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Feeling the Stones When Crossing the River:

The Rule of Law in China

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Synopsis

This article takes two perspectives not commonly found in the extensive literature that has emerged recently on the subject of "rule of law" in China. First, it examines the rule of law in contemporary China by offering comparisons with the rule of law in dynastic China, on grounds that it is impossible to understand today's China without understanding its past (which relatively few Western lawyers do). Second, the article surveys the views of several

contemporary Chinese legal scholars writing in Chinese for their national (Chinese) audience regarding the rule of law in their country. Both of these perspectives can help us see how the currently popular distinction between "thin" and "thick" versions of the rule of law applies in China as that country marks the thirty-year anniversary of its launching of a breathtaking legal reform campaign. Among the article's main conclusions are these: (i) subject to one important possible exception, China both aspires to and has achieved the "thin" version of the rule of law; (ii) serious disagreements exist within China as to what "thick" version of the rule of law (if any) China should seek to achieve, and how it should do so; and (iii) central to the current uncertainty on these matters is China's experience with the "rule of man" and the "rule by law" that characterized dynastic Chinese law — aspects of which still resonate deeply in today's China.

Introduction

The year 2009 marks a major anniversary for Chinese law reform. Thirty years ago, in 1979, the People's Republic of China ("PRC") embarked on a dramatic new phase of legal reform. Having just emerged from a chaotic era — one might say a tragic era — in which Mao Zedong had delivered such disasters as the Great Leap Forward and the Cultural Revolution, China and its leaders began charting a dramatically different economic course, which in turn required fundamental changes in the nation's laws and legal concepts.

In this anniversary year, it seems particularly appropriate to reflect on the consequences of that remarkable legal reform campaign. I have examined several such consequences in a recent book titled *China's Legal Soul.*[1] In this article, I wish to concentrate on a single key topic: the rule of law in today's China.

Of course, I am not alone. Many observers have offered views on the question of whether there is a "rule of law" in China. These views have appeared in many of the publications written in English (mostly by Westerners) that have emerged recently on contemporary Chinese law.[2] As of three years ago, a rich new resource

1. JOHN W. HEAD, CHINA'S LEGAL SOUL: THE MODERN CHINESE LEGAL IDENTITY IN HISTORICAL CONTEXT (2009) (I have drawn from, but expanded on, certain portions of that book in preparing this article).
2. Among the most important of those works, several of which are cited below in footnotes, are the following (listed in alphabetical order by author or editor, starting with books): RONALD C. BROWN, UNDERSTANDING CHINESE COURTS AND LEGAL PROCESS (1997); ALBERT HUNG-YEE CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA (3d ed. 2004) [hereinafter A. CHEN]; DANIEL C.K. CHOW, THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA (2003); KENNETH A. CUTSHAW & JUN HE

for learning about views expressed by Chinese legal scholars in Chinese-language legal journals has also become accessible to Westerners who (like myself) do not read Chinese.[3] As might be expected, the views expressed by this wide range of scholars and commentators vary dramatically on the central question at issue in this article: whether there is a "rule of law" in contemporary China. I intend to offer my own views by examining those writings — both English-language and Chinese-language — and by using a conceptual framework attributed largely to

LAW OFFICES, CORPORATE COUNSEL'S GUIDE TO DOING BUSINESS IN CHINA (2d ed. 2008); BIN LIANG, THE CHANGING CHINESE LEGAL SYSTEM (2008); KENNETH LIEBERTHAL, GOVERNING CHINA: FROM REVOLUTION THROUGH REFORM (1995); STANLEY B. LUBMAN, BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO (1999) [hereinafter LUBMAN-1999]; RANDALL PEERENBOOM, CHINA MODERNIZES: THREAT TO THE WEST OR MODEL FOR THE REST? (2007) [hereinafter PEERENBOOM-2007]; RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARD RULE OF LAW (2002) [hereinafter PEERENBOOM-2002]; PITMAN B. POTTER, THE CHINESE LEGAL SYSTEM: GLOBALIZATION AND LOCAL LEGAL CULTURE (2001); THE LIMITS OF THE RULE OF LAW IN CHINA (Karen G. Turner et al. eds., 2000); CHINA'S LEGAL REFORMS AND THEIR POLITICAL LIMITS (Eduard B. Vermeer & Ingrid d'Hooghe eds., 2002); INTRODUCTION TO CHINESE LAW (Wang Chenguang & Zhang Xianchu eds., 1997) [hereinafter Wang & Zhang]; XIN REN, TRADITION OF THE LAW AND LAW OF THE TRADITION: LAW, STATE, AND SOCIAL CONTROL IN CHINA (1997); GUANGHUA YU & MINKANG GU, LAWS AFFECTING BUSINESS TRANSACTIONS IN THE PRC (2001)[hereinafter YU & GU]; JAMES M. ZIMMERMAN, CHINA LAW DESKBOOK: A LEGAL GUIDE FOR FOREIGN-INVESTED ENTERPRISES (2d ed. 2004); ZOU KEYUAN, CHINA'S LEGAL REFORM: TOWARDS THE RULE OF LAW (2006); Volker Behr, *Development of a New Legal System in the People's Republic of China*, 67 LA. L. REV. 1161 (2007); Jianfu Chen, *The Transformation of Chinese Law — From Formal to Substantial*, 37 H.K.L.J. 689 (2007) [hereinafter J. Chen]; Randall Peerenboom, *The X-Files: Past and Present Portrayals of China's Alien "Legal System,"* 2 WASH. U. GLOBAL STUD. L. REV. 37 (2003) [hereinafter Peerenboom-2003].

3. I am referring to the very valuable journal titled *Frontiers of Law in China*, which has provided English translations of important articles written originally in Chinese by Chinese law professors since 2006. That journal is edited by two law professors from Renmin University of China, including my long-time friend, Professor He Jiahong. Of particular importance for this article are the following articles appearing in various issues of that journal: Chen Weidong, *The Basic Concepts of Re-Modifying the Criminal Procedure Law*, 1 FRONTIERS L. IN CHINA 153 (2006); He Jiahong, *Ten Tendencies of Criminal Justice*, 2 FRONTIERS L. IN CHINA 1 (2007); Jiang Ming'an, *Public Participation and Administrative Rule of Law*, 2 FRONTIERS L. IN CHINA 353 (2007); Ma Huaide, *The Values of Administrative Procedure Law and the Meaning of its Codification in China*, 1 FRONTIERS L. IN CHINA 300 (2006); Ma Xiaohong, *A Reflection on the History of Chinese Constitutionalism of Last Century*, 2 FRONTIERS L. IN CHINA 44 (2007); Wang Chenguang, *Law-Making Functions of the Chinese Courts: Judicial Activism in a Country of Rapid Social Changes*, 1 FRONTIERS L. IN CHINA 524 (2006); Wang Zhoujun, *Democracy, Rule of Law and Human Rights Protection Under Gradually Developed Constitutionalism*, 2 FRONTIERS L. IN CHINA 335 (2007); Zhang Wenxian, *China's Rule of Law in the Globalization Era*, 1 FRONTIERS L. IN CHINA 471 (2006).

Randall Peerenboom in some of his works.[4] That conceptual framework distinguishes between a "thin" version of the rule of law and a "thick" version (actually several competing "thick" versions) of the rule of law.

In addressing these issues I begin by exploring in Part I of this article some preliminary distinctions that will help us study both contemporary Chinese law and dynastic Chinese law — distinctions between "rule of law," "rule by law," and "rule of man." Then I offer in Part II some observations about how these distinctions applied in dynastic China, with an eye to providing a historical foundation for our examination of the rule of law in contemporary China. It is to that subject that I turn in Part III, where I summarize views expressed by important Chinese legal scholars — all to throw light on the issue of how we should assess the changes that have already occurred in China's legal system and how we might anticipate what further changes are to come. I provide a brief review of my views in the Concluding Observations with which the article ends.

I should note that I have taken a "hybrid" approach in preparing this article. On the one hand, I intend to provide a thoughtful series of comparisons and observations based on a broad range of literature, and of course I owe my readers clear guides about which specific sources within that literature I find most instructive. On the other hand, because of the enormity of the subjects involved here — twenty-plus centuries of Chinese dynastic law, a world of different definitions of the rule of law, and myriad other topics that warrant (and have received) multi-volume treatments — I can hope for no more than to provide an overview. As a consequence, and with the kind indulgence of the editors at the *Santa Clara Journal of International Law*, I have tried mightily to keep footnote citations to a bare minimum. Hence the "hybrid" nature of this article: it is intended both as an adequately-documented contribution to the literature and as an essay with a clear and unencumbered story line.

I. Preliminary Definitions and Distinctions

A. Rule of Law — A Survey of Meanings

The rule of law has recently become for many people and institutions around the world a goal, a requirement, a standard, a fetish, perhaps even a religion. But what does it mean? Even a quick perusal of literature relating to the rule of law

4. *See* PEERENBOOM-2002, Peerenboom-2003, and PEERENBOOM-2007, *supra* note 2.

reveals a smorgasbord of formulations.[5] I have distilled from a great many of those formulations a list of several elements that appear with some regularity in rule-of-law definitions. See **Box #1** for my distillation of those elements. [6] As would be expected, they are not by any means all consistent with each other, and they receive very different degrees of attention and nuances of meaning by various observers. In perusing the various elements in **Box #1**, we might consider them

5. Among some of the more recent contributions to that literature that provide definitions of the rule of law are the following (in addition to several of the China-specific sources already cited in notes 2 and 3): ROBIN L. WEST, RE-IMAGINING JUSTICE: PROGRESSIVE INTERPRETATIONS OF FORMAL EQUALITY, RIGHTS, AND THE RULE OF LAW 4-5 (2003); T.R.S. ALLAN, CONSTITUTIONAL JUSTICE: A LIBERAL THEORY OF THE RULE OF LAW 2-3 (2001); Luigi Ferrajoli, *The Past and the Future of the Rule of Law*, *in* THE RULE OF LAW: HISTORY, THEORY, AND CRITICISM 323, 355 (2007); JOHN PHILLIP REID, RULE OF LAW: THE JURISPRUDENCE OF LIBERTY IN THE SEVENTEENTH AND EIGHTEENTH CENTURIES 4, 8 (2004); PAUL W. KHAN, THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP 36 (1999); BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 9, 33, 92-93 (2004); LUC B. TREMBLAY, THE RULE OF LAW, JUSTICE, AND INTERPRETATION 29 (1997); Spencer Zifcak, *Globalizing the Rule of Law: Rethinking Values and Reforming Institutions*, *in* GLOBALISATION AND THE RULE OF LAW 32, 35 (2005); Ross P. Buckley, *The Role of the Rule of Law in the Regulation of Global Capital Flows*, *in* GLOBALISATION AND THE RULE OF LAW 140, 141 (2005); Franz Michael, *Law: A Tool of Power*, *in* HUMAN RIGHTS IN THE PEOPLE'S REPUBLIC OF CHINA 33 (Yuan-li Wu et al. eds., 1988); JEREMY MATAM FARRALL, UNITED NATIONS SANCTIONS AND THE RULE OF LAW 31, 33-35, 40 (2007); *Order in the Jungle*, THE ECONOMIST, Mar. 13, 2008, *available at* http://www.economist.com/displaystory.cfm?story_id=10849115; PRC STATE COUNCIL INFORMATION OFFICE, CHINA'S EFFORTS AND ACHIEVEMENTS IN PROMOTING THE RULE OF LAW (2008) http://www.chinadaily.com.cn/china/2008-02/28/content_6494029.htm [hereinafter PRC WHITE PAPER]; U.S. Department of State (see http://usinfo.state.gov/dhr/democracy/rule_of_law.html) (last visited in May 2008); HELEN YU & ALISON GUERNSEY, WHAT IS THE RULE OF LAW? U. IOWA CTR. FOR INT'L FIN. & DEV. (last visited Mar. 21, 2009), http://www.uiowa.edu/ifdebook/faq/Rule_of_Law.shtml; National Constitution Center, http://www.constitutioncenter.org/explore/BasicGoverningPrinciples/RuleofLaw.shtml (visited in May 2008); USAID, RULE OF LAW (2001), http://www.usaid.gov/our_work/democracy_and_governance/technical_areas/rule_of_law/; Thomas Carothers, *Promoting the Rule of Law Abroad: The Problem of Knowledge*, WORKING PAPERS: RULE OF LAW SERIES, Jan. 2003, *available at* http://www.carnegieendowment.org/files/wp34.pdf; Bo Li, *What is Rule of Law*, PERSPECTIVES Apr. 30, 2000, http://www.oycf.org/oycfold/httpdocs/Perspectives2/5_043000/Contents.htm; INTERNATIONAL BAR ASSOCIATION, RULE OF LAW RESOLUTION (2005), http://www.ibanet.org/About_the_IBA/IBA_resolutions.aspx.
6. Although many of the entries in Box #1 draw liberally from the sources cited in note 5, I have made no effort to indicate which entries are associated with which of those sources. For purposes of identifying typical elements in rule-of-law definitions, what is important is not their source but rather their substance. Indeed, some of the entries in Box #1 paraphrase, merge, or simplify specific formulations found in a variety of sources.

"grist for the mill"[7] as we move toward a working definition that we can use in assessing China's adherence to the rule of law. Please note that the listing of various elements and assertions in **Box #1** is not intended to reflect their order of importance.

Box #1. Rule-of-Law Definitions — An Array of Typical Elements

- The law must be consensual in its origin — that is, emerging from a general agreement or acceptance throughout the society, as opposed to being autocratic in origin.
- The rules in the legal system are created democratically — that is, with some input (whether direct or indirect) by the subjects or citizens of the state.
- The rules do not emerge from the arbitrary will or judgment of a person or group of persons wielding coercive governmental power.
- The government officials are required to act in accordance with pre-existing law.
- The law therefore rules over the government and the governed alike.
- The law is viewed as being in part a mechanism to prevent government agents from oppressing the rest of society.
- The government is therefore restricted from infringing upon an inviolable realm of personal autonomy.
- The powers of the government are divided into separate compartments — typically legislative, executive, and judicial — with checks and balances preventing any one compartment from dominating the others, and therefore the entire legal system.
- The judicial power of the state is largely separate from and independent of the holders of the executive and legislative power.

7. This phrase "grist for the mill" has been explained as "[s]omething that can be used to advantage, as in *These seemingly useless data will be grist for the mill when he lodges a complaint*. This expression alludes to *grist*, the amount of grain that can be ground at one time." Answers.com, http://www.answers.com/topic/grist-for-the-mill (last visited Mar. 21, 2009).

- The people in the society have a right to determine who will govern them and how they will be governed.
- The people in the society also have certain other fundamental rights whose exercise helps prevent unfettered governmental power — these include rights to the freedom of speech, assembly, press, and religion, as well as rights against arbitrary arrest and unjustified detention.
- The rules in the legal system reflect a theme of limited power of government, so that the rights and authority of the state are restricted, and all rights and authorities not expressly granted to the state are reserved to the people.
- The rules in the legal system are reasonably consistent over time.
- The rules in the legal system are applicable to all persons in the society.
- Nobody, therefore, is "above the law."
- The rules in the legal system are general, not particular, in the scope of their application.
- The legal system guarantees procedural fairness ("due process") — that is, certain basic rights of process must be followed in order for the government to act against the interests of an individual, including his or her economic interests.
- The legal system treats all people in the society with equality and with respect.
- The legality of a person's treatment by the organs of state power depends on its being shown to serve the common good — including the good that comes to all members of society by prohibiting harsh treatment of *any* member of society, even a member of an unpopular minority.
- Distinctions made between people or classes of people must be justifiable on rational grounds and not purely on the basis of race or religious belief or ethnicity or gender or on other grounds that reflect an attempt at dominance by one group over another.
- The law establishes limits on the state's power not only of a procedural character but also of a substantive character, so that certain fundamental substantive rights — usually set forth in a constitution — are guaranteed.

- The law should be employed to safeguard and advance the civil and political rights of the individual and to create conditions under which the individual's legitimate aspirations and dignity may be realized.

- The law also requires that the state take measures to prevent encroachment by powerful members of the society on the rights of other members of society.

- All members of the society are assumed to have moral rights and duties with respect to one another.

- Among the duties of citizens is the duty to submit to and obey the positive laws of the state, in order to preserve civil society and avoid anarchy or social chaos.

- The law provides people with the right to bring any non-frivolous allegation of government abuse before a competent court.

- The law acts as a constant impediment to arbitrary or overly discretionary authority on the part of the government.

- Any executive or administrative action infringing on individual rights must be authorized by law — that is, it must have a legal foundation conferring authority to act.

- Any punishment that the law prescribes for a transgression of the rules should be proportionate in its severity to the seriousness of the transgression.

- The law in the society must be clear and accessible to (and therefore understandable by) members of the society.

- The law protects a broad range of economic rights, by which members of the society may keep what they earn and may enter into contracts and alliances (such as business entities) as they wish.

- The law also provides at least a "safety net" of economic protections, so that members of society are not preyed upon by powerful and unscrupulous economic actors.

B. *Fazhi*, *Renzhi*, and Instrumentalism

I described the various elements listed in **Box #1** as "grist for the mill" that we might find useful in constructing a working definition of "rule of law" for purposes of assessing China's adherence to the rule of law. Let me now add further "grist for the mill" by summarizing a distinction alluded to above — the distinction between rule of law, rule by law, and rule of man.

The third of these — "rule of man" — is easy to picture: it is totalitarianism, with power concentrated in a single person or small cluster of persons who themselves stand outside the law and who rule predominantly by *ad hoc* directives, giving little or no attention to the rights of individuals or to the promulgation and application of clear and consistent rules. History is replete with examples of such forms of law and governance, and as we shall see below, "rule of man" is by no means foreign to China, either in ancient days or in recent days.

The more delicate or nuanced distinction is between "rule by law" and "rule of law." These two notions can perhaps be best distinguished by focusing on two related elements: (i) the role of discretion and (ii) the application of the law to government officials. Under the "rule *by* law" notion, while government officials typically would rely on written rules rather than pure discretion in governing the state, those officials would ultimately have discretion to depart from the rules in circumstances that they deemed exceptional. Moreover, as the existence of such discretion would imply, the government officials themselves would not be bound by the rules. Under the "rule *of* law" notion, the government officials *would* be bound by the rules and therefore would not have discretion to depart from them. Instead of exercising discretion in exceptional circumstances, the government officials would need to await the adoption of an official amendment of the rules to accommodate such exceptional circumstances.

A term often used to capture the same concept as "rule by law" (distinguishing that concept from "rule of law") is "instrumentalism." Pitman Potter offers this explanation of that term in the context of contemporary Chinese law:

> The Chinese government's approach to law is fundamentally instrumentalist. This means that laws and regulations are intended to be instruments of policy enforcement. Legislative and regulatory enactments are not intended as expressions of immutable general norms that apply consistently in a variety of human endeavors, and neither are they constrained by such norms. Rather, laws and regulations are enacted explicitly to achieve the immediate policy objectives of the regime. Law is not a limit on state power; rather, it

> is a mechanism by which state power is exercised, as the legal forms and institutions that comprise the Chinese legal system are established and operate to protect the Party/state's political power.[8]

Stanley Lubman uses the same term — instrumentalism — in describing the course of legal reform in China since the new PRC regime was declared in 1949:

> The last two decades of the twentieth century saw the Chinese leadership begin to use law as an instrument of governance in a manner relatively more sophisticated than the crude and formalistic copying of Soviet law in the early 1950s or the blunt instrumentalism — and worse — that had followed.[9]

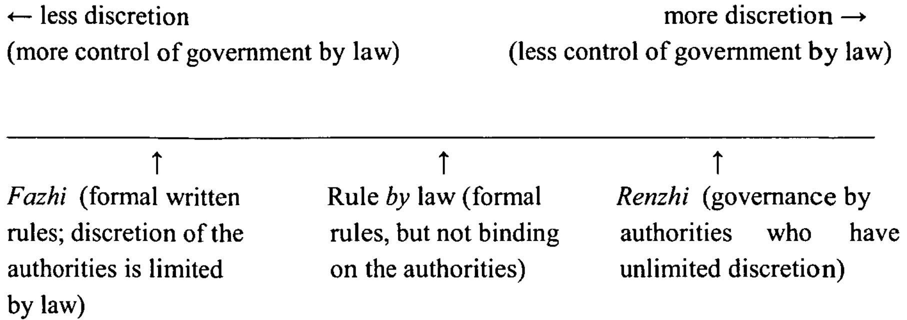
I interpret Lubman's observation to mean that following the establishment of the PRC in 1949, the Chinese leadership first mimicked Soviet law and then moved toward blunt instrumentalism — in which law is seen purely as an instrument of state power — and then deteriorated into something worse during the Cultural Revolution when all law was essentially abolished, before entering into a new phase in the last two decades of the twentieth century.

These three terms — rule of law, rule by law, and rule by man — may be seen, therefore, as describing three different points along a spectrum. The first one — rule of law, for which the Chinese term is *fazhi* and the Chinese characters are 法治 — represents a system in which the actions of government authorities are subject entirely to the control of the written law.[10] The second one — rule of man, for which the Chinese term is *renzhi* and the Chinese characters are 人治 — represents a system in which government authorities sit outside the control of the law, and in fact govern not predominantly through law at all but instead through discretion. In fact, as we shall see in part II below, Confucius urged that the rules of propriety — the *lǐ* 礼– typically should not take written form and could in any event never be fully encompassed in written form.[11] The third one — rule *by* law — represents a hybrid of the two, under which government officials apply formal, written, perhaps

8. POTTER, *supra* note 2, at 10.
9. Stanley Lubman, *The Study of Chinese Law in the United States: Reflections on the Past and Concerns About the Future*, 2 WASH. U. GLOBAL STUD. L. REV. 1, 3 (2003) [hereinafter Lubman-2003].
10. As I shall explain more fully below, my assertion here that "rule of law" and *fazhi* 法治 are identical in meaning would not have been accurate in some earlier times. Indeed, the relationship between the meanings of the two terms was unclear even as recently as a decade ago. *See infra Box #6 and accompanying text. See also* PEERENBOOM-2002, *supra* note 2, at 33 (explaining that in the time of the Legalists, *fazhi* 法治 was "better understood as rule *by* law" than as rule *of* law). In asserting an equivalence between *fazhi* 法治 and "rule of law," therefore, I refer to a contemporary perspective.
11. *See infra* note 18.

detailed rules but are not themselves bound by those rules. I have tried to represent in Diagram A the spectrum that encompasses *fazhi*, *renzhi*, and rule by law.

Diagram A. Formality, Discretion, and Control in Fazhi, Renzhi, and Rule by Law [12]



C. A Working Definition

It is from this general array of factors and definitions that I shall now propose a rough-and-ready definition of "rule of law" for purposes of assessing the presence or absence of a rule of law in China:

> *A society may be said to adhere to the rule of law if the rules in its legal system are publicly promulgated, reasonably clear in their formulation, prospective in their effect, reasonably stable over time, reasonably consistent with each other, applicable to all segments of the society (including the government, so as to prevent the government elite from acting arbitrarily), reasonably comprehensive in their coverage of substantive issues facing the society and its people, and reasonably effective, in the sense that the rules are broadly adhered to by the people in the society — voluntarily by most, and through officially forced compliance where necessary.*

It should be obvious that my rough-and-ready definition would surely seem

12. This diagram is simplified in several ways. For one thing, it focuses only on "formality, discretion, and control," thereby disregarding certain other elements that we may wish to reflect in defining the rule of law.

overly narrow and simplistic to some observers — especially those from whom I have drawn some of the elements appearing above in **Box #1**. For example, my rough-and-ready definition encompasses none of the substantive rights that some "rule of law" definitions insist on guaranteeing. Nor does it refer at all to democratic involvement (or consent or even acquiescence) in establishing the legal rules. Nor does it require a separation of governmental powers into offsetting compartments.

For reasons that I shall explain in Part III below, I have intentionally constructed a rather narrow definition of "rule of law," consciously drawing on the work of Professor Lon Fuller, a famous legal scholar of the mid-twentieth century. See **Box #2** for a synopsis of his work in defining a legal system.

Box #2. Lon Fuller and the "Morality" of Law [13]

In his great work, *The Morality of Law*, Lon Fuller argues that law is subject to an internal morality consisting of eight principles relating to the rules that purportedly comprise the legal system. These principles may be summarized in this way:

- the rules must be expressed in general terms;
- the rules must be publicly promulgated;
- the rules must be (for the most part) prospective in effect;
- the rules must be expressed in understandable terms;
- the rules must be consistent with one another;
- the rules must not require conduct beyond the powers of the affected parties;
- the rules must not be changed so frequently that the subject cannot rely on them; and
- the rules must be administered in a manner consistent with their wording.

In Fuller's view, no system of rules that fails minimally to satisfy these principles of legality can achieve law's essential purpose of achieving social order through the use of rules that guide behavior. A system of rules that fails to satisfy the second and fourth principles, for example, cannot guide behavior because people will not be able to determine what the rules require. Accordingly, Fuller concludes that his eight principles are "internal" to law in the sense that they are

13. I have drawn this description in part from an account offered at Internet Encyclopedia of Philosophy, Legal Positivism (last visited Mar. 21, 2009), http://www.iep.utm.edu/l/legalpos.htm#SH4a. The same website explains some of the criticisms directed at Fuller's work by other scholars, particularly H.L.A. Hart of Oxford.

built into the existence conditions for law. He claims that a total absence of any one of these eight principles would not simply result in a bad system of law; it would result in something that is not properly called a legal system at all.

Having identified a number of considerations and distinctions, and having offered my own rough-and-ready definition of "rule of law," I now proceed to a brief assessment of China's adherence to the rule of law. I do so in two parts, focusing first on dynastic China and then on contemporary China. As suggested earlier, I believe an examination of the former will contribute importantly to our examination of the latter.

II. The Rule of Law in Dynastic China

Was the rule of law present in dynastic China — that is, in the China that emerged well over two thousand years ago and lasted until the end of the Qing dynasty in 1911? For reasons that I wish to explore in the following paragraphs, the answer is not immediately obvious. On the one hand, as explained in section IIA below, there is perhaps no legal system on Earth that has created and sustained any more sophisticated written system of laws than the Chinese did over the many centuries of that country's dynastic history.[14] In particular, China's legal codes are monuments of elegance, nuance, and sophistication. On the other hand, as explained in section IIB below, certain aspects of dynastic China's legal system clearly fell short of meeting some criteria that seem essential to the rule of law.

A. Sophisticated Codes and Effective Governance

Several possible starting dates could be used for the origin of legal codification in China. I shall offer three alternatives: 536 BCE, about 400 BCE, and about 200 BCE. Let us look briefly at what happened at each of those points in Chinese history in terms of legal codification in order to see the foundations of what became one of the most sophisticated and durable legal traditions in the world.

The year 536 BCE is significant because it was then that Zi Chan, the prime minister of the state of Zheng, ordered "books of punishment" or *xing shu* to be inscribed on a set of bronze tripod vessels.[15] This issuance of written law — by

14. Anne-Marie Slaughter, *Closing Remarks*, *in* DEMOCRACY AND THE RULE OF LAW 64, 65 (2001) (observing, "the Chinese gave us the concept of the scholar official, the Mandarin, of law of a sophistication and detail that today we can barely imagine").
15. *See* JOHN W. HEAD & YANPING WANG, LAW CODES IN DYNASTIC CHINA: A SYNOPSIS OF CHINESE LEGAL HISTORY IN THE THIRTY CENTURIES FROM ZHOU TO QING 51 (2005) [hereinafter LCDC].

some accounts, the very first Chinese legal "code"[16] — represented a flashpoint in a great intellectual and ideological debate that raged in China for roughly three centuries. So significant is that debate, featuring the competing schools of the Legalists and the Confucianists, that we must take a short detour in that direction.[17]

The Confucianist school of thought, originating with Confucius (born around 551 BCE), espoused the view that the best form of governance, especially in the tumultuous political setting in which he lived, was one that relied on virtuous leaders to govern the people by enlightened example, following a strict (but unwritten)[18] tradition of proper behavior that centered on observance of ritual and respect for certain fundamental relationships, such as that between father and son and that between emperor and subject. Drawing inspiration from standards of virtuous conduct announced several centuries earlier by the so-called "Duke of Zhou" (an early leader in the Zhou Dynasty), Confucius urged that the social fabric could be kept strong, and that the country could enjoy enlightened government, by an understanding and practice of the principles of the *lǐ* 礼 See **Box #3** for a summary of the concept of *lǐ*. In such circumstances, Confucius taught, the need for punishment (*xing* 刑) was typically unnecessary, for the country was to be run not by punishment — nor by the written laws prescribing punishment — but instead by virtue. Later disciples of Confucius, particularly Mengzi (probably born around 373 BCE) and Xunzi (probably born around 313 BCE), elaborated on and altered these views by positing that society was inherently non-uniform and unequal and that one role of *lǐ* was to maintain the distinctions between upper and lower classes.

16. *Id.* at 52 (citing DERK BODDE & CLARENCE MORRIS, LAW IN IMPERIAL CHINA (1967)).
17. *See generally* LCDC, *supra* note 15, at 17, 31-52, 64, 70-78, 86-92 (discussing Confucianism and Legalism as summarized in the following few paragraphs).
18. The folly and failure of actually promulgating written, codified laws was a matter that Confucius emphasized. Randall Peerenboom offers this summary: "For Confucius, the codification and public dissemination of laws sends the wrong kind of message. Laws are designed to protect the minimum interests of society and to provide a mechanism for dealing with and removing those individuals who are not only unwilling to participate in fostering a harmonious social order, but whose behavior threatens the well-being of others and the ability of society to function. Making the laws public focuses attention, not on the achievement of the highest quality of social harmony possible, but on the lowest level of participation required by society. Consequently, it may encourage some persons to look only for ways to manipulate the system for their own advantage." PEERENBOOM-2002, *supra* note 2, at 29.

Box #3. Definitions of Lǐ and Fǎ

lǐ 礼, 豊 Rules of proper behavior; an ethic of traditional propriety. Although originally confined in meaning to refer to rituals relating to burial and honoring of the dead, the concept of *lǐ* gradually expanded in scope. In early Zhou Dynasty times, it referred to proper courtly behavior of the aristocracy in their dealings among themselves. Confucius broadened the meaning of *lǐ* to refer to proper behavior generally, based on the place or status of a person within the family or the social and political system. Western analogues to *lǐ* might include such concepts as ritual, chivalry, courtesy, morality, and ethical behavior. (Two Chinese characters for *lǐ* are given above; the first is the modern version, and the second is the older version.)

fǎ 法 Published law (in general, not a particular published law); positive law (posited by an official such as the emperor). The Legalist philosophy, emphasizing man's selfish nature, favored the use of *fǎ* instead of relying on the less objective rules of *lǐ*. Whereas reliance on *lǐ* is consistent with a "rule of men," reliance on *fǎ* is more consistent with a "rule of law." The ancient Chinese character for *fǎ* is 灋. The left part means water. The right part is a combination of two words, one of which refers to a one-horned goat or ram called the *xie zhi*, which existed in legend, and the other of which means "leave" or "go." It was said that during the rule of an early Chinese leader, a famous judge named Gao Yao tried cases by using such a one-horned goat. When the goat found that a defendant had committed the crime with which he was charged, the goat would gore him, thereby releasing an evil spirit from his body. As a result, justice was achieved, which was represented by water.

Opposing these Confucianist views were those of the Legalists. They asserted (i) that the government should rest not on social distinctions of *lǐ* but instead on written law applied equally to all persons, (ii) that most people can be persuaded to behave properly only when threatened with harsh punishments for transgressions, and (iii) that rule by law was superior to a rule of men. One author has explained these points, emphasizing the third one in particular, as follows:

> The Legalists' position . . . was diametrically opposed to that of the Confucianists. The [Legalists] denied that moral influence alone could determine the social order and that some one or two persons could wield enough power to transform the customs of the land and create either order or disorder within the state. They strongly rejected the rule-by-man principle . . . . Instead they sought a principle of governing that would assure a long, even

> a permanent peaceful order of society, and not one whose uncertainties could only lead to intermittent periods of order and disorder.
>
> Therefore the Legalists did not believe in the principle of "ruling-by-man." They claimed that "a sage ruler relied upon law, not upon wisdom" . . . . The Legalists usually drew an analogy between the workings of law and the compass and the square. A sage could no more give up law in governing than an artisan could correct a circle without a compass, or a square without a square.[19]

Central to the Legalist philosophy was the notion of *fǎ* 法 As reflected above in **Box #3**, *fǎ* may be defined as published, posited law setting forth rules that were relatively egalitarian in their effect and that created known disincentives for transgressions. Indeed, *fǎ* entailed, at least for the Legalists, harsh punishments that would create adequate "shock and awe" (in today's terms) to assure compliance by all in society.

These seemingly incompatible ideologies — Confucianism and Legalism — occupied legal and political discourse and practice for roughly three hundred years between about 550 and 230 BCE. As noted above, an early flashpoint in that ideological competition occurred in 536 BCE with the issuance of the *xing shu*, seen as a clear manifestation of Legalism as well as an early (perhaps the earliest) legal code in China.

The year 400 BCE is another crucial year for Chinese codification. According to legend, it was in that year that Li Kui, another famous Legalist, is said to have written the *Fa Jing* ("Canon of Laws"), which is often cited as a very important ancestor to all later Chinese legal codes. Whether in fact that specific document actually existed (there is considerable doubt on the matter), the legends regarding it are influential and instructive in themselves, as they assert in some detail that the *Fa Jing* comprised a compilation of written laws drawn from several states and emphasizing punishments for various behaviors, thus illustrating the rising tide of Legalist ideology in that era.

That rising tide became a storm surge in 221 BCE, when the state of Qin conquered the other warring states, creating a unified China under the control of a king who declared himself emperor — the famous Qin Shi Huangdi. For our purposes, the significance of Qin's conquest lies in the fact that it also marked the victory of Legalism over Confucianism — although only for a tumultuous decade and a half. According to the standard account, fifteen years of brutally harsh authoritarian control during the reign of the Qin Dynasty, drawing fierce energy

19. T'UNG-TSU CH'Ü, LAW AND SOCIETY IN TRADITIONAL CHINA 242-50 (1961).

from Legalist ideology, prompted such deep discontent that a popular uprising overthrew the Qin leaders, thus starting the Han Dynasty in 206 BCE.

This brings us to the third possible date that I suggested above to mark the origin of legal codification in China: 200 BCE. It was around that time, shortly after the Han Dynasty replaced the Qin, that China saw the unfolding of a remarkable compromise between the two seemingly incompatible ideologies of Legalism and Confucianism. Recall that the Legalist ideology had called for government to operate via written law — *fǎ* — instead of through the discretion exercised by a sophisticated elite deeply versed and immersed in the unwritten norms of *lǐ*. This Legalist emphasis on written law manifested itself in a detailed legal code, the Qin Code (reportedly derived from Li Kui's *Fa Jing* referred to above).

What is important (from a legal perspective) about the early days of the Han Dynasty is that the dramatic rejection of the Qin Dynasty did *not* involve a rejection of legal codification. Instead, the Han leaders adopted a legal code almost immediately after overthrowing the Qin — specifically, around 200 BCE — and it drew from precedents it received from the Qin Dynasty, particularly the Qin Code.

Although we know very little about the specific provisions or even the overall structure of the Han Code because it has been almost completely lost through the ages,[20] we do know that it reflected both Confucianist and Legalist aspects and indeed constituted an "alloy" of the two. A leading expert on the Han Code, A.F.P. Hulsewé, explains:

> Han law is the outcome of two streams of thought, an archaic one, filled with the magico-mythical concepts of "primitive" society, and a very matter-of-fact one, purely practical and political, with the *raison d'état* as its primary motive. To put it differently: Han law partook on the one hand in the general Chinese heritage with its particular views on the order of the universe, on the interdependence of all the parts of this universe and consequently on the responsibility of the individual to act conformably to its rules as these had been established by society so as not to disturb cosmic harmony, or else to suffer the consequences. On the other hand, Han law took over the administrative and legal rules of the Ch'in [Qin] empire and their practical application in the government organisation. These rules . . . had the very practical political purpose of maintaining the stability of the government and of increasing its power by means of detailed regulations affecting the

20. Only some scattered remnants of the Han Code have survived. For the landmark study of the Han Code by a Western authority, based on a careful and skeptical reading of the literature available to him at the time, *see generally* A.F.P. HULSEWÉ, REMNANTS OF HAN LAW (1955).

behaviour of its subjects.[21]

The first of the two "streams of thought" Hulsewé refers to is Confucianism — or, more precisely, "Imperial Confucianism," an amalgam of traditional Confucianism and other elements such as Daoism, *yin* and *yang*, the five elements (wood, fire, soil, metal, and water), and the three major human relationships (ruler-subject, father-son, and husband-wife). The second of the "streams of thought" is Legalism. Hulsewé is describing a process that has been widely referred to as the "Confucianization of Law,"[22] by which the Legalist doctrine that the Qin state and dynasty applied so strictly (and, for a brief time, successfully) was counterbalanced by the very Confucianist doctrine that the Qin leaders had tried to squelch. This process had already begun in the early stages of the Han Dynasty, and it was to continue for the entire remaining twenty centuries of dynastic Chinese history — perhaps most gloriously in the Tang Code of the seventh century CE.

Whichever of these three dates — 536 BCE, 400 BCE, or 200 BCE — is selected as the most appropriate starting date for codification in China, the significance of codification is undeniable. For the many centuries that followed — right up to the fall of the Qing Dynasty in 1911 — the legal codes were impressive, consistent over time, and effective in achieving their purpose: to maintain order and keep the emperor in power. As I have explained in some detail elsewhere,[23] the unique political continuity and concentration of power in China for century after century, dynasty after dynasty, is attributable in significant part to the "alloy" of Confucianism and Legalism as embodied in the legal codes that were enacted and re-enacted with remarkable consistency.

B. Was There a Rule of Law in Dynastic China?

But did these legal codes, and the values they reflected, give dynastic China the "rule of law"? No. For reasons that I shall only sketch out briefly here, it seems clear that the dynastic Chinese legal system, even at its most sophisticated, would fail to meet at least two of the standards included in the "rule of law" definition offered above. First, the legal system — centered on its sophisticated legal codes — was not "*applicable to all segments of the society*" because it did not apply to the ruling elite in the government. In a system dominated by an all-powerful

21. *Id.* at 5.
22. CH'Ü, *supra* note 19, at 267 (using this term). *See also* Bodde & Morris, *supra* note 16, at 27 (also using this term).
23. *See* LCDC, *supra* note 15, at chs. IV-VI.

emperor who exercises totalitarian control and is above the law — indeed, is the sole ultimate author of the law, with recognized authority to change it at will — the rule of law cannot be said to exist.

Second, the rules set forth in the dynastic Chinese legal codes were by no means "*comprehensive in their coverage of substantive issues facing the society and its people.*" Even though the very last versions of the codes did (according to academic discoveries made in just the past few decades) include some rules relating more directly to *minshi* (people's matters),[24] the fact remains that for the bulk of the Chinese population, personal behavior was most directly and importantly influenced not by the applicable law code but instead by traditional rules of moral and ethical conduct among members of family and society. In other words, even at their most sophisticated, the law codes that distinguish the Chinese dynastic legal tradition did not occupy a very large portion of the total area of rules governing human behavior in China.

After all, the aim of the codes was clear — to serve the interests of the emperor, not to address the personal affairs of people. This aim appears from even a glance at the structure of the codes. For example, the Qing Code (like all of its predecessors) seems to constitute a criminal code that focuses entirely on the imposition of specific punishments for specific behavior that is regarded as dangerous to the state in some way. This impression is supported by the formulation of the provisions themselves: each was constructed as an "if-then" statement. The "if" part of the statement described a certain type of act or behavior; the "then" part of the statement prescribed a specific punishment. A few representative provisions of the Qing Code, for example, appear in **Box #4**.

24. *See generally* Kathryn Bernhardt & Philip C.C. Huang, *Civil Law in Qing and Republican China: The Issues*, *in* CIVIL LAW IN QING AND REPUBLICAN CHINA 1 (1994) (providing a collection of articles emerging from a 1991 conference on "Civil Law in Chinese History," which examined the treatment that the Qing Code gave to matters of private property, succession, marital relations, contract, and debt).

Box #4. Sample Provisions from the Qing Code [25]

Plotting Rebellion

In the case of plotting rebellion and high treason, where there is joint plotting . . . all will be put to death by slicing. [The perpetrator's] paternal grandfather, father, sons, sons' sons, brothers, and those living in the same household . . . [and male relatives] sixteen years or older . . . will all be beheaded. His [male relatives] fifteen years or under, as well as [his] mother, daughter, wife, concubines, [unmarried sisters, and certain other named relatives] will all be given into the households of meritorious officials as slaves. The property [of the perpetrator] will be forfeit to the government.

Illicit Sexual Relations (Fornication)

In the case of fornication with consent, the punishment is 80 strokes of the heavy bamboo. If [the woman] has a husband, the punishment is 90 strokes of the heavy bamboo.

If there is fornication with force, the punishment is strangulation. If it is not consummated, the punishment is 100 strokes of the heavy bamboo and exile to 3000 *li*.

In the case of fornication with force, the woman is not punished.

Beating Another Person

Everyone who engages in an affray or inflicts blows and, using hands or feet, strikes another but does not cause injury, will receive 20 strokes of the light bamboo. If he causes injury, or if, by using some other object, he inflicts a blow on another and does not cause injury, he will receive 10 strokes of the light bamboo. [If the skin which is struck] turns blue or red [and] there is a swelling, this is an "injury". . . . If someone pulls out a square *cun* of hair or more, then

25. THE GREAT QING CODE 237, 347, 285, 360 (William C. Jones trans., 1994). For purposes of illustration, I have omitted most of the interlinear commentary appearing in Jones' translation of the Qing Code.

punish with 50 strokes of the light bamboo. [If someone strikes another] and blood flows from the ears or eyes and there is internal injury and [the victim] spits blood, then punish with 80 strokes of the heavy bamboo.

If someone breaks another's tooth, or tears off a finger from the hand, or a toe from the foot, or injures one eye or wounds another's ear or nose . . . then the punishment is 100 strokes of the heavy bamboo. . . . If someone breaks two teeth, or two fingers, or toes, or above . . . then the penalty is 60 strokes of the heavy bamboo and penal servitude of one year.

Officers Who Allow Thieves to Escape

Everyone charged with arresting persons who receives [an] order to pursue an offender and presents pretexts [for not going] and does not go will . . . receive the penalty for the offence [committed by] the offender reduced one degree.

Both of the two features I alluded to above — that the codes were not applicable to all segments of the society and that they were not comprehensive in their coverage of substantive issues — are noted in the following words of Professor Bill Jones:

> The polity of China consisted of a highly centralized government headed by an absolute ruler who ruled by means of a bureaucracy. The primary obligation of every Chinese was to fulfil the duties assigned to him by the Emperor. All human activities had to be carried on so as to fit into his scheme for directing society. Consequently one would expect the imperial law or Code to take note of human activity only as it was perceived to affect imperial policies. It was natural that the primary focus of attention would be the activities of bureaucrats in the performance of their duties, not the activities of ordinary human beings in their private lives.[26]

It is worth noting that the other factors included in the rough-and-ready "rule of law" definition that I offered above *do* seem present in dynastic Chinese law. The rules set forth in the law codes were for the most part *publicly promulgated*,[27] reasonably *clear* in their formulation (sometimes extremely detailed, in fact, so as

26. *Id.* at 5-6.
27. A significant exception to this appeared in the Song dynasty. One authority notes that "[t]he Sung [Song] authorities prohibited private individuals both from printing or copying any laws and from possessing any code provisions" on grounds that "the laws belonged exclusively to the emperor and were never to be made accessible to the people." Ichisada Miyazaki, *The Administration of Justice During the Sung Dynasty*, *in* ESSAYS ON CHINA'S LEGAL TRADITION 56, 58 (1980).

to reduce the likelihood of misapplication of punishments for their transgression), typically *prospective* in their effect, reasonably *stable* over time (enduring in some cases for centuries with little change), reasonably *consistent* with each other (as a result of intense study and fine-tuning by the Confucianist scholars at the imperial court),[28] and reasonably *effective* — with, indeed, immense coercive power available for and devoted to their enforcement.

Despite the fact that Chinese dynastic law does seem to meet the "rule of law" standards in these several aspects, its failure to meet the other two standards — those regarding applicability to the government and comprehensiveness of coverage — is fatal. I would conclude from this very abbreviated review that dynastic China was not governed by the "rule of law" as defined above.

III. Rule of Law in Contemporary China

What about the situation in today's China? Is that country operating under the rule of law in 2009? We might start to address that question by seeing how some observers have drawn a parallel between dynastic China and contemporary China. One authority, Wejen Chang, offers this perspective, some of which reminds us of the Confucianist-Legalist debate referred to above:

> Since the late nineteenth century, when China began its modernization, *fazhi*, a translation of the Western term "the rule of law," has gained popularity among the Chinese — first the intellectuals, then the common people. Now most Chinese want to see *fazhi* established in China . . . . The concepts of *fazhi* and its opposite, *renzhi*, or the rule of man, are not entirely new to the Chinese. Ancient records indicate that similar ideas were the subject of serious discussions among earlier philosophers and led to heated debates between the Confucians and the Legalists. The first debate was probably provoked in 536 B.C., by an order of Zi Chan, the prime minister of the state of Zheng, to have the criminal law of his state inscribed on a bronze vessel put on public display. It was meant by him and understood by his contemporaries as a dramatic gesture to demonstrate the

28. A significant exception to the typical internal consistency of dynastic Chinese legal codes appeared in the Ming dynasty — indeed, during the reign of the founding emperor, Zhu Yuanzhang. He repeatedly violated the basic requirement of consistency. One authority describes the situation in this way: "While the emperor was determined to produce a universal code that could be minutely followed, he undermined that intent by constantly issuing laws which met immediate needs and which often contradicted his Great Ming Code, thereby producing the anomaly of a Code that all officials were required to follow, and a body of his edicts (typically ordering much harsher, often cruel punishments that his Code specifically abolished) which transcended the Code's authority; that would prove to be typical of his imperial style." F. W. MOTE, IMPERIAL CHINA 900-1800, at 570 (1999). *See* LCDC, *supra* note 15, at 187-89 (describing this in further detail).

> permanence of the law and to assure the people that the law would be applied strictly according to its letter, free of government manipulation.[29]

This last element that Wejen Chang refers to in terms of the rule of law — that the application of the law would be "free of government manipulation" — is absent from the "rule of man" (*renzhi*) model that the Confucianists found preferable. Since the collapse of the Qing Dynasty in 1911, it seems rather easy to distinguish between rule of man versus rule of law, for Chinese law since 1911 has never achieved the sort of systemic sophistication that it had developed over centuries of cultivation under the generations of Confucian scholars in the Han, Tang, Sung, Ming, and Qing eras. Instead, Chinese law has in the past hundred years or so vacillated between two modes: that of a fairly obvious *renzhi* (rule of man, as for example during most of Mao Zedong's dictatorship) and that of a hybrid system that gives some deference to *fazhi* (rule of law) but with elements also of *renzhi*.

A. Constitutional Considerations — the 1999 Amendment

In debating the question of what role law plays in today's China — that is, whether that country is best characterized now as having rule of law, rule by law, or rule by man (instrumentalism) — observers sometimes focus on the actual language of the Constitution of the PRC, and particularly the language appearing in the amendments made in 1999. The pertinent text of those amendments appears in **Box #5**, along with information about varying translations into English.

29. Wejen Change, *Forward* to Turner, *supra* note 2, at vii.

Box #5. Excerpts from 1999 Constitutional Amendments on "Rule of Law" [30]

Amendment Three (approved on March 15, 1999, by the 9th NPC at its 2nd Session)

- The English version of the text of the amendment, as reported on the People's Daily website — http://english.peopledaily.com.cn/constitution/constitution.html — reads as follows:

  One section is added to Article Five of the Constitution as the first section: "The People's Republic of China practices ruling the country in accordance with the law [yifa zhiguo] and building a socialist country of law [jianshe shehui zhuyi fazhi guojia]."

- The key phrases are examined below — first in *pinyin*, then in Chinese characters, then in English translation using the People's Daily translation as above, then with some alternative translations from various sources.

  - *yifa zhiguo*

    - 依法治国

    - "ruling the country in accordance with the law" (People's Daily translation)

    or "governs the country according to law" — according to the PRC Government's so-called "official web portal," at http://www.npc.gov.cn/englishnpc/Constitution/node_2827.htm

30. The exact text in Chinese characters of the provision added to Article 5 by the 1999 amendment is beyond any question, of course. The key provisions of that text are shown in Box #5. Likewise, the exact text in *pinyin* of the provision added by the amendment is beyond any question. The key provisions of that *pinyin* text also appear in Box #5. What is subject to varying opinions is how the Chinese terms (whether in Chinese characters or in *pinyin*) are to be expressed in English. Some alternative translations are offered in Box #5. (All websites cited in Box #5 were visited in July 2008.)

or "govern the country according to law" (Peerenboom — see below)

- *jianshe shehui zhuyi fazhi guojia*

  - 建设社会主义法治国家

  - "building a socialist country of law"

  or "makes it a socialist country ruled by law" — according to the PRC Government's so-called "official web portal," at http://www.npc.gov.cn/englishnpc/Constitution/node_2827.htm

  or "establish a socialist rule of law country" (Peerenboom — see below)

As noted in **Box #5**, the key language (in *pinyin*) proclaims the policy "*yifa zhiguo, jianshe shehuizhuyi fazhiguo*," which has been translated literally by one (Western) expert — Randall Peerenboom — as "govern the country according to law, establish a socialist rule of law country."[31] Peerenboom offers this explanation of that language and suggests that it has been misinterpreted by some commentators who urge that China is not serious about the rule of law:

> [The assumption that a socialist system such as China's] could not be serious about legal reforms and the rule of law . . . is evident in the way many Western reporters and some academics translate the phrase *fazhi*. This phrase by itself could be translated as either rule of law or rule by law, as there are no prepositions in the Chinese language. However, the phrase is part of a longer *tifa* or official policy statement of *yifa zhiguo, jianshe shehuizhuyi fazhiguo* [as noted above]. The commitment to governing the country according to law reflects the central tenet of rule of law: law is supreme and binds government officials and citizens alike. Indeed, the principle of supremacy of law and the notion that no party or person is above the law is explicitly stated in both the state and Party constitutions. Significantly, an alternative phrase *yifa zhiguo* using a different first character, which means "use law to govern the country," was explicitly rejected because it could be interpreted to support an instrumental rule by law rather than rule of law in which all are bound by law. Because the difference between the two phrases had been the subject of much academic debate, the significance of the choice was well-known to all. There has also been considerable discussion of the difference between an instrumental rule by law

31. Peerenboom-2003, *supra* note 2, at 37, 67.

> and the rule of law among academics. PRC legal scholars who have given lectures on rule of law to Jiang Zemin and other senior leaders confirm that they understand the distinction between rule by law, in which government actors are not bound by law, and rule of law in which law is supreme. ... Nevertheless, many reporters and some scholars insist on translating *fazhi* as rule by law and sometimes even go so far as to translate *yifa zhiguo* as "relying on law to rule the country" or "using law to govern" and other such more instrumental renderings. Such translations are not translations in the sense of direct rendering of the ordinary meaning of the words in Chinese. Rather, they are interpretations that reflect the translators' biases or assumptions about the nature of legal reform in China.[32]

By Peerenboom's account, China has pledged itself to the rule of law — understood as meaning that the government is bound by the rules of law — as part of its formal constitutional framework. While the Constitution of the PRC is not directly applicable in the same way that the U.S. Constitution is,[33] the fact remains that China has officially adopted the rule of law as formal legal policy[34] — and indeed congratulated itself recently for implementing that policy so admirably.[35]

32. *Id.* at 67.
33. *See* CHOW, *supra* note 2, at 71, 78 (explaining that "it is doubtful . . . whether the current PRC Constitution has direct legal effect in the absence of implementing legislation" and that "[m]any scholars in the PRC view the Constitution as [merely] declaratory . . . [since] courts in the PRC do not have the power to determine whether a constitutional violation has occurred or to interpret the Constitution"). On the other hand, an expansion of the jurisdiction of courts to apply the Constitution was confirmed in a 2001 statement by the Supreme People's Court. *See* J. Chen, *supra* note 2, at 733-34 (referring to the Supreme People's Court's "clear and positive reply in relation to a request from Shandong High Court concerning whether the right to education as contained in the Constitution could be directly enforced and, if so, used as a legal basis for damages," thereby indicating that courts may refer to and rely on provisions of the Constitution in deciding cases).
34. For one authority's detailed account of what was intended at the time of the 1999 amendment of the PRC Constitution, see ZOU KEYUAN, *supra* note 2, at 34-35. Zou quotes from Jiang Zemin's 1997 report to the CPC for this explanation of what Jiang meant by "rule of law" as called for in what became the 1999 amendment:

    > The development of democracy must combine the improvement of the legal system so as to govern the country by law. To govern the country with law means to manage the state affairs, economic and social affairs by the people under the leadership of the Party in accordance with the Constitution and law stipulations through various ways and forms. It should be guaranteed that all the work in the state is carried out under the law. Institutionalisation and legalisation of the socialist democracy should be progressively achieved so that the institution and the law will not be changed because of the change of the leadership and because of the change of views and attention of the leadership.

    Zou also explains the earlier views of both Jiang and his predecessor Deng Xiaoping regarding the meaning they ascribed to "rule of law." *Id.* at 35-37.
35. See PRC WHITE PAPER, *supra* note 5. This February 2008 "White Paper" catalogued innumerable ways in which the CPC has, by its own account, delivered to the country an

Perhaps some further light may be shed on the issue of how *renzhi* should be translated by examining two points — one linguistic and the other historical. The first point revolves around the fact that the *pinyin* romanization *zhì* actually applies to two different Chinese characters (having some relationship to law, that is). The historical point revolves around Deng Xiaoping's role in developing the policies that the CPC would follow in respect of law and government. Both of these points appear in **Box #6**.

Box #6. Focusing on Fazhi and the Role of Law in China [36]

Using the *pinyin* Romanization *fazhi* in discussions of the "rule of law" in China is subject to uncertainty at several levels. In addition to the fact that there are no prepositions in the Chinese language (as noted above) is the fact that *fazhi* — or, to be more precise by including the tonal marks, *fǎzhì* — can be used for two different Chinese characters. The first is 法治and the second is 法制 The character 法 which appears in both binoms, is of course *fǎ* — law. [See **Box #3** for a detailed description of that term.] The character 治(*zhì*) would typically be translated as "to rule" or "to govern" or "to manage" or "to harness" as in the case of a river). The character 制(*zhì*) would typically be translated slightly differently, as "system" — or "to control" or "to regulate."

Before 1997, the question of which of the two related but different conceptualizations of the role of law in China should be used — that is, whether 法治or 法制should be used — was debated among scholars and among top level government officials. In simplified form, the debate asked whether China should build a "rule of law" country or should instead build only a country with "laws and systems." The debate was settled in September 1997, when the CPC proclaimed (at its annual meeting) that China should be a rule of law country — and it was this concept that was adopted into the Constitution by the NPC in 1999.

increasingly strong system of law and governance, based on what it calls the rule of law — although the White Paper does not actually define the term "rule of law."

36. I am indebted to Wang Yanping for assisting me with the content of Box #6. Definitions offered in Box #6 are drawn primarily from Chinese Character Dictionary (last visited Mar. 21, 2009), http://www.mandarintools.com/chardict.html.

Before 1997, however, the other conceptualization — 法制 — commanded much attention. It became well established that China was aiming to build a country with "laws and system" (法制). Indeed, Deng Xiaoping is the author (in this context) of the concept of 法制 On December 13, 1978, Deng Xiaoping proclaimed at an important government meeting that in order to build up the socialist legal system, China must follow four key principles. The first was 有法可依 which may be understood as follows: 有 (*you*, there should exist); 法 (*fa*, law); 可 (*ke*, may); 依 (*yi*, refer to) — or, in brief, there should be law [for the law officers] to refer to. The second was 有法必依 which may be understood as follows: 有 (*you*, there should exist); 法 (*fa*, law); 必 (*bi*, must); 依 (*yi*, refer to) — or, in brief, if there is law, one must refer to the law or comply with such law. The third was 执法必严 which may be understood as follows: 执 (*zhi*, enforce); 法 (*fa*, law); 必 (*bi*, must); 严 (*yan*, strict) — or, in brief, law enforcement officers should not be lenient; instead, enforcement of law must be strict. The fourth was 违法必究 which may be understood as follows: 违 (*wei*, violating); 法 (*fa*, law); 必 (*bi*, must); 究 (*jiu*, investigate, or prosecute) — or, in brief, if there is a violation of law, it must be prosecuted.

For Deng Xiaoping, then, it was the 法制 form of *fǎzhì* that China should focus on, not the 法治 form of *fǎzhì*. (Deng's explanation of the four key principles noted above appeared in Deng Xiaoping's *Selected Articles*) Not until 1997 was the 法治 form of *fǎzhì* accepted officially by China.

Having examined these definitional issues, let us now turn to the key question: if, as seems clear from the above explanation, China has indeed pledged itself to deliver the rule of law (defined to mean that the government is bound by the rules of law), has China actually *delivered* on this pledge? Does the rule of law exist in that country today?

To address this question, I believe we must focus on two points. First, we should pay attention to the nearly absolute authority of the Communist Party of China ("CPC") over China's system of law and governance and the corresponding absence of a genuinely representative legislature reflecting direct influence by society at large. Second, we should consider the distinctions explained most potently by Randall Peerenboom, between a "thick" and a "thin" concept of the rule of law.

B. The Role of the Communist Party of China

Understanding the role of the Communist Party in Chinese law is of absolutely central importance to understanding law in modern China. In his "nutshell" account of Chinese law, Daniel Chow devotes an entire chapter to this topic. He offers this explanation:

> Given the pervasive role of the Communist Party of China in all facets of the Chinese state and society, any treatment of China's legal system would be wholly inadequate without an examination of the CPC .... The PRC Constitution vests power and authority in the political and administrative structures that form the lawful government of China; the exercise of power through these structures is the legitimate exercise of power .... [T]he CPC ... is a political party and not a governmental entity. A political party is a body of voters formed for the purpose of influencing or controlling the policies and conduct of government through the nomination and election of its candidates for office. By installing its top leaders in leading government positions and its members throughout the PRC government apparatus, the CPC is able to influence and control the PRC government. At certain points, the organs of the PRC government and the CPC appear[ ] to be fused or merged together[,] with the CPC exercising effective power through its control of the government organs. When the CPC exercises power through the government apparatus of the PRC as set forth in the Constitution, it exercises legitimate power. If the CPC were to exercise powers directly and not through the filter of government organs, as appeared to be provided for under the 1975 and 1978 Constitutions, there might arise concerns about the legitimacy of its rule as it is not a government entity. *Under the present political system in the PRC, the government structure serves the important purpose of legitimizing the power exercised by the CPC.*[37]

The key point to draw from Chow's explanation is his insistence on the legal legitimacy of the CPC's exercise of power. Such exercise of power is legitimate, he asserts, because the CPC, which is not in fact the *only* political party in China but undisputedly the *key* political party,[38] has placed its leaders in government

37. CHOW, *supra* note 2, at 115-16 (emphasis added). The literature is full of other similar accounts of the CPC and its relationship with the PRC's political and legal system. *See e.g.* ZOU KEYUAN, *supra* note 2, at ch. 2; CHOW, *supra* note 2, at ch. 4; CHEN, *supra* note 2, at 58-73, 74-94).
38. CHOW, *supra* note 2, at 120 (explaining that "China officially endorses a multi-party system of political parties under the leadership of the CPC," which "exercises firm financial and supervisory control over [the other eight] parties," many members of which are also members of the CPC); XIN REN, *supra* note 2, at 56 (quoting a Chinese official as saying that "China is a one-party-ruling country in which the Chinese Communist Party is the core of the leadership with cooperation from other political parties who 'participate' in governing China but will never rule China.").

positions in ways that are entirely consistent with the PRC Constitution. Chow provides a further explanation of the constitutional provisions, and then of the specific mechanism by which the CPC exercise control over China through those provisions:

> While the CPC has absolute authority in China, *the Party is careful to give the appearance of operating within a legal framework* and careful not to give the appearance, as was the case during the Cultural Revolution, of acting above the law. Provisions in the 1982 Constitution explicitly subject all political parties to the rule of law and make clear that no organization or individual is above the law [citing Article 5 of the PRC Constitution] . . . . Operating within the legal constraints of a government system that appears to be representative and in which power is transferred from the people through popular elections to a parliamentary system in which lower level delegates elect higher level delegates allows the CPC to claim that its leadership is supported and affirmed by the will of the people . . . . *[H]owever, the political system actually operates quite in reverse of appearances. Decisions are actually made by a small group of Party leaders and then are ratified and rubber-stamped by Party and government organs under the control of a core of Party elites.* The outcome of elections for all important government positions is controlled by the CPC through the nomenklatura system in which the CPC is able to place its approved candidates into those positions. The government of the PRC, under the control of the CPC, does not really exercise the independent powers of government. Rather, the CPC uses its control of the government apparatus to justify or legitimate the CPC's own actions, decisions, and policies. This may seem to be unnecessary given that the CPC has absolute authority, but the legitimating function of the current system is quite crucial to the CPC.[39]

Without a doubt, this system guarantees CPC control over China's legal system — control that Chow refers to (in the passage quoted above) as "absolute authority." Not surprisingly, many observers have emphasized this feature of China's system of law and governance, and have drawn special attention to the historical tradition that such centralized control reflects.[40] They also note that

39. CHOW, *supra* note 2, at 131-32 (emphasis added); *Id.* at 129 (explaining, in another passage, Chow explains that the nomenklatura system "refers to a list of Party or government positions kept by Party leaders that can be filled only by certain persons whose names appear on a list of candidates or nominees for those positions . . . . Through the nomenklatura system, Party organs can determine the list of names of the candidate list, which often corresponds exactly with the number of positions available").
40. *See* XIN REN, *supra* note 2, at 1 (noting that "[o]ver the centuries, China's rulers . . . have displayed a consistent commitment to a model with the state's strong will in controlling and ordering Chinese society. Under this model, the state . . . aggressively penetrates into every thread of the social fabric, such as the family, kin, guild, trade union, school, and other social institutions. To the Chinese rulers, the ultimate goal of social control in Chinese society is far beyond the conventionally understood threshold — controlling human conduct. To the state officials the task of social control unmistakably means both behavioral conformity and thought uniformity. Regardless of its political shortfalls, such a

China is clearly *not* a country in which the great masses of individuals within the society write the rules, either directly or through an elected representative parliament. Indeed, as was recently explained by John Thornton — a professor at Tsinghua University and chair of the Brookings Institution — it is only at the village level that Chinese citizens can elect their officials. See **Box #7** for details.

Box #7. "Democratic" Elections in China [41]

There are several systems for selecting the officials responsible for enacting laws at the various levels of government in China. Some important features of those systems are summarized here:

- For about a decade, peasants in China's roughly 700,000 villages (that is, about 700 million farmers) have held competitive popular elections to choose government leaders for those villages.

- Those village-level elections began in some areas in the early 1980s. When it emerged in the 1990s that less than half of the officials so elected were CPC members, the Beijing authorities took corrective steps, so that today more village chiefs are CPC members.

- At the township level, which is the lowest rung in the Chinese government structure, some direct elections were held after the mid-1990s, but most townships use a different method — the "open recommendation and selection" system, under which any adult resident can become a candidate but a council of community leaders narrows the candidate pool to two persons and the local parliamentary body (the local People's Congress) makes the final selection. However, more experimentation is taking place at the township level, with some competitive elections being tried in some parts of the country.

model has been carried on for generations by Chinese rulers and thus forms a unique inherent feature of the legal tradition that predisposes China's propensity in the contemporary legalizing process").

41. The information in Box #7 is drawn (and in a few passages reprinted *verbatim*) from John L. Thornton, *Long Time Coming: The Prospects for Democracy in China*, 87 FOREIGN AFFAIRS 2, 5 (2008).

- At the county level — one administrative rung up from a township — some "open recommendation and selection" polls (as described above) have been conducted, again on an experimental basis, for the position of county deputy chief in a very few areas (representing less than one-half of a percent of China's counties).

- In urban areas, some experimentation is also occurring. For example, in 2003, twelve private citizens ran as independent (non-CPC) candidates for district legislative positions in Shenzhen, and two of them won seats. Independent candidates have also run for parliamentary positions in other parts of the country, although almost none of them have ever gotten elected.

- China's leaders have in recent years also taken steps toward competitive elections with the CPC. Some observers regard this "intraparty democracy" as more important than the experiments referred to above in competitive elections at the local level.

- For example, in the 2006-2007 election cycle, the local CPC leaders in nearly 300 townships were chosen through direct voting by party members; and the forming of "interest groups" within the CPC is reportedly no longer prohibited.

- Still, these incidents represent the exception to the rule. For the most part, the selection of legislative authorities in China remains within the control of the CPC.

Hence, instead of seeing rules of law emanating directly from "the will of the people carried out through an elected body such as a parliament," as Xin Ren says is the expectation in Western culture,[42] we see law in today's China — like law in dynastic China — written by a very small cadre of officials who have gained power by birth, through force, or on the basis of their proven apparent fidelity to a favored ideology. Throughout nearly all of dynastic Chinese history, those officials would have been emperors and the cluster of close advisors, especially Confucian scholars, who surrounded them. In contemporary China, those officials

42. XIN REN, *supra* note 2, at 54.

are the most elite of CPC officials.

C. "Thick" and "Thin" Rule of Law Concepts

Should we conclude from these observations about CPC control over the political system that there is no rule of law in contemporary China? Should we agree with Pitman Potter, who asserts that as a practical matter today's China still follows "legal instrumentalism" — that is, rule *by* law — because "the [Communist] Party retains its authority to determine the content of law"?[43]

Randall Peerenboom has offered some views that would lead us away from such a conclusion. For Peerenboom (whom I quoted above for his explanation of the "rule of law" language added to the PRC Constitution in 1999),[44] the entire debate over whether today's China aspires to and adheres to a rule of law is plagued by sloppy and biased definitions, some of which he attributes in particular to Hugo Mattei, a comparative law expert at the University of Torino and the University of California at Hastings:

> China seems to be moving toward some form of rule of law, but not the liberal democratic form of rule of law that Mattei implicitly uses as his benchmark . . . . [S]ome of the traits found in China are hard to reconcile with such a system [that features a liberal democratic form of rule of law]: [those traits include] a hierarchical society, an emphasis on family, different gender roles, different conceptions of rights or at least a different balance between the interests of the individual and group, and different justifications and rationales for those outcomes . . . . But these features are not at odds with the rule of law per se, just with one particular version. . . .
>
> Mattei . . . equates rule of law with Western liberal democracy . . . Mattei is not alone [in this respect;] . . . For many, "the rule of law" means a liberal democratic version of rule of law.
>
> The tendency to equate rule of law with liberal democratic rule of law has led some Asian commentators to portray the attempts of Western governments and international organizations such as the World Bank and IMF to promote rule of law in Asian countries as a form of cultural, political, economic, and legal hegemony. Critics claim that liberal democratic rule of law is excessively individualist in its orientation and privileges individual autonomy and rights over duties and obligations to others, the interests of society, and social solidarity and harmony.
>
> *It may help in sorting out matters to distinguish between thick and thin versions of rule of law. Briefly put, a thin theory stresses the formal or instrumental aspects of rule of law —* those features that any legal system allegedly must possess to function effectively as a system of laws, regardless of whether the legal system is part of a democratic or non-

43. POTTER, *supra* note 2, at 11.
44. *See supra* note 31 and accompanying text.

democratic society, capitalist or socialists, liberal or theocratic. Although proponents of thin interpretation of rule of law define it in slightly different ways, there is considerable common ground, with many building on or modifying Lon Fuller's influential account that laws be general, public, prospective, clear, consistent, capable of being followed, stable, and enforced.

In contrast to thin versions, thick or substantive conceptions begin with the basic elements of a thin conception, but then incorporate elements of political morality such as particular economic arrangements (free-market capitalism, central planning, etc.), forms of government (democratic, single party socialism, etc.), or conceptions of human rights (liberal, communitarian, collectivist, "Asian values," etc.).

In China and other Asian countries for that matter, there is little debate about the requirements of a thin theory and the basic principle that rule of law refers to a system in which law is able to impose meaningful restraints on the state and individual members of the ruling elite, as captured in the rhetorically powerful if overly simplistic notions of a government of laws, the supremacy of the law, and equality of all before the law. However, there is considerable debate about competing thick conceptions of rule of law.[45]

I have quoted from Peerenboom at length because I find that his conceptual framework offers a powerful way of organizing our thoughts on the rule of law in China. Note in particular Peerenboom's reliance on the work of Lon Fuller, which I referred to above in **Box #2**.

We might pull together (i) Peerenboom's views on a "thin" rule of law and (ii) Fuller's enumeration of attributes of legality to consider the following hypothesis about contemporary Chinese law: Even though China *does* aspire, according to its Constitution, to achieving a "thin" rule of law — under which the legal system would boast the attributes that Peerenboom draws from Lon Fuller's work — China *does not* aspire to the liberal democratic version of a "thick" rule of law. If it can be said that China does aspire to *any* thick version of the rule of law, it is one (or more) of the alternative versions of a "thick" rule of law that Peerenboom identifies. These include "statist socialist," "neo-authoritarian," and "communitarian" versions of a "thick" rule of law. Peerenboom briefly defines these various types of "thick" versions of a rule of law (including the "Liberal Democratic" version) as follows:

[T]he Liberal Democratic version of rule of law incorporates free market capitalism (subject to qualifications that would allow various degrees of "legitimate" government regulation of the market), multiparty democracy in which citizens may choose their

45. Peerenboom-2003, *supra* note 2, at 55-58 (emphasis added). Peerenboom's work, and especially his distinction between "thin" and "thick" versions of the rule of law, has been widely cited. *See* A. CHEN, *supra* note 2, at 38; J. Chen, *supra* note 2, at 730.

representatives at all levels of government, and a liberal interpretation of human rights that gives priority to civil and political rights over economic, social, cultural, and collective or group rights.

Statist Socialists endorse a state-centered socialist rule of law defined by, *inter alia*, a socialist form of economy (which in today's China means an increasingly market-based economy but one in which public ownership still plays a somewhat larger role than in other market economies); a non-democratic system in which the [Communist] Party plays a leading role; and an interpretation of rights that emphasizes stability, collective rights over individual rights, and subsistence as the basic right rather than civil and political rights.

There is also support for various forms of rule of law that fall between the Statist Socialism and the Liberal Democratic version. For example, there is some support for a democratic but non-liberal (New Confucian) Communitarian variant built on market capitalism, perhaps with a somewhat greater degree of government intervention than in the liberal version; some genuine form of multiparty democracy in which citizens choose their representatives at all levels of government; plus a communitarian or collectivist interpretation of rights that attaches relatively greater weight to the interests of the majority and collective rights as opposed to the civil and political rights of individuals.

Another variant is a Neo-authoritarian or Soft Authoritarian form of rule of law that, like the Communitarian version, rejects a liberal interpretation of rights, but unlike its Communitarian cousin, also rejects democracy. Whereas Communitarians adopt a genuine multiparty democracy in which citizens choose their representatives at all levels of government, Neo-authoritarians permit democracy only at lower levels of government or not at all.[46]

Having now introduced Peerenboom's distinction between a "thin" version of the rule of law and several "thick" versions of the rule of law, it is appropriate for us to consider yet again the rough-and-ready definition of "rule of law" that I offered earlier. That definition reads as follows:

A society may be said to adhere to the rule of law if the rules in its legal system are publicly promulgated, reasonably clear in their formulation, prospective in their effect, reasonably stable over time, reasonably consistent with each other, applicable to all

46. Peerenboom-2003, *supra* note 2, at 58-59, n.76. In considering the conditions of Asia, Peerenboom seems to prefer one of the latter two "thick" versions of the rule of law listed above — those emphasizing communitarian values. In his 2007 book on China, Peerenboom writes this: "On the whole, I find the arguments in favor of the kind of communitarian or collectivist approach to rights issues found in some Asian countries . . . more persuasive, and the results on the whole more attractive, than the liberal approach as practiced particularly in the United States . . . . To put it simply, . . . liberalism tends to benefit the more talented, smarter, or already well-off individuals in a society at the expense of the vast majority. In contrast, communitarianism benefits the vast majority, albeit at times to the detriment of exceptional individuals. PEERENBOOM-2007, *supra* note 2, at ix.

segments of the society (including the government, so as to prevent the government elite from acting arbitrarily), reasonably comprehensive in their coverage of substantive issues facing the society and its people, and reasonably effective, in the sense that the rules are broadly adhered to by the people in the society — voluntarily by most, and through officially forced compliance where necessary.

Does this definition of the rule of law adequately take into account the important distinction that Peerenboom has offered between "thin" and "thick" versions of the rule of law? I believe it does — and indeed I intended for it to do so. For one thing, the above definition *includes* most of Fuller's "morality of law" attributes (all of them, in fact, except the requirement that the rules not be beyond the powers of the affected parties, as this seems rather pedestrian), although instead of requiring that the rules must be expressed "in general terms," my definition states more plainly that the laws must be applicable to the government, so that the government officials are not above the law. In addition, my definition *adds* a requirement that the rules be relatively comprehensive in coverage, so that they address the bulk of issues facing the society and its people. Moreover, my definition *omits* elements that would appear in what Peerenboom refers to as a Liberal Democratic version of a "thick" rule of law definition. For example, my definition omits such elements as these:

- The law should be employed to safeguard and advance the civil and political rights of the individual — including most prominently the freedom of expression — and to create conditions under which the individual's legitimate aspirations and dignity may be realized.

- The legal system guarantees procedural fairness ("due process") — that is, certain basic rights of process must be followed in order for the government to act against the interests of an individual.

- The law emerges from democratic processes in which all citizens play a direct part in creating rules or in electing representatives who create the rules.

- The powers of the government are divided into separate compartments — typically legislative, executive, and judicial — with checks and balances preventing any one compartment from dominating the others (and therefore the entire legal system).

D. The Views Within China

I hypothesized above that even though China *does* aspire, according to its Constitution, to achieving a "thin" rule of law — under which the legal system would boast the attributes that Peerenboom draws from Lon Fuller's work — China (or at least its CPC leadership) *does not* aspire to the liberal democratic version of a "thick" rule of law. Is that hypothesis correct? One way of testing it is to consider a range of views expressed in recent writings by certain Chinese legal scholars from some of the top universities in China. I shall do that in the following paragraphs, in which I summarize observations made by experts Wang Zhoujun, Jiang Ming'an, He Jiahong, Ma Huaide, Chen Weidong, and Ma Xiaohong.

D1. "Feeling the stones when crossing the river"

Wang Zhoujun offers these observations about the meaning of the rule of law:[47]

> Rule of law requires that organizations of public power should possess and exercise public power to manage the society according to law. In other words, rule of law emphasizes government's compliance with the law. The three powers of legislation, law enforcement and administration all belong to the category of public power and must abide by the law.[48]

Two key themes in Wang Zhoujun's writing on democracy and the rule of law are these: (1) of the various forms of governmental power, it is *administrative* power that increasingly matters in the daily lives of individuals in today's China; and (2) China's contemporary legal system is, and should be, taking a *gradualist* approach to bringing administrative power under the control of the rule of law. As for the first of these themes, Wang Zhoujun gives this explanation:

> Modern administrative power keeps expanding and covers and manages everything from cradle to grave. In order to further improve the efficacy of social control, administrative organs have been granted certain legislative power and limited quasi power of law enforcement. Essentially a modern structure of public power has been formed with administrative power at the core, and . . . the domination of administrative power is determined by the complexity of the modern society. We have no choice and there is no way out. Consequently, in the context of modern society, the core of the construction of rule of law is how to perform official duties according to law.[49]

Wang Zhoujun then proceeds to his second thesis: enhancing the rule of law in the administrative functions of government must be undertaken gradually — as in

47. *See generally* Wang Zhoujun, *supra* note 3.
48. *Id.* at 339.
49. *Id.*

the case of "feeling the stones when crossing the river" in order to avoid falling headlong and drowning in a torrent of uncertainty and risk when making one's way to the other shore.[50] Noting that the basic strategy of exercising the "rule of law" was only officially formulated and adopted in 1999, Wang Zhoujun points to progress that has been made in implementing that strategy, particularly in the area of administrative law. In particular, he emphasizes the three stages of "startup," "accumulation," and "integration" that have occurred in China's development of the rule of law,[51] which Wang Zhoujun says "firstly requires government to abide by the law, and secondly requires that the law should comply with the essence of law, which contains justice, fairness, openness, credibility and efficacy."[52]

What Wang Zhoujun does *not* include in the notion of the rule of law — at least as it is pursued in China — is the principle of democracy by majority rule. He claims that China's cultural foundations are ill-suited to that form of democracy:

> China's Confucian traditional culture is a value system of clannishness with the royal authority at its core . . . . Although traditional culture has been weakened to some extent since the beginning of modern China, it is still very influential and has produced many restrictions on the development of China's constitutionalism.
>
> First, worship of power [that has its origin in] royal authority is poles apart from the ideas of modern democracy. Democracy is built upon the principle of "the minority is subordinate to the majority", while worship of power is in essence a rule of "the powerless are subordinate to the powerful" . . . . In this view, "majority" is not necessarily an adequate reason for soliciting obedience. [Expressed differently,] the principle of majority rule is the foundation of the western democracy, while in Chinese culture, the principle of majority rule is not always true — if without authority and power as backup, more often than not the minority would not yield to the ruling of the majority; they would rather set up another faction and split from the majority . . . .

50. *Id.* at 346-48. For Wang Zhoujun, "feeling the stones when crossing the river" means that "in the whole reform process, every step taken has to be very cautious"; and in his view, the other shore of the river is "a prosperous and powerful, democratic and civilized socialist country." *Id.* at 348. Although Wang Zhoujun does not say so, the phrase "feeling the stones when crossing the river" is derived from Deng Xiaoping's phrase *mozhe shitou guo he* or "crossing the river by feeling for stones." Deng used the phrase in the context of experimenting with economic policies. *See* Satya J. Gabriel, *Economic Liberalization in Post-Mao China: Crossing the River by Feeling for Stones*, *in* CHINA ESSAY SERIES (1998), http://www.mtholyoke.edu/courses/sgabriel/economics/china-essays/7.html.

51. Wang Zhoujun, *supra* note 3, at 340-41 (citing various administrative law statutes enacted in 1989, 1996, 2004, along with the draft administrative procedure code still under preparation).
52. *Id.* at 340.

> Second, clannishness can cause alienation of the fragile democracy in our country, which is already gaining ground in China. Our country is promoting democracy at the village-level organizations . . . . However, due to the penetration of the traditional culture of clannishness, some negative impact has occurred . . . . The clan's control over local affairs [is tightening, and in some areas has displaced official government authority.] . . .
>
> [Therefore,] it can be said that China's traditional culture is one of the reasons why China's constitutional reform flounders . . . . [Hence,] we should adopt a gradual process of cultural transformation . . . [because China's development of the rule of law by] simply "copying" the constitutional system of the West will not work. We need stable and cautious development strategies.[53]

D2. Democracy and rule of law

Another Chinese legal scholar, Jiang Ming'an of Peking University, also emphasizes the importance of (i) enhancing the rule of law in the exercise of *administrative* power, while (ii) taking a cautious and *gradual* approach to embracing certain aspects of democracy — what Jiang refers to as "participatory democracy."[54] For Jiang, "participatory democracy" can in fact be the enemy of the rule of law, as it was during the Cultural Revolution, "a period during which China's democracy ran out of control and was distorted, and legal system of destructed [*sic*]."[55] According to Jiang, "[i]t is obvious that 'mass participation democracy' (or 'direct democracy') without a legal system (and rule of law) is horrifying and will drive human beings back to the 'natural status' without any safety guarantee."[56]

In view of this danger, Jiang explains, the development of administrative rule of law in China (and the development there of the rule of law and constitutionalism more generally) has followed the path of "delegate democracy," which he claims has these advantages:

> [F]irst, the quality of the people's representatives is normally higher than that of the average citizens, hence the quality of the decisions made by the representative bodies is normally higher than that of the decisions made by the average citizens collectively; second, the people's congress has less people than the meeting of all citizens, so it is easier for it to reach consensus . . . third, the representative congress usually follows relatively strict procedures in discussing issues, and as a result is likely to be cautious in making decisions . . . [rather than being] affected by emotions and to be manipulated, which may

53. *Id.* at 349-52.
54. *See generally* Jiang Ming'an, *supra* note 3.
55. *Id.* at 356.
56. *Id.*

> result in some extreme decisions and may even lead to "majority tyranny" . . . fourth, delegate democracy is more economical than direct participation democracy."[57]

Jiang's views would surely strike most readers as self-evident, although they do raise the question (at least in my mind) of why Jiang does not address this key issue: does the "representative congress" to which he refers actually exist in the PRC, where control over the election of persons to such a congress is so tightly held by the CPC? Perhaps as a silent acknowledgment of that issue, Jiang turns his attention to ways in which "delegate democracy" in China can in fact be supplemented by "participatory democracy." Such supplementation is needed, he says, because "delegate democracy" has drawbacks: (1) representatives have their own interests that sometimes differ from those of the public whose interests they are supposed to serve; (2) "members of the modern parliament are normally recommended by political parties, which have their own interests that are not always aligned with those of the public"; and (iii) "when making decisions the representative bodies usually adopt the principle that the minority shall be subordinate to the majority, thus sometimes the legitimate rights and interests of the minority cannot be protected effectively."[58]

In addition, Jiang observes, in modern society the issues that face a government become so complicated as to require greater and greater delegation to administrative agencies, and this shift of authority can place even further distance between the authorities and the people in the society. This is the reason, he says, that administrative rule of law is so important. One means of ensuring such rule of law is to "protect freedom of speech, reinforce the report of public opinions by news media and perfect citizens' open discussion mechanism. Newspaper, radio, television and Internet and open discussions are important channels and forms of public participation."[59]

For Jiang, however, the (administrative) rule of law should *not* entail too much of these substantive freedoms of speech, press, and assembly:

> Of course, various media, especially open discussions over the internet, carry certain risks: some people may fabricate rumors and stir up troubles, make libelous, offensive and irresponsible remarks against the government and other people, mislead the public intentionally and create incidents . . . . Therefore, on the one hand, the law should protect freedom of speech, and on the other hand, it should regulate the operation of various news

57. *Id.* at 363-64.
58. *Id.* at 364-65.
59. *Id.* at 370.

media.[60]

D3. Importance of administrative procedure rules

A third Chinese legal scholar, Ma Huaide (vice president at the China University of Political Science and Law), also focuses on how administrative law, and especially administrative *procedure* law, bears on the rule of law in China.[61] Ma Huaide offers these observations:

> As a significant step toward constructing democracy and rule of law in China, codifying administrative procedural law has great implications in developing democratic politics, protecting citizen rights, controlling corruption, overcoming bureaucracy, accelerating administrative efficiency, improving the socialism market economy, and constructing socialism rule of law in the country, [especially] in constructing rule of law government.[62]

Ma Huaide seems to go further than many other Chinese scholars in embracing what would typically be regarded as liberal democratic political ideology. He asserts that "[a]s the basis of democratic politics, citizen's [*sic*] participation in the management of state affairs and democratic process should be greatly encouraged,"[63] and he explains how codifying administrative procedural law can contribute importantly to democratic politics. Such codification can also, Ma points out, "be conducive to civil rights protection, and human rights promotion, which are the common duties of all countries around the world, and which are also the main aims of bettering rule of law."[64]

D4. Restrictions on officials' power

He Jiahong, a friend of mine at Renmin University from the time of my Fulbright fellowship to Beijing in 1994, also defines and discusses issues relating to the rule of law.[65] For He Jiahong, the movement toward the rule of law is one of ten key "tendencies" that he believes will dictate the development of criminal justice (He Jiahong's work focuses on criminal law). He offers this succinct account of what the rule of law is, what it emerged from, and why it matters:

> Rule of man is a kind of government for primitive society. In primitive time, since there was no law, rule by man was the only choice, and rulers originally were people with strong body or high prestige .... In modern times, the emerging bourgeois in the western

60. *Id.*
61. *See generally* Ma Huaide, *supra* note 3.
62. *Id.* at 308.
63. *Id.*
64. *Id.*
65. *See generally* He Jiahong, *supra* note 3.

countries turned the "rule of law" into a banner and instrument for their fight for power, and one of their slogans was "the King shall not violate the law." Later, with social development and the accumulation of the experience of social administration, mankind became more and more aware of the superiority and essence of the rule of law. Thus, it is a necessary trend of human society to proceed from rule by man to rule of law.

Currently, the rule of law is in global fashion. Similarly, China should also move along the track of "rule of law". The basic aim of the rule of law is to form a law-based stable and benign social order. The basic meaning of the rule of law consists of two focuses and one basic point . . . . The first "focus" of the rule of law is to formulate good laws. However, without strict observance, execution and justice, good legislation in itself will not be able to make for a genuine rule of law. The "non-observance" is equal to the lawlessness . . . . So, the second focus is to execute laws . . . . In modern law-ruled nations, social members, especially powerful government officials, must strictly observe laws. Though it is necessary for ordinary people to conform to laws, yet it is more so for officials. Hence the "basic point" of the rule of law is to restrict officials' power and to adhere to the principle that "officials shall not violate the law."[66]

D5. Rule of law and international standards

Chen Weidong, another Chinese legal scholar at Renmin University, also examines the rule of law in the context of Chinese criminal law and procedure.[67] Chen discusses the "challenge" posed by a mismatch between certain international standards and certain Chinese rules governing criminal procedure. In particular, Chen notes that Chinese rules are inconsistent with provisions found in the International Covenant on Civil and Political Rights requiring a presumption of innocence, safeguards against self-incrimination, and protections against double jeopardy. "Hence," Chen says, "at present, applying the criminal justice guidelines stated in international covenants to our criminal procedure is a problem that needs to be resolved immediately."[68]

Chen's proposal for resolving that problem seems internally inconsistent. On the one hand, Chen posits that "all rules of criminal justice, which are ordained in international pacts that our nation has subscribed or has been affiliated to, should be carried out through this modification of [China's] Criminal Procedure Law." On the other hand, Chen claims that the PRC "should be able to set up some exceptional rules according to the situation of our nation."[69] There seems to be an unexplained inconsistency between these two approaches, which is odd given

66. *Id.* at 9-10.
67. *See generally* Chen Weidong, *supra* note 3.
68. *Id.* at 160.
69. *Id.* at 161.

Chen's acknowledgement that "if there is discord between international treaties and the Criminal Procedure Law, the whole law system will arrive at a state of confusion, which will then lead to contradictions and conflicts between law criterions [*sic*] and will go against the modernization of [China's] legal system."[70]

D6. Rule of law or rule of lǐ?

The exceptionalism that Chen Weidong suggests also appears, but in a much bolder form, in the views of Ma Xiaohong of Renmin University.[71] This legal scholar takes the position that the current enthusiasm, in China and elsewhere, for the rule of law rests on the assumption that the rule of law is superior to the rule by *lǐ*, which Ma Xiaohong defines as "rites" — "norms and concepts formed at the beginning of human society, including primitive religions (e.g. sacrificial rites), morals (kindness to tribe members and enmity towards adversaries), and habits (daily conducts and speeches)."[72] That assumption of superiority, Ma says, is incorrect; it merely reflects biased and racist views by Westerners (he cites the prominent nineteenth-century comparative jurist and legal historian Sir Henry Maine in particular) whose colonization of the world made them equate might with right.[73] As a result of that colonization, Ma asserts, "Western law had become a yardstick for judging whether a country/region's law was 'progressive' and 'civilized' or 'backward' and 'barbarous.'"[74]

That biased and racist view, Ma Xiaohong implies, should be discarded. Neither one of the two different approaches to law is inferior to the other, Ma says:

> If we can say that after the lengthy period of the Customary Law, the West, on the basis of their specific economic and social conditions, chose to leave the clanship [that all societies have gone through] for the rule of law, then, China, on the other hand, choose [*sic*] to "reform the clanship" and enter into the stage of rule by *lǐ*. The two choices in themselves were not inferior to each other, [but rather] the formation and development of a civilization and a cultural mode [represented by these two different choices] were endowed by the environment and the history and [therefore] no one could be said to be advanced or underdeveloped."[75]

70. *Id.* at 163.
71. *See generally* Ma Xiaohong, *supra* note 3.
72. *Id.* at 57.
73. *Id.*
74. *Id.* This assertion by Ma is echoed, of course, by advocates of many indigenous and other peoples who have found themselves in unfortunate relationships with colonizers from the West.
75. *Id.* at 58.

D7. Pluralism in perspectives

It appears, then, that Ma Xiaohong is issuing a call for China to renounce the "rule of law" in favor of the "rule of *lĭ*." The former, he indicates, is a foreign element that will never be successfully imposed on Chinese society. The latter, he says, reflects China's deep Confucian traditional values.[76]

It should be obvious from the survey of views summarized in the preceding paragraphs that Chinese legal scholars bring a wide range of perspectives to the question of whether China aspires to, or should aspire to, a rule of law — and if so, what that means. Some scholars do seem to endorse not only the rule of law in its "thin" version but also certain aspects of a Western-oriented liberal democratic "thick" version of the rule of law — including, for example, participatory rights and other procedural safeguards in administrative law, and even certain substantive rights for individuals.[77] Other Chinese scholars take a more gradualist approach, urging caution in China's development of legal changes that could be incompatible with China's current circumstances or long-held values. And some Chinese scholars would apparently have the country return to some of those long-held values, thereby abandoning the efforts made in recent years to adopt any sort of rule of law ideology — including, presumably, even the "thin" version of the rule of law. That last view, however, would seem to be a minority position, and one that is inconsistent with the 1999 constitutional amendment.

We should hardly find this diversity of views among Chinese scholars surprising. Surely a diversity of views on such an issue would appear in any country, and particularly in one that has experienced such an explosion of legal reform as China has in recent years. Randall Peerenboom offers these observations about that country's varied views on the rule of law and how to achieve it:

> Although one can appreciate the desire for an overall, coherent plan for reforms, no country has ever successfully implemented rule of law in accordance with some preordained theoretical blueprint. Legal reforms are necessarily evolutionary, context-specific and path-dependent. Moreover, China is increasingly pluralistic. As noted, there

76. *Id.* at 65-69.
77. For Stanley Lubman's assessment on this point — concluding that several leading Chinese legal scholars have "call[ed] for establishment of the rule of law based on principles familiar in the West" (including a requirement that members of the NPC be elected in public campaigns and that they not provide a "rubber stamp" for CPC policies) — *see* LUBMAN-1999, *supra* note 2, at 124-125.

> are important differences in the conceptions of rule of law and the different emphases in the purposes of law among central leaders, local officials, academics, and Chinese citizens, and within these broad categories as well . . . Thus, no single view of law or single theory can capture the diversity of perspectives.[78]

E. Is There a Rule of Law in Contemporary China?

Before concluding this examination of the rule of law in today's China, let us move from theory to practice — from "ought" to "is." In the preceding paragraphs I introduced and then tested this hypothesis: even though China *does* aspire (in accordance with its Constitution) to achieving a "thin" rule of law, China *does not* aspire to the liberal democratic version of a "thick" rule of law. In my view, that hypothesis holds up well under scrutiny: there appears to be little consensus in terms of *aspirations* about rule of law in China, beyond the aim to achieve the rule of law in its "thin" form.

Is there, however, a consensus of *observation*? That is, can we say that China's current legal system does in fact have the attributes of a "thin" rule of law? I think we can, although only barely. Using as our standard the "rough and ready" definition of (thin) rule of law that I offered earlier, it seems that law in today's China probably *does* possess the minimal attributes required to say that it does adhere to the rule of law — subject, however, to one point of uncertainty. That point of uncertainty relates to the requirement that the rules be "applicable to all segments of the society (including the government, so as to prevent the government elite from acting arbitrarily)." Given the peculiar and entrenched status of the CPC in the political system — and the opportunity for manipulation that this presents — it is not clear that the rules are in fact, when push comes to shove, fully applicable to the government.

Except for that point of uncertainty — which is by no means insignificant — it seems that China's system does have the rule of law under the "thin" standards explained above. The impressive legal reform efforts in China over the past thirty years have created a system that is, for the most part, competent and effective.

As evidence to support this assertion, I would highlight two areas of legal development over the past thirty years. Both of them are reflected in the

78. Peerenboom-2003, *supra* note 2, at 94. In another, more general context, Peerenboom asserts that it might even be better to "avoid reference to 'the rule of law,' which suggests that there is a single type of rule of law" and instead to "refer to the *concept* of 'the rule of law,' for which there are different possible *conceptions*." Peerenboom-2002, *supra* note 2, at 5.

chronological list of events and initiatives appearing in **Box #8**. First, China has witnessed an explosion in the number of laws and regulations enacted at the various levels of government. Between 1978 and 1992, according to one source, the PRC's government "promulgated more than two thousand laws, statutes, amendments, and decrees, exceeding the total number of laws enacted in its first three decades under Communist rule."[79] If anything, the pace has quickened in more recent years. According to another authority, the number of laws and regulations promulgated at the national level and by local peoples' "congresses" between 1992 and 2004 exceeds 7,100,[80] causing one observer to remark that legal reform in China "is an area of frenzied activity"[81] and another to note that "[t]he pace of reform makes it difficult even for those within China to keep abreast of the latest developments [because] . . . [n]ew laws and regulations are being issued at breakneck speed, old laws and regulations are amended continually, and whole new regulatory regimes and institutions are being created."[82]

79. XIN REN, *supra* note 2, at 2.
80. BIN LIANG, *supra* note 2, at 44 (table 3.1). Another source reports that "local people's congresses in the various provinces have adopted over 3,000 local rules and regulations." ZIMMERMAN, *supra* note 2, at 53 n.14; *id.* at 53 (explaining that NPC's Standing Committee, which has important legislative authority, has enacted over 300 laws since 1979, ranging from traffic rules and foreign investment incentives to domestic relations laws).
81. Edward B. Vermeer, *Introduction* to CHINA'S LEGAL REFORMS AND THEIR POLITICAL LIMITS, *supra* note 2, at ix.
82. Peerenboom-2003, *supra* note 2, at 38.

Box #8. Selected Chinese Legal and Political Developments from 1978 [83]

1978	• In February, the NPC is convened and enacts the 1978 Constitution, which marks a partial departure from the most radical ideology and policies of the Cultural Revolution but does not directly repudiate it (and indeed maintains the CPC's control over the political and legal system). In December, Deng Xiaoping insists that "the legal system must be strengthened" in such a way as to ensure that "laws would not change merely because of a change of leadership or a change in the leaders' views and attention." The procuratorates are reestablished. The CPC by now has 35 million members.
1979	• The Ministry of Justice is re-established; organic laws on courts and on procuratorates are adopted; the *Equity Joint Venture Law* is enacted.
1980	• The *Provisional Regulations on Lawyers* are issued in August by the NPC Standing Committee.
1981	• The *Contract Law* is adopted, with a strong flavor of Soviet influence. In June, the CPC adopts the *Resolution on Questions of Party History since the Establishment of the PRC*, which urged that law and the legal system must be emphasized to prevent the recurrence of errors committed during the Cultural Revolution.
1982	• The 1982 Constitution is adopted in December, representing a return to the "socialist legality" model of an earlier Constitution. The *Trademark Law* is also adopted, reflecting the influence of Western Law. The Chinese Law Society is established.
1983	• The Ministry of Education approves more than 30 universities to set up law departments, and a national conference on legal education (held in

83. Entries in Box #8 are drawn largely from the following sources: A. CHEN, *supra* note 2, at 23-45; Wang & Zhang, *supra* note 2, at 9-13; ZOU KEYUAN, *supra* note 2, at 2, 4, 12-13, 24, 161, 207, 217; J. Chen, *supra* note 2, *passim*; CHOW, *supra* note 2, at 9-11, 118-19, 230; Ma Xiaohong, *supra* note 3, at 47-53; J.A.G. ROBERTS, A CONCISE HISTORY OF CHINA 203-66 (1999).

Beijing) calls for the enrollment of up to 10,000 law students by the end of 1987. Some decisions of the Supreme People's Court begin to be distributed within the court system.

1984 • The *Patent Law* is adopted, again reflecting the influence of Western law.

1985 • The *Gazette of the Supreme People's Court* begins publication, thus expanding the range of court decisions publicly available and providing a mechanism by which the Supreme People's Court provides guidance to lower courts.

1986 • By the end of this year, numerous courts have been established, including 29 high courts, 337 intermediate courts, 2,907 basic courts, and over 14,000 people's tribunals, with a total of nearly 99,000 judges. The *General Principles of Civil Law* is adopted, based directly on the German model; and a relatively comprehensive legal regime for foreign investment has been established.

1988 • The 1982 Constitution is amended to legitimize the private economy and to legalize the leasing of land and the transfer of land-use rights; and the *Cooperative Joint Venture Law* is adopted.

1989 • By the end of this year, about 150 national statutes, more than 500 administrative regulations and rules, and more than 1,000 local rules have been issued, covering all major aspects of social and economic life; and legislative focus on administrative law results in the *Law on Administrative Litigation*, laying down detailed standards defining which administrative activities are legal or illegal. In May, the protests and crackdown at Tiananmen Square bring international criticism and reveal CPC concerns over risks associated with political reform.

1991 • The State Council issues its white paper, *Human Rights in China*, suggesting an about-face in the official attitude toward the discourse of human rights (by claiming that "[i]t remains a long-term historical task for the Chinese people and government to continue to promote human rights").

1992 • In January, CPC leader Deng Xiaoping takes his "Southern Tour" and is reported as saying that "reforms and greater openness are China's only way out" and that "if capitalism has something good, then socialism should bring it over and use it." In addition, the *Maritime Code* is adopted and is heralded as an example for harmonizing Chinese law with international practice.

1993 • The 1982 Constitution is amended again, this time replacing the reference to a "planned economy" with that of a "socialist market economy" and also replacing "state-run economy" with "state-owned economy" (implying that the public sector of the economy will no longer be operated by bureaucratic administration but will be regulated by market mechanisms); and the *Company Law* is enacted.

1994 • The *Foreign Trade Law*, the *Arbitration Law*, and the *Audit Law* are adopted, along with the *State Compensation Law* (supplementing the *Law on Administrative Litigation* adopted in 1989); and the legal aid system begins operations.

1995 • The *Securities Law*, the *Law on Accounting*, and the *Insurance Law* are adopted. There are by this time (according to one account), 89,000 lawyers and 7,200 law firms, and legal education has flourished, with the number of law schools having risen from two by the end of 1977 to more than 80.

1996 • Revisions to the *Criminal Law* and the *Criminal Procedural Law* are undertaken, with a stated aim of absorbing commonly accepted international standards on justice and the rule of law; and the NPC Standing Committee enacts the *Law on Lawyers*, which seeks to strengthen and modernize the legal profession and to recasting lawyers as professionals providing services to clients (instead of as state workers).

1997 • The *Law on Administrative Punishment* is adopted, complementing the earlier laws on administrative law and procedure; and an "Intensified Educational Rectification Movement" within the judiciary is undertaken, resulting in the reshuffling, disciplining, and removal of thousands of judges. Deng Xiaoping dies, and the CPC adopts "Deng Xiaoping

Theory" as part of the CPC's official ideology (along with Marixism-Leninism and "Mao Zedong Thought"). In addition, China signs the International Covenant on Economic, Social and Cultural Rights.

1998 • Several changes are initiated in the judicial system, including (i) improving a "lay assessor" system in which laypersons assist judges in making court judgments; (ii) strengthening township courts in order to expand the judiciary's role in rural areas, (iii) appointing certain senior judges as superintendents responsible for offering advice in handing major or difficult cases, (iv) opening most trials and hearings to the public, (v) introducing the practice of advising victims, witnesses, and suspects in criminal cases of their legal rights, and (vi) changing the system of recruitment of judges. In addition, China signs the International Covenant on Civil and Political Rights.

1999 • The 1981 version of the *Contract Law* is replaced with a revised *Contract Law* that reflects a "pluralist approach" to legislation, drawing on experience from foreign and international sources; and the 1982 Constitution is amended again, this time (i) to reflect the NPC's strategy (urged by CPC Secretary-General Jiang Zemin) of *yifa zhiguo, jianshe shehuizhuyi fazhiguo*, which has been translated by one expert (as noted above in **Box #5** and accompanying text) as "[to] govern the country according to law, [and to]establish a socialist rule of law country," and (ii) to give further prominence to the role of the private sector in China's economy.

2001 • The Supreme People's Court, in its "Reply to the Shandong High Court" regarding the case of *Qi Yuling v. Chen Xiaoqi and others*, suggested that courts may refer to and rely on provisions of the Constitution in deciding cases – thereby departing from the position established on this issue in 1955. China is admitted to the World Trade Organization.

2002 • Upon the retirement of Jiang Zemin from the position of CPC Secretary-General (succeeded by Hu Jintao), Jiang's "theory of the Three Represents" is formalized in the CPC constitution, setting the stage for the incorporation of that theory into the PRC Constitution in 2004. In addition, the CPC constitution is amended (i) to delete references to the

ultimate abolition of capitalism, and (ii) to open CPC membership to a broad range of people, including private entrepreneurs; and by 2002 the CPC has 66 million members.

2003 • As of the end of the year, over 560,000 undergraduate and nearly 11,000 graduate students are enrolled in several hundred law departments and schools within Chinese universities.

2004 • In March, the 1982 Constitution is amended again – this time mainly (i) to provide expressly that the state respects and protects human rights, (ii) to provide expressly for the protection of citizens' private property rights, and (iii) to adopt Jiang Zemin's "theory of the three represents." The NPC and its Standing Committee have adopted (as of June of this year) a total of 323 laws, 138 resolutions, and 10 sets of legislative interpretations since 1979, and the State Council had issued 970 administrative regulations; local legislatures has also issued thousands of rules. There are over 3,500 courts and more than 190,000 judges, whose qualifications are regulated by national laws and examinations; and there are roughly 120,000 practicing lawyers, of whom nearly 5,000 work in the 3,023 legal aid organizations.

2005 • The *Public Servants Law* is adopted, setting a high standard for conduct by government officials.

2006 • The NPC adopts the *Supervision Law*, which authorizes the NPC to exercise supervisory control over the operations of courts – not (as earlier proposed) over individual cases handled by the courts but rather on a collective basis and relating to "specific issues."

2007 • The *Property Law* is enacted, covering all three types of property in the PRC – state, collective, and private – and giving legislative detail to the constitutional provisions added in 2004 guaranteeing private property rights.

2008 • The NPC Standing Committee announces that draft laws submitted to it for review will be published on the NPC's website and in some cases also published in major newspapers, to permit comments to be provided by the

public.

What is the legislative state of play today, thirty years after this high-speed legal reform process got underway in 1979? Naturally, it is beyond the scope of this book to offer a substantive survey of the laws now in force in the PRC. Excellent sources of information are available for that purpose.[84] Suffice it to say that the PRC now has a comprehensive body of statutory and regulatory law that addresses the whole range of economic issues – contracts, property, tax, labor and employment, government procurement, banking, insurance, consumer protection, intellectual property, trade, securities, insolvency, and business associations – as well as civil law, civil procedure, criminal law, criminal procedure, family law, mediation and arbitration, environmental protection, and more.[85]

I have cited these law-making developments as one piece of evidence that China's contemporary legal system does meet the requirements of a "thin" rule of law – subject, that is, to the one important point of uncertainty noted above as to whether the role of the CPC in the legal system violates the requirement that the law be applicable to all segments of the society (including the government, so as to prevent the government elite from acting arbitrarily). But of course a legal system comprises much more than promulgated laws and regulations. It also includes institutions, personnel, and operations – most notably enforcement operations. As reflected in **Box #8**, China now has developed a sophisticated array of legal institutions – not just law-making institutions (congresses, standing committees, and councils at national level as well as at the levels of provinces, special

84. *See, e.g.*, Wang & Zhang, *supra* note 2; YU & GU, *supra* note 2; WANG GUIGUO & JOHN MO, CHINESE LAW (1999) [hereinafter WANG & MO]; ZIMMERMAN, *supra* note 2. *See* Box #8 (showing similar figures emphasizing the impressive volume of legislative activity in 1989 and 2004).
85. This list of topics is drawn from the chapter headings in ZIMMERMAN, *supra* note 2, and in WANG AND & MO, *supra* note 84. In addition to these laws and regulations, of course, and serving as some form of guide for the legal system as a whole, is the PRC's current constitution, first adopted in 1982 and amended four times since then. For the text of the constitution, detailing amendments at the end, *see* XIAN FA (1982) (P.R.C.), *available at* http://english.peopledaily.com.cn/constitution/constitution.html. As reflected in Box #8, the amendments were adopted in 1988, 1993, 1999, and 2004. Preceding the 1982 constitution were a 1978 constitution (also reflected in Box #8) and two earlier constitutions. *See* Arjun Subrahmanyan, *Constitutionalism in China: Changing Dynamics in Legal and Political Debates*, CHINA L. & PRAC., May 2004, *available at* http://www.chinalawandpractice.com/Article/1692820/Search/Results/Constitutionalism-in-China-Changing-Dynamics-in-Legal-and.html?Keywords=arjun (showing a synopsis of those constitutions, as well as the 1982 Constitution and its amendments).

municipalities, autonomous regions, etc.),[86] but also a court system, a procuracy system,[87] and an increasingly active community of practicing lawyers.[88]For better or for worse, these institutions have facilitated an explosion in the volume of litigation in China in recent years. One authority, in describing the "amazing increase in cases,"[89] offers these statistics:

> In 1978, the total number of cases accepted by the courts was 447,755. The number skyrocketed to more than 5 million after 1996, reached a record high of 5,692,434 in 1999, and then slowly decreased to 5,161,170 by 2005. In 27 years, the total number of cases increased more than tenfold. When broken down, data showed remarkable increases in all types of cases. From 1978 to 2005, the numbers increased more than 13-fold for general civil cases and almost fourfold for criminal cases; economic dispute cases increased more than 295-fold from 1980 to 2001; and administrative cases increased more than 181-fold from 1983 to 2005.[90]

Legal training also has expanded dramatically in the PRC in the past thirty years or so from its moribund state at the close of the Cultural Revolution:

> Only after 1978 did legal education finally gain a rebirth. In the next 10 years from 1978 to 1987, the number of law colleges and departments increased from 6 to 86; the number of teachers increased from 178 to 5,216; and the number of law graduates increased from 99 to 12,639. These numbers continued to grow in the 1990s and in the new millennium. By 2006, more than 600 law programs were open nationwide with more than 200,000

86. *See, e.g.*, ZIMMERMAN, *supra* note 2, at 52-63 (showing details regarding these various legislative bodies); CHOW, *supra* note 2, at 142-67 (same); *see* Box #7 (showing information on the degree to which the members of these various legislative bodies are chosen by means of open elections with popular voting).
87. The institution of a procuracy is unfamiliar to lawyers in many common law countries, including the USA. In general legal terms, a procurator – a term that derives from the Latin verb *procurare*, which means "to take care" – supposedly serves as a watchdog of legality, overseeing the observance of the laws in the system, especially by government officials. One authority offers this description of the procuracy as it exists in China: "[a]s in other civil law systems, China has a procuracy system that parallels the court system but is independent from both the courts and the Ministry of Justice, and is responsible for supervision of the judicial system . . . . [T]he Organic Law of the People's Procuratorates . . . provides that the procurators are entrusted with supervision of the courts and administrative tribunals; investigation and prosecution of illegal conduct committed by government officials and judicial officers . . . and investigation and prosecution of activities deemed to be a threat to public security." ZIMMERMAN, *supra* note 2, at 66.
88. *See* ZIMMERMAN, *supra* note 2, at 64-70 (courts, procuracy, lawyers); WANG & MO, *supra* note 84, at 15-19 (courts); CHOW, *supra* note 2, at 225-47 (lawyers); BROWN, *supra* note 2, at 24-27 (lawyers), 51-83 (courts). According to one source, the number of lawyers in China rose from about 2,000 in 1979 to nearly 154,000 in 2005. BIN, *supra* note 2, at 51. *See also* Box #8, *supra* (for a somewhat lower figure for 2004).
89. BIN, *supra* note 2, at 45.
90. *Id.*

students.[91]

There is obviously a linkage between these factors of (i) a rejuvenated court system, (ii) a quickening pace of litigation, and (iii) an increased supply of lawyers. Taken together, they could in time surely be expected to bring about the consistently effective implementation and enforcement of laws, which is something on which any legal system ultimately depends.

I would hasten to add that there are, to be sure, several aspects of the system that many critics both inside and outside China cite with deep concern. For example, the continuing lack of independence (and in some cases inadequate legal training) among members of the judiciary constitutes a major blemish on the system.[92] Similarly, improvements that several Chinese legal scholars cited above have proudly described regarding administrative law and procedure have in fact enjoyed only partial success, with some local officials in China's rural regions merely feigning compliance with the laws — or in some cases simply ignoring and breaking the law;[93] and other shortcomings in the adherence to the law deeply

91. *Id.* at 55. The same author explains that the numbers of graduate law programs and students also have increased. *Id.* at 55-57. *See* Box #8, *supra* (showing figures from another source regarding the numbers of law students in 2003).

92. CHEN, *supra* note 2, at 151-55 (addressing these and related issues); *see also* Jim Yardley, *A Judge Tests China's Courts, Making History*, N.Y. TIMES, Nov. 28, 2005, at A12, *available at* http://query.nytimes.com/gst/fullpage.html?res=9E06E6DD1431F93BA15752C1A9639C8B63&scp=2&sq=jim%20yardley%20a%20judge%20tests%20china%27s%20courts&st=cse (reporting that although "China's leaders have embraced the rule of law as the most efficient means of regulating society," a "central requirement in fulfilling that promise lies unresolved — whether the governing Communist Party intends to allow an independent judiciary"; and also asserting that "China's court system is far from an independent entity that can curb government power" and that instead the judges "remain a pliable tool to reinforce that power because they are often "poorly educated in the law and corrupt"). Other articles in a series on the rule of law in China can also be found at http://www.nytimes.com. *See, e.g.*, Joseph Kahn, *Deep Flaws, and Little Justice, in China's Court System*, N.Y. TIMES, Sep. 21, 2005, at A14; Joseph Kahn, *When Chinese Sue the State, Cases are Often Smothered*, N.Y.TIMES, Dec. 28, 2005, at A10.

93. *See* Kevin J. O'Brien & Lianjiang Li, *Suing the Local State: Administrative Litigation in Rural China*, *in* ENGAGING THE LAW IN CHINA: STATE, SOCIETY, AND POSSIBILITIES FOR JUSTICE 31, 31(2005) (explaining that the promulgation of the Administrative Litigation Law (ALL) in 1989 was hailed in China as a "milestone of democratic and legal construction." . . . [However,] the law's implementation has been hounded by interference and feigned compliance. To this day, the law is widely regarded to be a "frail weapon" that has not greatly reduced administrative arbitrariness. . . [Indeed,] in the countryside, . . . many local officials continue to mistreat villagers in egregiously illegal ways . . . [G]etting a case accepted is difficult, and long delays are common. Even when rural complainants manage to win a lawsuit, they often face uncertain enforcement or retaliation"); *see* Elizabeth Economy, *The Great Leap Backward?*, 86 FOREIGN AFFAIRS 38, 43 (2007)

trouble some observers.[94] Likewise, the treatment of minorities — Tibetans among them — by a heavy-handed Chinese government prepared to squelch any possible dissent also raises concerns among many groups and nations around the world.[95] And throughout the system, the pernicious use of *guanxi* (special personal relationship) continues to serve as an "extra legal mechanism" for handling affairs in China.[96] As one observer has noted, "the extensive use of personal connections (*guanxi*) to circumvent the law or to gain leniency seriously undermines the public's confidence in the judicial system."[97]

These are important matters; some of them are deeply troubling deficiencies — and other such deficiencies in China's legal system can also be cited. Indeed, the PRC's State Council recently acknowledged serious shortcomings in the country's legal system.[98]

However, while such features as these are patently inconsistent with a liberal democratic "thick" version of the rule of law as championed by (though rarely

(explaining, in a similar criticism, regarding local indifference to national laws, that "[o]ne of the problems is that although China has plenty of laws and regulations designed to ensure clean water, factory owners and local officials do not enforce them").

94. *See, e.g.*, J. Chen, *supra* note 2, at 738 ("Law-in-the-book is not necessarily the same as law-in-action . . . [There are] tremendous difficulties experienced by Chinese courts in enforcing court judgements [*sic*] or decisions . . ."); Stanley Lubman, *Looking for Law in China*, 20 COLUM. J. ASIAN L. 1, 4 (2006) [hereinafter Lubman-2006] ("[L]egal reform remain[s] [a] work in progress without clear goals. The Chinese Communist party (CCP) values its control over Chinese society more than it does legal reform; the Party-state's institutions for making and implementing law remain in considerable disorder; strong controls over the Chinese bureaucracy's exercise of discretion are lacking; localism weakens the application of laws and policies adopted by Beijing; and Chinese society is beset by severe strains that weekend the force of law").
95. *See, e.g.*, Erich Follath, *Western Democracy Loses Ground To Autocrats*, SPEIGEL ONLINE, June 13, 2008, http://freeinternetpress.com/story.php?sid=17131 (noting that although the Chinese Constitution guarantees "a right to freedom of speech, . . . when a minority like the Tibetans voice the slightest protest this is seen as an attempt to destabilize the country and their voices are silenced with brute force").
96. POTTER, *supra* note 2, at 12.
97. ZIMMERMAN, *supra* note 2, at 71. Zimmerman also points out that a "by-product of *guanxi* is the institution of nepotism in China, which has allowed senior cadres and their children . . . to monopolize key business and to hold substantial real property interests." *Id.* For similar comments on the pernicious uses and effects of *guanxi* in China, *see* Thornton, *supra* note 41, at 11; Lubman-2006, *supra* note 94, at 70-74.
98. *See* PRC White Paper, *supra* note 35 (stating that "in some regions and departments, laws are not observed, or strictly enforced [and] violators are not brought to justice; [instances of] local protectionism [by which legal rules are bent in favor of local persons and interests] occur from time to time; some government functionaries take bribes [and] abuse their power when executing the law.").

achieved) in the West, I doubt they require us to conclude that the PRC's legal system falls fatally short of meeting the standards of the rule of law in some reasonable "thin" version. In other words, that legal system is *not*, in my estimation, generally dysfunctional or inherently corrupt or so technically deficient as to place the PRC in the same category as those many other countries around the world whose laws and institutions are plainly unable to fulfill what Fuller calls law's essential purpose of achieving social order through the use of rules that guide behavior.[99]

The observations I have made in the preceding paragraph might be regarded as faint praise for the Chinese legal system. Alternatively, they might be regarded as a realistic assessment of that system, as judged against a different standard from the one often used in evaluating (and criticizing) Chinese law and governance.

Concluding Observations

I would offer six closing observations about the "rule of law" in today's China. First, as suggested above, China *does* seem to aspire — as an official policy and constitutional matter, with widespread support — to achieving a "thin" rule of law, under which the country's legal system would have the sorts of attributes Lon Fuller identifies. That is, the rules in the legal system would, for the most part, be general, public, prospective, clear, consistent, capable of being followed, stable, and enforced.

Second, the flurry of legal reform undertaken in China in the past three decades has moved the country at breathtaking speed toward meeting that goal of a "thin" rule of law. Considering the state of Chinese law when those efforts began,[100] progress has been remarkable, although shortcomings doubtless remain — as of course they do in all countries. Moreover, disagreements exist both within

99. *See* Box #2, *supra* for an elaboration on this purpose. Randall Peerenboom reminds us that the quality of a country's legal system is closely tied to the overall wealth (level of economic development) in that country. A country's economic development typically brings greater demand for, and therefore the emergence of, an efficient and fair legal system. Hence, the richer countries can be expected to have much better legal systems, and adherence to the rule of law, than poorer countries. Indeed, Peerenboom cautions that "given the importance of wealth [in achieving the rule of law], comparing poor countries to rich countries is like comparing a piano to a duck." PEERENBOOM-2007, *supra* note 2, at 199.

100. LIEBERTHAL, *supra* note 2, at 151 (observing that, "[a]s of 1977 . . . China was governed by decrees, by bureaucratic regulations, and by the personal orders of various officials; it had no codes of law at all. In addition, many of the decrees, regulations, and so on were kept secret").

China and outside China as to whether the progress, speedy as it has been, should not be accelerated even more.

Third, disagreements also exist as to just what version of a "thick" rule of law, if any, China aspires to today. While pronouncements from the CPC leadership typically seem to reject a liberal democratic version,[101] China may be, as Randall Peerenboom asserts, "increasingly pluralistic" and exhibiting "important differences in the conceptions of rule of law and the different emphases in the purposes of law among central leaders, local officials, academics, and Chinese citizens."[102]

Fourth, China does not today meet the standards of a liberal democratic version of a "thick" rule of law.[103] Illuminating the distinction between "thin" and "thick" rule of law concepts allows us to consider more intelligently why this is the case — that is, to consider whether the absence of a liberal democratic "thick" rule of law in China reflects either (i) an outright disregard for the PRC Constitution's

101. *See, e.g.*, Elisabeth Rosenthal, *China Trying to Crack Down on Liberal Intellectuals*, N.Y. TIMES, May 8, 2000, at A1, *available at* http://www.nytimes.com/2000/05/08/world/china-trying-to-crack-down-on-vocal-liberal-intellectuals.html?scp=1&sq=rosenthal%20china%20trying%20to%20crack%20down&st=cse ("China's leaders are trying to rein in a growing and increasingly assertive liberal intellectual movement" because "China's leaders clearly view this trend as a threat to their political power,"and the leadership has taken "a series of punitive action against writers perceived as straying too far in a liberal or reformist direction."); *see also* XIN REN, *supra* note 2, at 56 (quoting a chief justice of the People's Supreme Court as having instructed fellow judges that "the courts must exercise the independent power of the judiciary under the leadership of the Party."); Joseph Fewsmith, *China Under Hu Jintao*, CHINA LEADERSHIP MONITOR, No.14, Spring 2005, http://media.hoover.org/documents/clm14_jf.pdf (noting that the Hu administration "has actively backed a campaign to criticize "neoliberalism" and has cracked down on the expression of liberal opinion."); Yu Zheng, *Communist Reform Broadens Democracy*, SCI. OUTLOOK ON DEV., Oct. 17, 2007), http://news.xinhuanet.com/english/2007-10/17/content_6898247.htm (reporting that Chinese leader Hu Jintao asserted in visiting the USA in April 2006 that "China would not embrace Western-style democracy."). These relatively recent rejections of democratic liberalism have deep roots, of course. Deng Xiaoping, for example, condemned as proponents of "bourgeois liberalisation" those who wanted Western-style political freedoms in China. *See* Manoranjan Mohanty, *Development and Democracy: The Indian and Chinese Experience*, *in* ACROSS THE HIMALAYAN GAP (1998), *available at* http://ignca.nic.in/ks_41030.htm.
102. Peerenboom-2003, *supra* note 2, at 94.
103. For an engaging and detailed assessment of China's performance in reaching three goals identified by Premier Wen Jiabao in late 2006 as central to "democracy" — "elections, judicial independence and supervision based on checks and balances" — *see* John Thornton, *Slowly Does It: China's Embrace of Democracy*, AUSTL. FIN. REV., Feb. 8, 2008. *See also supra* notes 92-98 and accompanying text.

requirement for a "rule of law country," or (ii) instead (which seems more likely), a reluctance on the part of China's leadership to aim for a liberal democratic version of a "thick" rule of law and its acceptance instead of a different version.

Fifth, contrasting law in today's China with dynastic Chinese law can provide some context for the recent legal reform efforts. For example, (i) unlike dynastic Chinese law, contemporary Chinese law is addressed to the people in ways that bear on their daily lives, instead of being addressed narrowly to the government bureaucrats responsible for maintaining control over the people; (ii) still, the balance between control over the bureaucrats and discretion on the part of the bureaucrats seems similar now to the balance struck in the dynastic codes, although certain underlying assumptions about social hierarchy have disappeared; and (iii) the urge of the CPC in modern China to exercise firm control over the country's people, and over the state apparatus in its entirety, reflects an ages-old approach that dominates Chinese dynastic legal history.

Taking all these factors into consideration, I draw this conclusion: subject to one point of uncertainty, I take the view that a "thin" rule of law — consistent with the standards I have discussed above — *does* exist in today's China, although only barely. The point of uncertainty revolves around the standard requiring that the rules be applicable to all segments of the society, including the government. The peculiar entrenchment of the CPC in the political system continues to present a substantial risk of manipulation.

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