# China and the Rule of Law

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If any political concept could be said to have universal appeal, it would have to be the rule of law. Virtually no government rejects the idea of the rule of law. On the contrary, most, if not all, governments claim to seek its realization. In 1992, the World Bank officially deemed the rule of law a prerequisite of successful economic development, linking it to "efficient use of resources and productive investment."[1]

The modern West has staked out the claim of being the original birthplace and the eternal guardian of the rule of law. But China has also embraced this principle. The PRC's 1982 Constitution stated, "no organization or individual may enjoy the privilege of being above the Constitution and the law."[2] In 1997, the party declared at its Fifteenth Party Congress that China's "basic strategy" was "governing the country according to law and making it a socialist country of rule of law."[3] And General Secretary Xi Jinping has made the rule of law a centerpiece of his "new era."[4]

But what is the rule of law? Can a country like China realize the rule of law? Is America the leading model of the rule of law, as many believe? If we dig deeper, we find that the concept of the rule of law is greatly misconstrued and misinterpreted in the general media and in our political discourse. A more in-depth survey of the history, theories, and practices of the rule of law would demonstrate that it is not an exclusive possession of liberal societies.

In fact, conceptual confusion and practical corruption have placed the "rule of law" in a precarious position in the West. As a result, nonliberal societies, especially China, may now hold more promise in realizing the benefits of the rule of law.

## Is the Rule of Law Limited to Liberal Societies?

What is the rule of law? If one poses the above question to educated elites around the world, the likely answer would be close to the following: A country with the rule of law is governed by a constitution that guarantees individual rights and sets out the rules for democratic elections. Its political institutions are defined by a separation of powers, including an independent judiciary that adjudicates disputes impartially, without political interference, and with the power to review legislation to ensure its compliance with the constitution. Finally, all individuals must be equal before the law.[5]

This definition could be further elaborated by the obvious merits of the rule of law. When rules are set in advance and applied equally to all by an independent judiciary, rights and properties cannot be taken away arbitrarily. Businesses can operate, and individuals can organize their lives with security and predictability. Such conditions seem necessary for economic development and even basic human dignity.

In this narrative, liberal societies are essentially rule-of-law countries, and nonliberal societies are not. Liberal democracies are said to possess all of the above ingredients in varying degrees; China and other nonliberal countries, it is claimed, do not.

In China, it is said, the party holds arbitrary power over the law and even the Constitution because its one-party rule is supreme. The judiciary is not independent and, therefore, cannot be impartial. Under the party's political supervision, the judiciary cannot apply the law equally to all without political interference, let alone serve as a check on the party's political authority. Under such a system, any individual rights stipulated in the Constitution are meaningless. Businesses and individuals cannot operate with predictability, nor even basic security of property and liberty.

By about every abstract criterion, China seems to exemplify the opposite of the spirit of the rule of law, and to represent a standard case of the rule of man (albeit in the form of the rule of the party). As such, some have labeled China's efforts to develop the rule of law as rule *by* law. Rule by law, in their interpretation, is simply using laws as a means to efficiently exercise the rule of the party and is, therefore, contrary to the ideal of the rule of law.

But this is a narrative built on shoddy grounds, having little basis in fact or even in theory.

## The Rule of Law in the United States

Let's first examine the liberal societies of the world, which proclaim themselves to be the exemplary practitioners of the rule of law and the worldwide guardians of this principle. In particular, no country is said to represent that group better than the United States.

Yet, as soon as we get beyond the slogans, some puzzling facts emerge about the state of the rule of law in America. Why, for example, are there so many lawsuits in the United States? If general rules are set in advance and applied

with consistency and predictability, one might expect less litigation, not more. In a lawsuit between two adversaries, it is likely that one party will lose. Few would enter into a lawsuit knowing for sure they will lose. Yet the United States is by all measures the most litigious society in the world. If the rule of law delivers predictability, why do so many people think they can win but end up losing? Or, perhaps more accurately, why are so many parties using the law as a means to exert economic pressure?

Why, moreover, have so many consequential judgments been determined by 5–4 votes on the U.S. Supreme Court? One swing vote, which could be the result of one justice's health, age, or personal experience, is hardly a demonstration of predictability. As it stands, a justice's idiosyncratic situation could result in a decision that affects fundamental aspects of American life for decades or longer. Some, for example, traced the Supreme Court decision that made same-sex marriage constitutional (which was a 5–4 decision opposed by Chief Justice John Roberts) at least in part to the personal acquaintances and life experience of one justice, Anthony Kennedy.[6] Overnight, same-sex marriage became constitutionally sanctioned, yet not a word changed in the U.S. Constitution. Likewise, a determination no less important than who should occupy the highest office of the land in the United States, in the contested presidential election of 2000, was also decided by a 5–4 vote in the Supreme Court.[7]

The recent confirmation of Brett Kavanaugh to the U.S. Supreme Court offers another case in point. The political struggle was intense and overtly partisan. The Republicans called him one of the most qualified candidates ever. The Democrats portrayed him as a dangerous addition to the court. Democratic senator Cory Booker went so far as to call Kavanaugh

supporters "complicit in evil."[8] In fact, the Kavanaugh confirmation was the culmination of a well-organized and well-funded political campaign that lasted over thirty years. This campaign targeted not only the Supreme Court, but also the entire federal court system.[9]

One cannot help but wonder: if the essential elements of the rule of law are impartiality and predictability, why is so much partisan effort being put into ensuring that individuals of particular political persuasions become judges?

## Misconceptions about the Rule of Law

It turns out that the theories of the rule of law have never been as neat as portrayed by their advocates in politics and the media. Here I summarize four areas of misconceptions on the rule of law in general and the implications of these errors for the Chinese political context in particular.

*(1) The rule of law is liberal.* It is a historic fact that the rule of law predated liberalism by more than a millennium. When Aristotle first conceptualized the rule of law, it was perfectly consistent with Athenian slave society. Equality simply meant that the law was applied equally to all according to its own terms. So the rule of law as theorized by Aristotle, who many consider to be the intellectual founding father of the rule of law, at least in the Western tradition, did not preclude, and even supported, the categorization of individuals (men, women, slaves, and noncitizens) with different legal implications.[10] Judith Shklar went so far as to argue that Aristotelian rule of law is perfectly compatible with the modern "dual state," in which part of the population is declared subhuman (such as the United States until the Civil War, and in some ways long after that, as well as Nazi

Germany and apartheid South Africa in more recent times).[11] John Locke's proclamation, "*Where-ever Law ends, Tyranny begins*,"[12] seems weak in this analysis, particularly in the moral context of liberalism. Many contemporary legal theorists would concur. Joseph Raz wrote that "the law may . . . institute slavery without violating the rule of law," as in fact Locke's *Constitutions of Carolina* did. Raz went on further to state that the rule of law is morally neutral: "A good knife is, among other things, a sharp knife. Similarly, conformity to the rule of law is an inherent value of laws, indeed it is their most important inherent value. . . . Like other instruments, the law has a specific virtue which is morally neutral in being neutral as to the end to which the instrument is put."[13]

Likewise, the popular story that the Magna Carta inaugurated a liberal society based on the rule of law in England is but a myth. As Edward Jenks pointed out, it was a contract between the feudal nobility and the king, who signed it under duress. If anything, it further consolidated feudal privileges instead of advancing modern liberties.[14]

Even a paradigmatic liberal theorist like John Rawls recognized that nonliberal societies, those that "do not have the right of free speech," could be legitimate as long as "the system of law is sincerely and not unreasonably believed to be guided by a common good conception and obligations to all members of society."[15] Brian Tamanaha, a law professor at Washington University in St. Louis, called the view that only liberal democracies can have rule of law "unjustifiable," arguing that it "smacks of stuffing the meaning of the rule of law with contestable normative presuppositions to

produce a desired or presupposed outcome which is then imposed on everyone by definitional fiat."[16]

*(2) The rule of law necessarily prevents unlimited governmental power.* One of the most common criticisms of China and other nonliberal countries is that the lack of rule of law breeds societies in which the ruler, in China's case the party, can exercise sovereign power without constraints. Under such systems, civil rights and human rights do not have the protections of the law and can be trampled upon at will.

But this view is based on flawed political theory. The rule of law has never—not even at the conceptual level—resolved the issue of how to check sovereign power. Whatever the sovereign is—king, party, parliament, or court—can change the laws. "He that is bound to himself only, is not bound," as Hobbes put it.[17]

Carl Schmitt further elaborated this view in the twentieth century. In his *Political Theology*, Schmitt observed that a society's political decision-making is more fundamental than the law. The establishment of the constitution itself requires decision-making that is not further backed up by law. Indeed, even ordinary legislation requires decision-making. Laws are by definition general, and the gap between legal generalities and particular applications must be bridged by judicial decision-making that is central to justice itself.[18] A society's fundamental decisions are essentially within the realm of sovereignty, not law.[19]

Even in the long evolution of the liberal tradition in England, the role of the common law was shaped by fundamentally contradictory developments in

societal decision-making. Coke represented an era in which the common law, including the Magna Carta, was seen as providing the basic legal framework and principles that were above the powers of legislators.[20] This was then disputed by Jeremy Bentham and repudiated by legal reforms that regarded parliamentary sovereignty as supreme, while judicial review of legislation was rejected.[21] Even a scholar like Max Radin, who believed in the Magna Carta's enduring contribution to the development of liberal society, conceded that the British Parliament, as the sovereign, in theory could abolish the Magna Carta simply by an act of parliament.[22]

The U.S. Constitution also carries specific provisions on how everything in it can be changed by the proclaimed will of the people as long as certain procedures are followed. There are others who believe that the principles stated in the Declaration of Independence reign supreme and are even above the Constitution.[23] The debate seems endless.

Recognizing this theoretical predicament, Tamanaha identifies three ways in which the rule of law *can* limit sovereign power in practice: First, political necessity leads the rulers to voluntarily or involuntarily pledge to be bound by the laws. Second, customs that developed over long periods of time create a cultural environment in which there is a broadly shared assumption and social practice of being bound by laws, such as under Germanic customary law during the Middle Ages. Third, governments can require officials to strictly follow the rules when conducting routine and mundane tasks.[24] All three, however, are products of cultural and political developments. A. V. Dicey even proclaimed that the rule of law was a unique product of Anglo-Saxon culture.[25]

At the Fourth Plenary Session of the Eighteenth Party Congress in October 2014, Xi Jinping made the development of the rule of law a centerpiece of his political agenda. He said the following about the Chinese Constitution: "the party leads the people in establishing the Constitution, the party leads the people in executing the Constitution, and the party must be bound by the Constitution."[26] Many have dismissed such pronouncements as contrary to the idea of the rule of law, pointing out the conceptual contradiction of the party both being the lawgiver and claiming to be bound by the law. But such contradiction has always been inherent to the theory of the rule of law. The Chinese party state is no exception. Party-led rule of law is not an oxymoron, as many have claimed, unless the entire concept of the rule of law is an oxymoron.

The question should not be whether there is some innate flaw in China's political system that excludes the rule of law. The question should be whether and how China can develop the appropriate political and cultural conditions that can deliver the benefits of the rule of law.

*(3) The rule of law overcomes the follies of the rule of man.* Among all the misconceptions about the rule of law, the dichotomy of the rule of law versus the rule of man is perhaps the most misleading. As the popular saying goes, the rule of law is impartial and just while the rule of man is arbitrary and unjust. But again, Aristotle reveals that this concept produces more ambiguity than clarity.

Aristotle places reason at the center of the rule of law—"the law is reason unaffected by desire."[27] In this telling, because man is necessarily influenced by human passions and biases, the rule of man would make for an unstable

or even unjust society. Thus it would be preferable for a society to be governed by general rules set in advance and strictly applied.[28] On the other hand, Aristotle also emphasizes that the outcome of the rule of law depends on the quality of judges and, in complex cases, it would be better for laws to be less rigid so that judges could have more discretion.[29] This Aristotelian conflict has never been resolved throughout the intellectual and practical history of the rule of law. Montesquieu argued against expanding the role of judges for fear that "the life and liberty of the subject[s would be] exposed to arbitrary control."[30] Yet, Montesquieu, more than any other political thinker, was responsible for laying the intellectual foundations for the independence of the judiciary, which necessarily assigns tremendous power to judges. Later on, the likes of Jeremy Bentham and Justice Antonin Scalia railed against such institutional features, arguing that they led to bad laws being made by judges.[31] None of these thinkers could get away from the harsh reality that the law does not act or speak by or for itself; all laws must be interpreted and acted upon by human beings.

In fact, the rule of judges is now the normal condition of the rule of law in most Western countries, especially in the United States. And judges are men (or women). This conceptual contradiction explains why the process of appointing judges has turned into such an intense political battleground. It turns out that different judges can have radically different interpretations of the law, leading to radically different outcomes—so much so that many have begun to condemn the increasingly powerful roles judges play in directing political and legal outcomes in the United States. David Kaplan, in his recent book, called the U.S. Supreme Court "the most dangerous branch" of government, one that is mounting an "assault on the Constitution."[32] When

an independent judiciary in a nation that is perceived as the paragon of the rule of law can be viewed as an enemy of the Constitution, the line between the rule of law and the rule of man is surely blurred.

But do such conspicuous manifestations of the rule of man subvert the rule of law? Not necessarily. In fact, a strong case can be made that a strict view of formal legality, as termed by Tamanaha,[33] which stipulates the rigid application of the letters of the law without human discretion, is contrary to the ideals of the rule of law.[34] The rule of law should not be morally and substantively neutral. Procedural justice is not substantive justice and could very much produce the opposite. It takes the interpretive intervention of human beings to ensure that the content and execution of the law actually generate just outcomes. And such interpretive interventions are by necessity contextual and, yes, political.

Unsurprisingly, modern China has been going through the same struggle in its effort to implement the rule of law. After the Cultural Revolution, the party state sought to institutionally rectify the system that allowed Mao's absolute personal rule, which was an extreme case of the rule of man, by building more impersonal versions of the rule of law. Chinese public opinion also supported such a shift.

The following comments of Xiao Yang, the chief justice of the Supreme People's Court of China, from a public speech in 2003, best captured the mood of that era:

> Today's world is one of the rule of law. The prosperity of a nation, the integrity of its politics, the stability of its society, the development of its

> economy, the solidarity of its ethnic groups, the flowering of its culture and the contentment and well-being of its people, all hinge upon the maintenance of law and order and the soundness of the legal system. China is no exception. The national strategy of a country determines its future and destiny. At the end of the twentieth century, China . . . publicly proclaimed to the world that we would adopt the rule of law as our governance strategy.[35]

In this context, the rule of law was put in stark contrast to the rule of man. Some jurisdictions went so far as to implement automatic computer sentencing, so as to take personal discretion completely out of certain legal decisions.[36] Whether such methods are consistent with the fundamental intent and conception of the rule of law is very much debatable. Perhaps as a result, computer sentencing, which flourished in certain provincial courts in the early 2000s, was not adopted on a large scale. Although such software is still being used in Chinese courts, it is primarily for aiding investigative work such as evidence analysis rather than making binding legal decisions.[37]

*(4) The rule of law underwrites social justice in modern democratic societies.* In recent decades, the rule of law has been invoked as the ideological and institutional framework to deliver social justice in liberal democratic societies. Civil rights and welfare politics have both been presented as societal goals based upon the ideals of the rule of law. But this view ignores intrinsic contradictions within the theoretical foundations of the rule of law.

As summarized above, the historic roots of the rule of law, from Aristotle through the medieval period, hardly represented any form of universal social justice, as slavery and feudal privileges were both institutionally enshrined in

the concept of the rule of law. Even in the liberal tradition of the modern era, the rule of law was not about social justice, as we understand it today. John Locke, one of the most significant thinkers of the liberal rule of law, placed private property at the center of it. For Locke, a "state is a society of property owners,"[38] and the raison d'être of the rule of law was the "protection of the propertied members of society against the demands of the indigent."[39]

Adam Smith put it most succinctly:

> Laws and government may be considered in this and indeed in every case as a combination of the rich to oppress the poor, and to preserve to themselves the inequality of the goods which would otherwise be soon destroyed by the attacks of the poor, who if not hindered by the government would soon reduce others to an equality with themselves by open violence.[40]

Even centuries later, when social welfare became central to the political agenda of Western liberal societies as a means to remedy the excesses of capitalism, political and legal thinkers continued to view such positions as inimical to the rule of law. Prominent among them were A. V. Dicey[41] and Friedrich Hayek. For Hayek, the welfare state's pursuit of substantive equality through wealth redistribution was against the fundamental tenets of the rule of law.[42] If we pay attention to today's politics in America, echoes of this debate still divide the nation.

In China, this debate is perhaps just beginning. Forty years of expanding marketization and rapid growth has produced serious side effects that are

exposing fundamental social contradictions. The two most notable ones are the expanding divide between rich and poor and environmental degradation. Since 2000, China's Gini coefficient has surged through 0.4, signaling potentially destabilizing levels of inequality. In 2017, rural residents, who account for 42 percent of the country's population, had an annual per capita disposable income of ¥12,363. That was only about one-third of the average per capita disposable income of urban residents, which stood at ¥33,616.[43]

At the Nineteenth Party Congress held in 2017, General Secretary Xi Jinping stated that China's development paradigm had shifted from rapid growth to high-quality development.[44] The principal challenge for Chinese society has changed from backward economic production to unbalanced and inadequate development. Redistribution of economic gains is, therefore, now the central political task.

But, in 2004, the protection of private property was officially enshrined in the PRC Constitution.[45] Some liberal opinion leaders, such as Zhang Weiying, Wu Jinglian, and Mao Yushi have used the concept of liberty and the law's protection of private property (in other words, procedural justice) to oppose active government policies to achieve substantive equality through taxation and other political means,[46] just as Hayek did in the West decades ago. It is important to note that these opinion leaders are not dissidents; they are actually senior members of the Chinese Communist Party (CCP).

Here is the extraordinary irony: China, as a socialist country, is the only major economy in the world that still has neither a property tax nor an inheritance tax. As the political leadership seeks to build Xi Jinping's new era

by bringing general prosperity to all, there will surely be stiff resistance from elites within the party, from commercial powers, and from upper income strata. We can expect that the concept and interpretation of the rule of law will be a central theme in the great debates to come.

## Confucius and the Law

The great political debate, indeed the struggle that has defined the Chinese civilization, began more than two thousand years ago. It was the struggle between legalism and Confucianism (*fajia* versus *rujia*). During the Warring States period (475–221 BC), when China was divided into separate kingdoms battling endlessly for dominance, the kingdom of Qin eventually surpassed all others in economic and military power and unified China in 221 BC. It did so via the implementation of strictly applied legal codes. Shang Yang, a reformist government minister who instituted this legalism, is known in the annals of history as the political leader who set Qin on the path to empire.[47]

Legalism was on the march, but it was a short march. Brutally impersonal procedural rule led to rebellions and the Qin dynasty collapsed after only fourteen years.[48] The Han dynasty took over and the ensuing debates in political philosophy lasted nearly a century. Many schools of thought emerged, even flourished. But the central rivalry was between legalism and Confucianism.

Legalism was essentially the strict application of general rules that were set in advance. All were to be treated equally according to the terms of the rules, without exceptions; procedural justice trumped substantive fairness. As the

legal theorist Lon Fuller has suggested, this notion of the rule of law is "indifferent toward the substantive aims of the law and is ready to serve a variety of such aims with equal efficiency."[49] Modern Western thinkers such as Montesquieu, Raz, Fuller, and Hayek could all be considered disciples of legalism in the Chinese context.

Confucianism, on the other hand, was centered on the concept of the "mandate of heaven." Moral legitimacy was the basis of just rule. The ruler held a divine right to rule as long as he looked after the welfare of the people, but would risk overthrow if he failed in this duty. Being a good ruler entailed not only giving procedurally correct orders but also engaging in moral conduct. And performance legitimacy—ensuring the welfare of the people—was an important dimension of state legitimacy. In short, Confucianism was mostly about substantive justice, not procedural legitimacy.

Moreover, by linking the right to rule with performance legitimacy, Confucian thought implied that the ruler in China was not absolutely divine. He had to deliver substantive goods. "Mandate of heaven" contrasted sharply with the European doctrine of divine right, which asserted that a monarch received power directly from God and was subject neither to earthly authority nor to the will of the people.[50] According to the European logic, as long as succession procedures were followed correctly, the monarch's rule was deemed legitimate. And this view persists in the West even in the modern era: in general, as long as voting procedures are correctly carried out, a leader in a democracy is legitimate no matter how bad he is. The Chinese tradition is decidedly not that.

A simplified version of history would suggest that, in the great struggle between legalism and Confucianism in the early years of the Han dynasty, the latter emerged victorious and has served as the political foundation of China for two millennia.[51] But it's more complex than that. In fact, most historians name this defining period in Chinese political history the Qin-Han Era. They group the Qin dynasty (legalism) and the Han dynasty (Confucianism) together. Zhao Dingxin explains in his book, *The Confucian-Legalist State*, that although the Han dynasty instituted Confucianism as the official state ideology, legalism always remained an integral part of China's political constitution.

The procedural approach to law—Qin legalism—has served as the practical method of governance throughout all Chinese dynasties. People expect generality, prescriptiveness, and equality in the design of rules. Confucianism, however, is focused on higher purposes: constraining the ruler, securing substantive justice, and maintaining communitarian values.

Confucianism attempted to address the eternal problem of the rule of law—how to constrain the sovereign ruler, whether it's a king or a parliament. The Confucian doctrine both conceptually and institutionally sought to supply a check on sovereign rule. For centuries, it worked in ways not dissimilar to how Germanic customary laws worked in feudal Europe. Tamanaha gives a concise explanation of the medieval roots of the rule of law in the West, based on a "fusion of law and morals": The ruler answered to a moral responsibility that was higher than mere legal procedure.[52] Indeed, both the ruler and the ruled were bound by this higher moral law. The ruler, by declaring his obligation to this higher moral law effectively bound himself in his rule, and his legitimacy before the ruled rested upon honoring that vow.

This custom gave the ruled, in certain circumstances, a "right of resistance" if the ruler violated his obligation.[53]

Confucianism dictated that the emperor's mandate of heaven could only be based on moral rule. The ruler's legitimacy was only valid if he ruled for the common good. Mencius went so far as to suggest that a ruler who violated the moral code could be deposed.[54]

At the institutional level, Confucianism shaped the highly elaborate mandarin governance system through which a cadre of powerful commoner-officials effectively administered the country. These *shi da fu*s were the embodiment of Confucian morals and served as an institutional check on the absolute power of the emperor, possessing the Confucian right to disagree with or even criticize the emperor.[55] The right to rebellion was implicit and real—attested to by the violent overthrows of dynasties every two or three hundred years, followed by new dynasties with renewed mandates of heaven.

By extension, this Confucian check on sovereign power also served as the political and legal structure for the delivery of substantive justice when procedures alone were inadequate. In China's dynastic history, there are many examples of procedural outcomes that were contrary to the moral values of society. In the cases that turned out successfully, morality prevailed. And this cannot be seen as against the spirit of the rule of law; very much the opposite is true.[56]

This, of course, is not at all inconsistent with the intellectual framework of the rule of law in the West. Ronald Dworkin, for example, put forth the

idea that morality forms the background and is an integral aspect of positive law, even though morality is not actually established by positive law. It is the responsibility of judges to make decisions that are consistent with the moral and political consensus of the community, and this imperative is above and beyond the rules in the book.[57]

To be sure, Confucian morality is distinctly different from Dworkin's liberalism. But even here, there are meaningful areas of overlap between Confucian rule of law and the evolution of liberal rule of law. The most relevant is the similarity with modern communitarianism.

In the West, theorists mostly on the left have long argued that liberal rule of law "is irredeemably flawed owing to its starting presupposition of autonomous individuals joining together to form a legal order to facilitate the pursuit of their own vision of the good," to quota Tamanaha.[58] This criticism has only intensified and broadened since the financial crisis of 2008, and is now frequently heard from both the Left and the Right.[59] Liberal rule of law's overt emphasis on procedural justice based on the fundamental value of individualism has contributed to the atomization of communities in the Western world and thereby exacerbated the decline of substantive justice. Communitarianism, in this context, unites the Left and the Right in its call for substantive justice, be it income equality or social cohesion, the mobilization of a community of shared values around a common good. Given many Americans' yearning for the return of community or an advance toward socialism,[60] not to mention much stronger tendencies in European nations, communitarian movements will likely continue to grow stronger in the first half of this century.

And this is precisely the role that Confucianism played for centuries in its subordination of legalism. The values and purposes of the community have served as the overarching vault that houses Chinese rule of law. Rules are to be applied strictly but only in accord with the Confucian spirit. Communitarian faith lies at the foundation of Confucian politics—*tian xia wei gong . . . shi wei da tong* (heaven and earth for all, such is the great common).[61]

Just like Aristotle and his intellectual descendants, who have struggled with the idea of the rule of law in the West, the Chinese recognized long ago that the law cannot be soulless. At the same time, the soul of the law needs to be harmonized with procedural rules in the application of the law. This, of course, is no easy task and may never be fully realized.

## The Party and the Law: Present and Future

The one question that has driven prolonged political debates in and about China has been this: the party or the law, which is more important? Or which should be more important (*dang da hai shi fa da*)? Conservatives say the party is and should be; liberals say the party is but the law should be. Both miss the point. Both misread the fundamental essence and issues of the rule of law.

The structure of Chinese rule of law depends upon the combination of legal procedures with party oversight. Over the past forty years, the country has developed an elaborate system of laws. The main criticism has been that enforcement has been lacking, but most experts agree that enforcement and the professionalism of the courts have steadily improved.[62]

The contentious issue is the role of the party. The Central Committee Politics and Law Commission remains the nation's highest power on legal matters. And the party disciplinary commission structure holds all party members accountable to the party's rules, which are different and stricter than the official legal codes and allow the party to mete out punishments outside the country's formal legal structure.

Yet under a richer understanding of the history of and theory behind the rule of law, these arrangements may be well within the conceptual framework of the rule of law—even in the Western tradition. The party represents political sovereignty; the law cannot bind that sovereign power in theory or in practice. But the party declares itself to be bound, and the people expect such constraint as a basis of the party's political legitimacy. Indeed, the party subjects its members to higher standards of conduct and more severe punishments for violations.[63] And in this very practical way, the party is indeed bound by the laws, at least no less than other forms of sovereign powers.

More importantly, the party, through its Central Committee Politics and Law Commission, serves as the ultimate recourse on substantive justice, just as the Confucian political/moral structure did for centuries, and liberal values and institutions are supposed to do now in Western societies. Of course, the values that undergird substantive justice are quite different. The party upholds China's Confucian-Socialist ideology and the West's liberal institutions uphold the moral commitments of liberalism. But we have already established that the rule of law is not, and never was, the exclusive purview of liberalism.

When procedural justice produces outcomes that contravene society's generally accepted conceptions of substantive justice, and when public disagreement is significant and clearly manifested, the party does have the authority to step in and tip the balance of justice in favor of the community. In contemporary China, such cases have been rare, but they have indeed occurred and produced broad social impacts.[64] Some have criticized such interventions by the party as going against the ideals of the rule of law, but it is this very interpretive power that is an integral part of the rule of law. Such interpretive power is inherently political. The presence of the political in the rule of law is independent of the ideology of the particular regime concerned. Liberal politics is within liberal rule of law. And Confucian-Socialist politics is within Chinese rule of law.[65]

The party's political power over legal procedures also serves as the ultimate guarantor ensuring that procedural justice does not supersede the polity's fundamental values, as in Dworkin's claim that liberal society's consensus on moral imperatives forms the foundation of laws and their applications.[66] In China, the party plays this role instead of an "independent" judiciary. Therefore, the question of whether the party or the law is more important is a false dichotomy.

To be sure, conceptual clarity does not mean that reality is not messy on the ground. In China, the development of the rule of law has been and certainly is messy. Party committees at different levels often interfere arbitrarily with legal proceedings. There is a thin line between ensuring substantive justice and wanton political interference on behalf of special interests, or worse, for downright corrupt purposes.

On the other end of the spectrum, excessive legalism also plagues the development of Chinese rule of law. In an understandable attempt to move away from the rule of man after the Cultural Revolution, the legislature and the judiciary have codified increasingly larger portions of civil and commercial activities. In many areas, such as environmental protection and domestic disputes, the legal codes are elaborate and need to be applied in a unified fashion nationwide—and rigorous enforcement of existing laws remains an issue and source of complaint.[67] But it is also true that many of these codes, if applied strictly, without consideration for actual circumstances and regional differences—between urban and rural communities and other distinctive social groups—can prove practically unsuitable and contrary to the purposes of social justice.[68]

Looking forward, dealing with these issues and harmonizing the myriad conflicts that are both inherent to the rule of law and particular to China's circumstances will be a long and arduous process. But there are reasons for optimism. Both the party and the general public want a society in which general rules are made in advance and applied equally. Procedural justice has been and is being enhanced.

At the same time, the general consensus on values and moral imperatives in Chinese society is now the strongest it has been in perhaps a century and a half. For the foreseeable future, the moral imperatives of the Chinese nation are clear and simple: socialism and national renaissance. The former is the two-thousand-year Confucian patrimony of an egalitarian and just society for the "common good" expressed in modern form. The latter is the culmination of the struggles to survive that unified an entire people in the modern era. Chinese rule of law, in whichever procedural direction it may

evolve towards, has a soul. The party, if it guards against corruption and elitism, will continue to embody the soul of substantive justice, and such embodiment will continue to be accepted by the people.

Perhaps it is time we free the rule of law from the unwarranted ideological bondage of liberalism. As Randall Peerenboom points out in his book *China's Long March toward Rule of Law*,[69] China does not need liberalism to have the rule of law. The same reasoning applies to other nonliberal societies. We may see many new possibilities for the fulfillment of the promises of the rule of law in a more pluralistic world.

The irony is that the state of the rule of law seems most fragile in liberal societies, and this is concerning in a more fundamental way. Across liberal societies in the West, their moral consensus has been shattered. Communities are decaying and societies are polarized on basic values such as identity, gender, and equality. Liberalism has fallen victim to the worst impulses of its anti-communitarian tendencies. Perhaps as a result, procedural justice has become a purely political and adversarial game. Soulless laws cannot sustain legitimacy for long. Western elites would be well advised to concentrate on introspection instead of continuing their rule of law road shows around the world.

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[23] One example is the Lincoln-Douglas debates in 1858, a few years prior to the Civil War. Stephen Douglas held that democratic majorities in each state had the right to vote whether to adopt or reject a state constitution which prohibited slavery. Abraham Lincoln, by contrast, appealed not to the Constitution but to the Declaration of Independence, which asserts that "all men are created equal." See Francis Fukuyama, *Identity: The Demand for Dignity and the Politics of Resentment* (New York: Farrar, Straus and Giroux, 2018).

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