

ARTICLES

TOWARD A LEGAL ENLIGHTENMENT: DISCUSSIONS IN CONTEMPORARY CHINA ON THE RULE OF LAW

Albert H.Y. Chen*

I. A HISTORICAL INTRODUCTION

Although the term “the rule of law” (*fazhi*¹), as distinguished from *fazhi*², which can be translated as “legal system,” appeared in a few official documents in the early years of the People’s Republic of China (PRC), it soon disappeared from public usage and was substituted by terms such as “revolutionary legal system” and “people’s democratic legal system.”³ During and after the Anti-Rightist Movement of 1957, the concept of the rule of law was officially rejected as “bourgeois;” those who ad-

* Albert H.Y. Chen is a graduate of the University of Hong Kong (LL.B., 1980) and Harvard University (LL.M., 1982). He began his teaching career at the University of Hong Kong in 1984, and is currently a Professor and the Dean of the Faculty of Law of that University. He has written 6 books and over 70 articles in English and Chinese. His latest book is *AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE’S REPUBLIC OF CHINA* (Singapore: Butterworths Asia, 1998).

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3. This is pointed out in Gu Anliang, *A Commentary on Ruling the Country According to Law and Constructing a Socialist Rule-of-Law State*, in *YIFA ZHIGUO, JIANSHE ZHUYI FAZHI GUOJIA [RULING THE COUNTRY ACCORDING TO LAW, CONSTRUCTING A SOCIALIST RULE-OF-LAW STATE]* 191, 196-197 (Liu Hainian, et al., eds., 1996) [hereinafter *YIFA ZHIGUO*] (the author points out, among other things, that the Work Report of the Peoples’ Courts presented at the first national conference on judicial work in 1950 called for the development of “the Rule-of-Law and moral concepts of the New Democracy” and for the courts to be “the lecterns for propagating our country’s spirit of the Rule of Law”). See also Shen Zongling, *More on the Meaning of the Terms “Legal System” and “the Rule of Law”*, 10 *FAXUE [JURISPRUDENCE]* 4 (1996); Xie Pengcheng & Liu Cuixiao, *A Review of Research in Jurisprudence in 1996*, 1 *FAXUE YANJIU [CASS L.J.]* 3, 4 (1997).

vocated the authority of the law were purged as attempting to "use the law to resist the Party."⁴ During the Cultural Revolution, Mao Zedong even praised "lawlessness" as something good and positive for society and humanity.⁵

At the historic Third Plenum of the Eleventh Central Committee of the Chinese Communist Party (CCP) in late 1978, the decision was made to rehabilitate the socialist legal system that underwent a stillbirth in the 1950s. Deng Xiaoping coined a sixteen-character phrase that was to become the battle cry for legality for many years to come: "There must be laws for people to follow, these laws must be observed, their enforcement must be strict, and lawbreakers must be dealt with."⁶ Since 1978, significant progress has been made in rebuilding a credible set of laws and legal institutions in mainland China. Legal education and scholarship, which had been neglected for more than two decades, were also revived. Legal scholarship developed not only in areas of substantive and procedural law, but also in the field of legal theory.⁷ However, research in legal theory was more constrained by the dogma of Marxism and "forbidden zones" of political sensitivity than other branches of legal scholarship. Legal theorists trod cautiously into new fields, and setbacks were occasionally encountered. For example, after the June 4th events in 1989, there was a backlash against the "bourgeois liberalisation" tendency in legal philosophy, and some of the more liberally minded thinkers were criticized.⁸

Fortunately, the tide soon turned with Deng's trip to southern China in 1992, and the subsequent decision of the CCP at its 14th Party Congress to move China in the direction of a "socialist market economy." This concept, which has far-reaching theoretical and practical implications, found its way into the PRC Constitution in 1993, when the National People's Congress (NPC) adopted a constitutional amendment on the subject.⁹ The amendment also stressed the role of economic legislation in facil-

4. See Gu, *supra* note 3; Guo Daohui, *A Fundamental Change in the Mode of Rule*, in YIFA ZHIGUO, *supra* note 3, at 109. In the two decades following 1957, the expression "the Rule of Law" was regarded as an embodiment of "bourgeois ideology."

5. See Guo, *supra* note 4; ALBERT H.Y. CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA 28-33 (rev. ed. 1998).

6. The words were first emphasized in the communiqué of the watershed 3rd plenum of the 11th Central Committee of the Chinese Communist Party in December 1978. For further details, see CHEN, *supra* note 3, at 33-35.

7. See, e.g., Albert H.Y. Chen, *Developing Theories of Rights and Human Rights in China*, in HONG KONG, CHINA AND 1997: ESSAYS IN LEGAL THEORY 123 (Raymond Wacks ed., 1993).

8. See generally the 1989 volume of ZHONGGUO FAXUE [CHINESE LEGAL SCIENCE] (Mainland China's leading law journal).

9. See CHEN, *supra* note 5, at 209.

itating the development of a socialist market economy, and the NPC Standing Committee developed an ambitious program at the end of 1993 to start developing an adequate legislative framework for a socialist market economy.¹⁰

After the inauguration of the concept of the socialist market economy, there was an outburst of enthusiasm on the part of legal scholars for the idea that the socialist market economy is a "legal system-based economy" or "rule of law economy," the premise being that market transactions can only take place within a framework of legal rules on contract and property rights. The body of literature created by Chinese scholars on this subject has been examined elsewhere.¹¹ There were also signs that the top leadership in China was becoming increasingly sympathetic to this claim about the importance of law in promoting economic development. In late 1994 and 1995, the top leadership of the Party and the State attended two law lectures delivered by leading scholars on the subjects of international economic law and the legal aspects of a socialist market economy.¹² The culmination came on February 8, 1996, when the top leaders attended a lecture given by a leading scholar at the Chinese Academy of Social Science on "The Theoretical and Practical Issues Relating to Ruling the Country According to Law and Building a Socialist Legal System State."¹³ At the end of the lecture, President Jiang Zemin delivered a widely publicized speech on the importance of "ruling the country according to law." The speech was a lengthy one dealing with the legal doctrines in Deng Xiaoping's thought, the relationship between law and the socialist market economy, and the need to raise the legal consciousness of officials and citizens. He concluded by pointing out that "ruling the country according to law is an important mark of social progress and the civilization of a society; it is a necessary requirement of our construction of a modern socialist state."¹⁴

Subsequently, when the NPC met in March 1996, it incorporated the objective of "ruling the country according to law and constructing a socialist legal system state" into its Ninth Five-Year Plan and Outline of Objectives for Long-Term Develop-

10. See Cai Dingjian, *Towards the Rule of Law: Where is the Way?* in YIFA ZHIGUO, *supra* note 3, at 394, 395-396.

11. See Albert H.Y. Chen, *The Developing Theory of Law and Market Economy in Contemporary China*, in LEGAL DEVELOPMENTS IN CHINA: MARKET ECONOMY AND LAW 3 (Wang Guiguo & Wei Zhenying eds., 1996).

12. See YIFA ZHIGUO, *supra* note 3, at 1 (extract from RENMIN RIBAO [PEOPLE'S DAILY], February 9, 1996). Similar lectures organized for top leaders have continued to be held from time to time since 1995.

13. *Id.*

14. *Id.* at 4.

ments towards 2010.¹⁵ Further progress at the conceptual level was achieved when the term *fazhi guojia* ("rule-of-law state," or *Rechtsstaat* in German), instead of the more conservative term "legal system state,"¹⁶ was used in General Secretary Jiang Zemin's keynote address at the 15th National Congress of the Chinese Communist Party in September 1997,¹⁷ and in the Work Report of the National People's Congress (NPC) Standing Committee presented by Mr. Tian Jiyun, Vice-Chairman of the NPC Standing Committee, to the first plenary session of the 9th NPC in March 1998.¹⁸ These developments culminated in one of the constitutional amendments adopted by the 9th NPC at its second plenary session in March 1999. This amendment introduced the following sentence at the beginning of Article 5 of the Constitution of the People's Republic of China:

"The People's Republic of China shall practice ruling the country according to law, and shall construct a socialist rule-of-law state."¹⁹

These developments have spawned a lively discussion among legal scholars in China about what is the meaning and significance of "ruling the country according to law" and "the rule of law," and what is to be done if this is the objective to be achieved. This discussion represents the continuation and deepening of the debate among Chinese legal scholars that occurred in the early 1980s on "the rule of law" versus "the rule of men."²⁰ It can also be interpreted as an offshoot of the discussion dating back to 1995 on Deng's legal thought,²¹ as well as the discussion since 1993 on the relationship between the market economy and

15. 4 XINHUA YUEBAO [NEW CHINA MONTHLY] 19, 37 (1996).

16. The *pinyin* romanization for both "legal system state" and "rule-of-law state" is *fazhi guojia*, but in fact *zhi* corresponds to two different Chinese characters in the two expressions. The Chinese character romanized as *zhi* in the expression "legal system state" means "system," whereas the character romanized as *zhi* in the expression "rule-of-law state" means "rule."

17. *Collection of Documents of the 15th National Congress of the Communist Party of China* 1, 31 (1997).

18. *Collection of Documents of the 1st Plenary Session of the 9th National People's Congress of the People's Republic of China* 101, 102 (1998).

19. The remainder of Article 5, which has existed since the Constitution was enacted in 1982, provides as follows: "The State upholds the unity and dignity of the socialist legal system. No law, administrative regulation or local regulation may contravene the Constitution. All state organs, armed forces, political parties, social organizations, enterprises and institutions shall abide by the Constitution and the law. Responsibility shall be pursued in respect of all acts that violate the Constitution and the law. No organization or individual has the privilege of being above the Constitution and the law." (Author's translation). XIANFA [CONST.] art. 5 (1982).

20. See, e.g., FAZHI YU RENZHI WENTI TAOLUN JI [ESSAYS ON THE QUESTION OF THE RULE OF LAW AND THE RULE OF MEN] (Editorial Committee eds., 1981).

21. See generally the 1995 volume of ZHONGGUO FAXUE [CHINESE LEGAL SCIENCE].

the rule of law.²² The body of literature that has appeared since early 1996 on the subject of the rule of law can be regarded as the most mature stage thus far of modern Chinese scholarly reflections on the question of the rule of law. It is the purpose of this article to examine this body of literature and to evaluate it.

INTELLECTUAL RESOURCES FROM TRADITIONS

We shall begin by looking at the intellectual resources employed by contemporary Chinese thinkers when they embarked on the project of constructing a theory of the rule of law for present day China. By intellectual resources I mean the heritage of intellectual history, particularly the concepts and theories developed by great thinkers in the past. In their discussions on the rule of law, contemporary Chinese scholars have reflected on the heritage of both the Chinese and Western traditions in this regard.

In an influential treatise published in 1922, the famous Chinese thinker Liang Qichao used the terms "the rule of men" and "the rule of law" to characterize the political and legal doctrines of Confucianism and Legalism respectively in ancient China.²³ Contemporary Chinese scholars are almost unanimous in rejecting the alleged equivalence between Legalism and the rule of law. They point out that Legalism, as enunciated in the pre-Qin period and actually practiced in full during the Qin dynasty (221-207 BC), viewed law simply as an instrument of authoritarian and despotic rule. Law consisted of rules prescribing punishment for behaviour that was considered undesirable from the ruler's point of view. It emanated from the ruler, was designed entirely to enhance the ruler's power, and the ruler himself was not subject to the law.

Although Legalism as an orthodox ideology was abandoned after the Qin dynasty, the ensuing amalgam of Confucianism and Legalism that survived for almost two millennia was also not conducive to the rule of law.²⁴ It was pointed out by contemporary Chinese scholars that Confucianism advocated rule by virtue and by ethics rather than by law. Rulers were expected to be virtuous and to behave in an exemplary manner. Scholar-officials were to act as parents of the people. Subjects were to be well educated and morally cultivated, so that they would practice the rites and

22. See Chen, *supra* note 11.

23. For the English translation of the condensed version of this book, see LIANG CHI-CHAO, *HISTORY OF CHINESE POLITICAL THOUGHT DURING THE EARLY TSIN PERIOD* (L.T. Chen trans., 1930). See also Gu, *supra* note 3, at 192.

24. See generally ALBERT H.Y. CHEN, *CONFUSIAN LEGAL CULTURE AND ITS MODERN FATE*, (forthcoming 1999).

norms of good conduct voluntarily and in accordance with their conscience. In situations of disputes, people were encouraged to compromise and give concessions rather than to assert their self-interest or rights by litigation. In the Confucian vision, social harmony rather than justice is the symbol of the ideal society.

Although it is possible to interpret the Confucian approach in a positive manner and to argue that it represented the best possible option in Chinese pre-modern society, most contemporary Chinese legal scholars depicted the Confucian tradition negatively as depriving persons of their autonomy, freedom, individuality and claims to equality.²⁵ It was pointed out that traditional Chinese society was hierarchical and oppressive, most people were in positions of personal dependence on and subordination to some other persons or social groups, the individual's rights were ignored, the legal culture was one dominated by rulers' absolute power and subjects' unconditional obligations, and obedience to authority was over-emphasized. Some writers lamented the absence of "civil society" in historical China, and described the traditional Chinese socio-political structure as a monolithic one unifying the family, clan and the political state.²⁶ Others criticized the traditional attitude of "worshipping" the state and its power.²⁷ One scholar agreed with Hegel's portrait of traditional China as a system of paternal rule where subjects were treated like children in a family.²⁸

Given this grim assessment of the heritage of Chinese civilization as far as the rule of law is concerned, it is not surprising that most contemporary Chinese legal thinkers look to the Western tradition instead in order to find the necessary intellectual resources for their theory of the rule of law. In this regard, it is noteworthy that they find much that is positive in both the legal philosophy of classical Greece and in the political thought of the Age of Enlightenment. Even the Middle Ages have been praised for the theory of a natural or divine law that stood above positive

25. See CHEN, CONFUCIAN LEGAL CULTURE AND ITS MODERN FATE.

26. See, e.g., Fan Zhongxin, *Civil Society Determines the Rule-of-Law Society*, in YIFA ZHIGUO, *supra* note 3, at 423; Du Wanhua, *The Dualistic Social Structure and Jurisprudential Reflections Thereon*, 1 XIANDAI FAXUE [MOD. L. SCI.] 5 (1996).

27. See, e.g., Zhou Yongkun, *Surpassing Oneself: Legal Modernization and Transformation of Legal Culture*, 3 TIANJIN SHEHUI KEXUE [TIANJIN SOC. SCI.] 64 (1995), reprinted in 8 FAXUE [SCI. OF L.] 19 (1995); Zheng Chengliang et al., *The Essence of the Jurisprudence of Ruling the Country according to Law*, in YIFA ZHIGUO, *supra* note 3, at 126.

28. See Chen Duanhong, *Confrontation: The Future of Chinese Constitutionalism from the Perspective of Administrative Litigation*, 4 ZHONGWAI FAXUE [PEKING U. L.J.] 1 (1995).

human law²⁹ and the legal tradition developed by the citizens of autonomous towns who epitomized civil society.³⁰

In discussing the meaning of the rule of law, a significant number of leading scholars in contemporary China found it useful to cite Aristotle's passage in *Politics* that the rule of law embraces two principles: there is general compliance with the established laws, and the content of the law is good.³¹ Several also discussed approvingly Aristotle's arguments for the rule of law, for example that law represents reason and is free of human desires and emotions,³² that it restrains the exercise of arbitrary power, and that it embodies the judgement of "the many" rather than "the few."³³ It was observed that such a philosophy of the rule of law could only flourish in the social context of the democracy of the ancient Greek *polis*, which contemporary Chinese scholars wrote about with admiration.³⁴

Scholars are even more enthusiastic about and receptive to the political and legal philosophy of the Enlightenment, or what they describe as the period of "the bourgeois revolutions." The contemporary Chinese literature on the rule of law abounds with references to the works of classical writers like Locke, Montesquieu, Paine, as well as subsequent exponents of the liberal tradition such as Dicey, Hayek and Fuller. It is pointed out that according to Marxism, the transition from feudalism to capitalism which the bourgeois revolutions completed was a kind of progress in history, and that there is much which contemporary socialist China can learn and borrow from the political and legal thought of the bourgeois revolutions.³⁵ Marx was cited in support of the proposition that the encounter between the capitalist West and other civilizations was also a phenomenon of historical progress, and it was suggested that the experience of the legal modernization that started in the West is a common heritage of all humankind.³⁶

29. See Li Lin, *The Concept, Institution and Operation of the Rule of Law*, in YIFA ZHIGUO, *supra* note 3, at 234.

30. See Fan, *supra* note 26; Zhou Yongkun, *The Idea of the Priority of Society and the Rule-of-Law State*, 1 FAXUE YANJIU [CASS L.J.] 101, 107 (1997).

31. See, e.g., Gu Chunde, *Ruling the Country According to Law and the Rule of Law*, in YIFA ZHIGUO, *supra* note 3, at 180; Gu, *supra* note 3, at 192; Zhou, *supra* note 30, at 101.

32. See Li, *supra* note 29, at 235.

33. See Li Buyun, *Ruling the Country According to Law, Constructing a Socialist Rule-of-Law State*, in YIFA ZHIGUO, *supra* note 3, at 46, 49-50.

34. See, e.g., Fan, *supra* note 26; Zhou, *supra* note 30.

35. Gu Chunde, *supra* note 31; Gu, *supra* note 1; Li, *supra* note 29; Li, *supra* note 33.

36. See Gong Pixiang, *Legal Modernization Does Not Equal Westernization*, 1 FAXUE [JURISPRUDENCE] 6 (1997).

At the same time, Chinese scholars appreciate that the rule of law developed in the West as part of a dynamic historical process and has undergone distinct phases of development. Thus one scholar pointed out that the nature of the rule of law has changed as the West moved from the period of *laissez faire* capitalism into the period of monopoly capitalism and welfare states.³⁷ Another characterized the earlier period as "individuals-oriented" and the later period as "society-oriented."³⁸ A third writer distinguished the two stages by using the concepts of "a hard rule-of-law" (strict legal rules with little discretion in their administration) and "a soft rule-of-law" (a "living law" administered by the exercise of discretion in search for substantive justice).³⁹

Although most Chinese scholars find the theory and practice of the rule of law as developed in the West highly relevant to China's contemporary needs, some point out that the paths of legal modernization taken by the West and China have to be very different. In the West, legal institutions grew up side by side with the market economy in a spontaneous and gradual process of evolutionary change, while in contemporary China, legal as well as economic reforms have been pushed through by the state in a top-down direction.⁴⁰ From a macro-historical perspective, legal modernization was a result of the internal dynamics of social, economic and political development in the West, but occurred in twentieth-century China only as a response to the external challenge posed by the West. This means that legal modernization in China has, to a significant extent, been an exercise in legal transplantation accompanied by the persistent problem of a gap between local social reality and imported legal doctrines and norms.⁴¹

II. THE DEVELOPING THEORY OF LAW

The Meaning of the Rule of Law.

We now begin our survey of the contours of the developing theory of the rule of law in contemporary China. The first ques-

37. See Zhu Jingwen, *The Rule of Law is a Historical Category*, in YIFA ZHIGUO, *supra* note 3, at 292.

38. See Hao Tieshan & Fu Dingsheng, *The Problems and Challenges of China's Legal Modernization*, 7 FAXUE [JURISPRUDENCE] 2 (1995).

39. See Yan Cunsheng, *The Modernization of Legal Ideas*, in 2 FAZHI XI-ANDAIHUA [STUD. ON LEGAL MOD.] 197 (Legal Modernization Research Center of Nanjing Normal University ed., 1996).

40. See Su Li, FAZHI JI QI BENTU ZIYUAN [THE RULE OF LAW AND ITS INDIGENOUS RESOURCES] 11 (1996).

41. See Jiang Lishan, *An Analysis of the Characteristics of the Project of Chinese Legal Modernization*, 4 ZHONGWAI FAXUE [PEKING U. L.J.] 10 (1995).

tion to be considered is how scholars understand the concept of the rule of law. Here, there seems to be a consensus that the rule of law connotes the binding authority of democratically generated law on both subjects (citizens) and rulers (government), and submission to such law on the part of all members of the community, including the most senior government officials.⁴² Many scholars stressed the intrinsic connection between democracy and the rule of law in the modern sense.⁴³ The law that rules in a state subject to the rule of law is the people's law and not the ruler's law as in pre-modern states. While the ruler's law was often imposed by force on the people, the people's law is a product of the people's rational consent to its authority. Through such law, the people establish the government and authorize it to exercise certain powers which are conferred, regulated and limited by law.

Contemporary Chinese theorists associate the rule of law with other liberal values such as liberty, equality, human rights, separation of powers, checks and balances and judicial independence. The functions of law in protecting citizens' rights, controlling the exercise of state power and preventing its abuse are particularly emphasized. It is pointed out that although laws often exist in situations of the rule of men (rather than the rule of law), the difference between the rule of law and the rule of men is that in the former case, authority is depersonalized, and where a conflict arises between the authority of the law and the authority of a powerful political leader, the law will prevail.⁴⁴ One writer derives two basic principles from the notion of the rule of law: agencies of public power may not do anything that is not expressly authorized by law, and persons exercising private rights may do whatever is not expressly prohibited by law.⁴⁵

Some thinkers find in the notion of reason or rationality the essence of the rule of law.⁴⁶ It is pointed out that the rule of law

42. See Zhou Yongkun, *A Commentary on the Conference on the Theory of Ruling the Country according to Law and Constructing a Socialist Rule-of-Law State*, 2 FAZHI YU SHEHUI FAZHAN [LEGAL SYS. & SOC. DEV.] 1 (1997); Zheng Chengliang et al., *The Essence of the Jurisprudence of Ruling the Country according to Law*, in YIFA ZHIGUO, *supra* note 3, at 121; Fan, *supra* note 26.

43. See Bei Yue, *The Theoretical Basis of Ruling the Country according to Law*, in YIFA ZHIGUO, *supra* note 3, at 143; Gu Chunde, *supra* note 31; Xie Pengcheng, *Legal Authority in Contemporary China*, 6 ZHONGGUO FAXUE [CHINESE LEGAL SCI.] 3 (1995).

44. See Zheng et al., *supra* note 42.

45. See Liu zuoxiang, *Two Rule-of-Law Principles to be Adhered to in order to Realize the Rule of Law*, 3 FALÜ KEXUE [L. SCI.] 19 (1996), reprinted in 7 LILUN FAXUE, FASHI XUE [LEGAL THEORY & LEGAL HIST.] 25 (1996).

46. See Yan, *supra* note 39; Sun Xiaoxia, *The Choice of Realistic Objectives for the Rule of Law in China*, 3 FALÜ KEXUE [L. SCI.] 12 (1996), reprinted in 7 LILUN FAXUE, FASHI XUE [LEGAL THEORY & LEGAL HIST.] 18 (1996).

implies a rational way of doing things, a rational legal system, a rational legal spirit, and a rational social order.⁴⁷ Rationality includes formal rationality and substantive rationality. The former refers primarily to the process of law enforcement, and requires like cases to be treated alike and legal rules to be administered in a predictable manner. Substantive rationality refers to the content of the law, as well as the objectives to be achieved by the law, the values embodied in it and the consequences of its operation.⁴⁸

The Ingredients of the Rule of Law.

Some scholars explore further the different elements, aspects or levels within the concept of the rule of law. The following is a sample of the more influential views:

(a) A distinction can be drawn between the formal and substantive ingredients of the rule of law. The formal ingredient is the supremacy of the law (the law being made by the people and being binding on the people as well as the government), whereas the substantive ingredient relates to whether the content of the law is good and protects the people's rights.⁴⁹

(b) There are three levels of the rule of law. First, there is the rule of law in an ideal sense. Second, there is the rule of law as prescribed by a particular system of legal norms. Third, there is the rule of law as actually practiced in a society — the reality of the existence (or non-existence) of the rule of law.⁵⁰

(c) Some writers point out that the implementation of the rule of law depends on coordinated efforts on many fronts simultaneously, such as lawmaking, development of democracy and of institutions for supervising the exercise of power and the protection of rights, effective law enforcement, judicial independence, improvements in judicial procedures and the professional standards of judges, and raising people's legal consciousness.⁵¹

The Distinction Between "Legal System" and "Rule of Law."

As mentioned in the first section of this article, an official slogan adopted by the NPC in 1996 in the Ninth Five-Year Plan and Outline of Objectives for Long-Term Developments towards 2010 is "ruling the country according to law and constructing a

47. See Sun Xiaoxia, *The Rule of Law, Rationality and Cost*, 1 FAZHI YU SHEHUI FAZHAN [LEGAL SYS. & SOC. DEV.] 1 (1997).

48. See sources cited *supra* note 46.

49. See Zhou, *supra* note 42. See also Xu Xianming, *The Ingredients of the Rule of Law*, 3 FAXUE YANJIU [CASS L.J.] 37 (1996) (providing a more elaborate theorization of the rule of law in terms of both form and substance); Gao Hongjun, *Two Modes of the Rule of Law*, in YIFA ZHIGUO, *supra* note 3, at 262.

50. See Wu Dexing, *The Theoretical Mode and Process of Realization of the Rule of Law*, 5 FAXUE YANJIU [CASS L.J.] 97 (1996); Li, *supra* note 29.

51. See Li, *supra* note 33; Xu, *supra* note 49; Zhou, *supra* note 42, at 15.

socialist legal system state” (*fazhi guojia*⁵²). Since then, the term “rule of law” (*fazhi*⁵³ or “rule of law state” - *fazhi guojia*⁵⁴) has also received official and in 1999, constitutional recognition. What then is the difference between the two Chinese terms which are both romanized as *fazhi*?

Scholars’ understanding of the meaning of the “rule of law” (*fazhi*⁵⁵) has been discussed above. The problem with the term “legal system” (*fazhi*⁵⁶), which has been used (for example, in the call for “strengthening the socialist legal system”) to the exclusion of “rule of law” for many years in the PRC, is that it may be interpreted to mean “rule by law” rather than “rule of law.” Rule by law implies that law is merely an instrument which the state uses for the purpose of ruling the people. On the other hand, the rule of law requires the democratization of law and the legal institutionalization of democracy.⁵⁷

Thus it is pointed out that while all organized states have legal systems, not all of them practice the rule of law.⁵⁸ There was also an interesting discussion about who the subject is for the phrase “ruling the country according to law” — who rules the country according to law? Some scholars made the point that it is the people who rule the country according to law, by making law and entrusting to the government the necessary public administrative powers. As far as the government is concerned, the related slogan “using the law to rule the country” (*yifa zhiguo*) is sometimes used, but this slogan is inadequate by itself because it again connotes rule by law rather than rule of law. Therefore, the full notion of the rule of law can only be expressed by combining the concepts of (a) the people using law to rule the country (by legally establishing the state and entrusting legal powers

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57. See, e.g., Guo Daohui, *A Fundamental Change in the Mode of Rule*, in *YIFA ZHIGUO*, *supra* note 3, at 109 [hereinafter *Fundamental Change*]. See generally GUO DAOHUI, *FA DE SHIDAI JINGSHEN* [THE CONTEMPORARY SPIRIT OF LAW] (1997); GUO DAOHUI, *FA DE SHIDAI HUHUAN* [EPOCHAL CALL FOR LAW] (1998); LI BUYUN, *ZOUXIANG FAZHI* [TOWARD THE RULE OF LAW] (1998).

58. See Li, *supra* note 33; Zhou, *supra* note 42, at 12-14.

to it) and (b) the government (acting under legal authorization by the people) administering the country according to law.⁵⁹

Socialism and the Rule of Law.

The next question to be considered is how contemporary Chinese scholars have shifted away from the former official position that the rule of law was a bourgeois concept, and how they now reconcile it with socialism and Marxism. Here a leading scholar employs an analogy with Deng Xiaoping's view that the market economy does not equal capitalism, and it is possible to have a market economy under socialism. Hence it is also said that the rule of law is not the monopoly of capitalism, and a socialist rule of law is also practicable and desirable.⁶⁰ Like the market economy, the rule of law is now understood as a product of the historical development of civilization and as part of the common heritage of humankind.⁶¹

Relying on the Marxist view of historical progress from "slave society to feudalism to capitalism to socialism," some Chinese scholars argue that the rule of law in capitalism is superior to legal systems under feudalism, and socialist rule of law is a still higher stage of legal evolution compared to the rule of law under capitalism.⁶² The socialist project is one of human emancipation; socialism enables human beings to develop themselves to the full. While the rule of law under capitalism masks the reality of class oppression and capitalist law primarily serves the interest of capital, socialist law reflects the will and interest of all people in society, and socialist rule of law secures the richest degree of freedom, equality and rights.⁶³

What, then, are the features specific to socialist rule of law? Most scholars stress that it rests on the foundation of the pre-dominance of public ownership of the means of production in society, and that it adheres to the fundamental principle of the leadership of the Communist Party.⁶⁴ This means that certain el-

59. See Guo, *Fundamental Change*, *supra* note 57; Zhou, *supra* note 42, at 12; Zhou, *supra* note 30.

60. See Liu Shengping, *The Implementation of the Rule of Law is Inevitable in Historical Development*, 10 FAXUE [JURISPRUDENCE] 4 (1996); Gu, *supra* note 3, at 194.

61. See Liu, *supra* note 60.

62. See Li, *supra* note 29, at 242-243.

63. See *id.*; Zhou, *supra* note 42, at 14; Zhou, *supra* note 30, at 102; Wang Jiafu et al., *On Ruling the Country according to Law*, in YIFA ZHIGUO, *supra* note 3, at 6, 11; Ye Feng & Xie Pengcheng, *From "Having Laws to Follow" to "Strict Enforcement of the Law"*, Address before the annual conference of the Legal Theory Research Society of the Chinese Society of Legal Science, Shenzhen University, Shenzhen, November 5-8, 1996.

64. See Li, *supra* note 29, at 243-244; Lü Shilun & Peng Hanying, *The Economic Point of Departure of the Rule of Law*, in FAZHI XIANDAIHUA YANJIU [STUD. ON

ements of bourgeois rule of law, such as the inviolability of private property or political pluralism in the form of multiparty politics, cannot have any place in socialist rule of law.⁶⁵

The Nature of Law.

Since the 1980s, the debate about the nature of law has never ceased within the circle of legal philosophers in China.⁶⁶ The point of departure for this discussion was the orthodox view, imported from the Soviet Union in the 1950s, that law reflects the will of the ruling class, which in turn is based on the conditions of material life of that class. Such will is elevated into the will of the state through the legislative process. The law that emanates from this process is then a set of behavioral norms backed up by the coercive power of the state.

The continuing debate has been about whether this description or explanation of law in terms of its “class nature” (*jieji xing*) is correct and adequate, and the extent, if any, to which law also has a “social nature” (*shehui xing*) — in the sense that it responds to the common interests, needs and aspirations of all members of society.⁶⁷ The recent discussion on the rule of law has contributed significantly to this ongoing debate.

For example, one scholar, who himself works under the Standing Committee of the NPC, states unequivocally his view that the traditional notion of law as the will of the ruling class and an instrument of class dictatorship is inconsistent with the concept of the rule of law and the requirements of the market economy.⁶⁸ Indeed, in contrast to the orthodox view that law is used to suppress class enemies, a substantial body of scholarly opinion has accumulated in China in recent years supporting the view that law serves the functional needs of society in terms of coordinating different kinds of interests, regulating social relationships, and providing order and predictability in human affairs. In this sense law serves the common good of all members of society, expresses the values that they uphold, and responds to their needs. The content of law is very much a product of human

LEGAL MOD.], *supra* note 39, at 1; Wang et al., *supra* note 63, at 11; Zhu, *supra* note 37, at 301.

65. See Zhu, *supra* note 37, at 301-302.

66. See, e.g., Ronald C. Keith, *Chinese Politics and the New Theory of “Rule of Law”*, 125 CHINA Q. 109 (1991).

67. See generally Chih-yu Shih, *China’s Socialist Law Under Reform: The Class Nature Reconsidered*, 44 AM. J. COMP. L. 627 (1996).

68. See Cai Dingjian, *Notes on the Conference on Ruling the Country according to Law and the Construction of Spiritual Civilization*, 3 FAXUE YANJIU [CASS L.J.], 3 at 16 (1997).

experience accumulated over many generations, and is inseparable from notions of reason, justice, conscience and morality.⁶⁹

Accompanying this "new view" of law are two critiques of certain ideas associated with the "traditional" or "orthodox view." One is a critique of the instrumental view of law. More and more writers now recognize that law is not merely a means for achieving political and policy ends, but can be understood as a value and an end in and of itself because it expresses the values, needs and aspirations of the community and reflects the ideals of reason, liberty and equality.⁷⁰ The second critique is directed against the state-centered view of law. Scholars now stress that the existence of law preceded the rise of states and class rule. The origin of law lies in the customs and conventions that evolve spontaneously in the course of social interaction. When they gain general acceptance and are perceived to be binding on members of the community, they acquire the force of law.⁷¹

The Functions of the Rule of Law.

In contrast with the situation in the early 1980s, when there existed different schools of thought regarding whether the rule of law was the best mode of rule relative to other alternatives, there is now a clear consensus among Chinese legal scholars in favour of the rule of law. Various reasons and arguments have been articulated regarding why the rule of law is desirable and regarding the useful contribution it can make to China. For example, it is pointed out that the rule of law facilitates the operation of the socialist market economy and is conducive to the development of socialist democracy.⁷² It is also an important element of "spiritual civilization" (*jingshen wenming*).⁷³ Most important of all, it is the key to the longterm stability and prosperity of the nation

69. See Zheng et al., *supra* note 42, at 125; Zhou, *supra* note 30; Su, *supra* note 40, at 6-10; Ma Changshan, *Understanding the Nature of Law from the Perspective of Civil Society Theory*, 1 FAXUE YANJIU [STUD. IN L.] 41 (1995); Shi Taifeng, *Notes*, *supra* note 68, at 12-13.

70. See Shen Zongling, *Ruling the Country according to Law, Constructing a Socialist Legal-System State*, 6 BEIJINGDAXUE XUEBAO: ZHESHEBAN [PEKING U. J.: PHIL. & SOC. SCI. SECT.] 4 (1996), reprinted in 1 LILUN FAXUE, FASHI XUE [LEGAL THEORY & LEGAL HIST.] 8 (1997); Xie Hui, *On Legal Instrumentalism*, 1 ZHONGGUO FAXUE [CHINESE LEGAL SCI.] 50 (1994); Zheng et al., *supra* note 42, at 124-126.

71. See Zhou, *supra* note 30; Yan, *supra* note 39; Mi Jian, *Looking at the Nature of Law from the Perspective of Human Nature*, 1 FALU KEXUE [L. SCI.] 3 (1997), reprinted in 4 LILUN FAXUE, FASHI XUE [LEGAL THEORY & LEGAL HIST.] 8 (1997); Sun Xiaoxia, *The External Authority and Internal Authority of Law*, 4 XUEXI YU TANSUO [STUDY & INVESTIGATION] 85 (1996), reprinted in 9 LILUN FAXUE, FASHI XUE [LEGAL THEORY & LEGAL HIST.] 14 (1996).

72. See Wang et al., *supra* note 63; Zhou, *supra* note 42.

73. See *infra* pp. 33-34.

and will enable China to escape from its historical dynastic cycles in which each powerful regime ultimately declined and fell.⁷⁴

Other interesting points have also been made. Some scholars use the "new institutional economics" to explain how the rule of law can reduce transaction costs and facilitate market expansion.⁷⁵ Others point out that modernization releases people from their traditional familial, clan and social linkages and forms a society of isolated individuals in which the law will have to play an increasingly important role as a medium for social interaction and as the most authoritative norms of behaviour.⁷⁶ Social and economic change in contemporary China has led to a declining role for administrative, party and ideological means of social control, and has resulted in increased differentiation and diversity of interests and values in society.⁷⁷ The demand for legal coordination and regulation increases accordingly.⁷⁸ It has also been argued that settlement through the legal system of conflicts generated by the increasing social contradictions in China can prevent the escalation of such conflicts into social unrest.⁷⁹

The Authority of Law and Faith in Law.

If law is to perform these important functions to which society has assigned it, it must have sufficient authority first. Hence many contemporary Chinese scholars emphasize that the supreme binding authority of the law lies at the core of the notion of the rule of law. It has been pointed out that a crucial aspect of the supremacy of the law is that "law" rather than "power" must be the ultimate source of political legitimacy. In the traditional Chinese state, there was "worship of power," and any act or decision of a politically powerful person was automatically legitimate. However, in the eyes of modern rule of law, power has no legitimacy unless there exists a legal basis for it.⁸⁰

74. See Liu Zuoxiang & Xiao Zhoulu, *Jumping out of the "Periodic Cycle" by relying on Democracy and the Rule of Law*, 2 ZHONGGUO FAXUE [CHINESE LEGAL SCI.] 7 (1995).

75. See, e.g., Liu Yunlong & Li Min'e, 3 XIANDAI FAXUE [MOD. L. SCI.] 96 (1996), reprinted in 1 LILUN FAXUE, FASHI XUE [LEGAL THEORY & LEGAL HIST.] 31 (1997).

76. See, e.g., Gao, *supra* note 49, at 262; Long Fu & Yan Ping, *Notes on the Conference on the Rule of Law and Spiritual Civilization*, 2 FAXUE [JURISPRUDENCE] 61 (1997).

77. See also *infra* pp. 21-23.

78. See Hu Yunteng, *Several Questions relating to the Rule of Law*, in YIFA ZHIGUO, *supra* note 3, at 156; Xie Hui, *The Rule of Law: The Dominant Value Orientation for the Spiritual Transformation of the Chinese People*, 3 ZHENGZHI YU FALU [POL. SCI. & L.] 29 (1995).

79. See Gu Peidong, *Several Questions relating to the Development of the Legal System in China*, in FAZHI XIANDAIHUA YANJIU [STUD. ON LEGAL MOD.], *supra* note 39.

80. See, e.g., Zheng et al., *supra* note 42, at 126-127.

Some scholars study the connection between the supremacy of law and its autonomy. They rely on the American legal philosopher Roberto Unger's analysis of the autonomy of law, which consists of four components — substantive, institutional, methodological, and occupational autonomy.⁸¹ Other scholars theorize that the authority of the law consists of external and internal aspects.⁸² The external authority of the law depends on its coercive enforcement by the state. The internal influence of the law depends on its content and quality (whether it is good, just and consistent with people's interests), and whether the people believe in, accept and voluntarily comply with it.

The concept of the internal authority of the law leads into the interesting discussion among contemporary Chinese jurists about "faith in law." A significant number of them quote the American law professor Harold Berman's view that without faith in the law, the law is merely dead dogma; law must be believed in, otherwise it is empty.⁸³ They develop this idea further and elaborate on the meaning and significance of faith in the law. Such faith means that people not only understand the law, but respect it, trust it, and rely on it for the purpose of defending their interests.⁸⁴ It is also an attitude of fidelity to law, a commitment to uphold its values and principles, which manifests itself when people feel strongly about and fight against violations of the law, even to the point of sacrificing themselves in order to defend the law and its values and principles.⁸⁵

Hence, it is pointed out that faith in the law is not only a matter of knowledge; it is also a matter of emotions and the will. It is a sublimation of law's reason and passion, or what a scholar describes as "rationalized passion and passionized reason."⁸⁶ "After Marxist jurisprudence has taken off the overcoat of law's mystery and destroyed the myth of the sanctity of the law, we

81. See, e.g., Gao, *supra* note 49, at 266-267.

82. See, e.g., Sun, *supra* note 71; Qiao Keyu & Gao Qicai, *On the Authority of Law*, paper presented at the 1996 Shenzhen conference, *supra* note 63.

83. See, e.g., Sun, *supra* note 71; Zhao Zhenjiang & Fu Zitang, *The Functions of Law and Ruling the Country according to Law*, 2 FAXUE [JURISPRUDENCE] 12, 14 (1997); Zhou Yezhong, *The Supremacy of the Constitution: The Soul of China's Path to the Rule of Law*, 6 FAXUE PINGLUN [JURISPRUDENTIAL COMMENTARY] 1 (1995), reprinted in 1 LILUN FAXUE, FASHI XUE [LEGAL THEORY & LEGAL HIST.] 9 (1996); Liu Wanghong, *Faith in Law and Legal Modernization*, in FAZHI XIANDAIHUA YANJIU [STUD. ON LEGAL MOD.], *supra* note 39, at 226, 228.

84. See Sun, *supra* note 71; Xie, *supra* note 78; Li Youxing, *Research on the Problems and Solutions of Chinese Legal Modernization*, 2 HANGZHOU SHEHUI KEXUE [HANGZHOU J. SOC. SCI.] 73 (1997), reprinted in 4 LILUN FAXUE, FASHI XUE [LEGAL THEORY & LEGAL HIST.] 21 (1997).

85. See Zhao & Fu, *supra* note 83; Liu, *supra* note 83.

86. Liu, *supra* note 83, at 234.

must re-establish people's faith in the law."⁸⁷ Another scholar refers approvingly to the German legal philosopher Jhering's affirmation of the psychological attitude of actively fighting for one's rights (which means fighting to uphold the law), and his view that the cultivation of "legal feelings" (the right feelings towards the law) among citizens is one of the most important elements of civic education.⁸⁸

The Social Basis of the Rule of Law.

Another area which scholars explore as they attempt to develop a theory of the rule of law for China is the social basis of law. Here they rest their hope for the future of the rule of law on the developing market economy. As one writer puts it, "the market economy is the soil for the rule of law."⁸⁹ It is pointed out that the actors in the market economy are autonomous and free subjects competing to further their own interests (which form the basis of legal consciousness and legal rights), and this generates a demand for fair legal rules to govern their dealings with one another.⁹⁰

Two concepts have also been introduced in order to elucidate the nature of China's current social change and the significance of this change for the rule of law. They are the concepts of interest pluralism and civil society. Under the centrally planned economy and rigorous ideological control of pre-reform socialist China, plural interests in society were hardly allowed to exist or hardly recognized. However, economic reforms since 1978 have led to differentiation of social interests which some scholars believe to be the most important social issue in contemporary China.⁹¹ For example, there are now different regional interests, occupational interests, and conflicting interests between different income strata and between urban and rural residents. It is pointed out that interest pluralism in society provides the social basis for a rule of law society.⁹² There is a crucial role for law to play in coordinating, integrating and protecting the multifarious

87. *Id.* at 227.

88. See Yan, *supra* note 39, at 207-210.

89. Cai Dingjian, *Legal Evolution and the Transformation of the Chinese Legal System*, 5 ZHONGGUO FAXUE [CHINESE LEGAL SCI.] 3, 7 (1996).

90. See *id.*

91. Xie Hui & Cao Rong, *Interest Differentiation in Contemporary China and its Legal Regulation*, 1 FAXUE [JURISPRUDENCE] 13 (1997).

92. See Huang Jianwu, *Pluralism of Subjects of Interests and the Social Foundation of the Rule of Law*, 11 FAXUE [JURISPRUDENCE] 5 (1996).

interests in society.⁹³ Indeed, it is from society itself, rather than the state, that the strongest demand for the rule of law comes.⁹⁴

This logically leads to the concept of civil society. The interest in the concept of civil society in contemporary China originated from scholars of social theory,⁹⁵ and soon the concept also attracted the attention of legal philosophers. Civil society is understood as a non-governmental or private realm of social life in which autonomous persons freely and voluntarily enter into dealings and interactions with one another for their own purposes.⁹⁶ Some contemporary Chinese scholars emphasize that the distinction between civil society and the (political) state is recognized in the writings of Marx.⁹⁷ Others trace the evolution of civil society back to medieval European towns.⁹⁸

It is pointed out that in pre-reform socialist China, state and society were fused together into a monolithic whole.⁹⁹ Now, economic reforms have ushered in a dual structure of political state and civil society.¹⁰⁰ Some scholars describe this as a transition from an officials-oriented system to a people-oriented system,¹⁰¹ or from a state-centered structure to a society-centered structure.¹⁰²

What then is the relationship between civil society and the rule of law? Some contemporary Chinese scholars believe that civil society is the source of and the motivating force behind the rule of law.¹⁰³ Others see the rule of law as being generated by the reciprocal interaction between civil society and the political state.¹⁰⁴ A leading theorist of the relationship between law and civil society argues that civil society is the cradle of the rule of law and embodies the spirit of modern law, which he understands to be the spirit of private law. Private law upholds equality, free-

93. See Xie & Cao, *supra* note 91; Editorial comment, *Strengthening Research on the Effect on Law of Pluralism of Subjects of Interests*, 7 FAXUE [JURISPRUDENCE] 2 (1996).

94. See Huang, *supra* note 92.

95. See, e.g., DENG ZHENGLAI, GUOJIA YU SHEHUI: ZHONGGUO SHIMIN SHEHUI YANJIU [STATE AND SOCIETY: STUDIES ON CHINESE CIVIL SOCIETY] (1997).

96. See Liu Wujun, *Civil Society and the Spirit of Modern Law*, 8 FAXUE [JURISPRUDENCE] 28 (1995), reprinted in 11 FAXUE [SCI. OF L.] (Renmin University reprint service) 22 (1995).

97. See, e.g., Du, *supra* note 26; Ma, *supra* note 69.

98. See, e.g., Fan, *supra* note 26; Liu, *supra* note 96.

99. See Guo, *supra* note 4; Xie, *supra* note 43; Liu, *supra* note 96.

100. See Du, *supra* note 26; Liu, *supra* note 96.

101. See Hao Tiechuan, *A Major Transformation in Rule-of-Law Thinking*, 3 ZHONGGUO FAXUE [CHINESE LEGAL SCI.] 12 (1996).

102. See Cai, *supra* note 89.

103. See, e.g., Fan, *supra* note 26; Shi Taifeng, *Notes*, *supra* note 68, at 12-13.

104. See, e.g., Xie, *supra* note 43; Ma, *supra* note 69.

dom, and private rights, and these have been the products of civil society.¹⁰⁵

Private Law and Public Law.

The concept of private law has not yet gained full recognition and legitimacy in the PRC. Lenin once said that in the socialist state, all law was public law, because the economic domain that had come under private law in capitalism was now governed by public ownership of the means of production and economic planning by the state.¹⁰⁶ However, in recent years, there has emerged in China a growing body of scholarly opinion that not only should the conceptual division of private law and public law be affirmed, but that the priority or greater importance of private law should be recognized.

The argument for the priority of private law runs as follows: Legal evolution and modernization means the transition from a "public law culture" to a "private law culture." Whereas the former was characterized by social hierarchy, political authoritarianism, the supreme power of rulers and the use of law to punish disobedient subjects, the private law culture of modernity is characterized by liberty, equality, freedom of contract and individuals' rights. It is said that private law is about rights, and the modern emphasis on rights means the priority of private law relative to public law. It is further argued that the public law of the past should be reformed to implement the spirit of private law — the protection of rights, and by using the concept of the social contract which is derived by analogy with the contract in private law.¹⁰⁷

Other views have also been expressed regarding whether private law should be privileged as against public law. One scholar's insightful thesis is that while private law should be regarded as the basis of the legal system, public law should have priority in terms of importance. But this does not mean that the criminal law oriented public law of pre-modern times should enjoy this priority. The thesis is that private law develops with the rise of the market economy, and such private law provides the foundation for the development of modern public law. The latter is concerned with the protection of fundamental rights of citizens

105. See Liu, *supra* note 96; Liu Wujun, *A Jurisprudential Perspective on Civil Society*, 6 ZHONGWAI FAXUE [PEKING U. L.J.] 30 (1995).

106. See Jiang, *supra* note 41, at 14; Sun Guohua, *Several Issues in Jurisprudential Research in Contemporary China*, 4 FAXUE [JURISPRUDENCE] 2, 3 (1996).

107. See Zhou, *supra* note 30; Zhou, *supra* note 27.

and the control of state power. In this sense it is superior to private law.¹⁰⁸

Another scholar has made a similar point by theorizing on what he describes as the three historical stages of legal evolution: the criminal law stage, the civil law (private law) stage, and the constitutional law stage.¹⁰⁹ He refers to the English legal anthropologist Henry Maine's view that legal evolution is evidenced by the increasing proportion of civil law relative to criminal law in the laws of a society.¹¹⁰ He argues that the emergence of constitutional law represents the highest stage of legal evolution and of the development of political systems. And constitutional law is about not only civil and political rights but also social and economic rights; it makes possible the judicial control of state power.

The Social Contract.

It is noteworthy that the concept of the social contract as theorized by Western thinkers in the 17th and 18th centuries has now entered into the vocabulary of jurisprudential discussion in China after having been completely rejected as part of bourgeois ideology in the past. Some Chinese thinkers now find in the notion of the social contract the basis of government and law,¹¹¹ as well as the obligation to obey the law itself.¹¹²

The leading social contract theorist in China is a research professor at the Chinese Academy of Social Science.¹¹³ He develops a theory of the rationality of human beings, which includes cognitive and behavioral aspects. Being rational, human beings would be able to reach a consensus regarding what rules of behavior are necessary for the purpose of peaceful co-existence, social cooperation and the control of irrational behavior. They would agree to these rules, promise one another to abide by them, and authorize a public power to enforce them. Law is therefore a rationally produced system of rules which members of society ought to obey because they have agreed to them,

108. See Xie Hui, *Private Law as the Foundation and the Priority of Public Law*, 8 FAXUE [JURISPRUDENCE] 31 (1995), reprinted in 11 FAXUE [SCI. OF L.] (Renmin University reprint service) 25 (1995).

109. See Cai, *supra* note 89.

110. Maine has in fact been frequently cited by Chinese legal theorists in recent years, particularly in relation to his thesis about legal evolution being "from status to contract." See generally Chen, *supra* note 11.

111. See, e.g., Xie Hui, *Modern Law and its Nature*, 9 TIANJIN SHEHUI KEXUE [TIANJIN SOC. SCI.] 102 (1995), reprinted in 2 LILUN FAXUE, FASHI XUE [LEGAL THEORY & LEGAL HIST.] 38 (1996); Du Gangjian, *Legal Philosophy and Human Rights Law*, 5 TIANJIN SHEHUI KEXUE [TIANJIN SOC. SCI.] 61 (1994), reprinted in 1 FAXUE [SCI. OF L.] (Renmin University reprint service) 14 (1995); Du, *supra* note 26.

112. See, e.g., Bei Yue, *Human Rational Agreement and the Origin of Legal Rules*, 1 XAINDAI FAXUE [MOD. L. STUD.] 8 (1997).

113. *Id.*

although in the modern state, law is made by the people's representatives in a system of representative government. The author's writings abound with references to Hobbes, Locke, Spinoza, Rousseau and Kant, but he also tries to demonstrate that social contract theory is not inconsistent with Marxist historical materialism. Indeed, other Chinese thinkers sympathetic to the social contract theory have also argued that there is evidence that Marx himself was not against the theory.¹¹⁴

Law, Rights, and Human Rights.

The writings of Chinese jurists since the late 1980s on the issue of rights and human rights have been examined elsewhere.¹¹⁵ Here we can consider briefly how the discussion of rights and human rights is now converging with the developing theory of the rule of law. An influential thesis in this regard is that the supremacy of law means the supremacy of rights: if the law is sacred, then rights are sacred; taking the law seriously implies taking rights seriously and vice versa.¹¹⁶ Although legal relations involve both rights and obligations, rights are in a sense more basic because obligations exist for the purpose of implementing the rights which reflect the interests of the human beings concerned.¹¹⁷ Rights (of individuals) also have priority over power (state power), because government is established precisely for the purpose of protecting people's rights.¹¹⁸ It has also been said that legal science is a science of rights, and the protection of rights represents the spirit of modern law.¹¹⁹

According to a leading Chinese scholar,¹²⁰ human rights are rights that human beings ought to enjoy by virtue of their natural attributes and social nature. They are not conferred by the state or by law, although the state and the law should create conditions for their realization. It is argued that under socialism, human rights can be even more fully realized than under capitalism, and the socialist should carry courageously the banner of human rights. Another leading theorist of human rights points out that the concept of human rights originates from weak human individuals who confront the great powers of the state. Human rights are for their self-protection and for resistance to oppression by power. Legal progress consists in the process of the translation of human rights (as "subjective" rights that ought to

114. See, e.g., Du, *supra* note 26.

115. See Chen, *supra* note 7.

116. See Zheng et al., *supra* note 42.

117. See Li, *supra* note 33, at 60-61; Wang et al., *supra* note 63, at 17.

118. See Li, *supra* note 33, at 63; Zhou, *supra* note 30.

119. See Li, *supra* note 33, at 61.

120. See *id.* at 62.

be recognized) into legally recognized and protected rights that are actually enjoyed by human beings in the "objective world."¹²¹

The Theoretical Presuppositions of the Rule of Law.

It is interesting to observe that there has been an active reception in China in recent years not only of the vocabulary of the rule of law and related notions in the Western liberal tradition, but also of the deeper theoretical underpinnings of these notions. Two scholars at the Chinese Academy of Social Science have identified four concepts within the theoretical basis of the rule of law: the natural autonomy and equality of human beings, law-making as the rational self-regulation of human beings, the evil propensity in human nature, and the superior wisdom of the masses ("the many" as distinguished from "the few").¹²² Another scholar from Peking University develops a similar formulation consisting also of four elements: the effective control of the weakness in human nature, the rational governance of the social order, the recognition of the masses' intelligence, and justice as the unity of fairness and efficiency.¹²³

The Due Process of Law.

As mentioned above, in relation to the discussion of the meaning of the rule of law, some Chinese scholars draw a distinction between the formal and substantive rationality of the law. One view is that at this stage of the development of the Chinese legal system, formal rationality should be particularly emphasized.¹²⁴ The idea of formal rationality is associated with that of just procedure, procedural justice, formal justice or the due process of law. Many contemporary Chinese scholars point out that in traditional Chinese culture as well as previous legal practice in the PRC, procedural justice was much neglected and regarded as of secondary importance compared to substantive justice, and that this approach ought to be changed.¹²⁵ A number of scholars quoted the famous American Justice Frankfurter's saying that the history of liberty is one of observing procedural safeguards.¹²⁶ Another Western judge was also cited for the proposition that it is procedure that distinguishes the rule of law from the arbitrary rule of men.¹²⁷

121. See Du Gangjian, *supra* note 111.

122. See Zhang Hengshan, Notes on the Conference on Ruling the Country according to Law and Constructing a Socialist Rule-of-Law State, in 3 FAXUE YANJIU [CASS L.J.] 3, 8 (1996); Bei Yue, *supra* note 43.

123. See Zheng Qiang, *The Value Foundations of the Rule of Law*, paper presented at the 1996 Shenzhen conference, *supra* note 63.

124. See Sun, *supra* note 46.

125. See Cai, *supra* note 89; Li Youxing, *supra* note 84.

126. See Zhou, *supra* note 83; Wu Dexing, *The Theoretical Mode and Process of Realization of the Rule of Law*, in YIFA ZHIGUO, *supra* note 3, at 353, 359.

127. See Zhou, *supra* note 83.

The leading theorist of the rule of law as a matter of procedure came from the CCP Central Policy Research Unit.¹²⁸ He argues that the basic principle of the rule of law is the procedural principle that justice should be realized through fair procedures. He draws heavily on Rawls' theory of formal justice, and quotes Western thinkers' views that law is procedure, and just procedure is the primary meaning of the due process of law that stands at the heart of Western constitutionalism.¹²⁹ In his view, the realization of the rule of law is a process moving "from substance to procedure." He advocates the "proceduralization of the rule of law," which consists in the "proceduralization of law" and the "legalization of procedure."

Judicial Independence.

For two decades before 1978, the principle of judicial independence, or what the 1954 Constitution of the PRC called the independent exercise of adjudicatory power, was officially rejected as bourgeois and inconsistent with the principle of the leadership of the Communist Party.¹³⁰ After 1978, the principle of the independent exercise of the powers of the courts was rehabilitated and stipulated in the 1982 Constitution. In the recent discussion about the rule of law, many scholars continue to call for judicial independence.

It is stressed that judicial independence is a fundamental ingredient of the rule of law.¹³¹ It is important both for the purpose of ensuring the predictability and security in economic transactions that the market economy needs, and for the purpose of assuring the protection of citizens' rights.¹³² The rule of law requires the government to be subject to the law, and only independent courts can enforce the law as against the government and serve as the arbiter between citizens and government.¹³³

One scholar quotes approvingly Ronald Dworkin's language that courts are the capital of law's empire, and judges its aristocracy.¹³⁴ Another scholar tries to explain that the practice of judicial independence is not inconsistent with the principle of the leadership of the Communist Party. The Party exercises leader-

128. See Wu, *supra* note 126, at 353.

129. *Id.* at 359.

130. See generally CHEN, *supra* note 5, at 117-119.

131. See, e.g., Li, *supra* note 33, at 68; Li Jingbing, *Judicial Independence is Conducive to the Construction of the Rule of Law*, 3 FALÜ KEXUE [L. SCI.] 15 (1996), reprinted in 7 LILUN FAXUE, FASHI XUE [LEGAL THEORY & LEGAL HIST.] 21 (1996); Chen Jinzhao, *A Technical Choice in the Path of the Rule of Law*, 3 FALÜ KEXUE [L. SCI.] 16 (1996), reprinted in 7 LILUN FAXUE, FASHI XUE [LEGAL THEORY & LEGAL HIST.] 22 (1996).

132. See Xie, *supra* note 43.

133. See Cai, *supra* note 10, at 409.

134. See Ye & Xie, *supra* note 63, at 5.

ship in governmental affairs, including judicial affairs, by formulating general policies, promoting them through education and propaganda, and by determining appointments to official posts. However, it would be wrong for Party organs or officials to interfere with a court's work in individual cases.¹³⁵

The Communist Party and the Rule of Law.

What then are the implications of the rule of law for the Communist Party? Many scholars explain that the rule of law does not detract from the principle of Party leadership in the state. In relation to law-making, the Party's role is to organize and lead the people in forming their common will, and then elevating such will into law through the democratic procedure of legislation.¹³⁶ The law that emerges from this process is thus the unity of the Party's policies, the people's wishes and the will of the State.¹³⁷

After the law has been made, the Party should also lead the people in observing the law and in supervising the exercise of legal powers by state organs.¹³⁸ The Party itself should operate within the framework of the constitution and law of the state, as provided for in the Constitution of the CCP. The PRC Constitution also requires all political parties, social bodies and individuals to comply with the Constitution and the law.¹³⁹

It is noteworthy that not all scholars believe that the issue of the relationship between the Party and the law has been completely resolved even at the theoretical level.¹⁴⁰ For example, it has been pointed out that although the personnel and operations of Party organs are financed by the state budget, these organs are not regulated by state law.¹⁴¹ The question of the extent to which the Party as an organization should come under the legal control of the state cannot be avoided at some future point in the reform of the Chinese political system.¹⁴²

135. See Li, *supra* note 33, at 68-69.

136. See *id.* at 65; Xie, *supra* note 43.

137. See Li, *supra* note 29, at 247.

138. See Guo, *supra* note 4, at 120; Sun Guohua, *Ruling the Country according to Law is Needed for the Purpose of Improving and Strengthening Party Leadership*, 10 FAXUE [JURISPRUDENCE] 6 (1996).

139. See XIANFA [CONST.], art. 5. See also Gu, *supra* note 3, at 195-196.

140. See Zhou, *supra* note 83.

141. See Hao Tiechuan, *Ten Suggestions regarding Ruling the Country according to Law*, 5 FAXUE [JURISPRUDENCE] 2 (1996).

142. See Zhuo Zeyuan, *The Past and Future of the Rule of Law in China*, paper presented at the 1996 Shenzhen conference, *supra* note 63; Jiang Lishan, *The Basic Framework for China's Legal (Rule-of-Law) Reform and the Steps for its Implementation*, 6 ZHONGWAI FAXUE [PEKING U. L.J.] 1 (1995).

Constitutionalism and the Rule of Law.

The subject of constitutionalism has arisen in the Chinese discussion of the rule of law in recent years. Some scholars are of the view that having the rule of law is not sufficient; there should also be constitutionalism, and the rule of law is an important element of constitutionalism, which also entails the sovereignty of the people, the separation of powers, democratic government, judicial review, human rights protection, legal control of the armed forces, etc.¹⁴³ Another view is that the rule of law *is* constitutionalism, and the supremacy of law means first of all the supremacy of the constitution.¹⁴⁴ One scholar stresses that the division of power is the key to constitutionalism, and identifies the orthodox view that sovereignty is non-divisible as a conceptual obstacle to constitutional division of power in China.¹⁴⁵

In discussing the supremacy of the constitution, some scholars point out that in practice the status and force of the Chinese Constitution is worse than other ordinary laws, because the doctrine still prevails that the provisions of the Constitution are not justiciable and directly enforceable in the courts.¹⁴⁶ It is now advocated by some that constitutional provisions, particularly those guaranteeing citizens' rights, should be made judicially enforceable.¹⁴⁷ Others suggest the establishment of a general system of review of the constitutionality of laws, administrative regulations and local regulations, which can take the form, for example, of a constitutional committee under the NPC.¹⁴⁸

One scholar sees the enactment and implementation of the Administrative Litigation Law 1989 as an extremely important breakthrough in the development of constitutionalism in China.¹⁴⁹ The legal drama of administrative litigation enables the subject (citizen), for the first time in Chinese history, to confront the state and its officialdom as an autonomous person with a legitimate private interest, and to enter into a dialogue with the state as his or her equal. This is a revolutionary development in

143. See Cai, *supra* note 68.

144. See Zhou, *supra* note 83.

145. See Zhou Yongkun, *Separation of Powers: The Point for Strategic Breakthrough for the Rule of Law in China*, 3 FALÜ KEXUE [L. SCI.] 17 (1996), reprinted in 7 LILUN FAXUE, FASHI XUE [LEGAL THEORY & LEGAL HIST.] 23 (1996).

146. See, e.g., Zhou, *supra* note 83.

147. See Zhou Yongkun, *The Direct Effect of Basic Constitutional Rights*, 1 ZHONGGUO FAXUE [CHINESE LEGAL SCI.] 20 (1997); Liu Liantai, *A Positivist Analysis of and Commentary on the Direct Application of Constitutional Norms in the course of Adjudication in China*, 6 FAXUE YANJIU [CASS L.J.] 13 (1996).

148. See Du Gangjian, *The Reform of Constitutional Judicial Review in China and the Construction of a Socialist Rule-of-Law State*, in YIFA ZHIGUO, *supra* note 3, at 458.

149. See Chen, *supra* note 28.

Chinese political culture, under which the individual always had to “kneel before the shadow of the state”¹⁵⁰ which was always omnipotent, and the idea of the subject suing the official (*min gao guan*) was as unthinkable as that of the son suing the father.¹⁵¹ He believes that the system and experience of administrative litigation now educates the citizen in the idea that he or she is a subject with rights, and has begun to reconfigure the psychological structure of the Chinese people.

The Rule of Law and Spiritual Civilization.

After the 6th Plenum of the 14th Central Committee of the CCP adopted the Resolution on Certain Questions relating to the Strengthening of the Construction of Spiritual Civilization in October 1996,¹⁵² legal scholars began to discuss the significance of the rule of law in the construction of spiritual civilization. The Party advocates spiritual civilization — which relates to matters such as morals, ideology, culture, and education — as the component to material civilization — the promotion of which is the main objective of economic reform. Legal scholars find in the discourse on spiritual civilization a useful opportunity and context for them to advocate the rule of law.¹⁵³

Interesting concepts which have now emerged from the discussion on law and spiritual civilization include “rule-of-law civilization,” “institutional civilization” (*zhidu wenming*) and “spiritual civilization in the rule-of-law mode” (*fazhixing jingshen wenming*). One school of thought is that the concept of “institutional civilization” should now be recognized alongside those of material and spiritual civilizations, and the legal system, the rule of law and democracy belong to the realm of institutional civilization.¹⁵⁴ Another view is that according to the Marxist

150. *Id.* at 6.

151. The idea of the son taking the father to court was unacceptable in traditional Confucian culture. See generally Chen, *supra* note 24.

152. The concept of “spiritual civilization” (*jingshen wenming*) is not new. See The Resolution on the Guiding Principles in the Construction of Socialist Spiritual Civilization adopted by the 6th Plenum of the 12th Central Committee of the CCP in September 1987, in 2 SHIYIJIE SANZHONG QUANHUI YILAI ZHONGYAO WENXIAN XUANDU [SELECTION OF MAJOR DOCUMENTS SINCE THE THIRD PLENUM OF THE ELEVENTH CENTRAL COMMITTEE] 1152, 1152-1169 (CCP Central Documentary Research Unit ed., 1987).

153. The relationship between the rule of law and spiritual civilization was discussed at the 1996 Shenzhen conference, *supra* note 63, and a conference held in Beijing in April 1997 and organized by the Chinese Academy of Social Science, *supra* note 68. The papers presented at the latter conference have now been published in YIFA ZHIGUO YU JINGSHEN WENMING JIANSHE [RULING THE COUNTRY ACCORDING TO LAW AND THE CONSTRUCTION OF SPIRITUAL CIVILIZATION] (LIU HAINIAN ET AL. EDS., 1997).

154. See, e.g., Li Buyun, Notes on the Conference on Ruling the Country according to Law and the Construction of Spiritual Civilization, in 3 FAXUE YANJIU [CASS L.J.] 3, 14 (1997).

philosophical framework of the duality of the material world and social consciousness, there are only two civilizations — material and spiritual, and the rule of law or rule-of-law civilization (which consists of both physical reality and mental constructs) stands and mediates between the two civilizations and serves them both.¹⁵⁵ A third perspective is that modernity and progress consist in the transition from a “spiritual civilization in a rule-of-men mode” to a “spiritual civilization in a rule-of-law mode.”¹⁵⁶

Civilization, Progress, Modernity and the Rule of Law.

Finally, some general speculations at a macro-historical level on the part of some contemporary Chinese legal philosophers are worth noting.¹⁵⁷ In their eyes, the rule of law is a mark of historical progress and a measure of civilization’s achievements. The rule of law is not culture-specific. It has universal relevance for all humankind. Although it first appeared in Western civilization, it is a fruit of and belongs to the common heritage of human civilization as a whole.

The rule of law is also an achievement of modernity and a necessary ingredient of the modernization of nations. Reason and humanism epitomize the spirit of modern law. To modernize is to catch up with the contemporary level of development of human reason. Modern law is inspired by a humanistic spirit, a concern with the interests of human beings, their liberty, autonomy, equality, human rights and happiness. And scholars of law are the missionaries of the “spirit of modern law.” As a Peking University law lecturer puts it:

“Jurists are an important medium in mediating between the spirit of modern law and civil society. They are the missionaries of the spirit of modern law as well as the conscience of civil society Genuine jurists are set on exploring and propagating the eternal values of the law. They are deeply concerned with social reality. They are the carriers of the spirit of modern law

155. See Guo Daohui, Notes on the Conference on Ruling the Country according to Law and the Construction of Spiritual Civilization, in 3 FAXUE YANJIU [CASS L.J.] 3, 15; Sun Guohua, Notes on the Conference on Ruling the Country according to Law and the Construction of Spiritual Civilization, in 3 FAXUE YANJIU [CASS L.J.] 3, 4.

156. See Zhou Yongkun, Notes on the Conference on Ruling the Country according to Law and the Construction of Spiritual Civilization, in 3 FAXUE YANJIU [CASS L.J.] 3, 5.

157. See Gu Chunde, *supra* note 31; Li, *supra* note 29; Li, *supra* note 33; Li Buyun, Notes on the Conference on Ruling the Country according to Law and the Construction of Spiritual Civilization, in 3 FAXUE YANJIU [CASS L.J.] 3, 5-6; Cai, *supra* note 10; Yan Cunsheng, *Rationalization is the Core of Legal Modernization*, 1 FAXUE [JURISPRUDENCE] 8 (1997); Xie Hui, *The Choice of the Path for the Rule of Law: Experience or Constructivism?*, paper presented at the 1996 Shenzhen conference, *supra* note 63.

They use the spirit of modern law to nourish their souls and to form their character. "Absorbing" and "promoting" the spirit of modern law: this is the unique mode of existence of modern jurists, and this is also the eternal attraction of being a jurist."¹⁵⁸

III. ALTERNATIVE PERSPECTIVES

I have tried above to draw a picture of what, according to my survey of the literature, I believe to be the mainstream theory of the rule of law that has been constructed by Chinese legal scholars in the last few years. However, the survey of the Chinese jurisprudential scene would not be complete without some attention to the alternative visions and views of scholars who stand away from the mainstream. Some of them are skeptical about the whole discourse on the rule of law. Some point to its limitations and warn against placing too much hope on the rule of law. A few even argue that some of the ideas employed by the discourse run counter to Marxism and are therefore heretical. To these views we now turn.

First, some scholars caution against what they call the premise of the omnipotence of the rule of law¹⁵⁹ or "rule-of-law romanticism."¹⁶⁰ The higher the hopes about the rule of law and its benefits, the greater the disappointment of members of the public when they find that problems remain unresolved after a lot of laws have been produced. It has been pointed out that as a means of social improvement, law suffers from a number of inherent limitations and deficiencies. Law is in the form of general rules, and as has been recognized since Aristotle, situations inevitably arise in which the rigid application of the rules is inappropriate. The requirement for law's stability means that the law tends to be conservative. Moreover, in a time of rapid social and economic change like what China is experiencing, the law often lags behind the changing social reality and the requirements of reform, and may therefore become an obstacle to "reform and progress."¹⁶¹

Second, it has been argued that not only ordinary laws may hinder economic reform and social progress, but the Constitution itself would also have been an obstacle to reform if it had been strictly adhered to. A scholar at the East China Institute of Law and Political Science has put forward an interesting thesis of

158. Liu, *supra* note 96, at 30.

159. See, e.g., Gao, *supra* note 49, at 268; Li, *supra* note 84.

160. Chen Jinzhao, *Moving Out of the Error of the Omnipotence of the Rule of Law*, 10 FAXUE [JURISPRUDENCE] 7 (1995).

161. See *id.*; Hao & Fu, *supra* note 38.

“beneficial breaches of the Constitution.”¹⁶² He points out that grants of land-use rights had already been practiced and private enterprises had already been operating before the constitutional amendment permitting these was introduced in 1988. Similarly, calls for and moves towards establishing a market economy in 1992 had been, strictly speaking, unconstitutional before the constitutional amendment in 1993. Even the assumption of law-making power by the NPC Standing Committee was probably unconstitutional before the 1982 Constitution was made. He therefore argues that breaches of the Constitution should be allowed if they are “beneficial” in the sense of being conducive to the development of the productivity of society and advancing the fundamental interests of the nation.

Third, the rule-of-law discourse, which represents in a sense a wholesale adoption of modern Western liberal thought, has also been criticized for being detached from Chinese social reality. It is pointed out that many recently enacted laws were drafted on the basis of foreign models without adequate investigation into and consideration of the relevant circumstances in China itself. As a result the laws are ineffective.¹⁶³ A legal anthropologist points out that various customary institutions of dispute settlement exist in rural China. They are outside the formal legal system but have a high degree of efficacy.¹⁶⁴ A legal historian suggests that some of the more successful legal institutions in the PRC’s history, such as people’s mediation and reform through labor, have their roots in Chinese tradition.¹⁶⁵

The leading theorist of the importance of “local resources” in the development of the Chinese legal system is a Peking University legal scholar.¹⁶⁶ He queries whether “modern rule of law” is what is needed in Chinese rural society, and emphasizes the role of informal communal networks and customary patterns of behavior in contrast to formal legal rules and institutions. He does not believe that a legal system can be rationally and consciously designed and constructed by government or legal experts, or on the basis of some doctrines, concepts or theories. A legal system is the result of the actions, behavior, choices, attitudes, beliefs, and values of millions of people in the course of their social interaction and legal dealings with one another. The

162. Hao Tiejuan, *On Beneficial Breaches of the Constitution*, 4 FAXUE YANJIU [CASS L.J.] 89 (1996).

163. See Gu, *supra* note 79.

164. See Tian Chengyou, *The Question of Clans in Chinese Villages and the Destiny Of Modern Law in the Villages*, 2 FALU KEXUE [L. SCI.] 3 (1996).

165. See Ma Xiaohong, *The Rule of Rites and the Rule of Law*, in YIFA ZHIGUO, *supra* note 3, at 367.

166. See Su, *supra* note 40.

most valuable resources for the development of the Chinese legal system lie in the informal practices, conventions, customs, norms and arrangements that spontaneously evolve in the course of social life and economic activities. He is therefore skeptical about the state-centered model of legal development that is implicit in the contemporary Chinese discourse on the rule of law.

Finally, it should be noted that some of the concepts introduced into the developing theory of the rule of law have been attacked from a "leftist" or orthodox Marxist-Leninist perspective.¹⁶⁷ For example, the glorification of the contract and of private law, and the affirmation of Maine's thesis on "from status to contract" in the context of contemporary China, have been criticized as misguided. It is pointed out that the freedom of contract belonged to the age of *laissez faire* capitalism and is already out-of-date even in the West. In the socialist economy, there should only be a limited scope for contractual relations. The predominance of public ownership of the means of production under socialism means also that the thesis of the priority of private law is unacceptable.¹⁶⁸ As regards Maine's thesis, the critics point out that this relates only to the transition from slave society or feudalism to capitalism, and it is not appropriate to apply it to China's present transition from the socialist planned economy to the socialist market economy.

The conservative scholars also attack the use of the concepts of social contract, civil society, the priority of rights, and the spirit of modern law. It is said that the ideas of social contract and natural rights were ideological devices used by bourgeois writers to create the illusion of a just social order, to mask the reality of class oppression in the capitalist state and to deceive the proletariat. There is no need for these ideas in the socialist state. "The use of these terms would only serve to beautify capitalism and destroy socialism."¹⁶⁹ As regards "civil society," this is said to be relevant only to bourgeois society in the period of *laissez faire* capitalism. The pillars of civil society were the sanc-

167. See generally Sun, *supra* note 106; Zhang Guangbo, *Legal Research and Insisting on the Socialist System*, 1 DANGDAI SICHAO [CONTEMP. THOUGHT] 44 (1996), reprinted in 4 LILUN FAXUE, FASHI XUE [LEGAL THEORY & LEGAL HIST.] 8 (1996); Lü Shilun, *Several Theoretical Questions relating to the Construction of the Legal System*, 4 GAOXIAO LILUN ZHANXIAN [C. THEORETICAL FRONT] 42 (1996), reprinted in 7 LILUN FAXUE, FASHI XUE [LEGAL THEORY & LEGAL HIST.] 4 (1996); Lü Shilun & Zheng Guosheng, *What Kind of Society is the Society under the Socialist Market Economy?* in YIFA ZHIGUO, *supra* note 3, at 440.

168. In addition to the works cited *supra* note 167, see also Zhu, *supra* note 37; Wang Shen, *A Theoretical Exploration into the Characteristics of Chinese Legal Modernization*, 11 FAXUE [JURISPRUDENCE] 2 (1996), reprinted in 1 LILUN FAXUE, FASHI XUE [LEGAL THEORY & LEGAL HIST.] 16 (1997).

169. Zhang Guangbo, *supra* note 167, at 49.

tity of private property and the freedom of contract, so certainly the concept of civil society cannot be accepted under socialism. As regards the use of the concept "the spirit of modern law," this is criticized for obscuring the distinction between socialism and capitalism. The "leftist" sentiment of these scholars is vividly reflected in the following passage:

We must not exchange away Marxist principles when we borrow from, inherit or transplant Western legal and political thought and institutions¹⁷⁰ . . . If we allow a 'contract' of exchange between Marxism and non-Marxism, if we let Marxism be auctioned in the market, then this socialist society of ours can no longer be sustained.¹⁷¹

IV. THE REALIZATION OF THE RULE OF LAW IN CHINA

Despite the counter-currents mentioned in the previous section, the paradigm of the rule of law as constructed by the mainstream theorists appears to enjoy supremacy in contemporary China not only among scholars of law but also in the official propaganda about law and legality. But the vibrancy of the theory of the rule of law is partly a consequence of the grim reality of the lack of the rule of law in contemporary China. Scholars and top leaders call strenuously for the rule of law precisely because flagrant violations of the rule of law have been so frequent and extensive, and China is far from achieving the rule of law. The developing theory of the rule of law postulates an ideal to be realized, an objective to be strived for, a goal to be reached. But if we look at the reality of contemporary China, the realization of this dream remains as distant as ever.

This reality is revealed in the works of the same scholars who write about the theory of the rule of law. There seems to be a consensus about facts like the following:

(a) The system of laws is far from satisfactory. Many laws on civil and commercial matters and on the implementation of the constitutional rights of citizens are still missing.¹⁷² Among the laws that are in force, many still reflect the thinking and practice of the socialist planned economy, and are inconsistent with the requirements of the developing market economy.¹⁷³ Law drafting techniques leave much to be desired; many legal provisions are vague or are merely policy statements, and mechanisms

170. Lü Shilun, *supra* note 167, at 44.

171. Lü Shilun & Zheng Guosheng, *supra* note 167, at 447.

172. See Li Shuguang, *The Rule of Law in 1997: Five Problems and Five Trends*, 2 FAXUE [JURISPRUDENCE] 2 (1997).

173. See Hao & Fu, *supra* note 38; Cai, *supra* note 10.

and responsibilities for enforcing them are often not provided for.¹⁷⁴

(b) Many laws, particularly those in the form of departmental and local regulations, are drafted by the central government department or local government concerned in such a way as to further the interests of the department or the region in disregard of the general interest.¹⁷⁵ There is no effective system to check whether legal norms of a lower level (e.g. these regulations) contravene legal norms of a higher level (e.g. the Constitution, laws enacted by the NPC or its Standing Committee, and administrative regulations made by the State Council). Neither is there any machinery to deal with the inconsistency that often arises between norms at the same level of the legal order.¹⁷⁶ Some local governments only enforce national laws selectively, or introduce protectionist measures contrary to national law and blocking the extension of a nationwide market.¹⁷⁷

(c) The people's congress system is far from effective in the performance of their constitutional functions of legislation and supervision of government.¹⁷⁸ The quality of the members leaves much to be desired, and the congresses meet infrequently. To a significant extent they are still rubber-stamp institutions. Furthermore, in practice the status and authority of people's congresses relative to other branches of government or the Party is actually much lower than as prescribed in the Constitution, under which people's congresses are the highest organs of state power.¹⁷⁹ They are not taken seriously enough by people or officials.

(d) The deficiency in the authority of the people's congress system in fact reflects the lack of supremacy of the Constitution. The unenforceability of the provisions of the Constitution has already been mentioned above.¹⁸⁰ An even more serious problem is that the constitutional and legal status of the CCP is still unclear. Although the Party exercises *de facto* governmental powers, its structure, powers and responsibilities are not regulated by law.¹⁸¹ The orthodox view, still stated in authoritative textbooks, that Party policy is "the soul of the law"¹⁸² creates the impression

174. See Li, *supra* note 172.

175. See Li, *supra* note 33, at 60; Li, *supra* note 172; Hau, *supra* note 141; Cai, *supra* note 10.

176. See Li, *supra* note 172.

177. See Cai, *supra* note 10; Gu, *supra* note 79.

178. See Fang Tengga, *China's Strategic Choice of Sustainable Legal Development*, 6 ZHONGWAI FAXUE [PEKING U. L.J.] 11 (1995).

179. See Zhou Yezhong, *supra* note 83.

180. See *id.*

181. See *id.*

182. Li, *supra* note 33, at 65; Zhou, *supra* note 42; Fang, *supra* note 178.

that the law may be set aside when it no longer reflects current Party policies. Most people are still confused as to whether the law is above the Party, or whether the people's congress (the constitutional organ of state power) is above the Party organ.¹⁸³

(e) The de facto supremacy of the Party is one cause for concern as regards the administration of justice.¹⁸⁴ Although in theory the People's Courts should exercise their judicial power independently, in practice they are sometimes subject to pressure from Party organs. Even in theory the Party has legitimate authority to exercise leadership over judicial work by laying down general policies and guidelines, and such general principle of "leadership" can easily be turned into a pretext for interference in individual cases. But most scholars point out that currently the most serious failures in judicial independence are attributable not to "Party leadership" but to corruption among judges and law-related personnel and to the courts' subordination (in terms of financial dependence and appointment of personnel) to local governments. Thus, the courts often adopt local protectionist measures in the exercise of their powers by favoring local parties whose interests often converge with those of the local government.¹⁸⁵ And bribery of judges and the use of personal connections to get favored treatment by judges are so prevalent that they have become the subject of some Chinese popular expressions and jokes that have come into usage in recent years.¹⁸⁶ These problems are compounded by the fact that many judges have poor general educational standards or lack professional legal competence.¹⁸⁷

(f) Although the legal profession has enjoyed rapid growth in recent years and a sector of private law firms (under the names of cooperative firms and partnerships) have been allowed to develop alongside state law firms, the disregard of professional ethics and the deficiency in professional competence on the part of many lawyers have been a cause for concern.¹⁸⁸ The status of lawyers has not yet been firmly established, and some judicial and law enforcement personnel do not give due respect to lawyers and treat them poorly in their judicial and administrative work.¹⁸⁹

183. See, e.g., Fang, *supra* note 178; Li, *supra* note 172; Zhou, *supra* note 42.

184. See, e.g., Fang, *supra* note 178; Zhou, *supra* note 42.

185. See Gu, *supra* note 80; Fang, *supra* note 178; Cai, *supra* note 10.

186. See sources cited *supra* note 185; Li, *supra* note 172; Hu, *supra* note 78; Li, *supra* note 84.

187. See Li, *supra* note 29, at 258; He Qinhua, *It is Important to Raise the Professional Standards of Law Enforcement Personnel*, 3 *FALU KEXUE* [L. SCI.] 14 (1996), reprinted in 7 *LILUN FAXUE, FASHI XUE* [LEGAL THEORY & LEGAL HIST.] 20 (1996).

188. See Cai, *supra* note 10, at 401-402.

189. See Gu, *supra* note 79.

(g) A number of scholars have written about a crisis of faith in the legal system on the part of the general public. The enthusiasm for law and legality that arose in the early years of the reform era seems to have largely evaporated.¹⁹⁰ People see more and more laws being enacted, but find that the laws do not seem to be able to solve the increasing social problems. Many laws are not seriously enforced, many conflict with one another, many serve only the selfish interests of departments or local governments, and the system for law enforcement and administration of justice is corrupt and inefficient. Given such circumstances, how are people expected to have trust and confidence in laws and the legal system?¹⁹¹ So when people's interests are infringed upon, they blame the law for failing to protect them, and yet they disregard the law themselves when it is in their interests to do so.¹⁹²

In the face of so many obstacles to the the rule of law in China, what positive ideas have been developed by scholars regarding how to proceed? They all recognize that the project is an extremely laborious and long-term one, and a long uphill journey lies ahead. Movement towards the rule of law will have to be simultaneously promoted by the state and propelled by the civil society that is emerging from the market economy.¹⁹³ It is pointed out that the problems have to be tackled on two levels¹⁹⁴ — conceptual or ideological renewal (in the sense of winning widespread acceptance of the doctrines, values and culture of the rule of law on the part of officials and citizens who in the past had no concept of the rule of law and no experience of practicing it) on the one hand, and institutional innovation on the other. The institutional proposals that have appeared more frequently in the literature include the following:

(1) There should be a clear delineation of the scope of legislative power of the central and local (provincial, municipal, etc) authorities, as well as that of different state organs at the same level (such as the people's congress, its standing committee, the government, the departments of government, etc). Procedures should be established to deal with the problems generated by inconsistent legal norms enacted by different organs, and to review the validity of lower-level norms on the basis of higher-level

190. *See id.*

191. *See* Cai, *supra* note 10, at 402.

192. *See* Sun, *supra* note 71.

193. *See* Shu Guoying, Notes on the Conference on Ruling the Country according to Law and Constructing a Socialist Rule-of-Law State, in 3 FAXUE YANJIU [CASS L.J.] 3, 16 (1996).

194. *See* Sun Guohua & Peng Hanying, *Jurisprudential Research in 1996: Retrospect and Prospect*, 1 FAXUEJIA [JURISTS' REV.] 2 (1997); Zhou, *supra* note 30; Zhou, *supra* note 42.

norms.¹⁹⁵ It seems that some of these issues raised by scholars will be addressed in the Law on Legislation (*lifa fa*) which is being drafted by the NPC authorities.¹⁹⁶

(2) There is also active discussion of the desirability of introducing a system for the review of the validity of legal norms on the ground that they contravene the Constitution, and hence to interpret the Constitution itself.¹⁹⁷ An option which is favoured by many scholars is to establish a constitutional committee under the NPC for this purpose. Another possible option, which is a more radical one, is to set up an independent constitutional court.

(3) To avoid the current problems of government departments drafting laws which reflect their particular departmental interest to the detriment of more overall considerations, it has been proposed that the responsibility for drafting laws should be removed from interested government departments and vested in organs under the central and provincial legislatures (people's congresses) consisting of independent-minded legal experts and officials.¹⁹⁸

(4) Suggestions regarding improvements in the legislative process have also been made.¹⁹⁹ For example, the public should be allowed to have an input in the process, which means the existing practice of only consulting relevant bodies should be changed. Hearings should be held on bills, and their content should be more thoroughly debated in the legislatures. It has even been suggested that non-government bodies should be allowed to draft bills and introduce them in the legislatures.

(5) Institutional reforms regarding the people's congress system have been proposed.²⁰⁰ These include extending direct election to people's congresses above the county level (at present these higher level people's congresses are elected by members of the lower-level people's congresses, and only people's congresses at the county level or below are directly elected), reducing the number of deputies to the congresses so that they can work more effectively, lengthening the sessions of the congresses so that they have more time for their work, and institutionalizing and increas-

195. See Cai, *supra* note 10; Li, *supra* note 172; Gu, *supra* note 79.

196. See Fang, *supra* note 178; Li Buyun, *Several Questions regarding the Drafting of the PRC Law on Legislation (Experts' Proposed Draft)*, 1 ZHONGGUO FAXUE [CHINESE LEGAL SCI.] 11 (1997).

197. See, e.g., Du, *supra* note 148; Zhou, *supra* note 83; Tong Zhiwei, *Legal Modernization Requires Eleven Elements of Constitutional Reform*, 1 FAXUE [JURISPRUDENCE] 5 (1997); Zhou, *supra* note 42.

198. See Hao, *supra* note 141; Gu, *supra* note 79.

199. See, e.g., Cai, *supra* note 10; Fang, *supra* note 178.

200. See Zhou, *supra* note 42; Tong, *supra* note 197.

ing their powers to supervise the work of government organs and officials. The latter point will apparently be addressed by the Law on Supervision which is in the pipeline.²⁰¹

(6) Effective supervision of the exercise of governmental powers is seen by many scholars as the key to the rule of law.²⁰² In addition to supervision by the people's congresses as representatives of the people, the important supervisory role of public opinion and the mass media is also emphasized by some scholars. People's right to information about governmental affairs and freedom of speech are advocated. For instance, it is argued that "in the domain of the struggle against corruption, there should be no 'forbidden zone' for news media."²⁰³

(7) As mentioned above, apart from corruption the most serious problem which plagues the system of the administration of justice results largely from the local courts' subordination to the local government in terms of financial and personnel matters. Hence many scholars advocate a reform of the court system that would de-link the courts from the local governments. Suggestions include the use of the national budget to finance the local courts, the "vertical" administrative leadership of courts (by higher courts) and removal of their "horizontal" linkage to the local government structure, as well as the establishment of a dual court system (national courts and regional courts) in which the national courts (like federal courts in some federal states) have jurisdiction over cases which involve interests in more than one province or region. Other proposals relating to the judiciary include security of tenure for judges and better terms of service.²⁰⁴

(8) A few writers touch on the question of the reform of the system of Party leadership, which is in fact a crucial element of any future reform of the Chinese political system. As mentioned above, the central legal issue in this regard is the extent to which the organization, structure, functions, powers, responsibilities and operations of the Party should come under the purview of the law, given that it is financed by the state budget, its personnel are paid by the state, and it has the constitutional mandate to exercise "leadership" (the manner and procedure of which are not yet legally defined).²⁰⁵

The above relates to the more concrete proposals in the literature. It may also be noted that some scholars have ad-

201. See Hao, *supra* note 141.

202. See Ye & Xie, *supra* note 63; Fang, *supra* note 178.

203. Ye & Xie, *supra* note 63, at 12.

204. See generally Hao, *supra* note 141; Zhou, *supra* note 42; Cai, *supra* note 10; Gu, *supra* note 79.

205. See generally Hao, *supra* note 141; Zhou, *supra* note 42; Tong, *supra* note 197; Jiang, *supra* note 142; Zhuo, *supra* note 142.

dressed their minds to the more long-term scenarios in the development of the rule of law in China. The following are some examples.

One view is that the past, present and future of the legal history of the PRC may be divided into four stages: (1) “quasi-constitutionalism” (culminating in the first PRC Constitution of 1954), (2) “big democracy” (as conceived by Mao and exemplified by mass movements culminating in the Cultural Revolution), (3) “regularized politics” (as developed in the post-1978 reform era), and (4) “modern rule of law” (which belongs to the future). It is said that China is now in the transition from stage (3) to stage (4).²⁰⁶

A second scholar uses the knife, the baton and the bridle to symbolize the three stages of legal evolution in the PRC. The period of “the knife” ran from 1949 to the early 1980s. Law was conceived as an instrument of class dictatorship and for the suppression of “enemies.” Hence, law meant primarily criminal law. The period of “the baton” began in the 1980s and continues up to the present. Law is conceived as a tool for administrative management of people and the economy. This is an era of administrative law and economic law. The next period in China’s legal evolution will be that of “the bridle.” This will be the age of constitutionalism. Law will control the exercise of state power, prevent its abuse and protect the rights of citizens. It will attend not only to order and efficiency (the concerns of the previous eras), but also to justice, equality, freedom and democracy.²⁰⁷

A third writer suggests that the evolution of the rule of law in China may be viewed from three perspectives, each embracing three stages. In the first perspective, the transition is from (1) “doing things according to law” to (2) “ruling the country according to law” to (3) “ideal rule of law.” China is now moving from (1) to (2). In the second perspective, the movement is from (1) “rule by the Party” to (2) “rule by the State” to (3) “rule by the law.” China is now moving from (1) to (2). According to the third perspective, the development of the rule of law in China consists of three stages: (1) “the preparatory stage” (from 1978 to 1993, the year in which the constitutional amendment on the socialist market economy was introduced), (2) “the take-off stage” (from 1993 to 2010), and (3) “the formation and perfection stage” (post-2010).²⁰⁸

A fourth writer also adopts a long-term perspective, in this case up to the mid-21st century. He distinguishes between the

206. See Xie, *supra* note 43. See also Ye & Xie, *supra* note 63.

207. See Cai, *supra* note 10. See also Cai, *supra* note 89.

208. Zhuo, *supra* note 142.

periphery and the core of the legal system, and uses a cost (risk)-benefit analysis to predict the development of these two parts of the legal system. In his theoretical framework, the periphery of the legal system relates to effective law enforcement and general obedience to law ("rule by law"), whereas the core of the legal system consists of constitutionalism and effective restraint of state power ("rule of law"). The construction of this core would mean a fundamental reform of the existing political system. He believes that China's construction of its legal system will have to begin with the periphery. At present and in the foreseeable future, the reform of the political system is a high-risk venture whose benefits are uncertain, and will have to be postponed until probably the middle of the 21st century, when the social and economic conditions (including people's educational standards and the size of the middle class and entrepreneurial class) will be ripe for the reform.²⁰⁹

V. CONCLUDING REFLECTIONS

In reviewing the substance of the theory of the rule of law which Chinese scholars have been constructing in recent years, many of their points may seem commonplace. Is not what they are stating obvious and already well-established? A Western audience will perhaps have this feeling as they live in a post-Enlightenment world which has taken for granted the liberty, equality, human rights, rule of law and constitutionalism that the Enlightenment thinkers advocated more than two centuries ago and that generations of revolutionaries and activists in the Western world have fought hard to win in the nineteenth and twentieth centuries.

Only if we take into account the burdens of history that lie on the shoulders of contemporary Chinese intellectuals will we be able to appreciate the full significance of the developing theory of the rule of law as outlined in this article. These historical burdens include not only more than two millennia of imperial rule which had so often degenerated into despotism and tyranny, but also the Marxist-Leninist degradation of the rule of law and its associated values, as well as the explicit rejection and total repudiation of rule-of-law practices and values in China during the Cultural Revolution era, which left China in a state of total ruin in the late 1970s on which some primitive structures of law and legality have since been erected.²¹⁰

Even after the reform era began in 1978, the way for the reconstruction of legal theory has not been a smooth and

209. See Jiang, *supra* note 142.

210. See generally CHEN, *supra* note 5.

straightforward one. A number of setbacks were encountered during which more liberal-minded scholars were accused of promoting "bourgeois liberalization." These included a campaign against "spiritual pollution" in 1983, a 1987 campaign against "bourgeois liberalization" following the students' democracy movement of 1986 and culminating in the downfall of the Party General Secretary Hu Yaobang, and an even more intensive and extensive campaign along similar lines in the aftermath of the events leading to June 4, 1989. The movement in 1996-98 for the rule of law among Chinese jurists has only been politically possible because of the momentum towards reform built up since Deng's southern trips in 1992, the constitutional affirmation of the concept of the socialist market economy in 1993, and President Jiang Jemin's personal call for "ruling the country according to law" in early 1996.

The phenomenon of the developing theory of the rule of law in contemporary China may therefore be understood as a manoeuvre on the part of legal scholars in a complex political environment at an opportune moment, seizing hold of a golden opportunity to give a push to the development of the Chinese legal system in what they believe to be the right direction. As in the case of the French philosophers of the 18th century Enlightenment, the ideas advocated by the Chinese scholars may not be very intellectually sophisticated, theoretically refined or rich in philosophical depth, and are certainly not original, but their significance and impact (like the ideas of the Enlightenment) lie in the fact that they do address real problems in contemporary social and political life. The problems revolve around the lack of effective legal, political and popular control over the exercise of the huge powers of the ruling apparatus of the State, Party and bureaucracy, and it is believed that the rule of law can provide a powerful solution to many of these problems.

It may be pointed out that the theory does not go far enough. It falls short of querying the principle of the "leadership" of the CCP. It does not address sufficiently the question of human rights, particularly the civic freedoms of speech, publication, assembly and association, not to mention the political rights associated with Western style free elections. It also eschews inquiry into the question of private property rights as a possible pillar of civil society, social contract, private law and the system of rights, even as it tries to rehabilitate and even glorify these latter ideas. We can therefore observe clearly that there are still untouchable subjects and forbidden zones in academic discussion in contemporary China. The critique as discussed above on the part of Marxist ideologues of some of the concepts advocated by the theorists of the rule of law demonstrates how much the dog-

mas of the Marxist orthodoxy as codified by the Soviet and Maoist states are still alive and well in China in terms of legitimacy, and can be easily resurrected to become the "mainstream" opinion should the political climate turn against liberalization at some future point. But for the moment, scholars who believe in the rule of law are already doing their best.

With regard to the insights of neo-Marxism, critical legal studies and various strands of postmodernism in the West, it might be suggested that the Chinese theorists of the rule of law are naive in their unqualified embrace at face value of the discourse of reason, subjectivity, liberty, equality, rights, progress and modernization. However, I believe this criticism would miss the point. What has to be kept in mind is that the West has already developed elaborate legal systems which more than fulfil the highest hopes and noblest dreams of the thinkers of the Age of Enlightenment. The postmodernist takes these achievements for granted, and goes on further to expose the hypocrisy, arrogance and darker sides of modernity. The problem now confronted by the Chinese people is the non-existence of an advanced legal system which protects basic rights and guarantees equality of all before the law. They need to construct a legal system that meets their needs and aspirations, not to deconstruct a legal system that is reaching the limits of development. It is therefore right, I believe, for the Chinese theorists of the rule of law to put aside postmodern concerns.²¹¹

But it can also be pointed out, particularly by those who appreciate the past achievements of Chinese civilization, that contemporary Chinese scholars are probably too quick and ready to turn to the intellectual resources of the West in developing their theory of the rule of law, and to discard the values and resources of the Chinese tradition. It is important to bear in mind in this regard that "Chinese tradition" is by no means a monolithic whole. There have always been conflicting lines of thought and modes of practice in Chinese history, and the fact that Confucian paternalistic rule triumphed most of the time during the last two millennia does not mean that it is the eternal essence of Chinese culture.

For example, it has often been pointed out that in the late Ming and early Qing dynasties, there was an anti-authoritarian strand of thought, as exemplified by the great philosopher Huang

211. See Ji Weidong, *Towards 21st Century Law and Society*, 3 ZHONGGUO SHEHUI KEXUE [SOC. SCI. IN CHINA] 104 (1996) and Zhu Suli, *Postmodern Thought and the Jurisprudence and Legal System of China*, 3 FAXUE [JURISPRUDENCE] 11 (1997) for the debate regarding whether postmodern thought is relevant to contemporary Chinese legal developments.

Zhongxi who advocated a doctrine of the “rule of law” in which the law was not just in the interest of the emperor, his ancestors and successors, but was rather in the interest of all under Heaven.²¹² The leading neo-Confucian philosophers of this century also advocated the introduction in China of Western-style constitutional democracy, and even argued that this would be the ultimate fulfilment in the political sphere of the humanist Confucian project.²¹³ The successful introduction of Buddhism into China after the Han dynasty is often cited as a paradigmatic example of Chinese civilization borrowing important resources from outside itself.²¹⁴ We may therefore interpret the current efforts of rule-of-law theorists in China as an attempt to foster a new Chinese political culture that is liberal, constitutional and democratic, in contrast to the imperial and Maoist political cultures which were both dogmatic, authoritarian and paternalistic.

And this, after all, was also what the Enlightenment was about in Western Europe more than two centuries ago. I use the term “legal enlightenment” in the title of this article, because I find a kind of parallel between the intellectual currents in contemporary China and their relationship with contemporary society on the one hand, and the intellectual movement in Enlightenment Europe and its relationship to social conditions on the other hand. For China, the May Fourth Movement eight decades ago was also an enlightenment, but the social and economic conditions were then not ready for liberal constitutionalism, and the movement ended with the triumph of Marxism-Leninism as a new dogmatism. Will this second “enlightenment” fare better? In the last two decades, economic reform — China’s second revolution — has transformed many shabby Chinese towns into modern-looking metropolises. “Material civilization” of the kind seen in the West is clearly in the making. Will the “spiritual” or “institutional civilization” of the rule of law also arrive? If the modernity that was first experienced in the West can and will be globalized, which I believe it can and will, then this question can be happily answered in the affirmative.

212. See W.T. de Bary, *Chinese Despotism and the Confucian Ideal: A Seventeenth-Century View*, in *CHINESE THOUGHT AND INSTITUTIONS* 163 (John K. Fairbank ed., 1957).

213. See Chen, *supra* note 24.

214. See, e.g., W.T. DE BARY, *EAST ASIAN CIVILIZATIONS: A DIALOGUE IN FIVE STAGES* (1988).