

Rule of Law in China

Institutions and Prospects for Democracy

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Abstract:

As China has grown into the world's second largest economy, a chorus of international voices has urged the ruling Chinese Communist Party to reform the country's authoritarian government. Both in China and around the world, many of these calls for reform center on China's need to be governed by the rule of law. This capstone defines rule of law, before working to determine what political and institutional factors are necessary for a state to be governed by the rule of law. The conclusion of this research reveals that while implementing rule of law based reforms is necessary for China, the rule of law itself provides neither a clear path to democracy nor a panacea for human rights abuses.

I. Introduction

The People's Republic of China, a nation that includes one fifth of the world's population, is a topic of intense international attention. As the Chinese economy has grown at an unprecedented rate, China has become an increasingly large player on the world stage. With its ascension to global power, the international community has urged the ruling Chinese Communist Party to reform and democratize.

In response to both international and domestic pressure, the Communist Party has continually implemented "reforms". The goal of many of these reforms is to implement the "rule of law". Chinese politicians announcing and implementing rule of law reforms are prominently featured in the state-run media. Since Deng Xiaoping first announced economic reforms, three Chinese presidents have made pronouncements on the importance of the rule of law.

Many applaud the efforts towards governing China by rule of law. But both the domestic and international discourse on rule of law is far removed from the academic discussion of what rule of law actually is, what it will look like in China, and what is necessary to make it happen. This paper will investigate those questions by first examining what rule of law means as a concept, if it is intractably linked to democracy, what legal and political institutions are necessary for it and finally, what the rule of law will look like when governing China, a nation with legal traditions that have been shaped by thousands of years of unique history.

II. Rule of Law Theory

Defining Rule of Law

The most basic conceptual ideal of the rule of law is the opposite of “rule of man”. This would mean that the rule of law would exist any time government is beholden to the law rather than the whim of a monarch or dictator. Inevitably however, the degree to which leaders and politicians are either beholden to or above the law is a matter of heated debate in countries where governance by the rule of law is usually accepted as given, such as in the United States. In part because of this debate, numerous theories of what the rule of law is and when it exists have been written since the ideas of social contract theory and the enlightenment first brought these issues into academic discourse.

There is a broad division in rule of law theory between theories that tie the rule of law to certain political systems or economic ideologies and theories that contend that rule of law can be measured by the degree to which a state possesses legal institutions and other functional aspects of the law. For the purposes of this paper’s discussion of rule of law theory, these two schools of thought will be divided into two categories used by Randall Peerenboom in his discussion of rule of law in China, the broader definitions that advocate certain political structures and economic systems will be referred to as “thick” rule of law theories, and the more functional definitions will be called thin rule of law theories.

Working Definition of the Rule of Law

Rule of law is often thought of as an intangible idea, even an ideal that can never be

truly reached¹. Yet at the same time it is a concept that requires a firm definition in order to have a productive discussion about its implications and future. In order to have this discussion and to engage in meaningful international comparisons of rule of law, this paper will utilize the following definition of rule of law: A country can be said to be governed by rule of law when both its ruling elites and ordinary citizens are subject to the same laws, the laws are clear, the legal system well-staffed, and utilized when needed. Additionally, there must be some political force or government institution that effectively compels even the political elite to exercise state power without violating the law.

Thin Rule of Law Theory

Thin rule of law theory relies on the idea of rule of law as a functional or normative concept. Functioning legal institutions, and an adequate number of lawyers and professionals who work within those institutions are the essential core of thin rule of law theory.

The American Bar Association's World Justice Project four "universal principals" of the rule of law are an archetypal thin rule of law definition. They are as follows:

- "The government and its officials and agents are accountable under the law.
- The laws are clear, publicized, stable and fair and protect fundamental rights, including the security of persons and property.

¹ Teemu Ruskola, "Law Without Law, or Is Chinese Law an Oxymoron," *William & Mary Bill of Rights Journal* 11 (2003 2002): 656.

- The process by which the laws are enacted, administered, and enforced is accessible, efficient and fair.
- Justice is delivered by competent, ethical, and independent representatives and neutrals who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.”²

Randall Peerenboom, arguably the preeminent scholar on rule of law in China, defines thin conceptions of rule of law as including all of the basic institutional factors in a fair and functional legal system: including publicly available, consistent laws capable of being enforced and followed³. Peerenboom notably utilizes a thin definition of the rule of law, consistent with his thesis in *China's Long March Towards Rule of Law*⁴ that China will achieve a rule of law state that differs substantially from the conception of rule of law in the West and will be both undemocratic in the short term and reflect a much more communitarian, so-called “Asian values” rule of law rather than a thick rule of law definition rooted in modern liberalism.

Maravall and Przeworski also use a thin conception of the rule of law as the basis for their co-edited collection *Democracy and the Rule of Law*⁵. Maravall and Przeworski theorize that rule of law exists when political actors are compelled to use judicial

² “What Is the Rule of Law,” *The World Justice Project*, 2012, <http://worldjusticeproject.org/what-rule-law>.

³ Randall Peerenboom, “Let One Hundred Flowers Bloom, One Hundred Schools Contend: Debating Rule of Law in China,” *Michigan Journal of International Law* 23 (2002 2001): 472.

⁴ R. P. Peerenboom, *China's Long March Toward Rule of Law* (Cambridge, UK; New York: Cambridge University Press, 2002).

⁵ Adam Przeworski and José María Maravall, *Democracy and the Rule of Law*, Cambridge Studies in the Theory of Democracy (Cambridge University Press, 2003), iv.

institutions, that are impartial, to resolve their disputes, and the law meets many of the conditions already discussed in this section.

Thick rule of law

Thick theories of the rule of law contain all of the requirements of thin theories with the addition of requirements for the type of government necessary to preserve individual rights and certain economic systems⁶. Thick conceptions of rule of law typically include in their definition liberal democratic ideals such as protection for individual rights, democracy and fundamental ideas about how governments should be structured and an emphasis on free market economic system⁷. Other thick theories of rule of law can also mandate other economic systems, but for the most part thick rule of law is intrinsically linked to the ideals of western liberalism.

Thick rule of law theory is fundamentally rooted in western liberal philosophy. Within that political philosophy, few thinkers loom larger than John Locke. The structure of representative government advocated in Locke's *Two Treatises of Government* has had a strong influence on today's thick rule of law theory. Locke was among the first social contract theorists; he advocated a system of representative government where the people hold the ultimate sovereignty. Locke also had a strong emphasis on what he termed natural rights, life, liberty and property⁸. Linking the government and law to the preservation of natural rights is the defining feature of thick rule of law theory, and a foundation of liberal democratic ideals.

⁶ Richard H. Fallon, "'The Rule of Law' as a Concept in Constitutional Discourse," *Columbia Law Review* 97, no. 1 (January 1, 1997): 1–56, doi:10.2307/1123446.

⁷ Peerenboom, *China's Long March Toward Rule of Law*, 3.

⁸ John Locke, *Two Treatises of Government* (C. and J. Rivington, 1824).

Within the overarching category of thick rule of law theories, there are many different definitions of what a thick rule of law is. As a starting point for discussing the divisions of thick rule of law theory, we can examine two of Richard Fallon's "four ideal types of rule of law" featured in his article *The Rule of Law as a Concept in Constitutional Discourse*⁹. Fallon divides rule of law into four categories, two of which Historicist and Substantive could be considered thick rule of law definitions when applying the definition advocated by this paper. The Historicist ideal type does not view certain types of laws as moral or inherently fair, but focuses almost solely on the legitimacy of the bodies that formed the laws. In Historicist conceptions, the rule of law exists when laws made by legitimate lawmaking bodies are enforced according to their original meaning¹⁰. Historicist types therefore most closely resemble states where Judges adhere most closely to the original meaning of the text of the law. In legal discourse in the United States we would most closely associate this type with constitutional originalism¹¹. The Historicist ideal type is notable for relying on the legitimacy of the lawmaking body, which does not theoretically have to gain legitimacy from democracy, but is nonetheless represented as a thick theory in this paper because the interpretation of laws necessitates a consistent history and legal system shared by the lawmakers and eventual legal interpreters in order to interpret the law properly. A theory that requires a shared history in order to be achieved is definitively a thick theory. Substantive ideal type of rule of law is Fallon's second thick type, and most closely resembles the archetype of liberal democratic rule of law. Substantive theory

⁹ Fallon, "'The Rule of Law' as a Concept in Constitutional Discourse."

¹⁰ Ibid., 12.

¹¹ Ibid., 13.

advocates that rule of law exists only when law is in line with what is morally right, similar to Locke's idea of natural law, along with all of the process requirements of thin theories¹².

Thick rule of law theories are pervasive in American political discourse, indeed rule of law often serves as a sort of shorthand for the protection of fundamental, individual rights and democracy as separate ideals that are not dependent on one another. While certain thick rule of law theories, such as Fallon's Historicist ideal type are not entirely dependent on the linkage between democracy and rule of law, for the most part thick rule of law is dependent on democratic ideals or a strong focus on individual rights, and this paper will categorize thick rule of law as a rule of law coupled with fundamental ideas of western liberalism, including the need for a representative government and the protection of individual rights.

III. Traditional Chinese Legal Tradition and the Development of Chinese Law

Traditional Chinese Law is one of the world oldest legal traditions. Law in imperial China was seen as a means of maintaining harmony and social order—it did not have the economic and social protections that many think of as a hallmark of modern legal systems¹³. This section will briefly explore the philosophies that have influenced Traditional Chinese Law. The brief adoption of western style Civil Law both at the end of the Qing dynasty and in the Republic of China followed the use of Traditional Chinese Law. Finally, Socialist law under Mao Zedong and its impact on the rule of law in China will also be discussed.

Traditional Chinese Law

¹² Ibid., 22.

¹³ Peerenboom, *China's Long March Toward Rule of Law*, 30.

Traditional Chinese Law, with its emphasis on social hierarchy and social order, has its basis in ancient Chinese philosophy¹⁴. In contrast to Western and Islamic legal traditions, Traditional Chinese Law is rooted in neither economic necessity nor religious justification¹⁵. Instead, two opposing philosophies, Legalism and Confucianism, have until around 200 years ago, been the two greatest influences on Chinese law¹⁶.

Perhaps no philosophy has had more influence on China's culture and law than Confucianism. Confucianism makes the underlying claim that man is innately good, and that if society makes people follow the correct path in life or *li*, then crimes and other bad actions will not have the chance to occur¹⁷. Because of this, Confucianism is suspicious of codified law, with a belief that a government without the respect and belief of its people with has whatever codified laws it does make circumvented by its people. The Confucian emphasis on patriarchy and social and social order place it at odds with a thick rule of law in the Western liberal tradition. Confucianism places a much greater emphasis on maintaining harmony than protecting individuals¹⁸.

Legalism is in contrast and a reaction to the fundamental Confucian distrust of codified law. Legalists believe that man only acts out of self-interest, and that a strong government based on the equal application of law is the only way to ensure stability. Legalists placed special emphasis on public codified law, which they believed removed the need for highly capable, virtuous leaders that Confucianism required. Despite this, legalism,

¹⁴ Derk Bodde, "Basic Concepts of Chinese Law: The Genesis and Evolution of Legal Thought in Traditional China," *Proceedings of the American Philosophical Society* 107, no. 5 (October 15, 1963): 376, doi:10.2307/985644.

¹⁵ Derk Bodde, "Basic Concepts of Chinese Law: The Genesis and Evolution of Legal Thought in Traditional China," *Proceedings of the American Philosophical Society* 107, no. 5 (October 15, 1963): 379.

¹⁶ Bodde, "Basic Concepts of Chinese Law," 382.

¹⁷ Derk Bodde, "Basic Concepts of Chinese Law: The Genesis and Evolution of Legal Thought in Traditional China," 383.

¹⁸ Peerenboom, *China's Long March Toward Rule of Law*, 32.

just like Confucianism, placed the emperor above the law, not subject to its jurisdiction.

Because of legalism, Traditional Chinese law was heavily codified in the imperial era¹⁹. It also contained harsh, mandatory sentences, an essential part of legalist thinking.

Ultimately, traditional Chinese law became a hybrid between these two conflicting ideologies. When the Qin dynasty first unified all of China, it depended on an orthodox, legalist philosophy of government²⁰. However the Han dynasty that followed the Qin, eventually adopted Confucianism as the official state philosophy. What ultimately came of Traditional Chinese Law was a hybrid of these two systems that resembled a codified law heavily influenced by Confucianism²¹. This meant that it contained harsh, codified, proscribed sentences for crimes that were often defined by Confucian values. The legal code placed special emphasis on ideas like filial piety and punishments were meted out according to ones social status, in contradiction to the even application of legalism²².

Despite the impact of legalism, Confucianism remained the dominant personal and political philosophy of Imperial China. While magistrates were supposed to follow the legalist codes, there were rarely cited²³. Even more persistent today is the essential distrust of legal institutions that is central to the Confucian emphasis on community and family. Confucianism, rather than legalism, remains the dominant philosophy concerning how Chinese people personally approach the law. Still to the present day, Confucianism is a confounding factor in instituting the rule of law in China.

Civil Law in the Late Qing Dynasty Reforms and the Republic

¹⁹ Ibid., 38.

²⁰ Dekr Bodde, "Basic Concepts of Chinese Law: The Genesis and Evolution of Legal Thought in Traditional China," 387.

²¹ Ibid, 389

²² Peerenboom, *China's Long March Toward Rule of Law*, 38.

²³ Ibid., 39.

At the turn of the 20th century, a string of humiliating losses in the two Opium Wars and the Sino-Japanese war, along with internal rebellion, created an obvious need for reform of the imperial Chinese government under the Qing dynasty²⁴. These reforms included a full overhaul of the Chinese legal system, and the adoption of a Western style, codified, civil law system²⁵. This system was adapted from the Japanese who had themselves used the German legal system as a basis for legal reform.

In addition to adopting a new codified system of law, the Qing reformers in the early 20th century worked to create a new legal profession. A Ministry of Justice, law schools and law reviews were all established²⁶. One of the fundamental stated goals of the legal reforms was to adopt a system that placed greater emphasis on the rule of law, yet ultimately the imperial court insisted on the supremacy of imperial power over the law undermining the success of a modernization of the Chinese legal system²⁷. The failings of the Qing dynasty legal reforms are also particularly relevant in a modern context. Many of the efforts of the Qing dynasty's reforms resemble many of the efforts that the current regime appears to be making while undergoing its own legal reforms.

During the brief rule of the Republic of China under Sun Yat-sen and Chiang Kai-shek, China continued to move towards a civil law system based on German codes²⁸. Sun Yat-sen, the first president of the short-lived Republic of China, was determined to modernize the Chinese legal system and to remove what he saw as the backwards influence

²⁴ Limin Wang, "Transformation and Modernization of the Chinese Science of Law in the Early 20th Century," *US-China Law Review* 3, no. 4 (April 2006).

²⁵ Ibid.

²⁶ Ibid

²⁷ Ai Yong Ming, "Why Did the Attempt to Modernise the Legal System in Late Qing China Fail? A Sino-Japanese Comparative Study," *Bond Law Review* 16, no 1 (2004)

²⁸ Ibid., 2.

of Confucianism²⁹. Ultimately, the period of rule by the Republic of China was dominated by an almost constant state of civil war between the nationalists and the Communist People's Liberation Army. Because of this, the Republic was never able to institute a functioning legal system and thus never able to demonstrate anything beyond a stated commitment to institute the rule of law. The lasting influence of the Republic period was to create a chaotic environment from which the Communist Party could more easily implement its own legal institutions, starting from a blank slate.

Its terms of this papers definition of the rule of law, the imperial period clearly could not be said to be governed by any conception of the rule of law. While the Republic of China, under Sun Yat-sen, made attempts to implement a system based on the ideas of individual rights and what could be called a thick rule of law, the true results of its reforms were never realized both due to the chaos of China at that time and the short lived nature of the republic.

The Legal System of Modern China

Modern China is characterized by a unique hybrid of authoritarian governance and free market capitalism, which the Chinese government refers to as "Socialism with Chinese Characteristics"³⁰. This government was formed shortly after the long and bloody Chinese civil war, when the Communist Party took control of China and instituted a rapid transformation of a country influenced by centuries of traditional culture and customary law. Unlike the leaders during the republican period that preceded him, Mao Zedong, the

²⁹ Peerenboom, *China's Long March Toward Rule of Law*, 43.

³⁰ Edward Wong, "Chinese Lawyers Chafe at New Oath to Communist Party," *The New York Times*, March 22, 2012, sec. World / Asia Pacific, <http://www.nytimes.com/2012/03/23/world/asia/chinese-lawyers-chafe-at-new-oath-to-communist-party.html>.

leader of the Chinese communists, was able to fundamentally alter the culture and traditions of the Chinese state, including its legal system, during the brutal and oppressive “great leap forward”.

Under Mao, China’s legal system was nearly non-existent. Disputes were dealt with by party of military officials and the concept of the rule of law was nearly non-existent. This period is highly relevant to an examination of the Chinese legal system because a the fear of a regression back into the personality driven politics that personified the Mao era stood as a motivation for the Communist party to implement a system based on the rule of law.

Since the beginning of economic reforms in China at the end of the 1970s, the modernization of the legal system and the implementation of a system based on the “rule of law” has been one of the Communist Party’s highest stated priorities³¹. China’s rapid modernization along with fear of slipping back into the chaos of an event like the cultural revolution, make establishing the rule of law an important goal not only for party officials but also for businessmen and the general population. The Chinese Communist Party consistently promotes the rule of law through both new legislation and propaganda, but the public remains rightly skeptical of either the existence of rule of law in china or the party’s willingness to obey the laws that it promulgates³².

Implementing the Rule of Law, Chinese Legal Reforms 1978-Present

³¹ Andrew Sheng and Geng Xiao, “A Consensus Emerges in China That the Rule of Law Is a Priority,” *The Daily Star Newspaper*, accessed May 6, 2013, <http://www.dailystar.com.lb/Opinion/Commentary/2013/Feb-25/207776-a-consensus-emerges-in-china-that-the-rule-of-law-is-a-priority.ashx>.

³² Peerenboom, *China’s Long March Toward Rule of Law*, 2.

In 1982, the National People's Congress ratified a party constitution that guaranteed both the supremacy of the law over the government and equality before the law³³. While many guarantees provided in the 1982 constitution have gone unfulfilled, the CCP has made legitimate strides in developing both a legal profession and a modern justice system.

Zhenmin Wang divides the modern development of the Chinese legal system into 3 stages.³⁴ Each of these stages can also be attributed to the different pressures placed on the CCP to reform the system. The first reforms took place from 1978-1982 and culminated in the ratification of the 1982 Constitution. Development of the Constitution required the Communist Party to at least recognize that a rule by law, and not by a personality or dictator, was mutually beneficial to both the party and the population in general. Much of this recognition stemmed from a fear among the Chinese people of falling back into the chaos of the Cultural Revolution. Following the 1982 constitution, China embarked on a second period of legal reform that emphasized four things— legislation, professionalization, education and institutionalization. The speed at which China is currently creating its legal system has increased significantly. The People's Congress enacted only 134 new laws during Mao's tenure, while the legislature has now passed over 337 new laws along with 6,000 regulations since 1978³⁵. In addition, while many law schools were closed during the 20th century, many have reopened since reforms began. With these schools bring a greater professionalization of the legal community along with rapid growth. Between 1981 and 1998 China added over 6,000 law firms and over 100,000 lawyers. Institutions such as the

³³ Ibid., 6.

³⁴ Zhenmin Wang, "The Developing Rule of Law in China," *Harvard Asia Quarterly* (February 23, 2006).

³⁵ Peerenboom, *China's Long March Toward Rule of Law*.

Ministry of Justice were reestablished³⁶. As we will see in the following section, the strengthening of legal institutions, even when carried out by a non-democratic government, can be the precursor to a strong rule of law state.

In 1991, the beginning of a third period of modernization began in China when Deng Xiaoping official acknowledged the importance of the market economy to China's future³⁷. At the 12th National People's Congress, the Party officially recognized the importance of the rule of law as a principle for regulating China's market based economy³⁸³⁹. These factors and the current status of rule of law reforms will be discussed in a subsequent section where an international comparison will be utilized to evaluate China's current and future prospects for rule of law.

The Rule of Law in Imperial vs. Modern China

Even during the highly legalist period under the Qin Dynasty, the law never truly reflected a fundamental conception of the rule of law. During this period, when the law was relatively strict and well enforced, its legitimacy always came from the Emperor who himself was above the law. As a result, law in Imperial China was the ultimate incarnation of the rule by man rather than rule of law. Because of the tumultuous nature of the years following the fall of the Qing Dynasty, China's legal system in the years between 1911 and 1982 also lacked any real semblance of the rule of law.

³⁶ Ibid.

³⁷ Zhenmin Wang, "The Developing Rule of Law in China."

³⁸ Zhang Dejiang, Chairman of the Standing Committee of the National People's congress, stressed the need for the Communist Party to govern in accordance with the constitution, which he declared the "essence of rule of law". See: "Top Legislator Stresses Rule of Law," *Xinhua*, March 19, 2013, http://news.xinhuanet.com/english/china/2013-03/19/c_132246331.htm...

³⁹ Another high-ranking official, Premier Li Keqiang, stressed the need for rule of law in fight against corruption due to rapid economic growth See: "NPC Ends | Li Keqiang Closes with the Three Priorities for China | Gbtimes," *Gbtimes*, accessed May 6, 2013, <http://gbtimes.com/third-angle/chinas-leadership-change/domestic-affairs/li-keqiang-outlines-chinas-three-priorities>

In contrast, the law of China since the reforms of the 80s and 90s officially places a high degree of emphasis on the rule of law. While there is still clear evidence that the rule of law only exists theoretically in China, the current system is closer to implementing rule of law in the definition of this Explosive economic growth and the rise of a stronger Chinese middle class have created a demand from the people that the legal system needs to become more predictable and transparent. Recent reforms such as the emergence of property rights are indicative of this current trend.

IV. Institutional Requirements for Rule of Law and International Comparisons to China

Rule of law cannot exist without certain state institutions and political forces compelling elites to stay within the boundaries of the law. As the following international comparisons will show, the institutions and political forces that can cause a state to be governed by the rule of law vary as much as the definition of rule of law itself.

This section explores the rule of law in two governments; Chile under the rule of Augusto Pinochet, and the current democratic-authoritarian regime in Singapore. The principle purpose of discussing these two regimes is to show how nominally democratic states can achieve a thin conception of rule of law without democracy. A brief conclusion and discussion of the implications of each of case studies will follow. The next section will analyze the current status of rule of law in China, and its future as a potential thick rule of law state.

Rule of Law in Chile under Pinochet

Following a 1973 coup, Augusto Pinochet effectively controlled Chile for the better part of two decades. His regime is correctly criticized for widespread human rights abuses and extra-judicial killings⁴⁰. With these human rights abuses, the regime utilized legal processes to preserve their own legitimacy. In the edited volume *Democracy and the Rule of Law* Robert Barros highlights the dichotomy between rule of law as either regulations of how leaders should treat citizens, which he terms “rule by law” or the relationship between the state leaders and the rule of law, which he terms “constitutionalist rule of law”⁴¹. Barros contends that “rule by law” is a type of rule of law, in what this paper would term a “thin” conception. “Rule by law” includes all of the facets of this papers thin rule of law definition, including a large and capable legal bureaucracy⁴². According to Barros, Chile, despite being ruled by a military dictatorship, was in fact a thin rule of law state.

Several key facts about Chile’s government are in line with what we would look for in a thin rule of law state. In the rule of law definition utilized by this paper, laws must be publicly known and utilized. The legal system must be sufficiently trained and well organized to process lawsuits and defend suspects in criminal cases. In terms of civil litigation and property disputes, Chile’s legal system was functional and cases were generally handled properly. In terms of criminal cases, Chile lived in a constant state of exception⁴³, where military tribunals and “War Councils” were used to prosecute civilians suspected of subverting the government, often with little judicial independence. This dichotomy between civil legal proceedings being effectively dealt with and criminal

⁴⁰ Edward C. Snyder, “Dirty Legal War: Human Rights and the Rule of Law in Chile 1973-1995, The,” *Tulsa Journal of Comparative & International Law* 2 (1995 1994): 254.

⁴¹ Robert Barros, “Dictatorship and the Rule of Law: Rules and Military Power in Pinochet’s Chile,” in *Democracy and the Rule of Law*, by Adam Przeworski and José María Maravall, Cambridge Studies in the Theory of Democracy (Cambridge University Press, 2003), 193.

⁴² Snyder, “Dirty Legal War,” 254.

⁴³ Ibid.

proceedings greatly resembles the current standing of rule of law in China. Where Pinochet's Chile and modern China are dissimilar is perhaps the most interesting part of Barros' conclusion about authoritarianism and rule of law.

During Pinochet's rule, his military junta made continually regulated its own internal rulemaking processes in an attempt to both increase their own legitimacy and to keep the power structure balanced between competing factions within the junta. This balancing of power is where Barros theory about rule of law in Chile intersects with the second part of this paper's definition of rule of law, that some political force or institution must compel ruling elites to operate under the law. Because Chile's armed forces that led the Junta were each independent institutions, they had a strong incentive to keep one group from taking complete control of the country. Barros refers to this group rule as "collective sovereignty", and contends that it is essential to the co-existence of the rule of law with autocracy. Because of this *de facto* separation of powers the Chilean military was ultimately compelled to create a constitution that effectively limited their own and Pinochet's power, and ultimately led to a democratic election that removed Pinochet. What began as a type of thin rule of law paved the way for a constitutional, thick rule of law.

While direct comparisons are difficult to draw, there are striking similarities between Pinochet's Chile and modern-day China. China has the same dichotomy between better-developed civil litigation and criminal law⁴⁴. In terms of China possessing "collective sovereignty", China also has a government where power is divided between factions. These two factions are the elite Communist Party officials from wealthy provinces, and the more

⁴⁴ This dichotomy refers to the emphasis on encouraging economic growth and creating a hospitable business climate that is well documented in China and discussed by Snyder in the introduction of his article *Dirty Little War*. See *supra* note 42.

populist Party officials from poorer provinces⁴⁵. These divisions may be a driving force as China continues to implement more rule of law based reforms.

Singapore

Where Chile represents a legal system that just meets the faintest definition of a rule of law state, Singapore represents another extreme. Singapore is a valuable comparison to China for two reasons. First, it has an officially strong emphasis on the rule of law⁴⁶. Second, it shares an “Asian values” history of Confucianism and legalism with China⁴⁷. Singapore’s criminal courts, much like China’s, place a much higher significance on public safety and the community than individual rights. Both the Attorney General of Singapore and its Chief Justice have emphasized public safety rather than the protection of civil liberties as their chief concern⁴⁸.

Singapore is certainly governed by a thin rule of law⁴⁹. It has a highly functional system of administrative law and a highly developed legal profession. Singapore’s current legal system presents a compelling picture of what China’s legal system could become as it continues to advance towards the rule of law. Singapore’s problems also present pitfalls that China must be cautious about. More than just a lack of fundamental protection of individual rights, these problems include the fact that Singapore’s leaders use its highly developed legal system to defend what has become a *de facto* one party state. Libel laws

⁴⁵ Cheng Li, “One Party, Two Factions: Chinese Bipartisanship in the Making?,” in *Conference on “Chinese Leadership, Politics, and Policy”*. Carnegie Endowment for International Peace. Retrieved on July, vol. 20, 2005, 2006.

⁴⁶ Lee Kuan Yew, Singapore’s founding father

⁴⁷ Gordon Paul Means, “Soft Authoritarianism in Malaysia and Singapore,” *Journal of Democracy* 7, no. 4 (1996): 103–117, doi:10.1353/jod.1996.0065.

⁴⁸ Li-ann Thio, “Lex Rex or Rex Lex - Competing Conceptions of the Rule of Law in Singapore,” *UCLA Pacific Basin Law Journal* 20 (2003 2002): 76.

⁴⁹ Ibid., 75.

and the high cost of litigating have created a system where the Singapore's leaders utilize the legal system to silence political opposition and maintain one party rule⁵⁰.

Singapore, like China, represents the result of a fast growing economic power in Asia, with a culture that shares both an ethnic and cultural heritage with the Chinese. If China continues to develop its legal system, it may someday resemble the system that Singapore has built—a functional single-party democracy with a legal system that reflects more communitarian values with significantly less emphasis on civil liberties than exists in the west.

Conclusions from International Comparisons

Perhaps the most important conclusion to reach from these international comparisons is the relatively low threshold for a country to meet a thin rule of law definition. There is a significant consensus in the academic community that Singapore has achieved the rule of law⁵¹, yet there is also a significant deviation from any thick conception of the rule of law that preserves individual rights. The ultimate question that these countries raise is also a question of what rule of law really means in political discourse. Thin rule of law, which does not yet exist in China, is a very real possibility, and while that may solve many of the business disputes and other issues that China grapples with on the world stage, it is ambiguous whether the rule of law, in a thin sense, will be the solution to human rights abuses or democracy.

⁵⁰ Means, "Soft Authoritarianism in Malaysia and Singapore."

⁵¹ This refers to a thin rule of law. Among developed countries, Singapore ranks near the top in the American Bar Association's World Justice Project's Rule of Law index. See: "Singapore | The World Justice Project," November 27, 2012, <http://worldjusticeproject.org/country/singapore>.

The link then between democracy and the rule of law in these two cases is tenuous at best. It's clear that while, as in the case of Chile, implementing reforms that strengthen the rule of law can clearly contribute to the democratization of a state, the opposite, a state like Singapore with a strong rule of law, can actually become undemocratic. It's clear from these two examples that there are numerous other factors beside strong rule of law that contributes to a country's democratization, what exactly these factors are, and if they are tangible and predictable precursors to democracy is a topic that is ripe for further research but beyond the purview of this paper.

Current Standing of Rule of Law in China

The most significant evidence of success thus far in the Chinese legal system exists in the massive increase in litigation China has seen in the past 30 years. Compared to nearly zero two decades earlier, 5 million lawsuits were brought in 1996⁵². Also of note, plaintiffs are highly successful in Chinese courts, winning 40% of cases⁵³. This means that lawsuits are not only occurring, in many cases they are becoming a valid avenue for redress⁵⁴. The use of the legal system is a clear marker of its functionality, which is a defining feature of the rule of law in this paper's definition.

While increased litigation shows a growing willingness of the Chinese to utilize juridical institutions, systematic problems within the court system still exist. While criminal cases and civil lawsuits between individuals and businesses are common and

⁵² Peerenboom, *China's Long March Toward Rule of Law*, 7.

⁵³ *Ibid.*

⁵⁴ *Ibid.*, 6.

functioning, it is extraordinarily difficult for citizens to sue the government⁵⁵. The ability to sue the government is a key feature of a legal system emphasizing the rule of law. In 2004, a group of farmers in Shiqiao, Hebei Province tried to sue the government after local officials took their land, compensated them for far less than its actual value and then sold the land to a developer⁵⁶. When the farmers attempted to sue the government, the clerk would not even allow the case to be filed, he simply left the case out on the table and sent it back in an unmarked envelope⁵⁷. Worse still, officials employ the court system to add an air of legitimacy to corruption. When the farmers in Shiqiao attempted to protest their land sale by having a sit in, the construction company filed suit, and within 4 days a court ordered the farmers to leave⁵⁸. The misuse and inequity of the court system is widespread, but the simple use of the courts rather than simply ordering the police to arrest a group of protestors is a signal that the rule of law is slowly taking hold in China.

The Chinese criminal law system also suffers from deep, systemic problems. Torture of inmates is common and widespread, confessions alone are often enough to have someone executed and the police are more interested in social control than innocence or guilt⁵⁹. While some of the issues with criminal prosecutions in the criminal justice system show a system that reflect a type of communitarian philosophy of criminal justice in their lack of protection for individual rights, others are simply an example of corruption and lack of a functioning criminal justice system at trial.

⁵⁵ Joseph Kahn, "When Chinese Sue the State, Cases Are Often Smothered," *The New York Times*, December 28, 2005, sec. International / Asia Pacific, <http://www.nytimes.com/2005/12/28/international/asia/28land.html>.

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ Joseph Kahn, "Deep Flaws, and Little Justice, in China's Court System," *The New York Times*, September 21, 2005, sec. International / Asia Pacific, <http://www.nytimes.com/2005/09/21/international/asia/21confess.html>.

In terms of broader levels of rule of law in China, the Communist Party is subject to an entirely different legal system from that of ordinary citizens⁶⁰. While this legal system has been shown to deal harsh sentences to some party officials accused of corruption, not subjecting everyone to the same laws is not in line with a thin rule of law theory, the CCP submitting themselves to the same legal system as ordinary Chinese citizens will likely mark a major turning point in the Chinese effort to implement rule of law reforms.

IV. The Future of Rule of Law and Democracy in China

China's leaders continue to emphasize the need for China to achieve the rule of law. Legal reforms and efforts to reduce the level of corruption in the Chinese government are a constant priority of Chinese government officials. Though there has been a slowdown of late, the Chinese economy continues to grow at a rapid pace⁶¹. Perhaps the best way to speculate on the likelihood of China becoming a state governed by the thin rule of law is to look at how China may develop the factors necessary for rule of law as defined in this paper.

In terms of China's criminal justice system, increased investment and development of judicial institutions may lead to a divergence between the criminal justice system that deals with actual crimes and the system that deals with political dissidents. Speculatively, its likely that China's growing legal profession and increasingly well funded courts will lead to a system where it is more difficult for the police to violate essential principles of due process, the size of the legal profession will only serve to increase the legal representation

⁶⁰ Lily Kuo, "Being a Chinese Official: Not All It's Cracked Up to Be," *The Atlantic*, April 26, 2013, <http://www.theatlantic.com/china/archive/2013/04/being-a-chinese-official-not-all-its-cracked-up-to-be/275348/>.

⁶¹ "China Economy to Rebound in Q2 Despite Lower Export Growth," *International Business Times*, May 6, 2013, <http://www.ibtimes.co.uk/articles/464761/20130506/china-economy-q2-export-growth-cpi.htm>.

of defendants. Certainly further legislative measures will need to be taken to increase the number of defendants being represented in court, but international pressure to reform the system is unequivocal, and the Communist Party has no real reason not to yield to it as China continues to ascend to the world stage. The prospect for a reform of how political dissidents will be treated by the modern CCP is much more ambiguous. If the courts become an increasingly professionalized and fair environment, it is likely that dissidents will be punished through unofficial channels. These ultimate conclusions are speculative but are rooted in the enormous strides that China has made in implementing reforms to its legal system in the past 30 years. If the Communist Party continues to develop China's legal system, then a further development and utilization of the legal system and thus a more rule of law based government is inevitable.

In terms of factors that compel leaders and elites to utilize legal means to resolve disputes, the internal dealings of the Communist party remain obscure to outside observers⁶². Transitions of power are negotiated behind closed doors and the public only catches glimpses of the controversy that surrounds them. As a result of this lack of understanding of the succession process for Chinese leadership, it's difficult to know if the CCP has implemented similar internal procedures as Chile did when its ruling powers slowly regulated themselves. Evidence is clear though that being a government official does not guarantee blanket immunity from the law, last year's removal of Bo Xilai, a high-level CCP official and other officials on charges of corruption show that the CCP is increasingly

⁶² "After Months of Mystery, China Unveils New Top Leaders," *CNN*, accessed May 6, 2013, <http://www.cnn.com/2012/11/14/world/asia/china-leadership-transition/index.html>.

dealing with corruption in its ranks⁶³. It may also indicate that they are perhaps developing a system of internal deliberation and rulemaking similar to what we discussed earlier in Chile. In terms of other institutions that have been linked to the rule of law, China does not have an independent judiciary, evidenced by the closeness between the judiciary and party officials, the requirement that the judiciary report to the People's Congress and third regional protectionism means that local bureaucrats exert too much control over their local courts, both organs are ostensibly controlled by the central government⁶⁴. If future rule of law reforms are to make meaningful progress, the internal dealings of the CCP must be brought into the light of day. The Communist Party continues to build institutions suitable for rule of law to exist, yet without subjecting themselves to the rules of these institutions, the country will never be governed by the rule of law.

The eventual effect of increasing rule of law is ambiguous, as this paper has drawn an inconclusive link between democracy and the rule of law. If the behavior of the Communist Party is any indication, it views the natural continuation of rule of law as a potential gateway to democracy, another purported government goal that has been continually delayed. Both democracy and rule of law, in their fullest sense, appear to be threats to the CCP's power, and will continue to be delayed. Perhaps the Communist Party will regulate itself into a democratic state such as we saw in Chile. However, the most likely outcome is that legal institutions will continue to be strengthened to the point where they

⁶³ Lily Kuo, "Being a Chinese Official: Not All It's Cracked Up to Be," *The Atlantic*, April 26, 2013, <http://www.theatlantic.com/china/archive/2013/04/being-a-chinese-official-not-all-its-cracked-up-to-be/275348/>.

⁶⁴ Ma Huaide and Deng Yi, "Judicial Independence and Constitutional Reform," in *Democracy and the Rule of Law in Contemporary China*, by Yu Keping, Issues in Contemporary Chinese Thought and Culture v. 2 (Boston: Brill, 2010), 257.

can be utilized by the CCP in a similar way as Singapore's ruling party, to preserve power by exploiting the rule of law, with only an illusion of democracy.

V. Conclusion

The rule of law is not a concept that is easy to define nor is it a direct pathway to individual rights and democracy. The evidence in this paper demonstrates that that using rule of law as shorthand for the ideals of western liberalism is an ill informed practice. However, while thin rule of law does not inevitably lead to democracy, it certainly does make a country more hospitable to business interests and typically helps to prevent egregious abuses of citizens by the state.

The ultimate conclusion of this paper then is that rule of law can exist without democracy, but that rule of law as a concept is too indefinable to serve as a legitimate goal for those who want democracy and human rights to spread across the world. Instead of talking about rule of law, human rights activists and politicians would be better off discussing concrete reforms for members of the international community.

In China's case, governance in accordance with the rule of law in the thin sense is slowly becoming a reality. Yet implementing the rule of law will not be a panacea for human rights violations. It will certainly lead to more functional legal institutions, fairer trials and a government made more accountable to itself, but reform should be focused on more than just the rule of law.

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