

PLAYING BY THE RULES IN CONTEMPORARY CHINA

Introduction

In Oct 2014 at the Fourth Plenum of the 18th Party Congress in Beijing, the Central Committee of the Communist Party of China declared that comprehensively advancing the rule of law would now be one of the Party's major commitments.¹ In the communiqué of the session the Party proclaimed the rule of law as essential for 'the great rejuvenation of the Chinese nation' and for the 'development of strengthening the military.'² Xi Jinping, the General Secretary of the Communist Party of China and the President of the People's Republic of China, would later describe the rule of law as a 'knife whose handle is in the hands of the party and the people.'³ From the perspective of the Western world where the rule of law has operated for hundreds of years these pronouncements seem odd but they also begin to reveal the fundamental differences between how China and the West view the concept.

This essay aims to answer the question: To what degree has China implemented the rule of law? In answering this question this essay will utilize the following methodology. First, this essay will identify and examine what the rule of law is by studying its function in Western societies as well inspecting the principles commonly associated with its operation. Second, this essay will analyse China's amenability to the rule of law by investigating China's political, legal and cultural climate both throughout history and today. Thirdly, this essay will assess the Party's recent adoption of what they have referred to as the 'rule of law' and analyse to what degree they have either replicated or strayed from the Western standard. Fourthly and finally this essay will argue that the implementation or appropriation of the rule of law in China is manifested within the context and weight of China's history, culture and customs and that it has assumed and will continue to assume a distinctly Chinese

¹ Compilation and Translation Bureau of the Central Committee of the Communist Party of China, *Communique Of The 4Th Plenary Session Of The 18th Central Committee Of CPC* (1 October 2016) China.org.cn <http://www.china.org.cn/china/fourth_plenary_session/2014-12/02/content_34208801.htm>.

² Ibid.

³ Samuel Wade, *Xi's Sharp Words "Ominous" for Legal Reform* (1 October 2016) China Digital Times <<http://chinadigitaltimes.net/2015/02/xis-sharp-words-ominous-legal-reform>>.

form. Mao Zedong once reasoned to senior comrades of the National Association of Musicians in 1956 ‘We should graft foreign things onto a basic Chinese stock.’⁴ It is my argument that the rule of law in China epitomizes this sentiment.

PART 1

The Rule of Law in the Western Context

Despite its ubiquity the rule of law is a notoriously difficult and elusive concept to define.⁵ Perhaps the most influential definitions are those of British jurist A.V. Dicey⁶ and Harvard Law professor Lon L. Fuller.⁷ A.V. Dicey argued that the rule of law constitutes three main concepts: Firstly, that citizens can only be punished for breaching legitimately established laws (thereby nullifying the application of arbitrary power). Secondly, that everyone is equal before the law despite their social position or rank. And thirdly, that the Constitution is the result of the ordinary law of the land rather than its source.⁸ Lon L Fuller’s description is slightly more comprehensive. According to Fuller, the rule of law encapsulates the attributes of publicity of the law, no retroactivity of the law, clarity of the law, consistency in the application of the law, realistic obedience of the law, stability of the law and finally congruity between legal rules and their enforcement.⁹ These principles continue to shape and inform the contemporary understanding of the doctrine today¹⁰ with the Oxford English Dictionary defining the rule of law as ‘the principle whereby all members of a society are considered equally subject to publicly disclosed legal codes and processes.’¹¹

⁴ Mao Zedong, *The Writings of Mao Zedong, 1949-1976: January 1956-December 1957* (Routledge, 1993) 104.

⁵ Brian Z. Tamanaha, *On the Rule of Law* (Cambridge University Press, 2004) 3.

⁶ Judith Shklar, ‘Political Theory and the Rule of Law’ in Allan C. Hutchinson & Patrick Monahan (eds), *The Rule of Law: Ideal or Ideology* (1987) 1, 1.

⁷ Richard Flathman, ‘Liberalism and the Suspect Enterprise of Political Institutionalization: The Case of the Rule of Law’ in Ian Shapiro (eds), *The Rule of Law* (1992) 297, 304.

⁸ A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (Palgrave Scholarly, 10th ed, 1985) 198, 202-203.

⁹ Lon L. Fuller, *The Morality of Law* (Yale University Press, revised ed, 1977) 39.

¹⁰ Eric Orts, ‘The Rule of Law in China’ (2001) 34 *Vanderbilt Journal of Transnational Law* 43, 101.

¹¹ *Rule of Law Definition* (9 June 2015) World Encyclopedia of Law <<http://lawin.org/rule-of-law/>>.

Throughout the 20th century the definition of the rule of law was supplemented with additional legal principles as judges and legal theorists struggled to elucidate how the rule of law operated and what its application meant and looked like.¹² As legal professor Martin Krygier observes the rule of law is now typically defined by a ‘list of legal institutions and the norms and practices directly associated with them.’¹³ Many institutes now follow this approach. The Rule of Law Institute of Australia has defined the rule of law as embodying a set of core principles that include the separation of powers, representative and responsible government, a free press, equality before the law, publicity of the law, an independent judiciary, no retrospective laws and that punishment and conviction can only be administered for genuine breaches of the law.¹⁴ The Australian Collaboration enumerates a similar set of principles including universality of the law, clarity of the law and a legal culture whereby citizens respect the authority of the law.¹⁵

In the United States, the most powerful rule of law country in the world, the U.S. Agency for International Development defines the term as incorporating legitimacy, accountability, fairness and effectiveness in the law.¹⁶ The U.S. Institute of Peace endorses a more modern description which focuses on civil and human rights and democratic forms of governance.¹⁷ A particularly accessible explanation of the rule of law is that of the USA Courts Institute which describes it as ‘a principle under which all persons, institutions, and entities are accountable to laws that are publicly promulgated, equally enforced, independently adjudicated and consistent with international human rights principles.’¹⁸ Within international law the perspective is similar, with the United Nations (which considers promoting the rule of law as being at the heart of its mission) expounding it as encompassing the idea that everyone is

¹² Lord Bingham, ‘The Rule of Law’ (2007) 66 *Cambridge Law Journal* 67, 95.

¹³ Martin Krygier, ‘The Rule of Law: Legality, Teleology, Sociology’ in Gianluigi Palombella & Neil Walker (eds), *Re-locating the Rule of Law* (2008) 1, 3.

¹⁴ *Principles*, Rule of Law Institute of Australia <<http://www.ruleoflaw.org.au/principles/>>; Geoffrey de Q. Walker, *The rule of law: foundation of constitutional democracy* (Melbourne University Press, 1st ed, 1988) 23.

¹⁵ *The Rule of Law* (January 2012) The Australian Collaboration <<http://www.australiancollaboration.com.au/pdf/FactSheets/Rule-of-law-FactSheet.pdf>>.

¹⁶ Orts, above n 10, 75.

¹⁷ *Ibid* 76.

¹⁸ US Courts, *Overview - Rule of Law* United States Courts <<http://www.uscourts.gov/educational-resources/educational-activities/overview-rule-law>>.

accountable to laws that are publicly promulgated, equally enforced and independently adjudicated.¹⁹

The substance and the implication of these explanations can be filtered into one core theme: the restraint of the arbitrary exercise of power. Krygier has written that ‘the rule of law is eternally focused on the ways power is exercised. It emphasises the need to temper power, moderate its exercise, so that it cannot be exercised at the will and caprice of power-wielders, and so they are required to take into account the views, interests, defences and explanations of those their power might harm.’²⁰ The idea that the rule of law essentially calls for the restraint of power explains how easily it has been compounded with other ideas and doctrines. For instance, this essay will view judicial independence as a key example of legal systems that have adopted at least the classical notion of the rule of law.

Despite the difficulty of forming a coherent definition, by using the attributes associated with the rule of law (which all contribute to tempering the arbitrary use of power) it is possible to gauge and measure to what degree China has been successful in implementing it. Before measuring to what extent China has implemented a version of the rule of law consistent with the Western theory this essay will discern to what degree China is amenable to its application. By assessing how relatable or compatible China’s governing system is to the rule of law it is possible to discern to what degree the Party have manipulated and distorted the doctrine to suit their motives and aspirations for power.

PART 2

China’s Historical Amenability to the Rule of Law

To what extent is China historically amenable to the rule of law? The major Chinese

¹⁹ Deputy Secretary General, *Press Release* (25 October 2007) United Nations <<http://www.un.org/press/en/2007/dsgsm346.doc.htm>>.

²⁰ United Nations, *Justice and International Law* <<https://www.un.org/en/sections/priorities/justice-and-international-law/>>; Martin Krygier, *On the rule of law* (20 August 2015) *The Monthly* <<https://www.themonthly.com.au/blog/martin-krygier/2015/20/2015/1440049152/rule-law>>.

schools of thought,²¹ most notably the preeminent philosophies of Confucianism and Legalism have long been conveyed as being utterly incompatible with the Western rule of law.²² Confucianism is centered on the notion that humans do not need laws and can maintain harmonious relationships entirely through the voluntary obedience of the customary rules of morality known as *Li*.²³ Legalism on the other hand denies the suitability of morals or values in the application of the law and opts instead for strict subservience to authoritarian rule – a concept clearly at odds with the rule of law.²⁴ Much of China’s social order is derived from and is rooted in these two schools of thought.²⁵ The rule of law operates somewhere between these two philosophies by ensuring laws are artificially constructed and strictly adhered to but that they contain some kind of moral structure.

Despite the obvious differences between the two Chinese philosophies and the rule of law there remain similarities. For instance, the origin of Legalism and the rule of law is similar. Both arose out of periods of history where the privilege of lawmaking represented the authority of the ruler and belonged to the ruler exclusively.²⁶ In fact, recent archeological evidence indicates that principles resembling Western concepts of the rule of law predate the genesis of Legalism and actually influenced its conception.²⁷ Another similarity is that Legalism ignores the influence of morality in much the same way as legal positivism ignores the morality of natural law. Professor

²¹ Often referred to as the Hundred Schools of Thought: *Hundred Schools of Thought* New World Encyclopedia <http://www.newworldencyclopedia.org/entry/Hundred_Schools_of_Thought>.

²² Zhongqiu Zhang, *A Comparative Study on Western and Chinese Legal Cultures* (Nanjing University Press, 1991) 278, 290; Yang Shiqun, ‘Further discussion on rule-by-law in Chinese legalism: A reply to Wu Shuchen’ (1999) 2 *Journal of the East China University of Politics and Law* 50, 54; Liang Zhiping, *Searching for Harmony of Natural Order: Studies on Traditional Chinese Legal Culture* (China University of Political Science and Law Press, 1997) 60, 83; Chen Yanqing, ‘Comparative Study of the Aristotelian Rule-of-Law and Chinese Legalism’ (2001) 3 *Journal of Gansu Social Science* 19, 22.

²³ Orts, above n 10, 55; William P. Alford, *To Steal a Book Is an Elegant Offense: Intellectual Property Law in Chinese Civilization* (Stanford University Press, 1995) 20, 22.

²⁴ For the difference between Chinese legalism and western legalism see Kung-chuan Hsiao, ‘Legalism and Autocracy in Traditional China’ in Yu-ming Li (eds), *Shang Yang’s Reform and State Control in China* (1977) 655.

²⁵ Emily Mark, *Legalism* (31 January 2016) <<http://www.ancient.eu/Legalism/>>.

²⁶ Peng He, ‘The Difference of Chinese Legalism and Western Legalism’ (2011) 6 *Frontiers L. China* 645, 664. Early example of the phrase rule of law which identifies law as a noble right found in a petition to James I of England in 1610, from the House of Commons: ‘to be guided and governed by the certain rule of the law which giveth both to the head and members that which of right belongeth to them, and not by any uncertain or arbitrary form of government.... Source: Henry Hallam, *The Constitutional History of England* (Harper & Brothers, 1827) 441.

²⁷ James M. Zimmerman, *China Law Deskbook: A Legal Guide For Foreign-Invested Enterprises* (Aba Professional Education 1999) 10-12.

Judith Shklar even argued that Legalism underlies the Western idea of legal positivism so that the two jurisprudential stances actually have more in common than typically assumed.²⁸

Although Legalism is characterized by cruel punishment and unflinching authoritarianism, leading historical figures of the philosophy preached ideas that are comparable if not synonymous with those associated with the rule of law. As recognised by historian Sima Tan Legalists espoused the idea that ‘everything and everyone should be judged by law, based on the fairness of law.’²⁹ During the Qin Dynasty, Chinese statesman Shang Yang argued that everyone from ordinary folk to great officers and ministers should be answerable to the same punishments.³⁰ Other influential Legalist philosophers such as Han Fei and Guan Zhong advocated a similar notion that punishments and rewards should be applied equally to the commons and the nobles.³¹

Legalists also argued that laws should be public. Han Fei maintained ‘one should not make laws that only the intelligent can understand, for the people are not all intelligent.’³² Guan Zi asserted a similar notion stating punishment without warning was akin to oppression.³³ In demonstrating this viewpoint, renowned Legalist Zi Chan successfully organized the penal-code to be cast on a public vessel for all to see in the Jin Kingdom in 513 B.C.³⁴ Furthermore, Legalists also argued that the law should not be able to act retrospectively.³⁵ These ideas and beliefs as Chinese historian Dr. Peng has written ‘would not look out of place in the works of Lon L. Fuller.’³⁶ Therefore, there certainly exists a degree of amenability between Chinese and Western legal history.

²⁸ Judith Shklar, *Legalism: Law, Morals, and Political Trials* (Harvard University Press, 1964) 30-31, 106.

²⁹ Sima Tan, ‘Liu Jia Yao Zhi’ in Bojun Wang (eds), *Historical Records* (Literature Publishing House, 2008) 560.

³⁰ See generally, Shang Yang, ‘Rewards and Punishments’ in *Book of Lord Shang*; Liang Zhiping, ‘Explicating "Law": A Comparative Perspective of Chinese and Western Legal Culture’ (1989) 3 *Columbia Journal of Asian Law* 55, 84. Note: Zhiping is referring to the philosophical works of Liangshu Zheng, Shuchen Wu, Li Li, Su Nan and Fengge Su.

³¹ *Ibid.*

³² *Ibid.*

³³ *Ibid.*

³⁴ Honglie Yang, *History of Chinese Legal Thoughts* (China University of Political Science and Law Press, 2004) 51.

³⁵ He, above n 26, 660.

³⁶ Fuller, above n 9, 33-94.

Australian academic Ross Terrill has written that ‘Chinese Legalism is as Western as Thomas Hobbes.’³⁷ Whereas this essay does not corroborate such a grand claim, it does suggest that Chinese legal traditions are not as alien to the idea of the rule of law as is often presumed. In fact, the similarities discussed suggest that China’s legal history might even possess the historical attributes necessary to be at least responsive if not impressionable to the influence of the doctrine. As the rule of law is not a wholly foreign concept to China sowing it into their legal system would not be a futile endeavour. Indeed some scholars like Dr. Minxin Pei have even opined that ‘the rule of law could gradually emerge and acquire constraining power, although not without difficulty.’³⁸ Considering this, any analysis of how the rule of law has been institutionalized by the Party should be met with the realisation that it is increasingly credulous to suppose the Party do not understand what it is. Considering China does have the capacity and contextual grasp to accurately embrace rule of law principles, to the degree that it has not, can be at least partly explained by a resistance of the Party to do so.

China’s Modern Amenability to the Rule of Law

There is an academic consensus that transplanting English concepts into the Chinese communist and in particular the Marxist-Leninist-Maoist context poses particular difficulties. Professor Eric Orts has listed such endeavours as containing ‘peculiar and especially problematic features.’³⁹ Some political commentators even contend it is simply impossible to convey the rule of law properly or in a way that can be sufficiently understood. For instance, Chinese legal scholar Liang Zhiping has written ‘it is difficult to determine whether they themselves are able to comprehend the words’ meaning.’⁴⁰ Director of the CET Beijing Chinese language program David Moser has come to a similar conclusion stating that because Chinese phrases often lack prepositions, lexicographers seem to not be aware of the distinction between rule

³⁷ Ross Terrill, *The New Chinese Empire: And What It Means For The United States* (Basic Books, 2009).

³⁸ Orts, above n 10, 164.

³⁹ Ibid 75.

⁴⁰ Zhiping, above n 30, 58.

of law and rule by law which has resulted in confusion of its meaning.⁴¹ However, when examining the personal connections some of the Party's leaders have with the West such claims seem jarringly tenuous.

The personal connection that China's supreme leaders have with Western legal philosophy cannot be ignored. Xi Jinping's daughter studied at Harvard, his sister lives in Canada and his first wife who lives in England was the daughter of a Chinese ambassador to London. The Premier of China's State Council Li Keqiang was one of the first students to attend Peking University's law school and he once translated a book written by Lord Alfred Denning. Politburo Standing Committee member Yu Zhengsheng's mother was arrested as a journalist for seven years during the Cultural Revolution and he studied at Harvard. Politburo Standing Committee member Liu Yunshan created the Great Firewall, which censors China's internet from the rest of the world including content concerning China's lack of human rights and its wayward implementation of the rule of law.⁴² And Jia Qinglin, who was once the fourth highest-ranking official in China, has a granddaughter who studies at Stanford University. In fact, of the nine members of the Politburo Standing Committee – the most senior body of the Communist Party – five have children or grandchildren who have studied or are studying in the United States.⁴³

More than just the supreme leaders of the Party have been exposed to Western education and the rule of law. The Chinese Communist Party organise a training program that sends vetted officials overseas to the world's finest universities. Those who are selected travel to universities such as Harvard, Stanford, Oxford, Tokyo University and Cambridge. The coursework undertaken comprises of study covering U.S. policy and government, the Western media and social media. Of the 4,000 officials who have participated in the program, all are given the opportunity to mix

⁴¹ Josh Chin, *Rule of Law' or 'Rule by Law'? In China, a Preposition Makes All the Difference* (20 October 2014) The Wall Street Journal <<http://blogs.wsj.com/chinarealtime/2014/10/20/rule-of-law-or-rule-by-law-in-china-a-preposition-makes-all-the-difference/>>.

⁴² The Telegraph, *Profiles: Who are Xi Jinping and China's six other new leaders?* (15 November 2012) The Telegraph <<http://www.telegraph.co.uk/news/worldnews/asia/china/9679502/Profiles-Who-are-Xi-Jinping-and-Chinas-six-other-new-leaders.html>>.

⁴³ Andrew Higgins and Maureen Fan, *Chinese communist leaders denounce U.S. values but send children to U.S. colleges* (19 May 2012) The Washington Post <https://www.washingtonpost.com/world/asia_pacific/chinese-communist-leaders-denounce-us-values-but-send-children-to-us-colleges/2012/05/18/gIQAiEidZU_story.html>.

with the university's faculty and general student body.⁴⁴ With such exposure to leading Western universities and Western thought it is almost certain the officials are aware of Western systems of governance.

Given this information it would be extremely credulous to assume the leaders of the Chinese Communist Party are unaware of the Western perspective of the rule of law and its inherent curtailment of authoritarian rule. Any palpable indication of ignorance towards the rule of law demonstrated by the Party leaders is probably intentional. The Party remains suspicious of the tenets of democracy and continues to dismiss them as 'foreign concepts'⁴⁵ that are not suitable for China. In September 2013, an internal party memo listed seven political perils the Party should be weary of. The list referred to Western constitutional democracy at number one and went on to include the separation of powers, the multi-party system, an independent judiciary and general elections. The memo also scorned those opposed to the Party's dominance as determined to undermine the Party's leadership and guilty of plotting to infiltrate China's government with Western political systems.⁴⁶

Despite the difficulty of transposing foreign legal concepts across geo-cultural lines it is fairly evident the Party are aware of the implications associated with properly adopting the rule of law. Surprisingly, the Party have implemented the rule of law as a major governmental policy that is intended to steer China into a new era of leadership and rule. The way in which they have done this is significant because by considering how it has been implemented it is possible to gauge the Party's motives and what they wish to achieve with its operation.

PART 3

Rule of Law or Rule by Law

⁴⁴ Ibid.

⁴⁵ Alan Lawrance, *China Under Communism* (Routledge; Revised ed, 1998) 135.

⁴⁶ Stanley Lubman, *In Sharp Words From Xi, Ominous Implications for China's Legal Reforms* (10 February 2014) *The Wall Street Journal* <<http://blogs.wsj.com/chinarealtime/2015/02/10/sharp-words-from-xi-have-ominous-implications-for-chinas-legal-reforms>>.

The communiqué of the Fourth Plenum of the 18th Party Congress session proclaimed the Party would put the rule of law into full effect and that China would become a rule of law country.⁴⁷ This reflected a recent constitutional amendment which provided for China becoming a socialist rule of law state.⁴⁸ The Party's endorsement of the rule of law is suspicious. Considering the tenets of the rule of law envision a system at odds with the one-party state it is strange the Party have embraced it as a major and fundamental policy. One explanation is that it actually has not. In order to fully understand the rule of law in China, and the Party's adoption of it, first the obfuscation associated with the Chinese translation of the term must be dealt with.

The most common translation of rule of law is 'yifa zhiguo' or 'fazhi' which has been translated differently by different interlocutors to mean either rule of law or rule by law.⁴⁹ Much of the confusion involved in trying to understand China's adoption of the rule of law lays in the fact the two translations constitute two dissimilar and fairly unrelated concepts.⁵⁰ As observed by legal professor Eric Orts, rule by law does not necessarily adhere to the elements of the rule of law but merely refers to the use of legal rules in order to assure consistency and regularity of an existing legal system. There is no obligatory consideration of morality within its application. It is simply a social fact.⁵¹ As Orts purports 'in this sense, even a grossly authoritarian legal system may qualify as ruling by law. The only requirement is for a regime to use and enforce legal rules routinely through the use of officials.'⁵² Similarly, political commentators Zheng Yongnian and Shan Wei have argued the rule of law does not simply embody the existence of law and its application but was fostered out of Western liberalism and operates to restrain arbitrary power and prevent individuals or political parties from being above the law.⁵³ China's adoption of the doctrine is very different. It does not attach itself to the Western context and consequently the gulf between 'of' and 'by' in

⁴⁷ Communiqué, above n 1.

⁴⁸ Randall Peerenboom, *China's Long March Toward Rule of Law* (Cambridge University Press, 2002) 1.

⁴⁹ Elisa Nesossi, *Interpreting the Rule of Law in China*, (3 August 2015) Chinoreisie <<http://www.chinoiresie.info/interpreting-the-rule-of-law-in-china>>.

⁵⁰ Chin, above n 41.

⁵¹ Orts, above n 10, 94.

⁵² *Ibid.*

⁵³ Zheng Yongnian and Shan Wei, *Xi Jinping's 'Rule of Law' With Chinese Characteristics* (May 28 2015) China Policy Institute: Analysis <<https://cpianalysis.org/2015/05/28/xi-jinpings-rule-of-law-with-chinese-characteristics>>.

its application is basically non-existent. This would be viewed as a significant defilement of the doctrine in the West but because of China's general unfamiliarity with the term, it has been allowed to develop.

Legal scholars have accused the Party of being conscious of the confusing translation, intentionally adopting the term in order to mask their desire for retaining power. For instance, David Moser has suggested the official Xinhua translators are aware of the distinction of 'of' and 'by' but have tactfully chosen to preserve its use because it seems to suggest the democratization of China's political system whilst also allowing the Party to retain power.⁵⁴ Chinese Historian John Delury has labeled the Party's adoption of the doctrine as profoundly and intentionally misleading.⁵⁵ Dr Elisa Nesossi has claimed 'the authoritarian way in which the concept has been used thus far has produced a palpable sense of surprise and dismay over the future of the Chinese legal system.'⁵⁶ And Business Strategy Advisor at Amnesty International Joshua Rosenzweig has concluded 'for too long we have chosen to hear 'rule of law' every time a Chinese official speaks of 'yifa zhiguo' or 'fazhi' and we think that they are aspiring to achieve our version of legal and political culture, but they just lack the capacity or techniques to get there.'⁵⁷

China's implementation of the rule of law may not fully mimic the Western version but it has definitely involved the implementation of a diverse system of laws. Professor Randall Peerenboom has labelled China's efforts 'a legislative onslaught the pace and breadth of which has been nothing short of stunning.'⁵⁸ While litigation was virtually non-existent in 1979, the total number of cases of first instance reached 3 million by 1992 and 5 million by 1996. By 2007, cases heard in Court had reached almost 7 million annually.⁵⁹ As for legal professionals, in 1978 there were just 1,465 law offices and a mere 3,000 lawyers in China or roughly one lawyer for every 318,733 citizens. By 2014 the number of law firms had jumped to more than 15,000

⁵⁴ Ibid.

⁵⁵ Chin, above n 41.

⁵⁶ Ibid.

⁵⁷ Nesossi, above n 49.

⁵⁸ Peerenboom, above n 48, 6.

⁵⁹ *Supreme People's Court Monitor* (20 March 2016)

<<https://supremepeoplescourtmonitor.com/tag/china-court-statistics-2015/>>.

and the number of lawyers had reached over 271,000.⁶⁰ There are now 23 law schools in China,⁶¹ legal journals are in publication⁶² and judges are increasingly required to have professional legal training.⁶³ Much effort has also been put into publicizing laws with China currently in its fourth five-year plan of publicizing its legal system. Live trials are broadcast on television and a daily program called *Today on Law* is broadcast with professionals explaining current interesting cases.⁶⁴

A torrent of legislation has been passed including the *Company Law Act*, the *Securities Law Act*, the *Contract Law Act*, the *Advertising Law Act*, the *Arbitration Law Act*, the *Insurance Law Act*, the *Chartered Accountant Law Act* and more recently the *Domestic Law Act* as well as a *Criminal Code* and *Civil Code*.⁶⁵ As Harvard Law professor William P. Alford has written, the Chinese legal system as a formal structure of laws and regulations is quite formidable.⁶⁶ China's initial fervor in drafting laws to regulate its economy has spilled over into other areas. A good example of this is the *Legislative Law Act 2003* which is a major piece of legislation that aims to standardize and codify China's legal system after 20 years of haphazard development. It designates the connection between laws and regulations and clarifies the role of various bodies of the Chinese government.⁶⁷ Significantly, the legislation strengthens the stability of China's legal system which in turn legitimizes the law as a reliable authority in China's governing sector. Indeed, if China does not have the rule of law, it is certainly developing rule by law.

⁶⁰ Statista, *Number of lawyers in China between 2005 and 2014*, (2016) <<https://www.statista.com/statistics/224787/number-of-lawyers-in-china/>>; Benjamin L. Liebman, 'Legal Reform: China's Law-Stability Paradox' (2014) 43 *MIT Press Journals* 96, 112.

⁶¹ *China Law Schools* <<https://www.hg.org/law-schools-china.asp>>.

⁶² Peerenboom, above n 48, 7.

⁶³ Orts, above n 10, 73.

⁶⁴ Peerenboom, above n 48, 7.

⁶⁵ Orts, above n 10, 64.

⁶⁶ William P. Alford, 'A Second Great Wall?: China's Post-Cultural Revolution Project of Legal Construction' (1999) 11 *Cultural Dynamics* 193, 193-94.

⁶⁷ Laura Palar, 'China's Legislation Law and the Making of a More Orderly and Representative Legislative System (2005) 182 *The China Quarterly* 301, 309.

The Validity of the Party's Rule of Law Measures

Much of the criticism directed at the Party is centered on the perception they are utilizing the rule of law as a tool of governance.⁶⁸ Such criticisms accuse the Party of using the rule of law to justify and protect the Party's monopolization of state power. For instance, professors Yongnian and Wei contend the Party are using the rule of law as a way of controlling society, containing social unrest, disciplining wayward cadres and affirming the Party's domination over the legal system and their reign above the law.⁶⁹ There is also speculation President Jiang Zemin only endorsed the rule of law as a method of strengthening Party rule and reining in errant cadres and local governments.⁷⁰ These seem to be fair criticisms. Since the 1990s Chinese politicians like Vice Premier Wang Yang have praised the opportunities the rule of law affords the Party in centralizing power to its leadership.⁷¹ In the communiqué of the 4th Plenum the Party stressed that only under the leadership of the Party could the rule of law come to fruition. The Party also stress that their leadership 'is the most fundamental guarantee for socialist rule of law in China' and that the Party must 'exercise leadership throughout the whole process and in every aspect of developing the rule of law in China.'⁷² Some of the language of the communiqué also sheds light on how the Party aim to use the rule of law. The term 'Party leadership' is referred to 21 times, 'the Party' is referred to 30 times and 'state power' is referred to 5 times.⁷³ In contrast, 'independent judiciary' and the 'separation of powers' are only referred to once and 'democracy' and 'Western' is not referred to at all.⁷⁴ Indeed, if it were not for the muddied translation, the kind of legal system the Party refer to would not likely be readily identified as adhering to the rule of law at all.

The benefits for the Party in overseeing the establishment of an advanced system of laws is obvious. By doing so the Party are able to avoid the backlash of hindering ideas like human rights, constitutionalism and democracy, which could pose a threat to their power, and instead adopt them as official policy where they can be controlled.

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ Ibid 60.

⁷¹ Peerenboom, above n 48, 59.

⁷² Communiqué, above n 1.

⁷³ Ibid.

⁷⁴ Ibid.

Any threat Western ideas of democracy posed to the Party are immediately disarmed and any positive traits they contained are simultaneously used to legitimize the Party. This marks the Party's greatest departure from the purpose of the doctrine. If the legislature, the government, the courts, businesses and the populace are all subject to the rule of law, and it is the leadership of the Party that administers it, then the Party have the legitimacy to exercise unquestionable authority. Such a scenario seems to preserve the Party's authoritarianism and is anathema to the core principles the rule of law stands for. Perhaps the most pertinent example of how the Party has set itself above a seemingly constitutionally democratic system is its authority over the judiciary.

The rule of law requires a constitutionally entrenched independent judiciary that can exercise limits on state power,⁷⁵ which is typically achieved through a divide between legislative and judicial powers.⁷⁶ Without this implementation there exists no authority that can autonomously ensure accountability on the ruling regime. Formally, China seems to have adopted a constitutional democracy.⁷⁷ Their system of power is divided into 5 branches consisting of the Political Branch, Executive Branch, Legislative Branch, Judicial Branch and Military Branch in an arrangement which seems to mimic the doctrine of the separation of powers enshrined in the West. However, in reality as stated by former Standing Politburo Committee President Xiao Yang in 2007 'the power of the courts to adjudicate independently doesn't mean at all independence from the Party. It is the opposite, the embodiment of a high degree of responsibility vis-à-vis Party undertakings.'⁷⁸ Although the constitution seems to enshrine the rule of law by specifying all organizations, including political parties are subject to the law, it also demands subservience to the leadership of the Communist Party as one of its four cardinal principles.⁷⁹ As a result China's judiciary is basically an instrument of the Party. Less than one-fifth of judges have formally studied at a university⁸⁰ and most have been sourced from the military or the Communist Party

⁷⁵ Orts, above n 10, 94; *McGautha v California* 402 U.S. 183, 252. (1971)

⁷⁶ Orts, above n 10, 91.

⁷⁷ Zhao Yuhong, 'Law of Contract' in Wang Guiguo & John Mo (eds) *Chinese Law* (2009) 217, 222-23.

⁷⁸ Xiao Yang, *A correct concept of judicial authority is the proper meaning of rule of law* (18 October 2007) China Court Daily, <<http://old.chinacourt.org/html/article/200710/18/270093.shtml>>.

⁷⁹ Orts, above n 10, 68.

⁸⁰ Donald C. Clarke, 'What's Law Got To Do With It? Legal Institutions and Economic Reform in China' (1991) 10 *UCLA Pacific Basin Law Journal* 1, 58.

itself for being politically loyal to the Party line.’⁸¹ Consequently, judges are usually powerless without Party approval and lack any realistic capacity to act as a check and balance on Party authority.⁸² Furthermore, it is the Standing Committee alone that may interpret laws, a function typically performed by the judiciary.⁸³

Inspecting Rule of Law Measures

The abolition of China’s re-education through labour camps and the Party’s anti-corruption campaign launched in 2012 are often touted as evidence the Party is serious about implementing the rule of law.⁸⁴ In any case these examples provide a valuable insight into how the Party have implemented the rule of law and the typical dimensions of its application. The Standing Committee abolished the re-education through labour camps on 28 December 2013⁸⁵ partly due to the fact sentencing to the camps were largely performed by the police without the detainee being charged or tried. This was considered to be in conflict with the rule of law and⁸⁶ the United Nations called the decision a major step forward.⁸⁷ However, organizations like Amnesty International have dismissed the abolition as a mere cosmetic change claiming the persecutions have continued and that some camps have simply changed their names to Drug Rehabilitation Centres.⁸⁸ If such claims are true they would seem to serve as an archetypal example of the Party’s adoption of the rule of law. Whereas the re-education through labour camps were a clear illustration of Party indoctrination

⁸¹ Stanley B. Lubman, ‘Bird in a Cage: Legal Reform in China After Mao’ (Stanford University Press, 1999) 253; Orts, above n 10, 72.

⁸² Murray Scot Tanner, ‘The Politics of Lawmaking in Post-Mao China: Institutions, Processes, and Democratic Prospects’ (Clarendon Press, 1999).

⁸³ Orts, above n 10, 68.

⁸⁴ Sophie Beach, *What Will Zhou Yongkang Case Mean for Rule of Law?* (8 December 2014) China Digital Times <<http://chinadigitaltimes.net/2014/12/will-zhou-yongkang-case-mean-rule-law-china/>>; *Abolishment of Re-education through Labour: Strengthening Rule of Law and Judicial Reform* United Nations Development Programme <<http://www.cn.undp.org/content/china/en/home/ourwork/democraticgovernance/successstories/RTLS-reform-rule-of-law.html>>.

⁸⁵ Bao Ling-Ling, *Decision of the Standing Committee of the National People’s Congress on Abolishing the Provisions on the Reeducation through labor Law* (December 28 2013) NPC <http://www.npc.gov.cn/npc/xinwen/2013-12/30/content_1821974.htm>.

⁸⁶ Celia Hatton, *Final goodbye to China’s ‘re-education’ camps?* (20 November 2013) BBC News <<http://www.bbc.com/news/blogs-china-blog-25013994>>.

⁸⁷ Beach, above n 76.

⁸⁸ *China’s ‘Re-education Through Labour’ camps: Replacing one system of repression with another?* (17 December 2013) Amnesty International <<https://www.amnesty.org/en/latest/news/2013/12/china-s-re-education-through-labour-camps-replacing-one-system-repression-another/>>.

and thought-policing, rebranding the camps as correctional facilities for miscreants allows the Party to continue to intern political dissidents without looking like they are disciplining them for their political agendas. Xi Jinping's anti-grafting campaign constitutes a similar process.

Xi Jinping's anti-corruption campaign was announced as a key measure for advancing the rule of law following the 4th Plenum of the 18th Party Congress and has proven itself to be a ruthless and far-reaching campaign. The campaign plays a major role in China adopting the rule of law system. This is not just because the Party proclaims corruption as a 'trampling on the rule of law'⁸⁹ but because it fosters a core element of the doctrine; namely that no one is above the law no matter their eminence or authority and that those who make and enforce the law are also bound by it. To date the campaign has seen the indictment of more than 100,000 people.⁹⁰ It has netted over 120 high-ranking officials including five national leaders⁹¹ and it is currently responsible for the issuing of disciplinary penalties to roughly 300,000 officials every year.⁹² Perhaps most significantly, guided by Xi Jinping's vow to crack down on 'tigers and flies' alike,⁹³ the CPC Central Commission for Discipline Inspection has arrested and imprisoned some of China's most senior leaders. To date the campaign has arrested and charged 19 Central Committee members, 33 Generals and 100 Provincial Ministers.⁹⁴

The most senior official targeted by the campaign is Zhou Yongkang. Yongkang was previously a member of the 25-member Politburo Standing Committee, the Minister of Public Security of China and was ranked 29th in the 2011 Forbes list of the world's most powerful people.⁹⁵ Zhou was sentenced to life imprisonment for receiving \$20

⁸⁹ Minxin Pei, *5 Ways China Could Become a Democracy* (13 February 2013) The Diplomat <<http://thediplomat.com/2013/02/5-ways-china-could-become-a-democracy/>>.

⁹⁰ Keith Bradsher, *China's Anticorruption Commission Investigates Senior Official* (5 December 2012) The New York Times <<http://www.nytimes.com/2012/12/06/world/asia/early-target-of-chinas-anti-corruption-commission-identified.html>>.

⁹¹ Christopher Johnson, Minxin Pei, Kerry Brown, *Can Xi Jinping's anti-corruption campaign succeed?* (21 March 2015) China Power <<http://chinapower.csis.org/can-xi-jinpings-anti-corruption-campaign-succeed/>>.

⁹² Xinhua, *Graft busters discipline nearly 300,000 officials in 2015* (3 June 2016) <http://news.xinhuanet.com/english/2016-03/06/c_135160649.htm>.

⁹³ Bradsher, above n 81.

⁹⁴ Johnson, Pei, Brown, above n 82.

⁹⁵ Forbes <<http://www.forbes.com/profile/yongkang-zhou/>>.

million in bribes.⁹⁶ His wife Jia Xiaoye and son Zhou Bin were also given lengthy sentences and Bin was fined \$72 million.⁹⁷ Other Politburo members have also been targeted including Guo Boxiong, the former Vice Chairman of the Central Military Commission and General Xu Caihou, formally one of the most senior members of the People's Liberation Army and the former Vice Chairman of the Central Military Commission. Guo Boxiong was sentenced to life imprisonment for accepting bribes and General Xu Caihou was detained and removed from the Party in 2014 but died before trial. In an extreme case of discipline Gu Junshan, a former lieutenant general, was sentenced to death with a two-year reprieve for charges of bribery, embezzlement and abuse of power.⁹⁸

The campaign has precipitated the deconstruction of the widespread suspicion of criminal immunity enjoyed by the Party's highest-ranking officials. Many of those arrested were not only among the highest-ranking members of the Party but held considerable wealth and influence in their own right. For instance, Zhou was a chief executive and deputy general manager of the China National Petroleum Corporation and before he was arrested had a net worth of \$14.5 billion.⁹⁹ Likewise, Generals Boxiong and Caihou held considerable influence in the People's Liberation Army which continued well into their retirement.¹⁰⁰ Indeed, the campaign has proven itself to be anything but window dressing. No corruption investigations have ever been mounted against members of the Politburo Standing Committee, the previous member to be expelled from the Party was Zhao Ziyang following the Tiananmen Square protests in 1989 and not since the Gang of Four has Politburo Standing Committee

⁹⁶ Celia Hatton, *China corruption: Life term for ex-security chief Zhou* (11 June 2015) BBC News <<http://www.bbc.com/news/world-asia-china-33095453>>.

⁹⁷ Philip Wen, *Jail for wife and son of former China security chief Zhou Yongkang* (16 June 2016) The Sydney Morning Herald <<http://www.smh.com.au/world/jail-for-wife-and-son-of-former-china-security-chief-zhou-yongkang-20160616-gpkabg.html>>.

⁹⁸ James Mulvenon, *The Only Honest Man? General Liu Yuan Calls Out PLA Corruption* Hoover Institution <<http://media.hoover.org/sites/default/files/documents/CLM37JM.pdf>>.

⁹⁹ Benjamin Kang Lim and Ben Blanchard, *China seizes \$14.5 billion assets from family, associates of ex-security chief* (30 March 2014) Reuters <<http://www.reuters.com/article/us-china-corruption-zhou-idUSBREA2T02S20140330>>.

¹⁰⁰ Minnie Chan, *Hu Jintao's weak grip on China's army inspired Xi Jinping's military shake-up* (11 March 2015) South China Morning Post <<http://www.scmp.com/news/china/article/1734663/hu-jintaos-weak-grip-chinas-army-inspired-president-xi-jinpings-military>>.

members been put on trial.¹⁰¹ However, there are questions behind the motives of the campaign and whether they truly rest on promoting the rule of law.

Xi Jinping's anti-corruption campaign has been accused of masking a political purge with Xi Jinping himself appearing to be 'frighteningly ruthless.'¹⁰² The shape the campaign has taken and its disregard for procedural fairness, judicial transparency¹⁰³ and the apparent political motivations behind who it has targeted have convinced many commentators it has been driven by a lust for power. For instance, many of the trials have been closed, many of those arrested threatened Xi Jinping's authority and many of those charged have accused the Party of torturing them for their confessions.¹⁰⁴ The Economist's column on Asian politics, Banyan, has written 'it is hard not to see corruption allegations as the latter-day weapon of choice in the winner-takes-all power struggles that the party has always suffered.'¹⁰⁵ Founder and editor of Boxun news, He Pin, has compared the incarcerations of Zhou Yongkang, Bo Xilai, Ling Jihua, and Xu Caihou to a contemporary Gang of Four who were actually imprisoned for conspiring to usurp power.¹⁰⁶ New York Times writer and People's Literature Award winner Murong Xuecun has written: 'In my view, Xi's anti-corruption campaign looks more like a Stalinist political purge.'¹⁰⁷ And one military source commented that having witnessed Xu Caihou and Guo Boxiong control the army's staff affairs under Hu Jintao's nose, Xi Jinping persecuted them in

¹⁰¹ *China arrests former security chief Zhou Yongkang* (5 December 2014) The Telegraph <<http://www.telegraph.co.uk/news/worldnews/asia/china/11276723/China-arrests-former-security-chief-Zhou-Yongkang.html>>.

¹⁰² John Garrick and Yan Chang Bennett, *China's Socialist Rule of Law Reforms Under Xi Jinping* (Routledge, 2016) 121.

¹⁰³ *China: Confessions, Closed Trials Mock Justice* (3 August 2016) Human Rights Watch <<https://www.hrw.org/news/2016/08/03/china-confessions-closed-trials-mock-justice>>; Ting Shi and Brendan Scott, *China Security Head's Secret Trial Shows Limits of Xi's Push* (12 June 2015) Bloomberg <<http://www.bloomberg.com/news/articles/2015-06-11/china-security-chief-s-secret-trial-exposes-limits-of-xi-s-power>>.

¹⁰⁴ *Ibid.*

¹⁰⁵ Banyan, *Tiger in the net* (13 December 2014) The Economist <<http://www.economist.com/news/china/21636086-zhou-yongkang-may-well-have-been-corrupt-his-real-problem-was-losing-power-struggle-tiger>>.

¹⁰⁶ Fang Bing, *China's Fight Against Corruption and Tigers* (12 June 2014) Voa <<http://www.voachinese.com/a/zhouyongkang-case-20141205/2547874.html>>.

¹⁰⁷ Chunhua Hu, *Xi Dismantles the 'New Gang of Four' With Probe of Hu's Aide* (23 December 2014) Bloomberg <<http://www.bloomberg.com/news/articles/2014-12-23/xi-dismantles-china-s-new-gang-of-four-with-probe-of-hu-s-aide>>.

order to demonstrate his power upon becoming Chairman of the Central Military Commission.¹⁰⁸

The campaign is generally thought to have helped legitimize the Party's regime,¹⁰⁹ curb social dissatisfaction and to have improved the popularity of the Party.¹¹⁰ As with the re-branding of the re-education camps, the anti-corruption campaign appears to be instrumental in ensuring equality before the law exists while simultaneously allowing Xi Jinping to target political opponents.

PART 4

The Chinafication of the Rule of Law

How well rule by law will legitimize the Communist Party's leadership over the next decade will be of particular interest to the Western world. The Party's fierce adoption of law may have the effect of preserving its power or it may prove itself to be an instrument that will facilitate its own downfall. One-party regimes have a history of collapsing around the 70-year mark. The longest duration of a one party regime was the Communist Party of the Soviet Union which lasted 74-years.¹¹¹ One-party regimes in Mexico and Taiwan collapsed after 71 and 73-years respectively.¹¹² Moreover, close to another 80 countries have transitioned from authoritarian rule to varying forms of democracy in the past forty years.¹¹³ With such patterns of democratization some commentators have theorized that the collapse of the Communist Party in the next 10 to 15 years is highly probable and that its eventual collapse is inevitable.¹¹⁴ These predictions are based on an analysis of the elements that contributed to the collapse of authoritarian regimes elsewhere. For instance, the socioeconomic growth seen in China has been accompanied with a rise in literacy, income, urbanization and

¹⁰⁸ Minnie, above n 91.

¹⁰⁹ Peerenboom, above n 47, 60.

¹¹⁰ Johnson, Pei, Brown, above n 82.

¹¹¹ *Communist Party of the Soviet Union* Encyclopaedia Britannica
<<https://www.britannica.com/topic/Communist-Party-of-the-Soviet-Union>>.

¹¹² Ibid.

¹¹³ Ibid.

¹¹⁴ Minxin Pei *China's Middle Class Is About to Demand Big Changes* (27 May 2016) Fortune
<<http://new.fortune.com/2016/05/26/china-middle-class-changes/>>.

an improvement in technological communication. These changes can have the effect of de-legitimizing authoritarian rule and lubricating collective action as a once poor and agrarian society transform into a more educated middle class that wishes to assert power.¹¹⁵ This unique political landscape is only compounded by China's long history of power struggle.

Influenced by the success laws have had in regulating China's economy,¹¹⁶ the Party now believes that law is integral for governmental legitimacy. Whereas this has led to what some have called 'the most concerted effort in world history to construct a legal system,'¹¹⁷ this essay argues it is also being used as a tool in a way that is indicative of the power struggle that has been existent in China for thousands of years.¹¹⁸ As acknowledged by scholar Lynne Henderson, 'Because law is a major tool of social and political power, it is vulnerable to "capture" for substantively authoritarian purposes.'¹¹⁹ Whereas other authoritarian regimes surrendered to or compromised with democracy it seems the Party has hijacked democracy in a move that reflects and is shaped by China's political-legal history. China is a country that has had over a dozen dynasties¹²⁰ multiple Warring periods¹²¹ and in only the last century has seen a civil war,¹²² a revolution¹²³ and a grappling for power within its ruling Party that continues to this day.¹²⁴ It is no wonder then that the rule of law has been manipulated to fit in with its historical and political context and has been used as a tool for acquiring ruling legitimacy.

¹¹⁵ Ibid.

¹¹⁶ Randall Peerenboom, 'Ruling the Country in Accordance with Law: Reflections on the Rule and Role of Law in Contemporary China' (1999) 11 *Cultural Dynamics* 315, 343.

¹¹⁷ William P. Alford, 'Exporting "The Pursuit of Happiness"' (2000) 113 *Harvard Law Review* 1677, 1682.

¹¹⁸ Minxin Pei, *In Beijing, Signs of a Major Political Struggle* (29 March 2016) Fortune <<http://new.fortune.com/2016/03/28/china-politics-xi-jinping-power-struggle/>>; Tom Phillips, *China's Xi Jinping denies House of Cards power struggle* (4 May 2016)

<<https://www.theguardian.com/world/2016/may/04/china-xi-jinping-house-of-cards-attacks-conspirators>>; Shirley Yam, *Xi Jinping in full control?* (13 May 2016) South China Morning Post <<http://www.scmp.com/business/article/1944690/xi-jinping-full-control-what-anonymous-interview-tells-you-about-power>>.

¹¹⁹ Lynne Henderson, 'Authoritarianism and the Rule of Law' (1991) 66 *Indiana Law Journal* 379.

¹²⁰ *Timeline of Chinese History and Dynasties* (2009) Asia for Educators <http://afe.easia.columbia.edu/timelines/china_timeline.htm>.

¹²¹ Ibid.

¹²² See generally, Lloyd E. Eastman, *Seeds of Destruction: Nationalist China in War and Revolution, 1937-1949* (Stanford University Press, 2002).

¹²³ Ibid.

¹²⁴ Pei, Phillips, Yam, above n 118.

Perhaps the biggest hindrance facing China in adopting the rule of law is the West's dogmatic insistence of what the doctrine entails. This is only exacerbated by the West's unwillingness to take China's ruling history into consideration. Legal scholar John V. Orth has consistently argued that the West has used the term 'for purely hortatory purposes.'¹²⁵ Likewise, Judith Shklar has warned the term is often employed as 'another one of those self-congratulatory rhetorical devices that grace the public utterances of Anglo-American politicians.'¹²⁶ This tendency of viewing the rule of law indivisibly does arise in a lot of Western media content, particularly in the form of commentators overlooking the uniquely Western context the rule of law grew out from. For instance, human rights – an increasingly potent characteristic of the rule of law – is often claimed to be a self-evident principle and the rights the rule of law is routinely praised as protecting are often referred to as God given and individual.¹²⁷ On the other hand, China's legal traditions did not develop from this context. They are, like the West's, unique and admonishing China's failure to implement a Western rule of law is pointless when its history is not taken into account. China's philosophical history would not consider the American Bill of Rights self-evident, it has no history of Judeo-Christian values to support a notion of God similar to the West's and its traditional compliance to Confucianism favours the collective over the individual.¹²⁸

Commentators like political science professor Baohui Zhang and Nobel Peace Prize winner Liu Xiaobo have argued that for the rule of law to be genuinely implemented in China the country must undergo complete democratization.¹²⁹ Zhang argues that without the democratic attributes of political and institutional checks and balances and a free press to restrain the power of rulers, the rule of law cannot truly develop.¹³⁰ Liu also views the rule of law in absolute terms stating 'modernization means whole-sale westernization.'¹³¹ The magnitude of such a transition for a one-party state is not lost

¹²⁵ John V. Orth, 'Exporting the Rule of Law' (1998) 24 *N.C. J. INT'L L. & COM. REG* 71, 74.

¹²⁶ Orths, above n 10, 243.

¹²⁷ Ibid 83.

¹²⁸ Randall Peerenboom, *What's Wrong with Chinese Rights: Toward a Theory of Rights with Chinese Characteristics* (East-West Center, 1995) 551.

¹²⁹ Suisheng Zhao, *Debating Political Reform in China: Rule of Law vs. Democratization* (Routledge, annotated edition, 2006) 130.

¹³⁰ Ibid.

¹³¹ Ibid.

on Liu who predicts it would take at least 300-years.¹³² Perhaps it is foolhardy to expect the Party to fully embrace the rule of law when it would require such momentous and fundamental change. The Global Times has even labelled the wholesale pursuit of democracy in China as dangerous.¹³³ Eric Orts has dismissed the prediction China will pursue democracy arguing economic and cultural change is more likely to temper central government authority.¹³⁴ The Party's brutal response to the Tiananmen Square protests,¹³⁵ its arrest of notable Chinese democracy activists,¹³⁶ its frequently reported human rights abuses¹³⁷ and its continued assertion of power only buttresses Orts's argument.

Mao Zedong once philosophised 'we ought to critically assimilate useful elements from the West on our own Chinese foundation. In the assimilation of foreign things, they must be transformed and become Chinese.' Given China's political history it is this essay's contention that the rule of law in China will develop within the confines of this sentiment.¹³⁸

Conclusion

The ultimate question is can the outcome of China's march towards the rule of law ever reach synonymy with the West's if it is accomplished through a methodology reflective of China's wildly different culture, legal history and political landscape? As noted by Orts 'there is both a strong initiative to establish what is at least called the rule of law in China and, at the same time, a strong antipathy toward making a

¹³² Liu Xiaobo, *Liu Xiaobo, the "Dark Horse" of Literature* Open Magazine (27 November 1988).

¹³³ Economy, *Legal quagmire* (31 October 2014) Week in China <<https://www.weekinchina.com/2014/10/legal-quagmire/>>.

¹³⁴ Orts, above n 10, 107.

¹³⁵ An estimated 800 to 1,300 people died when the army opened fire on students and protestors protesting for democracy. The government thereafter imprisoned 10,000 to 30,000 participants. Source: Nicholas D. Kristoff, *A Reassessment of How Many Died in the Military Crackdown in Beijing* (June 21, 1989) The New York Times <<http://www.nytimes.com/1989/06/21/world/a-reassessment-of-how-many-died-in-the-military-crackdown-in-beijing.html>>.

¹³⁶ Examples include Wei Jingsheng, Fang Lizhi, Wang Meng, Dai Qing, Guo Luoji; Wang Juntao and Chen Ziming as discussed in William P. Alford, 'Double-Edged Swords Cut Both Ways: Law and Legitimacy in the People's Republic of China' (1993) *The MIT Press* 45, 51.

¹³⁷ Camilla Ruz, *Human rights: What is China accused of* (21 October 2015) BBC News <<http://www.bbc.com/news/magazine-34592336>>.

¹³⁸ Zedong, above n 4, 104.

transition to Western-style democratic government.¹³⁹ This is significant because there is a major difference between merely implementing a system of rules and truly exercising the principles that demonstrate what the rule of law actually reflects. If China continues to adopt what it has referred to as the rule of law but remains skeptical of Western ideals it will continue to foster the former and shun the latter. However, by at least institutionalizing a system of laws to the rapid degree that it has, China has at least begun to lay the groundwork necessary to support democratic transitions. In summary, measuring China's progress towards reaching a political and legal system bound by the rule of law should be viewed through the country's historical context. As Charles Montesquieu once claimed 'The political and civil laws of each nation must be proper for the people for whom they are made, so much so that it is a very great accident if those of one nation can fit another ...[The laws] must agree with the customs [of the people].¹⁴⁰ We should always remember to view China's progress towards fostering the rule of law from this basis.

¹³⁹ Orts, above n 10, 103.

¹⁴⁰ Charles de Montesquieu, *Secondat, baron de*, 1689-1755. *The Spirit of Laws*.

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