. Other proposals relating to the judiciary

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[170] Zhou Yongkun, supra n. 40; Tong Zhiwei, supra n. 167.[170] Zhou Yongkun, supra n. 40; Tong Zhiwei, supra n. 167.

[171] Hao Tiechuan, supra n. 118.

[172] Ye Feng and Xie Pengcheng, supra n. 56; Fang Tenggao, supra n. 148.

[173] Ye and Xie, id. at 12.

include security of tenure for judges and better conditions of employment.[174]

(8) A few writers touch on the question of the reform of the system of Party leadership, which is in fact a crucial element of any future reform of the Chinese political system. As mentioned earlier, the central legal issue in this regard is the extent to which the organization, structure, functions, powers, responsibilities and operations of the Party should come under the purview of the law, given that it is financed by the state budget, its personnel are paid by the state, and it has the constitutional mandate to exercise "leadership" (the manner and procedure of which are not yet legally defined).[175]

The above relates to the more concrete proposals in the literature. It may also be noted that some scholars have addressed the more long-term scenarios in the development of the Rule of Law in China. The following are some examples.

One view is that the past, present and future of the legal history of the PRC may be divided into four stages: (1) "quasi-constitutionalism" (culminating in the first PRC Constitution of 1954); (2) "big democracy" (as conceived by Mao and exemplified by mass movements culminating in the Cultural Revolution); (3) "regularized politics" (as developed in the post-1978 reform era); and (4) "modern Rule of Law" (which belongs to the future). It is said that China is now in transition from stage 3 to stage 4.[176]

A second scholar uses the knife, the baton and the bridle to symbolize the three stages of legal evolution in the PRC. The period of "the knife" ran from 1949 to the early 1980s. Law was conceived as an instrument of class dictatorship and for the suppression of "enemies." Hence law meant primarily criminal law. The period of "the baton" began in the 1980s and continues to the present. Law is conceived as a tool for administrative management of people and the economy. This is an era of administrative law and economic law. The next period in China's legal evolution will be that of "the bridle." This will be the

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[174] See generally Hao Tiechuan, supra n. 118; Zhou Yongkun, supra n. 40; Cai Dingjian, supra n. 8; Gu Peidong, supra n. 72.

[175] See generally Hao, id.; Zhou, id.; Tong Zhiwei, supra n. 167; Jiang Lishan, supra n. 119; Zhuo Zeyuan, supra n. 119.

[176] Xie Pengcheng, supra n. 41. See also Ye and Xie, supra n. 56.

age of constitutionalism. Law will control the exercise of state power, prevent its abuse and protect the rights of citizens. It will attend not only to order and efficiency (the concerns of the previous eras), but also to justice, equality, freedom and democracy.[177]

A third writer suggests that the evolution of the Rule of Law in China may be viewed from three perspectives, each embracing three stages. In the first perspective, the transition is from (1) "doing things according to law" to (2) "ruling the country according to law" to (3) "ideal rule of law." China is now moving from 1 to 2. In the second perspective, the movement is from (1) "rule by the Party" to (2) "rule by the State" to 3) "rule by the law." China is now moving from 1 to 2. According to the third perspective, the development of the Rule of Law in China consists of three stages: (1) "the preparatory stage" (from 1978 to 1993, the year in which the constitutional amendment on the socialist market economy was introduced); (2) "the take-off stage" (from 1993 to 2010); and (3) "the formation and perfection stage" (post-2010).[178]

A fourth writer also adopts a long-term perspective, in this case up to the mid-twenty-first century. He distinguishes between the periphery and the core of the legal system, and uses a cost (risk)-benefit analysis to predict the development of these two parts of the legal system. In his theoretical framework, the periphery of the legal system relates to effective law enforcement and general obedience to law ("rule by law"), whereas the core of the legal system consists of constitutionalism and effective restraint of state power ("rule of law"). The construction of this core would mean a fundamental reform of the existing political system. He believes that China's construction of its legal system will have to begin with the periphery. The reform of the political system is a high-risk venture with uncertain benefits, which will have to be postponed until probably the middle of the twenty-first century, when the social and economic conditions (including the people's educational standards and the size of the middle and entrepreneurial classes) will be ripe for the reform.[179]

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[177] Cai Dingjian, supra n. 8. See also Cai Dingjian, supra n. 82.

[178] Zhuo Zeyuan, supra n. 119.

[179] Jiang Lishan, supra n. 119.

## CONCLUDING REFLECTIONS

As we review the substance of the theory of the Rule of Law, which Chinese scholars have been constructing in recent years, we may find most of the points they made commonplace. Is not what they are stating so obvious that it may not even be worth putting into writing? But a Western audience will have this feeling only because they live in a post-Enlightenment world which has taken for granted the liberty, equality, human rights, Rule of Law and constitutionalism that the Enlightenment thinkers advocated more than two centuries ago and that generations of revolutionaries and activists in the Western world have fought hard to win in the nineteenth and even the twentieth centuries.

Only if we take into account the burdens of history that lie on the shoulders of contemporary Chinese intellectuals shall we be able to appreciate the full significance of the developing theory of the Rule of Law as outlined in this article. These historical burdens include not only more than two millennia of imperial rule, which so often degenerated into despotism and tyranny, but also the Marxist-Leninist degradation of the Rule of Law and its associated values, as well as the explicit rejection and total repudiation of Rule-of-Law practices and values in China during the Cultural Revolution era, which left China in a state of total ruins in the late 1970s. After that time, some primitive structures of law and legality have been erected.[180]

Even after the reform era began in 1978, the reconstruction of legal theory has not been a smooth and straightforward process. A number of setbacks were encountered during which more liberal-minded scholars were accused of promoting “bourgeois liberalization.” These included a campaign against “spiritual pollution” in 1983, a campaign in 1987 against “bourgeois liberalization” following the students’ democracy movement in 1986 and culminating in the downfall of the Party General Secretary Hu Yaobang, and an even more intensive and extensive campaign along similar lines in the aftermath of the events leading to June 4, 1989. The movement since 1996 for the Rule of Law among Chinese jurists has only been politically possible because of the building momentum for reform since Deng’s southern trips in 1992, the constitutional affirmation of the concept of the socialist market economy in 1993, and President Jiang Zemin’s personal call for “ruling the country according to law” in early 1996.

[180] See generally Chen, supra n. 3.

The phenomenon of the developing theory of the Rule of Law in contemporary China may therefore be understood as a maneuver on the part of legal scholars in a complex political environment at an opportune moment, seizing hold of a golden opportunity to give a push to the development of the Chinese legal system in what they believe to be the right direction. As in the case of the French philosophers of the eighteenth century Enlightenment, the ideas advocated by the Chinese scholars may not be intellectually sophisticated, theoretically refined or rich in philosophical depth, and they are certainly not original, but their significance and impact (like the ideas of the Enlightenment) lie in the fact that they do address real problems in contemporary social and political life. The problems China faces revolve around the lack of effective legal, political and popular control over the exercise of the huge powers of the ruling apparatus of the State, Party and bureaucracy, and it is believed that the Rule of Law can provide a powerful solution to many of these problems.

It may be pointed out that the theory does not go far enough. It falls short of querying the principle of the "leadership" of the CCP. It does not address sufficiently the question of human rights, particularly the civic freedoms of speech, publication, assembly and association, not to mention the political rights associated with Western-style free elections. It also eschews inquiry into the question of private property rights as a possible pillar of civil society, social contract, private law and the system of rights, even as it tries to rehabilitate and even glorify these latter ideas. We can therefore observe clearly that there are still untouchable subjects and forbidden zones in academic discussions in contemporary China. The Marxist ideologues' critique (discussed earlier) of some of the concepts advocated by the theorists of the Rule of Law demonstrates how much the dogmas of the Marxist orthodoxy as codified by the Soviet and Maoist states are still alive and well in China in terms of legitimacy, and can be easily resurrected to become the "mainstream" opinion should the political climate turn against liberalization at some future point. But for the moment, scholars who believe in the Rule of Law are already doing their best.

With regard to the insights of neo-Marxism, critical legal studies and various strands of postmodernism in the West, it might be suggested that the Chinese theorists of the Rule of Law are naive in their unqualified embrace at face value of the discourse of reason, subjectivity, liberty, equality, rights, progress and modernization. However, I believe this criticism would miss the point. What must be remembered is that the West has already developed elaborate legal systems that more than fulfill the highest hopes and noblest dreams of the

thinkers of the Age of Enlightenment. The postmodernist takes these achievements for granted, and goes on further to expose the hypocrisy, arrogance and darker sides of modernity. The problem now confronted by the Chinese people is the non-existence of an advanced legal system that protects basic rights and guarantees equality of all before the law. They need to construct a legal system that meets their needs and aspirations, not to deconstruct a legal system that is reaching the limits of development. It is therefore right, I believe, for the Chinese theorists of the Rule of Law to put aside postmodern concerns.[181]

But it can also be pointed out, particularly by those who appreciate the past achievements of the long-lasting Chinese civilization, that contemporary Chinese scholars are probably too quick and ready to turn to the intellectual resources of the West in developing their theory of the Rule of Law, and to discard the values and resources of the Chinese tradition. It is important to bear in mind in this regard that "Chinese tradition" is by no means a monolithic whole. There have always been conflicting lines of thought and modes of practice in Chinese history, and the fact that Confucian paternalistic rule triumphed most of the time during the last two millennia does not mean that it is the eternal essence of Chinese culture.

For example, it has often been pointed out that in the late Ming and early Qing dynasties, there was an anti-authoritarian strand of thought, as exemplified by the great philosopher Huang Zhongxi who advocated a doctrine of the "rule of law" with the law being in the interest of all under Heaven, instead of the "rule by law" that had been practiced hitherto with law representing only the interests of the emperor, his ancestors and successors.[182] The leading neo-Confucian philosophers of this century also advocated the introduction in China of Western-style constitutional democracy, and even argued that this would be the ultimate fulfillment in the political sphere of the humanist Confucian project.[183] The successful introduction of Buddhism into China after the Han dynasty is often cited as a paradigmatic example of Chinese civilization borrowing

[181] See the debate regarding whether postmodern thought is relevant to contemporary Chinese legal developments in Ji Weidong, "Towards 21st Century Law and Society," 3 *Zhongguo shehui kexue* (Social Sciences in China) 104 (1996); Zhu Suli, "Postmodern Thought and the Jurisprudence and Legal System of China" 3 *Faxue* (Jurisprudence) 11 (1997).

[182] See W.T. de Bary, "Chinese Despotism and the Confucian Ideal: A Seventeenth-Century View," in *Chinese Thought and Institutions* 163 (John K. Fairbank, ed. 1957).

[183] Chen, supra n. 22.

important resources from the outside.[184] We may therefore interpret the current efforts of Rule-of-Law theorists in China as an attempt to foster a new Chinese political culture that is liberal, constitutional and democratic, in contrast to the imperial and Maoist political cultures, which were both dogmatic, authoritarian and paternalistic.

And this, after all, was also what the Enlightenment was about in Western Europe more than two centuries ago. I use the term "legal enlightenment" in the title of this article, because I find a kind of parallel between the intellectual currents in contemporary China and their relationship with contemporary society on the one hand, and the intellectual movement in Enlightenment Europe and its relationship to social conditions on the other hand. For China, the May Fourth Movement eight decades ago was also an enlightenment, but the social and economic conditions were then not ready for liberal constitutionalism, and the movement ended with the triumph of Marxism-Leninism as a new dogmatism. Will this second "enlightenment" fare better? In the last two decades, economic reform—China's second revolution—has transformed many shabby Chinese towns into modern-looking metropolises. "Material civilization" of the kind seen in the West is clearly in the making. Will the "spiritual" or "institutional civilization" that the Rule of Law embodies also arrive?[185] If the modernity that was first experienced in the West can and will be globalized, which I believe can and will, then this question can be happily answered in the affirmative.

[184] See, e.g., W.T. de Bary, *East Asian Civilizations: A Dialogue in Five Stages* (1988).[185] On the concepts of spiritual and institutional civilizations and their relationship with the Rule of Law, see Yifa zhiguo yu jingshen wenming jianshe (*Ruling the Country According to Law and the Construction of Spiritual Civilization*, Liu Hainian et al. Eds., 1997); "Notes on the Conference on *Ruling the Country According to Law and the Construction of Spiritual Civilization,"* 3 Faxue yanjiu (CASS Journal of Law) 3 (1997).

[185] On the concepts of spiritual and institutional civilizations and their relationship with the Rule of Law, see Yifa zhiguo yu jingshen wenming jianshe (*Ruling the Country According to Law and the Construction of Spiritual Civilization,* Liu Hainian et al. eds., 1997); "Notes on the Conference on *Ruling the Country According to Law and the Construction of Spiritual Civilization,*" 3 Faxue yanjiu (CASS Journal of Law) 3 (1997).

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# NO PAIN, NO GAIN: Steps Toward Securing the Future of China's Legal System

Peter Corne

## INTRODUCTION

Laws that embody norms transplanted from foreign legal systems normally face substantial implementation problems. The experience of many Asian countries during the colonial and post-colonial periods shows that legal regulation is less relevant to social reality than are customary norms.[1] Imported legal concepts may not correspond with entrenched societal values. Consequently, people may be unwilling to adjust their behavior to fit the new legal standards.

This is the case in the People's Republic of China (PRC), which since 1978 has been establishing a legal system substantially drawn from continental and common law prototypes. China has pinned its future on its adoption of Western economic models, and for continued economic development it needs to further amplify economic linkages with the West and Japan. Thus, a legal system acceptable to foreign investors has become a key factor in attracting Western and Japanese support. However, the adoption of such a system necessarily entails a clash between the norms as expressed in law, and pre-existing attitudes as they have evolved under current and past regimes.

This article briefly outlines the key problems China faces in establishing a legal order. Many of these problems are derived from the persistent gap that exists between the legal concepts imposed by the regime and social values. Analysis is complicated by the profound influence of Marxism, itself largely a Western construct, on China's underlying normative reality over the last half century.[2] Not only has China been adopting Western legal norms against a cultural background unfamiliar with—or even hostile to—the impartial application of universal rules, it has been applying them in the context of a political system that for many years denied law any role whatsoever in societal regulation.

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[1] For an analysis from this perspective of various Asian countries other than the PRC see Chiba, M., ed. *Asian Indigenous Law in Interaction with Received Law* (London: KPI Limited, 1986).

[2] With respect to China, "underlying normative reality" does not merely refer to customary law. It is rather a body of attitudes that has evolved as a result of the interaction between customary norms and socialist ideology and policy.

In this article I tentatively seek to explain, at least in part, why a huge discrepancy continues to exist between law in the PRC *on its face* and reality in China, how law is actually being applied in practice in order to bridge this normative gap, how this process of "applying law to reality" has tended to result in inconsistent implementation of law, and how lack of legal autonomy contributes to the problems of implementation.[3] I assert that there is a grave risk that the existence of these features may affect the future integrity of China's developing legal system, as the ultimate likely result is the undermining of the legitimacy of law and of the development of government based on law. Current and prospective attempts to address some of these issues will be touched upon.

## THE PRC LEGAL SYSTEM: Why Input Does Not Correlate with Output

China's formal legal structures are heavily compromised in the course of their execution in order to incorporate customary practices. Extra-legal norms intrude and gradually become an important factor shaping the content and the implementation of legal norms. Generally, it is fair to say that extra-legal norms are allowed to intrude to a far greater extent than they do in the course of implementation in developed countries.

The intrusion of extra-legal norms is permitted, if not encouraged, because legal flexibility is considered a virtue. China's leaders consider law to be a flexible device used to implement policy initiatives. As legal certainty is not accorded a high priority, law is not insulated from extra-legal influences. Thus, at each stage of implementation following enactment, laws that are normally rather broad in nature are manipulated by administrative authorities charged with implementation so that they tolerate and even incorporate such influences.

Laws are subject to adjustment through reinterpretation. This leads to the distortion and compromise of legal norms as expressed in the original law. One form of reinterpretation, administrative specification, is the process by which law and regulations are interpreted, at one level, by State Council departments, and at another level, by local people's congresses and

[3] For a fuller elucidation of the author's ideas on this topic, see *Foreign Investment in China: The Administrative Legal System,* published by Hong Kong University Press in 1997, on which this article is based. Sections of this article are excerpted from the author's chapter "Creation and Application of Law" appearing in the loose-leaf publication *Doing Business in China* published by Juris Publishers, and from the author's article published in the May 2000 issue of *China Law and Practice.*

administrative bodies, which apply them to local reality. Law is in effect brought down or adjusted to local normative reality. Apart from administrative rules *(guizhang)*, this is often carried out by the formulation of normative documents *(guifangxing wenjian)*, many of which are created and applied by local governments at the county level and below in the form of administrative measures (*xingzheng cuoshi)*.

Higher administrative bodies also practice specification by issuing administrative rules or normative documents to regulate certain technical areas under their jurisdiction. These documents, which normally are revealed to a limited segment of the Chinese bureaucracy, reflect prevailing policy and provide much of the detail missing in higher statutes or regulations. These directives are interpretations of statutory law and in some instances, contradict the literal wording of the relevant statutes. History has shown how these documents have been issued to redefine statutes in the face of temporary changes in China's economic climate.

Higher administrative authorities also possess another device through which they can construe law and regulations in a way that may reflect departmental policy and/or the social reality of the regulated. This device is known as "administrative interpretation" *(falu de jieshi)*. Whereas "specification" involves the enactment of implementing legislation, administrative interpretation is an authoritative supplement and accretion to legislation. In the PRC, only the enacting body, its representative, or the controlling organ is competent to interpret any piece of legislation in a manner that is generally binding. Thus the State Council and its subordinate ministries and departments have the authority to make interpretations concerning the specific application of administrative rules and regulations not subject to judicial and procuratorial work.[4] Similarly, responsible departments under local people's governments are charged with making interpretations concerning the specific application of laws and regulations of a local character.[5]

Broad discretions further enable implementing agencies and/or their officials to often substitute extra legal norms, such as preferential treatment by way of "*guanxi*" (connections), for the norms espoused by the law. Blatant non-

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[4] The Resolution on Strengthening the Legal Interpretation of Laws ("the Resolution"), passed by the Standing Committee of the Fifth National People's Congress as an amendment to the 1955 Standing Committee Resolution on the Interpretation of the Law, Item 3.

[5] Item 4, the Resolution.

implementation of law is another device that reduces the impact of law on normative reality. This is very apparent in the PRC in the area of taxation.

Sometimes tacit policies of non-implementation arise out of attempts by local governments to ameliorate the effect of central legislation that is seen to be unreasonably restrictive in its impact and thereby harming business growth. One recent example in 1998-99 was the tacit countermeasures that were taken at the local level in Shanghai's Waigaoqiao Free Trade Zone to soften the impact of a general tightening up of foreign exchange controls, particularly on foreign currency flowing in and out of free trade zones in China.

This situation is perpetuated by weak and perfunctory legal supervision by the courts, administrative agencies and party organs charged with this function. China has taken steps toward instituting a system of general administrative accountability by providing in the *Administrative Litigation Law* of 1989 for review of the *legality* of certain *specific* administrative acts (i.e., orders against specific objects) and not abstract administrative acts (i.e., instruments of a universal binding nature).[6] Review of the legality of abstract administrative acts, the legality of internal specific administrative acts or the *appropriateness* of specific administrative acts is not within the jurisdiction of the courts, the latter two items being left to administrative bodies under the *Administrative Reconsideration Regulations*, as amended, of 1999, which are forums of questionable partiality in this context.

In Article 126, the PRC Constitution of 1982 provides for the judiciary's independence and freedom from the interference of other state organs, as do Articles 3 and 49 of the Administrative Litigation Law.[7] Thus, courts are in theory accorded a measure of *functional* independence, although actual *structural* independence is precluded by their subservience to the National People's Congress (NPC) and, by implication, to the Chinese Communist Party (CCP). Practice, particularly at the local level, does not, however, reflect functional independence, particularly as appointments and funding of courts and judges are inexorably linked to local government. The trial judge is moreover very susceptible to pressures, both internal and external to the court, as his decision is only preliminary and may at any time be overridden by an adjudication

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[6] That is, acts in relation to a specific person or matter.

[7] In a recent survey, 79.3 percent of lawyers and 80 percent of judges stated that "judicial independence" in this context means freedom from interference from administrative organs and social bodies, and not from the party.

committee within the local people's court under the principle of democratic centralism.

In China the characteristics pertaining to legal implementation can be understood to arise as a result of an adjustment by regulators to their own expectations and to the expectations generally held in the society around them. These expectations may vary widely from the regulatory norms generally espoused in law. Enforcement practice thus adopted reinforces the expectations held by the regulated of *actual* regulatory behavior rather than of the law. In this way, agency personnel settle the shared understandings that constitute actual regulation. These shared understandings are the true normative framework underlying administrative regulation not reflected by explicit legal doctrine.

## THE IMPLICATIONS OF CONTINUED LEGAL DISLOCATION

The existence of the features outlined above is not meant to suggest that for a period of time during the development of its legal system, normative dislocation in China should not be expected. Similar to many other developing countries, China's legal system is to a large degree not a product of its indigenous social, cultural, political and economic conditions. But this process is occurring in China in an unusual social and normative context. An authoritarian regime is imposing foreign-inspired legal norms against a background of fragmenting popular value systems. During the twentieth century, China has experienced the disintegration of the Confucian and the Maoist collective belief systems and the emergence, after the failure of the utopian project, of unprecedented levels of cynicism and disillusionment. Law is being infused into a society that is rapidly being engulfed by a normative vacuum. The establishment of a properly functioning legal system may be China's only hope for future social order.

Continued normative dislocation has potentially grave consequences for the legitimacy of law and the legitimacy of government based on law. It does not augur well for a government that is attempting to regain lost legitimacy through the development of a modern legal system. The law's overt purpose is to assist China's modernization by replacing policy decree and customary practices with a stable universal framework of normative behavior. However, in practice the reverse is occurring; law in its application to society is being readjusted in accordance with extra-legal norms and policy exigencies in the course of implementation. It does not appear that regulators and the regulated are internalizing the norms and ideals underlying the legal regime. Enforcement

patterns still tend to reflect whether or not one can attract the patronage of the "right official" for the personalized "quick fix" rather than codified substantive or procedural norms.

This promotes an atmosphere of uncertain and haphazard implementation, which undermines the legal norms that the legislature and China's leadership want to promote. Ultimate outputs do not correlate with legal inputs. In this context, legal norms are rendered virtually meaningless. Such patterns of legal enforcement, so prevalent in the PRC, serve to subvert the development of a system in which legal norms can be consistently and predictably applied. They also threaten China's future economic development as they deprive the market of a dependable and consistent normative basis on which rational economic activity can be conducted.

Law is still relatively undifferentiated from administrative and direct political planning and control. However, the normative content and operation of the legal system must be analytically and functionally separate from politics for a "general legal order," as coined by Talcott Parsons, to arise. Parsons uses this term to describe a legal system that is "applicable to the society as a whole rather than to a few functional or segmental sectors, highly generalized in terms of principle and standards, and relatively independent of both the religious agencies that legitimize the normative order of the society and vested interest groups in the operative sector, particularly in government."[8] Such a "general legal order" must override special status and provide a universal system of rights and obligations independent of kin and locality allegiances. In China, law appears universal in form, but loses this feature in the course of specification and implementation when it becomes the servant of such allegiances.

Failure to properly institutionalize legal rules and the means of enforcing them augurs badly for the regular operation and future development of legal institutions. If Parsons is correct in his assertion that a legal system must develop a high degree of functional autonomy for society to continue to evolve, further evolution of Chinese society will be inhibited by the inability of the PRC's legal system to break free of the polity and achieve an adequate measure of true functional specialization.

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[8] Ibid., 351.

## PROPOSALS FOR FURTHER DEVELOPMENT AND REFORM

### Further Separation of Law and Polity

It is apparent that law must be allowed more autonomy so that it can normatively control the forms of political and economic action, rather than *vice versa*, as is presently the case. China must allow a separation between law and polity so that the nascent legal structures are not further undermined and a viable and legitimate legal system is able to emerge. There is however a question as to whether and to what extent legal autonomy would be tolerated within the socialist model. Although structural separation would probably not be tolerated by the party in the foreseeable future, a greater degree of functional separation might be achievable.

Would the party voluntarily subject itself to the Rule of Law? Would not this go against the idea of the party's leading role? It should be noted that legal autonomy is already nominally enshrined in the Constitution of the PRC.[9] Even the Constitution of the CCP states that the party must act "in accordance with the law"[10] so such a development is not altogether out of the question. Already there has been intermittent public debate on this issue during periods of relaxation of government censorship of such discussion.[11] Further, as society evolves and social order becomes increasingly difficult to maintain, the party must for the sake of its credibility forge some kind of social contract with its people, as the vestiges of its former legitimacy are being swept away. For the sake of its survival the party must sooner or later allow a much greater degree of legal autonomy than it does presently.

The authority to specify and interpret law is the source of enormous power—power that can be easily abused and which administrative organs are anxious to protect. Administrative bodies should no longer be charged with the power to issue official interpretations with respect to their own rules and regulations. Moreover, they should be able to enact implementing rules only if they have been specifically entrusted with this power by an organ of state power, that is, the NPC, its standing committee or their equivalents at the local level. This power should not be expressed in terms so broad that its gives administrative bodies *de facto* lawmaking power. The concept of "void for uncertainty" should

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[9] Article 126, Constitution of the PRC (1982).

[10] General Programme, Constitution of the CCP (1982), translated in *Beijing Review,* 1982, No. 38, 8.

[11] There have been similar exhortations in the press as recently as 1999, usually at significant risk to the authors.

be introduced so that a supervisory body charged with overseeing the validity of rules and regulations can declare vague entrustment clauses invalid.

## Enhancement of Drafting Procedures

Apart from entailing a major commitment at the political level, such a transformation would be facilitated if changes were made to the content of some legal regimes. Some structural measures would achieve a greater degree of functional legal autonomy. First, legal drafting must be further improved so that laws are more certain and less subject to the vagaries of *ad hoc* interpretation. Legal drafting, although greatly improved from ten years ago, still tends to be characterized by such features as principle-like pronouncements, vagueness and ambiguity, broadly worded discretions, undefined terms, omissions and general catch-all phrases, that assist flexibility in the issue of lower implementing documents. The current attitude towards lawmaking still tends to favor short-term flexibility and the advantages of vagueness over long-term considerations. This is particularly true in the case of administrative laws for which adaptability is upheld as a meritorious feature. Consequently, most economic law in China is meant only to brush stroke basic policy, allowing any problems that arise to be solved on a case by case basis.

In the case of controversial legislation, such as the PRC Bankruptcy Law (1986), PRC Security Law (1995), PRC Securities Law (1999) or PRC Legislation Law (2000), some of these features (in particular, "omissions") are a result of compromise (or lack of it) between institutional power-brokers. An example is the status of statutory interpretations issued by the Supreme People's Court and the Supreme People's Procuratorate in the *Legislation Law*. Rather sketchy provisions appear in Chapter 4. Statutory interpretations have been issued by the National People's Congress or its Standing Committee only seven times since 1982, the most well known being the interpretation issued last year on the *Hong Kong Basic Law*. In fact, the Supreme People's Court through its Gazette has unofficially assumed the role of interpreting national law.[12] In the 1997 draft of the *Legislation Law*, the Supreme Court was limited to the role that was originally set out in the 1981 *Resolution on the Interpretation of Law* issued by the National People's Congress ("the Resolution") of only providing interpretations arising from application of the law to concrete cases. Apparently, the Supreme People's Court wished to eliminate the right of interpretation of the Supreme People's Procuratorate and avoid the situation of conflicting interpretations emanating from both bodies following the *Criminal Procedure Law*. The Procuratorate was said to have countered with accusations

[12] See Nanping Liu, *Judicial Interpretation in China* (Sweet and Maxwell, 1997).

that the Supreme People's Court frequently exceeded its power of interpretation anyway. The result was a stalemate, the dropping of the article on judicial interpretation and the retention of the status quo.

## Development of a Better Body of Procedural Law

There are three main ways through which administrative bodies have been able to exercise a power of discretion. The first is through taking advantage of discretion as already expressed in law, i.e., through application of law, and the lack of well-developed procedural law. Many developed legal systems have safeguards in place that either limit the degree of vagueness of a discretionary power, or put procedural rules in place to ensure that there is always an element of transparency in the way discretion is exercised. China in certain areas is gradually starting to promulgate laws and regulations that promise some increase in procedural transparency, but the country still has a dearth of procedural law.

Well-established administrative procedures allow courts to check on the exercise of discretion used in the course of legal implementation. However, in the PRC there is no underlying principle of fairness, natural justice or due process, although the beginnings of a concept of natural justice have appeared in the *Administrative Punishment Law*, promulgated in 1996 (in the form of hearings for those who are the intended object of a punishment order), and in other local regulations.[13] This makes it very difficult for a review body to check on the exercise of discretion. With respect to discretionary acts, no adequate procedural safeguards currently exist. There have also been attempts to draft a procedural law, but reports indicate that these efforts have become bogged down.

Although Article 54-2(c) of the *Administrative Litigation Law* provides that an administrative decision should be quashed if statutory procedures have not been followed, in practice, courts very rarely overrule the decision of an administrative body on the basis that the act was executed illegally for procedural reasons. This may be because the courts rarely investigate whether an act is illegal in a procedural sense. They normally focus merely on the substantive aspects of the administrative act.

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[13] Another example, Article 15 of the *Guangdong Province Administration Provisions Concerning Cadres on the Chinese Side of Enterprises with Foreign Investment,* announced in *Wen Wei Po,* July 22, 1988, which provides that "in respect of the handling of cases, the enterprise trade union must be consulted and the person in question must be given the opportunity to give an explanation in a hearing."

Even if courts notice that something is procedurally amiss, perhaps reflecting their comparative lack of status to courts in many other legal systems, they have tended to avoid confronting this problem as they fear *qingmian wenti* (making the administrative body lose face) and the fact that the administrative body normally finds such a judgment very hard to accept. In such cases, courts tend to resort to *biantong banfa*—adopting appropriate adaptations according to specific conditions—meaning that they avoid ruling in a court judgment that an administrative act is invalid on the basis that the administrative body has contravened the procedural law. Rather, they prefer to rule that the administrative act still stands, but that "in future" the administrative body should pay more attention to procedure. This in effect means that courts are prepared to overlook administrative procedural irregularities.[14]

## Enhancing Accountability

Under the present circumstances, given the vagueness of law and the impediments to supervision of its implementation, the government cannot be made truly accountable for its acts. This helps to explain the law's apparent lack of normative binding force. The vague nature of Chinese law allows administrative bodies to use their discretionary powers to apply normative systems different from those the legal drafters intended. Thus, the current situation leaves much to be desired in terms of transparency as well as accountability.

At the same time, the government should be made accountable for its interpretation and implementation of law so that the regulated are more certain about the actual criteria being applied by administrative bodies to assess whether or not behavior is legal. Without an elevation of certainty and consistency, the new legal norms will never become properly established as the reference against which "correct" or "appropriate" behavior is assessed.

For this to occur, rulemaking must be better supervised and subject to stricter guidelines. Rulemaking at the level of the State Council and many local congresses and governments is not presently subject to anything more than very rudimentary procedural law, and this is manifested in vague drafting processes out of which it is difficult to ascertain whether an instrument has been legally enacted. Lack of procedural law also contributes to the ease with which administrative agencies at the central and local levels can amend, repeal

[14] Jiang Ming An, Wang Dian Quan and Liang Jing Tang. *Xingzheng Anli Jingxi* (Analysis of Administrative Cases) ( Beijing China People's Public Security University Press, 1990), 41.

and re-enact legislation in accordance with the whims of departmental policy. China needs to introduce more detailed procedural laws and rulemaking at each level that clearly define the criteria that must be satisfied for normative documents to possess binding legal effect.

Recently, there have been legislative improvements in this area. Chapter Five of the *Legislation Law* generally restates the principles of review of inconsistent enactments introduced in other legislation and directs that lower level enactment bodies should file these instruments with higher level bodies. Responsibility for repeal of inconsistent or illegal lower level enactments is also accorded to specific higher level bodies.

To an extent it is helpful, for example, to have stated with some degree of certainty the principles defining what type of enactment prevails over another, and for the relevant body responsible for review of inconsistency or illegality to be nominated in each case. For example, in the case of an inconsistency between a local regulation issued by a local people's congress ("local regulation") and an administrative rule issued by State Council department ("departmental rule"), the State Council is responsible for formulating an opinion, and where it deems the departmental rule should apply, it should request the Standing Committee of the National People's Congress to make a ruling. Or where a departmental rule conflicts with a law, the National People's Congress is empowered with the right to cancel or amend the offending rule. An example is the provision in the *State Administration of Industry and Commerce Certain Provisions Concerning the Prohibition Against the Infringement of Trade Secrets,* enacted in 1995, which arguably illegally expands the application of the provisions of the *PRC Anti Unfair Competition Law* of 1993 on commercial secret protection from "business operators" to employees. A further example is the *State Council Supplementary Notice on Issues Concerning the Trial Implementation in Several Cities of State Owned Enterprise Bankruptcy and Merger and Reemployment of Staff and Workers* of March 2, 1997, which claims to override the priorities and rights of creditors expressed in the *Civil Procedure Law* of 1991, *PRC Enterprise Bankruptcy Law* of 1988 and *PRC Security Law* of 1995.[15]

No actual mechanism for putting these principles into effect has yet been established. The bodies mentioned lack the resources to take on a checking or review function on any scale at present. And one of the key proposals in the

[15] See Donald Clarke, "State Council Notice Nullifies Statutory Rights of Creditors," *East Asian Executive Reports,* April 15, 1997.

1997 draft of the *Legislation Law*—the creation of committees at various levels of people's congress and in the State Council, and the granting to citizens, social and party institutions, enterprises and other units of the right to apply to such committees for the invalidation or amendments of legislation—was dropped. One can only hope that the *Legislation Law* will provide the impetus for implementing legislation that creates such bodies in the near future. Otherwise, in practice, there will be no mechanism by which the principles on legislative consistency can be implemented by way of formal application.

This situation is already acute because the people's courts lack the power to formally strike down inconsistent or illegal enactments. The best that they can do, pursuant to Article 52 of the Administrative Litigation Law, is to refrain from applying inappropriate rules issued by central government departments or local people's departments.

Administrative review bodies are in a slightly better position in this regard than the courts, as pursuant to Article 27 of the *Administrative Review Law*, they may, in the course of administrative reconsideration of a specific administrative act, ask the appropriate body to repeal an "illegal" abstract administrative act that the review body has detected and on which the specific act is based. Repeal by way of application by an actual party to reconsideration is limited however to "other normative documents" below "rule" status, according to Article 7.

China's lack of an independent legal tradition and the current low status of the courts will make it very difficult to extricate the courts from the webs of party and governmental influence, which permeate their decision-making processes and undermine their value as a supervisory institution. While recommending that the courts should be vested with the powers to review the appropriateness of an act and to declare laws, regulations and rules invalid, it is conceded that under the present regime it is unlikely that operation independent from party influence would be permitted in practice. At this point, it should be acknowledged that there appear to be attempts underfoot by the Supreme People's Court to increase the standard of judges by making appointment criteria more transparent, and to make the position of judges and of courts less susceptible to local governmental influence by prying judges away from financial dependence on local government and toward centralized funding. China's legal profession has, comparatively speaking, made great strides in distancing itself from governmental influence in its activities, although residual strong-arm tactics on the part of the party, such as a directive not to act for members of the banned *farengong* sect, was reportedly issued last year.

China desperately needs an independently constituted body with the authority to deal with the problem of legislative inconsistency on an ongoing rather than an *ad hoc* basis. This body should be equal in status to the NPC and have the right of final approval over all enactments prepared by the NPC, its standing committee and the State Council. It should also be responsible for checking all *guizhang* enacted at the national and local levels for consistency. There should be a requirement that these administrative rules be lodged with the body for filing, and their validity should be subject to the approval of the body. The same should apply to enactments of local people's congresses. The body should also be able to accept and process complaints with respect to alleged inconsistencies within laws, regulations and rules.

The exercise of administrative discretion should be made clearly reviewable by the courts to increase accountability of the executive. Courts should be able to review administrative acts for their appropriateness. This will enable them to check on the exercise of administrative discretion in circumstances where there is no question about the legality of an administrative act. Moreover, the provision of clear procedural safeguards will also assist courts in the review of administrative discretion. Although Article 54-2(c) of the Administrative Litigation Law already provides that an administrative decision should be quashed if statutory procedures have not been followed, in practice, courts have had little on which they could base a decision that an administrative act is illegal in a procedural sense. As well-established administrative procedures also allow courts to check on the exercise of discretion, the enactment of an administrative procedural law that incorporates the requirements of fairness, natural justice and due process will accord a further method by which courts can review the exercise of discretionary power.

The body proposed above should also be charged with supervising the performance of supervisory bodies. Its powers should be strictly delineated so there is no doubt as to the outcome of adverse findings of an investigation. It should be charged with the power to dismiss any government leader, supervisory officer or other administrative officer that it finds guilty of dereliction of duty (such as failure to investigate a case), including partial application of law. Cases that involve an element of bribery or embezzlement must be handed over to the PRC Procuratorate for prosecution. With regard to the limitations on investigatory powers of the Ministry of Supervision, the new supervisory body should be established on a par with the NPC, or if this is impossible, as a body inside the NPC independent of the NPC Standing

Committee with the power to investigate any leader within the NPC, State Council, the people's courts, the people's procuratorate or the CCP.

There have been attempts to draft a *Supervision Law* that reportedly grants the National People's Congress similar powers, but the controversial nature of this law has led to interminable delays since it was first proposed over a decade ago.

### Abolition of Alternative Normative Regimes

The self-executing powers of administrative disciplinary sanction, administrative punishment and the party sanctioning system should be abolished, as they function as alternative normative regimes to law despite the intention that they should function to complement law. In fact, they are helping to undermine the legal system by marginalizing the relevance of legal sanctions. Administrative disciplinary sanctions and party sanctions should be reduced to the power of dismissal and vested exclusively in the independent supervisory body proposed earlier. The imposition of administrative punishment should be made subject to court order in all cases. All types of administrative detention should be abolished. Most importantly, Article 44 of the Administrative Litigation Law should be altered to allow the suspension in all cases of the implementation of administrative sanctions subject to judicial review, no matter what the circumstances.

The imposition of administrative disciplinary and party sanctions under the system practiced currently are essentially subjective, imposed at the leaders' whims. They are unreviewable in the courts but, given the nature of China's personal file system, carry grave consequences for the person at whom they are directed. Thus, the system is open to abuse through *guanxi* and political influences. Equality of treatment is alien to those who currently administer the system of administrative disciplinary sanction and this does nothing to encourage the expectation of equality before the law. If such sanctioning power is taken out of the hands of administrative agencies and put in the hands of an independent body, all officials, whether lower-ranking civil servants or leaders, will—one hopes—become accustomed to a system that embodies the concept of impartial treatment and the elimination of *guanxi* influences.

## ASSESSMENT OF PROSPECTS FOR REFORM

There are as yet no indications at a formal level that the party may be inclined to consider a structural separation of party, legislature, judiciary and executive. The CCP Constitution retains references to its active supervision over

enforcement of the Constitution, laws and regulations of the state.[16] Needless to say, the party continues to exercise "guidance" over the judiciary through its political-legal committees at each level.

The idea that the party is above the state and the judiciary has been questioned in legal circles. In 1994, for example, in an issue of the prestigious academic legal journal *Faxue Yenjiu (Legal Research)*, PRC legal scholar Guo Daohui[17] implicitly attacked the nature of the CCP's "leading role," arguing that its power to lead is different from state power and cannot be higher than the people's sovereignty as represented by the NPC and people's congresses.[18] Some months later, China's top legal newspaper, the *Legal Daily,* ran an article calling for true judicial independence and for the party to stop interfering in the conduct of court cases.[19] A 2,000-word petition, drafted by a group of scholars, writers and former Communist party members, including former *People's Daily* editors Wang Ruoshui and We Xuecan, was presented to the NPC and the CPPCC just before their 1995 session, calling for the establishment of an independent legislature and judiciary to police the government and the CCP.[20] There have been further attempts to petition the NPC since then.

The various flaws in China's emerging legal system can be addressed, particularly if the sensitive issues of structural separation of powers and the total elimination of party interference are thrown open to debate. The problems identified in this article must be progressively rectified for the legal system to retain legitimacy. If the system is allowed to develop without rectification and continues to build upon the same imperfect foundations, it will continue be considered a mere extension of the polity, embodying norms that represent political expedience, as flexible and transient as policy itself. If action is not taken, China's legal system will continue to be undermined by normative

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[16] General Programme, Constitution of the CCP (1982), translated in *Beijing Review,* 1982, No. 388.

[17] Guo Daohui is author of the previously cited *Zhongguo Lifa Zhidu* (The Lawmaking System in China), Beijing *Renmin Chubanshe* (The People's Press), Beijing, 1998.

[18] Guo Daohui. "Authority, Power or Right: Pondering Relations Between the Party and People's Congresses from a Legal Perspective," reported by Kuo, H.C. "Academic Circles Challenge China's System of Party Leading the Government," *Lien Ho Pao,* April 14, 1994, in *FBIS,* April 15, 1994.

[19] "A Call for Judicial Independence," *Legal Daily,* May 23, 1994, The daily was subsequently censured for running this and another article calling for legal protection of the news media. "*Fazhi Ribao* censured for Articles on the Judiciary, Media," *FBIS,* September 2, 1994.

[20] "Intellectuals Call for Graft Inquiry," *South China Morning Post,* February 27, 1995.

dislocation, reinterpretation, lack of implementation and corruption, to the extent that it will cease to command much relevance in a normative sense. Thus, action must be taken before it is too late to ensure that China secures its legal future by moving towards a more genuine "Rule of Law."

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# RULE OF RULES: An Inquiry into Administrative Rules in China's Rule of Law Context

Xixin Wang

## INTRODUCTION

In every society in which the ideas of the Rule of Law prevail, an enduring question remains: What kind of law should govern the society? Aristotle once defined the core components of the Rule of Law as (1) all laws must be obeyed by a society; and (2) laws that are observed by the society must be good.[1] The essence of this idea is the concept that Lon Fuller had termed "the morality of law."[2] Legal philosophers have been debating this issue for thousands of years with no agreement shared by different cultures. And that's one reason why candid and open dialogues are critically needed among different societies to understand the ideas of the Rule of Law and to accept them.

Beyond the debate over the "morality of law," we must consider yet another phenomenon in modern Rule of Law states. Common people, legal scholars and government officials are seeing that the family of law in modern society is expanding as result of numerous agency-made rules that have been established in every legal system. Today, in China, as in every country adhering to the Rule of Law, agency rules comprise a huge part of the family of law, through which an individual's life is regulated, and government power is exercised. It is in this fact that we must recognize that the Rule of Law in modern society is in reality "Rule of Rules."

In China, as in any other country, when we say that individuals are regulated "from the cradle to the grave," we recognize the reality that much of our lives has come to be governed by administrative rules. According to statistics from the Legal Affairs Office of the State Council, as of 1998, the legal system featured some 7,000 rules made by ministries and some 18,000 by local governments. These numbers, however, are not so surprising. Actually, in some

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[1] Aristotle, *Politics,* 1286a. See also Sir Ernest Barker, *The Political Thought of Plato and Aristotle* (Dover, 1959).

[2] Lon Fuller, *The Morality of Law,* 2nd ed. (New Haven: Yale University Press, 1969).

countries, such as the United States, the figure is even higher.[3] It is common today that agency-made rules completely dwarf laws enacted by legislatures, whether in the West or the East.

Rule-making power is an outstanding feature of the modern administrative state and its agencies. In the present century, agency rule-making powers are the rule rather than, as they once were, the exception. When Bentham inveighed against judge-made laws, he claimed that law-making power was only for the elected representatives of the people. This theory had its heyday in the nineteenth century, when the enacted law was for the most part produced directly by the legislature. However, when the twentieth century administrative state arrived, the legislature itself could not directly perform the vast tasks of regulation and guardianship. Rule making came into its own as a potent weapon in the governmental arsenal.

Confronted with the reality that agency rules serve as legal norms inevitably affecting individual rights and the way government exercises its power, we have good reason to believe that the success of the Rule of Law to a large extent depends upon whether and to what degree we can resolve the difficulties of agency rules, as will be described later, which are plaguing the whole legal system in China today.

## ADMINISTRATIVE RULES DEFINED: A Constitutional Background

Administrative rule (*xingzheng guizhang*), as a legal term in administrative law in China, receives its name from the Constitution of 1982 with a narrower definition than in some other countries, such as the United States. According to the Constitution of 1982, "administrative rule" is one source of law. The family of law in China comprises (1) "basic laws" (*jiben falu*) made by the National People's Congress (the NPC); (2) laws (*falu*) made by the NPC Standing Committee; (3) administrative regulations (*xingzhong fagui*) made by the State Council; (4) local regulations (*difangxing fagui*) made by some authorized People's Congresses at local levels; and (4) administrative rules (*xingzhong guizhang*) made by ministries of the State Council and by some authorized local governments. When we use the term "law" in a broad sense, we refer to all these legal norms.

[3] "For some time now, the sheer amount of Congress made law...the substantive rules that regulate private conduct...made by the agencies has far outnumbered the lawmaking engaged in by Congress through the traditional process." See *INS v Chadha,* 462 U.S. Supreme Court Report 919, 985-86 (1983). For example, the Federal Register for 1989 contained 53,482 pages, and the Code of Federal Regulations, with 196 paperback volumes, contains 122,090 pages, 60 million words—about seventy times as many as in the Bible. See B. Schwartz, *Administrative Law* (1991), 168.

And, in the 15th Amendment of the Constitution that reads "governing the country according to law, and construct the Rule of Law state," "law" as mentioned undoubtedly includes administrative rules.

Thus defined, administrative rule specifically includes only rules made by those constitutionally authorized ministries and local governments. Rules made by the State Council are not administrative rules but administrative regulations, and rules made by agencies other than those ministries and local governments are termed as "normative documents" (*guifangxing wenjian*), which in theory are not binding. (But in practice, normative documents very often seve as an agency's "secret weapon" in regulating society, which will be discussed below.)

## DELEGATION OF POWERS IN THE RULE-MAKING CONTEXT

Although China has not adopted the "separations of powers" pattern in formulating its power structure, it is expressly stated through the Constitution (Article 58) that the NPC and its Standing Committee shall exercise law-making power.[4] Does that mean that the legislature delegates to the executive branch, both the State Council and its ministries at the central level and governments at local levels, rule-making power? Some scholars believe that delegation of power is a prerequisite for an agency to make rules, because the Constitution vests the law-making power only in the NPC and its Standing Committee. Others argue that the Constitution itself does not expressly prohibit an administrative agency from enjoying rule-making power. Actually, they argue, the Constitution in Article 89 and Article 90 grants the State Council and its ministries the power to make administrative regulations and administrative rules respectively in a clear way.[5] For local governments, the Organic Law of Local People's Congress and Local Governments grants them powers to make local administrative rules (*difangxing guizhang*). Based on these constitutional provisions, they argue that ministries and local governments have an inherent power to make rules. To put it directly, rule-making power is an inalienable part of executive power.[6]

Is delegation of power a prerequisite for an agency to make rules? Or what is the nature of an agency's rule-making power? These are questions of crucial

[4] *Constitution,* Article 58.

[5] *Constitution,* Article 89 and 90.

[6] The proposed Legislation Law, which was submitted to the NPC Standing Committee for final consideration in October 1999, partly adopts this point.

importance in the rule-making context. Yet it is not easy to give simple answers only by reading the Constitution, because the Constitution deals with these essential issues in an equivocating manner and thus is very confusing. To analyze the nature of an agency's rule-making power, we must examine the functions of executive organs, which are designated by the Constitution. Article 89 and Article 105 of the Constitution state that the central government and local governments are executive organs of the NPC and local PCs respectively. Therefore, if agencies are expected to fulfill their functions—to administer laws—they have to interpret laws, to promulgate detailed rules pursuant to laws, and to make procedural rules for officials in implementing laws. Under such circumstances, agencies shall have rule-making power with or without delegation from the legislature. This power is thus "inherent," for it is inherent in an agency's functions as part of the executive branch. But rule making based on "inherent" powers must be pursuant to the laws the agency administers, without any changes of individuals' rights or obligations. On the other hand, if an agency's administrative rules are to substantively affect individuals' rights and obligations, delegation of rule-making power is a prerequisite, because in such cases, an agency virtually exercises the law-making power, which it does not have constitutionally.

## TYPES OF ADMINISTRATIVE RULES: Where is the Boundary of Rule-Making Power?

As analyzed above, rule-making powers may come to agencies through two channels: the Constitution and delegations of powers. From this perspective, some Chinese scholars try to draw line between rule making based on an agency's inherent power and rule making based on delegation of power.[7]

- **Rule making based on an agency's inherent power**. The Constitution provides that ministries are granted powers to make rules, as well as to issue executive orders and guidelines "within their own authorities" based on laws made by the NPC and its Standing Committee and administrative regulations made by the State Council.[8] And the Organic Law of Local People's Congresses and Local Governments stipulates that provincial governments shall make local rules "for purposes of meeting local needs."[9]

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[7] Luo Haocai (ed.), *Administrative Law* (Peking University Press, 1998).

[8] *Constitution,* Article 90.

[9] *The Organic Law of Local People's Congresses and Local Governments* (1986), Article 58.

Constitutionally, an agency can make rules without delegation from the legislature. By exercising this inherent rule-making power, an agency may make two sub-categories of rules:

(i) ***Rules to implement laws.*** Because an agency is expected to implement laws, it is logically necessary for an agency to make detailed rules pursuant to laws and for purposes of implementing laws within its own jurisdiction. Theoretically, implementing rules should involve only the administrative filling in of details and must not change the laws it administers. However, as many provisions of laws are too vague, it is very hard, if not impossible, to tell whether the implemented rules are pursuant to laws in practice.

(ii) ***Rules to interpret laws.*** Very often when an agency implements laws, it is again logically necessary for it to express its intended course of action or its view of the meaning of a law. Interpretative rules serve an advisory function, which are statements issued to advise the public of the agency's construction of the law it administers.

- **Rule making based on delegated powers**. If an agency intends to make rules that will substantially create new law, rights, and obligations and thus virtually exercises law-making power, expressly delegated power to the agency is a prerequisite. In practice, the legislature delegates power in two ways. The first is delegating powers to the agency in a particular law; the other is delegation through a specific decision by NPC Standing Committee. During the period 1979 through 1990, out of a total of 89 laws made by the NPC and its Standing Committee, 63 laws contained provisions of delegation, of which 11 laws, or 17 percent, delegated powers to the State Council to make administrative regulations; 44 laws, or 69 percent, delegated powers to ministries to make supplementary rules; four laws delegated powers to provincial governments to make local rules; and four laws delegated powers to the Central Military Commission of the CCP or Headquarters of the People's Liberation Army (the PLA).[10] It seems that although the Constitution provides agencies with rule-making power, delegation of power through particular laws is still popular. The other way to delegate powers to an agency is through specific decisions by the NPC Standing Committee. Since 1982, when the Constitution was established, the

[10] Luo Haocai, *Administrative Law* (Peking University Press, 1998), 122-25.

Standing Committee had made only three decisions to delegate powers to an agency, all to the State Council.

In practice, by exercising delegated powers, agencies have made rules that can be sub-categorized into two types:

(iii) ***Rules to supplement laws.*** Whenever the legislature passes laws that stipulate principles and broad criteria, detailed rules are needed to supplement the laws. Or wherever the legislature feels that a particular matter falls within an agency's jurisdiction, it usually leaves room to be supplemented by an agency through delegated powers. Supplementary rules can thus create rights or obligations within the limits imposed by the legislature. Substantively, this type of rule making is similar to "substantive rule" in the United States as defined in the Federal Administrative Procedures Act (the APA) insofar as it is the result of delegation and can have a substantial impact on the public.

(iv) ***Experimental rules.*** Experimental rules is a type of rule making with Chinese characteristics. Because China is in a rapid social transition phase, it is thought helpful for an agency to make rules on an experimental basis, thus providing precedents for later legislation. Wherever experimental rules are to be promulgated, no laws exist in that field. Consequently, such rules create laws, rights and obligations. Arguably, rule-making power should not be exercised on an experimental basis, for it affects the public. What if an experimental rule finally proves to be wrong? Legally and morally, can individuals' rights and obligations be used as a means for governmental experiments or political games? Despite these suspicions and even rejections, agencies, especially those in China's Special Economic Zones such as Shengzhen, Zhuhai, Sangtou, and Xiamen, have made many such rules with delegated powers from the NPC Standing Committee, the State Council and particularly local People's Congresses.

Of the four categories of administrative rules, for the first and second ones (rules to implement laws and rules to interpret laws), although an agency is constitutionally directed to make rules "within its inherent jurisdiction," in practice, however, it is very hard to tell whether it does or not, because the Constitution defines functions and authorities of those agencies in a very vague and broad manner. What's worse, although the Constitution demands that agency rules thus made "must not be in conflict with laws and regulations," no workable criteria to check this test are provided to facilitate supervisory organs,

such as the NPC Standing Committee and the State Council, to review their constitutionality, reasonableness, consistency or legality of agency rules. For delegated rule making, the most remarkable problem is that delegations are too broad, sometimes without any limits. Still another factor that makes the boundary of an agency's rule-making power open-ended is that the People's Court, despite the fact that it can exercise judicial review power over "agency concrete actions" under the Administrative Litigation Law of 1989 (the ALL), nevertheless cannot review agency rules. Therefore, as a practical matter, an agency can make rules with no effective limits posed by the Constitution, the legislature or the People's Court.

## *ULTRA VIRES,* CONSISTENCY AND REASONABLENESS: A Quest for the Boundary

In administrative law, the *ultra vires* theory is of fundamental importance in the field of rule making, because the jurisdictional principle is at the root of administrative power. An agency must exercise its power within its jurisdiction and legal boundary; otherwise there would be no Rule of Law. This theory is central to the Rule of Law, and no laws are needed to expressly establish it; *ultra vires* is inherent in the constitutional positions of agencies.

In China, it is also widely believed by scholars that an agency must not exercise its power, inherent or delegated, in a way that exceeds the boundary of that power, and that in administrative law, *ultra vires* and reasonable administration are root principles. This has been demonstrated, though not clearly or completely, by the ALL, which established that courts may review the legality and, under some particular circumstances, the reasonableness of agency actions.[11] However, an agency's rule making, termed "abstract administrative act," is insulated from judicial review.[12] Consequently, institutionalized review over rule making by courts is still not available.

If the courts do not have the authority to say whether or not an agency exercises its rule-making power reasonably or within its boundaries, who does? The Constitution grants this authority to the State Council. Section 13 of Article 89 articulates that the State Council "may alter or repeal inappropriate orders, guidelines, or rules promulgated by its Ministries and its Committees,"[13]

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[11] *The ALL,* Articles 5 and 54.

[12] *The ALL,* Article 12 (2).

[13] *Constitution,* Article 89 (13).

and Section 14 provides the State Council with the authority to alter or repeal inappropriate decisions or orders, including rules, made by local governments.[14] A question immediately rises here: Why should the State Council, but not the NPC or its Standing Committee, be vested with powers to supervise an agency's rule making? One can argue that the NPC and its Standing Committee, as the source of all powers, of course have this power. Yet the reality remains that they have never exercised such power since 1982. If in reality the State Council is the organ vested with this power, how can it review rule making based on delegation of powers from the NPC Standing Committee? Under circumstances where the legislature delegates rule-making power to agencies, only the legislature, perhaps with the courts, has logical authority to review that rule making.

Given its authority to review rules, what criteria should the State Council use in reviewing rules? That is perhaps too early to be analyzed, for the State Council rarely had exercised such power during the past two decades, and, as we have mentioned before, no laws provide any criteria. It is in this situation that the fundamental principles of administrative law such as *ultra vires* and reasonableness are of critical importance.

The *ultra vires* principle directs that agency rule-making powers, either inherent or delegated, must not exceed certain boundaries. For inherent rule-making power, as we have discussed, it must be exercised within the agency's "jurisdiction"; for delegated rule-making power, an agency must not make rules extending beyond the authority given by the relevant law or the legislature. The *ultra vires* test ensures that an agency's rules have been issued within its power and kept in line with laws.

It is not accurate, however, to assume that a rule is valid simply because it meets the *ultra vires* test. In administrative law, agencies are expected to exercise powers rationally, and they are not given carte blanche power to promulgate any rule they wish within their jurisdiction or delegated powers. Therefore, even a rule that deals with the subject matter within the agency's power may be invalid if it is "unreasonable" or "arbitrary." The reasonableness test at its core directs that there must be a rational connection between the facts found and the choice made.

[14] *Constitution,* Article 89 (14).

Once the boundary has been established, the question remains: who should act as the guard? Can the State Council, as the Constitution puts it, be the guard? The legal theory and past experiences suggest it cannot, as we have briefly discussed earlier. Then who? The Standing Committee? The Court? Or the Party? These are serious questions crying out for answers.

## RULE OF MAKING RULES: Deficiency in Openness and Public Participation

If substantive criteria are absent in limiting an agency's rule-making powers, how about the procedure? How are agency rules made? In what way can rules and the rule-making process attain legality, rationality and legitimacy, which are crucial to the Rule of Law? These questions remind law reformers as well as common people of the importance of rule-making procedures, among other things. Yet in the rule-making process, a unitary procedure that encourages public participation, consensus-building, rationality and accountability has yet to appear.

Currently, an agency usually makes administrative rules through procedures adopting the "Notice for Making Administrative Regulation" (*Xingzheng fagui Zhidiang Zhangxing Banfa*), which was issued by the Secretary Office of the State Council on April 21, 1987. According to this Notice, administrative regulation making shall employ the following procedural steps:[15]

First, compiling the five-year legislation plan and annual legislation plan. The contents of a five-year plan are strongly influenced by the concurrent five-year economic and social development plan, which is also compiled by the State Council. In this sense, the inclusion of a regulation in the five-year plan is no guarantee for its being drafted. The annual plan, on the other hand, is followed to a greater extent by the Legal Affairs Bureau of State Council. If a regulation is to be drafted and to be promulgated, it is usually necessary to include it in the annual plan. Beginning from the very first stage, law making invites struggles. As a Western scholar observed, ministries employ various tactics to get their preferred legislation in the annual plan.[16]

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[15] The Legislation Law, enacted by the Ninth People's Congress on March 15, 2000, also provides some procedural schemes for the State Council to make administrative regulations. See Articles 55, 56, 57, 58, 59 and 60 of Legislation Law. However, these provisions are very general, and are the same as what have been provided in the Notice of 1987.

[16] Murray Scott Tanner, "Organizations and Politics in China's Post-Mao Law-making System," in Pitman B. Potter (ed.), *Domestic Law Reforms in Post-Mao China* (M.E. Sharpe, 1993), 69.

Second, drafting regulation. While the Legal Affairs Bureau of the State Council usually assumes the bulk of the work in drafting regulations, it does not draft all administrative regulations. Many regulations are drafted by ministries to which the drafted regulations are relevant. Usually, if a ministry wins a place on the agenda for its proposed draft regulation, the ministry and the Legal Affairs Bureau will establish a drafting group (*qicao xiaozu)*. The group is led by the Bureau and will include representatives of the principal drafting ministry and of other "concerned departments," who produce an "opinion-solicitation draft" (*zhengqiu yijian gao*).

Third, soliciting opinions. When the draft is finished, the Legislative Affairs Bureau circulates the draft to all other closely concerned ministries or departments, and then later to other departments and provincial governments, and, in recent years, to selected legal scholars in order to solicit opinions on the draft. Opinions suggesting revisions, then, are returned to the Legislative Affairs Bureau, which forwards the comments and opinions to the drafting group, together with the Bureau's comments summarized from solicited opinions. The drafting group then revises the draft. This process is usually repeated several times before the Bureau submits the draft to the Standing Committee of the State Council for discussion and vote.

Fourth, coordinating competing opinions among departments and between central departments and local governments. Since regulations concern the allocation of powers and interests among different agencies, during the drafting and opinion-soliciting process those agencies involved usually compete to gain from the coming regulation. Thus, the opinions solicited from involved agencies are often contentious, making coordination necessary. In essence, the process of coordinating competing opinions is a process in which departments and local governments bargain and compromise with each other in order to maximize their interests, advocated by the Legal Affairs Bureau.

Fifth, reviewing the revised draft and compiling the explanation and the report of the draft before it goes to the Standing Committee of the State Council for discussion and ratification. The Legislative Affairs Bureau reviews the revised draft (*cao'an*) to check its legality and consistency with laws of the NPC and previous regulations. The Bureau then makes an explanation (*shuoming)* of the proposed draft and a detailed report of the draft (*shencha baogao*), as well as its own final recommendation (*yijian*).

Sixth, ratification of the draft. The draft, together with the explanation, report and final recommendation made by the Legal Affairs Bureau, then goes to the

Standing Committee of the State Council for discussion and ratification. Usually there is a formal meeting—the executive meeting (*changwu huiyi*)—presided by the Premier and attended by Vice-Premiers, State Councilors, and the Secretary General of the State Council,[17] in which the official from the Legislative Affairs Bureau and a representative of the drafting departments present the draft, the explanation, the report and the recommendation. The Constitution does not state the procedure for the State Council to pass its regulations. In practice, however, the Premier virtually has the power to make a final decision, since the Constitution of 1982 provides that the Premier assumes overall responsibility for the work of the State Council,[18] and that the Premier directs the work of the State Council.[19] A regulation is passed when the Premier signs his/her name to ratify it.

Finally, publication of the ratified regulation. According to a notice concerning administrative regulation-making procedure issued by the State Council on May 31, 1988, all administrative regulations ratified and signed by the Premier shall be made public through publication in both the *State Council Gazette* (*guowuyuang gongbao*) and the *People's Daily*.

Summarized above is the procedure for administrative regulation making. As to the huge and important source of Chinese formal law—the administrative rule (*xingzheng guizhang*)—there is no unitary procedure provided. While some ministries and local governments do have procedural requirements for rule making, they are usually very similar to that of administrative regulation-making described earlier.

What can we say about the procedural requirements for rule making in China? In a society in which rules play such an important role in public and private life, how should we deal with the "rule of making rules"? As China moves towards a society of the Rule of Law, what rule-making procedures should be established and how? These are questions frequently asked by Chinese legal scholars today. Obviously the rule-making procedure is far from desirable. As many Chinese scholars have correctly noted, Rule of Law does not mean "ruling the country using law."[20] In my view, if the law comes from the will of the leadership

[17] *Constitution*, Article 88 (2).

[18] *Constitution,* Article 86.

[19] *Constitution,* Article 88 (1).

[20] See, e.g., Li Buyun, "lun yifa zhiguo" (On the Conception of Rule of Law), in Wang Jiafu (ed.), *yifa zhiguo jianshe shehui zhuyi fashi guojia* (Ruling the Country According to the Law So As to Establish the Socialist Rule of Law), (The Law Publishing House, 1997), 132-45.

without any effective mechanism to restrain potential arbitrariness and to achieve rationality and legitimacy, and nevertheless is backed by coercive force, Rule of Law is no different from "rule of person." Besides, law in this sense conceptually contradicts the Rule of Law. In the Rule of Law society, however, law itself needs to be legitimatized, which in modern societies is usually met through democratic legislative procedures. In particular, we can argue that because the rule-making process directly affects those who are concerned, it is then important for them to participate in the rule-making process, and that is because, as a practical matter, rule making always involves value choices, and the procedures should be more democratic, representative and accountable, so that value choices in the process can be more rational and arbitrariness can be curbed. What's more, public participation and the interactions between the government and people promote public confidence in the government, at least from social psychological perspective.[21]

Partly in response to criticisms of its rule-making procedures, the NPC in the early 1990s initiated the work of making Legislation Law to govern legislative process, especially the rule-making process. The law was drafted in 1992 and 1993, and in 1993, two draft versions were produced and discussed by the Legislative Affairs Committee of the NPC, the Legislative Affairs Bureau of the State Council and the Chinese legal community. However, the enactment of this law is proving to be a tough struggle for powers among the NPC, its Standing Committee, the State Council, ministries and departments, and between the central government and local governments. In October 1999, a proposed draft was submitted to and discussed by the NPC Standing Committee; hopefully the NPC will enact it in the near future.[22] But those who hope this law will provide a procedural framework for rule making will be very disappointed; there are very few provisions governing rule-making procedure in this law. The "rule of making rules" is yet to arrive.

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[21] A social psychological study based on empirical analyses of procedural justice reveals that participation of parties in a legal process functions as a mechanism to meet the psychological need of justice. See, Latour, Houlden, Walker and Thibaut, "Procedure: Transnational Perspective and Preferences," 86 *Yale Law Journal* 258 (1976), and Houlden, Latour, Walker and Thibaut, "Preference for Models of Dispute Resolution as a Function of Process and Decision Control," 14 *Journal of Experimental Social Psychology* 13 (1978).

[22] With slight modifications, the draft proposal, now the Legislation Law, was enacted by the Ninth National People's Congress at its 3rd session on March 15, 2000, and became effective July 1, 2000.

## LEGAL EFFECT: An Imminent Clash between Agency and Court

More often than not, we think that agency rules, as a source of law in the modern administrative state, have legal effect. However, what do we mean when we say an agency rule has legal effect? The consequence is more than mere terminology; it means that the agency not only will apply the rule to particular cases in the administrative process, just as laws are applied, but also that the courts can act as though the rule had been enacted by the legislature. This means, in turn, that the rule is binding as a law. Of course, to maintain this legal effect, a rule must pre-conditionally meet the tests of both *ultra vires* and reasonableness.

In the United States, the basic principle governing the legal effect of rule making is "the black letter principle that properly enacted regulations have the force of law,"[23] meaning that they have the same force and effect as statutes.[24] Although this principle is by now fully accepted by courts, some earlier cases did deny it, holding that agency rules did not have statutory effect; some went so far as to rule that courts could not even take judicial notice of rules and regulations.[25] The principle governing the legal effect of rules applies not only to administrative cases, but even to criminal cases and civil cases.[26]

In China, however, legal scholars, the legislature and courts are reluctant to accept that agency rules may have the same legal effect as law. Given the problematic nature of the rule-making process, this is not too surprising. But agencies, as a practical matter, use rules in administrative process to regulate the society more often than laws. The reality is, qualitatively speaking, agency rules play a major part in the legal order, and they are of greater practical importance to those subject to the agency than are the broad provisions laid down by laws. If in a situation where the courts review agency actions, they do not apply rules to cases, a clash between the agency and the court seems inevitable.

While in practice agencies take actions based mainly on rules, and the Administrative Reconsideration Law (the ARL), amended in March 1999, recognizes that rules can be legal bases of agency actions, the Administrative Litigation Law (1989) directs that the People's Court, when reviewing an agency

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[23] *Flores v Bowen,* 790 F. 2d 740 (9th Circuit 1986).

[24] *Water Quality Association v United States,* 795 F. 2d 1303, 1305 (7th Circuit 1986).

[25] *Smith v Shakopee,* 97 F. 974 (8th Circuit 1899).

[26] See B. Schwartz, *Administrative Law* (Little Brown and Company, 3rd ed. 1991), 185-86.

action, may or may not use rules as legal bases.[27] Under the ALL, courts do not have authority to review agency rules, but they can refuse to apply agency rules to a case in handling, if they believe those rules are "unlawful."[28] But here self-contradictions present themselves: first, if the courts do not have authority to review rules, how can they hold a rule "lawful" or "unlawful"? Second, if the courts can determine whether or not a rule is "unlawful" without judicial review, it seems that too much discretion is left to judges, who arguably are not appropriate candidates to perform this duty, given the striking facts that the judiciary in this country is not well qualified and does not have professional integrity. Therefore, the treatment by the ALL to agency rules in the judicial review process buries seeds from which an imminent clash between agency and court is developing.

## CONFLICTS OF RULES: Fragmented China?

Administrative rules as a source of law, as the Constitution demands, must be in line in the hierarchy of other legal documents. For instance, the Constitution directs that rules made by ministries must be in line with laws and administrative regulations;[29] rules by local governments must be in line with laws, administrative regulations and local regulations made by local People's Congress at the same levels. These constitutional provisions are purportedly to maintain consistency and harmony of the whole legal system by eliminating conflicts within the law family. Once the hierarchy in the law family is established, conflicts may be limited, for an inferior rule conflicting with superior law or regulation will be invalid.

However, if we pay close attention to the hierarchy of laws established by the Constitution, three questions as to agency rules immediately arise. First, since both central agencies (ministries of the State Council) and local governments can make rules, which rules have a higher place in the legal hierarchy? The Constitution unfortunately remains silent on this point. In practice, central rules and local ones are deemed equal. A logical conclusion, then, is that local governments can make rules governing a subject without considering a central rule. With the tacit encouragement of the Constitution, local rules are in serious conflict with central ones, resulting in what had been called "local protectionism." Second, since local rules for different regions are also deemed

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[27] *The ALL,* Article 53.

[28] *The ALL,* Article 53.

[29] *Constitution,* Article 5.

equal, local rules are competing among each other. This is especially true in cases where local governments use their rule-making powers to protect regional interests and to fight against competitors in other regions. Consequently, conflicts of rules among regions become so serious that the country is "fragmented" from this point of view. Finally, local regulations, made by local People's Congresses, are viewed as superior to central administrative rules, as implied by Article 53 of the ALL, although without constitutional confirmation. As a result, localities can use their authority to make local regulations to resist controls from the central government. This development has made the central-local relationship even more intense, both politically and economically.

In response to serious conflicts, the proposed Legislation Law tries to provide a mechanism through which differences among rules may be arbitrated. As the law proposes, conflicts between local and central rules shall be arbitrated by the State Council; provincial rules in conflict shall, too, be arbitrated by the State Council. With respect to the conflict between local regulations and central rules, if the State Council believes that a regulation is unlawful and inappropriate, it shall have no power to repeal it; rather, it shall submit the regulation to the NPC Standing Committee for consideration. This mechanism proposed by the Legislation Law, in essence, reveals the uneasiness of the legislature about problematic local rules and the intent to re-centralize legislative power, but it is too early to tell whether it will work.

## NORMATIVE DOCUMENTS: Agency's Secret Weapons?

If rule-making authority is vested in limited agencies, as the Constitution stipulates, the authority to make normative documents (*guifangxing wenjian*) is virtually shared by all administrative agencies.[30] Any agency may issue orders, staff memos or guidelines within its jurisdiction. This has been thought by scholars necessary for agencies to apply the law consistently and with limited discretion. However, these documents should not bind the public. In other words, they have no binding force vis-à-vis the public. On the other hand, theoretically, agencies should abide by the discipline and standards set forth in their own normative documents.

Do an agency's normative documents have binding force against the public, say, as a matter of fact? Experiences tell us they do. What's more, they are as binding as agency rules. If this is the case, it is fair to say that normative

[30] *The Organic Law of Local People's Congresses and Local Governments,* Article 59.

documents are really an agency's "secret weapons." Normative documents are made internally; they are policy-oriented and rarely made public. They are the "laws" in the agency staff's hip pockets. If the public shall be regulated this way, it is the same as saying that we should obey "secret laws."

The fact that agencies themselves treat normative documents as binding rules is demonstrated by the Administrative Reconsideration Regulation issued by the State Council. Originally promulgated in 1991, the ARR laid down that an agency, in hearing administrative appeals, shall use laws, regulations, administrative rules and normative documents as legal bases.[31] This provision is a clear, formal confirmation of the binding force of normative documents. In March 1999, the ARR was revised by the NPC Standing Committee, and was enacted to be a law (the ARL). The most striking provision in the ARL is that in hearing administrative appeals, agencies may review the legality and reasonableness of the normative documents that are relevant to the case under review.[32] Although scholars applaud the provision, it has not been acknowledged that this provision actually reconfirms the binding force of normative documents in an indirect manner.

If normative documents do bind the public, they are in essence agency rules. Therefore, those substantive and procedural controls over rule making, as we have briefly discussed, should also apply to normative documents. Currently, the most striking fact with respect to normative documents is that they are internal and not public. After all, in a Rule of Law state, individuals should not be required to obey legal rules that are secret.

## THE LEGISLATION LAW: A Solution or A New Invitation to "Power Struggle"?

Recognizing the problems existing in China's law-making system, especially in the rule-making context, the 9th National People's Congress enacted the Legislation Law at its 3rd session on March 15, 2000. It has taken about 10 years for this law to be made, from 1992 through 2000, which to some extent reveals the difficulties of balancing power struggles among various departments and between the central government and the localities. Nevertheless, both high-level leaders and distinguished legal scholars seem to believe that this law will resolve the problems plaguing the lawmaking process, calling it "another landmark in

[31] The Administrative Reconsideration Regulation (1990), Article 41.

[32] The Administrative Reconsideration Law (1999), Article 42.

China's journey toward the Rule of Law," and referring to it as the most important law since the enactment of the Administrative Litigation Law (1989), which for the first time established the judicial review system in China.

However, a close investigation of the Legislation Law raises the question of whether the law offers a solution or a new invitation to a power struggle in the law-making process, particularly in the rule-making context. As we have observed earlier, the problems existing in an agency's rule-making process are ultimately the result of an unclear allocation in the Constitution of legislative powers among various bodies and between the central and local governments. As long as the constitutional allocation of powers has not been changed, the Legislation Law offers few solutions to making things better, if not impossible. In developing the Legislation Law, the legislature has always faced the dilemma: If the law changes constitutional provisions concerning law-making matters, it will be declared unconstitutional; if the law follows and even repeats what the Constitution stipulates, it simply cannot eliminate the problems that result from the constitutional arrangements. Therefore, if we deem the Constitution as an invitation to a power struggle in the law-making process, it should not be surprising that the Legislation Law is just a new invitation to power struggle.

In understanding this point, an examination of the provisions governing the rule-making matters might be helpful:

> *Article 71.* Every ministry, committee, the People's Bank of China, the Auditing Agency, and agencies directly under the State Council exercising regulatory function, may enact administrative rules within the scope of its authority in accordance with national law, administrative regulations, as well as decisions and orders of the State Council.
>
> A matter on which an administrative rule is enacted shall be a matter that is within the scope of implementing national law, administrative regulations, and decisions or orders issued by the State Council.
>
> *Article 72.* If a matter falls within the scope of authority of two or more agencies under the State Council, the relevant agencies shall request the State Council to enact an administrative regulation or the relevant agencies under the State Council shall jointly enact an administrative rule.

> *Article 73.* The People's Government of a province, autonomous region, municipality directly under the central government or a major city may enact local rules in accordance with national law, administrative regulations and local regulations of the province, autonomous region, or municipality directly under the central government.
>
> A local rule may provide for the following matters:
>
> (i) Matters for which enactment of local rules is necessary in order to implement a national law, administrative regulation or local regulation;
>
> (ii) Matters that are within the regulatory scope of the local jurisdiction.

Note the key term "within the scope of authority" in Articles 71 and 72, which may be used as the basis for ministries and committees to exercise rule-making power. However, "the scope of authority" of a ministry or a committee has never been defined by the Constitution, the Organic Law of State Council or any national laws or regulations. What's worse, the "scope of authority" of a ministry may vary from time to time depending upon changes in party policy and other political needs. This presents an opportunity for a ministry to claim that a matter "falls into its scope of authority." That's why the struggle for rule-making authority among ministries and committees is so common, and "departmental protectionism" so serious.

As far as local rules are concerned, the provisions in Article 73 simply repeat the vaguely worded term as "within the local regulatory scope of the local jurisdiction," which has already proved to be the source of a power struggle between the central and local government in the legislative context. As a practical matter, the central government, through its ministries and committees, usually exercises power to regulate affairs that locales would claim to be "local affairs." The ambivalence of such a key issue in the Constitution and the Legislation Law will inevitably invite power struggles that are already serious in the rule-making context.

## CONCLUSION

In an administrative state where administrative rules play a major part in a legal system, the Rule of Law is in practice the "rule of rules." If this is the case, we should replace the enduring question, frequently asked by legal philosophers, "what is a good law?" with "what is a good rule?" The quest for answers to this

question is of great importance; it may perhaps awaken us from a dream about an ideal Rule of Law, and caution us about the hurdles we must overcome in order to achieve an actual Rule of Law society.

In reforming China's rule-making system in order to obtain the legality, reasonableness and consistency of agency rules, one solution might be to introduce in China the system of judicial review over administrative rules. Unlike the supervision mechanisms already provided by the Constitution and the Legislation Law, judicial review may institutionalize the supervision over agency rules and thus might be more effective.

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# THE JUDICIAL SYSTEM AND GOVERNANCE IN TRADITIONAL CHINA

Weifang He

## INTRODUCTION: THE *EMILY* INCIDENT

On September 23, 1821, an accident occurred while an American ship from Baltimore, named *Emily,* was loading cargo in Guangzhou. A woman on a nearby boat fell into the water and drowned. Her family accused a crewmember from the *Emily,* Francis Terranova, of hitting the woman with a tile jar, which caused her death. But the Americans insisted that the woman fell into the water inadvertently and her death had nothing to do with Terranova. The local magistrate of Panyu County heard the case on October 6, on the ship *Emily*. According to the account of English scholar, Hosea Ballou Morse, the hearing was turned into a complete swindle:

> The trial was conducted by the Panyu magistrate, who heard the evidence for the prosecution, and refused to allow that evidence to be interpreted, refused to allow testimony or argument for the defense, and adjudged the accused guilty. After this mockery of a trial and farce of a judicial decision, he [Terranova] was then put in irons by the ship's officers, but not yet surrendered. The trade was still stopped, and American merchants and shipping annoyed; and after another week he [Terranova] was surrendered to take a second trial, and he was again adjudged guilty and executed by strangulation within twenty-four hours. His body was then returned to the *Emily*, and American trade reopened.[1]

The *Emily* incident was concluded quickly, but the clash of legal systems and legal concepts between China and the West in their early interactions became a very difficult, ongoing problem. Although it was the colonialist policy of the Western powers that created the modern military conflicts between the West and China, we must admit that if China's legal and justice system had not been so unreasonable either in concept or actual practice, many disputes would have

[1] Hosea Ballou Morse, *The International Relations of the Chinese Empire,* vol. 1 (Wenhsing Books Company, Taipei, n.d.), 105.

been resolved fairly without resulting in war. But on the other hand, it was China's failure in war that led to questions about the traditional legal system; in particular, reflections on the judicial system as well as on the reform of law and the judiciary were a natural result of the oppression of the Western powers.

With the longest history and the most advanced civilization, China has been proud of her written law tradition. According to a famous Japanese scholar, Professor Shiga Shuzo, the Chinese legal system achieved great accomplishments in its development. Then why did Westerners become increasingly intolerant towards China's legal system and its enforcement in early modern time? What exactly was the classical judicial system in China? It is necessary to review the basic structure of the old judicial system because it serves to provide the context for the evolution of the judicial system in this century. Considering the theme and the limited length of this article, we can only focus on the most basic characteristics in general terms.

## OLD TRADITION

The judicial system developed gradually during the long process of China's historical evolution, along with political, economic and other social systems. It also shared the same axiological implications with the other systems. Recognizing that judicial function is an essential part of government, our traditional government structure with its judicial system as a key element was unique in the world. Therefore, we can summarize the main characteristics of our judicial system by examining the relationship between the structure of government and society.

The government structure of ancient China can be divided into two levels: the central government and the county government. At the higher level, the central government included so-called three departments (the Department of State Affairs, the Chancellery, and the Secretariat) and six ministries. Of course, the emperor was always the paramount authority when legal disputes or other issues were involved. But as far as the everyday life of ordinary people was involved, the central government, or even government at the provincial level, was not that important. When disputes arose among people concerning reasons or amounts that were not significant enough, or when misdemeanors were involved, it was the county government that they turned to for help.

County officials were at the end of the power network by which the whole country was ruled. These officials were appointed by the central government, and they were responsible for collecting taxes, maintaining social stability and

resolving disputes. Included in those functions was what we call today the judiciary, which was very important at that time.

Much research has been done about the traditional judicial function of local officials.[2] But here I want to explore the characteristics of this judicial tradition and its potential influence from another perspective, one that emphasizes the impact of the function of social systems and sociological factors on the actual work of the judicial system, as well as on the relationship between knowledge and power.

## CONCENTRATION, INSTEAD OF SEPARATION OF POWERS

The most distinctive characteristic of the structure of the traditional Chinese local government is that there was no arrangement whatsoever for the separation of powers. The country magistrate exercised comprehensive responsibilities. The three basic functions, namely the enacting of rules (legislature), the execution of rules (administration) and the resolving of disputes (judiciary), which are taken for granted today, rested entirely with the magistrate alone. Although he was subject to the supervision of higher government, with the local government he held absolute power and was beyond the supervision and check of any entity. All the other people working inside the government served as the magistrate's consultants or assistants and had no power at all to check the magistrate's execution of power. It was because of this fact that Wang Huitsu, a famous consultant in Qing Dynasty, remarked, "Among the existing powers, except for that of the governors of provinces, the most important one is that of county magistrate. Why? They had concentrated powers."

The concentration of powers was also obvious in the judicial process. According to Ch'u Tongtsu's description, "the magistrate heard all cases in his area, civil as well as criminal. But he was more than a judge. He not only conducted hearings and made decisions; he also conducted investigations and inquests, and detected criminals. In terms of modern concepts his duties combined those of judge, prosecutor, police chief, and coroner. They

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[2] Cf. Ch'u Tongtsu, *Local Government in China Under the Ching* (Harvard University Press, 1962); Shiga Shuzo et al., *Civil Justice and Civil Contracts in Ming and Qing Dynasties,* Wang Yaxin et. al. (ed.) (Falu Chubanshe, 1998); *Yang Hsiefeng, Judicial System of Ming Dynasty* (Liming Cultural Enterprises Company, Taipei, 1978); Na Silu, *The Country Justice of Qing* (Art-History-Philosophy Publishers, 1982); Zheng Qin, *Essays on Judicial System of Qing* (Hunan Educational Press, 1988); and Wu Jiyuan, *The Judicial Functions of Local Government in the Qing Dynasty* (China Publisher of Social Science, 1998).

comprised everything relating to the administration of justice in its broadest sense, and the failure to carry out any of these duties incurred disciplinary actions and punishments, as defined in the many laws and regulations.[3]

To people today who have read Montesquieu's works and firmly believe in the value of separation of powers, and who hold the view that "power means corruption and absolute power means absolute corruption," the government model from the past with highly concentrated powers is most frightening. Indeed, there exist countless examples in the traditional politics of China that testify to the various defects of this despotism. But there is no system that is without at least some advantage. The highly concentrated powers in the county governments helped improve efficiency. Without other parallel powers to those of the magistrate, without an independent judiciary, a corrupt official could pervert the law and exploit the people at his will, but an upright and incorruptible official could also give full play to his administrative talents without any impediment. From the perspective of "rule by man," unity in government often made it difficult for people to gain rights to which they were entitled because there was nowhere to turn other than to this sole government. But on the other hand, the costs to people for dealing with the government remained low because of the uncomplicated nature of government. In addition, in a society with agriculture as its leading pillar, the simplicity of this government also helped reduce the number of officials and thus avoided impairing people's lives with high taxes.[4]

Of course, from the perspective of establishing a modern judicial system, the most significant impact of this traditional model of a highly centralized government is that it prevented the knowledge and development of judicial independence. It didn't even provide the context for this principle. Although there have always been the image of upright and incorruptible officials and the strong expectation of fair and honest judges, those were moral requirements of officials, quite apart from the notion of judicial independence.

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[3] Ch'u, op cit., 116.

[4] When Max Weber examined the Chinese government, he found the number of officers was much less than that of Europe, and he pointed out the relation of the rough style of governance with the face of a small amount of officers. Cf. Weber, *Konfuziamismus und Taoismus,* Chinese trans. by Wang Rongfen (Commercial Press, 1995), 98ff.

## RULE OF KNOWLEDGE

Still, the lack of an institutionalized check on this kind of government is difficult for modern observers to understand. How could powerful county officials not become dictators? In fact, the traditional selection process for county officials contributed to important restrictions on the use of powers by these officials.

The Keju Kaoshi (Imperial Civil Service Examination System) had a significant influence on the traditional political and legal system.[5] It meant, first of all, equality. Gaining political powers was no longer solely decided by blood or status. There were, at least in a formal way, more equal opportunities open to people of obscure birth to compete for political positions. What's more, the standard for this competition was not physical ability, but *literae humaniores* based on Confucianism. Although it became rigid over the time, the widespread use of Imperial Examinations resulted in the administration of social affairs by intelligentsia. In order to prepare for the exams, people needed to become extremely familiar with the ancient classical works and explanations of those works by the masters. Examinees were required to give persuasive explanations to some views themselves. Thus, the process of preparing for the exams was also the process of Confucianization. The political philosophy of Confucianism and some related theory became deeply etched in the minds of prospective county officials and formed a potential, but not ineffective, check of the use of powers in the future.

It should also be noted that the combination of the above two characteristics guaranteed the authority and legitimacy of the traditional government. Because the possibility of becoming an official was open to anyone, the unfairness from selection standards based on status or blood disappeared. Even people who failed could only criticize themselves for not being capable enough and admire or envy those who succeeded. As a result, this equality made reasonable the differences between the rulers and those being ruled and reinforced the obedience of people toward the rulers.

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[5] *About the Imperial Civil Service Examination System,* cf. Shang Yanliu (Sanlian Books, 1958); Lu Simian, *A History of the Chinese Institutions* (Shanghai Classical Publishers, 1985), chap. 15; and He Huaihong, *The Selective System and Its End* (Sanlian Books, 1998).

## RULE OF UNSPECIALIZED KNOWLEDGE

Although the Imperial Exams represented the traditional model of rule with the knowledgeable ruling the ignorant, they didn't promote the division of legal knowledge, but rather impeded it by holding on to the standards of the Confucianism and poetic techniques. "Ever since the introduction of the civil service examination system, the basic qualification for taking the examination had been a knowledge of the classics and the ability to write essays and poems. Hence, scholars concentrated their efforts on these subjects. But once they passed the examinations, they were given official appointments and were expected to handle administrative affairs. This did not mean that they possessed the kind of knowledge essential for fulfilling their duties; on the contrary, they were not at all prepared for them."[6] Though people who succeeded in those exams were involved in the judgment and resolution of disputes, because of the singleness of their knowledge and background, the officials' judicial activities were not able to contribute to the growth and development of independent and specialized legal knowledge.[7]

County officials usually had private secretaries to help them when deciding cases. But the training for those secretaries was to a large degree technical. Therefore they did not pay attention to the inherent logic of law with which modern lawyers are usually concerned, such as the rules by which the cases should be decided or the difference between the legal and moral reflections. At the same time, though the secretaries played an important role in deciding cases and making policies, they cared more about helping their masters than protecting the strictness and preciseness of law. They tended to calculate all the factors in a case and decided to apply the law if it was favorable to their masters and to ignore the law if it wasn't. As Ch'u Tongtsu pointed out, "Those secretaries studied law only to help their masters to decide cases and they never intended to study law systematically."[8] In the middle of the Qing Dynasty, sarcastic words were used to describe those secretaries. They were said to be "saving the living not the dead, saving the officials not the people, saving the important not the obscure, saving the old not the new." In addition, those secretaries were only assistants, and they were not responsible for any judicial decision-making, so they were reluctant to fight for justice for any particular decision on a case.

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[6] Ch'u, op cit., 93. Cf. Weber, op cit., 173.

[7] Cf. Ray Huang, *The Road of Modern China* (Lianjing Publishing Company, Taipei, 1995), 72-73.

[8] Ch'u Tongtsu, "The Role of Law in Traditional Chinese Society," in Ch'u, *Collected Papers in Law* (China University of Political Science and Law Press, 1998), 393-416.

In fact, we must admit that the traditional Chinese legal concept was a direct result of a judicial process dominated by laymen. In Western history, the independence of legal professionals as a group originated with and was connected to the restrictions of the accessibility to the profession, based on the pursuit of profits. Richard Posner even considered legal concepts as a side product of this special cartel. According to Posner, "a professional ideology is a result of the way in which the members of the profession work, the form and content of their careers, the activities that constitute their daily rounds, in short the economic and social structure of the profession."[9] But Posner notes that the way legal professionals work, and the formality and essence of their work, is also an important source of legitimacy. Judges apply strict legal procedures to their assigned cases and make decisions without interference. Those decisions become unshakable once they obtain the procedural validity. All those principles are taken for granted in the West.

But in China, the judges were not lawyers and they usually didn't specialize in law. When they dealt with disputes and cases—mostly what we would label as civil cases today—there was no certainty of law. What they were applying was a combination of law, moral requirements and the community customs. As resources, there were no distinctive differences among them. When local officials handled cases, they were not able to apply different levels of resources as the judges do today. At the same time, because of their background of knowledge, in order to support certain decisions in a case, they always relied on resources from the teachings of Confucianism or historical works, which had no legal implications. When the records of some of the "famous trials" are seen from today's point of view, they are more valuable as literary or rhetorical references than legal documents.[10] County magistrates made decisions based on the specific facts of the case. They did not pay attention to precedents, such as the continuity and coherence of the rules established in different cases. French scholar Escarra attributed this to the low status of law in China's value system, which he compared to that in the West:

> The People of Western civilization have lived throughout under the Graeco-Roman conception of law. The Mediterranean spirit,

[9] Richard Posner, *Overcoming Law* (Harvard University Press, 1995), 35.

[10] Cf. He Weifang, "The Style and Spirit of Traditional Chinese Judicial Decisions: Based Mainly on the Song Dynasty and Comparing with that of England," Zhongguo Shehui Kexue (*CASS Journal of Social Sciences),* No. 6, 1990, 203-19; for the English version see *Social Sciences in China,* No. 3, 1991, 74-95.

> while central to the patrimony of the Latin peoples, has also inspired large parts of the law of Islam, as also of the Anglo-Saxon, Germanic, and even Slavonic, nations. In the West the law has always been revered as something more or less sacrosanct, the queen of gods and men, imposing itself on everyone like a categorical imperative, defining and regulating, in an abstract way, the effects and conditions of all forms of social activity. In the West there have been tribunals the role of which has been not only to apply the law, but often to interpret it in the light of debates where all the contradictory interests are presented and defended. In the West the juris-consults have built, over centuries, a structure of analysis and synthesis, a corpus a "doctrine" ceaselessly tending to perfect and purify the technical elements of the systems of positive law. But as one passes to the East, this picture fades away. At the other end of Asia, China has felt able to give to law and jurisprudence but an inferior place in that powerful body of spiritual and moral values which she created and for so long diffused over so many neighbouring cultures…Though not without juridical institutions, she has been willing to recognize only the natural order, and to exalt only the rules of morality. Few indeed have been the commentators and theoreticians of law by the Chinese nation, though a nation of scholars.[11]

## PROCEEDINGS WITHOUT ADVERSITY

Lack of involvement of lawyers in legal proceedings further reinforced the uncertainty of rules, which had been established by county magistrates rather than by lawyers. Even though dialecticians, such as Deng Hsi and Gong Sunlong, had appeared in court representing petitioners from the very early times, Confucianism and Taoism adopted a negative attitude towards them. They were considered to know only logic but not right or wrong, and thus posed a threat to the social order. Their joint efforts turned logic into an underdeveloped discipline during the two thousand years of history in China.[12] According to Tang Tekang, it was this different legal concept that created the sharp contrast in the development of logic between China and the West.[13]

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[11] Jean Escarra, *Le Droit chinois* (Vetch, Peiping, 1936), 3. Cited in Joseph Needham, S*cience and Civilization in China,* vol. 2 (Cambridge University Press, 1956), 521.

[12] Cf. He Weifang, op cit.

[13] Tang Tekang (ed.), *The Autobiography of Hu Shih,* chap. 5, editor's note 23.

Of course, there always existed the profession of the pettifogger. Although pettifoggers have been vilipended by the government, according to the research of the Japanese scholar, Fuma Shushumu, during the thousand year period between the Song Dynasty and the Qing Dynasty, pettifoggers became more active. Based on abundant research, Professor Fuma concluded that they existed against all the odds, within the loopholes of the judicial system. They met both their clients' needs and shared interests with government officials. However, the work of advocates was quite different from that of advocates today. For example, they could not represent clients and argue in court. Almost all of their work was done outside the court. As a result, the claims of parties could not be developed into an exploration of legal theory. Rules of Evidence couldn't be created without the participation of lawyers. Neutrality and passive jurisdiction amidst professional confrontation were not possible either. As a result, officials in local government played a dominant role in the proceedings. At the same time, even though the pettifoggers did survive as a profession, their exclusion from the social mainstream, in addition to the fact that most pettifoggers were people who failed in the imperial exams, made them a powerless group that lacked support from justifiable sources. The influence of this humble class on social affairs was further impaired by the lack of guild, which usually establishes a set of professional guidelines to gain wide support for the conduct of business activities. Again and again, during the process of constructing a modern legal system and structure, people confronted the problem of lack of legal professionals.

To sum up, when we review China's old government structure and the operations of its judicial system, we observe that some of its characteristics still exist today; these characteristics might be a potential impediment to the process of creating a new legal system in China. To some degree, the evolution of a modern judicial system in China was the outcome of both a collision and fusion between traditions and foreign experience, which occurred in connection with changes in China's social structure and social life.

After the mid-eighteenth century, despite China's increasing contact with the West and the constant clashes in law during the process, the Chinese were not particularly interested in the legal system of the Western nations. Even missionaries to China seldom made efforts to introduce their law. This was partly because the Chinese people were traditionally more interested in knowing about things they already had, and partly because the deeply held notion of Middle Kingdom made it difficult to acknowledge any superiority of the "barbarians." As a result, when the Western powers arrived with guns, the

Chinese were equipped to confront them only with disdain, an underdeveloped social structure, and armies that were by no means capable of exerting power or administration.

Under such pressure from the outside, changes in China's legal system began. Because of this, the Chinese first had to make superficial alterations. For example, without the pressure from the West, especially the tremendous pressure from the Western invasion of Beijing after the Boxers' Movement, the Qing Dynasty wouldn't have made fundamental changes to its traditional legal and judicial systems, which had been in place for more than two thousand years. But with Western influences, it became more evident that the traditional legal system was not effective enough to retain control in such a large country with a growing population. Some progressive ideas were advanced that to change the legal system was the only way for China to survive.

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# WTO'S IMPACT ON THE RULE OF LAW IN CHINA

Martin G. Hu

There is no doubt that the WTO will bring China formally and completely into the world trading system. Unlike any other trade agreements, the WTO is unique in that it has a strong dispute settlement system—the so-called DSB (the Dispute Settlement Body), which is given the power under the WTO to adjudicate disputes among member countries, and more significantly to enforce its decisions. Given that the People's Republic of China has never accepted adjudication of an international body, let alone any enforcement against it, China's willingness to accept the DSB shows a huge commitment. In this sense the WTO's impact on the Rule of Law in China is unprecedented.

## WTO'S BASIC LEGAL PRINCIPLES

Although numerous principles can be extracted from WTO agreements, the following are the most prominent ones:

(1) Tariff reduction, which is self-explanatory.

(2) Fair trade, which prohibits export via dumping or subsidy. (Article 6 and Article 16 of General Agreement on Tariffs and Trade—GATT.)

(3) Transparency, which requires member countries to timely publish and maintain transparency of trade-related laws, regulations, judicial decisions and administrative rulings. (Article 10 of GATT.)

(4) Non-discrimination including national treatment, which requires that treatment for foreign products be no worse than that for like domestic products in terms of taxes, charges, and other laws, regulations and requirements. (Article 3 of GATT.) This is indeed the cornerstone of the WTO, which also has triggered most disputes among WTO members.

## WTO'S IMPACT

All the above legal principles of the WTO will contribute to the reshaping and development of the Rule of Law in China. One direct consequence of tariff reduction is more trading transactions between China and the rest of the world. All the parties linked with the transaction chain will demand better protection of their property and economic rights in the Chinese legal system. Tariff reduction will also require more competition and reform of the state-owned

enterprises, which I hope can translate into less corruption and more equal protection of all players in the market, whether private-owned or state-owned, foreign-owned or domestic-owned.

The impact of tariff reduction on the Rule of Law in China may seem far-reaching and indirect, but the other three principles (fair trade, transparency and national treatment) will certainly have a more immediate and direct effect.

The economic reform underway in China is largely a reform of a centrally planned economy into a market economy. In this process it is crucial to define the areas where government interference should become unnecessary as well as to "hand over" such areas to the market or private sector with reasonable costs to the society and the individuals so affected. The principle of fair trade (anti-dumping and anti-subsidy) under the WTO, which serves to disentangle the government from the trade activities, will facilitate the process of China's transformation into a market economy. In turn the market economy itself will demand the Rule of Law.

The principle of transparency, though limited to trade regulations under the WTO, connotes some of the core components of the Rule of Law, as provided by Article 10.3 of GATT:

> *(a) Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article [which requires prompt publication to enable acquaintance of traders].*
>
> *(b) Each contracting party shall maintain, or institute as soon as practical, judicial, arbitral or administrative tribunals or procedures for the purpose,* inter alia, *of the prompt review and correction of administrative action relating to customs matters. Such tribunals or procedures shall be independent of the agencies entrusted with administrative enforcement and their decisions shall be implemented by, and shall govern the practice of, such agencies….*

Such WTO provisions read a lot like law school textbooks on the Rule of Law. As we can see, not only does the WTO require transparency and accessibility of law, it also calls for an independent judiciary review, both of which are the core components of the Rule of Law.

The principle of non-discrimination or national treatment, as many scholars have pointed out, will first encourage local Chinese business to break down the barriers of various forms of protectionism or favoritism before it does so for

foreign companies. Most of the existing protectionism and favoritism cannot be justified either in an economic sense or from the Rule of Law point of view. They have something to do with unjustified and unchecked privileges granted by the government, the process of which is often secretive, arbitrary and capricious. In order to improve the competitiveness of Chinese businesses in the world market, the Chinese government has to break down unjustified protectionism and favoritism. If there have not been sufficient incentives or pressure to do so before, the WTO is now establishing a deadline for China by requiring national treatment and transparency. Here again, market forces and competition, which will be introduced into China by the WTO, will give the Rule of Law a better chance to grow in China, because both the government and the governed will have to draw the legal boundary between them as dictated by market forces.

## WTO CALLS FOR JUDICIAL REVIEW

Absent independent judicial review the Rule of Law would become an empty slogan for a society, rather than an achievable reality for individual citizens, regardless of whatever rights may be written down in the constitution or statutes. The great importance of independent judicial review simply lies in the fact that individual citizens need an independent venue to seek equal and fair application of the law. Should the governed feel that the government has crossed the legal boundary between the government and the governed, independent judicial review is the necessary (if not the only) recourse for the governed. If there is no judicial review or if the judicial review is not independent, it would be extremely difficult to ensure that every actor in the society, including ordinary citizens, the government and its officials, is subject to the Rule of Law.

Under the current PRC legal framework, courts are allowed to review specific administrative actions, but not any legislation or administrative regulations even if they conflict with the Constitution or other higher law. The problem with this kind of "judicial review" is very obvious—the protection of legal rights is diminished as citizens and enterprises, in fear of violating the relevant legislation or administrative regulations, usually choose to abstain from exercising the rights that they are otherwise entitled to. As a result, undue burden is placed upon citizens and enterprises in the process of exercising their rights, which certainly erodes the personal rights of individual citizens and increases the transaction costs of enterprises.

Now comes the WTO, which as an international agreement is regarded as having higher legal force than conflicting legislation and regulations according

to the PRC General Principles of Civil Law. Because the WTO is intended to confer rights only on member countries rather than on individuals or enterprises, whether a PRC court should directly apply WTO agreements in resolving such conflicts is subject to academic debate. However, the practical side of such a conflict is that if it is not resolved in China, actions will be taken against China in the WTO. As such, in order to avoid unnecessary actions against China at the WTO level and to avoid politicizing trade disputes among member countries, judicial review should be adopted in China and should extend not only to "specific administrative actions," but also to legislation and regulations.

As discussed above, the WTO requires independent judicial review at least for trade issues. In addition to such a requirement under the principle of transparency (Article 10 of GATT) as cited above, Article 13 of the Anti-dumping Agreement also calls for judicial review:

> *Each Member whose national legislation contains provisions on anti-dumping measures shall maintain judicial, arbitral or administrative tribunals or procedures for the purpose,* inter alia, *of the prompt review of administrative actions relating to final determinations and reviews of determinations within the meaning of Article 11. Such tribunals or procedures shall be independent of the authorities responsible for the determination or review in question.*

Just like the principle of transparency, the critical requirement here is not the form of the tribunal, which can be judiciary, arbitral or administrative. Rather it is the independent nature of the tribunal that should be maintained by the member countries. However, we all know the judiciary sits in a better position than any other branch of the government to act independently as well as professionally, if the judiciary is given the opportunity to do so.

Unfortunately, contrary to establishing an independent judiciary as dictated by the Rule of Law, the recently passed PRC Legislative Law (passed March 15, 2000) clearly denied the judiciary branch the power of judicial review. Instead the power of resolving conflicts among law and regulations is given to the Standing Committee of the People's Congress (the legislative branch) and the State Council (the administrative branch). As a matter of fact the lack of an efficient and transparent mechanism in the legislative and administrative branches to resolve conflicts within a prescribed period of time invites most of my criticism, let alone the lack of independence.

Although the Legislative Law deserves praise for its clarification of the hierarchy of laws and the division of respective legislative powers, the provisions denying independent judicial review are a step back from moving

toward the Rule of Law. I certainly hope the WTO's call for judicial review will in the long run reverse the trend.

## CONCLUSION

I do not see any possible chance for the Rule of Law to flourish in a society with a centrally planned economy. The reason is not ideological. Rather it lies in the very essence of the Rule of Law, which is to draw a well-defined legal boundary between the government and the governed. In a centrally planned economy where the government plans everything, produces everything, takes everything, and distributes everything, there is indeed no need to draw the legal boundary between the government and the governed, not only from the perspective of the government, but also from that of the governed.

Therefore I believe the external market forces to be introduced into China upon its entry to the WTO will accelerate China's legal reform toward the Rule of Law. China's commitment to the legal principles set forth in WTO agreements, and its acceptance of enforcement of DSB decisions upon China hold the promise that the Rule of Law has never been so close to the Chinese people.

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# THE RULE OF LAW IN TAIWAN

Tsung-fu Chen

The English jurist, A.V. Dicey, once formulated a famous definition of the Rule of Law that included three principles: first, the law has absolute supremacy over arbitrary power, including the wide discretionary powers of government; second, all classes of people are equally subject to the ordinary law of the nation administered in the ordinary courts; and third, constitutional law is not the source but the consequence of the rights of individuals, as defined and enforced by the courts.[1]

In a modern welfare state, the discretionary powers of government are inevitable. As a result, the crucial issue is the extent to which the government is entitled to exercise this power. Although in a continental law system an administrative court is established in addition to ordinary courts, it can follow the principle of the Rule of Law by carrying out the due process of law. Even if a constitution is the result of legislation, constitutional rights must be "the fruit of contests carried on in the courts on behalf of the rights of individuals."[2] Therefore, Dicey's concept of the Rule of Law means in modern society that (1) no arbitrary exercise of governmental power in excess of its authorization is permitted; (2) both the government and private citizens are subject to the law, with all classes of people entitled to a fair and equal procedure in any court of law; and (3) the courts shall be strengthened to enforce constitutional rights; otherwise abstract constitutional statements are merely a bill of rights in a book.

The American jurist, Franz Michael, provides a Western notion of the "Rule of Law," which we may use to compare the Chinese concept of legality, stating:

> Rule of law is the very foundation of human rights. In the Western legal tradition, law is applied equally to all; it is binding

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1 A.V. Dicey, *Introduction to the Study of the Law of the Constitution,* 184-203, (London: MacMillan & Co., 10th ed., 1959), in J.C. Smith & David N. Weisstub eds., *The Western Idea of Law,* 446-452 (London: Butterworths, 1983). Dicey's conception of the Rule of Law is widely discussed. i.e., Roger Cotterrell, *The Sociology of Law,* 157(London: Butterworths, 2nd ed., 1992); Masami Ito, *The Rule of Law: Constitutional Development,* in Arthur Taylor von Mehren ed., *Law in Japan,* 203 (Cambridge: Harvard University Press, 1963).

2 Dicey, *supra* note, at 450.

> on the lawgiver and is meant to prevent arbitrary action by the ruler. Law guarantees a realm of freedom for the members of a political community that is essential to the protection of life and human dignity against tyrannical oppression and to the regulation of human relations within the community.[3]

Accordingly, the state of Rule of Law in Taiwan can be examined through such issues as strengthening judiciary power, protecting human rights, and ensuring equal justice for all under the law. After concisely depicting Taiwan's transition, this paper first examines the way in which the Taiwanese judiciary exercises its authority to bring the government under its control so as to curtail the state's wide discretionary powers. It further investigates the extent to which individual rights are reinforced through court decisions. With respect to equality before the law, however, the paper demonstrates that equal access to the justice system in Taiwan has not been fully realized.

## TAIWAN'S TRANSITION

Prior to exploring the current state of the Rule of Law in Taiwan, it is desirable to skim through Taiwan's political and legal transformation from an authoritarian regime to a liberal democratic country. The Kuomitang ("KMT") took over Taiwan following the Japanese defeat marking the conclusion of the War World II in 1945. As the local government in Taiwan, the Republic of China (ROC) modeled itself after the Japanese government-general in colonial Taiwan and continued the latter's authoritarian rule. In late 1949, when the KMT government moved to Taiwan from mainland China, these Mainlanders inflicted their harsh rule on the local Taiwanese and continued to function under the framework of the ROC Constitution established in 1946. In spite of Chiang Kai-shek's constant declaration of the Rule of Law, his regime promulgated a large number of special laws to consolidate the power of Chiang and its party. These special laws invariably infringed upon the rights of the people in the name of public security, rendering the protection of individual rights under the Constitution nothing more than words on paper.

In the early 1980s, the political situation in Taiwan changed. The KMT regime lost its status in the international arena as the legitimate government of China. It then had to turn to the people of Taiwan to establish its legitimacy.

[3] Franz Michael, "Law: A Tool of Power," *Human Rights in the People's Republic of China,* 33 (Boulder & London: Westview Press, 1988).

Meanwhile, a new generation of Taiwan intellectuals, who were influenced by Western liberal ideas, began to demand political and legal reforms. These new, diversified social movements forced the KMT leader at that time, Chiang Ching-kuo, to gradually shift his agenda to build a democratic state. Martial law was lifted, and the people on Taiwan were allowed to visit China in 1987.

From the late 1980s to the early 1990s, a series of political reforms transformed Taiwan into a democratic country. In 1986, the first Taiwanese opposition party, the Democratic Progressive Party ("DPP"), was successfully established to challenge the KMT-imposed political order. With the trend toward democracy, the "Temporary Provisions for the Period of Mobilization and Suppression of (the Communist) Rebellion of 1948" were repealed. The Constitution of 1946 was repeatedly and extensively amended in 1991, 1992, 1994, 1997, 1999 and 2000, effectively resulting in a new constitution. In 1996, the president of Taiwan was elected through popular election, and in 2000 the former opposition party, DPP, won the presidential election and became Taiwan's ruling party.

Recently, along with political democratization, legal reform is taking place and individual rights are being improved. While the Constitution of 1946 provided extensive political, economic and social freedoms, the newly passed constitutional amendments have further enhanced other civil rights such as the elimination of gender discrimination and the promotion of aboriginal interests.[4] It should be emphasized again that abstract constitutional provisions are not a real guarantee of individual rights. The old Constitution purported to protect a large number of individual rights, while in reality the KMT regime issued numerous statutes and regulations that oppressed individual rights in the name of anti-communism.

In Taiwan's past, the KMT ruling group had omnipotent power throughout all corners of society. The lawmakers, mostly Mainlanders, were not subject to re-election prior to 1992, and the Legislative Yuan, exercising general legislative power, was taunted as "a legislative bureau of the Executive Yuan," the executive branch that exercises power with respect to the administration of the state, in that it was entirely controlled by the KMT party. As a result, any statutes promoted by the executive were rubber stamped by lawmakers. With respect to the judiciary, a high-ranking KMT official once publicly asserted that

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[4] Article 10 of the Constitutional Amendments 2000.

"the courts belong to the KMT." The separation of powers delineated under the Constitution was nonsense. There was no rule of law, but rather rule of the KMT party.

These regrettable experiences, nonetheless, have been changed to a large degree through Taiwanese democratization and social pluralization. Taiwan is no longer "rule of men" but rather "rule of law." In Taiwan today, the judiciary is able to exercise independent authority; the political power is subordinate to the law; and human rights are proclaimed to be the ultimate value of Taiwanese society. Meanwhile, the government endeavors to devise a court system convenient for the people and to recruit more attorneys to provide legal services, with the intent to reinforce common access to the law. Nevertheless, some problems still remain, particularly with respect to the quality of legal services available to the common citizen.

It is worth noting the dynamics of political and legal change during the last two decades in Taiwan. From the mid-1980s on, the opposition party, DPP, successfully instigated a large number of social and political movements, which functioned as an outside force to push the KMT to gradually change its role into that of a reformer. Within the KMT party, however, a division formed between old, conservative members and new reformers, rendering the KMT unable to undertake a full-fledged reform scheme. In the course of acting as a reformer, the KMT could not fully relinquish the power of its old members. Consequently, as it initiated its reform program, some old KMT ideology remained in the statutes and regulations, which were constantly challenged by the Constitutional Court. The Constitutional Court was established by the KMT regime and was once a tool of the KMT party. Nonetheless, the Court built itself into a powerful judicial organ that used the law to eradicate KMT ideology. This development was accompanied by recent fierce social change in Taiwan.

## THE POWERFUL JUDICIARY

In Taiwan, the highest judicial organ of the state is the Judicial Yuan, comprising 15 Grand Justices with a president and a vice-president appointed among them. The Grand Justices constitute the Council of Grand Justices, as well as the Constitutional Court.[5] The Constitutional Court is the sole organ

[5] For the Taiwanese legal system, see Tay-sheng Wang, *Taiwan,* in Poh-Ling Tan ed., *Asian Legal Systems: Law, Society and Pluralism in East Asia,* 124-161 (Sydney: Butterworth, 1997).

with judicial review power in Taiwan. It is entrusted to protect the rights of the people and is theoretically "the guarantor of the Constitution." This Court, however, like other courts, was once the tool of the party-state regime. In the course of Taiwan's democratization, the Constitutional Court has become the most important organ for carrying out the Rule of Law in Taiwan. It established requirements for the administrative agencies to issue regulations, demanded that the legislature implement its decisions and declared the constitutional amendment of 1999 unconstitutional. The people admire the Court's prowess as the defender of the law, with a clear message that the government itself is subjected to the law.

The German principle of legality (*Rechtsstaatsprinzip*) requires that administrative power be exercised in accordance with laws enacted by the legislature. This principle is embodied in the Taiwanese Constitution. Chapter II of the Taiwanese Constitution provides for comprehensive rights and freedoms, which Taiwan's citizens theoretically enjoy. Article 23 of this chapter further insists that all these rights and freedoms may be restricted only by *statute laws* "to prevent infringement upon the freedom of other persons, to avert an imminent crisis, to maintain social order, and to advance public welfare." That is, the power to restrict individual freedoms is solely entrusted to the legislature based on constitutional requirements.

The principle of legality, however, was not enforced by the KMT regime. Because most lawmakers were KMT members, the legislature usually endorsed the executive's proposed laws. Further, the legislature mostly vested a large amount of its power in the executive through the delegation of power to the administrative agencies. Laws enacted by the legislature typically included such provisions as "the promulgation of an enforcement rule is entrusted to (specific agencies)." Under such broad delegation, the executive branch enjoyed wide discretionary power, empowered to issue any regulations it preferred. As a result, individual rights were infringed upon whenever it was deemed necessary.

The Constitutional Court was determined to curtail the broad discretion of administrative actions. In the 1995 case of *The Factory Closing-Down*, for instance, the petitioner and his family produced bean products at their home. The local government decided that their setup was equivalent to a factory, which was required to apply for registration under an administrative rule. The local government thus ordered the petitioner to close down his business because of his failure to register. The Constitutional Court declared the administrative rule null and void, observing that under the Constitution, the

administrative act of closing down a factory constituted a limitation on civil rights, which could be governed only by statutes. The Court found further that an executive order would be valid "only if *it was delegated by a statute that provided clear and specific purposes, contents, and scopes.* Without such clear legislative delegation, any executive order shall be void."[6]

The Court not only put the executive branch under its control, but also demanded that the legislature follow its decisions. The most salient examples are the cases of *Educators.* Under the Constitution, no one can serve as a public official without passing a public competitive examination. The Statute of the Employment of Educators provided, however, that incumbent school personnel who did not pass public examination could continuously serve their offices. The Court held in 1991 that the statute was intended to protect the vested interests of incumbent school personnel, but they could only work for the schools they already were serving unless they passed specific examinations.[7]

The holding, however, was overruled by the legislature, which revised the challenged statute in 1994. The revised statute provided that incumbent school personnel were permitted to transfer among different schools, a provision apparently in contravention of the Court's decision. The Court did not hesitate in 1996 to insist that the legislative power could not transgress the Constitution and the Court's decisions. According to the Court, the legislative revision of this statute would have conferred special status on incumbent personnel without requiring them to pass specific examinations and to demonstrate the same qualifications as other applicants. Such a distinction violated the principle of equality enunciated in the Constitution and ran afoul of the tenor of the Court's prior decision. The article of the challenged statute was thus held void.[8]

The Court instigated a fierce controversy over its authority when declaring the constitutional amendments of 1999 unconstitutional. Before that time, under the Constitution, the National Assembly was the sole parliamentary organ entrusted with the power to amend the Constitution. In 1999, the National Assembly voted anonymously to amend the Constitution in order to prolong the terms of its members and legislators, as well as to change the election

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[6] The Court's interpretation No. 390 (1995).

[7] The Court's Interpretation No. 279 (1991).

[8] The Court's Interpretation No. 405 (1996).

procedure of its members. These amendments provoked strong opposition in society because the members of the National Assembly had amended the Constitution for their own benefit. With the petition of legislators, in 2000, the Court held these amendments unconstitutional and null and void. The Court asserted that the procedure to amend the Constitution shall be publicly known, and that the principle of a republic, the principle of citizens' sovereign powers, and the principles concerning the protection of individual rights and the separation of powers were all of essential importance. These essential principles constituted the basis for the constitutional order of a liberal republic, without possibility of amendment; otherwise the constitutional order could be destroyed.[9]

Given that constitutional amendments become incorporated in the Constitution, the Court's decision raised the issue as to whether the interpreters of the Constitution had the power to review these amendments. In spite of intensive debates, the National Assembly re-amended the Constitution accordingly one month after the decision, with the result that most of its powers were rescinded, reducing the National Assembly to a meaningless organ.

Since the Court was able to declare constitutional amendments unconstitutional, it was hard to identify any governmental actions not subject to judicial review. The Court's brave decisions to fight the executive, the legislature and the National Assembly demonstrated the judiciary's powerful authority and its independence. Political power in no way retained an influence on the judiciary.

## THE PROTECTION OF INDIVIDUAL RIGHTS

The KMT regime deprived the people of their individual rights to consolidate power and to maintain social order. Its measures included arresting any potential dissidents and criminals, as well as undertaking so-called "mind-control" activities. Those measures had a substantial impact on the people's lives and property and greatly inhibited social progress. The KMT's power to manipulate social activities, however, has been strictly confined by the Constitutional Court since the late 1980s, thereby strengthening Taiwanese human rights.

[9] The Court's Interpretation No. 499 (2000).

## The Rights of the Accused

The efficient way to maintain social order is to arrest, under no reasonable legal procedure, any potential criminals, even those who commit misdemeanors. The most effective method to deter crime is to severely and immediately punish the accused with no chance of appeal. And the best way to obtain a confession is to detain the accused as soon as he is arrested. These strategies were widely employed by the KMT state during its authoritarian rule.

Article 8 of the Constitution guarantees individual freedom, and no trials or punishments are allowed except by a court after due process of law. Nonetheless, a police law enacted in the 1950s to punish minor misdemeanors authorized police officers to arrest, prosecute and punish offenders without judicial surveillance. Punishment included detention for up to two weeks, forced labor up to 16 hours and reformatory education. The misdemeanors punishable under this police law included 136 ambiguous offenses, rendering people vulnerable to unwarranted arrests. While the Constitution required that the accused be sent to a court within 24 hours of arrest, the police usually charged the accused with an offense under the police law in case they were unable to investigate the charge within the timeframe. With this maneuver, the police could easily detain the accused for seven days. About 18 percent of Taiwan's population was punished under this police law, and over 15 percent of all offenders were detained from 1969 on.[10]

Although the KMT state effectively used the police law to fight gangsters in order to maintain social order, detention, forced labor, and reformatory education were declared null and void in 1990 because they imposed confinement in violation of the Constitution.[11]

While the intent of the police law was to punish minor misdemeanors, the Anti-Hoodlum Law of 1985 was designed to incarcerate violent hoodlums. The accused were forced to work and deprived of nearly all civil rights. The decision to charge an individual as a hoodlum depended solely upon police discretion, because the magistrates responsible for imposing reformatory education served as mere rubber stamps. The accused under this act were often

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[10] See Rui-Zhi Xie, *Weijing Fafa Xiuzheng Fangaxiang zhi Tantao* (A Research on the Revision Approach of the Law Governing Offenses Punished by the Police), in vol. 8, n.8 Zhongguo Luntan (China Tribune) 18, 19 (1979); Rui-Tong Chen, *Weijing Fafa zhi Yanju* (A Research on the Law Governing Offenses Punished by the Police), 87-8, figure 2 (1975).

[11] The Court's Interpretation No. 205 (1990).

subject to double jeopardy—sentenced to jail in addition to reformatory education. Moreover, the decision to convict most suspects accused of being hoodlums was based on confidential testimony of three secret witnesses, thereby offering police a chance to "produce" fake witnesses. In practice, therefore, many suspects were confined because of the police's administrative maneuvers.

To invalidate the Anti-Hoodlum Law, the Constitutional Court invoked the American doctrine of due process of law. According to the Court, it was unconstitutional for the law under challenge to empower the police to arrest an accused without a warrant, to use secret witnesses without cross-examination, to impose reformatory education without a prior hearing, and to impose both reformatory education and imprisonment where an individual was convicted of a crime. All these provisions of the law were inconsistent with the constitutional guarantees of physical freedom and due process of law.[12]

After police power was delimited, the protection of the rights of the accused extended to the detention initiated by prosecutors. Under the Code of Criminal Procedure, prosecutors had the authority to detain an accused for up to four months during the investigation phase prior to filing a formal indictment. Since prosecutors were responsible for investigating and indicting criminal defendants, they were inclined to detain first and seek evidence later. Detention became a tool to coerce the accused into confession. Further, while the prosecutor and defendants ideally should carry equal weight before a court, the prosecutor's power of detention resulted in substantial inequalities between the prosecutor and the accused.

Taiwanese prosecutors were viewed by both the government and the public as equivalent to judges. When the prosecutor's power was challenged, the government was shocked and embarrassed. Article 8 of the Constitution provides that individuals may be tried or punished merely by a court of law in accordance with legal procedure, and that any individual arrested or detained for committing a crime has to be transferred to a court for trial within 24 hours. The prosecutor's power of detention was declared unconstitutional under this article, even though the government strongly argued that for the prosecutor to share these 24 hours with the police was insufficient to investigate a criminal case, and that to deprive a prosecutor of the power of detention would impair social order.

[12] The Court's Interpretation No. 284 (1995).

In this case, the Court concluded that "the protection of human rights is the highest standard of our contemporary cultural system and the common principle of advanced civilized societies…. Physical freedom is the basis of all freedoms, and other freedoms will be destroyed if physical freedom cannot be rigidly protected."[13]

As crime rates were still high and maintaining social order remained the government's main objective, the due process of law took precedence over all other concerns. Human rights have been declared to be a part of Taiwan's cultural system. Arguably, any law infringing upon individual physical freedom will be declared unconstitutional regardless of any grounds to support that law. Indeed, while the Taiwanese military fell furthest from the judiciary's jurisdiction because of the special status of soldiers, the military court system was recruited into the judiciary jurisdiction in 1997 under the consideration of the protection of physical freedom. That is, even a soldier is entitled to appeal his case to the civil court after his military trial.[14]

## The Freedom of Expression

In addition to rigid control over people's physical freedom, the KMT state intended to control the people's thoughts and to hinder all discourses that challenged its ideology. According to the original Taiwanese Constitution, freedom of speech, teaching, writing, publishing, and freedom of assembly and association are all given to citizens, subject to restriction for the sake of public welfare and social order. To fully allow these rights, however, would have ruined the KMT regime's ideology and its dominance.

After relocating to Taiwan, the KMT regime still claimed its legitimate sovereignty over mainland China and was determined to restore its rule there. Thus, anti-communism was a national policy, and Taiwan independence was a remote idea. Any support for either communism or Taiwanese independence was banned. Those who defied these policies were arrested. To reinforce the KMT's ideology, the Assembly and Parade Law of 1988 decreed that people were not allowed to proclaim support for communism or territorial division when assembling or parading in public. Meanwhile, under an executive order, any nationwide associations were required to put "China" ahead of their names. That is, the word "Taiwan" was not permitted to form any part of an

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[13] The Court's Interpretation No. 392 (1995).

[14] The Court's Interpretation No. 436 (1997).

association's name.

Both laws were challenged in the Constitutional Court. In 1998, the Court, based on the clear and present danger test of American constitutional law, declared the prior-check on speech unconstitutional, saying:

> Both article 14 of the Constitution providing freedom of assembly and article 11 providing freedom of speech, teaching, writing and publishing are freedoms of expression, which are the most important fundamental rights in carrying out democratic politics…. To restrict the rights of assembly and parade, the law has to conform to the principle of clarity and meet the requirements of article 23 of the Constitution…. The Assembly and Parade Law […] that [bans public assembly and parade] based on their discourses about supporting communism or territorial division empowers the authority to investigate people's political opinions prior to assembly and parade. This infringes upon the freedom of expression provided for under the Constitution.[15]

The Assembly and Parade Law contained two additional restrictions: that "it can be recognized from the fact that the assembly or parade may endanger national security, social order, or public welfare," and that "it may endanger other's lives, bodies, liberty, or severely impair other's property." The Court overruled these two restrictions because of their ambiguity, stating that it is unconstitutional for the governing authority to forbid assembly or parade merely based on possible occurrence of risks with *no clear and present danger*.[16]

This case took account only of the protection of freedom to express oneself, disregarding government's state policy. It makes clear that the protection of individual rights is preferable to political ideology. In the same vein, when the Taiwan Law Society (*Taiwan Faxue Hui*) challenged the constitutionality of the executive order requiring "China" instead of "Taiwan" in its name, the Court found the order unconstitutional, arguing that the selection of a name for an association was protected as freedom of assembly, and that restrictions on this selection had to meet the requirements of article 23 of the Constitution, which allowed statute law alone to make such restrictions.[17] Since then, a variety of

[15] The Court's Interpretation No. 445 (1998).

[16] The Court's Interpretation No. 445 (1998).

[17] The Court's Interpretation No. 479 (1999).

nationwide associations have used "Taiwan" in their names, suggesting that "Taiwan" is identified as a nation as a whole.

To socialize the people of Taiwan with the KMT ideology, the party-state regime assumed tight control over the education system. Under KMT party-style education the main educational objectives included instilling nationalism, patriotism and morality. Political issues comprised the major contents of textbooks in primary and secondary schools. Courses such as "Three Principles of People" and "Thought of our National Father (Dr. Sun Yat-sen)," which dealt only with KMT political ideology, were included in the upper grade school curricula. A military training program was incorporated into the national curriculum, and military officials served as staff in senior high schools and colleges from 1952 on. The main purpose of military training was not to teach military skills, but to educate students in KMT ideology and maintain campus security.

With Taiwan's democratization, the KMT began moving its party offices out of university campuses in 1987. A new University Law was enacted to implement academic freedom and school self-governance. Nonetheless, the use of education as a mechanism for ideological control did not diminish with the promulgation of the new law. The KMT government maintained those political ideology courses as requirements for college students under an enforcement rule of the University Law. This requirement was evidently devised to maintain the KMT's ideological hegemony. On the grounds of protecting academic freedom, this enforcement rule was held unconstitutional. The Court ruled that freedoms of academic research, teaching and learning were guaranteed by the Constitution and the University Law. Government restrictions on the college's self-governance had to conform to the principle of legality provided by article 23 of the Constitution. The enforcement rule imposed a limitation on the college's self-governance not addressed by the University Law, thereby unduly interfering with freedom of teaching, and therefore rendering it unconstitutional.[18]

The enforcement rule of University Law also required colleges to institute military training offices staffed by military officers. These military training offices were to carry out KMT ideology and maintain campus security, but would not be concerned with academics. Based on the freedom of teaching

[18] The Court's Interpretation No. 380 (1995).

guaranteed under the Constitution, the Court held the enforcement rule void because it ran afoul of the principle of college self-governance.[19]

When the KMT government made every effort to facilitate ideological socialization among the people and students through restrictions on individual rights, these relevant statutes and regulations have been consistently repealed because of their unconstitutionality. The KMT ideology no longer prevails over individual rights. People are allowed to air their opinions on communism or territorial division through free assembly and parades. The term "China" is no longer symbolic of Taiwan as a nation. School courses for the sole purpose of education in political ideology are not required for college students; and military officers for KMT's ideological training are banned. The "mind-cleaning" measures initiated by the KMT government have gradually been eliminated through court decisions. These developments make clear that human rights prevail over government policy, and that the government has to exercise its power under the Rule of Law.

## ACCESS TO THE LAW

The principle of Rule of Law means that our relations and actions are governed by codified, impersonal and impartial procedures and rules that are applied equally and fairly to all people.[20] Nonetheless, laws are written in such a way that they can be interpreted only by lawyers; judicial decisions are crafted so as to be fully intelligible only to the legally trained. Court regulations and court schedules, even courthouse architecture, are designed around the needs of the legal profession. The denial of legal services is in reality a denial of access to the legal system.[21] By the same token, without competent courts to deal with case processing, even an ideal justice system and well-established legal concepts would nevertheless be futile.

Legal reforms continue to be a constant undertaking for every head of the judiciary in Taiwan. To encourage the people to bring their cases before courts, the judiciary revised the Code of Civil Procedure several times, making it easier for citizens to use the courts and expanding the scope of small claims cases. A large number of small claims courts have been set up in almost every town

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[19] The Court's Interpretation No. 450 (1998).

[20] Gerald Turkel, *Law and Society: Critical Approaches,* 46 (Boston: Allyn and Bacon, 1996).

[21] David Luban, *Lawyers and Justice: An Ethical Study,* 244 (Princeton: Princeton University Press, 1988).

since 1991. Judges in small claims courts even work at night, preparing to serve citizens at any time. The presence of so many small claims courts makes civil procedures expeditious, economical and convenient. The people are encouraged to resolve their disputes in courts. In this regard, the government has demonstrated its determination to carry out the Rule of Law among society.

Nonetheless, Taiwanese court caseloads are tremendously heavy. In 1999, each district court judge had to deal with an average of 545 litigation cases.[22] There were fewer than six judges per 100,000 persons in 1998.[23] As a result, the quality of court decisions is declining, delays in processing cases are multiplying, and the expenditure necessary to sue is increasing. Those litigants with little knowledge or wealth may be overlooked by the court system.

Even worse, it is expensive to hire a lawyer in Taiwan, making it difficult to obtain competent legal aid. In Taiwan, the bar examination is notorious for how difficult it is to pass. Although the government endeavored to raise the passing rates, only 5.6 percent of applicants passed the bar examination in 1998. According to a rough estimate, about 3,200 attorneys were practicing in Taiwan in the same year, reflecting a ratio of 14.6 attorneys per 100,000 persons.[24] Overall, the service of an attorney is still a rare product in the Taiwanese legal market.

Expensive attorney service fees in Taiwan result from the low rate of attorney representation in courts. In December 1999, for instance, the percentage of all civil lawsuits in which both parties had attorney representation was only 4.6 percent, and 19.1 percent in which only one party was represented in district courts. In the high courts, however, the ratios increased to 40 percent and 26 percent, respectively. The attorney representation rates were even lower in criminal courts, with 12.5 percent in district courts and 32.9 percent in high courts, respectively.[25] That is, the parties were inclined not to hire attorneys until their cases were appealed to the high courts, still with a low rate of attorney representation. With such meager attorney assistance, the rights of the people are hardly adequately ensured. Due to expensive legal services, those

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[22] See Judicial Yuan's network service, address: http://www.judicial.gov.tw/juds/1-source5.htm.

[23] In 1998, Taiwan, with a population of almost 22 million, had only 1,275 judges.

[24] The estimated number of attorneys in Taiwan was provided by Taiwan's National Bar Association.

[25] See Judicial Yuan's network service, address: http://www.judicial.gov.tw/juds/1-source5.htm.

litigants with the greatest resources of knowledge, wealth and influence are most likely to be able to make use of the courts. In this way, the Rule of Law is available to the "haves" to a far greater extent than to the "have-nots."[26]

While attorney services are rare in the courts, legal aid for criminals who cannot afford representation is in short supply. Few public offenders are provided with legal aid, despite the government's 1999 policy decision to support a legal aid system. No specific legal-aid organizations, like the American Services Corporation, have ever been established. Legal aid in Taiwanese society is offered by law schools, charity organizations and social activists groups. Their legal services, however, are not comprehensive. Mostly, they provide only consultation with no further paperwork or legal services in the courts, which citizens need most. In the end, citizens have to find and hire lawyers, which many cannot afford.

## CONCLUSION

The Rule of Law suggests no arbitrary governmental power, no infringement on human rights, and the courts' determination to carry out constitutionality based on the principle of equal access to the law. In Taiwan, the judiciary has been an active organ in reviewing decrees, regulations, statutes and even constitutional amendments. The government's power is strictly checked by the principle of legality and constitutionalism. Individual rights such as physical freedom and freedom of expression are highly appreciated over any other concerns. While the government tries to encourage the people to use the courts to resolve their disputes, however, legal services, in terms both of their quality and quantity, are not yet efficient and available. Under the Rule of Law, people are equal before the law. The legal system signifies justice to all. While the people in Taiwan recently have enjoyed a higher standard of legal procedures at the upper levels of the judicial system (i.e., the Constitutional Court), the remaining issue is the way in which the ideal of the Rule of Law can be carried on throughout the lower courts. If only those litigants with great resources of knowledge, wealth and influence are able to make use of courts, then the Rule of Law is available merely to the "haves" rather than the "have-nots." The Taiwanese issue concerning the Rule of Law is that there is in effect a two-tier legal system; there is a high standard of the Rule of Law at the highest court with insufficient support for access to the law. This two-tier

[26] Cotterrell, *supra* note 1, at 159.

system may amount to a systematic denial of justice to the poor. It is therefore imperative for Taiwan to develop a legal aid system that enables the poor to use the courts, which will be an indication that the Rule of Law is equally available for all.

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# THE RULE OF LAW IN VIETNAM: Theory and Practice

Truong Trong Nghia

## INTRODUCTION

After reviewing two Mansfield Center for Pacific Affairs publications on the Rule of Law, (*The Rule of Law: A Lexicon for Policy Makers* by Barry M. Hager, and the December 1999 issue of *Asia Perspectives*) as well as conducting my own research on this topic, I would like to share three observations.

First, it seems to me that there are fewer controversies between the West and Asia on what constitute the core components of the Rule of Law than there are on the contents of those components and on how to apply them to structure a government or govern a society. Second, neither Asia nor East Asia are unified in their approaches to the process of becoming familiar with or adopting the Rule of Law in their societies; different historical developments in each country have led to different attitudes towards and different treatment of the Rule of Law concept, despite a common Confucian tradition. Third, if we accept a certain level of diversity and modifiability in the course of adapting the Rule of Law to the specific circumstances of each country, without sacrificing the spirit and the goal of the Rule of Law, we will be better able to understand the development of the Rule of Law in theory and practice in different countries. We will also be able to learn more from and better help each other in adopting the Rule of Law.

With these three views in mind, I have three goals in writing this paper. First, the paper should provide a historical background on the course of adopting the Rule of Law in Vietnam. Second, it should give an update on the theory of the Rule of Law in Vietnam, especially its endorsement in the official documents of the ruling party—the Communist Party of Vietnam (CPV). Third, it should provide information about how the Rule of Law as a theoretical concept has been transformed into laws and regulations that can be enforced.

## HISTORICAL BACKGROUND OF THE RULE OF LAW IN VIETNAM

My research revealed the following: The Rule of Law in Vietnam has a history dating back to the 1920s. This is likely to surprise many legal scholars and practitioners in the West who have the perception that there is *suspicion or*

*resistance to the Rule of Law concept among Asian leaders*, a fact noted by Barry Hager in his lexicon. From 1858 to 1945, Vietnam was ruled by a French colonial regime, and from 1940 to 1945, also by the Japanese fascist army in Indochina. All patriotic movements and uprisings were drowned in bloodbath, including a number of resistance movements led by several kings of the Nguyen Dynasty, the last royal family of Vietnam. This situation led to the emigration of intellectuals and revolutionaries to other countries, most notably France and Japan, where they hoped to learn from other nations how to eliminate foreign occupation (or gain their support as allies).

Among the outstanding patriotic figures of that time was one person who understood the progressiveness of the Rule of Law and advocated for its theory. When he came to power, he did his utmost to apply the Rule of Law to his government. That person was Ho Chi Minh, the founder of the Democratic Republic of Vietnam—the predecessor of the current Socialist Republic of Vietnam. Thanks to Ho Chi Minh's personal contribution, the Rule of Law was very early planted in the political soil of Vietnam.

Ho Chi Minh left Vietnam in 1911 at the age of 21. By 1919, he became the most prominent leader of the Vietnamese patriotic movements. He joined the French Communist Party in 1920, went to the Soviet Union in 1923, and attended the Fifth Congress of Comintern in 1924. He then worked as a functionary of the Comintern in a number of countries between 1925 and 1938.

But being a communist did not prevent Ho Chi Minh from realizing that, once independence was gained, democracy and the Rule of Law would be the appropriate way to achieve development and wealth for a backward country like Vietnam. In June 1919, the victorious countries of World War I met in Versailles to deal with post-war issues. Ho Chi Minh, under the alias Nguyen Ai Quoc (Nguyen the Patriot), on behalf of a group of leading patriotic Vietnamese in France, sent to this conference *The Demands of the Annamese*[1] *People (Revendication du Peuple Annamite)* requesting *inter alia*:

- Reform of the justice system in Indochina by allowing domestic people to enjoy the same legal protection as European people;

- Free press and free speech;

[1] One of the old names of Vietnam.

- Freedom of association and meeting;
- Free emigration;
- Freedom of education; and
- Replacement of government by orders with government by laws.[2]

During the same period, in a document written in poetic form in the Vietnamese language and disseminated among Vietnamese in France, Ho Chi Minh wrote: "May the Law—this Holy God—be reigning and a constitution be made for Vietnam."[3]

In 1926, in *An Appeal to All Other Nations*, jointly signed with two prominent leaders of the patriotic movement of Vietnam, Phan Boi Chau and Phan Chu Trinh, Ho Chi Minh declared:

> We make our request known to all other nations: we demand full and immediate independence for the Vietnamese people. If that be not implemented, our people will resort to an uprising in a not far future…
>
> If independence is given to our country, we accept the following:
>
> (1) Voluntary contribution to pay, on an annual basis, a part of the debts France is owing to America and England during the World War.
>
> (2) Entrance into a peace and alliance treaty with France.
>
> (3) Adoption of a constitution based on the people's rights.[4]

In 1927, Ho Chi Minh wrote *The Revolutionary Road*, a training and propaganda manual presenting the experiences of the revolutions in the United States, France and Russia, and basic lessons of revolutionary methodology. He also quoted the American Declaration of Independence saying "that all men are …

[2] *Study on Ho Chi Minh's Ideology on State and Law* (Research Institute for Legal Sciences under the Ministry of Justice, 1993), 75-76.

[3] Id., 181.

[4] Id., 182.

endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness …. [W]hen ever any Form of Government becomes destructive of these ends, it is the Rights of the People to alter or to abolish it, and to institute a new Government ….”[5]

*The above-mentioned examples show that for Ho Chi Minh, independence and freedom for a future Vietnam required,* inter alia*, three components: a constitution; the rule by law and not rule by orders; fundamental rights and freedoms for citizens. In other words, they required the core elements of the Rule of Law.*[6]

In February 1930, authorized by the Comintern, Ho Chi Minh founded the Communist Party of Vietnam by unifying three separate communist parties in the country at that time. Ho Chi Minh's correspondence and writings (publicized in the series *Ho Chi Minh's Entire Collection*) and Vietnamese literature on that event reveal that there was a certain discrepancy between Ho Chi Minh's points of view and the official positions of the Comintern regarding strategies and tactics for the revolution in Vietnam. Ho Chi Minh incurred disgrace with the Comintern.[7]

Was Ho Chi Minh's advocacy for the Rule of Law also the reason? I do not have a direct answer, but Ho Chi Minh's literature provides some indication. In the Report on the Tonkin, Annam and Cochin-China sent to the Comintern in 1924, he wrote:

> The economic structure of Indo-China, and I can say, also of India and China, does not resemble the one of the Western society, both in the Medieval Age and in the recent past, and the class struggle in the former is not so severe as in the latter …. In any way, one

[5] *The Revolutionary Road*, Ho Chi Minh's Entire Collection, Title 2, 269-270, (National Politics Publishing House, Hanoi, 2000).

[6] Compare Barry M. Hager, *The Rule of Law: A Lexicon for Policy Makers* (Mansfield Center for Pacific Affairs, 1999), 19-44.

[7] A letter by Ho Chi Minh sent to a Comintern cadre revealed that situation: “Dear Comrade, today is the 7th anniversary of my arrest in Hong Kong. This also the day starting the 8th year of my inactivity. On this occasion, I write you this letter asking for your help to get me out of this sad and suffering situation. Send me to somewhere. Or keep me here. Assign me a work that you find useful. What I would like to propose to you is: please do not let me be inactive that long, just like being beside, being outside of the Party. I will be very grateful, dear Comrade, if you allow me to have an audience with you. I believe that would be better. Since very long, you did not see me. Dear Comrade, please accept my communist brotherly greetings. July 6, 1938. Lin (Nguyen Ai Quoc)” *Letter to a Comrade at Comintern*, Ho Chi Minh's Entire Collection, Title 3, 90.

> cannot forbid the supplement of the of the "historical basis" of Marxism by adding facts that Marx could not be aware of in his days …. Marx has built his theory on a certain philosophy of the history, but history of whom? History of Europe. And what is Europe? Europe is not the whole mankind …. Marxism is to be revised with respect to its historical basis, and to be consolidated by the ethnology of the East. Our Charter: The general direction: Mobilizing the native nationalism in the name of Comintern.[8]

Between 1939 and 1941, Ho Chi Minh returned to Vietnam via China, consolidated the Party, founded the Viet Minh (Alliance for Independence of Vietnam) and prepared for a national uprising.

In August 1945, the Viet Minh led by Ho Chi Minh succeeded in taking power from the capitulating Japanese army in Indochina, despite the presence of the French colonialist regime that had surrendered to the Japanese army in 1939. The Viet Minh took power over all of Vietnam.

At a ceremony marking the founding of the Democratic Republic of Vietnam (DRV) on September 2, 1945, Ho Chi Minh commenced *The Declaration of Independence*, which he authored, with a quotation from the Declaration of Independence of the United States. This quote preceded an excerpt from the Declaration of Human and Citizen Rights of France. Even though he was a communist and a friend of the Soviet Union, which was a victorious party in World War II and playing an influential role in shaping the politics of Eastern Europe in the post-war period, Ho Chi Minh chose the Rule of Law-based democratic republic, not the dictatorship of the proletariat, as the appropriate political regime under the then political circumstances of Vietnam.[9]

One day after the foundation of the Republic, on September 3, 1945, Ho Chi Minh convened the first session of the Interim Government and suggested the *six most urgent tasks of the DRV*, one of which was "to have a democratic constitution …. , to organize, as soon as possible, the general election by giving

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[8] Ho Chi Minh's Entire Colletion, Title 1, 465-467. [Note: Tonkin, Annan and Cochin-China are old names for the north, central and south of Vietnam.]

[9] See Hoang Tung, *From Traditional Thinking to Ho Chi Minh Ideology* (The National Politics Publishing House, Hanoi, 1988), 10. The Soviet Union established diplomatic recognition of the DRV in 1950, five years after its foundation and its involvement in the resistance war against France.

the right to general voting and self-nomination to all citizens reaching the age of eighteen with no discrimination as to sex, wealth, religion, race."[10]

On January 6, 1946, the general election was held throughout the country with nominees from different political parties, including anti-communist parties. A multiparty parliament, the People's Parliament, was elected and it appointed a multiparty government to administer the country. In November 1946, the Parliament adopted the 1946 Constitution.

I find it is worthwhile to review some parts of this Constitution for two reasons. First, among the four constitutions of Vietnam, it is the classic constitution based on Rule of Law principles. Second, 46 years later, it was reincarnated in the 1992 Constitution. Nguyen Dinh Loc, Minister of Justice, noted that, "in many aspects, the 1992 Constitution has taken the model of the 1946 Constitution, not only with regard to the organization of the state apparatus, but also with respect to many provisions on the economic regime."[11]

Regarding the political regime of Vietnam, Article 1 of the 1946 Constitution provides:

> Vietnam is a democratic republic.
>
> All power of the country belongs to the whole people of Vietnam without discrimination as to race, sex, wealth, social class,[12] [and] religion.

The second chapter stipulates the obligations and rights of the citizens, under which all citizens are equal before the law and have equal political, economic and cultural rights. The interests of both the intellectual and the manual worker are protected. Women have rights equal to those of men in all respects. Vietnamese citizens have freedom of speech, publication, association and meeting; the right to free choice of residence; free emigration within or outside the country; and free compulsory primary education. The people have the right to a general, free, direct and confidential vote, as well as the right to referendum on matters vital to the country or amendment to the Constitution. No seizure or detention is allowed without a judicial decision; no invasion of house and

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[10] *The Urgent Tasks of the Democratic Republic of Vietnam*, Ho Chi Minh's Entire Collection, Title 4, 8.

[11] See n. 2, *Study on Ho Chi Minh's Ideology on State and Law*, 25.

[12] The non-discrimination as to social class distinguished this political regime from the dictatorship of the proletariat.

correspondence is permitted without stipulation by law. Private ownership is guaranteed.

With respect to the separation of power, the 1946 Constitution provides for a clearly determined jurisdiction for each of three branches of the state. The People's Parliament is given the highest power of the DRV. Not only does it make laws, but it also elects the president and prime minister and approves the cabinet members. It is subject to reelection by the people every three years. The government is given the highest administrative power, composed of the president, the prime minister and the cabinet, with the president having immunity from any liability except in the case of committing treason. The judiciary comprises the supreme court, appellate courts, primary courts and secondary courts. Judges are appointed by the government and abide by the law alone without intervention by other institutions. Court sessions are open except for special cases. Torture, beating and mistreatment of the accused or the defendants are forbidden.[13]

Should conferring the highest power on the legislative branch be considered a deviation from the Rule of Law? In my opinion, it is not. The Rule of Law requires a clear separation of the legislative, administrative and judicial powers, but does not proscribe the election of the administrative branch or judiciary by the legislature, which is the most democratic branch of the state due to its being subject to the periodic, general and direct election by the people, as well as its heterogeneous composition and its collective decision-making, voting mechanism.

The Rule of Law-based state operated less than one year in peace. In December 1946, the French colonialists launched an unequal war on Ho Chi Minh's infant government and army. The war ended nine years later with the defeat of the French army at Dien Bien Phu.

Thereafter, the country was divided and became involved again in an extremely violent war, which ended in 1975. Between 1975 and 1990, Vietnam applied the "dictatorship of the proletariat," a model of state that was dominant in the whole system of socialist countries. Minister of Justice Nguyen Dinh Loc noted that "the 1980 Constitution almost

[13] The collection of state laws of the SRV, *The 1946 Constitution* (National Politics Publishing House, Hanoi, 1996), 8-19.

fully copied the Soviet model."[14] This model prevailed until the collapse of the socialist block and Vietnam's decision to transition to a market-oriented economy.

## AN UPDATE ON THE THEORETICAL DEVELOPMENT OF THE RULE OF LAW IN VIETNAM

From 1989 until the beginning of the 1990s, renowned legal scholars and practitioners, party cadres and government officials in Vietnam have thoroughly studied and discussed the Rule of Law as a theoretical concept for organizing the political regime and governing society. This examination took place in a series of studies that were assigned to a number of central government institutions that are the think tanks of the Party and the State.[15] It is easy to guess that those activities must have been permitted by the top leaders of the ruling Communist Party of Vietnam (CPV) as part of its efforts to bring political reform in line with economic reform.

The notable result of the theoretical studies of the 1990s was the creation of the concept of "the socialist Rule of Law state."[16] The studies during the 1990s noted that the Rule of Law state originated with the birth of the bourgeois state during the course of fighting feudalism. The Rule of Law state is a democratic state, and vice versa. It is understood to be a state embodying the law, but also abiding by the law. It makes laws to govern relations between the state and its citizens, state-to-state relations, the relationships of citizens to one another, and the state itself (in contrast to the feudal state, which makes laws to govern others). The Rule of Law state enacts the democratic rights and

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[14] See Nguyen Dinh Loc, Minister of Justice, *Study on Ho Chi Minh's Ideology on State and Law*, Research Institute for Legal Sciences under the Ministry of Justice, 25.

[15] I pay special attention to and will quote more from the book *On the Reform of the State Apparatus,* a government-sponsored study project conducted by the National Administration School (now National Administration Institute) under its chair Professor Doan Trong Truyen. I focus on this project for the following reasons. First, it began in 1989 and was completed in 1990, one year before the 7th Party Congress. In this book, the terminology "Socialist Rule of Law State" was used for the first time and one chapter was reserved to define that terminology. Second., the book provided a more complex and far-sighted solution for the political reform that the 7th and 8th Party Congresses have gradually adopted. Other projects were either conducted or published after the 7th Party Congress, meaning that they have surely been adjusted according to official endorsement, or they provide only a repetition of the former.

[16] In fact, from the 7th Congress, the term "dictatorship of the proletariat" was no longer used and was replaced by the term "socialist state of the people, by the people, for the people on the basis of the alliance of the class of workers, the class of peasants and the intellectuals" (the 7th Congress) or "the socialist Rule of Law state" (the 8th Congress).

freedoms of the people into law and is responsible for protecting and guaranteeing those freedoms and rights. However, the differences between the socialist Rule of Law state and the bourgeois Rule of Law state must be distinguished.[17]

The first difference concerns the role and position of the ruling party, the CPV, in Vietnam.

> The CPV is the political force leading the whole [political] system[18] …. [T]hat is an historical inevitability in Vietnam.
>
> … We do not accept the multiparty or pluralist concept both theoretically and practically…, that explains that a democratic society be identical with the existence of oppositional political parties challenging the leading authority of the communist party.
>
> … Reform of the political system should absolutely not touch on the fundamental and decisive issue which is the sole leading role of the CPV.[19]

But at the same time, a warning is served to the ruling party. No matter how great its role and reputation, the ruling party cannot replace the role of the state, and the policy and ideology of the party cannot be substitutes for the law. The ruling party should never convert itself into a state power, or stand above the state power. Doing so will lead to self-weakening, or even to self-destruction. The ruling party must undertake self-reform in order to live up to its mandate as a party of intelligence and scientific methods.[20]

The socialist Rule of Law state does not separate its power but unites it in the legislative branch, the highest state power, which has the authority to make laws, but delegates the administrative authority to the government and the judicial authority to the court. The Rule of Law principle understands the separation of power to mean a clear distinction of the jurisdiction of each branch, and no

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[17] The National Administration School. *On the Reform of the State Apparatus* (The Truth Publishing House, Hanoi, 1991), 32-37.

[18] Id., 10-11. "The term 'political system' is defined as comprising: first, the communist party as the leading force and the most decisive component; second, the state as the center or backbone of the system with the law as the core feature; and third, the political and social organizations, associations or groups of working people."

[19] *On the Reform of the State Apparatus*, see no. 19, 11-19.

[20] Id.

encroachment of one branch by the other. Western theoreticians and practitioners are quoted as saying that in Western countries, due to some flaws and contradictions of the separation of power theory, the separation is sometimes modified and inconsistent.[21]

The socialist Rule of Law state is defined as a state of law. This state makes the constitution and enacts laws to protect the socialist democracy and the freedoms, rights and obligations of citizens. Under this type of state, all people are equal before the law, allowed to do anything the law does not ban, and cannot be forced to do what the law does not oblige. All people, including party organizations or state institutions, have to comply with the law without exception. Restrictions on constitutional freedoms and rights are allowed only to prevent the violation of the interest of other people or of the state, and must be stipulated by law, not by sub-law regulations. [22]

Under the socialist Rule of Law state, state ownership of the key means of production is allowed, but should not lead the state to directly running or intervening in business operations, instead of governing the economy as a whole, and it should not diminish the non-state sectors.[23]

The results of the above-mentioned studies have become the theoretical basis for the CPV in outlining the orientation or policies for political reform. In fact, starting with the 7th Party Congress of CPV[24] in June 1991, the fundamental components of the above-mentioned Rule of Law concept were officially endorsed in the Party documents and enacted through a number of laws and regulations.

The 7th Party Congress did not itself use the term Rule of Law, but it caused a breakthrough in its application. The Congress requested that, unlike during the preceding period, political reform be carried out concurrently—albeit

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[21] Id., 22-23, 104-105. See further "The separation of powers principle has not been fully and completely realized in our constitutional structure, federal and state. The general principle has been qualified by a number of exceptions." *An Introduction to the Anglo-American Legal System* (West Publishing Company, St. Paul, Minnesota, 1988).

[22] Id., 36-41.

[23] Id., 38-40.

[24] Under socialism, the periodic congress of the ruling communist party has the mandate to adopt the most important policies and orientations for the development of all spheres of society over the next term.

gradually—with economic reform. It stated that the core of the political reform in Vietnam is the development of the socialist democracy, because "democracy is the objective law of the establishment, development and self-improvement of the socialist political system." It also pointed out that "the important condition for furthering democracy is to develop and improve the legal system…[25] The 7th Party Congress opined that political pluralism or the operation of opposition parties is not a reflection of democracy. The uniparty system of Vietnam is a result of Vietnam's historical development and objective reality; it does not contradict the Rule of Law or democracy, because state power does not belong to and serve the interest of a ruling minority, but rather the majority of the people. Of course, the ruling party must overcome mistakes and weaknesses in the past by strengthening the law and furthering democracy, but democratic character of a political regime must be evaluated not in political slogans or theories, but mainly in practice and reality.[26]

If the 6th Party Congress marked a milestone in economic reform through its endorsement of the multisectoral market economy including the private capitalist sector, the 7th Party Congress had the same historical significance for political reform. This Congress requested the repeal of the 1980 Constitution, which was almost a copy of the Soviet model,[27] and the enactment of the 1992 Constitution, which is the highest legal endorsement of the socialist Rule of Law state and the *market economy under a socialist orientation* (i.e., not a regular market economy but one that is modified by a socialist orientation).

The terminology "Rule of Law" was officially used for the first time in the documents of the 8th Party Congress in June 1996. Evaluating the implementation of the resolutions of the 7th Congress, it recognized "the successful realization of a number of important renovations of the political system," such as "the proclamation of the 1992 Constitution; amendment and enactment of a number of important laws, further reform of the public administration, [and] continuous building and improvement of the Rule of Law state of the SRV."[28] The Congress' Political Report realized that "the political system has many shortcomings," such as the capability and effectivity in the leadership of the Party and the State not matching the requirements of the

[25] Documents of the 7th Party Congress (The Truth Publishing House, Hanoi, 1991), 54, 90-91.

[26] Id., 122-126.

[27] See n. 16.

[28] See Documents of the 8th Party Congress (National Politics Publishing House, Hanoi, 1996), 61.

situation; widespread bureaucratic attitudes towards and serious violations of democratic rights of the people; and the weakening of morality and diminishing idealism and enthusiasm among some party members and organizations. After confirming the acceptance of the market economy under a socialist orientation, the Congress reaffirmed the characteristics of the socialist Rule of Law state in the same manner as the 7th Congress[29] and urged the Party and the State "to strengthen the socialist legality and the building of the Rule of Law state of Vietnam."[30] It also instructed the Party and all members to operate within the Constitution and the law and bear the liability for their operation."[31]

## THE CONVERSION OF THE RULE OF LAW CONCEPT INTO LAWS

In my opinion, understanding the Rule of Law in Vietnam requires viewing both sides of the coin: the theoretical and the practical. In the case of Vietnam, the theory of the Rule of Law and even its theoretical endorsement in Party documents do not reflect the reality of the multifaceted process of converting the Rule of Law concept into enforceable legal norms that regulate people's actions and social relations. This part of my paper presents some information on this reality.

### The 1992 Constitution

The 1992 Consititution is based on the concept of the socialist Rule of Law state. Under Article 146, "[t]he Constitution of the SRV is the State's basic law having the highest legal validity. All other laws must comply with the Constitutuion." Although up to now, there has been no procedure and state institution for directly enforcing constitutional norms, the Constitution can have practical application in at least two instances. First, a number of constitutional provisions (e.g., the freedoms and rights of citizens, and the structure and operation of the central state institutions) must be converted into detailed laws and regulations in order to be enforced. Second, all laws and regulations must be made in compliance with the Constitution. Therefore, when you find a law or sub-law provision conflicting with constitutional norms, you can request the National Assembly (NA) to nullify it by making use of the NA's supreme authority of supervision over the implementation of the

[29] See above, 6-8.

[30] See Documents of the 8th Party Congress (National Politics Publishing House, Hanoi, 1996), 129.

[31] Id., 150.

Constitution and laws and the NA's authority to repeal laws or other normative documents conflicting with the Constitution, under Articles 83 and 84.

Regarding the political regime, Article 2 stipulates that "the State of the Socialist Republic of Vietnam is a state of the people, by the people, and for the people." All power of the state, the fundament of which is the alliance of the class of workers, class of peasants and the intellectuals, belongs to the people. The CPV is defined under Article 4 as "the leading force of the state and the society." The targeted objective of the nation is defined as "the building of a strong and wealthy country," "the realization of social equality," and "a comfortable, free and happy life for all people."[32]

As for the principle of the supremacy of the law, Article 12 provides that "the State governs the society by the law, and continuously strengthens the socialist legality. All state institutions, economic and social organizations, units of the people's armed forces and all citizens shall strictly abide by the Constitution and the law …. All activities infringing the interest of the state, [and] legitimate rights and interest of collective or individual citizens, shall be handled in compliance with the law." Furthermore, Article 4 stipulates that "all organizations of the Party operate under the Constitution and the law."

With respect to the economic regime, Article 15 affirms "the development of a market economy under the socialist orientation," with a "multisectoral structure with diversified forms of production or commerce on the basis of the whole people's ownership, collective ownership and private ownership the fundament of which are the whole people's and collective ownership." Under Article 22, "businesses and enterprises of all sectors shall implement strictly the obligations towards the State, are equal before the law, enjoy the protection of the State as to legitimate capital and assets. Enterprises of all sectors are allowed to enter into joint ventures or cooperate with local or foreign individuals or economic organizations as stipulated by the law." According to Article 21, "the private and capitalist economic sectors are free to select the

[32] This is a clear break with the Soviet-influenced 1980 Constitution, which provided that the state is "a dictatorship of the proletariat" on the fundament of the "alliance of workers and peasants" carrying out the "historical mandate of successful building of socialism and moving towards communism." Under that Constitution, the CPV is defined as "the sole leading force of the state and the society," "the key factor that is decisive for all successes of the revolution in Vietnam," while the 1992 Constitution recognizes the CPV as "the leading force of the state and the society." As to the party-law relationship, the 1980 Constitution said that "all organizations of the Party operate under the Constitution," whereas the 1992 Constitution adds "…under the Constitution and the law."

form of production or commerce and to set up their enterprises with no limit of size in the industries or professions beneficial to the country and the people." Article 23 provides a "non-nationalization of legitimate properties of individuals and organizations," whereas under Article 25, "the State guarantees the legitimate ownership of capital, properties and other interest of foreign individuals and organizations…" and guarantees that "foreign-invested enterprises shall not be nationalized."

With regard to human rights, Article 50, for the first time, stipulates that "In the Socialist Republic of Vietnam, human rights such as political, civil, economic, cultural and social rights, are respected, as expressed in the citizen's rights and enacted in the Constitution and in laws." Besides other common constitutional freedoms and rights, Chapter 5 provides for a number of personal freedoms, such as the right to free choice of residence and free emigration in, from and into Vietnam; the right to no infringement of body and of residence; the right to legal protection of life, health, honor and virtue; the right to safety and secrecy of correspondence, telephone and telegraph; and various rights to due process (e.g., presumption of innocence, warranted search and seizure, ban on induced or oppressed confession and corporal punishment, early assistance of counsel …), especially the rights of illegally arrested, detained, accused, and tried people to compensate for physical damages, restoration of honor, and to file suit against their wrongdoers.

In implementing the 1992 Constitution, a number of laws and statutes have been passed. I just address those that are new and relevant to the conversion of the Rule of Law concept to enforceable legal norms.

## The Civil Code

The Civil Code of 1995 is the first ever codified civil law of Vietnam; it is the result of a high level of legal drafting skills and legal thinking. The Code provides civil substantive norms for a wide and diversified range of civil relations and activities, such as the civil rights of individuals, including personal rights and their protection through cause of action; all kinds of properties and ownership, especially the official endorsement of private ownership of the means of production and the judicial protection thereof; freedom of business and contract, including forms of civil contract and transaction; and laws on inheritance, intellectual property, technology transfers, and transfers of land use rights.

Regarding personal rights and freedoms, the Code provides *inter alia*: the right to identity (name, picture); the right to protection of honor, virtue and

reputation; freedom of belief or non-belief; freedom of personal privacy; freedom of emigration and the right to free choice of residence; freedom of business; freedom of creative work; and the right to a cause of action to request judicial protection of the rights and freedoms formulated under this Code.

One of seven titles of the Code (Title 2 with 113 sections, out of a total of 838) addresses property and ownership. The Code defines different forms of ownership and reserves one sub-chapter to the regulation of private ownership (for sole proprietors, small businesses and capitalists), which can be established for different kinds of properties, including capital and the means of production, and which pertains to property rights such as the right to occupy, use and dispose of properties, and the right to no restriction as to the quantity and value of properties. One chapter deals with measures to protect the ownership rights and properties of legitimate owners, including the right to judicial protection.

Implementing Article 12 of the Constitution, the Civil Code provides for the first time two sections imposing civil liability on civil servants and judicial officials for their wrongdoings during the course of carrying out their public functions. The Code gives the harmed person a cause of action to recover damages not from the individual wrongdoers, but from the government agency for which the wrongdoer is working.

## The Commercial Law

The National Assembly enacted the Commercial Law in May 1997. This Law, which came into force on January 1, 1998, governs all aspects of commercial activities in Vietnam. It elaborates the constitutional freedoms and rights by providing, *inter alia*, the rights of individuals reaching the age of 18 to practice commerce; the right to equality before the law for business people of all economic sectors; and the obligation of healthy competition and consumer protection versus unfair practices such as market distortion, price dumping, defamation, and the infringement of intellectual and industrial properties. Regarding private sectors in commerce, Section 12 of the Law affirms that the State protects the legitimate commercial ownership, rights and interests of private sector business people, including private capitalists, and encourages state capitalism[33] or mixed ownership.

[33] State capitalism is a joint venture of state-owned and capitalist enterprises.

## The Enterprise Law

Passed by the National Assembly in June 1999 and enacted on January 1, 2000, the Enterprise Law applies to all private enterprises, including enterprises of mixed ownership and joint-stock companies with state equity.[34] Again the constitutional freedom of business and the right to private ownership is the legal basis for the detailed rights, obligations and procedures of the Law. Except for a few categories, such as civil servants or state agencies, the Law gives every individual and organization the right to set up and manage enterprises, and it gives owners of the enterprises full authority to operate their business as well as to own, occupy and dispose of the enterprise's assets.

The Law itself is a revolution of Vietnamese business law in many aspects. It abolishes the licensing authority of the government and gives the business person the freedom to set up and merely register the enterprise. It also repeals the system of minimum capital for each industry prescribed by the government. Except for a few types of businesses, when setting up an enterprise now, the incorporator only declares the capital in the business charter. The Law also does not require the business person to have capital on hand before obtaining the certificate of incorporation.[35]

## The Administrative Court

In May 1996, in an effort to deal with widespread red tape and arbitrary practices in public administration and to further democracy in the state-citizen relationship, the Administrative Court was established as a trial court specializing in adjudicating complaints made by citizens or entities disagreeing with or wrongfully harmed by administrative decisions or actions. Currently, the Administrative Court's jurisdiction encompasses nine categories of administrative decisions or actions, including administrative fines or injunctions, dismissal of civil servants, administrative measures concerning land, housing and construction, confiscation of properties, and collection of taxes and fees. If not satisfied with the Court's judgment, the parties can appeal to the higher court, whose judgment is final.

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[34] The Law has been said to be a step toward creating a level playing field for all business sectors, including state-owned and foreign-invested enterprises. Currently, the latter two are still governed by the Law on State-Owned Enterprises and the Foreign Investment Law.

[35] Statistics show that during the first six months of the new Enterprise Law, 6,100 new private enterprises were established, an increase of 15 percent from the entire number of private enterprises (41,000) created since 1990. Before 1990, no private enterprise was allowed.

## CONCLUSION

At present in Vietnam, there is no suspicion or resistance to the Rule of Law concept from the society and the leadership. Vietnam's reality dictates that while Vietnam should learn from other countries, the nation must develop its own concept and theory of the Rule of Law. That concept must be, on the one hand, based on the generally agreed core principles or components of the Rule of Law, but on the other hand, these must be applied to the specific circumstances of our history, tradition and culture according to the state of our development. This adaptation or modification of the Rule of Law and the consideration of a reasonable pace and prudent way of applying the Rule of Law to the political structure of our country are necessary parts of political reform and aim to ensure political stability and accelerate economic development.

However, there should be no slowness or hesitation in effecting political and economic reform; nor can be there be an abridgment or deviation from the esteemed goals of the Rule of Law: furtherance of democracy, protection of the people's rights and freedoms and guarantee of the supremacy of law. Like the economy, the Rule of Law concept is subject to globalization, which will lead to mutual understanding and benefit for all countries, as long as it does not or is not used to infringe on national sovereignty or intervene in the internal affairs of nations.

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# IN DEFENSE OF ASIAN COLORS

Takashi Oshimura

As an Asian political scientist, I would like to comment on some of the political issues involved with the Western concept of the Rule of Law and its possible application to Asian societies.

## ASIAN PHASE OF POLITICAL LEGITIMIZATION

It should be noted first that the Western Rule of Law approach is by no means completely free from value bias. In making a close review of the Lexicon,[1] a non-Westerner will get the general impression that the Anglo-American concept of the Rule of Law is founded on a separation of universal justice from particular political cultures. For example, if you take the term fairness, a rigid conceptual distinction between procedural fairness and moral sentiment characterizes the American concept of the Rule of Law. Using this logic, while a judgement on "good or evil" is inevitably affected by cultural relativity, fairness itself could be neutral to any specific culture.

However, despite its claim to be neutral and applicable to almost all civilizations, the Anglo-American concept of law is proposing, in effect, a particular kind of world view—its individualistic vision of society. For this reason, the Western approach to the Rule of Law and its underlying value become too often at odds with communitarian philosophy in Asia.

Montesquieu, a celebrated French thinker struggling to formulate a free and democratic constitution based on the idea of the separation of power, once said that legislation should be conceived and laid down in accordance with the beliefs widely accepted among the governed people. Hardly a proponent of Asian values, Montesquieu advised lawgivers to take into consideration the social customs *(moeurs)* peculiar to the nation. Two centuries later, Hayek agreed with Montesquieu that any law that can destroy the spontaneous social order qualifies as tyrannous.

In Montesquieu's view, an institution can be judged legitimate when it is founded on a people's moral sentiment or system of values. This collective sentiment forms a crucial part of political culture. We are not going so far as

[1] Barry M. Hager, *The Rule of Law: A Lexicon for Policy Makers* (Washington, D.C.: The Mansfield Center for Pacific Affairs, 1999).

to assert, with German philosopher Hegel, that a constitution should reflect or even derive from *Volksgeist* (nation's spirit). But we could say at least that a legitimate regime is one that does not go against the people's belief about what is just and what is unjust. Within this context, it is worth emphasizing that the Rule of Law alone cannot suffice to provide legitimacy in Asia.

In considering the idea behind the Lexicon that equates legality or lawfulness directly with legitimacy, a non-Westerner is inclined to ask whether the legal legitimization generalized in major Western countries should replace elsewhere a pre-existing system of values in cases where a society has its own longstanding methods of legitimization rooted in its moral culture.

Not surprisingly, for example, Confucianist nations become perplexed when they are told that a father and his son are legally equal under the Western concept of the Rule of Law. They are puzzled because in most Confucianist legal traditions, the crime of patricide has been penalized more severely than the crime of homicide.

Moreover, it would not be so difficult to confirm that each country has its own factors that hamper promotion of the Rule of Law. If we are to make a diagnosis of the Rule of Law, a localization of the concept is necessary.

As for relativism, it is often used along with the principle of non-intervention as a pretext under which the authority in power justifies a suppression of human rights. Nonetheless, its use in this way should not lead to the conclusion that relativism is bad in and of itself. From a relativist point of view, one may argue that obstacles to promotion of the Rule of Law can differ from country to country. In the case of Japan, bureaucratic discretion as well as extra legislative ordinance powers continue to be a most serious threat to the Rule of Law.

Even when the inherent value of the Rule of Law is universally recognized, the vital question will remain when, how and at what pace a country should proceed with a transition from an authoritarian regime to a Rule of Law regime. Again, relativist thinking is indispensable: there is clear need for transitional theories that can offer practical suggestions on a legal reform program. Theories that focus on the dynamic nature of the transition, including a legal manual, may be more helpful and richer in policy implications.

While the legal scholars and practitioners pursue a purely general theory of the Rule of Law in a Cartesian way, political sociologists tend to focus on developing a quasi-universal, applicable typology. Given the objective of promoting the Rule of Law, legalists and socio-typologists should collaborate.

## POLITICAL POWER AS A PREREQUISITE FOR RULE

All kinds of rule, including the Rule of Law, presuppose an effective exercise of political power. The implementation of the Rule of Law would be made possible by means of a certain amount of governance—a set of controllable elements, such as a central authority and governable people in a demarcated space.

What China or Southeast Asian countries lack is this kind of power arena. One example is China with its huge population and ethnic diversity, where making the Rule of Law work is not necessarily compatible with gaining a power arena. In comparison, the successful acceptance of the Rule of Law in the West is due largely to the fact that nations there had already developed centralized political power.

It is significant that nations in Europe are now discussing a democratic deficit in the European Union (EU). In the EU's institutional structure, the democratic policy-making process is lacking simply because it has only a vulnerable power arena and the population there holds no more than a weak shared identity. EU citizens have so far failed to develop a feeling that they are all subjected to a common authority.

More importantly, when looking back in European history one notices that a rapid transition to the Rule of Law was often accompanied by social fragmentation, which resulted in antagonism as witnessed in the former Soviet Union.

In short, developing countries in Asia and elsewhere have no option but to keep navigating between the two systems: defining a power arena on the one hand and rationalizing power on the other, the latter being achieved through a promotion of the Rule of Law.

## CONCLUSION

The major Western legal systems seem to have made every effort to avoid the worst potential regime, namely totalitarianism. In contrast, in places other than the West, people have never given up in pursuit of the best regime, and they still believe that good government will be a natural product of a virtuous and respectable people. This decisive divergence in perception is a basis for the difference in attitudes towards the Rule of Law.

Somewhat obsessed with the number of lessons drawn from absolutism in the eighteenth century or personalization of power in this century, Westerners have established the goal of building into their legal systems a series of preventionist procedures and for this purpose made the freedom to criticize the government

one of the most important elements of the Rule of Law. On the other hand, Asian nations seek to avoid at all costs not merely totalitarianism but disorder, anarchy, poverty and Western imperialism. The real risk for Asian nations is that they will destroy an existing social morality at the same time that they eliminate these threats.

As a concluding remark, it can be argued that in Asia, particularly at this stage, the Rule of Law should be promoted for reasons other than preventing authoritarian government. What the current financial crisis in Asia reveals is that in order to restore economic stability in this region, mutual and multilateral surveillance on financial policies is needed. But for such a monitoring to be more effective, the policy-making process of each nation should be transparent so that neighboring countries may observe developments within that country.

Therefore, the idea of some Asian leaders that any talk of liberal democracy is a threat to economic stability is no longer persuasive. In seeking to restore economic development, of which Asians are so proud, each country will find the greatest merit in making government more transparent, predictable, representative and accountable.

Apart from the above observations, we can be rather optimistic about the future of Asian democracies, in so far as we are witnessing everywhere in Asia a rise of the middle class and the new rich who are eager to protect their individual rights and to assert their claim to fair treatment under the law, to which governments will sooner or later be obliged to respond.

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# THE RULE OF LAW AND ITS ACCEPTANCE IN ASIA: A View from Korea

Joon-Hyung Hong

According to Professor George P. Fletcher, fairness and reasonableness are two concepts that in the proper meaning of the words are only to be found in the American legal culture.[1] They are, to be sure, of essential importance in the development of the doctrine of Rule of Law. But it remains open to question whether the Rule of Law is merely a function of those two variables. The question arises again: Is the notion of the Rule of Law, based on those two fundamental pillars, unique to American legal culture, as Professor Fletcher claims? On the contrary, the Rule of Law has acquired certain different levels of abstraction in its historical development. At its highest level of abstraction, it is no longer exclusively of Anglo-American origin. It is important that we identify its universal nature and uncover the common ground to be shared among us in the globalizing context of the twenty-first century.

## RULE OF LAW AS A GLOBAL STANDARD

Four years ago, the annual meeting of the Research Committee on Sociology of Law, International Sociological Association, took place in Tokyo. At this meeting the conflicts and transformations of legal culture throughout the world, especially between the Western and non-Western regions including Asia, were discussed. I presented a paper there, arguing that the doctrine of the Rule of Law, viewed at its highest level of abstraction, can be conceptualized as a universal principle of civilized legal systems, and that we will be able to utilize it as a universal criterion to measure and evaluate specific national legal systems that claim to be those of a constitutional democracy.

> The Rule of Law in reality emerged in the context of Western legal history, showing significant divergences in pattern and in origin. Expressions such as "Rule of Law," "Due Process of Law," "*Règne*

[1] George P. Fletcher, "Fair and Reasonable: A Linguistic Glimpse into the American Legal Mind" (paper presented at "The Rule of Law and Its Acceptance in Asia," a conference co-sponsored by the Mansfield Center for Pacific Affairs and the Global Forum of Japan, May 28, 1999).

*des lois,*" *"État de droit,*"[2] or "*Rechtsstaat,*" signify not merely a range of terminological nuances, but characteristics distinctive to each of the socio-historical milieux which contributed to the worldwide currency of these legal principles. These diverse ideals are highly heterogeneous, but comparative legal studies have provided common denominators for varying legal theories. One constant encapsulated in them is an aspiration for individual freedom and political liberty through repudiation of absolute power: this underlies the idea of *Herrschaft des Rechts*, which sees a central function of law as constraining, organizing, limiting and judicially controlling the state power.[3] The political ideal of "government in accordance with law" has, through a long historical development, been integrated into the legal cultures of Europe and North America. Among the shared contents in its diverse manifestations are an injunction against governmental arbitrariness, meaning that state coercion should be exercised only according to rules announced in advance, or, in other words, that commands should be issued and coercion be applied only on the basis of announced rules.[4] Another indispensable element of the Rule of Law is independence of the judiciary, for the autonomy of courts is critical to the autonomy of law, an essential prerequisite for the Rule of Law.[5] Through their law-finding activities the judiciary purports to secure a "government of laws, not men." These aspects of Western constitutionalism, regardless of variations in particular countries, contribute to a Rule of Law paradigm widely accredited in modern societies.

The Rule of Law notion can be differentiated according to level of abstraction as follows: First, the concepts of a "Rule of Law" or a *Rechtsstaat* can be understood as generated in particular national-historical milieux. Second, we can propound a common ideal of

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[2] Latin countries adhere to the same notion without having coined a special term for it: the concept of *legality* is both broader and narrower (Ehrmann: 48). P. Weil, in formulating the concept of legality in France (1978:85) remarks the "*État de droit*" had to be *"État de légal"* above all. For comparison between Great Britain and Germany, see e.g., Scheuner, 472-484; Hess, 1968, 557, etc.

[3] Stern, 1984: 765.

[4] Scheuner, 1964: 16; Ehrmann, 1976, 48; Yoon, D.K., 1990, 1; Collins, 1982, 12; Friedmann, L.M., 1981, 255; Hong, 1991, 35.

[5] Yoon, 1990: 2-3.

the European family of legal systems, in which the *Rechtsstaatsprinzip* and the Rule of Law manifest themselves as "*essentially contested concepts*"[6] with familial resemblances. This general idea of a Rule of Law has become a key part of the Western tradition of political culture, deeply rooted in its organic growth.[7] Its fullest achievement is associated with the maturation of capitalism into laissez-faire competition under conditions of political stability.[8] Finally, the Rule of Law in its broadest extension is an ideal propagated as a universal organizing principle for constitutional orders since World War II, especially across the Third World in the period of decolonization.[9]

It is at this highest level of abstraction that the Rule of Law is seen as "marking the transition from the rule of person to that of an impersonal and neutral order, which protects the citizen against discretionary and arbitrary power, ensures equality with others, guarantees procedural fairness, impartial administration of the law through independent courts, a democratic process of law-making, and rules which both define and enforce the limits on the powers of state institutions as well as set out the scope of legitimate state intervention in the affairs of its citizens."[10]

The possibility of considering the Rule of Law as a superior concept *(Oberbegriff)* to the specific principles of public or constitutional law developed in certain concrete legal-cultural

[6] See Gallies, W.B., Essentially Contested Concepts, 56 Proceedings of the Aristotelian Society (1955-56), 169 (quoted in MacCormich, D.N., "Der Rechtsstaat und die rule of law," *Juristenzeitung* 1984, 65ff).

[7] Selznick, P., Legal Culture and Rule of Law, Plenary Papers, Proceedings of 1995 Annual Meeting Research Committee on Sociology of Law, International Sociological Association (Legal Culture: Encounters and Transformations, August 1-4, 1995, The University of Tokyo), 6: "Despite significant divergences in pattern and in origin, there emerged what could properly be called the Western legal tradition. The rule of law is often identified with the particular legal culture it created."

[8] Ghai, 1986: 184.

[9] See Hong, J.H., 1991: 33. In this respect Wolfgang Friedmann's position (1964, 273ff.), that to give to the "rule of law" concept a universally acceptable ideological content is as difficult as to achieve the same for "natural law," refers to only the institutional aspects of the principle. At the highest level of abstraction, however, it is possible to extract minimum content of the rule of law as a legitimating principle of legal order in modern liberal democracy.

[10] Ghai, 1986: 182-183.

> environments consists in the replacement of the rule of a (subjective) person by the rule of (objective) law, on one hand, and in their functional similarities as legitimating ideologies for the legal order, on the other hand. Abstracted from specific historical circumstances, the Rule of Law thus acquires an ideological universality. A Rule of Law in which validity of the legal order is secured by the autonomy and supremacy of the law in relation to the state and its functionaries thus has been regarded as an essential organizational principle of liberal democratic regimes, giving expression to fundamental ideals of the objectivity, universality and neutrality of law.[11]

My argument was then suggestive of a future in which the Rule of Law becomes a global standard—setting, determining and adjusting the legal-institutional terms of trade for the countries interacting in the environment of globalization. Now, I am beginning to see such an effort being made. The future at that time is now becoming the present.

If we try to reconstruct or reinvent the doctrine of Rule of Law as a global standard, promising both the development of mature democracy and the establishment of healthy (i.e., sound and sustainable) economic growth, we have to examine and parse precisely what it means. When we reach a general agreement on the indispensable ingredients of the Rule of Law, then we can use it as a universal good and also recommend it to those Asian countries that are reluctant to accept it. This is very difficult job.

## ELABORATING THE AGENDA

The major tenets of the Rule of Law need to be agreed upon in the context of globalization. We can see the Rule of Law as "marking the transition from the rule of person to that of an impersonal and neutral order, which protects the citizen against discretionary and arbitrary power, ensures equality with others,

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[11] R. Unger, *Law in Modern Society* (1976), 52-58, 176-192; Hong, J.H., "A Study on the Rule of Law and Marxist Theory of Law," *Ajou Social Science Review,* 1987 (vol. 1), 96, 134; Ghai, 1986, 181, 201. For a critical assessment of this thesis, see Craig, P.P., *Administrative Law* (1983), 37-38. Hunt writes: "It is a common presumption that not only is it desirable to have a system of authoritative rules, but that a civilised or democratic society is one characterised by the subjection of all, rulers and ruled, to a common set of rules. The 'rule of law' doctrine thus forms not merely a constitutional dogma, but constitutes a major element of the general legal ideology. Such a view incorporates the 'universalism' which is embodied in Western political and legal theory and is encapsulated in the concept of citizenship." A. Hunt, 1978: 142.

guarantees procedural fairness, impartial administration of the law through independent courts, a democratic process of law-making, and rules which both define and enforce the limits on the powers of state institutions as well as set out the scope of legitimate state intervention in the affairs of its citizens."[12]

At the same time, it seems to me that this concept of the Rule of Law needs to be tailored in at least two aspects. First, the elements of the Rule of Law have to be minimized in order to be accepted by those Asian countries advocating "Asian values" as well as those standing for Western constitutional democracy. It is important to bear in mind that the ideal Rule of Law has never been 100 percent perfectly realized even in the Western world, its place of origin. A strictly reductionist strategy, of course, would dismiss the essence of the Rule of Law. But by limiting its elements to indispensable, minimum requisites we are able to reach a mutual understanding more easily.

> In the Third World context, a welfare state (*Sozialwohlfahrtstaat*) not grounded in a Rule of Law may tend to evolve into a "police state" (*Polizeistaat*).[13] A Rule of Law is nothing if not a restraint on arbitrary exercises of power. A social order which has made serious attempts to eliminate social inequality, as Weitzer argues, may discover that equality before the law furthers the more general amelioration of inequality.[14] In much of the developing world the Rule of Law remains an unrealized ideal and far less effective in legitimating existing legal orders than is true in Western societies. Evaluation of a developing country's legal reality will be particularly meaningful when the Rule of Law is unevenly institutionalized. Such an approach hardly entails simple adoption of a universalistic Western standard, for the Rule of Law concept must be adapted to historical reality when used to generate criteria for evaluation of shifts from authoritarian to more democratic institutional arrangements.

For instance, the protection of human rights is being glorified as a universal value. The scope and degree of its realization differs according to each country's situation. We can discern some critical, basic human rights that are indispensable for the Rule of Law. If, as Michael Freeman pointed out,

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[12] Ghai, 1986: 182-183

[13] Hong, 1987: 126.

[14] Weitzer, 1980: 151.

freedom of expression and the accountability of public officials are cherished by both East Asians and Americans, those deserve to be included as universal, indispensable elements of the Rule of Law. However, can we make a perfect, unappealable list of human rights to be protected by governments as well as by other social entities? With the paradigm of Rule of Law, we can discuss what kinds of human rights ought to be protected and which rights, with what level of probability. Those global declarations would help us in that discussion. The real problem is the amount of time it would take us until we stop merely confirming the developmental nature of the human rights. What matters here is not the "Yes or No" question about whether human rights are protected, but rather the scope and degree of the guarantee of human rights protection. In this vein it is highly recommendable that we start with those human rights that are admitted, or can be admitted without any serious reservation, by most countries, and those with relatively clear contents and scope (for example, right of human dignity, right of equality, freedom of conscience *(forum internum),* and of course, accountability of public officials).

Let me add another example. In most Asian countries there exist disparities between legal norms and legal reality. The system of judicial review of legislative acts is easily to be found among them—a system that is influenced by the United States or the Federal Republic of Germany.

But some of these legal norms remain only as constitutional decorations, which was the case in Korea until 1988. The constitutional review of legislation, a consistent element of Korean constitutions, wasn't a reality until the Constitutional Court came into operation in 1988. But in this case, how do we tell whether Korea has judicial review as an indispensable element of the modern principle of the Rule of Law?

In Korea there has been enormous progress toward a consolidation of the Rule of Law. With the irreversible process of democratization underway since the "October Protest" in 1987, the existing regime of law had to be transformed to meet the rising needs of the people for a renovated, rational system of governance.

> The changes took place basically in three directions: (1) legislative innovations propelled by the government; (2) development of case law through vitalized law-finding activities of the courts; and (3) growing demand and pressure from the people for Rule of Law in public administration. In the first place, there have been immense legislative innovations, owing mostly to the reform politics of the "Civilian Government" led by the former President Kim Young Sam (hereafter referred as YS). The YS administration carried

> through lots of reform legislations for the public administration sector, such as the Administrative Procedure Act (APA), the Freedom of Information Act and the Information Protection Act, the Basic Law on Administrative Regulation (so called "Regulatory Reform Act"), the Local Autonomy Act, etc. Those epochmaking legislative innovations, in parallel with other reform initiatives, have opened up a new terrain to the Korean administrative law. Second, the administrative case law has made great progress, since the late 1980s, especially thanks to the vigorous activities by the Supreme Court and the Constitutional Court (hereafter each referred as "SC" and "CC"). The CC took up a very strong, positive stance in reviewing the constitutionality of laws, issuing determined decisions nullifying numbers of existing laws, while the SC also assumed a sort of judicial activism delivering a vast number of decisions, sometimes reversing some of its major precedents. Thus, they have made significant contribution to the enrichment of Korean administrative law. Lastly, and the most important factor, was the growing demand and pressure for good governance from the people, that government service should not only be better in quality but also more in accordance with the principle of Rule of Law. With such undiminishing expectations they didn't hesitate to file suits against public authorities, when the legality of their actions was deemed to be questionable. The consequence was a constantly growing number of people suing government, which brought about the court reorganization of 1994, which established the Administrative Court in March 1998, adding a new instance to administrative litigation.

Though the Korean legal system experienced remarkable changes during the last decade, much yet remains to be done in order for the Rule of Law to become a reality in law and practice. The progress, as mentioned above, has been encouraging on the whole. It is still questionable, however, whether the Rule of Law can be achieved in a full-fledged manner. Because the development of Korean law was in part flawed both in process as well as substance, now it is very difficult to judge it in light of the Rule of Law principle. How can we find a workable set of criteria to evaluate the individual legal system and its reality?

Second, some strategic considerations are needed to establish a common ground for dialogue. An overemphasis on the universality of the Rule of Law might expose some authoritarian governments in the Asian region to the risk of losing their legitimacy. The Rule of Law by design constrains political leadership; but to win credibility the government must be supreme and be seen

to have full authority; judicial review and formalized administrative processes may derogate such authority.[15] Normative argument and efforts to convince political leaders (including government leaders on occasion) would not be sufficient. Why should the political leadership have to accept elements of the Rule of Law as new terms of trade in the context of globalization. We need, therefore, a more elaborated texture of Rule of Law, demonstrating the advantages and clarifying the disadvantages of introducing or consolidating the Rule of Law in non-Western countries.

## CONCLUDING REMARKS: Perspectives on the Rule of Law in Korea

Let me conclude my comments by mentioning the status of the Rule of Law in Korea. If the Rule of Law is to be a reality, then the legal system has to become more accessible to the lay public. It has proven very difficult, however, for the enlightened, rational values of Western jurisprudence, exemplified in the Rule of Law principle, to take root in the sediment of Korea's modern history. There existed in fact a widening gap between legal norm and reality. It is important to note that past failures and frustrations of the Rule of Law in Korean history were major factors undermining the legitimacy of the government and the legal order.

A real, effective Rule of Law began to emerge through notable improvements in law and practice, which began during the late 1980s. Now we are faced with unprecedented challenges from the globalizing world, where we have to live up to the Rule of Law as a global standard. The Rule of Law is not only necessary for restoring secure legitimacy of the legal order, but it is also crucial for enhancing the competitiveness of the governance system as a whole. Even though experience tells us that the Rule of Law is a principle of relative rather than absolute value, it can never be abandoned in a modern constitutional democracy. As an insurance (i.e., a *"soupape de sûreté"*) for the future, the Rule of Law promises us a right, democratic and secure way of life in a global village.

The judiciary now stands for its independence more decidedly than ever before. Since 1992, civilian governments have pursued various law reforms aimed at consolidating democracy and the Rule of Law, despite resistance from conservative forces. They try to rebuild popular confidence in the legal order by enacting reform legislation, such as the Administrative Procedure Act (APA), the Freedom of Information Act and the Information Protection Act, the Regulatory Reform Act, the Local Autonomy Act, etc. These reforms are

[15] Ghai, 1986: 200.

expected to contribute to the flowering of the Rule of Law in Korea. It is the people's initiative coupled with the efforts of NGOs that are playing a crucial role in consolidating the Rule of Law in Korea. The ever-growing interest of the people in mobilizing and utilizing legal remedies to protect their rights, demonstrated by the skyrocketing increase in litigation, is therefore a vital, very promising strategy to achieve the Rule of Law. The legal status of individuals must be institutionally guaranteed to enhance their capacity as a driving force to make the Rule of Law a reality.

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