

# The dynamics from the ideal to the reality

## ----The rule of law in China \*

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### I. Introduction

China is doing her best with great enthusiasm to build up a country that is based on the rule of law. The process of realizing the rule of law in China, with 1.25 billion people and five thousand years civilization is an unprecedented venture and one of the most exciting events in the world today.

This paper argues that implementing the ideals of the rule of law and making them into a reality in China is a dynamic process. There are some close connections between the rule of law and Chinese cultural tradition, which can contribute significantly to constructing the foundations of the rule of law, but there are also some hindrances, which must be overcome. The most important ideal that needs to be addressed is that “the people demand that the government and its officials abide by law”.

As the link between the rule of law and society is a dynamic one, the huge developments in Chinese society regarding the introduction of the market economy and democratization in the People’s Congress and in the countryside will be examined below. Also, as legal institutions are the vehicles that realize the rule of law, reform in the Chinese legislature, judiciary and legal education will also be discussed below. Finally, the author will conclude that the realization of the rule of law is just like a newborn baby and there is a long way to go before the ideals become a reality in China.

### II. The ideal of the rule of law in China

The ideal of the rule of law in China consists of four aspects. First, is the concept of the rule of law. The second, is the development of the ideals. The third, is how the reasons and rationales of the rule of law will be received by the Chinese people. The last aspect is how the tradition of Chinese culture impacts upon the conception and consideration of the rule of law in China.

#### A. The concept of the rule of law

The concept of the rule of law has been discussed in China since the beginning of the last century.<sup>1</sup> We can draw out some of the theoretical conclusions of those discussions, although there are still some questions left open.<sup>2</sup> Chinese scholars consider there to be three parts to the rule of law when relating it to China. Firstly, “the rule of law” is contrasted with and is distinguished from the “rule of man” under which a few people are above the law and able to disregard the law. “The rule of law” refers to the ideal of the supremacy of the law<sup>3</sup> and the

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<sup>1</sup> Zhang Qi, “Jicheng yu Chaoyue----Ershi shiji zhongguo falixue huigu lungang” [Succeeding and Surpassing---], Peking University Law Journal, Vol.12, No.1, p. 72-81; and e.g. Fazhi yu renzhi wenti taolun ji [Collected Essays on The Rule of Law and the Rule of Man] (Mass Press, 1981).

<sup>2</sup> See C of this part.

<sup>3</sup> See Li Buyun and Zhang Zhiming, “Kua shiji mubiao: yifa zhiguo, jianshe shehuizhuyi fazhi guojia” [A Cross-century Topic: the rule of law and to build our country into a socialist state under the rule of law ], 6 Zhongguo Faxue ( Chinese Legal Science) (1997), p. 21.

crucial feature of it is that “the people demand that the government and its officials abide by law. The foundation of the rule of law is that officials are bound by the law and that the rule of the people prevails over despotism.”<sup>4</sup> Secondly, “the rule of law” refers to a theory and a way of governing state affairs or resolving disputes by law, which include both substantive and procedural law as well as legal formalities.<sup>5</sup> Thirdly, the rule of law consists of a body of inherited values which include certain fundamental human rights, social justice, equality and so on<sup>6</sup>. There is a strong connection between human rights, democracy and the rule of law. Some scholars point out that “the citizen’s rights are the legalization of human rights in a state; it is fundamental issue of democratic construction and a crucial function of the modern rule of law.”<sup>7</sup>

## B. The development of the ideal

Prof. Weiler at Harvard University said: “In the history of all polities there are memorable ‘constitutional moments’ associated in the collective mind with important changes in the constitutional order... The constitution of a polity may be thought of in less formal ways as well—as, say, an expression of the basic tenets of a polity’s political and civic culture. In this case ‘constitutional moments’ may be linked in the mind to non-legal yet symbolic historical events and the constitutional change they reflect may be indirect and informal—the beginning or end of a deeper process of mutation in public ethos or societal self-understanding.”<sup>8</sup> One such ‘constitutional moment’ regarding the rule of law in China, was the Third Plenary Session of the Eleventh Central Committee of CCP at the end of 1978, after the Chinese people had woken up from the nightmare of the Cultural Revolution. As a result of the conference, a significant resolution was passed. Although the specific words ‘rule of law’ did not appear in the resolution, this was such a landmark, as a decision was made to develop a socialist democracy and to construct a legal system, implying certain ideals of the rule of law. Since then, the ideal and the concept of the rule of law became clear gradually.

Between the late 1970s and the beginning of 1980s, there was widespread debate regarding the rule of law and the rule of man in China in which many legal scholars participated. The majority of the scholars made a clear distinction between the ideals of the rule of law and the rule of man and the significance of the rule of law to the country.<sup>9</sup> In 1982, the Constitution was amended to provide that “the state upholds the uniformity and dignity of the socialist legal system. -----No organization or individual is privileged to be beyond the Constitution or the law.” Although we could agree that one Chinese scholar’s observation that the Constitution thereby embodied the idea of “the rule of law”,<sup>10</sup> yet there was a necessity to articulate the concept of the rule of law expressly. During 1980s and 1990s many scholars had published a lot of articles and books advocating the ideal and the concept of rule of law. One important issue that they argued for was the difference between Chinese words 法治 (Fazhi) and 法制(Fazhi). 法means law; 治means rule; 制means institution, system and check. 法治 refers to the rule of law and 法制refers to the legal system according to the textual meaning of the word and the common usage in contemporary Chinese society. Some

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<sup>4</sup> Wu Zhichun, *Fazhi yu minzhi*, [The Rule of Law and The rule of the People] (Life Bookstore, 1946) p. 11, 14.

<sup>5</sup> See Liu Nanping, *Judicial Interpretation in China* (Sweet & Maxwell Asia, Hong Kong. Singapore: 1997), p. 194.

<sup>6</sup> *Ibid.* p. 201 and supra note 3 p. 22.

<sup>7</sup> *Supra* note 3, p. 24.

<sup>8</sup> See J. H. H. Weiler, *THE CONSTITUTION OF EUROPE*, (Cambridge University Press: 1999), p.3.

<sup>9</sup> *Cf.*, *Fazhi yu renzhi wenti taolun ji* [Collected Essays on The Rule of Law and the Rule of Man] (Mass Press, 1981).

<sup>10</sup> *Supra* note 5, p. 195.

scholars thought that both 法制 and 法治 were same because their political foundation were same and both of them meant ruling a country by law. So, it would not good to replace “legal system” by “the rule of law”.<sup>11</sup> However, many scholars thought that 法制 meant laws and institutions and it did not have the meanings that 法治 had. They said that the two concepts belonged to two different categories. 法治 meant a principle that was opposite to the ideal of the rule of man and required the effectively checking and reasonably exploiting public power. It would be very important to prescribe the rule of law in the political and legal system of the country.<sup>12</sup>

Prof. Wang Jiafu with the cooperation of his colleagues addressed the rule of law in his lecture to the top leaders of CCP including Mr. Jiang Zemin on February 8, 1996.<sup>13</sup> In 1997, after constant work by many Chinese scholars for several years, the Report of the Fifteenth National Conference of the CCP expressly stated their policy of “Governing the country according to law and making it a socialist rule of law state”(Yifazhiguo, jianshe shehuizhiyi fazhi(法治) guojia).<sup>14</sup> This was also later incorporated within China’s Constitution when it was amended in 1999.

The superficial difference between 法治 and 法制 is only one Chinese character. However, it took 20 years to replace 法制 by 法治 from the end of 1978 to 1999. The significance of that development is the final establishment of the rule of law as the fundamental principle of political and legal system in China, which further provided for an institutional framework through which the ideals of the rule of law and socialism with Chinese characteristics could be realized step by step. The rationales are below.

### C. The reasons why the rule of law is necessary in China

The concept of the rule of law has been developed with the consideration of the reasons of why the rule of is necessary. There are the two primary reasons why the Chinese people are striving to realize the rule of law.

The first reason is to create an environment of tranquility and order in which a market economy can efficiently operate, in keeping with China’s open door policy, and an environment of stability in which the Chinese people can conduct their daily lives. The functions of laws including guidance, predictability, stability, regulation and limitation on government power, as well as transparency not only to preserve social order and tranquility, but also prevent the government from abusing their powers. The laws in a society based on the rule of law operate as a tool of constraint upon the action of government itself. A modern government should be a government under the law.

The second reason is to prevent a repetition of the tragedy of the Cultural Revolution, during which the whole country suffered chaos without democracy and laws, and to resolve

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<sup>11</sup> See: Zhang Hao, Jian Lun Fazhi and Fazhi (On Legal System and the Rule of Law), in 3 Zhongguo Faxue (Chinese Legal Science) (1993), p. 48-50.

<sup>12</sup> Cf. Li Buyun, Fazhi yu Fazhi de Qubie he Lianxi (The differences and connections between legal system and the rule of law), in Wu Daying and Shen Zongling ed. *Zhongguo Shehuizhuyi Falv Jiben Lilun Wenti* (Basic Legal Theory of Socialism in China), Law Press, 1987, p.62-65; *Yifa zhiguo Jianshe shehuizhuyi fazhi guojia* [Governing the state by law, constructing the socialism state of the rule of law], Liu Hainian, Li Buyun and Li Lin ed., (Zhongguo Fazhi Chubanshe, Beijing: 1996) pp. 558-559.

<sup>13</sup> Cf., *Yifa zhiguo Jianshe shehuizhuyi fazhi guojia* [Governing the state by law, constructing the socialism state of the rule of law], Liu Hainian, Li Buyun and Li Lin ed., (Zhongguo Fazhi Chubanshe, Beijing: 1996) pp. 1-5.

<sup>14</sup> Cf. Beijing Review, Vol. 40, No. 40, 1997, p. 23-24. But the English translation “making it a socialist country ruled by law” was not so accurate because it did not convey the message that the development of the ideal of the rule of law has made in 20 years.

some fundamental problems. Since 1949, there have been two fundamental problems that have troubled China. The first is the relationship between the authority of the leaders and the authority of the law. The second is the relationship between the ruling party and the state.<sup>15</sup> If the authority of a leader is substantial, and there is no rational institution and process to control this, then this authority might be capricious, arbitrary and unpredictable. The leader of the Party could use the authority of the Party system to pursue his own purposes which may contravene the peoples' interest and will. In a country based on the rule of law, all individuals and groups recognize an obligation to comply with the law and act accordingly. So the leader's authority is checked by legal institutions or individual rights and channeled in such a way as to conform to the peoples' values and wills.

#### D. The rule of law and Chinese tradition

China is a country that has a long history without the rule of law. However, China has developed her own ways to maintain social order and stability. The current ideals of the rule of law can not be separated from Chinese cultural tradition. Some of the legacy of Chinese cultural tradition should be kept as the basis of the rule of law, but some should also be discarded. The rule of law in China can not be successful unless these issues are dealt with correctly.

##### 1. The legacy of ancient Chinese philosophy

The legacy of ancient Chinese philosophy can provide a very good basis for the process of the rule of law in China, provided that the historical ideas are carefully selected on the basis of current needs. In today's world, the rule of law no longer has a merely formalist meaning lacking in substantive values such as human rights, freedom, social justice etc. However, there has been no substantive rule of law in Chinese history at all.<sup>16</sup> Nevertheless, the process of the rule of law can not be successful unless it has some indigenous foundations for the modern substantive rule of law. Ancient Chinese philosophy could contribute significantly to constructing the foundation needed. The foundations of the spirit of humanity, freedom and social justice can be used from ancient Chinese philosophy. It is necessary that we examine some points of that philosophy, which are and will be continuously influential in the process of developing the rule of law in China.

First, both Confucius and Mencius had certain great humanistic thoughts. Confucius said that: "A man who has faith in humanity, while seeking to be established himself, tries to enable others to be established, too; while desiring success in everything for himself, he helps others succeed in everything, too. To know how to draw exemplary strength from handy facts may be considered the best way to pursue the principles of humanity." He also said: "do not do to others what you would not want others to do to you."<sup>17</sup> Confucius sought the base of societal norms from the relationships between people. His approach was to inquire into humans' hearts. Human beings were the center, not gods.<sup>18</sup> Mencius said that: "The empire was given to him by Heaven and the people, so I say an emperor has no right to give his

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<sup>15</sup> *Supra* note 3, p. 18.

<sup>16</sup> Some scholars may contend that there has been the rule of law in ancient China, for example in the Qin Dynasty two thousand years ago. I think that should perhaps be called formalist rule of law but not substantive rule of law. Because the law served despotism and was inhumane as a whole, although the laws were enforced strictly.

<sup>17</sup> *The Analects of Confucius*, (Published by Shandong Friendship Press, A Chinese-English Bilingual Edition, Translated into English by Lao An: 1992) pp. 109, 193.

<sup>18</sup> Prof. Wejen Chang, Guest Professor of Peking University, in his class on Chinese Earlier Thoughts of Politics and Law at Tsinghua Law School, Beijing, September 1999.

empire to anybody. . . . . People's eyes are the eyes of Heaven; people's ears are the ears of Heaven."<sup>19</sup> Apparently, Mencius thought the wishes of the people were the foundation of political authority. His ideas were regarded as the school of 'people-based' (Min-Ben) philosophy. People were the crucial underpinning of the philosophy of Confucius and Mencius. Those ideas are potentially significant because theories of human rights and democracy can be developed from them.

Second, Mencius's thought of "four beginnings" which vividly express the ideas of social justice. He said that: "whoever has no sense of compassion is not human; whoever has no sense of shame is not human; whoever has no sense of modesty is not human; and whoever has no sense of right and wrong is not human. The sense of compassion is the beginning of benevolence; the sense of shame the beginning of righteousness; the sense of modesty the beginning of decorum; the sense of right and wrong the beginning of wisdom. Man possesses these four beginnings just as he possesses four limbs."<sup>20</sup> These 'four beginnings' can be seen as equivalent to the expression of justice as a moral conception.

Third, Chuang Tzu's philosophy provides us with the foundations of a thorough liberalism and humanity. Prof. Wejen Chang said that "Chuang Tzu took freedom and human dignity very seriously...the idea that an individual can and should stand up to the authorities in defense of his personal integrity is the central theme of Chuang Tzu's philosophy and his most important contribution to Chinese thought."<sup>21</sup> Chuang Tzu showed people that "everyone is entitled to have its point of view and opinion, and all different views and opinions are relative; none is absolute. None has an inherent value greater than the other does. None is completely right or completely wrong."<sup>22</sup>

Fourth, Confucius pointed out the high value in moral education. Confucius did not reject laws, but he thought that rulers should rely on virtue and Li<sup>23</sup> instead of relying only on laws. He said that: "Guide them by edicts, keep them in line with punishments, and the people will stay out of trouble but will have no sense of shame. Guide them by virtue, keep them in line with the rites, and they will, besides having a sense of shame, reform themselves."<sup>24</sup> < The Great Learning >, one of the classic books of Confucianism, written in 300 B.C.E., stated a similar idea. It said there were eight goals that everybody should aim for in order to achieve an ideal human life: investigating things, perfecting knowledge, being sincere and honest, setting the heart right, cultivating oneself, educating the family, running the state well and making world peaceful.<sup>25</sup> Prof. Feng Youlan explained that the core or the goal of the eight items was cultivating oneself, which was also the practice and realization of moral perfection of the people. This was a simple and systematic moral philosophy that could guide people to have a good life. And that could not only be of guidance to the sage but also

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<sup>19</sup> Mencius, (Published by Shandong Friendship Press, A Chinese-English Bilingual Edition, Translated into English by Zhao Zhentao and others: 1993) pp. 349, 351.

<sup>20</sup> Ibid. pp. 102.

<sup>21</sup> Chang We-Jen, TRADITIONAL CHINESE LEGAL THOUGHT (Part IV), in Taida Faxue Luncong [National Taiwan University Law Journal], Vol. 22, No. 1, 1993, p. 25.

<sup>22</sup> Ibid. p 3.

<sup>23</sup> Li ( 禮 ) was a comprehensive concept that included rituals, societal rules of behaviors(customary norms) and humanity as a whole in Confucianism thought. The functions of Li were adjustment and civilization. Cf., Feng Youlan, *Zhouguo Zhexue Jianshi* [Chinese Little History of Philosophy], Translated into Chinese by Tu Youguang, (Peking University Press: 1985) pp. 176-179; Ch'u T'ung-tsu, *Law and Society in Traditional China*, Mouton, Paris and The Hague, 1961, Ch. 6; Li Zehou, Lunyu Jin Du [Reading The Analects Today], (The press of Anhui Literature and Arts, 1998) pp. 42, 51; Benjamin I. Schwartz, *The World of Thought in Ancient China*, The Belknap Press of Harvard University Press, Cambridge, Massachusetts, 1985.

<sup>24</sup> The Analects of Confucius, Bk. 2, "Wei-cheng", Ch.3, Translated into English by Wejen Chang at Harvard Law School, 1990, p. 22.

<sup>25</sup> Cf., *The Great Learning & The Doctrine of The Mean*, Translated into English by He Zuokang, ( published by Sinolingua, Beijing, 1996) p. 6.

to the ordinary people.<sup>26</sup> Chinese history has shown this to be true to a certain extent. In contemporary China, the rule of law can not succeed unless it has a stable moral foundation.

These legacies are indeed impressive. But a further question is how to transmit them into current societal life? This question is worthy of profound study.

## 2. The traditional misconceptions related to the rule of law

The legacy of Chinese traditional philosophy is helpful to the process of the rule of law. But, at the same time some traditional misconceptions are hindrances to the establishment of the rule of law in China. Two misconceptions are analyzed below.

### a. Instrumentalist conception of the rule of law

There are different conceptions about the rule of law in China, which are Fa Zhi Guo Jia (rule of law state) and Yi Fa Zhi Guo (governing the state by law). These phrases are both in current and regular usage in China. However, some people mistakenly use these phrases inter-changeably causing some confusion. There is an interesting contrast that I have called the **phenomena of the comma**. There is a comma between the two phrases in “Governing the state by law, constructing the socialism rule of law state”. Many scholars focus on the phrase after the comma that in fact refers to the *rule of law*; while some officials focus on the part of the phrase before the comma that refers to *rule by law*.<sup>27</sup>

That is understandable. The two sides of that comma are interrelated when it comes to discussing the law in contemporary China, as the achievement of the rule of law depends on laws being established in the first place. Rule by law is better than rule by force, or by nothing but chaos and arbitrariness.

However, there is a big difference between rule by law and the rule of law. They are based upon different rationales. Rule by law is of an instrumentalist conception and instrumental rationality. The rule of law is a kind of value rationality.<sup>28</sup> The rule of law is actually the rule of people, rule of rationality and justice instead of rule of caprice or arbitrariness of man. In this context, the law is the ‘end’, instead of the ‘mean’. Concluding that the law is the ‘end’ actually is the same as saying that the human being is the ‘end’, according to Kant.<sup>29</sup> However, law is an instrument in the context of rule by law; the ends are something else and laws are the instruments served for some political or economical interests.<sup>30</sup> Hence laws are vulnerable and unreliable in the context of rule by law. If rule by law could be easily supplanted by rule by force or rule by nothing, then laws are no good as instruments for those ends in some circumstances. Or there could be some positive laws without the rule of law. Nevertheless those laws were not good laws as they were contrary to justice, human rights and humanity.<sup>31</sup>

The rule of law based on value rationality is crucial. Nevertheless traditionally, people in China tended to think of laws as instruments, nothing more. More than two thousand and

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<sup>26</sup> Feng Youlan, *Zhouguo Zhexue Jianshi* [Chinese Little History of Philosophy], (Peking University Press: 1985) p. 215.

<sup>27</sup> There is also some widespread usage relating to laws that govern provinces, cities, counties, and townships, villages and even law that govern families. Who are the governors? Law? Perhaps not.

<sup>28</sup> *Cf.*, N. McCormick and Weinberger, *An Institutional Theory of Law* (D. Reidel Publishing Company: 1986) p. 190.

<sup>29</sup> Kant said that “Humanity itself is a dignity; for man cannot be used merely as a means by any man (either by others or even by himself) but must always be treated at the same time as an end.” *Cf.*, Immanuel Kant, *The Doctrine of Virtue, Part II, of The Metaphysic of Morals* (1797), §38, p. 462.

<sup>30</sup> C. Geertz, *Local Knowledge* (Basic Books: 1983), in Liang Zhiping ed. *Falv de wenhua jieshi* [The cultural interpretation of laws] (Shenghuo. Dushu. Xinzhi Sanlianshudian: 1994) p. 145,171.

<sup>31</sup> Naturally we think about Nazi regime as evidence of this knowledge.

three hundred years ago both Confucianism and Legalists had the same opinion on this issue. Besides, value rationality is not easily accepted by ordinary Chinese people.<sup>32</sup> The practical way to have Chinese people begin to believe in law and justice is to let them feel the benefits of the actual effect of the law in their every day lives, a process which will take a very long time.

#### b. The consensus between political authority and spiritual or moral authority

The necessity of the rule of law is obvious, as people, including government officials, are not perfect. The rule of law acts as a rational institution and process, which checks, and controls the use of power, avoiding the caprice and arbitrariness of those people in authority.

Nevertheless, traditional political and legal theory and practice of ancient China were based on the ideal of rule of man and contrary to that common sense approach. According to Confucianism, which was the dominant political and legal theory in ancient China, the ruler should be a sage or at least be the man who had virtues deserving of his authority. The ruler should be overthrown if he does not have virtues or no longer has virtues. This was a very sophisticated theory.<sup>33</sup> The rule of man's idea of Confucianism was like Plato's idea of rule of man in his earlier time—the ideal of philosopher's king.

However, the political and legal practice of ancient China was a different story. The reason and the result were inverted. One became a ruler not because of one's virtue and wisdom. Rather, one had virtues and wisdom or was a sage just because one was the ruler! The ruler, no matter whatever process through which he became the ruler or the emperor, automatically had virtues and wisdom or even became a sage. He also had the authority to express the order of Heaven because he was the son of Heaven (Tian Zi). In reality, the only reason that he could do so was that he held the power and political authority. That authority legitimated itself with the help of that theory. The rule of law can not operate in such a framework, and this kind of thinking has to be overcome before the establishment of the rule of law is made possible.

### III. The reality of the rule of law in China

This part argues that the rule of law is related to a society and has a very close connection with civil society and that both the ideal and the reality of the rule of law in China have to go hand in hand with the evolution of the society. It starts with an investigation into the relationship between the rule of law and society, and then deals with the development of Chinese society, especially the development of a market economy and of a democracy.

#### A. A dynamic connection between the rule of law and civil society and its complexity

A civil society refers to a society that is separate from the state and one in which a government does not directly administer the economy. There are also plural social forces or plural interest groups and no single authority is able to rule the others other than through the rule of law. Some examples of this could be found in Western Europe in the Middle Ages,

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<sup>32</sup> Value rationality has something to do with transcendent thinking. Prof. Roberto M. Unger thought that the universality and uniformity of law were not thought as an unconditioned requirement of realization of justice and social welfare because of weakness of transcendence religion in ancient China. That thought was very important to the idea of the rule of law and Rechtsstaat in the West. Cf., Roberto M. Unger, *Law in Modern Society* (The Free Press: 1976), p. 104.

<sup>33</sup> Cf., Qu Tongzu, *Zhongguo falv yu zhongguo shehui*[Chinese Law and Chinese Society], (zhonghuo shujv[ The Chinese Press]: 1981) at 292-295; Zhang Guohua and Rao Xinxian, *Zhongguo falv sixiang shigang*[ The Outline of The History of Chinese Legal Thoughts], ( Gansu People's Press: 1984) p. 111.

where no single political power could rule a society entirely.<sup>34</sup> But the rule of law was neither fully developed nor stable at that time. The civil society has not developed until the 20th century, especially after World War Two in continental Europe. So, the rule of law is particularly a European and 20<sup>th</sup> century phenomenon.<sup>35</sup>

In China, the civil society is keeping up pace with the developments of a market economy and a democratic polity which are also the fundamental requirements for the realization of the rule of law and *vice versa*. Only this kind of society needs the rule of law.

Contemporary China is a complex and non-homogeneous society. There are vast poor and undeveloped agricultural districts in the west, as well as the rich and developed coastal areas and some big cities in China. The economic, political and cultural situations of the different areas are widely divergent. This complex and uneven social development makes the process of implementing the rule of law complicated and cumbersome. For example, it is widely agreed that the rule of law is dependent on individualism and the consciousness of the individual. However, individualism and the consciousness of the individual are hardly a reality in a clan society based on agriculture. Because clans and families are much more important than individuals, there is little call for individualism. Clans and families are still very powerful in many rural areas. The rule of law in China has a long way to go because the development of a society corresponding to the rule of law is a gradual process of evolution. The process of the rule of law has to be joined together with the evolutionary process of development within the society.<sup>36</sup>

#### B. The developments of market economy

Chinese people have done many things to transform the society since the end of 1978. There have been a lot economic reforms to facilitate the growth of a market economy. And China's entry into the WTO will have a significant influence on the rule of law in China. For example, it will be helpful for a market economy, namely for the reform of state-owned enterprises. As they begin to face global competition, Chinese state-owned companies will have to totally restructure themselves to compete in a market economy. This provides fertile soil for the rule of law. As people will have to take care of themselves, manage their own resources and not be as dependent on the state as they did in the time of the planned economy. In keeping with this, they will have to start to rely on laws and will require the government to also abide by laws.

#### C. The development of the democratization at grass-roots level in rural areas

The autonomy of the people and the social units' independence from the governments are crucial for a civil society and the rule of law. The villager's committee is an organization of mass autonomy and the construction of it is an important part of the nation's political reform and is significant for democratization. The construction of the villager's committee and the autonomy of the masses started along with the economic development of the 1980s and have developed immensely, thanks to decisions of the Central Committee of the CCP and

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<sup>34</sup> Cf., Harold J. Berman, *Law and Revolution*, (Harvard University Press, Cambridge, Massachusetts, 1983), pp. 293-294.

<sup>35</sup> Though, perhaps Britain, the Commonwealth countries, and the U.S. developed rule of law much earlier than the European continent.

<sup>36</sup> To quote Prof. Dr. Gunther Teubner : " Recently, the most striking change of direction in politics, social science and law has been the tendency to replace the concept of regulation by that of evolution. " See, *Autopoietic Law: A New Approach to Law and Society*, edited by Gunther Teubner, ( Walter de Gruyter. Berlin. New York: 1988 ) p. 217.



the new Organization Law of Villager's Committee (1998).<sup>37</sup> 19 provinces had conducted elections, in accordance with the new Organization Law of Villager's Committee before the end of 1999.<sup>38</sup> The campaign and transparency of the elections provide the foundation of grass-roots democracy and cultivate the sense of autonomy of the mass. Development of democracy and the autonomy of the mass in the countryside is a continuing process but still has a long way to go. In my observation, some places in China have experienced tensions in that development, which can be narrowed down to two factors. The first tension is between the new wishes of the mass autonomy and the old inertia of historical paternalism of the local governments (town or township). The second is between the villager's committees whose leaders are elected by the villagers, and the system of the party's organization, where leaders are appointed by higher-level organizations of the party (town or township). In practice the governments and the party's organizations of the town or township hold more resources and therefore are able to influence unfairly and unlawfully the operation of the villager's committee. The settlement of the two tensions is not only a matter of law. Political reform and economic development are also necessary.

#### D. Development of the people's congress

The People's Congresses at local, provincial and national levels are being democratically reconstructed on the foundations of the rule of law. Here are two groups of numbers that shows the motions put forward by deputies in every session from 1979-2001.

TABLE 1. Deputy Motions at Annual NPC Plenary Sessions, 1979-1998 (1)

| (2) | 1979                     | 1980                     | 1981                     | 1982                     | 1983                     | 1984                     | 1985                     | 1986                     | 1987                     | 1988                                 | 1989                     | 1990                     | 1991                     | 1992                     | 1993                     | 1994                     | 1995                     | 1996                     | 1997                     | 1998                     |
|-----|--------------------------|--------------------------|--------------------------|--------------------------|--------------------------|--------------------------|--------------------------|--------------------------|--------------------------|--------------------------------------|--------------------------|--------------------------|--------------------------|--------------------------|--------------------------|--------------------------|--------------------------|--------------------------|--------------------------|--------------------------|
| (3) | 5 <sup>th</sup> ,<br>2nd | 5 <sup>th</sup> ,<br>3rd | 5 <sup>th</sup> ,<br>4th | 5 <sup>th</sup> ,<br>5th | 6 <sup>th</sup> ,<br>1st | 6 <sup>th</sup> ,<br>2nd | 6 <sup>th</sup> ,<br>3rd | 6 <sup>th</sup> ,<br>4th | 6 <sup>th</sup> ,<br>5th | 7 <sup>th</sup> ,<br>1 <sup>st</sup> | 7 <sup>th</sup> ,<br>2nd | 7 <sup>th</sup> ,<br>3rd | 7 <sup>th</sup> ,<br>4th | 7 <sup>th</sup> ,<br>5th | 8 <sup>th</sup> ,<br>1st | 8 <sup>th</sup> ,<br>2nd | 8 <sup>th</sup> ,<br>3rd | 8 <sup>th</sup> ,<br>4th | 8 <sup>th</sup> ,<br>5th | 9 <sup>th</sup> ,<br>1st |
| (4) | 189<br>0                 | 230<br>0                 | 231<br>8                 | 210<br>2                 | 61                       | 114                      | 128                      | 265                      | 262                      | 488                                  | 411                      | 384                      | 471                      | 472                      | 611                      | 723                      | 732                      | 603                      | 700                      | 830                      |
| (5) |                          |                          |                          |                          | 23<br>31                 | 26<br>97                 | 28<br>32                 | 33<br>41                 | 30<br>14                 | 38<br>47                             | 37<br>78                 | 34<br>91                 | 34<br>91                 | 17<br>31                 | 16<br>87                 | 16<br>05                 | 15<br>93                 | 19<br>58                 | 12<br>89                 |                          |

Note:

(1) Source: Renmin Daibiao Dahui Gongzuo Quanshu, Liu Zheng and others ed., ( Zhongguo Fazhi Chubanshe [ The Press of Chinese Legal System, Beijing, China]: 1998), at 1418-1420.

(2) Year;

(3) NPC Plenary Session;

(4) Numbers of legislative motions;

(5) Numbers of viewpoints, criticisms, suggestions.

TABLE 2. Deputy Motions at Annual NPC Plenary Sessions, 1999-2001 (1)

| year                           | 1999                  | 2000                  | 2001                              |
|--------------------------------|-----------------------|-----------------------|-----------------------------------|
| NPC Plenary Session            | 9 <sup>th</sup> , 2nd | 9 <sup>th</sup> , 3rd | 9 <sup>th</sup> , 4 <sup>th</sup> |
| Numbers of legislative motions | 759                   | 916                   | 1040                              |

<sup>37</sup> Cf., Zhonggong zhongyang guanyu nongye he nongcun gongzuo ruogan zhongda wenti de jue ding [The Decisions of Some Important Issues Concerning Agriculture and Countryside of CCP]. 1998, 10, 14.

The Organization Law of Villager's Committee of P. R. China took effect on Nov. 4, 1998.

<sup>38</sup> Cf., Fan Yu, Cunweihui Xuanju Zhidu de Yanjin ji Tedian [The evolution and the characteristics of election system of villager's committee], in Zhongguo Nongcun Guancha [ The Observation of Chinese Countryside], 2001, 1, pp. 60-63.

Note:

(1) Source: Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Gongbao (The Official Report of the Standing Committee of NPC), 2001, 3, p. 266-275; 2000, 2, p. 176-186; 1999, 2, 207-217.

The numbers of legislative motions and the numbers of viewpoints, criticisms, suggestions in Table 1 and Table 2 indicate that deputies of the NPC have been more and more active and that the NPC is a political power that cannot be ignored now. In addition, the deputies can use their votes to remind the government, the courts and the procuratorates of this fact.<sup>39</sup> In February 2001, the People's Congress of Shenyang City rejected a report of the Middle Court of Shenyang City as it found that many deputies were unsatisfied with the severe corruption of its judges and their neglect of duty. This event also had an impact on the government of that city which worked more carefully to keep their work up to a standard that satisfied the deputies.<sup>40</sup> The president of the court lost his position soon after.<sup>41</sup>

In sum, the rule of law is inextricably linked to society, namely the civil society. In China, the economic development, especially the development of market economy, developments of democratization in rural areas and People's Congresses are the forces that are pulling society towards a civil society that corresponds to and fosters the rule of law in China.

#### IV. The development of legal institutions toward the rule of law -----Realization of the ideal

The legal institution is the foundation and the framework that enables the rule of law to operate. Below are several major aspects of the China's current development of its legal system, both positive and negative for the rule of law.

##### A. Legislation Law

The Legislation Law took effect on July 1, 2000. This is a milestone for the establishment of the rule of law in China. The legal system of China is close to the civil law system in terms of statute laws playing important role. However there were many conflicts among the various laws.<sup>42</sup> The Legislation Law regulates the powers of national and local legislatures in enacting and interpreting laws to define the division of those powers clearly and reasonably and to avoid the conflict of laws. The logical result of these provisions is that some restrictions on the legislative arm of government and executive branch conform to the basic requirements of the rule of law. The prescriptions of the Legislation Law are the institutionalized ways to maintain the constitutionality and uniformity of the laws of the country.

##### B. Enforcement of laws

There ought to be an enforcement system to guarantee the rule of law from abuse. That enforcement system is crucial and varies from country to country. There has been a legal

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<sup>39</sup> In 1997, the working report of the People's Supreme Procuratorate almost failed to pass because the deputies were not satisfied with it so the votes in favor merely reached 50 per cent, which made the top officials of the People's Supreme Procuratorate very nervous.

<sup>40</sup> Overseas Edition of People Daily, 2001, February 15, p. 4.

<sup>41</sup> China News Net, March 29, 2001.

<sup>42</sup> Cf., Cai Dingjian, The Conflicts of the laws and the way to resolve them (Falv Chongtu Jiqi Jiejue de Tujing), in Chinese Legal Science, No. 3, 1999(Serial No. 39), June 9, 1999.

supervision system for more than two thousand years in China. The new enforcement system of law has been built up using this basis.<sup>43</sup> The Standing Committee of the NPC is working on a Supervision Law to provide a comprehensive legal framework for the supervision of laws. Besides the drafting of the Supervision law, other issues concerning the enforcement system are discussed below.

The first thing is Constitution supervision. Constitution supervision is the term that is equivalent to 'constitution review' in some countries. The reason why it is necessary to have constitution supervision does not provoke much opposition in China. The main concern is *who* will oversee the enforcement of the Constitution and resolve constitutional disputes and *how* to do it in China?<sup>44</sup>

The legal supervision of People's Congresses that watches the enforcement laws in general has gradually gained in substance. For example, the NPC and the local People's Congresses have strengthened the scrutiny of budgets.<sup>45</sup> A controversial issue is the examination of cases by People's Congresses. They review cases already decided by the courts if people bring a petition to them or they think it is necessary to do so. However, the Standing Committee of the NPC has been cautious to react. It is believed that a draft concerning this kind of supervision has been delayed for a long time.<sup>46</sup> The major concern of the delay is to avoid harming judicial independence.<sup>47</sup>

The supervision of procuratorates is a specialized supervision. The people's procuratorates of China was built up according to Leninism.<sup>48</sup> They play a double role- one of state organ for legal supervision and the other, a public (criminal) prosecution organ. Their task is to maintain the uniformity of the national legal system and they are considered as an important part of the nation's judicial organs (Si Fa Ji Guan) along with the people's courts. Both of them have the authority to deliver judicial interpretations that must be followed by the courts and procuratorates at lower levels. The future question will be how to balance the authority of the procuratorates and the authority of the courts in the coming judicial reform with regard to the rule of law.

### C. Human rights and the relevant development on criminal procedural law

The Chinese government acknowledges the connection between the rule of law and human rights through legal institutions.<sup>49</sup> China has signed and ratified the International Covenant on Economic, Social and Cultural Rights in 1997 and 2001<sup>50</sup> and signed the

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<sup>43</sup> I have pointed out the difference between the current legal supervision and old legal supervision in an article. Cf. Zhang Qi, Lun Fa Lv Jian Du De Fa Zhi Hua (On Rule of Law of Legal Supervision) <Fa Xue> (Shang Hai) No. 12, 1998 (General No. 205)

<sup>44</sup> Chen Yunsheng, Wanshan woguo xianfa he falv jiandu zhidu de shexiang [The Proposal concerning Imperfection of the Supervisions of Constitution and the Laws in Our Country], in Lifa fa yanjiu [Study on Legislation Law], ed. By Li Buyun (Hunan Ren Chubanshe [The Press of Hunan People]: 1998) p. 257-259.

<sup>45</sup> See: *Supra* note 47.

<sup>46</sup> See: Quanguo Renda Neiwu Sifa Weiyuanhui Zhaokai Ge-an Jiandu Chengxu Guiding (taolun gao) Zhengqiu Yijian Zuotanhui [the Internal and Judicial Committee of NPC hold a advisory meeting on the procedure of the supervision on individual case], in Renda Yanjiu [Study on People's Congress], No. 5, 1999 p. 11; Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Gongbao [Official Report of the Standing Committee of NPC], No. 1 2001, p. 70.

<sup>47</sup> Cf. Li Xuesong, Ershiliu li Ge-an Jiandu Shili de Kaocha yu Sikao [Observation and Thinking on 26 supervisions of individual case], in Renda Yanjiu [Study on People's Congress], No 3, 2000, p. 4-8.

<sup>48</sup> Li Shiyong, Dangdai Zhongguo Jiancha Zhidu [The Procuratorates System in contemporary China], (Zhongguo Shah Kexue Chubanshe [Chinese Social Science Press], 1988) p. 7.

<sup>49</sup> See the Office of News of the State Council, The White Paper of the Development of Chinese Human Right for Fifty Years, in *Guangming Ribao* [Guangming Daily], Feb. 18, 2000, p. III.

<sup>50</sup> See Quanguo Renmin Daibiao Dahui Changwuweiyuanhui Gongbao [Report of Standing Committee of NPC], 2001.2, p. 143.

International Covenant on Civil and Political Rights in 1999. The revised Criminal Procedure law entered into force in 1997. A research group of Institute of Law of CASS has made four suggestions to the policy-makers to confirm the two above-mentioned covenants and include “respect and protection of human rights” to the Constitution as an amendment.<sup>51</sup>

The new developments in the revised Criminal Procedural law and in the proposals of the legal scholars include the presumption of innocence of the defendant, expressive prescription of Miranda warning, and prevention of double jeopardy in law.<sup>52</sup> The idea of the law is clear that anybody is not guilty until a court of law convicts him and defendants can get more help from lawyers in the criminal procedure from an early stage, although there is not a provision concerning the presumption of innocence of the defendant. Most of all, it institutionally prevents policemen from abusing their power and protects the human rights of suspects, defendants and other citizens as well. Also, apparently the notion of Miranda warning has started to be accepted by Chinese officials of law enforcement. A Public Security organ in Wuhan City has removed a warning asking suspects to confess in interrogating rooms.<sup>53</sup> The procuratorate of Shuncheng District of Fushun City has started a new working regulation called “Zero confess regulation of the prosecutors” according to which the prosecutors do not have to get a confession from suspects, rather, they need to collect other evidences and prove them. This gives suspects actual rights of silence.<sup>54</sup>

#### D. Judicial review in the starting point

The question of whether there is judicial review in China remains an open one. A very influential book on administrative law answers the question with a “yes”.<sup>55</sup> Other legal scholars, including the author, do not think that there is judicial review in China yet. This is for three reasons. First, as there are no legislative acts of national legislature, central government acts enacting administrative rules and administrative regulations, or local level administrative rules, there can hardly be any real judicial review. Second, the key to understanding judicial review is the words of “refer to” in article 53 of the Law of Administrative Procedure. That article prescribes that the People’s Courts may **refer to** administrative regulations and local government regulations when they judge administrative cases. “Refer to” means an authorization to the courts. If the courts think that what they refer to does not conform to the administrative regulations of a higher level or there is an inconsistency among those regulations the courts may not apply them. However, “to refer to” does not mean a power of making judicial judgements. The courts do not have the authority to say that a regulation or the making of that regulation is illegal or unconstitutional in their judgements. It is the Supreme Court that sends the cases to the State Council for interpretations or decisions when the courts think that there is an inconsistency or complexity that they are not equipped to deal with. Third, “the judicial review is based on the law, administrative rules and local rules” is to take the objects of judicial review as the legal grounds of judicial review.

Article 53 of and the all other relevant legal prescriptions can be seen as an important starting point of development from which the courts are able to check the unlawful behaviors of the governments step by step. But, the courts ought to be empowered to review the

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<sup>51</sup> Li Lin, the speech at “Rechtsbindung der Verwaltung und Individualrechtsschutz”, Peking, 12. Und 13. Juni 2000.

<sup>52</sup> Cf., Chen Guangzhong and Zhang Jianwei, Lianheguo gongmin quanli he zhengzhi quanli gongyue yu woguo xingshi susong [The International Covenant on civil and Political Rights of United Nations and the criminal procedure in our country], in Zhongguo Faxue [Chinese Legal Science] No. 6, 1998 p. 82.

<sup>53</sup> Beijing Chenbao [Beijing Morning], December 15, 1999, p. 4.

<sup>54</sup> Beijing Wanbao [Beijing Evening], September 13, 2000, p. 33.

<sup>55</sup> *Zhongguo Sifa Shencha Zhidu* [The Chinese Judicial Review], Luo Haocai ed., (Peking University Press, Beijing: 1993), pp. 3-5.

legislative acts of national legislature and the other acts discussed above. It is an indispensable way to guarantee the constitutionality and uniformity of the legal system in China.

The role of Chinese courts is amusing. On the one hand, the people's courts, mainly the Supreme Court of China actually quietly enjoy a vast power to make laws or develop laws through legal interpretations many of which take the form of statute. On the other hand, they follow the instructions of the party, cooperate with the governments and legislature and never cross boundaries delimited by the political structure of the state. Nevertheless, the courts have begun to say "No!" to the administrations in China.<sup>56</sup> Another significant event happened on August 13, 2001. The Supreme Court of China took a crucial step forward, by giving a judgment that stated that the courts could cite the prescriptions of the Constitution directly to protect the basic rights of the citizens. The Justice of the Court considered it as a milestone of further development of constitutional litigation [Xianfa Sifahua] (Chinese expression of constitution review) following the American model of ordinary courts dealing with constitutional issues.<sup>57</sup> Frankly speaking, the only foreseeable direct influence of that judgement will be on the area of private law. It will be more significant once the constitutional litigation enters into the area of public law.

#### E. On going process of judicial reform and growth of the legal profession

The people's courts of China are working on judicial reform.<sup>58</sup> We might generalize the aims as judicial justice, efficiency and rationalization of organization of the courts. Below are the some aspects of judicial reform.

First is law enforcement. The courts of law ought to be the guardian of social justice so it should have enough authority to realize this mission. However, the courts have been dependent on administrations for more than two thousand years. The government officials had judicial functions in the old Chinese Empire. Traditionally the magistrate was much more influential than the chief judge of the court was. Many persons do not follow the judgements of the courts because they do not think that the courts are real authoritative organs. Therefore, the people's courts of China have conducted a campaign called "the year of enforcement of the judgements" for two years since 1999. The main purpose of the campaign was to enforce the judgements of the courts. The by-product of that campaign would be to strengthen judicial authority.

The second is the reform of civil procedure. The important reform of civil procedure is to introduce the adversarial system. The judges do not have to collect evidence any more, because the lawyers of the two parties have to do more to win the case, which avoids a lot of corruption<sup>59</sup> and saves the budget of the courts.

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<sup>56</sup> On a civil case, a court of Urumqi City (first instance) in Xinjiang Autonomous District declined to follow an administrative rule called The Procedure Concerning Dealing With Medical Malpractice [Yiliao shigu chuli banfa] enacted by the State Council. It has been followed by many courts whatever it was unfair and unreasonable in a medical malpractice case and the court of Urumqi City (second instance) affirmed the judgement. Cf., *Zhongguo shenpan anli yaolan* [The collection of judicial cases in China] (1993), ed. by The Training Center of Senior Judges of China, Law School of Renmin of China ( *Zhongguo renmin gongan daxue chubanshe*, 1994) p. 690-693.

<sup>57</sup> Huang Songyou, Xianfa Sifahua Jiqi Yiyi [Jurisdictionalization of Constitution and its significance], in *Renmin Fayuan Bao* [People's Court Daily], August 18, 2001, pp. B1-B2.

<sup>58</sup> See: *Renmin Fayuan Wunian Gaige Gangyao* [The Outline of the Five Years Reform of the People's Courts], in *Zhonghua Renmin Gongheguo Zuigao Renmin Fayuan Gongbao* [Official Report of the Supreme People's Court of P.R.C.], No. 6, 1999, pp. 185-190.

<sup>59</sup> The judges traveled together with the lawyers of the parties to collect the evidence in the past because of lack of budget. This was called "San Tong (Three together)" that was Eating together, staying together, playing together which meant that lawyers had the opportunity to bias the judges.

The third is reform of the internal organization of the courts. In China, judicial independence takes the form of the courts independence instead of the judge's independence. The problem is that the internal system of the court is organized as an administrative hierarchy in which some senior judges act as the presidents of the courts or the chief judges of the divisions and they can unfairly influence other judge's decisions. The courts and the lawmakers have begun to take these issues seriously and have started to change the situation.<sup>60</sup>

The fourth is the cultivation of the autonomy of the legal profession besides those institutional reforms. The competence, conscience and ethics of the legal profession are important to realize the rule of law and judicial justice. This is true in every country and more important in the current process of the rule of law in China. At the present it is important to build up an autonomous legal community within which the members will be disciplined by the community. That can maintain the integrity of legal profession on the one hand and prevent the interference from outside influences on the other hand. That is what legal education and legal studies need to do and what they are doing. Now, The Supreme Court of China has started to publish the judgements of the court step by step in the media and on the Internet, in order to increase transparency and receive the supervision of the people.<sup>61</sup> The publication is significant because it will not only speed up the cultivation of the autonomy of the legal profession, but will also act as a check and balance on the powers between the government branches in the future. The author even dares to foresee the dawn of Chinese case law system.

The most recent development of this aspect is that the first national uniform judicial exam will take place in the beginning of 2002. It is decided jointly by the Supreme People's Court, the Supreme People's Procuratorate and the Judicial Ministry in accordance with the amendments of Law of Judges P. R. C. and Law of Prosecutors of P. R. C. in July 2001. The new uniform exam will replace the old separate exams among lawyers, judges and prosecutors.<sup>62</sup> Because people complained that the many judges and prosecutors were not qualified for many years and it was attributed to that phenomenon that the entry's exams of judiciary was too easy.<sup>63</sup> The purposes of the new exam are to make the entry of judiciary more restricted to promote the professional qualification of legal profession and to connect the fluid channel within the legal profession.<sup>64</sup> It will surely better guarantee the competence, conscience and ethics of the legal profession and the potential impact of it will be the promotion of the autonomy of legal community.

In conclusion, the ideal and reality of the rule of law have interacted in a dynamic process in China. There has been only twenty-three years of construction work. Hence, the rule of law is just like a newborn baby and it is an on going process. There are still many tough issues to be dealt with. Notwithstanding, it will be realized gradually but eventually.

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<sup>60</sup> See Xiao Yang, Working Report of the Supreme Court of China, in *Fazhi ribao* [Legal Daily], March 20, 2000, at II.

<sup>61</sup> Supra note 60, "Supervision of people" does not mean that the people could interfere in the judicial process from outside courts. It mainly means that the judgements are transparent.

<sup>62</sup> *Fazhi Ribao* (Legal Daily), July 16, 2001, p.1.

<sup>63</sup> He Weifang, Tongyi Sifa Kaoshi de Yiyi (The Significance of the Uniform Judicial Exam), in *Fazhi Ribao* (Legal Daily), July 13, 2001.

<sup>64</sup> Supra note 62.