

# The Developing Rule of Law in China

Contributed by Zhenmin Wang

Wang tells the history of the development of the rule of law in China, from the end of the Cultural Revolution, which almost obliterated the Chinese legal system, to the present day. He discusses the myriad difficulties facing China in the road to a modern legal system and the role that Hong Kong can play in China's legal development.

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I. What the rule of law is

The concept of the rule of law originated in the West. It is not a product of Chinese culture. There is scarcely little foundation for this concept in Chinese legal traditions. Law has traditionally been equated with the concept of punishment and only referred to criminal law. For thousands of years, China was under this rule of punishment, or rule of criminal law. More accurately, this rule was the rule of only one man, namely the emperor. It would be unfair to denigrate the concept of the rule of man as adopted in China without considering the particular social context within which it developed. We must recognize that the rule of man developed in feudal China to meet the needs of an agrarian society. When disputes arose among farmers, they often asked a senior person to mediate and seldom considered seeking legal remedies. Although China has been a people's republic for over fifty years, the feudal influence still exists and impedes China's efforts to establish a rule of law. Nevertheless, the Chinese understanding of law is changing. When I was a student at law school, a professor once asked my class to list things that we associated with the law. Most students came up with concepts such as jail, execution, death penalty, police, army, and criminal tribunal. No one mentioned civil rights or supervision of government. For a long time, it was difficult to see the law in terms of rights or justice in China. Today, as a law professor, I raise this very same question in my first-year classes and receive very different answers. Students of this generation are beginning to associate the law with ideas such as protection of civil rights, dispute resolution, equity and justice. This reflects the progress that has been made in the attitude of the Chinese towards the law and the rule of law. The general understanding of the rule of law is multi-faceted. First, the rule of law is the means by which human activities can be regulated and is essential to a modern industrial society. Such a society cannot prosper under the rule of man (i.e. a society governed solely by the decisions of those in power). When a society evolves from an agrarian to an industrial one, the socio-legal structure must shift from one based upon the rule of man to one based upon the rule of law. As our society gradually sheds its industrial character and becomes more dominated by information technology, this shift becomes more pronounced. The more developed the society is, the greater the need for the rule of law. Second, under the rule of law, the primary purpose of the legal system is to regulate and restrain the behavior of government officials. There must be laws regulating the authority of the government and its officials-political behavior must comply with legal rules. Moreover, these laws should clearly delineate the constitutional functions of the government. This understanding of the role of law is inconsistent with traditional Chinese legal thinking, in which the law is regarded as an instrument for rulers to govern the ruled. Third, the rule of law necessarily assumes the existence of rights. The law should uphold the various rights that modern conceptions of citizenship entail. When the government abuses its power, citizens should have the right to seek legal remedies against the government. Compared to the power of the state, the voice of the individual citizen is weak. Citizens need legal protection against government encroachment. While the law regulates the behavior of the citizen, the scrutiny to which the law subjects the government should be more stringent than that upon the individual. No one should be above the law. During China's tumultuous history, there were many instances of stringent, and at times draconian, laws. However, China was never truly a country under the rule of law. Although laws regulated the behavior of individuals, including that of senior government officials, there remained a notable and crucial exception-the emperor. The emperor embodied and was above the law. He was a law unto himself. The legal system did not protect the political and social rights of citizens from the whims of the emperor. Hence, feudal China was in reality under the rule of man and not the rule of law, despite the existence of a fairly formalized legal system. Fourth, judicial independence is crucial to the rule of law. Under the rule of law, judges should be aware that the courts are the forums of last resort to which the citizens turn to resolve their disputes with each other or with the government. Judges are the ultimate protectors of the citizens. If this final recourse of judicial remedy failed to perform its function, or if these forums of last resort were to be dismantled, the country would degenerate into anarchy. Because of their importance, society should not easily tolerate the mistakes or misconduct of its judges. In a sense, the rule of law is actually the rule of the bench.

II. Our Lessons

No natural or man-made disaster could rival the damage suffered by China from the "Great Leap Forward" and the Cultural Revolution (1966-1976). It has been estimated that the economic loss that the ten years of Cultural Revolution inflicted upon China was about RMB 500 billion. The loss caused by the "Great Leap Forward" in 1958 has been estimated to be approximately RMB 120 billion. Compare this to China's overall investment in its infrastructure from 1949 to 1979, which amounted to only RMB 600 billion, it is easy to understand why China's economy was on the verge of collapse by the end of the Cultural Revolution. The costs of the Cultural Revolution were not purely monetary. It is impossible to quantify its devastation of China's scientific progress and cultural heritage, not to mention the untold suffering of its citizens and the permanent scars left on the collective consciousness. While we may not be able to prevent natural disasters like floods and earthquakes, we can and should prevent socio-political disasters such as the Cultural Revolution. The key to achieving this is the rule of law. What exactly were the causes for the devastating Cultural Revolution? The 3rd Plenary Session of the 11th Central Committee of the Communist Party of China (CPC) convened in 1978. The Session analyzed the causes of the Cultural Revolution and proposed measures to prevent

similar tragedies from ever repeating themselves again. The Session conducted a serious deliberation on the issue of developing democracy and the legal system and concluded, "There has to be sufficient democracy before correct centralization can be conducted. ... We had been striving for centralization in the absence of democracy ... over the past period. There is too little democracy." Furthermore, the Session concluded, "To guarantee the people's democracy, it is necessary to strengthen the socialist legal system, and institutionalize and legalize the democratic system so as to ensure the stability, continuity, and maximum authority of this system as well as the laws." Such a system and laws should not be affected by the changing of leadership. These are the painful historical lessons China learnt as a nation. We have been working on our "legal construction project" for the past two decades, and the Chinese people have realized that the legal system is perhaps the most important institution for a modern nation. In the early 1980s, there was a nationwide debate among China's academics on whether to adopt the rule of man or the rule of law after the ten-year "nightmare" of the Cultural Revolution. Most intellectuals, particularly those in the resurgent legal community, advocated the rule of law as the one and only choice for China, echoing the call of the central authorities.

III. What we are doing: Developing the rule of law

The development of the rule of law in China since 1978 can be divided into three stages. The first stage lasted from 1978 to 1982, during which China drew lessons from the Cultural Revolution. China began to recognize what constituted each citizen's rights and freedoms and what "ruling the country by law" would entail. The promulgation of the 1982 Constitution signified the meeting point of theory and practice. Under the basic principles and framework of the new Constitution, China's legal system was ushered into a new age. The second stage, which lasted from 1982 to 1991, saw the further development of "legal construction." In this stage, the pace for new civil and economic legislation accelerated. The first comprehensive civil legislation-General Principles of Civil Law-was promulgated in 1986. Though not nearly as detailed as it should have been, it provided the fundamental operating rules for the emerging market economy. Even more significantly, in 1991, the State Council published an unprecedented white paper titled "The Situation of Human Rights in China", which signaled the official acceptance of the concept of human rights. The third period began in early 1992, when China's architect of reforms, Deng Xiaoping, took a crucial inspection tour in southern China. During that visit, the senior leader remarked that the objective of China's economic reforms was to develop a socialist market economy with the aim of "further liberating and developing productive forces". For the first time in modern Chinese history, the nation's political leadership acknowledged that a link between socialism and the market economy was desirable. This represented a quantum leap forward in China's economic reforms. Correspondingly, the changes in the legal system reflected the need for a fundamental ideological transition, since many of the old laws, which had been passed to function in the former centrally planned economy, were of little use and relevance to the developing market economy. In light of this development, in 1992, the 14th National Congress of the CPC proposed that legal development be accorded a high priority, and that the pace of lawmaking be accelerated, with the aim of safeguarding reform and promoting economic growth. At the Congress, the leadership formally recognized that a sound market economy must be based on the rule of law, that laws promulgated to serve in the centrally planned economy should be either amended or abolished, and that a legal framework commensurate to the needs of the nascent market economy should be established. Since 1992, China has passed a flurry of new legislation. A number of important basic laws concerning civil procedures, criminal procedures, criminal law, and contract law were introduced or revived to serve as effective guarantees for the developing market economy. China has also been striving to improve its law enforcement and the judiciary. In 1997, for the first time in the Party's history, the 15th National Congress of the CPC explicitly incorporated the rule of law as a basic guiding principle in the Party's official document, and elaborated on the rule of law as a separate subject in the plan for the reform of the political system. The Congress also proposed to institute a comprehensive legal framework with Chinese characteristics by the year 2010. These events represented yet another shift in the CPC's understanding of the law and is a significant milestone in China's progress towards democracy and the rule of law. They reflected a conscious move from "the rule by law" to "the rule of law", and an improved understanding of the rule of law from a technical perspective to a strategic one. This demonstrates China's new commitment to the rigorous practice of the rule of law. The 1982 Constitution was thus amended at the Second Session of the 9th National People's Congress in March 1999 to endorse the fundamental principle of the rule of law. The rule of law has been acknowledged as a constitutional principle thereafter. When establishing the rule of law, China has paid particular attention to the regulation of the practices of the administrative and law enforcement agencies to prevent the violation of the citizens' legal rights. Important legislation has included: - The Administrative Litigation Law became effective in October 1st, 1990. The State Council also issued The Regulations on Administrative Reconsideration as an auxiliary regulation to this Law. - In May 1994, China enacted the State Indemnity Law, which stipulates that "where a government agency or its personnel invades the legitimate rights and interests of a citizen, legal person or other organization, resulting in injury while performing its functions, the sufferer shall be entitled to obtain state indemnity according to this Law". The people's courts at the intermediate level and above have all established indemnity committees to hear such cases. - In March 1996, China promulgated The Law on Administrative Punishments to set up mechanisms for regulating the administrative punishment behavior by government agencies. The people's procuratorates put special emphasis on investigating and dealing with criminal cases that arise in the leadership organs of the Party and the state, in justice administration agencies and judicial agencies, and in departments responsible for economic management. Chinese lawyers are rapidly growing in number, and have been playing an increasingly important role in safeguarding the legal rights and interests of the citizen. In The Law on Lawyers of 1996, lawyers are defined as "legal practitioners who have obtained business licenses according to the law and provide legal service for the society". Corresponding requirements for lawyers' practices, businesses, rights, and duties are also set forth in the Law. Before the adoption of the Law, private lawyers simply did not exist. All lawyers were legal workers serving the country and the government. The Law on Lawyers represents remarkable progress.

IV. The future of rule of law in China

Over the past two decades, China has been improving its understanding of the importance of the rule of law. If the aim of legal reforms

was previously only to prevent tragedies such as the Cultural Revolution, China has now realized that a sound legal framework is effective not only in safeguarding public interests, but also in facilitating economic and social development. For instance, a country's legal environment is a crucial consideration of most foreign investors. The law should be the primary legitimate means for tackling social problems. It ought to give people a sense of hope, confidence, and safety. If the law is perceived as ineffective or worse, unjust, the people will have no place to turn to for redress and will be more likely to resort to violent or illegal means. The people would lose their confidence in the legal system. When this happens, society degenerates into anarchy, and tragedies like the Cultural Revolution may happen again. Violence begins when the law ends. China has learnt many profound lessons in this regard. There are many difficulties in the course of establishing a sound legal system. Building tangible infrastructure such as highways and airports is, in comparison, much easier than erecting civil institutions such as legal systems. It is often very difficult to impress upon the people the importance of the law. No similar problem exists for tangible infrastructure. To tackle this problem, the Chinese government has conducted three five-year general legal education programs for the cadres and the general public to heighten their awareness of the law. In recent years, central authorities have held a number of law lectures, which were attended by leaders including President Jiang Zemin. These lectures generated strong reactions throughout the country. All provinces, autonomous regions, and municipalities directly under the central government have since organized law lectures for their leadership. Party secretaries and governors have taken the lead in attending these lectures. The study of the law by the leadership demonstrates its determination to advance the rule of law, and this practice is now gradually becoming institutionalized. Much more needs to be done. Development of higher education must be accelerated and legal education must be significantly improved. Most law schools in China do not have libraries, and professors do not even have their own offices. The gap between legal education and the legal profession must be bridged. Salaries for judges need to be raised in order to prevent corruption. Well-trained lawyers with a strong sense of professional responsibility and high ethical standard are needed to develop the rule of law. Moreover, the legal profession in China is fragmented. Lawyers are regarded as private practitioners whereas judges and government attorneys are categorized as civil servants. They have different qualification and admission requirements. To facilitate development of the legal system, the current three legal professions must be standardized and brought under the same umbrella of one unified legal profession. All three groups should have the same admission criteria. Nevertheless, there is a great sense of optimism that the rule of law will be established in China. There are three stages in the establishment of a legal system. The first stage is signified by the dominance of criminal law of the legal system. China was known for its harsh criminal code during the feudal period, and thus China can be said to have passed this stage already. The second stage is the development of civil and commercial law as the major elements of the legal system. Current trends show that China is in the second stage. Once sound social and economic order has been established in the first two stages, the country should proceed to improve the political system. In the third stage, the development of the legal structure is centered on constitutional law. The constitution regulates political activities and should be supreme among all laws. It is particularly important that the constitution, not the will of an individual, be placed at the apex of the legal system and an orderly society. Only upon completion of these three stages may one conclude that the rule of law has been established. These three stages together create a comprehensive legal network: criminal law safeguards the general social order, civil and commercial laws provides a just, safe, and efficient business order, and constitutional law guarantees an open and just political order. Two aspects call for particular attention when looking into the future of Chinese law. One is the influence of common law on Chinese jurisprudence. The other is the impact of China's entry into the WTO on China's legal development. The Chinese legal system, along with the Anglo-American common law system, continental European civil law system, and the Islamic law system, has historically been considered one of the four major legal systems in the world. The Chinese legal system had considerable influence on East and Southeast Asia. However, the Chinese system, rooted in a traditional agrarian economy and Confucian culture, could not withstand the onslaught of Western capitalist civilization towards the end of the dynastic era in the late 19th century. In response, the Qing Dynasty reformed its legal system. Just as a hungry person is not choosy about his or her food, the late Qing government introduced whatever Western law it happened to find. In those days, few people in China had much knowledge of the western legal systems, not even things as basic as the distinction between common law and Roman law. In fact, the Qing government could not even find capable interpreters when negotiating with Western countries, let alone well-trained lawyers who could speak foreign languages. The laws and legal works introduced during this period came from common law, continental civil law and Japanese law, and the counsels employed by the Qing government came from many different legal systems. Common law later came to have more influence on the Chinese legal system than Roman law, and the main thrust of initial legal reforms was to introduce common law in China. After the 1898 Reform Movement, the focus of legal reform shifted to civil law and, in particular, Japanese law. Eventually, Roman civil law replaced common law in all the newly revised laws in the late Qing. This practice continued until the new China was founded in 1949, when the legal codes were replaced by the socialist legal system. Before the 1980s, the legal system in new China was largely based on that of the former Soviet Union. Since the return of Hong Kong to China in 1997, two different legal systems-the common law system in Hong Kong and the socialist legal system in mainland China-have co-existed. In recent years, China has begun to adopt a number of principles and institutions from the common law system. This is exemplified by the Criminal Procedure Law enacted in 1996, which shifted the truth-finding process from an inquisitorial to an adversarial system. China's imminent entry into the WTO will be likely to usher in another period of radical change in the Chinese legal system. Many laws will be revised to meet international standards. As China commits itself to open its legal services market internationally, much pressure will be put on China's fledgling legal profession. This will indubitably have a significant impact on most aspects of the legal and judicial systems, and will represent both a challenge and an opportunity for the legal profession in China. Chinese lawyers will face strong competition from abroad. At the same time, they will have access to both overseas and domestic markets. Given China's immense legal market, such development

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will bode well for lawyers from abroad, especially those who are fluent in both Chinese and English. China is still in the early stage of developing the rule of law. The legal system established on the basis of a planned economy is now changing to one based on market economic concepts. The new legal system must treat and protect all its economic constituents fairly. It should emphasize market regulation and the establishment of a legal order that allows equal opportunity and fair competition among its participants. Moreover, as China enters the WTO, the new legal system will have to adhere to international standards, especially in the area of civil and commercial laws. It is expected that the new legal infrastructure be complete by the year 2010.

VI. The role Hong Kong can play in the establishment of the rule of law in China

Hong Kong has long been the meeting point of Chinese and western cultures and institutions. It is truly a place where the east meets the west. The ideas of "one city, two worlds" and "one city, two cultures" have been a distinct mark of Hong Kong for a long time. Hong Kong is a modernized and developed region in China, both in the economic and the legal sense. Hong Kong has a developed legal system, and an efficient, open, and independent judiciary. It also has a well-established legal profession that is relatively free from corruption. There is a great deal mainland China can learn from Hong Kong in developing its legal system. This is beneficial to China because having a model to emulate is easier, more economic and effective than trying to develop a legal system on its own. China has, in fact, learnt from Hong Kong in the past. In the 19th century, many people from Hong Kong went to Britain and other countries to study and brought their knowledge back to Hong Kong. Many of these returning scholars had studied law abroad. In addition to practicing in Hong Kong, they helped China to modernize its feudal laws. For example, Mr. Wu Tingfang was born in Canton and went to school in Hong Kong. He studied law in England and practiced law in Hong Kong. He was later called by the Qing government to help revise its obsolete laws. He was appointed in 1903 as the Minister of Law Revision and contributed substantially to the legal reforms. Without his involvement, the legal reform process would have been much more difficult. Modern day China is obviously very different from late Qing Dynasty. Our country is growing stronger and the economy is booming. However, the opportunity for participation by Hong Kong legal professionals exists just as it did more than a century ago. As the environment for foreigners improves, Hong Kong legal professionals will have a more substantial role in China's ongoing legal modernization.

Conclusion

Chinese people are gradually beginning to realize that, instead of being a source of trouble, the law is an essential characteristic of modern society. The rule of law is important to all aspects of life in any country. It provides the country with a safe political and social environment, guarantees the enforceability of commerce and business transactions, improves economic productivity, and safeguards property and freedom. The establishment of the rule of law in China is perhaps one of the largest social infrastructural projects in the history of mankind. It is a complex and demanding endeavor and the process will indubitably be a protracted and difficult one. However, because of the utmost importance of this project, the Chinese and Hong Kong legal professions must make its best efforts to carry it through.