

Rule of Law with Chinese Characteristics: Is Any Country Precluded From Joining in the Feast?

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Abstract

Inside and outside academic circles, China is often talked about with respect to the presence or absence of rule of law. Some talk of “rule by law” and not “rule of law” as the most appropriate description of the Chinese situation. To the uninitiated, this may sound like a mere prepositional difference without much significance but to the jurist, this little change of preposition carries a lot of difference in meaning and to some extent, conveys a value-laden concept related to good governance. This paper takes the view that the expression “rule of law” is a multi-layered concept with various strands of meanings and that it is rather simplistic to merely hail or denounce a country as adhering to or not adhering to the rule of law without referring with specificity to the exact strand of rule of law which is the frame of such charge against that polity. I make the case that if there is no specificity as to the particular sense in which the expression “rule of law” is used, it is rather misleading for any polity to be talked about in terms of that expression as far as law enforcement within its territorial borders is concerned.

I. INTRODUCTION

In any discussion of the concept of rule-of-law, a legitimate question that arises is “what is law”? The expression “rule of law” presupposes the use of “law” as a constraining or measuring standard. So what is that standard itself? Jurists the world over are sharply divided as to the definition of the term “law” and hence any attempt to define law in this introduction may shift the focus of this paper from the main issue which this paper seeks to tackle. However, a teaser such as the above question only helps to show how elusive concepts like “law” or “rule of law” can be even to the jurists let alone the uninitiated. As Radin has observed, “the Rule of Law... is deeply ambiguous, a contestable concept.”¹ Yet with some reasonable effort, it is possible for us to ascertain some basic meanings or senses in which the phrase “rule of law” may be used. I take the view that the rule of law is a multi-layered concept and that with care, it is possible for one to separate one strand from the other any time this phrase is used. It is only by pinpointing the exact sense in which we intend to use such a phrase that we can avoid talking at cross purposes with each other when we engage in a discussion relating to the rule of law. Fallon made the following observation about American lawyers who end up talking at cross purposes whenever they engage in rule of law discussions:

“Indeed, in contemporary constitutional discourse it is by no means anomalous to find competing Rule-of-Law claims arrayed against each other. In Planned Parenthood v. Casey, for example, the plurality (joint) opinion argued that the Rule of Law required fidelity to the central holding of Roe v. Wade, while the dissenting opinion insisted that respect for the Rule of Law required Roe to be reversed.”²

It is in this light that this paper attempts to identify the very basic meanings of the phrase “rule of law” and to measure each of these senses against Chinese law to find out whether sweeping generalizations that the “rule of law” does not exist in China can be justified.

II. THE CONCEPTUAL ISSUES ABOUT THE RULE OF LAW

I take the view that even though the phrase “rule of law” is used to mean different things at different times, the phrase has about five (5) basic meanings which are quite certain in the discourse on the rule of law. I therefore proceed to examine each of these five meanings to see how each meaning sits well with China’s legal or judicial system. The following are the various meanings I shall examine:

1. Rule of law in the sense of legal dominance of permissible conduct;
2. Rule of law in the sense of stability of the law and avoidance of retroactivity of law;
3. Rule of law in the sense of equality before the law;
4. Rule of law in the sense of the subjection of the state to the law; and

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

²See Richard H. Fallon Jr., *Rule of Law as a Concept in Constitutional Discourse*, *Columbia Law Review*, Vol. 97, No. 1, at p. 5

5. Rule of law in the sense of impartial justice.

III. RULE OF LAW IN THE SENSE OF LEGAL DOMINANCE OF PERMISSIBLE CONDUCT

One of the strands of the multi-faceted meanings of the phrase “rule of law” is where it is employed to denote the concept that the law must determine what conduct is permissible or not permissible. Simply put, this requires that there should be legal dominance of permissible conduct. In this sense, the phrase is used to imply that everything done by any person (whether in his private or official capacity) must be in accordance with the law and not as dictated by the person’s whims and caprices. At the personal level, expressions such as the often used saying that a person has taken the law into his or her own hands (instead of allowing the law to rule his or her conduct) all stem from this meaning of the phrase rule of law. At the official level, this meaning of the phrase rule of law implies that no official conduct is permissible unless it is first and foremost consonant with the law. Thus, unless the justification for any unpopular action by a public office holder is traceable to the law, such an action is considered to be contrary to the rule of law in the sense of legal dominance of permissible conduct. The common law notion of the doctrine of *ultra vires* or unconstitutionality of actions of public office holders is a practical manifestation of this meaning of the phrase rule of law.

It is in this sense that the phrase “rule of law” is often used in contradistinction to the phrase “rule of man”. The value-laden concept of “rule of law” is thus preferable and indicative of a higher level of legal-consciousness than the less honourable conduct termed “rule of man” which conjures the impression of arbitrariness, whimsicality and capriciousness and sometimes, barbarity or savagery depending on the context. It is in this sense (with an allusion to arbitrariness) that Carl F. Minzner deprecated the *xinfang* system in China in the following terms:

*“It is a tripwire device designed to trigger political intervention in particular cases, not a means of assuring justice in accordance with universal legal norms. Simply put, the xinfang system is based on the rule of man (renzhi), rather than the rule of law (fa zhi).”*³

It is also in this sense of the phrase that Professor Richard H. Fallon, Jr. observed as follows:

*“Indeed, many invocations of the Rule of Law are smug or hortatory. Within the twentieth century, however, references to the Rule of Law have increasingly acquired either defensive or accusatory tones. The sources of unease are multiple, and possibly even conflicting. But any account should begin with the familiar contrast between ‘the Rule of Law’ and ‘the rule of men’”*⁴

Professor Margaret Jane Radin was obviously trying to throw more light on this very meaning of the phrase when she opined that “[t]he ideal of ‘the rule of law, not of men’” ought to be better couched as “ ‘the rule of law, not of individuals.’ ”⁵ Of course, the conduct of all individuals must be ruled by the law and not by their mood or whims and caprices but not all individuals are “men” in the terms of sex classification but the word “men” is mostly used in a generic sense to imply all natural persons or human beings. In today’s world where there are artificial persons in the form of various types of corporations, this will equally apply to them in the sense that the actions of all corporate bodies must be in accord with the law else they can be accused of a corporate policy of displaying scant regard for the rule of law in their actions. The expression “rule of law” in this sense would cover the entire spectrum of rules referred to as the law such as the law of contract, commercial law, company law, law of torts, criminal law, land law, succession and the law of trust, family law, constitutional law, administrative law, private and public international law etc. In this sense, all persons, corporate bodies or corporations as well as the conduct of nations in international relations, ought to be ruled by the law and not by anyone’s whim.

³ See Carl F. Minzner, *Xinfang: An Alternative to Formal Chinese Legal Institutions*, *Stanford Journal of International Law*, Vol. 42, 103 at p. 172, (2006)

⁴ See Richard H. Fallon Jr., *Rule of Law as a Concept in Constitutional Discourse*, *Columbia Law Review*, Vol. 97, No. 1, at p. 2-3

⁵ Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 *B.U. L. Rev.* 781, 783 (1989)

Coming to the context of China, there is no doubt the rule of law in the sense of legal dominance of permissible conduct does exist. This basic meaning of the rule of law is the pivot for the enforcement of the law in the people's courts in China since the courts constantly engage themselves daily with the question of whether what the defendant or the accused person has done is in conformity or in conflict with the law.

IV. RULE OF LAW IN THE SENSE OF STABILITY OF THE LAW AND AVOIDANCE OF RETROACTIVITY OF LAW

A second sense in which the phrase "rule of law" is used is that people should be ruled by a body or framework of rules and principles announced or published or known beforehand so that no one can be trapped by the law in the sense that he does something knowing it to be acceptable under the law only to be rudely awoken by the nightmarish experience of being told that the law now makes such an act illegal and that the law has a retrospective or retroactive effect of prohibiting that past conduct of his for which reason he stands liable in either criminal or civil law. In short, rule of law in this sense simply means the avoidance of retroactive or retrospective law-making as well as the avoidance of retrospective or retroactive application of the law. This is equally a value-laden concept that enjoins the law-maker not to make laws that should take retroactive effect. Obviously, the NPC is desirous of promoting this meaning of rule of law in China when it provided as follows in the Law on Legislation of the People's Republic of China:

*"The laws, administrative regulations, local regulations, autonomous regulations, special rules, administrative rules or local rules do not have retroactive force, with the exception of a special provision made for the purpose of better defending the rights and interests of citizens, legal persons or other organizations"*⁶

Rule of law in this sense also enjoins the courts not to apply any law retroactively unless the law expressly says so. In fact, this meaning of the phrase rule of law is intricately related to the first meaning explained above in that without the avoidance of retrospectivity or retroactivity in the way the law is applied, people would have no incentive to allow the law (and not their whims) to rule their conduct. Why should anyone be bothered about legal dominance of permissible conduct if adherence to such a principle would not guarantee his piece of mind thereafter? Believers in the legal dominance of permissible conduct must be encouraged to continue using the law as a compass for their acts and omissions only if they can get the assurance that any future changes in the law would not rubbish all their actions in faithfulness to the law. Secondly, if all retroactive law-making or retroactive application of the law is avoided, it will prevent witch-hunting. The makers of the law cannot use it to entrap anyone whom they dislike and neither can the courts do so by applying the law retroactively to entrap people.

As I have already pointed out, the notion of rule of law in the sense of stability in the law, uses the notion of rule of law in the sense of legal dominance of permissible conduct as its springboard. Therefore Professor Fallon observed as follows:

*"If courts (or the officials of any other institution) could make law in the guise of applying it, we would have the very 'rule of men' with which the Rule of Law is supposed to contrast."*⁷

The above quote appears to take a swipe at the common law system and its case law tradition by which judges actually do make law under "the guise of applying it". Little wonder that Professor Fallon (a common law lawyer) immediately staged an impressive defence of the common law system in the following terms:

"This account is undoubtedly far too crude; one of my principal aims in this Article is to qualify and revise it. Nonetheless, the caricature contains a glint of truth, which helps to illuminate the doubt and confusion that have increasingly surrounded debates about the Rule of Law and its implications for American constitutional democracy. In particular, uncertainty and confusion have mounted among those who, on the one hand, are disposed to accept (or at least find it hard to reject) the rough sketch of the Rule of Law drawn

⁶ See Article 84 of the Law on Legislation of the People's Republic of China.

⁷ See Richard H. Fallon Jr., *supra* note ... at 3

above and yet, on the other hand, believe that the American legal system must surely count as a paradigm of the Rule of Law. Respect for the Rule of Law is central to our political and rhetorical traditions, possibly even to our sense of national identity. Yet the modern American legal system departs significantly from the provisional account of the Rule of Law that I just provided, and it is strongly arguable that no plausible legal system could avoid departing from it in some respects.”⁸ (The emphasis is mine)

Contrary to the above-quoted justifications of Professor Fallon in support of the common law tradition of judge-made law under the guise of applying it, the Chinese legal system does not allow judges to behave as such.⁹In this sense of the rule of law, the Chinese legal system has outperformed the common law legal system as far as certainty or stability in the law is concerned because judges are only permitted to apply the law but not to make new law and implicitly apply it retroactively under the guise of interpreting it.

V. RULE OF LAW IN THE SENSE OF EQUALITY BEFORE THE LAW

The phrase “rule of law” is also used in contexts which imply that all persons ought to be equal before the law. An alternative rendition of this sense of rule of law is often stated as that the law is no respecter of persons. This meaning of the phrase “rule of law” clearly has its roots in the first meaning explained above (i.e. legal dominance of permissible conduct). Equality before the law, however, stands as a separate strand of the meaning of the phrase rule of law in the sense that it denotes the concept that there ought to be no exceptions when enforcement of the law is envisaged whilst the legal dominance of permissible conduct conceptualizes the law as the standard by which acceptable conduct must be measured in any civilized polity. This would imply that when the law is breached or violated by any person, the same punishment or remedy should be meted out against such a person irrespective of whether or not such a person is an exalted personality, or is of a lowly and humble standing in society be it his social position, economic, financial position or political position. Indeed, it is in this sense that the French philosopher, Charles de Secondat, Baron de Montesquieu, stated that “law should be like death, which spares no one.”¹⁰The Constitution of the People’s Republic of China has given expression to this meaning of rule of law in the following words: “All citizens of the People’s Republic of China are equal before the law.”¹¹

It is in this sense that Jianfu Chen referred to China when he stated as follows:

*“Equality before the law is nowadays often emphasized, demanding the application of the law to both the CPC and high-ranking government officials. It is on this aspect that most complaints are heard from ordinary people in China.”*¹²

Proceeding further, Jianfu Chen gives a practical demonstration of this meaning of the phrase “rule of law” at work in China when he observed as follows:

*“While different interpretations may be given to the motivations for the current anti-corruption campaigns, the fact is that a large number of high-ranking officials have fallen from grace, been jailed, or even executed after legal processes. This perhaps indicates how law can apply and has been applied to everyone, high and low in official positions, when there is the political will to do so.”*¹³

Stretched to its limits, this principle also means that the law should apply the same way to all legal persons irrespective of whether they are natural persons or artificial legal persons like corporations and administrative agencies. Thus all governmental institutions and administrative agencies are supposed to be subject to the same legal restrictions as

⁸ *Id*

⁹ See Article 67 (1) and (4) of the Constitution of the People’s Republic of China. Also, see Articles 42-47 of the Law on Legislation of the People’s Republic of China (These articles make it abundantly clear that the power to give interpretation of the laws is vested in the NPC and not the courts). Notably, the Supreme People’s Court also issues Judicial Interpretations but these are given in advance in printed format much like legislative enactments and not in the form of case law akin to the common law system under which judge-made law can be cast retroactively over conduct which was previously thought to be consonant with the law until that case was decided.

¹⁰ See Charles de Secondat, Baron de Montesquieu, *The Spirit of the Laws*, (1748)

¹¹ See Article 33 of the Constitution of the People’s Republic of China.

¹² See Jianfu Chen, *The Transformation of Chinese Law From Formal to Substantial*, *Hong Kong Law Journal*, Vol. 37, 689 at p. 732 (2007)

¹³ *Id* at p. 733

ordinary people. In fact, this was the aspect of the doctrine of rule of law that Dicey feared would be thrown to the dogs if administrative law was allowed to grow in Britain but history has judged him wrong because his fears have been proved to be unfounded. Indeed, under the English common law, administrative agencies can also be subjected to the rule of law just as natural persons.

Equality before the law is variously stated as equality in the eyes of the law, equality under the law or legal equality. This meaning of rule of law is pretty much certain and has gained international acceptance in the United Nations Universal Declaration of human Rights.¹⁴ Once this principle got accepted at the level of the United Nations, it has become the anchor for agitations for the protection of rights of minorities, the poor and other vulnerable groups under the law.

The Constitution of the People's Republic of China has given further meaning to this sense of rule of law as follows:

"All nationalities in the People's Republic of China are equal. The state protects the lawful rights and interests of the minority nationalities and upholds and develops the relationship of equality, unity and mutual assistance among all of China's nationalities. Discrimination against and oppression of any nationality are prohibited; any acts that undermine the unity of the nationalities or instigate their secession are prohibited. The state helps the areas inhabited by minority nationalities speed up their economic and cultural development in accordance with the peculiarities and needs of the different minority nationalities.

*Regional autonomy is practiced in areas where people of minority nationalities live in compact communities; in these areas organs of self-government are established for the exercise of the right of autonomy. All the national autonomous areas are inalienable parts of the People's Republic of China. The people of all nationalities have the freedom to use and develop their own spoken and written languages, and to preserve or reform their own ways and customs."*¹⁵

VI. RULE OF LAW IN THE SENSE OF THE SUBJECTION OF THE STATE TO THE LAW

Yet another meaning of rule of law is the notion that the State must also be subject to the law. This notion is closely related to the principle of equality before the law but it is distinguishable from the principle of equality before the law for the reason that the state is not a person. The state enjoys sovereign immunity from suits in some countries and state immunity at the international level when suits are contemplated in one jurisdiction against a foreign state. In all such cases where the immunity of the state is invoked, acts of the state become incapable of being questioned with regard to their conformity to the law. It is thus in this sense that there is said to be rule of law when in any particular country, it is possible for citizens to sue the state itself (and not merely administrative agencies) if people act on behalf of the central government but in violation of the rights of anyone. In this sense, the state becomes amenable to suits just like any private individual. "Rule of law" is thus contrasted with the phrase "rule by law" in that sense to imply that in the former phrase, the law rules even the state's acts whilst in the second situation, the state uses the law to rule the people but the state itself is not necessarily bound to obey the law it has made. In other words, under the "rule of law" the state can be sued for its failure to obey the law because the law is higher than the state itself whilst under "rule by law", the state stands above the law and cannot be sued for violating the law.

To begin with, it is notable that the Chinese expression for rule of law is stated in Chinese literature as 法治 (pronounced "fa zhi"). In the Chinese language rendition of this term, there is no preposition such as "of" or "by". It is therefore debatable whether this Chinese expression means "rule of law" or "rule by law". This debate can, however, be resolved by looking at the roots of the word as well as what practical meaning the Chinese people themselves have given to this expression. Kenneth Winston has opined that the Chinese expression 法治 means "rule by law" and he contends that it has its roots in the ideas of the legalist school of thought in ancient China. He states it as follows:

*"The Chinese legal tradition, rather, is rule by law, as elaborated most fully in ancient Legalist texts such as the Han Feizi."*¹⁶

¹⁴See Article 7 of the Universal Declaration of Human Rights states that "All are equal before the law and are entitled without any discrimination to equal protection of the law."

¹⁵ See Article 4 of the Constitution of the People's Republic of China.

¹⁶ Kenneth Winston, *Singapore Journal of Legal Studies* [2005] 313

He continues as follows:

“Chinese Legalism did not begin with the Han Feizi, but it is generally regarded as the most sophisticated exposition of the theory ...The conventional reading of the Han Feizi pictures law as an instrument in the hands of the ruler.”¹⁷

Kenneth Winston proceeded further to draw a link or similarity between the concept of “rule by law” and the positivist school of thought in jurisprudence by comparing it to the ideas of John Austin and Lon Fuller in the following words:

“By definition, Austin’s sovereign is not subject to a superior power and hence does not have any legal duties ... Austin formulates this point most sharply by observing that “every government is legally despotic”. This is a provocative way of saying that its power is legally unlimited; it stands above the law and can make, or unmake, any law whatever”¹⁸

Finally, he opines that the “rule by law” is a deliberately chosen mode of governance:

“Rule by law is a consciously chosen and principled mode of governance, not simply instrumental to the preferences or interests of the lawmaker. Rather, it is a cooperative venture and carrier of collective value, involving reciprocal dependence between ruler and ruled.”¹⁹

Zhu Suli agrees that in the current circumstances of China, the rule by law is more apposite. He opines that in comparative studies between China and the West, there is the need for Westerners to avoid taking the moral high ground on this issue of “rule of law” being of higher moral standing than “rule by law”. He states that too often, the writings of Western scholars reveal what he calls:

“the deep ideological bias that is central to the “moral authority” of the western notion of the autonomy of law and “rule of law” (a shaky authority that has evaporated after 9/11), but also a theoretical mistake that is common in comparative or implicitly comparative studies of China.”²⁰ (The emphasis is mine)

Zhu Suli opines that every nation must design a constitutional arrangement or mode of governance in the light of its peculiar history and its position in the world at any point in time and that the Western notions and concepts cannot be divorced from their historical contexts. He explains it as follows:

“Once we understand the role that the CCP has played in modern China in social mobilization and representation, in nation building, and in the creation of institutions, then we must maintain a degree of moderate academic vigilance against the apparently successful Western experience in the judiciary and rule of law. Vigilance is not hostility. Rather, simply because of current Western institutions’ ostensible success, we should not take them as a decontextualised standard when they are in fact imbedded in and abstracted from particular historical and theoretical contexts.”²¹ (The emphasis is mine)

From the foregoing, it can be concluded that the expression “rule by law” may be appropriately applied to the Chinese constitutional situation but it is a conscious choice made by the Chinese people (taking into account their history and peculiar situation) as the best mode of governance and it is paying them great dividends as can be seen from the fast progress of the Chinese nation.

VII. RULE OF LAW IN THE SENSE OF IMPARTIAL JUSTICE DELIVERY

Finally, rule of law may also be used to imply the existence of impartial avenues for enforcement of the law. An independent judiciary is one of the implicit meanings of this sense of the phrase “rule of law”. It is this sense of “rule of law” that Carl F. Minzner referred to when he stated as follows with respect to the *xinfang* system in China:

¹⁷ *Id* at p. 315

¹⁸ *Id* at p. 317

¹⁹ *Id* at p. 329

²⁰ Zhu Suli, *Political Parties in China’s Judiciary*, *Duke Journal of Comparative & International Law*, Vol. 17:533 at 534

²¹ *Id* at p. 557

*“Responsibility systems also impact the development of **rule of law** by affecting citizens’ relationship with legal norms and institutions. **Chinese citizens lack independent judicial channels to protect their rights set out in law.**”²² (The emphasis is mine)*

This meaning of rule of law goes beyond the mere existence of an independent judiciary. It also includes the use of a fair procedure to ascertain the guilt, culpability or liability of a person who has been accused of violating the law. If it is possible for anyone to corrupt or manipulate the procedure for the determination of a person’s guilt or liability whenever he stands accused, then the law enforcement system can easily be manipulated to set the guilty free and to rather punish the innocent. In this sense, the existence of an independent judiciary may not be enough for the attainment of the ideal concept implied in this meaning of rule of law, i.e. the delivery of impartial justice whereby only the truly guilty gets punished whilst the truly innocent has a very good chance to be set free. Simply put, rule of law, in the sense of the delivery of impartial justice, denotes two things: an independent judiciary that relies on fair rules of procedure to achieve high quality substantive justice in the sense that the truly innocent stand a very good chance of not being freed whilst the truly guilty do not stand a good chance of escape from punishment. It is in this sense of the phrase rule of law that Professors Margaret Y. K. Woo and Yaxin Wang stated as follows:

*“**Legal procedure is** not simply **the practical method of securing the rule of law** and ensuring the enforcement of substantive rights. Legal procedure also reflects our collective **sense of justice.**”²³ (The emphasis is mine)*

In the same light, Hamson has observed as follows:

“it is in its legal institutions that the characteristics of a civilized country are most clearly revealed, not only and not so much in its substantive law as in the practice and procedure of its courts. Legal procedure is a ... ritual of extreme social significance.”²⁴

The 1983 Constitution of the People’s Republic of China attempts to promote this sense of rule of law in the following provisions:

“The people’s courts shall, in accordance with the law, exercise judicial power independently and are not subject to interference by administrative organs, public organizations or individuals.”²⁵

*“The personal dignity of citizens of the People’s Republic of China is inviolable. Insult, libel, **false accusation or false incrimination** directed against citizens by any means **is prohibited.**”²⁶ (The emphasis is mine)*

Sida Liu and Terence C. Halliday traced the history of the development of this sense of rule of law in China as follows:

“When the People’s Republic of China (PRC) was established in 1949, no formal criminal procedure code or criminal code was adopted in its first thirty years, except for a number of criminal law-related statutes issued by various judicial and administrative agencies and party organs. Driven by the principle of ‘leniency for confession, harshness for resistance’ (tanbaicongkuan, kangjucongyan), the criminal process in the early years of the PRC was characterized by long, informal, and secret interrogations and lack of defense for the criminal suspects (Cohen 1968, 48-49). The ‘iron-triangle’ of the police, procuracy, and judiciary (gongjianfa) often acted together in striking at crimes, and they possessed huge discretionary power in the

²²See Carl F. Minzner, *Xinjiang: An Alternative to Formal Chinese Legal Institutions*, *Stanford Journal of International Law*, Vol. 42, 103 at p. 155, (2006)

²³See Margaret Y. K. Woo and Yaxin Wang, *Civil Justice in China: An Empirical Study of Courts in Three Provinces*, 53 *The American Journal of Comparative Law*, 911

²⁴ See C. J. Hamson, *In Court in Two Countries: Civil Procedure in England and France*, *TIMES* (London), Nov. 15, 1949

²⁵ See Article 126 of the Constitution of the People’s Republic of China

²⁶ See *Id* Article 38

criminal process. However, this socialist model of criminal justice was swept away during the Cultural Revolution (1966-1976), together with most other legal institutions in China, and by 1979 — the year China's first CPL was promulgated — the whole legal system had to be rebuilt from scratch."²⁷

Again, the Liu and Halliday continued as follows:

*"The 1979 CPL, together with the 1979 Criminal Law, was among the first major laws promulgated by the NPC after the Cultural Revolution. As our interviews and many previous studies indicate, **this round of lawmaking was the direct result of a deep lesson from the social and political turmoil during the Cultural Revolution**"²⁸ (The emphasis is mine)*

Liu and Halliday threw more light on the development of this meaning of rule of law in China when they stated the following:

*"A more fundamental source of Chinese characteristics comes from a long history of criminal justice that emphasizes substantive justice and overlooks procedure. In the traditional Chinese criminal justice system, once a person was arrested he was considered a criminal by the public, and there were few procedural limits on periods of detention, coerced testimony, or trial. Reinforced by the Communist ideals of subordinating all procedural fetters to the goal of creating a new society, this long and deep tradition of substantive justice still significantly shapes the legal ideologies of many criminal law enforcement officers, judges, citizens, and even some lawyers."*²⁹

Liu and Halliday proceeded by explaining that even lawyers who engage in criminal defence work are as vulnerable as their clients:

*"The struggles for criminal defense are pungently illustrated through lawyers' articulation of their grievances with two metaphors, namely, "Three Difficulties" (san nan) and "Big Stick 306" (306 da bang). The Three Difficulties refer to lawyers' difficulties in (1) meeting the criminal suspect, (2) getting access to the procuracy's case files, and (3) collecting evidence and cross-examining witnesses at trial. Big Stick 306 refers to the abusive use of Article 306 of the 1997 Criminal Law and Article 38 of the 1996 CPL by the police and procuracy, which allow prosecutors to arrest lawyers who are defending cases against them on grounds that lawyers have conspired with defendants to commit perjury or to give false testimony. **Lawyers are most vulnerable when defendants change the story they tell the lawyer from the story they told the police, often as a result of police coercion** (Yu 2002; Halliday and Liu 2007)"³⁰ (The emphasis is mine)*

In order to give true meaning to this meaning of rule of law (in the sense of high quality impartial justice through the use of a fair procedure to ascertain guilt), the rules of the law of evidence in many jurisdictions provide that when any evidence is acquired through illegality such as torture to obtain confessions, then such evidence is not admissible against the accused person. Again Liu and Halliday have explain the practical workings of such rules of evidence in China in the following manner:

"Conflicting diagnoses are also found in tensions between the police/procuracy and the court over the exclusion of illegal evidence. As confession by torture is still prevalent in the investigation phase, the prosecutor's evidence is often obtained through illegal means. If the defender finds evidence of confession by torture and argues for the exclusion of illegal evidence in the court proceeding, the judge faces a dilemma—if the defender's argument is adopted and the case is dismissed, then the procuracy's work record would be damaged and the defendant could request state compensation from the police and the procuracy; if the argument is rejected and the defendant appeals to the higher-level court and the verdict is reversed, the trial record of the court would be stained. A judge at a basic-level court in Xi'an explained what would usually happen in this situation:

²⁷ See Sida Liu and Terence C. Halliday, *Recursivity in Legal Change: Lawyers and Reform of China's Criminal Procedure Law, Law & Social Inquiry*, Volume 34, Issue 4, 911 at p. 921-922

²⁸ *Id*

²⁹ *Id* at p. 920

³⁰ *Id* at p. 921

'If the defense lawyer can show confession by torture, what is the result? The rule of evidence in China is not comprehensive. In practice when this occurs we will request the procuracy to investigate in three days. If it is confirmed and illegal evidence is involved, you cannot really declare the person innocent but we request the procuracy to withdraw the case and "digest" it in the system. The police, the procuracy and the court are not independent from one another. They have equal positions under the guidance of the Party, so we will try to avoid state compensation.' ³¹

The upshot of the above analysis is that by identifying each of the different strands of the multi-faceted term "rule of law" and holding it up against the Chinese legal system, it can be seen that many of them are applicable to the Chinese legal system yet the rule of law continues to dominate the discourse of foreign scholars whenever there is an opportunity to discuss Chinese law. Of course, in respect of some of the meanings of the phrase rule of law, China still has more work to do to advance the rule of law in that sense but in view of the peculiar history of China, the country has actually come a long way in the area of rule of law.

As observed by Fallon:

"[A] general theory of the Rule of Law, disconnected from any legal system in particular, would necessarily be thin and abstract. The Rule of Law is a human ideal, and theories of the Rule of Law are inevitably framed to serve political or moral interests." ³²

He continues as follows:

"The Rule of Law is an ideal that can be used to evaluate laws, judicial decisions, or legal systems. A legal system that on the whole comports with the Rule of Law may nevertheless include regulations or decisions that do not ... [T]he extent to which a legal system approaches the Rule-of-Law ideal is itself a matter of degree. Probably no legal system realizes any of the desiderata perfectly" ³³

Robert Stein agreed with Fallon when he also opined as follows:

"The rule of law, in the purist sense, is an ideal, a goal, something to be strived for. As an ideal, it is never fully achieved. Its presence or absence should be judged in relative terms; what is possible in an advanced western democracy may not be possible in a developing nation." ³⁴

VIX. CONCLUSION

From the foregoing, it becomes clear that if we avoid using the rule of law to score political and ideological points, China equally qualifies to use that label just like any other country. Indeed, I have demonstrated that with respect to the meaning of rule of law in the sense of stability of the law and avoidance of retroactive law-making, the People's Republic of China will perform far better than many common law jurisdictions which pride themselves as the bastions of the rule of law. Jianfu Chen has come to the following conclusion:

"Perhaps it is premature or simply unfair to assess contemporary Chinese law according to the criterion of 'rule of law'. After all, the 'rule of law' has developed for some 800 years in the Common Law system, whereas China's modern history has been a rather turbulent time. But the overall trend is evidently in that direction." ³⁵

³¹ *Id* at p. 935

³² See Richard H. Fallon Jr., *supra* note 2 at p. 7

³³ *Id* p. 9

³⁴ See Robert Stein, 18 *Minn. J. Int'l L.* 293, 303 (2009)

³⁵ See Jianfu Chen, *The Transformation of Chinese Law From Formal to Substantial*, *Hong Kong Law Journal*, Vol. 37, 689 at p. 736 (2007)