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Let One Hundreded Flowers Bloom, One Hundred Schools Contend: Debating Rule of Law in China

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LET ONE HUNDRED FLOWERS BLOOM, ONE HUNDRED SCHOOLS CONTEND: DEBATING RULE OF LAW IN CHINA†

*Randall Peerenboom**

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Rule of law, like any other important political concept such as justice or equality, is an “essentially contested concept.” Yet the fact that there is room for debate about the proper interpretation of rule of law should not blind us to the broad consensus as to its core meaning and basic elements. At its most basic, rule of law refers to a system in which law is able to impose meaningful restraints on the State and individual members of the ruling elite, as captured in the rhetorically powerful if overly simplistic notions of a government of laws, the supremacy of the law, and equality of all before the law.

Theories of rule of law can be divided into two general types: thin and thick. A thin theory stresses the formal or instrumental aspects of rule of law—those features that any legal system allegedly must possess to function effectively as a system of laws, regardless of whether the legal system is part of a democratic or non-democratic society, capitalist or socialist, liberal or theocratic.² Although proponents of thin interpretations of rule of law define it in slightly different ways, there is considerable common ground, with many building on or modifying Lon Fuller’s influential account that laws be general, public, prospective, clear, consistent, capable of being followed, stable, and enforced.³

In contrast to thin versions, thick or substantive conceptions begin with the basic elements of a thin conception. Thick versions then incorporate elements of political morality such as particular economic arrangements (free market capitalism, central planning, and so on), forms of government (democratic, single party socialist, and so on) or conceptions of human rights (liberal, communitarian, collectivist, “Asian Values,” and so on).

Thus, the liberal democratic version of rule of law incorporates free market capitalism (subject to qualifications that would allow various degrees of “legitimate” government regulation of the market), multiparty democracy in which citizens may choose their representatives at all levels of government, and a liberal interpretation of human rights that gives priority to civil and political rights over economic, social, cultural, and collective or group rights.

1. Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781, 791 (1989).

2. See, e.g., JOSEPH RAZ, *The Rule of Law and Its Virtue*, in THE AUTHORITY OF LAW 210 (1979); Robert S. Summers, *The Ideal Socio-Legal Order*, 1 RATIO JURIS 154 (1988) [hereinafter Summers, *Ideal Socio-Legal Order*]; Robert S. Summers, *A Formal Theory of Rule of Law*, 6 RATIO JURIS 127 (1993) [hereinafter Summers, *Formal Theory*]; see also *infra* Part I.

3. Although one of the first to spell out the elements of a thin theory of rule of law, Fuller was uncomfortable with the instrumental aspects of a thin theory and its potential for abuse by authoritarian or fascist regimes, arguing that truly evil regimes would not comply with even a thin theory. LON FULLER, *THE MORALITY OF LAW* (1976).

Although rule of law has ancient roots and may be traced back to Aristotle, the modern conception of rule of law is integrally related to the rise of liberal democracy in the West. Indeed, for many, "the rule of law" means a liberal democratic version of rule of law.⁴ In striking contrast to the many volumes on rule of law in the Western literature, relatively little work exists to clarify alternative conceptions of rule of law in other parts of the world.⁵ There is no reason to assume, however, that at the end of China's legal reform rainbow lie liberal democracy and a liberal democratic rule of law.

The tendency to equate rule of law with liberal democratic rule of law has led some Asian commentators to portray the attempts of Western governments and international organizations such as the World Bank and International Monetary Fund (IMF) to promote rule of law in Asian countries as a form of economic, cultural, political, and legal hegemony.⁶ Critics claim that liberal democratic rule of law is excessively individualist in its orientation and privileges individual autonomy and rights over duties and obligations to others, the interests of society, social solidarity, and harmony.⁷ Significantly, although a handful of legal scholars and political scientists in China or living in exile abroad have advocated a liberal democratic rule of law, there is little support for liberal democracy, and hence a liberal democratic rule of law, among China's State

4. See, for example, the influential statement of rule of law in the report of the Committee on the Legislative and the Rule of Law in Int'l Comm'n of Jurists, *Rule of Law in a Free Society*, in A REPORT ON THE INTERNATIONAL CONGRESS OF JURISTS 61 (New Delhi 1959). Given the many possible conceptions of rule of law, I avoid reference to "the rule of law," which suggests that there is a single type of rule of law. Alternatively, one could refer to the concept of "the rule of law," for which there are different possible conceptions. The thin theory of rule of law would define the core concept of rule of law, with the various thick theories constituting different conceptions. Yet as I argue below, from the perspective of philosophical pragmatism, how one defines a term depends on one's purposes and the consequences that attach to defining a term in a particular way. As thick and thin theories serve different purposes, I do not want to privilege thin theories over thick theories by declaring the thin version to be "the rule of law."

5. For a welcome exception, see the essays in *LAW, CAPITALISM AND POWER IN ASIA* (Kanishka Jayasuriya ed., 1999).

6. See Carol Rose, *The "New" Law and Development Movement in the Post-Cold War Era: A Viet Nam Case Study*, 32 *LAW & SOC'Y REV.* 93, 93-94 (1998); Barry Hager, *The Rule of Law: Defining It and Defending It in the Asian Context*, in *THE RULE OF LAW: PERSPECTIVES FROM THE PACIFIC RIM* (The Mansfield Center for Pacific Affairs ed., 2000), available at <http://www.mcpa.org/rol/perspectives.htm> (summarizing complaints of critics).

7. See Takashi Oshimura, *In Defense of Asian Colors*, in *THE RULE OF LAW: PERSPECTIVES FROM THE PACIFIC RIM*, *supra* note 6, at 141 (claiming that the individualist orientation of [liberal democratic] rule of law is at odds with Confucianism and "the communitarian philosophy in Asia"); see also Joon-Hyung Hong, *The Rule of Law and Its Acceptance in Asia*, in *THE RULE OF LAW: PERSPECTIVES FROM THE PACIFIC RIM*, *supra* note 6, at 149 (noting the need to define rule of law in a way that is acceptable to those who believe in "Asian Values"); Rose, *supra* note 6, at 128.

leaders, legal scholars, intellectuals, or the general public. On the contrary, studies show most people are more concerned about stability and economic growth than democracy and civil and political liberties.⁸

Although China's leaders have officially endorsed rule of law, they have not sanctioned the liberal democratic version. In 1996, Jiang Zemin adopted the new *tifa*, or official policy formulation of ruling the country in accordance with law and establishing a *socialist* rule of law State (*yifa zhiguo, jianshe shuhui zhuyi fazhiguo*), which was subsequently incorporated into the Constitution in 1999. Since 1996, People's Republic of China (PRC) scholars have debated the new policy and the concept of rule of law more generally.⁹ Some have questioned whether rule of law, and especially a liberal democratic version of rule of law, will take root

8. See, e.g., Yali Peng, *Democracy and Chinese Political Discourses*, 24 MOD. CHINA 408, 408-40 (1998); see also Minxin Pei, *Racing Against Time: Institutional Decay and Renewal in China*, in CHINA BRIEFING: THE CONTRADICTIONS OF CHANGE 11 (William A. Joseph ed., 1997). Pei cites polls showing that two-thirds of the people thought that the economic situation was improving, while half thought their own living standards were improving. In the same poll, a majority of respondents (54%) placed a higher priority on economic development than democracy. Over two-thirds of those polled supported the government's policy of promoting economic growth and social stability, and 63% agreed that "it would be a disaster for China to experience a similar change as that in the former Soviet Union." *Id.* at 18. Even 40% of non-CCP member respondents said they voluntarily supported the same political position as the Chinese Communist Party (CCP). *Id.*; see also XIA LI LOLLAR, CHINA'S TRANSITION TOWARD A MARKET ECONOMY, CIVIL SOCIETY AND DEMOCRACY 74 (1997) (citing results of poll in which 60% of respondents assigned highest priority to maintaining order, while another 30% chose controlling inflation; only 8% chose giving people more say in political decisions and free elections, and a mere 2% chose protecting free speech). Wan Ming cites survey data showing growing support for the Party, and concludes that a development consensus that emphasizes stability has emerged. Wan Ming, *Chinese Opinion on Human Rights*, 42 ORBIS 361 (1998). Another study showed the Chinese to be the least tolerant of diverse viewpoints among all of the countries surveyed. It also found little support for a free press and the publishing of alternative views. Andrew Nathan & Shi Tianjian, *Cultural Requisites for Democracy in China: Findings from a Survey*, 122 DAEDALUS 95 (1993).

Granted, polling results must be used with caution. Often, the design of the question influences the outcome, as may be the case when people are simply asked to choose between economic growth and democracy. Moreover, respondents may feel inhibited, and provide what they feel are safe answers or the answers desired by the pollsters. On the other hand, many of the surveys provide for anonymity. Further, PRC nationals living abroad often make similar arguments about democracy and economic growth and exhibit similar values. Nor are such views limited to mainland PRC citizens. When asked to choose between democracy and economic prosperity and political stability, 71% of Hong Kong residents chose the latter, and only 20% chose democracy. Similarly, almost 90% preferred a stable and peaceful handover to insisting on increasing the pace of democracy. DANIEL BELL, EAST MEETS WEST: HUMAN RIGHTS AND DEMOCRACY IN EAST ASIA 119 (2000).

9. It is not my purpose here to discuss all of the various arguments or points of contention. For a general overview, see Albert H.Y. Chen, *Toward a Legal Enlightenment: Discussion in Contemporary China on the Rule of Law*, 17 UCLA PAC. BASIN L. J. 125 (1999). For a discussion of debates through the early to mid-1990s, see RONALD C. KEITH, CHINA'S STRUGGLE FOR THE RULE OF LAW (1994); CHIH-YU SHIH, COLLECTIVE DEMOCRACY: POLITICAL AND LEGAL REFORM IN CHINA (1999).

in China's very different soil.¹⁰ What is needed, they suggest, is an indigenous theory of rule of law—rule of law with Chinese characteristics—one that takes into consideration China's native resources and China's particular circumstances, its culture, traditions, and history, as well as other such contingent factors as ideology, the current stage of development of its legal and political institutions, and the fact that China is still in the midst of a dramatic transition from a centrally planned economy to a more market-oriented one. Others argue that an explicitly socialist theory of rule of law is necessary.¹¹

Accordingly, if we are to understand the likely path of development of China's system, and the reason for differences in its institutions, rules, practices, and outcomes in particular cases, we need to rethink rule of law. We need to theorize rule of law in ways that do not assume a liberal democratic framework, and explore alternative conceptions of rule of law that are consistent with China's own circumstances. To that end, I describe four competing thick conceptions of rule of law: Statist Socialism, Neo-Authoritarian, Communitarian, and Liberal Democratic.

In contrast to Liberal Democratic rule of law, Jiang Zemin and other Statist Socialists endorse a State-centered socialist rule of law defined by, *inter alia*, a socialist form of economy (which in today's China means an increasingly market-based economy but one in which public ownership still plays a somewhat larger role than in other market economies); a non-democratic system in which the (Chinese Communist) Party plays a leading role; and an interpretation of rights that emphasizes stability,

10. Su Li, *Bianfa, Fazhi Jianshe Ji Qi Bentu Ziyuan* [Change of Law, Establishment of the Rule of Law and its Native Resources], 41 ZHONGWAI FAXUE 1, 4 (1995) (emphasizing China's native resources—*bentu ziyuan*); Sun Guohua, *Cong Zhongguo de Shiji Chufa, Zou Ziji de Daolu* [Start from China's Actual Circumstances, Take Our Own Road], in *Zhongguo Fazhi Shixian Fanglue (Bitanhui)* [Strategy for the Realization of the Rule of Law (Written Exchange of Ideas)], 71 FALU KEXUE 3 (Liu Zuoxiang ed., 1996) [hereinafter *Strategy for the Realization of the Rule of Law*] (emphasizing the need to consider China's "national character"—*guoqing*). Ma Xiaohong suggests that rule of law in China must take into account the traditional emphasis on morality and substantive justice. Ma Xiaohong, *Yifa Zhiguo Jianshe Shehuizhuyi Fazhi Guojia Xueshu Yantaohui Jiyao* [Excerpts from the Academic Conference on Ruling the Country According to Law, Establish a Socialist Rule of Law State], 3 FAXUE YANJIU 3, 17 (1996) [hereinafter *Establish a Socialist Rule of Law State*]; see also Su Li, *Ershi Shiji Zhongguo de Xiandaihua He Fazhi* [Twentieth Century China's Modernization and Rule of Law], 1 FAXUE YANJIU 3, 10–12 (1998) (noting that China is still predominantly an agrarian society). In the villages, custom and traditional informal means of resolving disputes remain strong. However, as Su Li acknowledges, society is changing and reliance on custom and traditional informal means of resolving disputes is no longer sufficient. *But see* Zhang Wenxian, *Lun Lifazhong de Falu Yizhi* [On the Legal Transplant of Legislation], 1 FAXUE 6 (1996) (arguing that China has little choice but to import laws given the needs and rapid pace of economic reforms).

11. Shao Cheng, *Jiaqiang Lianzheng Fazhi de Jianshe* [Strengthen the Establishment of Good Governance Rule of Law], in *Strategy for the Realization of Rule of Law*, *supra* note 10, at 9.

collective rights over individual rights, and subsistence as the basic right rather than civil and political rights.

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

Another variant is a Neo-Authoritarian or Soft Authoritarian form of rule of law that, like the Communitarian version, rejects a liberal interpretation of rights, but unlike its Communitarian cousin, also rejects democracy. Whereas Communitarians adopt a genuine multiparty democracy in which citizens choose their representatives at all levels of government, Neo-Authoritarians permit democracy only at lower levels of government or not at all.¹²

The Article proceeds in three stages. Part I provides a brief overview of thin versions of rule of law and their relation to thick theories. Part II then takes up the four thick versions of rule of law. Part III addresses a number of thorny theoretical issues that apply to rule of law theories generally and more specifically to the applicability of rule of law to China. For instance, can the minimal conditions for rule of law be sufficiently specified to be useful? Should China's legal system at this point be described as rule by law, as in transition to rule of law, or as an imperfect rule of law? How do we know that the goal of legal reforms in China is rule of law as opposed to a more efficient rule by law or some third alternative? Given the many different interpretations of rule of law, should we just stop referring to rule of law altogether, or at least reserve rule of law for Liberal Democratic rule of law States? Finally, turning from theory to practice, are non-Liberal Democratic rule of law systems sustainable?

12. Alternatively, the Neo-Authoritarian State might give the appearance of allowing genuine multiparty elections at all levels, but in fact control the outcome by limiting the ability of opposition parties to campaign (as in Singapore).

I. THIN VERSIONS OF RULE OF LAW

Notwithstanding competing thick conceptions of rule of law, there is general agreement in China and elsewhere that rule of law requires at minimum that the law impose meaningful limits on State actors.¹³ There is also general agreement that a rule of law system must meet the standards of a thin conception,¹⁴ though there are some differences in the

13. See, e.g., Wang Jiayu, *Guanyu Yifa Zhiguo Jianshe Shehui Zhuyi Fazhi Guojia de Lilun he Shijian Wenti* [On Governing the Country in Accordance with Law: Theoretical and Practical Issues in Establishing a Socialist Rule of Law State], in ZHONGGONG ZHONGYANG FAZHI JIANGZUO HUIBIAN 127 (Ministry of Justice ed., 1998) (discussing supremacy of law); *Establish a Socialist Rule of Law State*, supra note 10, at 9 (summarizing views of Gao Hongjun that rule of law requires, inter alia, supremacy and autonomy of law). Liu Hainian argues that rule of law requires, inter alia, the supremacy of law, equality before the law and administration in accordance with law. Liu Hainian, *Beilun Shehuizhuyi Fazhi Yuanze* [General Discussion of Socialist Rule of Law Principles], 1 ZHONGGUO FAXUE 5 (1998). Li Buyun claims that rule of law requires that (i) laws must be based on the Constitution; (ii) everyone must act in accordance with the law; (iii) the Constitution and law are made in accordance with democratic procedures; (iv) all are equal before the law; and (v) there be judicial independence. Li Buyun, *Xianzheng yu Zhongguo* [Constitutionalism and China], in ZOUXIANG FAZHI [TOWARD THE RULE OF LAW] 10–11 (Li Buyun ed., 1998).

14. Despite such general agreement, there are pockets of controversy. For instance, the emphasis on law's role in limiting the State is based on the liberal Lockean tradition that emphasizes the supremacy of the law and the equality of all before the law (though even Locke allows that government authorities have considerable discretion, and thus may act outside the law, even against it, provided they do so for the public good). In contrast, Hobbes and Austin favored the view that whatever the sovereign says is the law, is the law. Thus for Hobbes, the sovereign authority had to be above the law. See Leslie Friedman Goldstein, *The Rule of Law: Do We Know It When We See It?* (2001) (unpublished manuscript presented at Law and Society Conference, Budapest, on file with author). Similarly, the emperor in the Imperial Chinese legal system had the power to make law; and, at least in the view of some commentators, the (Chinese Communist) Party's leading role means that it must to some extent be above the law as it plays an important role in determining what the laws will be.

In all systems, the entities with power to make or change laws are in some sense beyond the law. However, there may still be laws that limit their authority to make or change laws. The view that the sovereign is above the law and determines the law was modified slightly, but significantly, by positivists such as H.L.A. Hart, for whom the touchstone for what constitutes a valid law is whether the rule was promulgated in accordance with proper procedures. Such procedures, and thus the authority for law, can be traced back to a basic legal norm or a "rule of recognition." A dictatorial regime, therefore, could exercise legal authority and make law, as long as it complied with the procedural requirements for making law. Moreover, the rulers could be required to follow laws once made. Such a system is compatible with rule of law. On the other hand, a system in which the ruling regime's pronouncements simply have the force of law and the regime is not itself bound by such laws is better characterized as a rule by law or *Rechtsstaat*. For the concept of rule of recognition, see H.L.A. HART, *THE CONCEPT OF LAW* 100 (2d ed. 1994).

In any event, whether or not a legal system based on the rule of recognition that "whatever the sovereign (or the CCP) says is the law, is the law" is consistent in theory with a thin rule of law, in practice any such system is likely to fall short of the other requirements of a thin theory. In most cases, the concentration of power in the hands of a single person or party would result in arbitrary and conflicting laws, rapid change in laws, and difficulty implementing such laws, and thus a large gap between law and practice.

way scholars define a thin theory.¹⁵ For present purposes, the constitutive elements of a thin conception include, in addition to meaningful restraints on State actors, the following:

There must be procedural rules for lawmaking and laws must be made by an entity with the authority to make laws in accordance with such rules to be valid;

Transparency: laws must be made public and readily accessible;

Laws must be generally applicable: that is, laws must not be aimed at a particular person and must treat similarly situated people equally.

Laws must be relatively clear;

Laws generally must be prospective rather than retroactive;

Laws must be consistent on the whole;

Laws must be relatively stable;

Laws must be fairly applied;

A second objection to the Lockean emphasis on limiting State actors is that it reflects the concerns and biases of the liberal tradition, invoking images of atomistic individuals opposed to the State. In contrast, Chinese political traditions have emphasized a more harmonious relation between the State and the people, with persons viewed as socially-situated selves defined in terms of their social roles and relationships to others. Whatever the merits of these generalizations, Chinese citizens today appreciate the importance of limiting arbitrary State action. With the pluralization of interests that has resulted from economic reforms, harmony among the divergent social groups and between such groups and the State is even less likely than in the past. Thus, the differences between China and other countries are likely to be more a matter of degree than of kind. As noted below, Statist Socialists, Neo-Authoritarians, Communitarians, and Liberal Democrats all accept that law must bind the State, though they differ on the degree. A related concern, discussed below, is that it is not clear how meaningful the limits on State actors must be for the system to be considered "rule of law."

15. A quick comparison of the lists of rule of law elements of John Finnis, Lon Fuller, Joseph Raz, Geoffrey Q. Walker, Richard Fallon, Robert Summers, and various PRC scholars reveals both common ground and some differences. See JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 270–71 (1980); FULLER, *supra* note 3, at 39; RAZ, *supra* note 2; GEOFFREY DE Q. WALKER, *THE RULE OF LAW* 23–42 (1988); Richard Fallon, *The Rule of Law as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 8–9 (1997); Summers, *Formal Theory*, *supra* note 2.

Preferring thick to thin theories, several PRC scholars begin with a list similar to Fuller's and then add various elements, some of them substantive. See Xu Xianming, *Lun "Fazhi" de Goucheng Yaojian* [*On the Constitutive Elements of Rule of Law*], 3 FAXUE YANJIU 3, 37 (1996); Liu Junning, *Cong Fazhiguo Dao Fazhi* [*From Rechtsstaat to Rule of Law*], in ZHENGZHI ZHONGGUO [POLITICAL CHINA] 233, 254–56 (Dong Yuyu & Shi Binhai eds., 1998) [hereinafter POLITICAL CHINA]. Xia Yong, *Fazhi shi shenme* [*What is the rule of law?*], 4 ZHONGGUO SHEHU KEXUE 117 (1999), for example, adds supremacy of the law, judicial authority, and judicial justice to the list.

Laws must be enforced: the gap between the law on the books and law in practice should be narrow; and

Laws must be reasonably acceptable to a majority of the populace or people affected (or at least the key groups affected) by the laws.¹⁶

That laws be reasonably acceptable to the majority of those affected by them does not mean that the laws are necessarily “good laws” in the sense of normatively justified. The majority might support immoral laws. Historically, immoral laws are often buttressed by prevailing social practices and widely held norms and values. Furthermore, many laws serve an amoral purpose. For example, whether cars drive on the right or left is not a moral issue. Laws that solve such collective action problems, facilitate commercial transactions, or otherwise make it easier for people to get on with their lives will be acceptable to most people simply because they work.¹⁷

A thin theory requires more than just these elements. A fully articulated thin theory also specifies the goals and purposes of the system as well as its institutions, rules, practices, and outcomes. Typical candidates for the more limited normative purposes served by thin versions of rule of law include:¹⁸

16. The requirement that laws must be reasonably acceptable to the majority of those affected by the law (and hence followed) is on this view an element of *rule of law*, not of *law per se*. Thin theories generally take as their starting point a positivist account of law. Following Hart, we can draw a distinction between the validity and efficacy of a rule or law. A law is valid when it is passed in accordance with the system’s rule of recognition even if it is not obeyed in practice and not enforced. However, a law is more efficacious the more it is obeyed. The existence of too many valid, but routinely ignored laws, undermines the legal system and rule of law, running afoul of the requirement that the gap between law on the books and law in practice be reasonably narrow. See generally HART, *supra* note 14.

For Hart, citizens need not like the laws or find them normatively justified. As long as people obey the laws, the legal system could exist and function. See *id.* However, as a practical matter, relying on compulsory enforcement for every law is costly and impractical. For this reason, Geoffrey Walker includes general congruence of law with social values as one of the requirements of a thin theory of rule of law, although he notes: “In a sense we may be cheating a little by making this . . . point an element or part of the definition. Strictly speaking, it is a limit on the model, not an ingredient of it. The rule of law could theoretically exist without this requirement being satisfied. But . . . it would not last long.” WALKER, *supra* note 15, at 28; see also RAZ, *supra* note 2 (arguing that the notion that people should be ruled by law and obey it suggests that the acceptability of the law and respect for law would be advantageous, if not absolutely necessary).

17. Long before Hart, Max Weber noted the relation between rule of law and legitimacy. He maintained that citizens were more likely to find clear, predictable laws that are fairly applied by an autonomous judiciary legitimate, and that they would be more likely to comply—without the need for coercion—with laws they found legitimate. See MAX WEBER, *MAX WEBER ON LAW IN ECONOMY AND SOCIETY* (Max Rheinstein ed., 1954).

18. For a discussion, see Randall Peerenboom, *Ruling the Country in Accordance with Law: Reflections on the Rule and Role of Law in China*, 11 *CULTURAL DYNAMICS* 315 (1999).

stability, and preventing anarchy and Hobbesian war of all against all;

securing government in accordance with law—rule of law as opposed to rule of man—by limiting arbitrariness on the part of the government;

enhancing predictability, which allows people to plan their affairs and hence promotes both individual freedom and economic development;

providing a fair mechanism for the resolution of disputes; and

bolstering the legitimacy of the government.

A variety of institutions and processes are also required. The promulgation of law assumes a legislature and the government machinery necessary to make the laws publicly available. It also presupposes rules for making laws. Congruence of laws on the books and actual practice supposes institutions for implementing and enforcing laws. While informal means of enforcing laws may be possible in some contexts, modern societies must also rely on formal means such as courts and administrative bodies. If the law is to guide behavior and provide certainty and predictability, laws must be applied and enforced in a reasonable way that does not completely defeat people's expectations. This implies normative and practical limits on the decisionmakers who interpret and apply the laws and principles of due process or natural justice, such as access to impartial tribunals, a chance to present evidence, and rules of evidence.

A. *Advantages of Thin Theories*

Depending on one's purpose, thin theories may offer several advantages over thick conceptions. One potential advantage is that thick conceptions require a complete moral and political philosophy. As Joseph Raz observes:

If rule of law is the rule of the good law then to explain its nature is to propound a complete social philosophy. But if so the term lacks any useful function. We have no need to be converted to rule of law just in order to believe that good should triumph. . . . A non-democratic legal system, based on the denial of human rights, of extensive poverty, on racial segregation, sexual inequalities, and religious persecution may, in principle, con-

form to the requirements of rule of law better than any of the legal systems of the more enlightened Western democracies.¹⁹

Even the more limited thin version of rule of law has many important virtues.²⁰ At minimum, it promises some degree of predictability and at least some limitation on arbitrariness and hence some protection of individual rights and freedoms. By narrowing the focus, a thin theory highlights the importance of the virtues of rule of law.

A thin interpretation also allows for focused and productive discussion of rule of law among persons of different political persuasions. As Robert Summers notes: "A substantive theory necessarily ranges over highly diverse subject matter, and thus sprawls in its application. On a full-fledged substantive theory, arguments and criticisms purportedly in the name of 'rule of law' tend to be arguments and criticisms in the name of too many different things at once."²¹ Being able to narrow the focus of discussion and avoid getting bogged down in larger issues of political morality is particularly important in cross-cultural dialogue between, for example, American liberals and Chinese socialists or Muslim fundamentalists.

As a practical matter, much of the moral force behind rule of law and its enduring importance as a political ideal today is predicated on the ability to use rule of law as a benchmark to condemn or praise particular rules, decisions, practices, and legal systems.²² To the extent that there is common ground and agreement on at least some features of a thin rule of law, many of the theoretical and practical problems associated with normative valuations in a pluralist society and world are avoided. Criticisms are more likely to be taken seriously and result in actual change given a shared understanding of rule of law. Conversely, criticisms of China's legal system that point out the many ways in which the system falls short of a liberal interpretation of rule of law are likely to fall on deaf ears and may indeed produce a backlash that undermines support for rule of law, thereby ironically impeding reforms favored by liberals.²³

19. RAZ, *supra* note 2, at 211.

20. See Summers, *Ideal Socio-Legal Order*, *supra* note 2, at 161; Summers, *Formal Theory*, *supra* note 2, at 135–38.

21. Summers, *Formal Theory*, *supra* note 2, at 137.

22. See Fallon, *supra* note 15, at 43.

23. When the United States and China agreed on a project aimed at improving China's legal system during the 1997 Jiang-Clinton summit, the Chinese side rejected the label "rule of law" in favor of "legal cooperation." Presumably, PRC representatives rejected "rule of law" because of the vagueness of the concept and the potentially broad implications for political reform. Paul Gewirtz, Address at Law in Contemporary China Conference, Harvard University (Mar. 1999). However, China and Germany have been cooperating in the field for a number of years, and promoting rule of law in China normally is an explicit goal of the individual cooperation projects agreed upon between the two. Furthermore, since June 2000,

Some PRC scholars suggest an additional reason for emphasizing a thin or procedural rule of law over a thick or substantive rule of law for China at this time.²⁴ China has historically favored substantive justice over procedural justice²⁵ and, in the clash between morals and law, morals have often won out. The tendency has been to favor particular justice at the expense of generality and rationality.²⁶ While strong normative arguments may be made in favor of a particularized substantive justice, in practice this emphasis gives decisionmakers considerable discretion and makes the process more subjective. To correct for the tendency toward substantive justice, the legal system should arguably stress the more rule-oriented procedural aspects of a thin rule of law.

B. Normative Concerns About Thin Theories and the Relation Between Thin and Thick Theories

PRC scholars object to thin theories primarily on normative grounds. First, many fear that an authoritarian government may use a thin rule of

China and Germany have undertaken a broader dialogue on legal issues explicitly dealing with rule of law, initiated by the Chinese Prime Minister Zhu Rongji and the German Chancellor Gerhard Schröder. A description of the project is available at <http://www.bmj.bund.de> (last visited Apr. 1, 2002). The German term used is *Rechtsstaatlichkeit*. In a strictly positivistic sense both *Rechtsstaat* and *Rechtsstaatlichkeit* can be used to describe a “rule of law” system which merely satisfies the requirement of a thin rule of law, but which features laws that are unjust in that they are not in accordance with any generally accepted notion of justice. However, today both *Rechtsstaat* as well as *Rechtsstaatlichkeit* are understood by the German constitutional court to refer to a more substantive or thick rule of law, with the definition being derived from the content of the German Constitution. Personal communication with a German lawyer working on the projects in Beijing, who noted that trying to implement a Liberal Democratic thick rule of law concept in China would be counterproductive, as his own experience working on these projects clearly showed (e-mail on file with author).

24. See, e.g., Sun Xiaoxia, *Zhongguo Fazhi De Xianshi Mubiao Xuanze* [Choosing the Target for the Realization of the Rule of Law in China], in *Strategy for the Realization of the Rule of Law*, *supra* note 10, at 12. Shen Guoming has also argued that traditionally there was too much emphasis on *quan*—context-specific reasoning—rather than *jing*—regularity and generality—and that China should now emphasize the formal aspects of rule of law over the substantive. Shen Guoming, *Establish a Socialist Rule of Law State*, *supra* note 10, at 10.

25. Although there were procedural requirements, they were more oriented toward ensuring that officials properly performed their duties than protecting individual rights or interests. See, e.g., WILLIAM JONES, *THE GREAT QING CODE* (1994); William Alford, *Of Arsenic and Old Laws: Looking Anew at Criminal Justice in Imperial China*, 72 CAL. L. REV. 1180 (1984). As Derk Bodde and Clarence Morris note, imperial law was only secondarily interested in defending interests of one individual or group against another and not at all interested in defending individual or group interests against the State. DERK BODDE & CLARENCE MORRIS, *LAW IN IMPERIAL CHINA* 4 (1967).

26. See, e.g., Benjamin Schwartz, *On Attitudes Toward Law in China*, in *GOVERNMENT UNDER LAW AND THE INDIVIDUAL* (Milton Katz ed., 1957). As Alice Tay observes: “Whereas Western legal procedure tends to depersonalize all claims in order to bring out more sharply the question at issue, Chinese tradition personalizes all claims, seeing them in the context of human relations.” Alice Erh-Soon Tay, *The Struggle for Law in China*, 21 U. BRIT. COLUM. L. REV. 561, 562 (1987).

law to strengthen the regime while diminishing individual rights. In the absence of democracy and opportunities for public participation in the law-making processes, the ruling regime can pass illiberal laws that limit individual rights, such as broad State secrets laws, rules against endangering the State, or regulations requiring that all social groups register with government authorities.²⁷ By grounding rights in a thick conception of rule of law, some scholars hope to offset the socialist tendency to view law in instrumental terms and to consider rights as positivist grants from the State that may be revoked and limited by the State as it sees fit.²⁸

Second, and related, many people simply find thin theories lacking in sufficient substantive normative content.²⁹ Given the traditional emphasis on substantive justice, the virtues of a largely procedural thin theory appear insubstantial. For many both in China and abroad, a rule of law that is compatible with morally reprehensible evil empires like Nazi Germany is simply not worth pursuing.³⁰

27. Of course, even democracies that allow public participation may pass illiberal laws.

28. On the conception of rights in positivist rather than natural law terms and something that is granted by the State and may be revoked by the State, see R. Randle Edwards, *Civil and Social Rights: Theory and Practice in Chinese Law Today*, in HUMAN RIGHTS IN CONTEMPORARY CHINA 41, 44–45 (R. Randle Edwards et al. eds., 1986); see also Li Buyun & Zhang Zhiming, *Kuashiji de Mubiao: Yifa Zhiguo, Jianshe Shehuizhuyi Fazhi Guojia [The Cross-Century Target: Ruling the Country According to Law, Establishing a Socialist Rule of Law State]*, 6 ZHONGGUO FAXUE 18, 25 (1997).

29. See, e.g., Li, *supra* note 13; Liu, *supra* note 15; Xia, *supra* note 15.

30. Four further points are worth noting. First, in the rare case of a rule-of-law-compliant authoritarian government misusing law for normatively reprehensible ends, there surely are more direct and telling criticisms of the regime than that it is violating rule of law. A dictator who commits racial or ethnic genocide, or a corrupt authoritarian leader that misuses the legal system to advance the economic interests of his family and cronies while turning a blind eye to widespread, abject poverty and human suffering, surely deserves to be subject to moral censure. Still, to claim that they are violating rule of law somehow misses the point. To focus on rule of law violations in the case of Hitler, Pol Pot, or South Africa highlights the wrong normative issues. Expanding the concept of rule of law makes such criticisms possible, but at the price of obscuring the primary virtues of rule of law, thus increasing the likelihood that discussions of rule of law will get bogged down in disagreements over such insolvable issues as positive versus natural law, the nature of justice, the merits of socialism versus liberal democracy, and so on. Second, whether as an empirical matter Nazi Germany or apartheid South Africa met the standards of a thin rule of law is much debated. Third, today countries and their legal systems are embedded in an international legal order. Accordingly, any country whose legal system meets the requirements of a thin rule of law must comply with its international legal obligations, including its obligations with respect to human rights set forth in international treaties to which it is a party and derived from international customary law and *jus cogens* principles. Although there is considerable debate as to the content of such rights, their interpretation, and how they are to be implemented, at minimum they provide some normative constraints on evil empires. Fourth, insisting on more robust normative constraints beyond what is required by international law leads to a slippery slope problem and the risk of imposing one's own values on others. Liberals may consider some laws that limit individual freedom in the name of maintaining social order morally repugnant, and thus not "good laws." Communitarians, Neo-Authoritarians, and Statist Socialists may simply disagree.

To remedy the lack of an adequate normative content to a thin rule of law, scholars both in the PRC and elsewhere have suggested that rule of law requires “good laws.”³¹ Harold Berman, for instance, claims that rule of law requires laws that are grounded in some normative foundation that transcends the legal system itself. In the past, divine law or natural law provided the foundation; today, a more secular notion of democracy and human rights provide the foundation.³² Similar to Berman, Liu Junning has distinguished rule of law (*fazhi*) from *fazhiguo*, which he interprets as a rule of law State or *Rechtsstaat*.³³ Liu argues that rule of law is based on a natural law tradition whereas *Rechtsstaat* is based on legal positivism. Grounded in natural law, rule of law takes rights more seriously, whereas rights in a *Rechtsstaat* are granted by the State and may be limited by a simple majority of the legislature. A *Rechtsstaat* emphasizes following laws rather than the purpose or values of the law and the need to protect individual freedom; it puts more importance on the origin of laws rather than whether the laws are good or not.

In the absence of a deeply rooted natural law tradition, those who do not support democracy but believe that rule of law entails good laws must look elsewhere for a normative basis for laws. Pan Wei, for example, contends that laws should be derived from “generally-accepted moral principles of the time,” and therefore accepted as just by the public.³⁴

Like Pan, PRC scholars, going beyond the contention that rule of law requires good laws, assert that it entails justice for all.³⁵ Dong Yuyu, for instance, argues that ruling the country in accordance with law (*yifa zhiguo*) is not the same as rule of law (*fazhi*), even allowing that the former entails the supremacy of the law. He believes that rule of law requires more—specifically, peace, order, freedom, and justice.³⁶

31. Wang, *supra* note 13, at 117; Liu, *supra* note 15, at 254–55; Xu, *supra* note 15. It is not always clear whether the authors mean “good” in an effective, efficient, prudential sense, or “good” in a moral sense. The emphasis on the utility of the laws is understandable given the low quality of much legislation.

32. HAROLD J. BERMAN, LAW AND REVOLUTION 294 (1983); Harold J. Berman, *The Rule of Law and the Law-Based State (Rechtsstaat)*, in TOWARD THE “RULE OF LAW” IN RUSSIA?: POLITICAL AND LEGAL REFORM IN THE TRANSITION PERIOD 43–60 (Donald D. Barry ed., 1992).

33. Liu, *supra* note 15, at 233.

34. Pan Wei, Democracy or Rule of Law?—China’s Political Future (May 19–21, 2001) (unpublished manuscript presented at the University of Denver Center for China–United States Cooperation Conference on China’s Political Options, Vail, Colorado, on file with author).

35. See *id.*; Liu, *supra* note 15, at 255; Xu, *supra* note 15.

36. See Dong Yuyu, *Tongguo Tizhi Zhengzhi Gaige de Fazhi zhi Lu [The Rule of Law Road to Political System Reform]*, in POLITICAL CHINA, *supra* note 15, at 57.

Although justice is a popular requirement for rule of law, there is little agreement over what justice is. Liberals, Socialists, Communitarians, Neo-Authoritarians, Soft Authoritarians, New Conservatives, Old Conservatives, Buddhists, Daoists, Neo-Confucians, and New Confucians all differ on what is considered just, and hence what rule of law requires. By incorporating particular conceptions of the economy, political order, or human rights into rule of law, thick conceptions decrease the likelihood that a consensus will emerge as to its meaning. Indeed, one reason for limiting the concept of rule of law to the requirements of a thin theory is to avoid getting mired in never-ending debates about the superiority of the various political theories all contending for the throne of justice.

While thin and thick versions of rule of law are analytically distinct, in the real world there are no freestanding thin rule of law legal systems that exist independently of a particular political, economic, social, and cultural context. In other words, any legal system that meets the standards of a thin rule of law is inevitably embedded in a particular institutional, cultural, and values complex, whether that be Liberal Democratic, Statist Socialist, Neo-Authoritarian, Communitarian, some combination of them, or some other alternative.

Concentric circles offer one way to conceive of the relationship between a thin rule of law, particular thick conceptions of rule of law, and their broader context. The smallest circle consists of the core elements of a thin rule of law, which are embedded within a thick rule of law conception or framework. The thick conception is, in turn, part of a broader social and political philosophy that addresses a range of issues beyond those relating to the legal system and rule of law. This broader social and political philosophy is one aspect of a more comprehensive general philosophy or world view that might include metaphysics, aesthetics, and religious beliefs.

The use of a thin rule of law as a benchmark to assess China's legal system does not allow one to completely avoid all substantive issues of the type that advocates of a thick theory of rule of law must address. It merely reduces the range of issues where such substantive values are relevant and, hence, the scope of possible conflict. Although the features of a thin rule of law are common to all rule of law systems, they will vary to some extent in interpretation and implementation depending on one's substantive political views and values. Socialists and liberals, for example, may agree that one purpose of a thin rule of law is to protect individual rights and interests, but disagree about what those rights and interests are. Or, they may agree that rule of law requires creation of laws by an entity with the authority to make laws, but disagree as to whether members of that entity must be democratically elected.

Accordingly, they will still diverge to some extent with respect to purposes, institutions, rules, and outcomes due to the different contexts in which they are embedded.

II. FOUR IDEAL TYPES: STATIST SOCIALIST, NEO-AUTHORITARIAN, COMMUNITARIAN, LIBERAL DEMOCRATIC

Given the wide variety of political beliefs and conceptions of a just socio-political order, it is theoretically possible to categorize thick conceptions of rule of law in several ways. In order to facilitate discussion, however, I have divided PRC views into four schools: Statist Socialist, Neo-Authoritarian, Communitarian, and Liberal Democratic. A few preliminary observations about these conceptions may help avoid misunderstandings. First, a full elaboration of any of these types requires a more detailed account of the purposes or goals the regime is intended to serve and its institutions, practices, rules, and outcomes.³⁷ These four ideal types were constructed with the present realities of China in mind. For instance, I attribute to Statist Socialism a belief in a market economy. Although this does not rule out the possibility of a Statist Socialist rule of law that adopts a centrally planned economy, China can no longer be described in such terms. My purpose is not to create an exhaustive set of categories that can be applied to all countries and legal systems, or even all Asian countries.³⁸ The categories may not be applicable at all to other countries, or even if applicable in a general sense, they may need refining in light of particular circumstances and issues.

Nor are these categories exhaustive with respect to China. A form of semi-religious rule of law might be appropriate for some parts of China given the wide regional differences and the importance of religion and non-Han values in some areas such as Tibet and Xinjiang.³⁹ Moreover, the ideal types could be further subdivided. Thus, Communitarian rule of law could come in a more statist "Asian Values" version, a pragmatic New Confucian version, or a Deweyan civic republicanism version that mirrors much of the Liberal Democratic order's value structure and insti-

37. See RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARD RULE OF LAW (2002).

38. Jayasuriya's commendable effort to develop an alternative to a liberal conception of rule of law is, in my view, marred by his strong-arm attempt to force all Asian countries into his statist model. As several of the other contributors point out, his model fails to capture the diversity within Asia. The model is even less applicable to two countries conspicuously missing from the volume—Japan and South Korea. See generally LAW, CAPITALISM AND POWER IN ASIA, *supra* note 5.

39. I am indebted for this point to Xia Yong, Director of the China Academy of Social Sciences (CASS) Law Institute.

tutional framework.⁴⁰ Although one could create an ever-expanding taxonomy by making finer specifications of any of the variables or introducing new ones, at some point, one begins to lose sight of the forest for the trees.⁴¹ For present purposes, these four types are sufficient to capture the main differences between dominant prevailing political and legal views.

Because the four representative variants are ideal types and are intended to reflect real positions, it is therefore possible to identify schools of thought and individuals that fall into each category.⁴² At the

40. As Michael Davis notes, Communitarianism in Asia is different than in the West in that Western communitarians assume a liberal democratic framework. Michael Davis, *Constitutionalism and Political Culture: The Debate Over Human Rights and Asian Values*, 11 HARV. HUM. RTS. J. 109 (1998). In contrast, Asian communitarians tend to be more conservative and authoritarian. Asian neo-conservative communitarians emphasize hierarchy and order rather than pluralism and vibrant social discourse. Western communitarians put more stress on equality and liberation of the members of the community. For an attempt to develop a Deweyan-Confucian alternative to liberalism, see DAVID HALL & ROGER AMES, *DEMOCRACY OF THE DEAD: DEWEY, CONFUCIUS AND THE HOPE FOR DEMOCRACY IN CHINA* (1999). William Theodore De Bary argues for a more liberal form of Confucian Communitarianism. WILLIAM THEODORE DE BARY, *ASIAN VALUES AND HUMAN RIGHTS: A CONFUCIAN COMMUNITARIAN PERSPECTIVE* (1998). While admirable preliminary attempts to sketch a philosophical theory of Confucian Communitarianism, neither account addresses in any detail the issue of rule of law nor provides details regarding political or legal institutions, legal rules, or outcomes with respect to particular controversial issues. Daniel Bell assesses the arguments for and against a communitarian system based on non-liberal democratic traditions and values, suggesting that such a system may suit certain States. See BELL, *supra* note 8. Critics of Asian Communitarianism have pointed out that often citizens in Asian countries exhibit precious little concern for the community. Indeed, in China today the principal units of normative concern and allegiance appear to be the family and the State, with little regard shown for what falls between these two units. Accordingly, "collectivism" might be a better descriptive term than Communitarianism. On normative grounds, however, Communitarianism provides a better foundation for establishing a normatively attractive social and political order than collectivism.

41. If China's legal system does, at some point, reach a stable equilibrium state, for example coming to rest in some form of Communitarian rule of law, it would become necessary to draw increasingly fine distinctions between the various forms of Communitarian rule of law. By way of comparison, the category of Liberal Democratic rule of law, while useful for comparative purposes with respect to competing conceptions of rule of law in China, is of little use without further specification for capturing competing conceptions of rule of law in Western liberal democracies. With respect to the United States for instance, one would need to distinguish between libertarians, conservatives, communitarians, and liberals, and then between various schools of liberals—including traditional liberals, social liberals, postmodern liberals, and so on. Moreover, particular issues might be more important in one context than another. For example, in the United States, the fault lines for competing conceptions of rule of law tend to run along the lines of different theories of constitutional interpretation. See Fallon, *supra* note 15.

42. Jiang Zemin's report at the 15th Party Congress is an excellent example of Statist Socialism. Jiang Zemin's Congress Report, FBIS-CHI-97-266 (September 23, 1997). Neo-Authoritarianism is generally associated with Zhao Ziyang and members of his think tank. See, e.g., Barry Sautman, *Sirens of the Strongman: Neo-Authoritarianism in Recent Chinese Political Theory*, 129 CHINA Q. 72 (1992). However, I use the term in a more inclusive way. For instance, Neo-Authoritarianism has resurfaced in the form of New Conservatism and

same time, they are a distillation of the views of many different individuals, drawn not only from written sources but also from thousands of conversations with scholars, legal academics, judges, lawyers, and citizens over the years.⁴³ Consequently, no one type may fit exactly the position of any one person or group. For instance, while most New Conservatives would support Neo-Authoritarianism, some might favor Statist Socialism or Communitarianism.⁴⁴ Others might not fit

elitist democracy. See Edward Gu, *Elitist Democracy and China's Democratization*, 4 DEMOCRATIZATION 2 (1997) (noting that, despite some differences, New Conservatives and elitist democrats share the same basic views with respect to democracy and the role of the elite in bringing about social order and harmony). Pan Wei, a political scientist at Beijing University, has put forth a "consultative rule of law" that incorporates and builds on the basic principles of Neo-Authoritarianism, including the rejection of democracy in favor of a strong State, albeit with a much reduced role for the Party. See Pan, *supra* note 34. Liberal Democratic rule of law is well represented by Liu Junning and many living abroad in exile, such as Baogang He. See Liu, *supra* note 15, at 233; BAOGANG HE, THE DEMOCRATIZATION OF CHINA (1996). No PRC scholar has articulated a comprehensive theory of a Communitarian rule of law, though some have criticized aspects of the current system, taken exception to various features of a Liberal Democratic order, and developed pieces of a communitarian alternative. Xia Yong has attempted to construct a virtue-based theory of rights. Similarly, scholars in China and abroad have defended communitarian positions against liberal democratic critics, but generally on highly abstract philosophical grounds and primarily with respect to alternatives to democracy and liberal human rights. *Supra* text accompanying note 41. The Communitarian position captures the views of the majority of Chinese citizens who may wish for democracy, but not right now, as reflected in the polling data cited *supra* note 8. They value individual rights, but fear even more disorder and chaos. Accordingly, Chinese citizens draw a different balance than liberals between individual rights and group interests. This position is evident in the legal and philosophical literature of the long running debates over collectivism and the relation between rights and duties. See, e.g., Shih, *supra* note 9. The four positions also track the result of Peng's survey of political discourse in China. Peng's four categories overlap to a large extent with the four positions I have identified, with radical democracy representing the Liberal Democratic view; established conservatism representing Statist Socialism; concerned traditionalism representing Neo-Authoritarianism; and alienated populism aligning to some degree with Communitarianism, albeit a jaded and somewhat cynical communitarian view. One of the striking features is that, despite radically divergent views on democracy, all four groups strongly support rule of law. See Peng, *supra* note 8, at 428-31.

43. In some cases, I have drawn on current institutions, rules, practices, and outcomes to demonstrate features of the various positions, particularly Statist Socialism and Neo-Authoritarianism, but also to some extent Communitarianism and rule by law. While the current system does not exhibit many features of a Liberal Democratic order, it is possible to appeal to Western countries for concrete, "real life" examples. The Communitarian variant is the most hypothetical (in the sense of not being grounded in existing institutions and practices) of the positions as the current system remains more State-dominated than the Communitarian view would allow. One advantage of defining a Communitarian rule of law in a rigorous way is that it becomes possible to design a survey instrument to gauge the degree of support for it among the populace.

44. Xiao Gongqin, one of the leading New Conservative theorists, considers himself a Neo-Authoritarian. However, his support for the Party also aligns him with Statist Socialists. On New Conservatives, see Merle Goldman, *The Potential for Instability Among Alienated Intellectuals and Students in Post-Mao China*, in IS CHINA UNSTABLE? (David Shambaugh

easily into any category, but rather endorse elements from different schools. Although certain individuals may express general support for some central tenets of the various ideal types, they will not have addressed all of this Article's issues specifically. At times, the positions attributed to their variant of rule of law are therefore a logical extension of their ideas based on inferences from their general principles.

Each of the various types is compatible with a variety of institutions, practices, rules, and to some extent, outcomes. Within Western liberal democratic legal orders, for example, there is considerable variation along each of these dimensions. Take such a basic issue as separation of powers. In the United States, separation of powers refers to a system in which the legislature, executive, and judiciary are constitutionally independent and equal branches. In contrast, the United Kingdom and Belgium, among others, are parliamentary supreme States. Despite these structural differences, no country—not even the United States—adheres to the simplistic separation of powers where the legislature passes laws, the executive implements them, and the courts interpret and enforce them by adjudicating disputes. For better or worse, administrative agencies everywhere make, implement, and adjudicate laws.⁴⁵

Conversely, different regimes may share similar purposes, institutions, practices, and rules. Given a general consensus on the purposes and elements of a thin theory, one would expect of course a certain amount of convergence in institutions, practices, and rules. In order to enhance predictability and limit governmental arbitrariness, China has established many of the same mechanisms for controlling administrative discretion as have other regimes.⁴⁶ It has also enacted a number of administrative laws modeled on comparable laws in the United States and Europe.

Notwithstanding the wide variation within particular regime types on the one hand and the overlap among different regime types on the other, the ideological differences that underlie different thick conceptions of rule of law tend to be reflected in variations in institutional arrangements, practices, rules, and most importantly in outcomes. Indeed, even if China imported wholesale U.S. institutions and legal doctrines, the outcomes in particular cases would still differ because of fundamental

ed., 2000); Barret McCormick & David Kelly, *The Limits of Anti-Liberalism*, 53 J. ASIAN STUD. 804 (1994).

45. See, e.g., KENNETH F. WARREN, *ADMINISTRATIVE LAW IN THE AMERICAN POLITICAL SYSTEM* 310 (1982) (“[A]dministrative agencies, much to the dismay of those who endorse a clear separation of powers in government, have legislative, judicial and administrative powers.”).

46. Randall Peerenboom, *Globalization, Path Dependency and the Limits of Law: Administrative Law Reform and Rule of Law in the People's Republic of China*, 19 BERKELEY J. INT'L L. 161 (2001).

differences in values, political beliefs, and philosophies. The four ideal types, therefore, serve a heuristic purpose in capturing some of the basic differences between alternative thick conceptions of rule of law in the PRC.

For comparison purposes, I refer to a rule by law regime where relevant. Rule by law systems come in different varieties as well. The legal system during the Mao era, particularly during the Cultural Revolution, exemplified an extreme version that, at times, could hardly be described as a rule by law legal system, which implies some form of law-based order.⁴⁷ Notwithstanding variation within the category of rule by law, rule by law is distinguishable from rule of law systems in that the former rejects the central premise of rule of law: that law is to impose meaningful limits on even the highest government officials. Nevertheless, a rule by law system, especially a more moderate form than that of the Mao era, may share some features with some versions of rule of law, particularly the Statist Socialist and Neo-Authoritarian ones; for example, the rejection of elections in favor of single party rule. This is hardly surprising given that institutions, rules, or practices may serve more than one purpose or end. In some cases, however, certain features may appear to be the same but differ in degree or the role they play in rule of law and rule by law regimes. For instance, while Communitarians accept some limits on civil society, the limits are much more restrictive in a rule by law system, even a moderate rule by law regime. Similarly, a rule by law system aims at a much higher degree of thought control than the others.

A. *The Economic Regime*

Although all four rule of law variants favor a market economy, they differ with respect to the degree, nature, and manner of government intervention. Notwithstanding the significant differences in the economies of Western liberal democracies that have led neo-institutionalists and political economists to posit varieties of capitalism even within Europe,⁴⁸

47. Chinese commentators often describe the Mao era, or at least the Cultural Revolution period, as rule by man (*renzhi*). However, even during the Cultural Revolution, the legal system continued to exist and limp along. Claims that China fell into a state of legal anarchy and legal nihilism are overstated. In any event, my concern here is not with the distinction between rule of man and Mao era rule by law. More relevant for present purposes is the opposite end of the rule by law spectrum, where rule by law arguably butts up against rule of law.

48. For an assessment of the variety of capitalism literature, see Peter Hall, *The Political Economy of Europe in an Era of Independence*, in *CONTINUITY AND CHANGE IN CONTEMPORARY CAPITALISM* (Herbert Kitschelt et al. eds., 1999); J. Roger Hollingsworth & Robert Boyer, *Coordination of Economic Actors and Social Systems of Production*, in *CONTEMPORARY CAPITALISM: THE EMBEDDEDNESS OF INSTITUTIONS* (J. Rogers Hollingsworth & Robert Boyer eds., 1997). On the importance of institutions to economic development, see generally

economies in liberal democratic States tend to be characterized by minimal government regulation intended primarily to correct market failures, a clear distinction between the public sphere and private commercial sphere, and limited administrative discretion to interfere in private business.

In contrast, economic growth in many Asian countries, including China, has been attributed to a form of managed capitalism in which the State actively intervenes in the market, government officials blur the line between public and private spheres by establishing clientelist or corporatist relationships with private businesses, and universal laws are complemented—and sometimes supplanted—by administrative guidance, vertical and horizontal relationships, and informal mechanisms for resolving disputes.⁴⁹ In these Asian development States, the government relies on its licensing power and control over access to loans, technology, and other information and inputs to steer companies in the direction determined by the State. In some cases, the government champions particular companies or sectors of the economy and may also have a direct or indirect economic interest in certain companies. Of course there is considerable variation in the amount, nature, and form of government intervention in Asian countries. Hong Kong's economy has been as *laissez-faire* as any in the West. On the whole, however, Asian governments have taken a more interventionist approach to managing the economy.

China's economy is now heavily regulated and characterized by clientelism and corporatism.⁵⁰ Moreover, governments at all levels have both direct and indirect economic interests in companies. To be sure, there is considerable debate about the merits of such heavy government

DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE, AND ECONOMIC PERFORMANCE (1990).

49. See, e.g., John Gillespie, *Law and Development in "the Market Place": An East Asian Perspective*, in *LAW, CAPITALISM AND POWER IN ASIA*, *supra* note 5, at 118, 123; Carol Jones, *Capitalism, Globalization and Rule of Law: An Alternative Trajectory of Legal Change in China*, 3 *SOC. & LEGAL STUD.* 195, 212 (1994). Whether Asian countries grew because of, or in spite of such practices is, of course, much contested.

50. See, e.g., DAVID WANK, *COMMODYING COMMUNISM: BUSINESS, TRUST, AND POLITICS IN A CHINESE CITY* (1999) (describing the importance of clientelism for private businesses in Xiamen). Corporatism has been put to three main, quite different uses, in China. Some analysts have used it as it has been used elsewhere—as a way of looking at State-society relations and as a measure of civil society. See, e.g., Jonathan Unger & Anita Chan, *China, Corporatism, and the East Asian Model*, 33 *AUSTL. J. CHINESE AFF.* 29 (1995). Others have used it as a way of understanding East Asian statist models of economic development. See, e.g., MARGARET PEARSON, *CHINA'S NEW BUSINESS ELITE: THE POLITICAL CONSEQUENCES OF ECONOMIC REFORM* (1997). Still others have used it to explain local forms of government-business relations. Jean Oi, for instance, uses corporatism to capture the way in which local governments have treated the local economy as a single corporate entity. JEAN OI, *RURAL CHINA TAKES OFF* (1999); see also Andrew G. Walder, *The County Government as an Industrial Corporation*, in *ZOUPING IN TRANSITION* 62 (Andrew G. Walder ed., 1998).

intervention and close government-business relations. While a more *laissez-faire* economy has its supporters, there is ample support for the view that China's transition from a centrally planned economy to a market economy requires a strong (Neo-Authoritarian) government able to make tough decisions without fear of having to appease the electorate.⁵¹ Although Statist Socialists and Neo-Authoritarians (and rule by law proponents) are most likely to adopt such views, most Communitarians also support them. By way of comparison, Statist Socialists arguably favor a higher degree of government regulation than Neo-Authoritarians and Communitarians.

Statist Socialists and Neo-Authoritarians are more likely to favor corporatist or clientelist relationships between government and business than might Communitarians, on the grounds that it increases the State's control over economic activities. All are nonetheless concerned about the negative effects of corporatism and clientelism, in terms of both economic efficiency and increased corruption. Thus, some shift away from such relationships as they currently exist toward a more open, transparent process based on generally applicable laws is likely, even if there ultimately remains a higher degree of interaction between government and business than in the West.

Public ownership is one pillar, albeit a shaky one, of Jiang Zemin's socialist rule of law State. While all States allow for some public ownership, Statist Socialists favor somewhat higher levels of public ownership, more limitations on the kinds of shares that can be held by private and foreign investors, and more restrictions on private and foreign majority shareholding in certain industries.

B. *The Political Order*

Liberal democracies are characterized by genuine democratic elections for even the highest level of government office, a neutral State in which the normative agenda for society is determined by the people through elections, and a limited State with an expansive private sphere and robust civil society independent of the State.⁵² In contrast, Statist

51. See Sautman, *supra* note 42. For a critique of the alleged advantage of authoritarianism, see Jose Maria Maravall, *The Myth of the Authoritarian Advantage*, 5 J. DEMOCRACY, Oct. 1994, at 17.

52. For a defense of the neutral State, see, for example, Ronald Dworkin, *Liberalism, in PUBLIC AND PRIVATE MORALITY* 113, 127 (Stuart Hampshire ed., 1978); W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). For a critique of the claim that liberal democracy is neutral, see MICHAEL J. PERRY, *MORALITY, POLITICS, AND LAW* 57-73 (1988). That democracy should be neutral is contested by communitarians, conservatives, and philosophical perfectionists. See, for example, Michael Sandel's invocation of John Dewey in Michael Sandel, *Dewey Rides Again*, N.Y. REV. BOOKS, May 9, 1996, at 35 (reviewing ALAN RYAN, *JOHN DEWEY AND THE HIGH TIDE OF AMERICAN LIBERALISM* (1995)). See also MICHAEL SANDEL, *DEMOC-*

Socialism is defined by single party rule: elections at only the lowest level of government and, at present, a nomenklatura system of appointments whereby the highest level personnel in all government organs, including the courts, are chosen or approved by the Party. Rather than a neutral State, the Party in its role as vanguard sets the normative agenda for society, which currently consists of the four cardinal principles: the leading role of the Party, adherence to socialism, the dictatorship of the proletariat, and adherence to Marxism-Leninism-Mao Zedong thought. There is also a smaller private sphere and a correspondingly larger role for the State in supervising and guiding social activities. If Statist Socialists had their way, there would be at most a limited civil society characterized by a high level of corporatist and clientelist relationships with government.⁵³ In these respects, there is little to distinguish Statist Socialists from rule by law advocates, although the latter might favor an even more totalitarian form of government.

Neo-Authoritarians prefer single party rule to genuine democracy. They would either do away with elections, or if that were not politically feasible, limit elections to lower levels of government. If forced to hold national level elections, they would attempt to control the outcome of the elections by imposing limits on the opposition party or monopolizing major media channels. Like the Statist Socialists, they reject the neutral State and favor a large role for the government in controlling social activities. They would nevertheless tolerate a somewhat smaller role for the government and a correspondingly larger civil society, albeit one still subject to restrictions and characterized by clientelism and corporatism.

In contrast, Communitarians favor genuine multiparty democratic elections at all levels of government, though not necessarily right at the moment. Given their fear of chaos, distrust of the allegedly ignorant masses, and lack of requisite institutions, they are willing to postpone elections for the moment and to accept a gradual step-by-step process where elections are permitted at successively higher levels of

RACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY (1996). Similarly, welfare liberals allow for a greater role of the State than classical liberals, whereas libertarians favor an even more restricted role.

53. See Edward X. Gu, "Non-Establishment" Intellectuals, Public Space, and the Creation of Non-Governmental Organizations in China: The Chen Ziming-Wang Juntao Saga, 39 CHINA J. 40 (1998) (noting the limited space for civil society); see also GORDON WHITE ET AL., IN SEARCH OF CIVIL SOCIETY: MARKET REFORM AND SOCIAL CHANGE IN CONTEMPORARY CHINA (1996) (describing close relations of many civil organizations with the State); Tony Saich, *Negotiating the State: The Development of Social Organizations in China*, 161 CHINA Q. 124 (2000) (pointing out that the Leninist tendency to thwart organizational plurality is compounded by the fear of the potential for social unrest resulting from economic reforms, but also observing that the State's capacity to exert formal control is increasingly limited).

government. Like the Statist Socialists and Neo-Authoritarians, they believe State leaders should determine the normative agenda for society, and thus allow a larger role for the State in managing social activities than in a Liberal Democratic State. However, they prefer a somewhat more expansive civil society. Although some groups, particularly commercial associations, might find close relationships with the government helpful, other more social or spiritual groups might not. The latter would be permitted to go their own way, subject to concerns about social order, public morality, and specific harms to members of the group or society at large. Rather than hard or Statist corporatism, Communitarians favor a soft or societal version.⁵⁴

C. Perspective on Rights

Liberal Democrats favor a liberal understanding of rights that gives priority to civil and political rights over economic, social, cultural, and collective or group rights. Rights are conceived of in deontological terms as distinct from and normatively superior to interests.⁵⁵ Rights are considered to be prior to the good (and interests), both in the sense that rights “trump” the good/interests, and in that rights are based not on utility, interests, or consequences, but on moral principles whose justification is derived independent of the good.⁵⁶ To protect individuals and minorities against the tyranny of the majority, rights impose limits on the interests of others, the good of society, and the will of the majority. Substantively, freedom is privileged over order, individual autonomy takes precedence over social solidarity and harmony, and freedom of thought and the right to think win out over both the need for common ground and right thinking on important social issues.⁵⁷ Rights are also emphasized over duties or virtues.

In contrast, Communitarians endorse a communitarian or collectivist interpretation of human rights that emphasizes the indivisibility of rights. Greater emphasis is placed on collective rights and the need for economic growth, even at the expense of individual civil and political

54. For a discussion of hard or Statist corporatism versus soft or societal corporatism, see HOWARD J. WIARDA, *CORPORATISM AND COMPARATIVE POLITICS: THE OTHER GREAT “ISM”* (1997); Philippe Schmitter, *Still the Century of Corporatism?*, in *THE NEW CORPORATISM* (Frederick Pike & Thomas Stritch eds., 1974).

55. Randall Peerenboom, *Rights, Interests, and the Interest in Rights in China*, 31 *STAN. J. INT’L L.* 359 (1995).

56. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977); JOHN RAWLS, *A THEORY OF JUSTICE* (1971). Of course, not all liberals accept that the right should be privileged over the good or endorse a deontological theory of rights.

57. Randall Peerenboom, *Confucian Harmony and Freedom of Thought*, in *CONFUCIANISM AND HUMAN RIGHTS* 234 (William Theodore de Bary & Tu Weiming eds., 1998).

rights.⁵⁸ Rather than a deontological conception of rights as anti-majoritarian trumps on the social good, rights are conceived of in utilitarian or pragmatic terms as another type of interest to be weighed against other interests, including the interests of groups and society as a whole.⁵⁹ Accordingly, stability is privileged over freedom, social solidarity and harmony are often more important than autonomy and freedom of thought, and the right to think is limited by the need for common ground and consensus on important social issues. Communitarians, Neo-Authoritarians, Statist Socialists, and rule by law advocates also pay more attention than do Liberal Democrats to the development of moral character and virtues and the need to be aware of one's duties to other individuals, one's family, members of the community, and the nation.

Like Communitarians, Neo-Authoritarians and Statist Socialists conceive of rights in utilitarian or pragmatic terms. However, they have a more State-centered view than Communitarians. Statist Socialists, in particular, are likely to conceive of rights as positivist grants of the State and useful tools for strengthening the nation and the ruling regime.⁶⁰ They are also more likely than Neo-Authoritarians to invoke State sovereignty, "Asian Values," and the threat of cultural imperialism to prevent other countries from interfering in their internal affairs while overseeing the destruction of the communities and traditional cultures and value systems that they allegedly defend.⁶¹ Communitarians and

58. Jack Donnelly refers to the perceived need to limit individual civil and political rights to ensure development as the "liberty tradeoff." See Jack Donnelly, *Human Rights and Asian Values: A Defense of "Western" Universalism*, in *THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS* (Joanne R. Bauer & Daniel Bell eds., 1999).

59. Peerenboom, *supra* note 55, at 361.

60. See Edwards, *supra* note 28; Andrew Nathan, *Sources of Chinese Rights Thinking*, in *HUMAN RIGHTS IN CONTEMPORARY CHINA*, *supra* note 28, at 125.

61. The debate over "Asian Values" has tended to produce more heat than light. Supporters of universal human rights dismiss the claims of Asian governments as the self-serving rhetoric of dictators, misrepresenting their position as a morally reprehensible and philosophically absurd anything-goes cultural relativism. Defenders of "Asian Values" respond by attacking Western governments for past and present violations of human rights, and accuse them of cultural imperialism and ethnocentricity. Clearly, authoritarian regimes have at times used the rhetoric of "Asian Values" for self-serving ends, playing the culture card to deny citizens their rights and to fend off foreign criticism. Just as clearly, there are many different voices within Asia, and anyone professing to speak for all Asians or of "Asian Values" runs the danger of discounting these voices. Yet, we need to be careful not to dismiss "Asian Values" as merely a cynical strategy seized on by authoritarian regimes to deny Asian citizens their rights. That some Asian governments use culture as an excuse to deny citizens their rights speaks to the motives of the governments but tells us little about the substantive merits of their position. A government's invocation of "Asian Values" may be politically motivated and yet still accurately reflect the views of the majority of the people. Indeed, Asian governments would not appeal to "Asian Values" unless such values resonated with the attitudes of their constituency. More philosophical and nuanced accounts point out that whatever Asian

Neo-Authoritarians in China are nevertheless likely to object to strong-arm politics and the use of rights to impose culture-specific values on China, or to extract trade concessions in the form of greater access to Chinese markets.⁶² Like Communitarians, Neo-Authoritarians and Statist Socialists also privilege order over freedom. They go even farther than Communitarians, however, in tilting the scales toward social solidarity and harmony rather than autonomy, and are willing to impose more limits on freedom of thought and the right to think. While Neo-Authoritarians would restrict the right of citizens to criticize the government, Statist Socialists would impose such broad restrictions that criticism of the government would be, for all practical purposes, prohibited. Indeed, Statist Socialists much prefer unity of thought to freedom of thought, and right thinking to the right to think.⁶³ Were it possible, without undermining their other goals such as economic growth, they would return to the strict thought control rule by law regime of the Mao era. At minimum, they draw the line at public attacks on the ruling party or challenges to single party socialism. Despite the changes in society over the last twenty years that have greatly reduced the effectiveness of "thought work," they continue to emphasize its importance to ensure common ground and consensus on important social issues defined by the Party line.⁶⁴

The rule by law regime of the Mao era differed from any of these rule of law regimes in considering the concept of rights as a bourgeois liberal device to induce false consciousness in the proletariat. Although the Mao regime included some rights in its various constitutions, such rights were considered programmatic goals to be realized at some future date. In addition, duties were privileged over rights, especially duties to

governments' political motivations, there are legitimate differences in values at stake. See, e.g., Joseph Chan, *The Asian Challenge to Universal Human Rights: A Philosophical Critique*, in HUMAN RIGHTS AND INTERNATIONAL RELATIONS IN THE ASIA-PACIFIC REGION 25, 38 (James T.H. Tang ed., 1995); Randall Peerenboom, *Human Rights and Asian Values: The Limits of Universalism*, 7 CHINA REV. INT'L. 295 (2000). See generally THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS, *supra* note 58; YASH GHAI, ASIA FOUNDATION'S CENTER FOR ASIA PACIFIC AFFAIRS, OCCASIONAL PAPER NO. 4, HUMAN RIGHTS AND GOVERNANCE: THE ASIA DEBATE (1994); Davis, *supra* note 40, at 115-31.

62. In a survey of 547 students from thirteen universities in China, 82% claimed that for other countries to initiate anti-China motions before the U.N. Commission on Human Rights constituted interference in China's internal affairs; 71% believed that the true aim of the United States and other countries in censuring China was to use the human rights issue to attack China and impose sanctions on it, with 69% maintaining that this constituted a form of power politics. See *Students' Attitudes Toward Human Rights Surveyed*, BBC SUMMARY OF WORLD BROADCASTS, FE/3525 G/17 (May 4, 1999).

63. Peerenboom, *supra* note 57.

64. DANIEL LYNCH, AFTER THE PROPAGANDA STATE: MEDIA, POLITICS, AND "THOUGHT WORK" IN REFORMED CHINA (1999).

the State; civil society was extremely limited; and efforts at thought control were pervasive.

D. Purposes of Rule of Law

Proponents of the various conceptions see rule of law serving certain similar purposes: enhancing predictability and certainty, which promotes economic growth and allows individuals to plan their affairs, preventing government arbitrariness, increasing government efficiency and rationality, providing a mechanism for dispute resolution, protecting individual rights, and bolstering regime legitimacy. They differ, however, with respect to the priorities of the various purposes, their degree of support or enthusiasm for any given purpose, and the details of how the goals are interpreted. Broadly stated, Liberal Democrats emphasize the role of rule of law in limiting the State while protecting the individual against government arbitrariness, whereas Communitarians favor a more balanced role for rule of law as a means of both limiting and strengthening the State. In contrast, Neo-Authoritarians place somewhat greater emphasis on the State-strengthening aspect, which is assigned an even higher priority by Statist Socialists.

Indeed, although Statist Socialists accept—at least in theory—the primary requirement of rule of law that government officials and citizens alike are subject to law and must act in accordance with it, they accept such limits grudgingly. Not surprisingly, to date the reach of the law has been limited, with high-level government officials typically subject to a separate system of Party discipline rather than to the formal legal process. Moreover, while Statist Socialists appreciate the benefits of limiting government arbitrariness, they also prefer a system that allows them sufficient flexibility to pursue their legitimate, and sometimes illegitimate, ends. Although they regularly declare that rule of law is necessary to protect individual rights, it is not a high priority. The ability of the legal system to protect individual rights is therefore severely hampered by their statist conception of rights and extreme emphasis on stability and order over freedom.

Differences in the purposes of rule of law are evident in the weights attached to stability. All—even Liberal Democrats—agree that stability is important. Clearly one purpose of law in Western traditions has been to prevent anarchy and a Hobbesian war of all against all. China, for its part, has suffered tremendous upheaval in the last 150 years, from the uprisings against and eventual collapse of the Qing to the chaos and internal struggles of the Republican period to the turbulence of the anti-rightist movement, the Great Leap Forward, and the Cultural Revolution of the Mao era. With a quarter of the world's population, many of them

below or near the poverty level, China (and the rest of the world) can hardly afford political chaos or anarchy. Current economic reforms have already resulted in massive unemployment and rising unrest. As reforms continue and unemployment rises, the potential for traumatic disruptions of the social order increases.⁶⁵

Rule of law could serve the goal of stability in a variety of ways. First, it could limit arbitrary acts of government. One major source of instability in the last fifty years has been the Party itself and the arbitrariness of senior leaders. One of the main reasons for promoting rule of law after the death of Mao was to avoid the chaos of the Cultural Revolution where the whims of Party leaders substituted for laws. Rule of law is meant to make governance more regular and predictable. It is also needed to address the perennial problem confronting socialist regimes of political succession.⁶⁶ Whereas the death of Mao set off a struggle for power, rule of law is supposed to ensure a more seemly and seamless transition of power.⁶⁷

Rule of law also serves stability by regularizing central-local relations. Conflicts between the central and local governments have increased dramatically as a result of economic reforms that have given local governments both more authority and responsibility. In their desire to promote local economic development, local governments regularly ignore central laws and policies, issue regulations that are inconsistent with national level laws, or engage in local protectionism. While there seems little chance of the central government losing control over local governments to the point where local governments emerge as Republican-era type warlords, as some alarmists have suggested, authority has become fragmented to such an extent that China arguably now has a de facto federalist form of government.⁶⁸ Predictably, Jiang Zemin and other Statist Socialists emphasize the value of rule of law as a means of disciplining local governments and recentralizing power.

65. For an analysis of the likelihood of China becoming unstable and the factors that might contribute to it, see Shambaugh, *supra* note 44. The contributors discuss conflicts among the ruling elite and government-military relations, the declining role of the Party at the grass-roots level, economic reforms, urban and rural unrest, and minority regions.

66. Wang, *supra* note 13, at 119.

67. In fact, the transition from Deng to Jiang was relatively smooth, as has been the recent shuffling of top leaders, including Li Peng's move from the State Council to the National People's Congress (NPC) when his term expired. To be sure, one could question what, if anything, rule of law had to do with it. Nevertheless, the fact that there are term limits does provide the backdrop against which political maneuvering occurs. In any event, the hope is that in the future, succession will proceed in accordance with legal rules, and that when senior officials reach the end of their terms they will step down or move to another post as required by law.

68. See YASHENG HUANG, *INFLATION AND INVESTMENT CONTROLS IN CHINA* (1996).

On the other hand, some scholars note that stability is often a code word in Chinese politics for greater centralization of power, an emphasis on collective over individual rights, and continued Party dominance.⁶⁹ In this view, the government's emphasis on stability is overstated and is really just an attempt to limit challenges to Party rule. Former Vice Director of China Academy of Social Sciences, Li Shenzhi, for instance, argues that subsistence is no longer such a major problem and therefore more emphasis should be placed on political reform and citizens' civil and political rights.⁷⁰ Similarly, Yu Keping has argued that political reform need not lead to instability.⁷¹ To some extent, the differences turn on empirical issues. How unstable is China? How likely is it that the activities of any one dissident, or even a group of dissidents, could endanger national security? They also reflect fundamental differences in values. Although all appreciate the need for stability, liberals would place greater importance on freedom whereas Statist Socialists, Neo-Authoritarians, and Communitarians would privilege, to varying degrees, order over freedom.

Broad agreement over other purposes also gives way to subtle differences upon further probing. All agree, for instance, that predictability and certainty are crucial for economic growth. Yet, predictability and certainty may serve other purposes as well. Liberal Democrats value predictability because it enhances freedom by allowing people to plan their affairs and realize their ends in life, thus promoting human dignity.⁷² Underlying this view is a liberal view of the self as a moral agent that emphasizes autonomy and the importance of making moral choices. Not all ethical traditions share this view of the self or place such importance on making choices. The dominant Chinese view of the self as social, and the Confucian emphasis on doing what is right rather than the right to choose, call into question justifications of rule of law that appeal to this interpretation of human dignity.⁷³ Of course, the ability to plan

69. Noting that the Party contends that stability entails the continued dominance of the Party, Stanley Lubman has pointed out that the rule of law co-exists in the Constitution with the ideals of Mao Zedong and Deng Xiaoping. STANLEY LUBMAN, *BIRD IN A CAGE: LEGAL REFORMS IN CHINA AFTER MAO* (1999). Shi Taifeng asserts that whereas the purpose of rule of law is to limit the State, in China the purpose of rule of law is to ensure stability and that the current regime remains in power. This view is typical of the Statist Socialist variety but not of the others. *Establish a Socialist Rule of Law State*, *supra* note 10, at 13.

70. Li Shenzhi, *Yei Yao Tuidong Zhengzhi Gaige [Push Ahead with Political Reforms Too]*, in *POLITICAL CHINA*, *supra* note 15, at 21.

71. Yu Keping, *Zouchu "Zhengzhi Gaige-Shehuiwending" de Liangnan Jingdi [A Way Out of the Dilemma: "Political Reform-Social Stability"]*, in *POLITICAL CHINA*, *supra* note 15, at 49-53.

72. FINNIS, *supra* note 15, at 272; RAZ, *supra* note 2, at 221.

73. See Peerenboom, *supra* note 57, at 245. Joseph Chan, for example, develops a Confucian alternative to a liberal or Kantian conception of moral autonomy. The former is a more

one's affairs is valuable, to some degree, in China.⁷⁴ However, the weight attached to the ability to plan one's affairs and the reasons given in support are likely to differ between Liberal Democrats and the others, with Statist Socialists assigning it the least weight.⁷⁵

Similarly, all hope that rule of law will enhance the legitimacy of the ruling regime. However, by allowing elections and ample opportunities for public participation in lawmaking, administrative rulemaking, and interpretation and implementation processes, legitimacy for Liberal Democrats and Communitarians is based on consent. In contrast, in the absence of elections and with only limited opportunities for public participation, legitimacy for Statist Socialists and Neo-Authoritarians is primarily performance based: that is, legitimacy depends on whether the laws, the legal system, and the regime as a whole, produce good results.⁷⁶

In contrast, in a rule by law regime, law is merely a tool to serve the interests of the State, and there are no meaningful legal limits on the rulers. Law serves the State by enhancing government efficiency, although that goal is often compromised by the heavily politicized nature of law and the dominance of policy. Law is not meant to protect the rights of individuals. Whereas rule of law regimes rely on the courts to resolve disputes, in the Mao era, for example, the formal legal system was used primarily to suppress enemies. Disputes among the people were settled through mediation, and economic conflicts between State-owned entities were resolved administratively or by Party organs.

E. *Institutions and Practices*

According to Max Weber, the defining feature of a modern legal system that merits the label rule of law is autonomy. Law is distinct from politics, and independent judges decide cases impartially in accordance with generally applicable laws using a distinct type of legal reasoning. To be sure, the line between politics and law is not always a clear one, as

minimal conception of autonomy than the latter, and supports civil liberties to a lesser degree. Joseph Chan, *Moral Autonomy, Civil Liberties, and Confucianism*, 52 PHIL. E. & W. (forthcoming 2002).

74. See, e.g., Liu, *supra* note 13.

75. A survey of academics, think tank experts, officials, businesspersons, journalists, and religious and cultural leaders found significant differences between Asians and Americans. The former chose an orderly society, harmony, and accountability of public values, in descending order, as the three most important societal values. In contrast, the Americans chose freedom of expression, personal freedom, and the rights of the individual. See Susan Sim, *Human Rights: Bridging the Gulf*, STRAITS TIMES (SING.), Oct. 21, 1995.

76. Jiang Zemin seems to believe that rule of law can help shore up the regime's legitimacy in a more direct way by providing a normative basis for a market economy.

Critical Legal Scholars repeatedly remind us.⁷⁷ Nevertheless, as Alice Tay observes, “The difference between law and decree, between government proclamation and administrative power on the one hand and the genuine rule of law on the other, is perfectly well understood in all those countries where rule of law is seriously threatened or has been abolished.”⁷⁸

While the outer extremes between a system dominated by politics—such as the legal system in the Mao era, particularly during the Cultural Revolution—and a rule of law system in which legal institutions and actors enjoy a high degree of autonomy are reasonably clear, there is considerable room for variation in the middle. Advocates of alternative conceptions of rule of law are likely to disagree over where to draw the line between law and politics due in part to their divergent views about the economy, the political order, the nature and limits of rights, and the purposes that law is meant to serve.

Liberal Democrats favor a high degree of independence and autonomy. The legislature that makes laws is freely elected rather than appointed by the ruling party. The judiciary as a whole and individual judges are independent. Judges generally enjoy lifetime tenure and can be removed only for limited reasons and in accordance with strict procedures. The appointment process is relatively non-politicized.⁷⁹ There are a variety of mechanisms for reining in administrative discretion, and the legal system is capable of holding even top-level government officials accountable. The legal profession is independent and often self-governing.

At the other end of the spectrum, Statist Socialists favor only a moderate to low level of separation between law and politics. In keeping with the minimal requirements of rule of law, Chinese Communist Party (CCP) policy is now to be transformed into laws and regulations by entities authorized to make law in accordance with the stipulated procedures for lawmaking,⁸⁰ whereas in the Mao era CCP policies substituted for or trumped laws.⁸¹ Although the legislature is not freely

77. See generally *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* (David Kairys ed., 3d ed. 1998).

78. Alice Ehr-Soon Tay, *Communist Visions, Communist Realities, and the Role of Law*, 17 *J.L. & Soc'y* 155 (1990).

79. In practice, the degree of politicization varies widely from country to country. See *JUDICIAL INDEPENDENCE: THE CONTEMPORARY DEBATE* (Shimon Shetreet & Jules Deschenes eds., 1985).

80. The greater reliance on laws rather than CCP policy is widely acknowledged to be one of the hallmarks of the post-Mao era. See, e.g., Thomas Jones & Susan Finder, *PRC Law: A Millennium Retrospective*, 13 *CHINA L. & PRAC.* 53, 54 (Dec.–Jan. 1999–2000).

81. See Michel Oksenberg, *Policy Making Under Mao, 1949–68: An Overview*, in *CHINA: MANAGEMENT OF A REVOLUTIONARY SOCIETY* (John M. H. Lindbeck ed., 1971);

elected, Party influence on the lawmaking processes has diminished radically since the beginning of reforms.⁸² To be sure, like ruling parties in parliamentary systems in other countries, the Party is able to ensure that major policy initiatives become law when it is united and willing to expend the political capital to do so.⁸³

Statist Socialists also favor a more limited judicial independence. Courts have a functional independence in the sense that other branches of government are not to interfere in the way courts handle specific cases. Unlike the Mao era, courts may decide cases without Party approval of the judgment.⁸⁴ However, the courts may still be subject to macro-supervision by the National People's Congress (NPC), the procuracy, and other State organs, and even Party organs. While the courts as a whole enjoy limited functional independence, the autonomy and independence of individual judges is even more restricted. Accordingly, a panel of judges decides most cases, and a special adjudicative supervision committee within the court has the right to review particular decisions in case of manifest error.

The legal profession is granted a similar partial independence. Although not the "workers of the State" of the Mao era, lawyers still must meet political correctness standards to practice law and pass the annual inspection test.⁸⁵ While the Ministry of Justice (MOJ) shares responsibility for supervising the legal profession with lawyers associations, the MOJ retains most of the authority, including the power to punish lawyers. In part because of such political reasons, but mainly due simply to

KENNETH LIEBERTHAL & MICHEL OKSENBERG, *POLICY MAKING IN CHINA: LEADERS, STRUCTURES AND PROCESSES* (1988).

82. See MURRAY SCOTT TANNER, *THE POLITICS OF LAWMAKING IN CHINA* (1999); Michael Dowdle, *The Constitutional Development and Operations of the National People's Congress*, 11 COLUM. J. ASIAN L. 1 (1997).

83. See P. P. CRAIG, *ADMINISTRATIVE LAW* 74 (3d ed. 1994) (expressing the idea that "the government can always ensure that its policies become law in much the way that it desires"); G. Craenen, *Legislators*, in *THE INSTITUTIONS OF FEDERAL BELGIUM* 71, 77 (G. Craenen ed., 1996) (describing a change in center of gravity away from the Parliament to the Executive such that the latter is able to "push its initiatives to the foreground and to obtain from Parliament what it considers necessary" and arguing that Parliament's main function is now less legislative and more to keep the government in check). This is not to claim that the Party is on all fours with ruling parties in parliamentary liberal democracies.

84. In fact, Party interference in specific cases is rare; interference by government officials motivated by local protectionism is much more common. See FAZHI DE LIXIANG YU XIANSHU [THE IDEAL AND REALITY OF RULE OF LAW] (Xiangrui Gong ed., 1993) [hereinafter IDEAL AND REALITY OF RULE OF LAW].

85. See RANDALL PEERENBOOM, *LAWYERS IN CHINA: OBSTACLES TO INDEPENDENCE AND THE DEFENSE OF RIGHTS* (1998) (noting there are no reported cases in which a political litmus test was invoked to deny a license).

corruption and rent-seeking by the MOJ and its local affiliates, lawyers try to forge close clientelist relations with the MOJ.⁸⁶

In the administrative law area, government officials are granted considerable discretion, in part so that they may be more responsive to shifts in Party policy, but mainly for other reasons, such as the need to respond quickly and flexibly to a rapidly changing economic environment.⁸⁷ Limits on civil society, freedom of the press, and public participation in the law-making, interpretation, and implementation processes make it difficult for the public to monitor government officials. The lack of elections eliminates whatever leverage the public has over officials resulting from the possibility of voting the current government out of office.

Neo-Authoritarians prefer a moderate separation between law and politics. As with Statist Socialism, the legislature is not elected. However, Neo-Authoritarians favor greater judicial independence than Statist Socialists, although many would still limit the independence of the courts and individual judges in various ways. For instance, they may prefer China's unitary system in which the NPC is supreme and exercises supervision over the courts to a U.S.-style separation of powers system. On the other hand, they support the development of a more professional and honest civil service, and an administrative law system capable of reining in wayward government officials and combating corruption.⁸⁸ They also advocate greater public participation and more expansive—though still limited—freedom of association, speech, and the press so that the public can play a greater role in monitoring government officials.

The primary purpose of administrative law, however, remains rational and efficient governance, rather than protection of individual rights. The elite corps of civil servants is given considerable flexibility in formulating and implementing administrative rules, which are the main form of legislation in daily governance. The legal profession would be granted limited independence and subject to supervision by the MOJ, albeit a cleaner and more professional one. Nevertheless, lawyers would still seek to establish clientelist ties to the MOJ due to its control over licensing for special forms of business and other commercial reasons.⁸⁹

86. See Randall Peerenboom, *Law Enforcement and the Legal Profession*, in *IMPLEMENTATION OF LAW IN THE PEOPLE'S REPUBLIC OF CHINA* (Chen Jianfu et al. eds., 2001) (discussing rent-seeking and importance of clientelist ties to justice ministry and bureaus).

87. This paragraph depicts the current situation. See Peerenboom, *supra* note 46.

88. See, e.g., Pan, *supra* note 34. Statist Socialists might also favor an honest and professional civil service, though they may put greater emphasis on ideology and political factors in appointing civil servants and prefer that Party discipline committees be responsible for dealing with corruption among senior officials.

89. Communitarians share a view of the legal profession similar to the Neo-Authoritarians, though they view the legal profession's obligations as being more toward

Communitarians prefer a moderate to high degree of separation between law and politics. The legislature would be freely elected. There would be ample opportunities for public participation in rule creation, interpretation, and implementation. The public would also be able to throw out a government that is corrupt or performs poorly; as a whole, the administrative law system would be sufficiently strong to hold even top level government officials accountable. Although Communitarians are sympathetic to the argument that a strong economy—particularly in times of transition—requires a strong executive, they balance the need for efficient government against the need to protect individual rights. Moreover, like the Liberal Democrats, they support an autonomous judiciary, with life tenure for judges and relatively apolitical processes for appointing and removing judges. At the same time, they reject the liberal notion of a neutral State. Accordingly, they favor the practice whereby courts decide cases in light of a substantive moral agenda for society determined by the ruling elite. In that sense, they do not differ from Statist Socialists or Neo-Authoritarians.⁹⁰

Rather, what distinguishes them is the particular normative agenda. The Communitarians believe that judges should emphasize harmony, stability, and the interests of the community over the interests of individuals, as well as economic development. Neo-Authoritarians and State Socialists agree in general but place more emphasis on economic development and upholding the authority of the State. In particular, Statist Socialists insist that the courts uphold the four cardinal principles—a position not supported by either Neo-Authoritarians or Communitarians.

F. Rules

Although there is room for disagreement among Liberal Democrats on specific issues, on the whole Liberal Democrats prefer liberal laws. Liberal laws provide strong protections for broadly defined civil and political rights. For some, free speech may be subject to only narrow time, place, and manner restrictions. Social groups are free to organize without having to register with government authorities. Persons accused of crimes have the right to a lawyer, who may be present at all stages of formal interrogation; the accused may only be held for a very limited

society than the State and differ over specific issues, such as when lawyers' obligations to the State and society will trump their obligations to their clients.

90. LAW, CAPITALISM AND POWER IN ASIA, *supra* note 5, at 19 (arguing that judicial independence in East Asia is influenced by a statist ideology that rejects the liberal notion of a neutral State in favor of a paternalist State which grounds its legitimacy in its superior ability to fathom what constitutes "the good" for society; thus, Jayasuriya claims, courts are more likely to serve as an instrument for the implementation of the policy objectives of the State and ruling elite).

time without being charged; and the State may not rely on illegally obtained evidence in making its case. Euthanasia laws may allow individuals to choose to end their life or to ask others to assist them in doing so. Parents may keep their children out of the schools and educate them at home if they choose.

Communitarians, Neo-Authoritarians, and Statist Socialists all endorse laws that limit individual freedom to one extent or another. All allow registration requirements for social groups to ensure public order. All accept substantive limits on speech as well as time, place, and manner of speech. No one is free to walk into a courtroom with a jacket that says, "Fuck the Draft" on it.⁹¹ Flag burning is outlawed. The accused has a right to a lawyer, but only after the police have had an initial opportunity to question them. The accused may be held for longer periods without being charged, and the period may be extended upon approval by the authorities. Illegally obtained evidence may be used in certain instances, though forced confessions and police torture are not allowed. Children are required to attend State-authorized schools, and to study a curriculum approved by the Ministry of Education. More controversially, Statist Socialists and Neo-Authoritarians—and perhaps even Communitarians—endorse broadly drafted laws to protect the State and social order, such as State secrets laws and prohibitions against endangering the State.

G. Outcomes in Specific Cases

Institutions in a broad sense include ideology, purposes, organizational structures and cultures, norms, practices, rules, and outcomes in specific cases.⁹² Although I have separated them for the sake of a clearer exposition, in reality they overlap and blend together, as evidenced by the following examples concerning constitutional, administrative, and criminal law.⁹³

In general, constitutions in socialist countries have played a very different role than constitutions in Liberal Democratic rule of law States, in

91. In *Cohen v. California*, 403 U.S. 15 (1971), the U.S. Supreme Court held that an individual's right to free speech extends to wearing a jacket with "Fuck the Draft" on it in court, even though others may find such language offensive.

92. NORTH, *supra* note 48.

93. Indeed, focusing on each dimension separately is somewhat misleading. While different regime types tend to be correlated with different institutions and rules, in some cases advocates of alternative conceptions of rule of law might espouse seemingly similar purposes or adopt similar institutions or rules. Yet in practice the outcomes will still differ widely. This is to be expected in that there is generally some degree of indeterminacy to legal rules. Thus, even in the United States, for example, conservative judges are likely to come to different conclusions in some cases than liberal judges, notwithstanding the fact that they share the same institutional context.

part because socialist States have made little pretense of abiding by the basic requirements of rule of law and accepting any constitutional limits on the ruling regime's power.⁹⁴ Reflecting their origins in Enlightenment theories of social contract, liberal constitutions emphasize a limited State and a separation between State and society. Rule of law plays a central role in imposing limits on the State and protecting the individual against an overreaching government by ensuring that the State does not encroach on the fundamental rights of individuals set out in the constitution. Liberal constitutions set out fundamental principles that are supposed to stand the test of time, including the basic rights of citizens.

In contrast, socialist constitutions are characterized by frequent change. The frequent change in socialist constitutions is consistent with socialist legal theory, which conceives of law as a superstructure reflecting the economic basis of society and in particular the ownership of the material modes of production. When the economic base changes, law—and the constitution—must change accordingly. Moreover, because Marxism posits an evolution toward an ideal State, when the economy passes through various stages, amendment of the constitution is expected. In the PRC, the 1978 Constitution was replaced in 1982 by a more market-oriented Constitution that reflected Deng Xiaoping's economic open-door and reform policies. The 1982 Constitution has subsequently been amended three times as economic reforms have deepened and the economy has steadily moved away from a centrally planned economy toward a more market-oriented economy. Each time the amendments incorporated the more market-oriented policies.

Although changes in PRC constitutions reflect transformations in the economic base of society, they also reflect fundamental shifts in political power. Again, this is entirely consistent with socialist legal theory, which conceives of law as a tool of the ruling class. Whereas in a capitalist society law serves the bourgeoisie, in a socialist State law allegedly serves the people. In a Leninist socialist State, however, the Party acts as the vanguard of the people. Thus law becomes a tool of the Party. The constitution changes when there are major changes in Party leadership or Party policy.⁹⁵ The 1954 Constitution therefore reflected the victory of the CCP and the Party's consolidation of power. The 1975 Cultural Revolution Constitution codified Mao's victory over his opponents and embodied his radical vision for a society that must engage in permanent revolution and ceaseless class struggle to defend socialism against the

94. Yash Ghai, *Constitutions and Governance in Africa: A Prolegomenon*, in *LAW AND CRISIS IN THE THIRD WORLD* 51, 51–52 (Sammy Adelman & Abdul Paliwala eds., 1993).

95. See generally Jerome Cohen, *China's Changing Constitution*, 76 *CHINA Q.* 794 (1978); William Jones, *The Constitution of the People's Republic of China*, 63 *WASH. U. L.Q.* 707 (1985).

enemy within and abroad. The short-lived 1978 Constitution signaled Deng's victory over Mao loyalists, the turn toward a more law-based order, and the need to concentrate on economic development rather than class struggle.

However, Deng had yet to consolidate his power. By 1982, he was firmly in control. Thus the 1982 Constitution confirmed the new emphasis on economic development. It also continued the trend, which began in the 1978 Constitution, to downplay the dominance of the CCP, separate the Party from government, and turn over the functions of day-to-day governance to State organs.⁹⁶ Although the 1982 Constitution incorporated Deng's four cardinal principles, they were placed in the preamble. In contrast, the principles of the supremacy of the law and that no individual or party is beyond the law were incorporated into the body of the Constitution. Nevertheless, the Constitution did not explicitly endorse rule of law, even a socialist rule of law, until the amendment in 1999.

What role the Constitution will play in the future depends in part on which version of rule of law prevails. Should Statist Socialism win out, given the relatively low level of separation between law and politics, the Constitution is likely to continue to change frequently to reflect major changes in policies as determined by State leaders. Because Statist Socialists see rule of law as a means to strengthen the State, the role of the Constitution in protecting rights will remain limited. The Constitution might not be directly justiciable; individuals would generally be able to avail themselves of the rights provided in the Constitution only if such rights are implemented by specific legislation. On the other hand, even if Statist Socialism prevails, the Constitution is likely to play a more important role as a baseline for measuring the legitimacy of State actions. To maintain credibility, the ruling regime will have to take the Constitution more seriously. As a result, the ruling regime will appeal to the Constitution more often to justify its acts. Indicative of the transition toward rule of law, Beijing has already begun to appeal to the Constitution at critical times, including when the government imposed martial law in 1989 and banned Falungong in 1999.

The Constitution will play an even more important role if a Neo-Authoritarian or Communitarian form of rule of law is adopted. Although the tension between strengthening and limiting the State would still be manifest in constitutional law, there would at minimum be greater emphasis on individual rights. As a result, the Constitution would

96. Andrew Nathan, *Political Rights in Chinese Constitutions*, in HUMAN RIGHTS IN CONTEMPORARY CHINA, *supra* note 28, at 77, 112–20.

probably become directly justiciable.⁹⁷ It might also be subject to less change. The process for amending the Constitution would differ, at least for Communitarians. Whereas non-elected State leaders would make the decision to amend the Constitution for Statist Socialists and Neo-Authoritarians, democratically elected representatives would make the decision in a Communitarian State.

Like constitutional law, the administrative law regime will vary depending on which version of rule of law wins out. Until recently in China, the main purpose of administrative law was to facilitate efficient administration. This view has now largely given way to the belief that administrative law must strike a balance between protecting the rights of individuals and promoting government efficiency.⁹⁸ Although the tension between the two goals is evident in every system, how China balances the two will depend on which of the various alternatives of rule of law is adopted. To date, there is very limited public participation in the administrative law process. An Administrative Procedure Law is being drafted, however, that will increase opportunities for public participation. Should the Communitarian or even the Neo-Authoritarian conception prevail, one should expect the law to allow for greater public participation than if the Statist Socialist conception prevailed.

Differences in conceptions of rule of law are also evident in the outcomes of administrative litigation cases. PRC courts have been reluctant to aggressively review administrative decisions. On the whole, they have shown considerable deference to administrative agencies, for example, by interpreting very narrowly the abuse of authority standard for quashing administrative decisions. In particular, they have been reluctant to interpret abuse of authority to include a concept of fundamental rights, as have courts in some Western liberal democracies.⁹⁹ There are many

97. Many PRC scholars maintain that the Constitution should be justiciable. *See, e.g.*, Wang Chenguang, *Falü de kesuxing: Xiandai fazhi guojia zhong falü de tezheng zhiyi* [Justiciability of Law: One Characteristic of a Modern Rule of Law Country], 8 FAXUE YANJIU 18–22 (1998). Interestingly, the Supreme People's Court recently issued a potentially landmark interpretation in its reply to an inquiry from Shandong High People's Court. The Supreme Court stated that the plaintiff's basic right to an education as provided in the Constitution should be protected even though there was no implementing law regarding the right to education. While a number of questions remain as to the Court's interpretation, it would appear that the decision opens the door to parties to directly invoke the Constitution when at least their basic (*jiben*) constitutional rights have been violated, even in the absence of implementing legislation, thus making the Constitution directly justiciable. *See* Supreme People's Court Reply No. 25 (Zuigao Renmin Fayuan Gongbao, Aug. 13, 2001).

98. *See, e.g.*, XIANDAI XINGZHENGFA DE PINGHENG LI LUN [THE BALANCE THEORY OF MODERN ADMINISTRATIVE LAW] (Luo Haocai ed., 1997) [hereinafter BALANCE THEORY OF MODERN ADMINISTRATIVE LAW].

99. Compare CRAIG, *supra* note 83, at 17–18 (claiming the standard of *ultra vires* is being reinterpreted along lines consistent with respect for fundamental rights in the United Kingdom), with Minxin Pei, *Citizens v. Mandarins: Administrative Litigation in China*, 152

reasons for the courts' deference other than ideology, including institutional limits on the power of the courts.¹⁰⁰ Even setting aside the various institutional obstacles, however, PRC courts are less likely than their counterparts in Liberal Democratic States to take full advantage of the abuse of authority standard as a means to protect individual rights and rein in government officials at the expense of government efficiency given the weak support for liberalism in China.

Criminal law is another area where outcomes are especially sensitive to differences in ideology and in the conceptions of rule of law. In light of the importance of stability to most Chinese,¹⁰¹ civil and political rights are likely to be subject to more limits than in Liberal Democratic States. Statist Socialists in particular will object to criticisms of the government that challenge single party socialism. Accordingly, the continued persecution of dissidents is likely to continue if Statist Socialists (and perhaps if Neo-Authoritarians) prevail. At present, the authorities often rely on reeducation through labor (*lao jiao*), an administrative sanction whereby dissidents may be detained for one to three years, with a possible extension for another year, without many of the procedural rights afforded criminal suspects under the Criminal Procedure Law.¹⁰² Although Liberal Democrats object to reeducation through labor, others are likely to support it as necessary for social stability. Hence the complete elimination of reeducation through labor does not appear to be politically feasible at this point. Arguably, the best that Liberal Democrats can hope for is that the process is changed to incorporate more procedural protections of the kind incorporated in the Criminal Procedure Law.

On the other hand, rule of law is not infinitely elastic. Any supporter of rule of law will question the manner in which the government has suppressed dissidents. Even in criminal cases, dissidents are often denied their rights under the Criminal Procedure Law, including a right to an open trial, to communicate with their lawyers and families, and so on.¹⁰³

In short, the outcomes of many particular issues will turn on the specific substantive moral, political, and economic beliefs that define a

CHINA Q. 832, 856 table 12 (1997) (reporting that "abuse of authority" was invoked in only 16 of 219 cases where PRC courts quashed the illegal acts of agencies in comparison to 60 times for "exceeding legal authority," 48 for "insufficient principal evidence," 40 for "incorrect application of law," and even 32 for violation of legal procedures).

100. Peerenboom, *supra* note 46, at 214–18.

101. See LOLLAR, *supra* note 8 and accompanying text; Pei, *supra* note 8 and accompanying text.

102. LAWYERS COMM. FOR HUMAN RIGHTS, OPENING TO REFORM? AN ANALYSIS OF CHINA'S REVISED CRIMINAL PROCEDURE LAW 65–67 (1996).

103. *Id.* at 56–60; see also Human Rights Watch World Report 1998: China (Dec. 8, 1998), available at <http://www.hrw.org/hrw/campaigns/china-98/chn-wr98.htm> (last visited Mar. 21, 2002).

particular thick conception of rule of law. How much criticism of government should be allowed and under what circumstances? Should one be able to use offensive language in public? Should beggars be allowed on the street? Under what circumstances can someone be stopped and searched? Do the police need a warrant to enter your house and, if so, how and when can they obtain one? Must individuals carry an identification card? Is the "anger of the people" a legitimate basis for meting out capital punishment? Should adultery be a crime? Are gay marriages consistent with family values, a way of strengthening a newly envisioned family, or a threat to the very notion of family? Liberal Democrats, Communitarians, Neo-Authoritarians, and Statist Socialists will disagree over these issues and, indeed, there will be many disagreements within any given school of thought, just as there are many disagreements over such issues in countries known for Liberal Democratic rule of law. Despite such disagreements, there is also considerable common ground about the basic requirements of rule of law as captured in thin theories, and general acceptance that rule of law differs from rule by law in that the former entails meaningful legal limits on the government actors.

III. A RESPONSE TO SEVERAL COMMON CRITIQUES

The suggestion that China is in transition toward rule of law, though not a Liberal Democratic rule of law, gives rise to a number of theoretical and practical issues. Some of the criticisms are common to rule of law theories in general. Others are more China-specific.

A. Specifying the Minimal Conditions for Rule of Law: Will We Know Rule of Law in China When We See It?

One common objection to thin versions in China and abroad is that they are inadequately theorized.¹⁰⁴ Even acknowledging considerable agreement about the basic elements, there is still considerable room for disagreement about the details. Some of the elements are vague, a matter of degree, and subject to exceptions. What precisely is meant by consistent? Some laws may not be directly contradictory, but may have inconsistent purposes. Some laws are clearer than others. Sometimes

104. Of course, given the wide diversity of legal systems and the fact that even a thin theory implicates numerous normative and culture-specific issues, the incompletely theorized nature of rule of law theories is both an advantage and a disadvantage. On the positive side, it may allow people who disagree about certain theoretical issues to agree on more specific issues that arise in practice. For instance, one may disagree about what structural arrangements best ensure judicial independence and yet still agree that the current lack of judicial independence is a problem. For a discussion of the virtues of incompletely theorized arguments, see CASS SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 3–7 (1996).

laws are changed and even made effective retroactively.¹⁰⁵ The notion of equality before the law raises the question of equal in what respect: what are the morally and legally relevant factors in deciding whether two people are similarly situated?¹⁰⁶ The general principle of supremacy of the law may in some cases need to give way to higher moral principles and considerations of equity or justified civil disobedience.¹⁰⁷

At times, various elements and goals may conflict. Replacing a number of vague rules with clearer ones would result in greater clarity

105. Stephen Munzer, *A Theory of Retroactive Legislation*, 61 *TEX. L. REV.* 425 (1982).

106. Peter Westen, *The Empty Idea of Equality*, 95 *HARV. L. REV.* 537 (1982).

107. When particular laws may be set aside to secure other values is a difficult theoretical issue. One of the criticisms of rule of law is that it tends to degenerate into rule fetishism. Rule of law promotes obedience to laws, whether such laws are good or bad, appropriate in the particular context or not. Most people, however, would allow that in some cases laws should give way to higher values, though they may disagree about the particular instances when laws should give way, who has the right to decide, the standards for making the decision, whether the discretion ceded the decisionmaker to follow the rules is subject to review and if so by whom, and so forth. See René David, *Source of Law*, in *INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW* (1984) for a discussion of the way different legal systems attempt to incorporate or appeal to higher values.

Just as individuals may differ over such issues, so may societies, given their different ethical traditions. Many of the most dominant Western ethical traditions have tended to focus on establishing the proper rules to guide interpersonal interactions, such as the Ten Commandments, the Kantian Categorical Imperative, the utilitarian principle of maximization of the good, or Rawls's two principles of justice (though there are exceptions of course, including Aristotelian ethics, pragmatism, and situational ethics). Moreover, such rules tend to be abstract and universally applicable to all contexts. Accordingly, many in Western countries who have been influenced by such traditions may be more willing than those influenced by other traditions to accept a narrowly circumscribed rule of law that sacrifices equity and particularized justice for the virtues of generality, equality, impartiality, and certainty that result from limiting the discretion of the decisionmaker. In contrast, Chinese ethical traditions whether Confucian, Daoist, or Maoist, have rejected rule ethics and universal principles in favor of a context-specific, pragmatic, situational ethics. See DAVID L. HALL & ROGER AMES, *THINKING THROUGH CONFUCIUS* (1987); RANDALL PEERENBOOM, *LAW AND MORALITY IN ANCIENT CHINA: THE SILK MANUSCRIPTS OF HUANG-LAO* (1993). In the past, Confucian and Daoist sages were responsible for determining what was best in a given situation based on their own judgment rather than by appeal to fixed laws or universal ethical principles. More recently, socialist leaders and government officials have claimed the same right. Indeed, one of the most striking features of the legal system in China today is the wide discretion ceded government officials to interpret and implement the law.

China may well differ from other countries with respect to the ease with which law may be shoved aside to accommodate other values. (A strict interpretation of rule of law that does not allow for any deviations from the rules will simply result in rule of law giving way to other values more often.) Nevertheless, theoretical disagreement over this issue does not call into question the basic premise that law is to be supreme or that law is meant to constrain the arbitrary acts of the government. To be sure, the effectiveness of law as a restraint on the government will depend in practice on how easily law may be shunted aside. Further, at some point, routine disregard of the law will raise questions as to a society's commitment to rule of law, though it is important to bear in mind that there may be other explanations why laws are not followed in practice, including that the laws are poorly drafted, unworkable in practice, or the product of a bygone era and out of step with present-day realities.

and perhaps predictability in the long run, but would lead to instability and greater unpredictability in the short run. A more fundamental objection is that the notion of “meaningful restraints” on the State and State actors is too vague. Legal systems differ both in the degree and in the nature or manner of restraints on the State and State actors.

Put differently, if we accept, as we must, that implementation of the rule of law ideal is always a matter of degree, then the question arises as to when a system merits the label rule of law. There are several possible approaches to this problem. The first approach tries to provide an account of deviations from the ideal that, individually or collectively, are so serious as to be incompatible with rule of law.¹⁰⁸ It seeks to answer the questions: At what point do (relatively minor) shortcomings and deviations from the ideal of rule of law, taken collectively, tip the scales such that the system no longer merits the label rule of law? Alternatively, are there some types of shortcomings that are so serious that they alone are sufficient to show the absence of rule of law (and the presence of rule by law)? For example, if the president and other senior-most officials are not likely to be impeached or held accountable for illegal acts but all other officials are held accountable, is that an imperfect—even a deeply flawed—rule of law, or simply not rule of law at all? Is a legal system that routinely deprives dissidents and opposition political figures of a fair trial, but handles all other cases in a fair way, a flawed rule of law or an efficient rule by law?

108. If this approach is adopted, then arguably one would also need to address similar issues with respect to the other end of the spectrum. That is, one would need to specify the optimal degree (and, where applicable, the form or type) of transparency, clarity, stability, consistency, and so on for realization of the rule of law ideal. Additionally, such a methodology would require priority rules for dealing with conflicts where improvements with respect to one element—for example, clarity—will have an adverse affect on one or more other elements, such as stability. Given the difficulty of considering all of the conceivable context-specific factors that could influence such choices, whether it would be possible—and if possible, of much practical use—to construct such a detailed formal theory is highly doubtful.

In my view, the elements of a thin theory are sufficiently specified for the present purpose of determining the direction of China’s legal reforms and providing a workable standard for measuring the progress of such reforms. More generally, rather than attempting to further hone the elements into a fully developed ideal thin theory, a more useful approach would be to consider specific cases as they arise in the context of a particular legal system in order to determine whether more clarity or consistency is desirable or the gap between law and practice should be narrowed. Ultimately, my approach is pragmatic: to the extent that a thin rule of law is a useful way of understanding some of the obstacles faced by citizens, investors, or legal reformers in China, or can be used as a metric for cross-cultural comparisons or for analyzing political or economic phenomena, then use it. There is no need to wait for a fully developed thin or thick theory of the rule of law. For the criticism that the rule of law paradigm may hinder more than assist in understanding legal reforms in China, see Donald Clarke, *Alternative Approaches to Chinese Law: Beyond the “Rule of Law” Paradigm*, in WASEDA PROCEEDINGS OF COMPARATIVE LAW: OPEN LECTURE MEETINGS, APRIL 1999–DECEMBER 1999 & SYMPOSIUMS, OCTOBER 1998–DECEMBER 1999, at 2, 145 (1998–1999).

There are considerable theoretical and practical difficulties to this approach. For instance, China's legal system suffers from a number of shortcomings, many of them institutional in nature.¹⁰⁹ As a result, the system falls considerably short of the ideal in terms of such basic requirements as consistency and stability of laws, a reasonably narrow gap between law on the books and law in practice, and the fair application of laws. On the other hand, there has been marked improvement within all of these dimensions. There seems no non-arbitrary way of deciding whether the system should be described as an imperfect rule of law or simply not rule of law at all. Take the requirement of "consistency" as an example. Let us assume that we could show that twenty percent of all local regulations were inconsistent with central laws. Would that be sufficient to disqualify the system from being considered as a rule of law, albeit an imperfect one? What if forty percent or sixty percent or eighty percent of such regulations were inconsistent? Would it matter whether the trend was toward less inconsistency, say if in the past eighty percent of regulations were inconsistent, but now "only" fifty percent were? Would it matter if steps were being taken to reduce the level of inconsistency, as is indeed the case in China? Would the reasons for the high level of inconsistencies matter? During times of economic transition, higher levels are to be expected. Does that somehow make the high level of inconsistencies less objectionable than turf-fighting between administrative agencies or the lack of effective institutions for overturning inconsistent local regulations?

Of perhaps even greater concern is the still limited, albeit increasing, ability of the legal system to impose meaningful limits on government actors. Administrative officials enjoy considerable discretion.¹¹⁰ To be sure, administrative officials everywhere enjoy considerable discretion, and there are good reasons why administrative officials in China should have somewhat greater discretion than officials in countries where the legislature is more developed and the economy is more stable. Even assuming PRC officials should be granted a high degree of discretion, however, such discretion must be subject to legal limits to comply with the requirements of rule of law. Unfortunately, the mechanisms for checking administrative discretion—the letter and petition system, supervision by the media and the Party, administrative reconsideration, administrative supervision, and administrative litigation—remain weak. Nevertheless, the very fact that such mechanisms have been established

109. See LUBMAN, *supra* note 69; William Alford, *A Second Great Wall? China's Post-Cultural Revolution Project of Legal Construction*, 11 *CULTURAL DYNAMICS* 193 (1999); Peerenboom, *supra* note 18.

110. See Peerenboom, *supra* note 46.

represents a major step toward realization of rule of law and away from rule by law. Moreover, although the mechanisms are weak, they are not completely ineffectual. After all, plaintiffs do prevail in administrative litigation in some forty percent of the cases, a rate higher than in the United States, Taiwan, or Japan.¹¹¹

Despite the high success rate, the PRC judiciary at present clearly lacks sufficient independence and authority to hold the highest level senior government officials accountable, at least without the support of the Party.¹¹² Is the limited accountability of senior officials in practice sufficient to deny China's legal system the label of rule of law? After all, even in the United States, senior government officials are frequently not held accountable for their actions. Despite the rhetoric of equality of all before the law, in reality senior government officials often receive special treatment in many countries. One need only consider Gerald Ford's pardoning of Richard Nixon or Bill Clinton's pardoning of former Housing Secretary Henry Cisneros and congressman Daniel Rostenkowski. Indeed, the light slap on the wrist Clinton received for lying under oath—suspension of his license to practice law for five years and a fine of \$25,000—smacks of special privilege.¹¹³

Hilary Josephs concluded in her comparison of legal accountability for corruption in China and the United States that they "are quite alike in their general reluctance to prosecute high officials. Despite fundamental differences in political systems, and a common commitment to equality before the law, those in power are rarely called to task in either country for criminal misconduct associated with discharge of their official du-

111. In 1995, there were 51,370 administrative suits, with the decision of the administrative unit being modified or quashed 15% of the time. In addition, the plaintiff withdrew suit in approximately 23% of the cases when the administrative unit changed its decision prior to judgment. 1997 CHINA LAW Y.B. (Publ'g House of Law, Beijing) 48. Despite the increase in total number of administrative suits to over 90,000 in 1997, the success rate was virtually unchanged, with 15% of the decisions quashed or modified and 25% ending in withdrawal after the agency agreed to change its decision. 1998 CHINA LAW Y.B. (Publ'g House of Law, Beijing) 134. In contrast, the success rate is 12% in the United States and 8% in Japan and Taiwan. Of course, by themselves, such numbers are hard to interpret. It is possible that the success rate should be even higher in China because administrative officials act illegally more often than elsewhere. For the U.S. figure, see Peter Schuck & E. Donald Elliot, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984 (1990) (citing figures for 1985). For Japan and Taiwan, see KATHARINA PISTOR & PHILIP A. WELLONS, *THE ROLE OF LAW AND LEGAL INSTITUTIONS IN ASIAN ECONOMIC DEVELOPMENT 1960-1995*, at 254, 257 (1999).

112. Most CCP members who are disciplined internally or punished by the courts tend to be low level officials. For instance, in 1998, courts handled 18,468 cases of economic crime and convicted 15,670 offenders. However, there were only 3 officials at the ministerial level, 54 officials at the prefecture or department level, and 434 at the county or division level. See Supreme People's Court Work Report, FBIS doc. FTS19990323000320 (Zuigao Renmin Fa-yuan Gongbao, Mar. 20, 1999).

113. *Mr. Clinton's Last Deal*, N.Y. TIMES, Jan. 20, 2001, at A22.

ties.”¹¹⁴ She also points out that in both countries, prosecutors’ decisions are influenced by political factors, including party affiliations, with a greater readiness to target someone from the opposing political party or faction. Needless to say, China and the United States are not on all fours in this regard. In some ways, China takes corruption more seriously in that corrupt government officials are more likely to be prosecuted based on the core offense rather than ancillary crimes such as fraud or tax evasion, and serious offenses carry the death penalty, whereas in the United States the worst punishment is a definite term of imprisonment.¹¹⁵

To be sure, it is hard to imagine Jiang Zemin being asked to testify under oath in regard to alleged sexual harassment, as in the case of President Clinton.¹¹⁶ Nor is it likely that Jiang could be impeached, or convicted of crimes and sentenced to jail once he leaves office, as with former South Korean Presidents Chun and Roh.¹¹⁷ But should that be the minimum standard?¹¹⁸ Given that China has implemented laws and established legal institutions capable of imposing limits on some government officials, the inability to hold a small core of senior-most leaders accountable in all instances arguably demonstrates only that rule of law is weak in China, not completely absent.

Similarly, all legal systems are politicized to some extent. Moreover, the degree and nature of politicization may differ depending on the type

114. Hilary Josephs, *The Upright and the Low-down: An Examination of Official Corruption in the United States and the People’s Republic of China*, 27 SYRACUSE J. INT’L L. & COM. 271 (2000).

115. *Id.* at 272–74.

116. Clinton was forced to testify as part of Paula Jones’s civil damages case when the U.S. Supreme Court rejected his arguments that the civil case would be unduly disruptive and should be stayed until he left office. *Clinton v. Jones*, 520 U.S. 681 (1997).

117. Chun and Roh were sentenced to death and 22 years imprisonment, respectively, on charges of corruption, treason, and mutiny during the military era. President Kim Young Sam reduced both sentences, and as president-elect, Kim Dae Jung pardoned both men as a goodwill gesture toward political conservatives. Andrew Pollack, *New Korean Leader Agrees to Pardon of 2 Ex-Dictators*, N.Y. TIMES, Dec. 21, 1997, sec. 1, at 10.

118. The principle of equality for all, the public’s demand for justice, and the legitimacy of the government all support holding senior officials accountable. Holding even former heads of State responsible for their prior actions may also signal a successor regime’s commitment to rule of law and its intent to distance itself from the previous regime. On the other hand, there are good reasons in some cases for not prosecuting senior officials or to pardon them for criminal acts. Impeachment of the president, for example, might lead to a constitutional crisis or destabilize a shaky government. Furthermore, the decision to prosecute may itself be politicized, and result in prolonged social confrontation. The citizenry’s sense of national pride may be injured when senior leaders are publicly paraded before the eyes of the world. Pardons may also be justified on the ground that the public humiliation of being removed from office or having one’s transgressions broadcast on the nightly news is sufficient punishment for wayward officials. Nevertheless, the question remains, setting aside such worries and assuming that in some cases the current or former head of State should be held accountable: Is the inability of the legal system to hold such heads of State accountable sufficient to deny the legal system rule of law status (and to describe it as rule by law)?

of rule of law that prevails. Nevertheless, the PRC legal system is undeniably and unusually politicized, and clearly differs both in the degree and manner of politicization from other legal systems, particularly liberal democracies, known for rule of law. Although the Party and individual Party members are legally obligated to follow the law, the Party's role is not clearly defined in law. Implementation of even a Statist Socialist rule of law would require that the Party's role be spelled out more clearly in law. For instance, while political parties in other countries may play a role in appointing judges, that role is prescribed by law, whereas the role of the Party in appointing judges is not set forth in any publicly promulgated State law. Nor is the role of Party organs within the court or the role of the Political-Legal Committee (PLC) prescribed by law.¹¹⁹ Even assuming the role of Party organs was spelled out in law, the degree and manner of influence of such organs over the work of the judiciary that would be consistent with rule of law would still be an issue. There have been some efforts to separate Party and State with respect to judicial matters. Party organs rarely interfere directly in the courts' handling of specific cases.¹²⁰ Yet dissidents are regularly denied a procedurally fair trial.¹²¹

119. The Political-Legal Committee (PLC) is one department within the Party organization; thus there is a PLC at each level, with the PLC answering to the Party Committee at the same level and the PLC at the next highest level. The PLC is primarily responsible for ideological work through setting and disseminating policy, though it is also involved in the decision-making process for certain important or difficult cases, and occasionally for personnel decisions.

120. According to a survey of 280 judges published in 1993, almost 70% of the judges claimed that as a rule they were subject to outside interference, citing the following sources: CCP, 8%; government organs, 26%; social networks, 29%; other, 4%. See IDEAL AND REALITY OF RULE OF LAW, *supra* note 84, at 33. Another survey of 100 intermediate and basic level court judges in Chongqing asked: "when you handle compulsory enforcement, what kind of interference do you regularly experience?" Forty-five percent responded no interference; 12%, CCP interference; 32%, government department interference; 15%, interference from the people's congress; 12%, interference from within the court; 11%, outside interference from non-parties; and 6%, other interference. See ZHONGGUO XINGZHENG FAZHI FAZHAN JINCHENG DIAOCHA BAOGAO [SURVEY REPORT ON THE DEVELOPMENT AND PROGRESS OF CHINA'S ADMINISTRATIVE RULE OF LAW] 63 (Jiang Mingan ed., 1998). In a survey of arbitral award enforcement in China, I found that while interference from local government officials was common, CCP interference was rare and usually only occurred when there was a personal connection between a Party member and the respondent against whom enforcement was being sought. Randall Peerenboom, *Seek Truth from Facts: An Empirical Study of Enforcement of Arbitral Awards in the PRC*, 49 AM. J. COMP. L. 249 (2001). Of course, it is often difficult to draw a clear line between the Party and State, as government officials generally wear two hats. However, the primary allegiance of government officials may in some cases be to their government post rather than to the Party. See SHIPING ZHENG, PARTY VS. STATE IN POST-1949 CHINA (1997).

121. U.S. Dep't of State, 1999 Country Reports on Human Rights Practices Released by the Bureau of Democracy, Human Rights, and Labor (Feb. 25, 2000), at <http://>

Whether politically sensitive cases are handled according to law and even dissidents are afforded a fair trial would seem to be one useful barometer of whether a legal system meets the requirements of rule of law. Because politically sensitive cases challenge the ruling regime most directly, a legal system capable of handling such cases fairly and in a manner consistent with the requirements of a thin rule of law will most likely handle commercial, criminal, and other less controversial cases in a similar way. Yet it is possible that a legal system could be rule of law compliant in some respects (with respect to commercial law) and not compliant in other ways (with respect to political cases). Indeed this arguably has been the case at some points in Taiwan, South Korea, Singapore, and other Asian countries.¹²² Granted, in the long run, such a system is not likely to be sustainable because for a system to comply with the standards of a thin rule of law in the commercial area requires significant institutional development and autonomy. Once institutions gain a certain degree of autonomy and authority and those within the institution achieve a level of professionalism, the institutional actors are likely to pursue further changes to increase their autonomy and authority. As a result, there are likely to be spillover effects from one area of law to another as institutions develop. Again, Taiwan, South Korea, and more recently Indonesia are examples of this trend.¹²³ During the transition

www.state.gov/www/global/human_rights/1999_hrp_report/china.html (last visited May 6, 2002).

122. Of the Asian countries that have experienced sustained growth, most have enjoyed legal systems that comply with the standards of a thin rule of law, at least with respect to commercial matters. Although the political regimes may not have been democratic and the legal system may not have provided much protection for civil and political rights in some cases, the Asian countries that experienced economic growth generally scored high with respect to the legal protection of economic interests. A survey of economic freedoms in 102 countries between 1993 and 1995 found that 7 of the top 20 countries were in Asia. Economic freedoms include protection of the value of money, free exchange of property, a fair judiciary, few trade restrictions, labor market freedoms, and freedom from economic coercion by political opponents. *BEHIND EAST ASIAN GROWTH: THE POLITICAL AND SOCIAL FOUNDATIONS OF PROPERTY* 7 (Henry S. Rowen ed., 1998). For the argument that law played a greater role than normally suggested, see PISTOR & WELLONS, *supra* note 111; MARK RAMSEYER & MINORO NAKAZATO, *JAPANESE LAW: AN ECONOMIC APPROACH* (1999); SAMANTHA RAVICH, *MAR-KETIZATION AND DEMOCRACY: EAST ASIAN EXPERIENCES* (2000).

123. See Sean Cooney, *A Community Changes: Taiwan's Council of Grand Justices and Liberal Democratic Reform*, in *LAW, CAPITALISM AND POWER IN ASIA*, *supra* note 5 (noting the Council of Grand Justices assumed a much greater role in curbing administrative discretion and limiting government as legal and political reforms progressed, thereby contributing to further reforms); see also Tsung-fu Chen, *The Rule of Law in Taiwan*, in *THE RULE OF LAW: PERSPECTIVES FROM THE PACIFIC RIM*, *supra* note 6 (observing that the Council has become more aggressive in protecting human rights by relying on broad constitutional clauses such as due process to promote freedom of speech and the press and to strike down criminal law statutes, and by relying on practices similar in many respects to current PRC statutes and procedures); Hong, *supra* note 7 (noting that the rising demand for rule of law among the citizenry who had come to believe in the ideology of rule of law put

period, some will choose to describe the legal system as a developing, albeit flawed, rule of law. Others, particularly Liberal Democrats who privilege civil and political rights over other rights, will be more likely to deny the system the label rule of law.

It should be noted, however, that a “fair” trial in politically sensitive cases need not mean that dissidents or political activists will win. In fact, even in the United States political activists regularly lost free speech cases well into this century under a variety of restrictive laws from the Alien and Sedition Acts of 1798 to the Espionage Act of 1917 to state laws criminalizing “subversive advocacy.”¹²⁴ Likewise, slaves challenging slavery laws and people of color protesting various forms of racial discrimination have all too often met with defeat in U.S. courts. Yet despite such outcomes, many would describe the U.S. legal system at such times as rule of law. As noted, a thin rule of law does not ensure just outcomes. Thus, while the struggle to obtain a procedurally fair trial consistent with a thin rule of law may represent a significant achievement in some respects, at times it may seem a hollow victory to those sent to jail under repressive laws.

To sum up the discussion so far, the problem of defining precisely when a legal system meets the minimum threshold of rule of law, despite its shortcomings, and when the shortcomings are so extensive or objectionable to deny the system the title of rule of law, is a generic jurisprudential problem not unique to China. Clearly, reasonable people can, do, and will disagree over the degree and type of shortcomings that will be sufficient to deprive a legal system of the exalted status of rule of law. Given the wide variation in legal systems and the many ways in which all legal systems fall short of the ideal of rule of law, attempting to articulate more precisely the standards of a thin theory or trying to state in a formal way the degree or kind of deviance from the ideal sufficient to deprive a legal system of the label rule of law is not likely to result in

pressure on the government to continue reforms); K. Yang, *Judicial Review and Social Change in the Korean Democratizing Process*, 41 AM. J. COMP. L. 1 (1993) (noting South Korean courts became more aggressive as legal and political reforms progressed, thus supporting and promoting further reforms).

In Indonesia, the Suharto government's desire to obtain legitimacy abroad and to deal with corruption and patrimonial practices that were adversely affecting business confidence led to the establishment of administrative courts. Those courts, however, turned on Suharto, pursuing key allies on corruption charges and defiantly striking down the government's decision to ban a popular weekly news magazine. In response to a groundswell of public support, the judiciary became increasingly aggressive in challenging the government, to the point where Suharto himself was brought up on charges of corruption. See David Bourchier, *Between Law and Politics: The Malaysian Judiciary Since Independence*, in LAW, CAPITALISM AND POWER IN ASIA, *supra* note 5, at 240–41.

124. See David Rabban, *The First Amendment in Its Forgotten Years*, 90 YALE L.J. 514 (1981).

sufficient consensus to put an end to the general debate. The best that can be hoped for is a rather rough consensus based on the facts in a particular case. As U.S. Supreme Court Justice Potter said about pornography, "I know it when I see it."¹²⁵ To be sure, one person's pornography is another person's art. As the ongoing debates over what is and what is not pornography demonstrate, the eyeball test allows for considerable personal bias. Liberal Democrats will inevitably weight more heavily certain deficiencies in China's legal system, such as the unfair treatment of dissidents and the system of reeducation through labor. Thus, the eyeball approach will not always lead to agreement. Nevertheless, in some cases, there will be a general consensus. For instance, few if any would challenge the claim that China's legal system during the Mao period was not rule of law.¹²⁶

Given the difficulties associated with the first approach, an alternative approach would be to describe any system as rule of law in which there is a credible normative commitment to the principle that law is to bind the State and State actors, as evidenced by efforts to establish a legal system that meets the standard of a thin theory. Although in some cases there might still be disagreement about whether even such a minimal standard has been met, lowering the standard would shift the debate in most cases from whether a legal system ought to be described in terms of rule of law to how well rule of law is implemented in practice. Having cleared the initial hurdle of a credible commitment to the principle that law ought to bind the State and State actors, the focus then turns to the extent to which the ideal of rule of law is actually realized, with legal systems ranked on a sliding scale based on the criteria of a thin theory, including the extent to which law does limit the State and State actors. Such an approach is arguably more consistent with the reality that all legal systems deviate from the ideal in various ways and to various degrees. Taking this tack, China's legal system, for instance, could be considered as a rule of law, albeit an imperfect one. Whereas the legal systems of Japan and Germany, for example, might merit a ranking of nine on a ten-point scale, China's legal system might only be assigned a score of two.¹²⁷

125. "[C]riminal laws in this area are constitutionally limited to hard-core pornography. I shall not today attempt further to define the kinds of material I understand to be embraced with that shorthand description . . . but I know it when I see it." *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

126. As Goldstein concludes, the answer to the question "do we know the rule of law when we see it?" is: sometimes. Goldstein, *supra* note 14.

127. To rank a legal system there must be rules for assigning points to positive and negative features. There is likely to be some disagreement about how to interpret a statistic such as a 50% inconsistency rate in China, particularly given other factors such as the reasons for such a high level of inconsistency. Similarly, how much weight should be assigned to the inability

This sliding scale approach is, however, not without problems. An initial difficulty, though not an insurmountable one in my view, is in establishing the minimum requirements to show a “credible normative commitment” to the principle that law binds the State and State actors. For instance, in China’s case, the principle that the Party, individual Party members, State organs, and government officials must comply with the law was set forth in Article 5 of the 1982 Constitution. By itself, however, that would not be sufficient, particularly given the previous role of law and constitutions during the Mao era. At the time, few observers would have believed solely on the basis of a change in the Constitution that the Party had accepted any meaningful limits on its power. Observers could reasonably have expected the ruling regime to produce more evidence of its change in policy, and in particular to back up its rhetoric with actions.

Since then, however, the ruling regime has taken concrete steps to create a legal basis for challenging the State by passing a wide range of administrative laws and carrying out a host of reforms to strengthen legal institutions.¹²⁸ The dominant understanding of the purpose of administrative law has also shifted from simply a focus on government efficiency and the use of administrative law to ensure that government officials serve the interest of the State to the now widely accepted “balance theory” whereby administrative law both protects individual rights and enhances government efficiency.¹²⁹

The ruling regime reconfirmed its commitment to rule of law by amending the Constitution in 1999. In addition, the State has expended considerable resources building up all of the legal institutions.¹³⁰ The legislature is more assertive;¹³¹ the courts enjoy greater independence;¹³² the legal profession is more autonomous and professional;¹³³ the procuracy and police forces have also been strengthened. The Party has turned over much of the responsibility for daily governance to the usual State or-

of the legal system to hold senior officials accountable? Again, whether there is much point in trying to work out a detailed metric is highly doubtful. The best that can be expected are some rough rules of thumb. A more practical approach is to create a rule of law index by selecting a limited number of variables, and then to have observers familiar with the legal system assign a rank within a relatively narrow range. Such a method is employed, for example, by the International Country Risk Guide—which uses a scale of 0 to 6 to measure business risk arising from shortcomings in the legal system. Adapting this approach to present purposes, countries could be ranked on a scale of 1 to 10 based on how well they comply with the requirements of a thin theory.

128. See Peerenboom, *supra* note 46.

129. See, e.g., BALANCE THEORY OF MODERN ADMINISTRATIVE LAW, *supra* note 98.

130. LUBMAN, *supra* note 69; Alford, *supra* note 109.

131. TANNER, *supra* note 82; Dowdle, *supra* note 82.

132. PEERENBOOM, *supra* note 37, ch. VII.

133. See PEERENBOOM, *supra* note 85.

gans.¹³⁴ The Party no longer rules primarily based on Party policy and Party dictates.¹³⁵ With the greater reliance on law to govern, law has begun to gain normative authority and is becoming an independent source of legitimation independent of tradition or the charisma of revolutionary Party leaders whose views in the past provided the authority for policies and laws.¹³⁶

Many skeptics still question whether the ruling regime accepts the principle that law binds the State and State actors. Many commentators still characterize the legal system as an instrumental rule by law.¹³⁷ Some suggest that many of the reforms are actually consistent with a more efficient rule by law, especially a softer authoritarian version than that of the Mao era.¹³⁸ When vital interests of the Party are at stake, as in politically sensitive cases involving democracy dissidents or Falungong adherents, the interests of the Party prevail over legal niceties such as the procedural rights of the accused.

134. PEERENBOOM, *supra* note 37, ch. V.

135. LUBMAN, *supra* note 69; Jones & Finder, *supra* note 80.

136. Dowdle, *supra* note 82; cf. Edward Epstein, *Law and Legitimation in Post-Mao China*, in DOMESTIC LAW REFORMS IN POST-MAO CHINA (Pitman Potter ed., 1994).

137. See, e.g., Chen Jianfu, *Market Economy and the Internationalisation of Civil and Commercial Law in the People's Republic of China*, in LAW, CAPITALISM AND POWER IN ASIA, *supra* note 5 (suggesting that legal reforms are not meant to change the nature of law as a tool, but simply make law a better tool); see also Pitman B. Potter, *The Chinese Legal System: Continuing Commitment to the Primacy of State Power*, 159 CHINA Q. 672, 674, 683 (1999) (describing the system as "rule through law" and concluding that rule of law, in the sense of the State being just another actor, remains a distant prospect); Stanley Lubman, *Bird in a Cage: Chinese Law Reform After Twenty Years*, 20 NW. J. INT'L. L. & BUS. 385, 423 (2000) (allowing that "China is in transition"). However, Lubman does not say in a transition from what to what. Presumably it is not from rule by law to rule of law. Though he accepts that law plays a more important role than in the past and that there has been considerable progress in institution building, and even acknowledges certain "fragile harbingers" of a possible rule of law future for China, he denies that China even has a legal system because of the incoherence he perceives in current institutions. LUBMAN, *supra* note 69. He also highlights the instrumental aspects of PRC law and the primacy of policy; claims that there is an "inescapable contradiction between the avowed goal of attaining rule of law and the ideological limits" of the ruling regime; suggests that the Party's emphasis on stability is shorthand for Party control; sides with those who see the development of the NPC not in terms of an evolution to rule of law, but as serving the purpose of a heavily instrumental law; and, as a result, remains cautiously pessimistic about the future of legality in China. *Id.* Although Lubman does not characterize his own position in terms of rule by law, in my view, an instrumental law in which law is a tool for the Party and is not meant to impose meaningful limits on the CCP because there remains a deep contradiction between rule of law and the leading role of the Party is still (i) a rule by law and (ii) not consistent with any fundamental change, and in particular a shift toward rule of law.

Law is used instrumentally in every legal system. Thus, a distinction must be made between pernicious instrumentalism and acceptable instrumentalism. Legal systems in which the law is *only* a tool of the State are best described as rule by law, whereas legal systems in which the law (at least in theory) imposes meaningful limits on State actors may merit the label rule of law.

138. See, e.g., Chen, *supra* note 137.

Yet there are good reasons to question the skeptics' view. Undeniably, *some* of the recent reforms and, developments, such as a certain amount of institution building, greater reliance on law rather than policy, and even some devolution of power, are consistent with the view that the purpose of legal reforms is a more efficient rule by law. However, they are also consistent with a transition to rule of law. As is often the case, much turns on which side bears the burden of proof. Rule by law advocates insist that those who see a transition toward rule of law provide conclusive proof of the transition. Turning the tables, however, why assume the skeptics' view is correct? Rule by law advocates cannot show conclusively that reforms consistent with both a transition to rule of law and a more efficient rule by law are actually meant to support a more efficient rule by law any more than others can show conclusively they are meant to support rule of law.

That said, while some of the reforms are consistent with a ruling regime bent on creating a more efficient rule by law, they are not necessary for such a system. For instance, it is not clear why the ruling regime would have had to allow for private law firms to create a more efficient rule by law. Moreover, the nature and extent of institution building and the degree of devolution of authority call into question the view that the purpose of such reforms is simply to create a more efficient rule by law. In some cases, reforms have been driven not by central authorities but by other actors within the system, who have pushed reforms in directions not anticipated by the central authorities and taken reforms beyond what was originally intended by the central leaders.¹³⁹

Different groups and individuals are likely to support reforms for different reasons. The skeptical view tends to emphasize the purpose of central Party leaders in supporting or tolerating legal reforms, rather than the motives of other segments of the polity in backing reforms.¹⁴⁰ Yet

139. For instance, much of the regulatory framework for business has been developed on an incremental basis in response to grass-roots initiatives. To meet the demands of investors, local governments regularly have forged ahead in carrying out commercial law reforms without central approval. Among countless examples, local governments approved the establishment of wholly-foreign owned enterprises and holding companies and allowed investors to mortgage their assets years before the central government passed laws sanctioning such activities. Similarly, by the time the Lawyers Law was passed in 1996, authorizing the establishment of partnership law firms, local justice bureaus had already approved hundreds of such firms. In recent years, the Ministry of Justice (MOJ) established a network of hotlines in response to complaints from frustrated citizens about negligent lawyers and from equally frustrated lawyers that government officials were preventing them from carrying out their duties. For the bottom-up institutional development of the NPC, see Michael Dowdle, *The NPC as Catalyst for New Norms of Public Political Participation in China*, in *CHANGING VIEWS OF CITIZENSHIP IN CHINA* (Merle Goldman & Elizabeth Perry eds., 2001).

140. The most common explanation for China's troubles places the brunt of the blame on ideology and the attitudes of China's ruling elite, particularly senior Party leaders. Analyses

many government officials, academics, and citizens no doubt support legal reforms because they believe such reforms will limit government arbitrariness and lead to better protection of individuals' rights and interests.

While skeptics can explain away some reforms as consistent with a more efficient rule by law, other reforms cannot be dismissed so readily. The express commitment to rule of law and the efforts to establish a viable administrative law system that aims to both protect individual rights and enhance government efficiency, for instance, are at odds with the establishment of a more efficient rule by law.

Setting a high standard for showing a credible commitment to the principle that law ought to bind the State and State actors (and hence is not rule by law) runs into similar problems confronted in the first approach. Are such failures evidence of lack of normative commitment to rule of law principles or simply evidence of a weak rule of law? Taken to the extreme, diehard skeptics will be satisfied with nothing less than the full realization of the rule of law ideal, or at least a legal system that substantially complies with their own values and biases as to what is important. Thus, some skeptics may not be satisfied until current or former leaders are held accountable and political dissidents win their free speech cases. Only then will they be convinced that there is a credible commitment to the principle that the law binds the State and State actors. Yet requiring such actions as conclusive proof of a credible commitment to rule of law demonstrates the shortcomings of this approach.

The establishment of rule of law is a long term process. No legal system can transform itself from rule by law into a fully implemented rule of law overnight. All countries now known for rule of law initially went through a period in which legal institutions were weak and rule of

of China's failures to realize rule of law thus typically begin, and all too often end, by noting that China remains a single party socialist State. See, e.g., Leslie Palmer, *Conclusion: Conditions for Rule of Law*, in *STATE AND LAW IN EASTERN ASIA* 141 (Leslie Palmer ed., 1996) (declaring that "it is certainly not possible to speak of the rule of law, and not even of the rule by law. It is clear . . . that the country's rulers, namely the Communist Party, regard such rules as simply Western 'bourgeois' conventions which limit their freedom of action; arbitrary government, which recognizes no restraint, is usual.")

While Lubman portrays rule of law as incompatible with current Party ideology, he does note that there are many other obstacles to rule of law besides Party ideology. LUBMAN, *supra* note 69. Like Lubman, both Peter Corne and William Alford observe that there are many obstacles to the realization of rule of law besides the Party. However, they appear to claim that a hostile view toward rule of law among the leaders is sufficient to prevent its realization. Alternatively, their claim may be the weaker one that the intent of the leaders is an important factor in determining whether rule of law will be realized in China. If so, then the difference between us may simply come down to a matter of degree as to how important such views are, since I believe the views of leaders are relevant, but not determinative. See PETER CORNE, *FOREIGN INVESTMENT IN CHINA: THE ADMINISTRATIVE LEGAL SYSTEM* (1996); Alford, *supra* note 109, at 193, 198.

law was imperfectly implemented. Although it may be impossible to pinpoint the exact moment the tide turned toward rule of law, at some point preceding the actual implementation of some reasonable approximation of the ideal of rule of law, there was inevitably a credible commitment to it. Similarly, in China, there will necessarily have been a credible commitment to rule of law long before the day when senior State leaders are held accountable and the courts decide dissident cases impartially, at which point even the most cynical skeptic will finally be willing to acknowledge that China is committed to (and indeed enjoys) rule of law. If and when that day arrives, it will be clear in retrospect that the skeptics' view during the transition period that the purpose of reforms was to create a more efficient rule by law will have been incorrect.

Alternatively, rule by law skeptics might define rule by law in terms of a much higher standard of actual performance of the legal system rather than the minimal standard of whether a credible commitment has been made to the principle that law binds the State and State actors. Yet anyone who defines rule by law in terms of a higher performance standard must define the point at which the system no longer counts as rule by law. As we have seen, it is difficult if not impossible to define the minimal conditions for rule of law with any precision.

More importantly, the distinction between rule by law and rule of law seems to be a conceptual one rather than an empirical one. A system in which law is only meant to serve as a tool of the ruling regime without binding government officials is rule by law. It seems counter-intuitive to argue that a system in which law is meant to be supreme but which falls short of that ideal in practice is for that reason rule by law.

Focusing on the conceptual distinction in the purpose of law rather than the extent to which law actually imposes meaningful limits on State actors provides a fairly bright line test for distinguishing between rule of law and rule by law. The legal systems of Imperial and Mao China, where law was conceived of as just a tool to achieve the interests of the State and was not meant to limit the ruler or Party, are best described as rule by law. In contrast, the change in the official rhetoric to a conception of law, where law is to be supreme, represents a major departure from the Imperial and Mao eras. Defining rule by law in terms of the extent to which the legal system actually imposes meaningful limits on State actors tends to lump the current system together with the legal systems of the Imperial and Mao eras, despite their significant differences.

While it may no longer be accurate to describe China's legal system as rule by law, whether the system merits the label rule of law is another matter. Perhaps the biggest objection to the low-threshold, sliding-scale approach is that rule of law is an honorific term used to praise or criti-

cize a legal system. Thus, rule of law in ordinary usage implies a certain degree of achievement. Accordingly, many people would object to calling a legal system that scored a one or two on a ten-point thin-rule-of-law scale a rule of law, just as many object to referring to China's legal system in terms of rule of law, even though it would seem to rank at least a two on such a scale.

In light of the many shortcomings of the legal system and the ordinary use of rule of law as an honorific term signaling a certain standard of achievement, I describe China's legal system as in transition toward rule of law but still falling short of the minimal standard of achievement required to be considered rule of law.¹⁴¹ Problems such as the treatment of political dissidents and the inability of the legal system to hold senior-most officials accountable would certainly give me pause in describing China's system as even an imperfect rule of law. As troubling, if not more so from a rule of law perspective, however, are the many technical problems that arise in daily practice that have nothing to do with politically sensitive issues. The cumulative toll of these everyday deficiencies, in my view, is sufficient to deny China's current system the title of rule of law, even allowing that there is sufficient evidence of a credible normative commitment to the principle that law is to bind the State and State actors to render the characterization of the legal system as rule by law inapposite.

Suffice it to say that while what constitutes the minimal standard of achievement for rule of law as a general matter is subject to debate, just as in some cases most people of whatever political persuasion will be able to agree that a particular object is pornographic, most commentators both within China and abroad readily acknowledge that the legal system falls well short of the minimal standard implied by the honorific label rule of law.¹⁴² Given the general consensus, there is no need at present to delve more deeply into the minimal conditions for rule of law. In the final analysis, little is to be gained by engaging in an endless debate about which of the above approaches is more warranted. To some extent, the approach one adopts will depend on one's purpose. Clearly, there is a rhetorical difference in claiming that China lacks rule of law or, conversely, that China's legal system is a weak rule of law. Government officials may prefer to argue that China has rule of law, albeit a weak

141. See PEERENBOOM, *supra* note 37.

142. As noted, many people conflate rule of law with Liberal Democratic rule of law. Foreign commentators in particular often fail to appreciate the significant progress China has made in improving the legal system in a short time. Nevertheless, even when measured against the more technical standards of a thin theory, China's legal system still falls far short, not just of some unobtainable ideal, but of reasonable expectations for how a system can and should operate.

one, to emphasize the difference between the current regime and previous regimes. Critics who wish to condemn China for the harsh treatment of dissidents will prefer to characterize China as lacking rule of law or as implementing a more efficient rule by law. Yet substantively, those on all sides of these debates acknowledge both progress and problems. Many are also likely to share the same goal that China's legal system more fully implement rule of law. Accordingly, those who favor the sliding-scale approach can simply take my comments that China currently lacks rule of law or is in transition toward rule of law to mean that China is in the process of more fully implementing rule of law.

*B. Imposition of a Western Ideal? The Lack of
Viable Alternatives to Rule of Law*

Still another approach would be to argue that because China—is so different from other countries, it is likely to develop its own long term, stable alternative to rule of law—a different kind of legal system that does not comply with the requirements of a thin theory. According to this view, my focus on rule of law is simply wrong-headed. Despite my efforts to escape imposing “Western” categories, I have still ended up doing just that by assuming that China must develop a legal system that meets the requirements of a thin theory.

Donald Clarke, for instance, raises a number of concerns about the “imperfect realization of an ideal” or “IRI” approach to comparative law, an approach that shares certain similarities with my approach, although there are also important differences.¹⁴³ According to Clarke, under this “essentially teleological approach,” the Chinese legal system is identified and measured in terms of an ideal end state chosen by the analyst.¹⁴⁴ He notes that the IRI approach could work with any end state, but “in fact it is always invariably used in conjunction with an end state posited as the Western rule of law ideal. This rule of law ideal constitutes the paradigm, in the Kuhnian sense, that governs the entire enterprise of analyzing the Chinese legal system.”¹⁴⁵

Clarke argues that reliance on the paradigm of “the Western rule of law ideal,” or the Ideal Western Legal Order, has several theoretical and practical drawbacks. First, it “dictates” the questions one asks, what one considers to be relevant data, and how one interprets the phenomena observed. In the naïve version, China's legal system is simply compared to

143. Clarke, *supra* note 108, at 2.

144. *Id.* at 51.

145. *Id.* In a longer revised version of the article, Clarke refers to the Ideal Western Legal Order rather than “the Western rule of law ideal.” See Donald Clarke, *Puzzling Observations in Chinese Law: When Is a Riddle Just a Mistake?* (2001) (unpublished manuscript, on file with author).

idealized portrayals of modern Western legal institutions, or even more narrowly an idealized account of the U.S. system, and found wanting. In the more sophisticated version, researchers overlook important aspects of the Chinese legal system, misinterpret phenomena, and either attach too much or too little importance to other phenomena. As a result, their predictions as to how the legal system will develop are likely to be wrong.

Clarke claims that practitioners of the IRI approach assume without argumentation or support “that China *has* legal institutions” and that the legal system is developing toward some form of rule of law:

In other words, the IRI approach assumes that we can talk meaningfully about Chinese law and legal institutions; that China has a set of institutions that can meaningfully be grouped together under a single rubric, and that it is meaningful (i.e., it clarifies more than it obscures) to label this rubric “legal”—the same word we use to describe a set of institutions in our own society. Thus, even to embark on the study of something called “Chinese legal institutions” involves an *a priori* assumption that China has a set of institutions largely similar to the institutions we call “legal” in our society. If the institutions were not largely congruent—if, for example, we were discussing churches or the movie industry—we would not call the institutions “legal” in the first place. More specifically, the very act of naming certain institutions involves drawing conclusions about them before the investigation has even begun. If we call a certain institution a “court,” then we are claiming that this word conveys to the listener a more complete and accurate picture of the institution in question than some other word. We could equally well call the institution a “team,” or an “office,” or a “bureau”; the decision *not* to use those words represents an implicit assertion about the nature of the institution in question. The problem is that this assertion *precedes*, rather than follows, inquiry into the nature of the institution.

The second assumption is that these institutions are “developing.” Academic articles adopting this approach are typically entitled “China’s Developing Law of Contract” or something similar. By “developing” is meant moving from a more primitive and inferior stage to a more sophisticated and better stage along a trajectory of linear progress toward a well-understood end. The substantive content of this well-understood end, as I have noted earlier, is typically the Western rule of law ideal. In other words, the sophisticated IRI approach understands

a particular institution now by seeing it as a nascent version of an institution in the Western rule of law ideal. We identify its imperfections in this way and we predict its future changes (which we call “development” and not simply “change”).¹⁴⁶

Clarke is surely right to caution against an a priori assumption that Chinese institutions are meant to serve the same purposes as those in some Western liberal democracies. He is also surely correct to point out that we are likely to misinterpret phenomena and go awry in our predictions about China’s development if we impose without questioning our own modern U.S.-based notion of how a legal system must function. However, while China is distinctive in some respects, it increasingly confronts similar challenges to those faced by other States with a market economy and a more pluralistic populace. China has also already become more entwined in a global economy and international legal order. Not surprisingly, there has been considerable convergence in its legal system, including with respect to the legislature, judiciary, and administrative agencies. No one would confuse these institutions with churches or the movie industry, to use Clarke’s examples, or even with the much more politicized entities of the Mao era.

The applicability of a thin theory of rule of law is not therefore simply the unreflective a priori imposition of a Western ideal. In fact, is not an imposition of a Western ideal at all due to widespread acceptance of, and support for, a legal system that meets the requirements of a thin rule of law in China?¹⁴⁷ Given the convergence with respect to the purposes of the legal system, legal rules, and the functions and practices of the various institutions, one can reasonably describe China’s institutions as *legal* institutions. Indeed, it is difficult to imagine how else to describe them. To be sure, China’s institutions are embedded in a very different context from that of economically advanced Western liberal democracies. Thus, there are likely to be some important differences in the institutions. However, to deny that China’s institutions are legal institutions simply because they differ in some ways from institutions in some modern Western liberal democracies is to assume that any institutions other than ours are not legal institutions in the proper sense.¹⁴⁸ At this point, it is

146. Clarke, *supra* note 108, at 52.

147. Further, at least in my case, the view that China is moving toward a thin rule of law is based on an empirical assessment of how institutions have changed since the Mao era and how they operate today, rather than on an a priori assumption of the inevitable applicability of thin theories.

148. In the final analysis, as Clarke says, the ultimate standard for any definition, label, or paradigm is whether it is useful: does it serve the purpose it was intended to serve (and is that purpose itself useful)? In some cases, scholars may wish to stipulate a narrow definition of law or legal system in order to bring out more sharply the contrasts between different

unlikely that China will develop a legal system so radically different as to render a thin rule of law conceptually inapplicable. China's distinctiveness is likely to be reflected in variations in thick theories compatible with a thin theory, rather than in some credible, sustainable, normatively acceptable, and feasible alternative to a thin theory.

One of the problems in heeding Clarke's warning about relying on rule of law as a benchmark is that there is no other credible theory that better describes the current system. For years the alternative has been to describe China as an instrumental rule by law. That is problematic for all of the reasons discussed previously. Whatever its descriptive inadequacies, rule by law is even less useful as a normative goal for future reforms. It should be noted that Clarke does not endorse rule by law as an alternative description; nor does he, in the works cited, set out to present a systematic alternative interpretation or theory to the rule of law paradigm.

This is not to claim that Clarke or someone else could not come up with a new theory that better describes the system than "the Western rule of law ideal."¹⁴⁹ In fact, if by the Western rule of law ideal one means

systems. This approach, however, may also lead the analyst to exaggerate the differences. For example, the current system differs dramatically from the Mao era. No longer can the NPC be described as a rubber stamp or the courts as just another bureaucracy with no more authority than the post office. On the comparison of the courts to the post office, see Donald Clarke, *Power and Politics in the Chinese Court System: The Enforcement of Civil Judgments*, 10 COLUM. J. ASIAN L. 1 (1996).

149. Of course, not just any description will be an improvement. Ugo Mattei, for instance, describes three types of legal systems. In a rule of professional law or rule of law system, law is the primary mechanism for resolving disputes and the State is subject to law. In contrast, in a rule of political law system, the separation between law and politics is absent or minimal. Legal institutions are weak, and the law often does not bind government officials. This form of law is characteristic of former socialist States in transition. A third category, reflecting "the Oriental view of the law," is rule of traditional law. Mattei includes in this category such disparate States as China, Japan, Vietnam, Laos, India, Singapore, the Philippines, and Mongolia.

The legal systems of these countries allegedly lack a separation between law and religion or traditional "transcendental" philosophies. They are characterized by an increased role for mediators and "wise men," a high rate of survival of diversified local customs, emphasis on duties rather than rights, and a hurried, though largely unsuccessful, attempt to transplant Western legal codes and relationships. In my view, Mattei greatly overstates the importance of traditional elements in the contemporary system while failing to appreciate the many significant changes in the system. Indeed, few elements of the traditional legal system even survived the intervening Mao period and the implementation of a socialist legal system.

To characterize China in terms of traditional law is therefore highly anachronistic. On the other hand, China does share many features of a rule of political law system. Mattei acknowledges that China's legal system exhibits many of the elements of a rule of political law, but he apparently feels compelled to force China into the Oriental box along with such radically different countries as India, Japan, and Morocco. Part of the problem is that China seems to be moving toward some form of rule of law, but not the liberal democratic form of rule of law that Mattei implicitly uses as his benchmark for a professional law system. (Mattei allows that

Liberal Democratic rule of law, then I fully agree that any of the three alternatives discussed herein, and possibly others as well, are likely to be more useful for understanding the future path of development in China (though all are still rule of law theories). Although Clarke claims that the main problem with the IRI approach, "is that its practitioners tend to leave unstated and unjustified its most crucial component: the ideal against which the Chinese legal system is identified and measured," Clarke himself never defines in any detail what he means by "the Western rule of law ideal."¹⁵⁰ As we have seen, rule of law is a contested concept, even in the West. In thinking about the role of law in China and the possible path of future development, it is necessary to distinguish between thin and thick theories and between different types of thick theories. By so doing, predictions about rule of law in China become more open-ended and *less* teleological (although obviously the standards of a thin theory, while allowing some diversity in institutions and practices, are teleological in nature).

C. *Why We Can't Simply Abandon Rule of Law Talk or Reserve Rule of Law for Liberal Democracies*

In light of the many different interpretations of rule of law, might it not be best simply to abandon reference to rule of law altogether? Wouldn't it be more useful to adopt, for instance, a "microanalysis approach"?¹⁵¹ Microanalysis tries to avoid or at least minimize generalizations, metaphors, and conceptualizations as explanatory mechanisms. Rather, microanalysts attempt to describe the way actions of independently motivated individuals create social systems by tracing the way individual actions aggregate to produce larger social structures and institutions.

While there is considerable merit in the suggestion that what matters most is not the label but the substance of particular legal reforms in

"Western-style rule of law" would be an acceptable alternative name for rule of professional law).

Some of the traits found in China are hard to reconcile with such a system: a hierarchical society, an emphasis on family, different gender roles, dissimilar conceptions of rights (or at least a different balance between the interests of the individual and of the group), and different justifications and rationales for those outcomes. One could add to this list: a different balance in the role of law as strengthening or limiting the State, different conceptions of and limits to civil society, a different balance between freedom and order or stability, and so on. These features, however, are not at odds with rule of law *per se*, just with one particular version. Ugo Mattei, *Three Patterns of Law: Taxonomy and Change in the World's Legal Systems*, 45 AM. J. COMP. L. 5 (1997).

150. Clarke, *supra* note 108, at 53.

151. See Edward L. Rubin, *Getting Past Democracy*, 149 U. PA. L. REV. 711 (2001) (arguing for the need to move beyond the rhetoric of democracy to focus on how institutions actually work in the United States).

China, abandoning reference to rule of law is neither possible nor desirable. As a practical matter, people both in China and abroad will continue to invoke rule of law. Given that fact, it is better to try to bring some clarity to the different uses of the term, by distinguishing between rule by law and rule of law and between thin and thick conceptions of rule of law and different types of thick conceptions, than to insist futilely that the term be avoided altogether.

Moreover, legal reformers have pragmatic reasons for referring to rule of law in that the normative appeal of rule of law may be used to support controversial legal and political reforms. Indeed, one of the reasons PRC scholars prefer thick conceptions to thin conceptions is that thick conceptions allow them to discuss topics that would otherwise be too sensitive to approach directly. For instance, bringing democracy and human rights under the umbrella of rule of law may open up discussion of sensitive topics such as multiparty elections, separation of powers,¹⁵² and freedom of thought.¹⁵³

In addition, rule of law provides a useful heuristic guide for legal reforms in that the elements of a thin (or even thick) theory may be used to clarify and prioritize areas in need of reform, and to see the relationships between the various elements. It provides some structure to what otherwise could be a chaotic, piecemeal reform process.

Assuming that we cannot abandon rule of law talk altogether, perhaps we could limit rule of law to only the Liberal Democratic version. After all, given that “rule of law” has become associated with Liberal Democratic rule of law, one might argue that the term should not be stretched to include other variants. When talking about China, one should simply forgo use of rule of law in favor of other terms.

Although one is free to reserve the label “rule of law” for a particular version, forcing PRC ideas about rule of law into our prevailing yet contingent categories smacks of cultural imperialism.

Second, the debate about legal reform in China has been couched in terms of rule of law, both in China and abroad. Again, one could protest every time the term rule of law is used or at least point out that the term is being misused. Given that “rule of law” is a contested concept even in the West, however, any attempt to appropriate the term for a particular usage will be futile; the debate will continue to be posed in terms of rule

152. See, e.g., Li, *supra* note 13, at 8; Xie Pengcheng, *Lun Dangdai Zhongguo de Falii Quanwei* [On the Authority of Law in Contemporary China], 6 ZHONGGUO FAXUE 3 (1995) (suggesting that rule of law requires judicial independence, which demands some degree of separation of powers, which, in turn, requires a change in the balance of power between State and society and the development of civil society).

153. Hu Weixi, *Sixiang Ziyou yu Minzhu Zhengzhi* [Freedom of Thought and Democratic Politics], in POLITICAL CHINA, *supra* note 15, at 120–23.

of law, both by those inside and outside of China. Rather than restricting the use of the term with respect to China, it is more useful to try to figure out what those who use the term mean by it and why they want to invoke it. How one defines rule of law will depend on what one's purpose is. Investors, governments, multilateral agencies, NGOs, moral philosophers, and political scientists all have different purposes for invoking rule of law, and may therefore find some ways of defining or measuring it more suitable to their particular purpose than others. That does not mean that they are free to define rule of law as they like. Enough people in the relevant discourse community must accept the usage for the speech act to be meaningful, or for the definition to serve a useful purpose. There is, however, enough common ground to the various conceptions of rule of law, provided by the basic requirements of a thin rule of law, to render the invocation of rule of law in the Chinese context intelligible and useful.

Third, as just noted, many reformers in China want the debate couched in terms of rule of law for strategic reasons: rule of law entails, at minimum, some restraints on government leaders and opens up other possibilities for political reform.

Fourth, simply relying on either Liberal Democratic rule of law versus rule by law is no longer sufficient to capture what is happening in China. It is descriptively incorrect—the legal system is no longer a pure rule by law. Nor can we capture all of the nuances in the PRC debates about rule of law if we only have the overly simplistic categories of rule of law (i.e. our Liberal Democratic version) or else rule by law.¹⁵⁴ Without more refined categories, we simply will not be able to understand what is happening, either in terms of the evolution of PRC discourse or, in practice, with respect to the development of the legal system.

Fifth, the practical import of forcing PRC discourse and practice into our preconceived boxes of Liberal Democratic rule of law or authoritarian rule by law is that we are likely to come to the wrong conclusions about reforms. We are likely to be either too pessimistic or too optimistic—either there is no fundamental change, or China is becoming “like us” in some modern Western liberal democracies. Neither seems to be the case. Misreading what is happening is likely to lead to bad policy choices. Foreign governments and aid agencies could miss opportunities to support reforms that would improve the PRC system, for example, by failing to provide adequate resources for certain reforms because they do

154. Nor is it possible to simply rely on Jayasuriya's statist rule of law as an alternative. The statist version fails to capture the differences between the Statist Socialist and Neo-Authoritarian versions, and is at odds in significant respects with the Communitarian variant. See LAW, CAPITALISM AND POWER IN ASIA, *supra* note 5.

not believe such changes could possibly work in a rule by law system meant to serve the interests of the Party and nothing more. Alternatively, time and resources could be wasted on projects that are not consistent with the form of rule of law likely to emerge in China. Some rules or practices that work in the context of a Liberal Democratic rule of law might require liberal institutions and perhaps liberal values to succeed. They may fail to take hold in a different legal order, exacerbating the gap between law and practice.

Finally, objecting to the application of rule of law to China and other States that are not liberal democracies overstates the differences and fails to capture the considerable agreement with respect to the basic elements of a thin rule of law. Despite considerable variation, all four variants of rule of law accept the basic benchmark that law must impose meaningful limits on the ruler, and all are compatible with a thin conception of rule of law. As legal reforms have progressed in China, the legal system has predictably converged in many respects with the legal systems of well-developed countries, and it is likely to continue to converge in the future. At the same time, however, there will inevitably be some variations in rule of law regimes even with respect to the basic requirements of a thin conception due to the context in which they are embedded. Hence signs of both divergence and convergence are to be expected. Whether one finds convergence or divergence depends to a large extent on the particular indicators that one chooses, the time frame, and the degree of abstraction or focus. The closer one looks, the more likely one is to find divergence. That is a natural result of narrowing the focus. Distinguishing between thin and thick theories and between different thick theories helps identify the similarities and areas of convergence while acknowledging and explaining the differences.

D. From Theory to Practice: Are Non-Liberal Democratic Rule of Law Systems Sustainable?

A frequent objection is that while it is possible conceptually to distinguish between these different types of rule of law legal systems, in reality rule of law is only sustainable in countries that adopt Liberal Democratic institutions and values. Yet Singapore and Hong Kong, among others, are examples of non-democratic, non-liberal countries that have enjoyed rule of law;¹⁵⁵ and contemporary Japan, Taiwan, and South

155. See BELL, *supra* note 8; Pan, *supra* note 34. Minxin Pei cites as further examples in addition to Hong Kong and Singapore, Kaiser Germany, pre-1945 Japan, Pinochet's Chile, Franco's Spain, and "nearly all Western European countries before they became democratic." Minxin Pei, *Legal Reform and Secure Commercial Transactions: Evidence from China*, in *THE VALUE OF LAW IN TRANSITION ECONOMIES* 31 (Peter Murrell ed., 2001). To be sure, full implementation of rule of law generally goes hand in hand with democracy. For instance, it was

Korea seem to be examples of a Communitarian rule of law. While an adequate discussion of whether or not these categories do in fact apply to these countries and if so whether they are the best way to characterize the legal systems would take us far afield, a few further comments may help clarify some of the main issues.

Critics might argue that the use of the legal system to harass opposition politicians demonstrates that Singapore does not merit the label of rule of law, and calls into question whether a non-democratic rule of law is in fact possible. Of course, all systems fall short of the ideal of rule of law, and Singapore is no exception. At times judiciaries reach decisions that reflect a degree of politicization that is hard to reconcile with rule of law. Many would argue that the U.S. Supreme Court's recent intervention in the Gore-Bush election controversy in Florida was one such instance.¹⁵⁶ However, the nature of executive interference with the judiciary in Singapore arguably constitutes a difference in kind, rather than simply degree, and therefore Singapore does not merit the honorific "rule of law" at all. Others, emphasizing all of the ways in which the Singapore legal system does meet rule of law standards, may conclude that such shortcomings simply demonstrate that Singapore's legal system falls short of the ideal and yet on the whole may still be characterized as a rule of law, albeit an imperfect one. For those in the latter camp, Singapore will be an example of a sustainable non-liberal democratic rule of law. For the former group, Singapore will be further proof of the limited ability of law to control State actors in a non-liberal democratic State.

Even if Singapore were not a good example of a non-democratic, non-liberal rule of law, Hong Kong would appear to be so. Granted, Hong Kong may be a special case, having had the benefit, as it were, of colonial rule by the British. Nevertheless, while many commentators predicted that Hong Kong's reversion to PRC control would result in the demise of rule of law, most now agree that Hong Kong has continued to enjoy rule of law even after the handover.¹⁵⁷ There have undeniably been

only after Taiwan and South Korea democratized that the judiciary acquired enough independence and authority to handle virtually all politically sensitive cases in an impartial manner according to law. Nevertheless, rule of law and impartial treatment in politically sensitive cases do not necessarily require democracy, as evidenced by Hong Kong. Pei argues that the key to autocracies maintaining rule of law is the existence of political constraints that oblige rulers to exercise political moderation. These restraints may come from an independent aristocracy, the church, a rising urban capitalist class, or external threats. *Id.*

156. Akhil Amar, *Supreme Court: Should We Trust Judges?*, L.A. TIMES, Dec. 17, 2001, at M1.

157. For an even-handed, detailed account of important cases and legal developments in Hong Kong since the handover, see Albert Chen, *Hong Kong's Legal System in the New Constitutional Order*, in IMPLEMENTATION OF LAW IN THE PEOPLE'S REPUBLIC OF CHINA (Chen Jianfu et al. eds., 2001); see also The Joseph R. Crowley Program, *One Country, Two Legal Systems?*, 23 FORDHAM INT'L. L.J. 1 (1999); Bureau of E. Asian & Pac. Affairs, United States Report on Hong

bumps in the road, attributable in part to the differences between Hong Kong's common law system and the more civil law system of the PRC as well as the sheer complexity of operating a legal system based on the historically unprecedented principle of one country, two systems. Moreover, some of the developments since reversion reflect the more conservative policies of the new administration (though it bears noting that Hong Kong was hardly a bastion of liberal democracy under the colonial rule of the British). Yet the judiciary remains independent. Beijing has been reluctant to intervene, doing so only when forced to by the arguably rash actions of the Court of Final Appeals and Chief Executive Tung Chee-hwa in the infamous illegal immigration case.¹⁵⁸

Hong Kong differs from the mainland in many ways. Skeptics could still claim that, as a general rule, establishing and maintaining rule of law requires democracy.¹⁵⁹ Indeed, China would seem to be an unlikely candidate to implement and sustain rule of law without democracy given the limits of socialist ideology and the Party's commitment to single party socialism and maintaining its grip on power. Ultimately, the key to the future realization of rule of law in China is power. How is power to be controlled and allocated in a single party socialist State? To the extent that law is to limit the Party, how does the legal system obtain sufficient authority to control a party that has been above the law? In a democracy, the final check on government power is the ability of the people to throw the government out and elect a new one. In the absence of multiparty democracy, an authoritarian government must either voluntarily relinquish some of its power or else have it taken away by force. Naturally, Party leaders will resist giving up power so readily. They may therefore be disinclined to support reforms that would strengthen rule of law but also allow institutions to become so powerful that they could then provide the basis for challenging Party rule. The result may be that, at least

Kong (Aug. 7, 2001), at <http://www.usconsulate.org.hk/ushk/pi/20010731.htm> (last visited June 27, 2002). The Crowley report, which clearly assumes a liberal democratic orientation, was more critical of Hong Kong with respect to democracy than with respect to rule of law.

158. See Chen, *supra* note 157. The actions of Elsie Leung, Secretary of Justice, in handling the Sally Aw case are arguably even more objectionable from a rule of law perspective than the way the illegal immigration cases were handled. In the Sally Aw case, Leung decided not to prosecute Aw, the head of a newspaper and a friend of Tung Chee-hwa. When asked to explain her decision not to prosecute, she at first limited her comments to general policy considerations, refusing to go into detail as the case was still pending regarding other parties. In response to a public uproar, she then sought to clarify her position and justify her decision in part by appealing to public interest. Aw was in negotiations to sell her newspaper, and Leung did not want to influence the sale. This broad interpretation of public interest provoked a hailstorm of criticism, leading to a no-confidence vote, which Leung survived.

159. The absence of any example of a non-democratic rule of law State would not prove that such a State is not possible or that the PRC could not become one, though it certainly would give pause to those who believe it possible.

on those issues that threaten the survivability of the Party, the needs of the Party will continue to trump rule of law for some time—though of course most of the issues confronting legal actors on a daily basis do not threaten the Party.

I have argued elsewhere that there are reasons to believe that the issue of power can be resolved in favor of rule of law and that law will come to impose meaningful restraints on Party and government leaders.¹⁶⁰ Briefly put, the development of the legal system hinges on more than the ideas of the top leadership. Legal reforms will continue to be driven to a considerable extent by objective forces, including the needs of a market economy; the demands of foreign investors and domestic businesses; the Chinese citizenry's desire for justice; international pressure, as evidenced in the amendment of the Criminal Law and Criminal Procedure Law, and China's accession to various human rights treaties;¹⁶¹ GATT requirements, now that China has become a member of the WTO; and the ruling regime's desire for legitimacy, both at home and abroad. All of these forces, taken collectively, are likely to exert a much stronger force on the pace and trajectory of legal reforms than the wishes of some senior leaders who may be lukewarm about implementation of rule of law.

CONCLUSION

Twenty years ago, few predicted that China's legal system would develop to this degree. Given the remarkable progress, skeptics who deny any fundamental change in the basic nature of China's legal system seem unduly pessimistic or cynical. On the other hand, liberals who think China is on the way to establishing a liberal legal system of the kind found in Western democracies seem at once overly optimistic and underappreciative of differences in fundamental values that have led many Asian countries to resist the influence of liberalism in favor of their own brand of "Asian Values" (differences which remain even after we discount the self-interested claims of leaders of authoritarian governments).

I suggest a middle ground. While the footprint of the system's instrumental rule by law heritage remains visible, there is considerable evidence of a shift from a legal regime best characterized as rule by law, toward a system that complies with the basic elements of a thin rule of law. Even assuming—as appears to be the case—that China is moving

160. See PEERENBOOM, *supra* note 37.

161. LAWYERS COMM. FOR HUMAN RIGHTS, *supra* note 102 (describing the influence of international pressure and international legal norms in the Criminal Procedure Law amendment process).

toward rule of law, which form is most appropriate for China remains hotly contested. There is little evidence of a shift toward a Liberal Democratic rule of law. China is not likely to embrace democracy in the near future, for a variety of reasons.¹⁶² In the long run, however, China may need to allow genuine democratic elections to enhance accountability and to provide a peaceful mechanism for alleviating growing social divisions. Even if China becomes democratic, it will not necessarily become a *liberal* democracy or adopt a Liberal Democratic form of rule of law.

162. See PEERENBOOM, *supra* note 37, ch. XI; Larry Diamond & Raymond Myers, *Introduction: Elections and Democracy in Greater China*, 162 CHINA Q. 365 (2000).

TABLE I: A COMPARISON OF THE FOUR IDEAL
RULE OF LAW TYPES PLUS RULE BY LAW

Liberal Democratic Rule of Law

Economic Regime	<ul style="list-style-type: none"> • Free market • Minimum government interference and regulation • Clear distinction between public and private • Administrative discretion limited
Political Regime	<ul style="list-style-type: none"> • Democratic elections at all levels • Neutral State • Limited State • Civil society as independent of State
Rights	<ul style="list-style-type: none"> • Liberal • Emphasis on civil and political • Deontological view of rights as antimajoritarian trump on social good • Freedom privileged over order • Autonomy over social solidarity and harmony • Freedom of thought and right to think over need for common ground and right thinking on important social issues • More attention to rights than character building, virtues, and duties
Purposes of Rule of Law	<ul style="list-style-type: none"> • Limited government • Prevent government arbitrariness • Protect individual rights • Predictability and certainty: economic growth, allow individuals to plan affairs • Dispute resolution, protect property rights largely through formal legal system • Government efficiency and rationality • Legitimacy
Institutions/ Practices	<ul style="list-style-type: none"> • High degree of separation between law and politics • Independent and elected legislature • Autonomous and independent judiciary, with life tenure for judges, appointment and removal relatively non-politicized • Administrative law: mechanisms for reining in discretion, capable of holding even top leaders accountable; public participation; public can hold government officials accountable by throwing government out of office • Independent legal profession
Rules	<ul style="list-style-type: none"> • Protection of civil and political rights; no registration requirements for social groups; strong rights to protect accused in criminal cases

Chinese Communitarian Rule of Law

Economic Regime	<ul style="list-style-type: none"> • Market economy • Managed capitalism • More government intervention • Public–private division not as clear • More administrative discretion
Political Regime	<ul style="list-style-type: none"> • Democratic, multiparty elections • Reject neutral State • Larger role for State • Civil society, but limits; groups free to go own way subject to general limits, although some groups, particularly commercial associations, may still establish corporatist or clientelist relations with government, but soft or societal form of corporatism
Rights	<ul style="list-style-type: none"> • Communitarian • Emphasis on indivisibility of rights, collective rights • Economic growth at expense of rights (liberty tradeoff) • Utilitarian or pragmatic conception of rights • Stability and order privileged over freedom • Social solidarity and harmony as important if not more so than autonomy • Freedom of thought and right to think limited by need for common ground and consensus on important social issues • Attention to character building, virtues, and duties as well as rights
Purposes of Rule of Law	<ul style="list-style-type: none"> • Balance between law as means of strengthening State and limiting State • Stability • Prevent government arbitrariness • Protect individual rights • Predictability and certainty: economic growth, allow individuals to plan affairs • Government efficiency and rationality • Dispute resolution, property rights protected through formal and informal mechanisms, more reliance on corporatist and clientelist ties • Legitimacy

Chinese Communitarian Rule of Law

Institutions/ Practices	<ul style="list-style-type: none"> • Moderate to high degree of separation between law and politics • Independent and elected legislature • Autonomous and independent judiciary, with life tenure for judges, appointment and removal relatively non-politicized; arguably likely to decide cases based on substantive agenda • Administrative law: mechanisms for reining in discretion, capable of holding even top leaders accountable; but more deference to agencies in policymaking, emphasis on efficient government balanced to some extent by need to protect individual rights; opportunities for public participation in rule making and interpretation; public can hold accountable by throwing out of office • Independent legal profession, though perhaps monitored by State agency such as Ministry of Justice (MOJ)
Rules	<ul style="list-style-type: none"> • Broad laws to protect State: State Secrets; endangering State interests • Illiberal laws: limit civil society, freedom of expression; registration of social groups; or privilege group—no exclusion of tainted evidence

Neo-Authoritarian Rule of Law

Economic Regime	<ul style="list-style-type: none"> • Market economy • Managed capitalism • More government intervention • Public–private division not as clear • More administrative discretion
Political Regime	<ul style="list-style-type: none"> • Single party rule, no elections or only at low level or appearance of genuine elections but limits on opposition party • Reject neutral State • Even larger role for State • Civil society, but limits, perhaps corporatist or clientelist relations with government

Neo-Authoritarian Rule of Law

Rights	<ul style="list-style-type: none"> • “Asian Values” or communitarian • Emphasis on indivisibility of rights, collective rights • Economic growth at expense of rights (liberty tradeoff) • Utilitarian or pragmatic conception of rights • Stability and order privileged over freedom • Social solidarity and harmony over autonomy • Freedom of thought and right to think limited by need for common ground and consensus on important social issues; limits on right to criticize government • Attention to character building, virtues, and duties as well as rights
Purposes of Rule of Law	<ul style="list-style-type: none"> • Balance between law as means of strengthening State and limiting State favors strengthening • Emphasis on stability; • Predictability and certainty: mainly for economic growth, less to allow individuals to plan affairs • Government efficiency and rationality • Dispute resolution, property rights protected through formal and informal mechanisms, more reliance on corporatist and clientelist ties • Legitimacy • Limits: Government must act in accordance with law; law to prevent government arbitrariness • Protect individual rights, but not priority and limited
Institutions/ Practices	<ul style="list-style-type: none"> • Moderate separation between law and politics. • Legislature not elected • Judicial Independence may or may not be limited • Administrative law system, capable of checking government officials, professional civil service; more emphasis on rational government than protecting individuals; more deference to government in policymaking; opportunities for public participation and monitoring • Legal profession supervised by MOJ
Rules	<ul style="list-style-type: none"> • Broad laws to protect State and social order: State secrets law; endangering State interests • Illiberal laws: limit civil society, freedom of expression: registration of social groups; or privilege group—no exclusion of tainted evidence

Statist Socialism Rule of Law

Economic Regime	<ul style="list-style-type: none"> • Market economy • Much government regulation • Public ownership
Political Regime	<ul style="list-style-type: none"> • Single party rule, no elections or only at lowest levels • Reject neutral State • Much larger role for State • No or very limited civil society, high level of corporatist or clientelist relations with government, hard or Statist form of corporatism
Rights	<ul style="list-style-type: none"> • Emphasis on subsistence, economic growth at expense of rights (liberty tradeoff) • State sovereignty • Utilitarian or pragmatic conception of rights • Rights as grant from State • Stability and order privileged over freedom • Social solidarity and harmony over autonomy • State prefers unity of thought to freedom of thought, right thinking to right to think; tendency to exercise strict thought control if possible; at minimum, strict limits against attacks on ruling party; emphasis on thought work to ensure common ground and consensus on important social issues • Attention to character building, virtues, and duties as well as rights
Purposes of Rule of Law	<ul style="list-style-type: none"> • Emphasis on strengthening State • Stability • Predictability and certainty: economic growth • Law as way of enhancing government efficiency and rationality • Dispute resolution, property rights protected through formal and informal mechanisms, more reliance on corporatist and clientelist ties • Legitimacy • Some limits on State: government must act in accordance with law, but accept limits begrudgingly; prevent government arbitrariness; protect individual rights, but not priority and limited view of rights

Statist Socialism Rule of Law

<p>Institutions/ Practices</p>	<ul style="list-style-type: none"> • Moderate to low separation between law and politics • Legislature not elected; Party influence on law-making process • Functional independence of judiciary; no interference by other branches; courts as independent as opposed to judges, so adjudicative supervision; arguably likely to decide cases based on substantive normative principles defined by State; regime wants courts to serve Party interests • Legal profession: subject to political requirements, partial independence, mainly due to corporatist nature of relationship with MOJ • Administrative law: more discretion; more responsive to Party policy; system imposes weak limits on top leaders, limited public participation in rule making, interpretation and implementation; limited ability for media and public to monitor
<p>Rules</p>	<ul style="list-style-type: none"> • Broad laws to protect State: State secrets; endangering State interests • Illiberal laws: limit civil society, freedom of expression: registration of social groups; or privilege group—no exclusion of tainted evidence; administrative penalties such as reeducation through labor

Rule By Law

<p>Economic Regime</p>	<ul style="list-style-type: none"> • Could be planned economy, free market, or managed capitalism • Government intervention high • Public–private distinction non-existent or unimportant • Control by administrative policy and fiat
<p>Political Regime</p>	<ul style="list-style-type: none"> • Single party rule, no elections • Reject neutral State • Totalitarian or authoritarian State • No or very limited civil society, State-dominated corporatist arrangements

Rule By Law

Rights	<ul style="list-style-type: none"> • Emphasis on subsistence, economic growth at expense of rights (liberty tradeoff) • Socialist conception of rights as bourgeois; emphasis on duties, particularly duties to State • Rights as grant of State • Rights exist as programmatic goals only, no real protection of rights • State sovereignty • Social solidarity and harmony over autonomy • State enforces strict thought control; unity of thought over freedom of thought • Strict limits against attacks on ruling party
Purposes of Rule of Law	<ul style="list-style-type: none"> • Law is tool to serve interests of the State; Party's role not defined in law; no meaningful legal limits on rulers • Law enhances government efficiency • Law not meant to protect individual rights • Dispute resolution, but many disputes settled administratively or by Party leaders rather than in courts • Heavy reliance of mediation to resolve disputes "among the people," formal legal system used to suppress enemies • Party members not subject to courts
Institutions/ Practices	<ul style="list-style-type: none"> • No minimal separation between law and politics • Party policies supplant and trump laws • Legislature not elected, just rubber stamp • Courts not independent; Party determines outcome of specific cases; adjudicative committee used to enforce Party line; courts serve Party interests • Legal profession: lawyers as workers of the State; no independence; work in State firms; limited rights to defend accused • Administrative law: main purpose is government efficiency; officials wide discretion, govern by fiat; no administrative laws provide individuals right to challenge government; no or extremely limited public participation in administrative process
Rules	<ul style="list-style-type: none"> • Law relatively unimportant; much of day-to-day governance by policies • Absence of many major laws—criminal law, contract law, civil procedure law • Laws frequently ignored in practice