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THE RULE OF LAW IN CHINA: A REALISTIC VIEW OF THE JURISPRUDENCE, THE IMPACT OF THE WTO, AND THE PROSPECTS FOR FUTURE DEVELOPMENT

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The construction of the rule of law in China has become an international concern. This article discusses the impact of WTO accession on China's legal reform in the context of the rule of law jurisprudence. It discusses the "thin" / "thick" theories of the rule of law, arguing that the Lon Fuller's "thin" theory of the rule of law is a suitable model in the Chinese context. It sees that the "thin" version creates possibilities for the realization of any "thick" theories of the rule of law, including a liberal democratic version, albeit a sudden jump to this "thick" version is neither pragmatic nor even possible. China's urgent task at this stage is to build the requisite institutions to facilitate the establishment of a "thin" rule of law. Compliance with WTO obligations can directly help achieve this goal in terms of transparency, impartial application of laws, and judicial review.

I. INTRODUCTION

Despite the national pride and cautious praise abroad,[1] China's unprecedented project on legal construction is still in search of its soul. The ultimate goal, as proposed by

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1 Inside China, the government has set the aim to "form a socialist legal system with Chinese characteristics by the year 2010." See Jiang Zemin, *Gaoju Deng Xiaoping Lilun Weida Qizhi, Ba Jianzhe You Zhongguo Tese Shehui Zhuyi Shiye Quanmian Tuixiang Ershiyi Shiji—Zai Zhongguo Gongchandang Di Shiwu Ci Quanguo Daibiao Dahui shang de Baogao* (*Hold High the Great Banner of Deng Xiaoping Theory for an All-Round Advancement of the Cause of Building Socialism with Chinese Characteristics into the 21st Century—Report Delivered at the 15th National Congress of the Communist Party of China*) (12 September 1997), Part VI, Chinese text online: <http://www.people.com.cn/GB/shizheng/252/5089/5093/index.html> [*The 15th CCP Report*]. Nevertheless, the report of China's top legislative body claimed that China has established a "preliminary socialist legal system" centered on the Constitution. See *e.g.*, Li Peng, *Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Gongzuo Baogao—2003 Nian Sanyue Shiri Zai Di Shijie Quanguo Renmin Daibiao Dahui Diyici Huiyi Shang* (*The Work Report of the Standing Committee of the National People's Congress—Delivered to the First Session of the 10th National People's Congress*) (10 March 2003), Part I, Chinese text online <http://www.china.com.cn/chinese/zhuanti/297749.htm> Outside China, it is widely recognized that China's legal construction has achieved impressive results. The U.S. Congressional-Executive Commission on China (CECC), a high-level governmental body charged with the mission to monitor human rights and rule of law movement in China, recognized in its 2002 report that "China has made important strides toward building the structure of a modern legal system" over the past two decades, albeit "[a] wide gap remains between the law on paper and the law in practice." See

the Chinese Communist Party (CCP) at its 15th National Congress and codified by a constitutional amendment in 1999,[2] is to realize "*yifa zhiguo*" or "*fazhi*", which is "ruling the country in accordance with the law."[3] What plagues domestic and international observers is the exact meaning of *fazhi*:[4] Does it mean the rule of law or merely ruling the country through the use of law by the CCP (namely *rule by law*)? More fundamentally, could the rule of law, which originated from Western political theories, take root in China, a society generally perceived to be alien to the concept of rule of law? The "thick" theories of rule of law as a Western concept features liberal democratic thinking and is defined by the presence of a democratic political system, market economies, and human rights protection to support the legal regime.[5] The "thin" theories of rule of law on the other hand have a less demanding requirement of generality, publicity and regularity of the laws, having little or no concern as to the actual content of the law and whether it is "good" or "bad".[6] Given China's current authoritarian ruling regime, the possibility of adopting a liberal democratic version of the rule of law in China in the near future is dim. However, the realization of a "thin" version of the rule of law in China is also challenged as being insufficient on a variety of grounds because it is alleged that formalistic law is no law and/or formalism is not sustainable in the long run.[7] China joined the World Trade Organization (WTO) in December 2001 after 15 years of arduous negotiations. Under the terms of accession, China undertakes to initiate sweeping reform measures "designed to implement the WTO'S market access, national treatment and transparency standards, to protect intellectual property rights (IPR), to limit the use of trade-distorting domestic subsidies and to make other changes to bring its legal and regulatory system in line with those of other WTO members."[8] Those commitments certainly have aroused reasonable expectations as well as fantasies about China's legal reform. For instance, Pitman Potter suggests that China is required by WTO to implement systemic reforms to "bring the legal and regulatory system as a whole into compliance."[9] He asserts that China needs to revise its constitution by deleting the term "socialism" and even abandoning the CCP monopoly of power

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CECC *Annual Report 2002* (2 Oct. 2002) at 1, online: <http://www.cecc.gov> One of the witnesses in the CECC's hearings on this topic, Professor William Alford views that "the PRC has been engaged in the most concerted program of legal construction in world history." See Statement of William P. Alford to the Congressional-Executive Commission on China Hearing on Human Rights in the Context of the Rule of Law (7 February 2002) online: <http://www.cecc.gov/pages/hearings/020702/alford.php>

2 *Ibid. The 15th CCP Report*, Part VI. See Article Five and Amendment Three to *Zhonghua Renmin Gongheguo Xianfa* (*Constitution of the People Republic of China*), passed on 15 March 1999 by the Ninth National People's Congress, English text available online: <http://english.peopledaily.com.cn/constitution/constitution.html> [*PRC Constitution*].

3 *Ibid.*

4 Randall Peerenboom, *China's Long March Towards Rule Of Law* (Cambridge: Cambridge University Press, 2002) at 56 and 68.

5 *Ibid.* at 3. See also David Kairys, "Searching for the Rule of Law" (2003) 36 Suffolk U. L. Rev. 307 at 314-17; Eric W. Orts, "The Rule of Law in China" (2001) 34 Vand. J. Transnat'l L. 43 at 83-93.

6 Peerenboom, *supra* note 4 at 56.

7 See *e.g.*, R.M. Dworkin, "Is Law A System of Rules?" in *The Philosophy Of Law* (R.M. Dworkin, ed., Oxford: Oxford University Press, 1977) at 38-65.

8 United States Trade Representative, *2003 Report to Congress on China's WTO Compliance*, 11 December 11, 2003 at 3, online: <http://www.ustr.gov> (*USTR Report (2003)*).

9 Pitman B. Potter, "The Legal Implications of China's Accession to the WTO" (2001) 167 The China Quarterly 592, 603.

in order to meet the transparency, national treatment and "rule of law" requirement of the GATT/WTO.[10] Another commentator, Donald Clarke, maintains instead that "the WTO does not mandate a perfect legal system, or even a basically fair one, outside of a few specific areas."[11] The debate is essentially about what impact of the WTO can have on the different aspects—"thick" or "thin"—of the rule of law in China.

This article attempts to address the "essentially contested concept"[12] of the rule of law in the Chinese context, with a particular interest in the WTO's impact on China's legal reform. Part I provides a critical overview of the various theories of rule of law developed by Western jurists and philosophers. Part II seeks to explore the possibility of establishing the rule of law in China by examining the characteristics of China's legal tradition, the evolution of contemporary China's legal system, including the westernization of Chinese law in the past century. Part III analyzes the impact of China's WTO entry and compliance to the country's legal reform and rule of law construction. The article concludes that a "thin" theory of the rule of law, based on Lon Fuller's account of the "inner morality of law", is a suitable model in the Chinese context. Furthermore, there are no insurmountable barriers between the "thin" model and a "thick" model featuring individual rights. Rather, the rule of law is a matter of degree in which the "thin" version is an indispensable part. Although not guaranteed, the "thin" version creates possibilities for the realization of a "thick" version of the rule of law, which can provide more protection for individual freedom and security. However, a sudden jump to this "thick" version is neither pragmatic nor even possible. China's urgent task at this stage is to build the requisite institutions to facilitate the establishment of a "thin" rule of law. Compliance with the WTO obligations can directly help achieve this goal. Moreover, it will have an indirect impact on China's civil and political life and lay the foundation for the future establishment of a more robust conception of the rule of law.

II. The Many Meanings of the Rule of Law

A. *The Formal-Substantive and "Thin"-"Thick" Dichotomies of the Rule of Law*

Though the idea of the rule of law is western in origin,[13] there is no consensus even in the West as to the meaning of the rule of law except the remarkable agreement on what it is not—the rule of man. Rule of law proposes that law is what should govern

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10 *Ibid.*

11 Donald C. Clarke, "China Legal System and the WTO: Prospects for Compliance" (2003) 2 Washington University Global Studies Law Review 97 at 111.

12 Margaret Jane Radin "Reconsidering the Rule of Law" (1989) 69 B. U. L. Rev. 781 at 791, cited in Randall Peerenboom, "Let One Hundred Flowers Bloom, One Hundred Schools Contend: Debating Rule of Law in China" (2002) 23 Mich. J. Int'l L. 471 at 472 [Peerenboom].

13 Lawrence B. Solum, "Equity and the Rule of Law", in Ian Shapiro, ed., *The Rule Of Law* (New York: New York University Press, 1994 120 at 121 (noting the idea of the rule of law "can be traced back at least as far as Aristotle" and is "deeply embedded in the public political cultures of modern democratic societies"). Aristotle, in *Politics,* wrote that "The rule of law, it is argued, is preferable to that of any individual." See *ibid.* at 120.

society and not the arbitrary will of particular persons.[14] In the past centuries, the global spread of western civilization, technology, capitalism, nation-state and networked world markets inspired tremendous indigenous demand for law in the "non-Western" part of the world.[15] In some sense, this only makes pursuing the exact meaning of the rule of law more difficult because of the very different historical, cultural, political, economical and social background of the many regions covered by this trend. Furthermore, it is even argued that the contrast between "rule of law" and "rule of men" is both an exaggeration and an oversimplification.[16]

Legal theorists have proposed multiple definitions for the rule of law, which can be categorized into two general types: "thick" and "thin".[17] Generally speaking, the "thin" version of the rule of law is "a vision of judging that celebrates the systemic virtues of regularity, predictability and certainty over the concern with substantive justice in particular instances: formal rules are the most efficacious and legitimate way to protect substantive values."[18] Arguably, the implication is that "it is possible for a legal system to comply with the rule of law and still be undemocratic and/or unjust in general … and in particular instances."[19] A "thick" version, on the contrary, holds that "the existence of pre-announced, objectively-knowable and impartially-applied rules must be supplemented by tying such formal virtues to a substantive account of democratic justice."[20] Law as such becomes inseparable from values and politics.

There is also a second way of categorizing the various theories of the rule of law, which draws a distinction between the "formal" and "substantive" conceptions.[21] Paul Craig describes formal conceptions of the rule of law as mainly concerning "the manner in which the law was promulgated" by duly authorized person in a properly authorized manner, "the clarity of the ensuing norm" (meaning it is sufficient to serve as guidance for individuals' conduct) and "the temporal dimension of the enacted" being prospective or retrospective.[22] The holders of the substantive conceptions of the rule of law, while recognizing the formal attributes mentioned above, however seek to go beyond this by claiming that certain substantive rights are said to be based on, or derived from, the rule of law, "which are then used to distinguish between 'good' laws, which comply with such rights, and 'bad' laws which do not."[23]

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14 Paul W. Kahn, *The Cultural Study Of Law: Reconstructing Legal Scholarship* (Chicago: University of Chicago Press, 1999) at 67.

15 Teemu Ruskola, "Law without Law, or Is 'Chinese Law' an Oxymoron?" (2003) 11 Wm. & Mary Bill Rts. J. 655 at 657.

16 *Ibid.* at 659 (noting that even the American understanding of America itself does not support this oversimplified contrast and quoting Paul W. Kahn, The Reign of Law 26 [New Haven: Yale University Press, 1997] ("[I]f the rule of law truly must stand in contrast to the rule of men, then the rule of law has never existed. No system of rule is independent of those who hold political office.").

17 Peerenboom, *supra* note 12 at 472.

18 Allan C. Hutchinson, "The Rule of Law Revisited: Democracy and Courts", in David Dyzenhaus, ed., *Recrafting The Rule Of Law: The Limits Of Legal Order* (Hart Publishing: Oxford-Portland Oregon, 1999) 196 at 199.

19 *Ibid.*

20 *Ibid.*

21 Paul Craig, "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework" (1997) P.L. 467.

22 *Ibid.*

23 *Ibid.*

Apparently the similarities of contents between "thin" theories and formal conceptions of the rule of law are tremendous, which might lead to an understandably conclusion that the two are virtually the same. A "thin" version of the rule of law, however, contains not merely legal positivism. Craig omits Lon Fuller's explication of the content of the rule of law in his work, yet it is actually Fuller's account of the "inner morality of law" that constitutes the basis for building the common ground of the different definitions of "thin" theories of the rule of law.[24] In the following sections, the article seeks to examine competing conceptions of the rule of law offered by the positivist and natural law traditions. The author submits that Fuller's "inner morality" discourse is the highest common factor between these two traditions and is suitable for transitional countries striving to build legal institutions but is not yet able to achieve liberal democracy.

B. *Rule of Law in Positivism and Natural Law*

Holding generally that the existence and content of law depends on social facts and not on its merits, legal positivists strive to separate law from morality. This so-called "separation thesis" proposes that jurisprudence should simply determine what the law actually is without having to delve into questions about what is good, right, or just.[25] The positivist view of the rule of law is most clearly explained by Joseph Raz.[26] Raz interprets the rule of law as "a political ideal which a legal system may lack or may possess to a greater or lesser degree."[27] Further, "the rule of law is just one of the virtues which a legal system may possess and by which it is to be judged."[28] Raz reminds us that the essential feature ("basic institution" in his words) of the doctrine of the rule of law is that "*it must be capable of guiding the behaviour of its subjects*".[29] *[emphasis original]* Out of this Raz articulates eight of what he views as the "more important" principles of the rule of law: laws be prospective, open and clear, that they should be stable, that law-making process should be guided by open, stable, clear and general rules, that judicial independence must be guaranteed, that judicial judgments shall have the final binding force, that the principles of natural justice must be observed, that the power of judicial review on legislation and administrative actions is secure, that courts are accessible to citizens, and that the discretion possessed by crime-preventing agencies should not pervert the law.[30]

Like legal positivism, the term "natural law" also has many definitions. However, the essence of natural law discourse has not changed for several thousands years since the Greeks, which holds "that there is an immutable order of justice, of right and wrong and of good and evil, that we [human beings] are capable of knowing."[31]

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[24] Peerenboom, *supra* note 12 at 472. See generally, Lon L. Fuller, *The Morality of Law*, (New Haven: Yale University Press, 1977, Rev. Ed.) c. 2 [Fuller].

[25] *Ibid.*

[26] *Supra* note 21 at 468.

[27] Joseph Raz, *The Authority Of Law* (Oxford: Oxford University Press 1979) at 211.

[28] *Ibid.*

[29] *Ibid.* at 214.

[30] *Ibid.* at 214-24.

[31] Conrad Johnson, *Philosophy of Law* (New York: Macmillan Publishing Company, 2003) at 3.

Leading contemporary natural law philosopher Dworkin rejects legal positivists' theory that law is just "a system of rules."[32] Dworkin builds his argument on the "fact" that "when lawyers reason or dispute about legal rights and obligations, particularly in those hard cases … they make use of standards that do not function as rules, but operate differently as principles, policies, and other sorts of standards."[33] But the substantive content of the right "political convictions" should after all be determined by certain standards. Dworkin answers this with his rights conception of the rule of law in attempts to challenge the legal positivist version of the rule of *the* law, which he calls the "rule-book" conception.[34] The rights conception "assumes that citizens have moral rights and duties with respect to one another, and political rights against the state as a whole."[35] Thus, the rule of law is essentially the rule of an accurate public conception of individual rights, and "[i]t does not distinguish, as the rule-book conception does, between the rule of law and substantive justice; on the contrary it requires, as part of the ideal of law, that the rules in the rule book capture and enforce moral rights."[36]

C. *Lon Fuller's Inner Morality of Law: Building the Common Ground of a "Thin" Model*

A self-professed natural lawyer,[37] Lon Fuller however offers a discourse on the rule of law which is substantially different from classic natural law theories in that he accepts that law is "a system of rules" (in contrast to Dworkin) and that no belief in higher law is necessary. Fuller bases his theory on an emphasis of purpose. Human activity is necessarily goal-oriented and purposive, whereby people engage in a particular activity in order to achieve some end. Applying this, law is treated as "an activity" and a legal system is regarded as "the product of a sustained purposive effort."[38] Law as a purposive enterprise necessarily fulfills certain moral qualities. Fuller identifies eight principles as the "demands of the inner morality of law" which a system of rules has to satisfy:[39]

(1) *Generality*: There must be rules, and they must be expressed in general terms.[40]

(2) *Promulgation*: The rules should be made known or available to the affected party. This means readily availability of laws so that the laws can be legitimately applied and enforced; it also means adequate publication so that public criticism towards the laws can be generated.[41]

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32 See generally Dworkin, *supra* note 7.

33 *Ibid.* at 43.

34 Ronald Dworkin, *A Matter of Principle* (Cambridge: Harvard University Press, 1965) at 11.

35 *Ibid.* at 11.

36 *Ibid.* at 11.

37 Fuller, *supra* note 24 at 96.

38 *Ibid.* at 106, 53, 74 and 91.

39 In various other places of his work, Fuller also names the eight principles as "the morality that makes law possible," "the special morality of law," "procedural natural law," and "the principle of legality." See generally, Fuller, *supra* note 24.

40 *Ibid.* at 46.

41 *Ibid.* at 51.

(3) *Prospectivity*: The rules should be prospective, not retroactive, in effect.[42]
(4) *Clarity*: The rules must be clear and understandable.[43]
(5) *Consistency*: This is a requirement aiming at avoiding "inadvertent contradictions in the law"[44] and achieving the eradication of incompatible or "repugnant" provisions which could not together make sense.[45]
(6) *No impossible obligation*: The rules should not require what is impossible, namely not require conduct beyond the power of the affected parties and "keep the law within citizen's capacity for obedience."[46]
(7) *Constancy*: The rules should not be too frequently changed so that the subjects can rely on them.
(8) *Congruence*: Finally, there should be congruence between official action and declared rules, namely the rules must be enforced in a manner consistent with their wording. A reading of Fuller's literature suggests that "congruence" might mean two things. First, the rules must also govern the conduct of officials who enforce them.[47] Secondly, subjects should only be required to observe rules imposing duties on them.[48]

On Fuller's view, a system's failure to comply with the principles would invalidate the system itself: "[a] total failure in any one of these eight directions does not simply result in a bad system of law; *it results in something that is not properly called a legal system at all.*"[49] He explains:

> Certainly there can be no rational ground for asserting that a man can have a moral obligation to obey a legal rule that does not exist, or is kept secret from him, or that came into existence only after he had acted, or was unintelligible, or was contradicted by another rule of the same system, or commanded the impossible, or changed every minute. It may not be impossible for a man to obey a rule that is disregarded by those charged with its administration, but at some point obedience becomes futile—as futile, in fact, as casting a vote that will never be count.[50]

On this ground Fuller concludes that the eight principles he explicated shall be "internal" to law in the sense that they are prerequisites for the existence of law.[51] Fuller regards the quality of the principles as "morality" because they are associated with moral values in two respects: "(1) law conduces to a state of social order and (2) does so by respecting human autonomy because rules guide behavior."[52] The argument, as one analyst observes, is based on the logic that "since no system of

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42 *Ibid.* at 53.
43 *Ibid.* at 64.
44 *Ibid.* at 65.
45 *Ibid.* at 69.
46 *Ibid.* at 73.
47 See J.W. Harris, *Legal Philosophies*, 2nd ed. (London: Butterworths, 1997) 147 See also Fuller, *supra* note 24 at 82.
48 *Ibid.* at 149.
49 Fuller, *supra* note 24 at 39 [*emphasis added*].
50 *Ibid.*
51 *Ibid.* at 42-43.
52 Kenneth Einar Himma, "Natural Law" in *The Internet Encyclopedia of Philosophy*, online: <http://www.iep.utm.edu/n/natlaw.htm>

rules can achieve these morally valuable objectives without minimally complying with the principles of legality, it follows … that they constitute a morality."[53]

D. *Analysis of the Jurisprudence of "Thin" and "Thick" Theories*

Although Fuller's account of the inner morality of law draws intensive criticism from both legal positivists and orthodox natural lawyers,[54] it is however not the task of this article to revisit those inspirational debates. The goal of this part is to examine the various theories on the rule of law and support a "thin" model of the rule of law which can be used to explain and guide China's legal reform.

The above survey of the legal theories shows that a "thin" model of the rule of law, based mainly on the principles explicated by Fuller as well as by Raz, can be supported on two pragmatic, co-related, but still separate, grounds. First, the principles comprising the "thin" model belong to the inherent nature of the rule of law, be it called the "instrumental function" (Raz) or "process nature" (Fuller) of a legal system. If the rule of law can serve both "good" or "bad" purpose, and even assuming a liberal democratic interpretation of the rule of law should be eventually accepted by all, the formal and procedural requirements of law and adjudication shall still be a priority in a society's legal construction agenda. Second, Fuller's account of the inner morality of law, despite its vulnerability to criticism, works well in showing that a legal system meeting the requirement of generality, regularity, transparency, consistency, clarity and good enforcement, among others, is more likely than not to lead to a moral legal system. In any event, building a legal system conforming to the "thin" theories should be encouraged.

1. *Satisfying the Formal and Procedural Requirements to Be a Functioning Legal System*

Raz notes that, as a result of the instrumental conception of law advocated by legal positivists, the rule of law should be regarded as the inherent or specific, but still morally neutral, virtue of law.[55] Conformity to the rule of law can serve both good and bad purposes. First, "it is a necessary condition for the law to be serving directly any good purpose at all."[56] Further, such conformity "also enables the law to serve bad purposes", but

> That does not show that it is not a virtue, just as the fact that a sharp knife can be used to harm does not show that being sharp is not a good-making characteristic for knives … Being sharp is an inherent good-making characteristic of knives. A good knife is, among other things, a sharp knife …. [C]onformity to the rule of law is an inherent value of laws, indeed it is their most important inherent value.[57]

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53 *Ibid.*

54 See *e.g.*, H.L.A. Hart, "Book Review of The Morality of Law" (1965) 78 Harvard Law Review at 1281 [Hart], and see generally, Fuller, *supra* note 24 at c. 5, 187-242.

55 *Supra* note 27 at 226.

56 *Ibid.* at 225.

57 *Ibid*.

Without being entangled in the debates as to whether the rule of law should be moral or not, it important to note Raz's proposition that conformity to the rule of law, as he defined it, is an inherent value of law. The law is to be used properly and for "the proper ends", and it is to be used to guide behavior through rules and courts in charge of their application (which is considered the essence of law by Raz). As a matter of course, it must be capable of doing so.[58] Capability, in turn, depends on the establishment and perfection of the key principles of the "thin" theories.

However, not only legal positivists recognize the importance of the instrumental function of the rule of law. Natural law theorists, such as Dworkin, also endorse the formal aspects of a legal system. In discussing the rights conception and rule-book conception of the rule of law, Dworkin writes:

> Though the two conceptions compete as ideals of the legal process …. They are nevertheless compatible as more general idea of a just society. Any political community is better, all else being equal, if its courts take no action other than is specified in rules published in advance …. Some high degree of compliance with the rule-book conception seems necessary to a just society. Any government that acts contrary to its own rule book very often—at least in matters important to particular citizens—cannot be just, no matter how wise or fair its institutions otherwise are.[59]

Although Dworkin notes that compliance with the formal aspects "is plainly not sufficient for justice"[60] and even "full compliance will achieve very great injustice if the rules are unjust",[61] this assertion does not allow the abandonment of the formal requirements. He also holds the rights conception alone is equally not sufficient for a just society. It also does not preclude the possibility that, at certain stage, striving to meet those principles of the "thin" version should even be a priority. After all, as Dworkin notes, a society that achieves a high rating on both (formal and substantive) fronts assuredly is a just society.[62]

2. *The "Inner Morality of Law": Linkage from a "Thin" Model to a Rights-Based "Thick" Model?*

Lon Fuller's explication of the eight principles of the rule of law is regarded as "one of the signal achievements of legal philosophy in the twentieth century."[63] Although Fuller's critics recognize his achievement in explicating the content of the rule of law, they complain that the "inner morality" discourse confuses the notion of morality and the notion of efficacy.[64] To base the "thin" model on Fuller's account of the rule of law, one probably still has to defend, to some extent, the moral quality of the principles.

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58 *Ibid.*
59 *Supra* note 34 at 12.
60 *Ibid.*
61 *Ibid.*
62 *Ibid.*
63 Robert P. George, "Reason, Freedom and the Rule of Law: Their Significance in the Natural Law Tradition" (2001) 46 Am. J. Juris. 249.
64 *Ibid.* at 250.

H.L.A. Hart, noting that Fuller's work was actually a "designation of these principles of good legal craftsmanship as morality",[65] accused Fuller of causing confusion between the notions of purposive activity and morality.[66] Hart raised an interesting example: Poisoning is certainly a purposive activity which has its internal principles such as "avoid poisons however lethal if their shape, color, or size is likely to attract notice."[67] Hart suggests, however, these principles cannot be called "the morality of poisoning."[68]

It can be seen that Hart rejects Fuller's eight principles as a conceptual connection between law and morality. However, it is submitted that Hart pushes his understanding of Fuller's theory to an extreme end. As one philosopher observes:

> Hart overlooked the fact *that most of Fuller's eight principles double as moral ideas of fairness.* For example, public promulgation in understandable terms may be a necessary condition for efficacy, but it is also a moral ideal; it is morally objectionable for a state to enforce rules that have not been publicly promulgated in terms reasonably calculated to give notice of what is required. Similarly, we take it for granted that it is wrong for a state to enact retroactive rules, inconsistent rules and rule that require what is impossible. *Poisoning may have its internal standards of efficacy, but such standards are distinguishable from the principles of legality in that they conflict with moral ideals.*[69] *[emphasis added]*

In fact, Fuller has prominent supporters in both the natural law and the legal positivism camps. John Finnis espouses eight desiderata of the rule of law which are virtually the same as Fuller's eight principles.[70] Significantly, Finnis insists that "[n]one of the eight desiderata is merely a characteristic of a meaning-content, or even of the verbal expression of a meaning-content; all involve qualities of institutions and processes."[71] For example, *promulgation* is not simply printing and dissemination of legible official copies of rules and decisions; "it requires also the existence of a professional class of lawyers whose business it is to know their way around the books, and who are available without undue difficulty and expense to advise anybody who wants to know where he stands."[72] *Coherence* represents a requirement beyond "an alert logic in statutory drafting" and "a judiciary authorized and willing to go beyond the formulae of intersecting or conflicting rules, to establish particular and if need be novel reconciliations, and to abide by those reconciliations when relevantly similar cases arise at different times before different tribunals."[73] Similarly, *prospectivity* depends on a certain restraint in the judicial adoption of new interpretations of the law.[74] As a result, "[a]t each point we see that the Rule of Law involves certain qualities of process which can be systematically secured only by the institution of judicial authority and its exercise by persons professionally equipped

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65 See generally Hart, *supra* note 54 at 1286.
66 *Ibid.*
67 *Ibid.*
68 *Ibid.*
69 See Himma, *supra* note 52.
70 See John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980) at 270.
71 *Ibid.* at 271.
72 *Ibid.*
73 *Ibid.*
74 *Ibid.*

and motivated to act according to the law."[75] With his theory of "common good" in mind, Finnis concludes that "The Rule of Law is thus among the requirements of justice or fairness."[76]

Neil MacCormick, one of the principal theorists in the contemporary legal positivist tradition who once shared Raz's view that the rule of law can only be purely instrumental, eventually revised his opinion to endorse Fuller's claim of the inner morality of law:

> There is always something to be said for treating people with formal fairness, that is, in a rational and predictable way, setting public standards for citizens' conduct and officials' responses thereto, standards with which one can choose to comply or at least by which one can judge one's compliance or non-compliance, rather than leaving everything to discretionary and potentially arbitrary decision. That indeed is what we mean by the "Rule of Law." Where it is observed, people are confronted by a state which treats them as rational agents due some respect as such. It applies fairly whatever standards of conduct and of judgment it applies. This has real value, and independent value, even where the substance of what is done falls short of any relevant ideal of substantive justice.[77]

This observation provides an especially desirable justification for the strides towards constructing a "thin" rule of law in the non-democratic societies. If the "thin" rule of law, as explicated by Fuller, can provide certainty and predictability to people's life, and as such to limit the arbitrary power of the government, then it simply cannot be wrong to have it. A society without it is simply a tyranny, which can only be worse but no better than any country following at least the "thin" principles. Fuller's account of the inner morality of the rule of law is logical and backed up by the empirical practices of many nations of the world.[78]

3. *Conclusion*

As can be seen from the above discussions, the present author prefers Fuller's account of the rule of law, in particular his procedural naturalism or internal morality of law. If this is to be defined as a "thin" version of the rule of law,[79] as opposed to the substantive view of the rule of law as that envisaged by Locke or Dworkin as well as to the kind of "a rule of law" which is described by Finnis as "in a 'thin', rather

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[75] *Ibid.*

[76] *Ibid.* at 273. The reference to "common good" represents the difference between Finnis and legal positivists and even between Finnis and Fuller. Nonetheless Finnis makes it clear that the eight principles can probably sufficiently constitute the Rule of Law because they are a complex body of institutions rather than verbal expression of verbal content.

[77] Neil MacCormick, "Natural Law and the Separation of Law and Morals", in Robert P. George, ed., *Natural Law Theory: Contemporary Essays* (Oxford: Clarendon Press, 1992) 106 at 123.

[78] *See* e.g., Randall Peerenboom, "Human Rights and Rule of Law: What's the Relationship?", [2005] 36 Georgetown International Law Journal (forthcoming; on file with the author). (surveying the practices of various countries ranging from East European nations, Russia and Asian countries and noting that empirical evidence supporting the claim the implementation of the rule of law plays a necessary yet not sufficient role for those countries' development in light of the empirical studies that those countries do not necessarily follow the liberal democratic version of thin theories but they have strived to meet the minimum requirements of the thinner conceptions.)

[79] Peerenboom, *supra* note 12 at 472.

uninteresting sense" (*i.e.*, a rule authorizing a tyrant to do what he wills), then this "thin" version might be desirable for a transitional country which tries to build legal institutions and rules but, for a number of significant reasons, is not able to achieve the kind of substantive rule of law whose features relating to liberal democratic political system often encounter persistent resistance in those societies at the early stage. A thin model requires that laws be general, promulgated, prospective, clear, not impossible to be followed, consistence, stable, and followed by and enforced against both citizens and officials. These principles should also be complemented by the desiderata enumerated by Raz and Finnis (such as the principle of judicial independence).

But if, as a reading of Fuller's works suggests, the rule of law is "a matter of degree",[80] then marching towards a rights-based, substantive version of the rule of law should not be precluded. In certain circumstances, it should even be encouraged. A "thin" model of the rule of law does not exclude the possibility of moving to a substantive model which tends to provide larger protection for personal freedom and individual rights, when the time and conditions are ripe. Therefore, it is more appropriate to view a thin model as the first stage of constructing a just society embedded in the ideals of the substantive conceptions of the rule of law. For a transitional society which strives to establish the rule of law, constructing a legal system conforming to the thin version is definitely preferred as prioritized work for four pragmatic, realistic, and co-related reasons:

(1) Those principles are built into the existence conditions for law, without which no legal system can exist;
(2) In a transition country, the political barriers for constructing democracy are tremendous and even insurmountable in a short term, but the rulers would be less willing to object to the construction of legal institutions;
(3) The well-supported "inner morality of Law" shows that even the thin model of the rule of law can constraint arbitrary powers,[81] enhance predictability for individual planning of their life, and improve individual freedom; but,
(4) Even if one rejects Fuller's account of the "inner morality of law" in favour of a purely instrumental view of law proposed by the positivists (*i.e.* the rule of law can serve both good and bad purposes so long as it is capable of guiding human conduct to achieve its goals), the construction of a thin rule of law, featuring the building of legal institutions and reforming the bureaucracy, is preferable over no-action based on legal nihilism and legal orientalism if signs can be seen that it is marching towards the direction of serving good purposes.[82]

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[80] *Supra* note 63 at 250.

[81] As Robert George notes, "An unjust regime's adherence to the procedural requirements of legality, so long as it lasts, has the virtue of limiting the rulers' freedom of maneuver in ways that will generally reduce, to some extent, at least, their capacity for evildoing." Further, "Potential victims of injustice at the hands of wicked rulers will generally benefit, if only to a limited extent, from their rulers' willingness, whatever its motivation, to respect the requirements of the rule of law." See George, *ibid.* at 253.

[82] Despite the strong "rule of law" movement in China, there still exist strong suspicions and even opposition toward the legal construction project among Chinese people. This is evidenced by the pervasive phenomenon such as corruption, *guanxi*, local protectionism and contempt on law in China. Legal orientalism, as shall be discussed in Section B of this Part, doubts the possibility of promoting even a thin version of the rule of law in China.

III. A Realistic View on Rule of Law in the Context of China's Legal Reform

A. *What a Realistic View Requires*

China's legal reform, entering its third decade, still leaves many questions unanswered. To cite some examples: Is it meaningful to talk about law or a legal system in China given that many do not think that the notion of "Chinese law" or "Chinese legal system" exist? Is it possible to apply the rule of law theories, be it "thick" or "thin", to China given that China is so different from the West? Further, given that China is an authoritarian state whose power is monopolized by the CCP, is there any chance the ruler itself would accept the rule of law? A "nay" to these questions will naturally lead to a tendency to ignore China's accomplishments in legal construction so far and a refusal to recognize the prospects of establishing the rule of law in China. A realist view, as the author proposes, purports to provide answers to the series of questions and challenges with regard to the development of the rule of law in China, taking into consideration China's history, its contemporary circumstances and its increasing interactions with the outside world.

A realist view recognizes that the basics of the legal theories analyzed in Part I of this Article, at least the thin theories of the rule of law, have certain universal values. For contemporary China, it is not a question of imposing "Western imperialist ideas" but rather a question of modernising society and establishing institutions in order to provide order and predictability for people's life. China's ancient legal traditions, few elements of which have persisted into today's official legal structure, can hardly provide such a framework. However, China's achievements in building a legal system in recent decades prove that a thin rule of law, albeit an imperfect one, is being constructed in China. Two factors help strengthen this prospect. First, China's legal construction in the past century is largely a process of westernizing legal regimes subject to China's own "national circumstances" [*jiben guoqing*].[83] Second, despite intense debates on the different versions of the rule of law, there is consensus in China that "rule of men" should be ousted, the exercise of arbitrary power by the government should be restrained by law and market economy should be developed.[84] In essence, these factors are the natural requirements of one ongoing movement in the Chinese society: modernization through engaging in market economy and globalization.

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[83] See *e.g.*, He Qinhua & Li Xiuqing, *Waiguo Fa Yu Zhongguo Fa—Ershi Shiji Zhongguo Yizhi Waiguo Fa Fansi* (*Foreign Law and Chinese Law—A Reflection on the Transplantation of Foreign Law in China in the 20th Century*) (Beijing: Zhongguo Zhengfa Daxue Chubanshe (China University of Politics and Law Press), 2002). See also generally, Jianfu Chen, "Market Economy and the Internationalisation of Civil and Commercial Law in the People's Republic of China", in Kanishka Jayasuriya, ed., *Law, Capitalism and Power in Asia* (London: Routledge, 1999).

[84] Peerenboom, *supra* note 12 at 533: "Despite considerable variation, all four variants of the rule of law accept the basic benchmark that law must impose meaningful limits on the ruler, and all are compatible with a "thin" version of rule of law."

B. *Removing the Blinders of Legal Orientalism to Recognise the Evolution of the Chinese Legal System*

There are doubts both within and without China as to whether the "thick" and/or "thin" theories can be applied in China. Indeed, the voices inside China against the notion of establishing the rule of law sound weaker than doubts from outside. As "running the country according to the law" has become an official Party line[85] and achieved consensus among Chinese legal scholars,[86] there is almost no distinguishable voice against the idea that China is to be constructed as society governed by law, albeit some jurists do call for paying more attention to China's *bentu ziyuan* ("native resources").[87]

Doubts on whether China has a legal system and whether the various theories of the rule of law (including the "thin" theories) can apply to China exist adamantly among many western scholars. Although some of the doubts stem from fair and objective criticisms, others belong to the camp of "legal orientalism", which looks at Chinese law (or even law itself) in a static and isolated way.[88]

1. *The Inaccuracy of Legal Orientalism in Describing the Chinese Legal System*

"Orientalism" is the term originally used by Edward Said to refer to the discourse that structures Westerners' understanding of the Orient, tainted by prejudice and racism.[89] Said holds that, in a series of imperialistic gestures, the West has created a dichotomy between the reality of the East and the romantic notion of the "Orient", reducing the "Orient" to a passive object which is backward, eccentric, substantially different, and sensual, with a tendency to love despotism but distant itself from progress.[90]

To some extent, early Orientalist ideas held by Hegel, Adam Smith, Montesquieu, Max Weber and others still form part of the contemporary perception of Chinese law.[91] For example, Hegel, whose *Philosophy of History* opines that "the history of the world travels from East to West" and Europe "is absolutely the end of History" while Asia is "the beginning",[92] puts China on the threshold of History and describes it as the paradigmatic example of "Oriental Despotism."[93] According to Hegel, the

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85 *The 15th CCP Report*, *supra* note 1.

86 See generally, Peerenboom, *supra* note 12 at 486-510.

87 See *e.g.*, Zhu Suli, "Bianfa, Fazhi ji Bentu Ziyuan" ("Change of Law, Rule of Law, and Native Resources") in (1995) 5 *Zhongwai Faxue* (*Studies of Chinese and Foreign Law*) and *reprinted in Jiushi Niandai Sixiang Wenxuan* (*Selected Works on the Thoughts in the 1990s*), vol. 3 (Nanjing: Guangxi Renmin Chubanshe, 2000) at 408-43 (noting that China has to change from depending on the populous fashion of legal westernization through laws' transplantation to drawing inspirations from its own tradition and "resources" in China's *minjian shehui* (civilian society) for contemporary legal construction). However, it cannot be so concluded that those "native resources jurists" are against the application of the theories of the rule of law to China or against legal transplantation entirely. Indeed, Zhu Suli, the major theorist in this regard, actually developed his thoughts based on the literature of a number of Western theorists on the relationship between foreign laws and local knowledge. This observation was further strengthened by the author's personal conversation with Mr. Zhu in Singapore in May 2004.

88 See generally Teemu Ruskola, "Legal Orientalism" (2002) 101 Mich. L. Rev. 179-234.

89 See Edward Said, *Orientalism* (New York: Vintage, 1979) at 1-5.

90 *Ibid.*

91 *Supra* note 88 at 213.

92 *Ibid.*

93 *Ibid.* at 214.

Chinese do not exist as individual subjects; only the supreme leader in that society possesses "subjectivity."[94] He also made a strong, yet very general statement that "(t)he Chinese regard themselves as belonging to the family, and at the same time as children of the state."[95] As one analyst observes, Hegel's Orientalist account of China has a profound implication: the assertions that China is timeless and static, that Chinese people lack subjectivity, and that Chinese confuse law and morality are implicitly measured against another set of assertions, namely that the West possess those progressive qualities but does not have those confusions.[96] Hegal and Weber even went further to conclude that the lack of "rationality"—which was considered as the key feature of modern law in their jurisprudential theories—in Chinese law was caused by the nature of the Chinese language.[97] To Hegel, that language has not "matured" and reached the level of Western languages, and that writing system is a fundamentally inadequate instrument for "representing and imparting thought."[98]

A representative example of modern legal orientalism is Ugo Mattei's "tripartite taxonomy" of world legal systems.[99] Dissatisfied with the traditional classifications of the world's legal families (*i.e.*, the common law/civil law distinction),[100] Mattei proposes a new one which describes three types of legal systems in the contemporary geo-legal map of the world. His classification is based primarily on the Weberian sense of law as a tool of social organization, which dictates that "in all societies there are three main sources of social norms … which affect an individual's behavior: politics, law, and philosophical or religious tradition."[101] In brief, Mattei classifies the world's legal systems into three: rule of professional law, rule of political law, and rule of traditional law.[102] In this new taxonomy, the Western legal tradition is treated as a single entity called the rule of the professional law.[103] Mattei justifies this on the basis that law in western legal traditions mainly serves the function of dispute resolution, and it is separate from both politics and religious and/or philosophical traditions.[104] Further, law is a paramount value judgment so that "high level (political) decision-making is itself subject to the restraints of the law",[105] *i.e.* both the rulers and the ruled are governed by the same law.[106] In contrast, the rule of political law sees no separation between the political and legal processes so that it has no "such thing as formal law binding on government,"[107] especially when the clash occurs between individuals and the government.[108] Former socialist states and developing countries are prime examples. In addition, such states suffer from

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94 *Ibid.*
95 *Ibid.*
96 *Ibid.* at 214-15.
97 *Ibid.* at 218-19.
98 *Ibid.*
99 Ugo Mattei, "Three Patterns of Law: Taxonomy and Changes in the World's Legal Systems" (1997) 45 Am. J. Comp. L. 5-44.
100 *Ibid.* at 8.
101 *Ibid.* at 12.
102 *Ibid.* at 15, 19.
103 *Ibid.* at 23.
104 *Ibid.*
105 *Ibid.*
106 *Ibid.* at 25.
107 *Ibid.* at 28.
108 *Ibid.*

weak legal institutions, instable political structure, as well as highly a bureaucratized public decision-making process.[109]

A student of Chinese or East Asian legal studies will probably be mostly disturbed by the third type in Mattei's tripartite taxonomy, which is the Rule of Traditional Law, or "the Oriental view of the law".[110] According to Mattei, in such a system of law, there is no separation between law and religious and/or philosophical tradition.[111] What Mattei calls the Eastern legal tradition covers Islamic law countries, Indian and Hindu law countries, and other countries which adopt the Asian and Confucian conceptions of law, such as China, Japan, Singapore, South and North Korea, Indonesia, Malaysia, etc.[112] These countries share the key features of the Oriental view of the law which are, in Mattei's words:

> [A] reduced role played by lawyers with respect to other individuals entrusted with the resolution of social disputes (mediators, wise men, religious authority); forced westernization and consequent hurried incorporation of professional models into legal relationships traditionally regulated through other means; the existence of Western-style codes and statutes lacking the necessary social foundations and therefore limited in their operation to specific areas of law or specific communities; the high legal value of penitence; the importance of the homogeneity of population as a means of preserving a particular social structure; family groups rather than individuals as the building blocks of society; a high level of discretion left to decision makers; a high rate of survival of very diversified local customs; extensive use of judicial coercion; a strongly hierarchical view of society; a high value placed on harmony; a great emphasis on the role of gender in the society; a social order based on duties rather than rights; hierarchical structure of the society counterbalancing egalitarian organization; limited ability of indigenous tradition to absorb (by means of scholarly elaboration) changing social conditions and a consequent need to import western legal models; disparate sources of law in the countryside and in urban contexts. *The "democracy" and "hierarchy" dichotomy is probably the easiest way to characterize the profound distinctions between the Eastern and Western legal families.*[113] *[emphasis added]*

It is firstly very difficult to understand why the legal systems of all Islamic countries and East Asia states can be said to be substantially the same given the fact that the countries so classified are so diverse in terms of culture, history, political tradition as well as the evolution of legal systems, ideology and many other important aspects of social life. Furthermore, the orientalism inherent in Mattei's theory denies the possibility that evolution in the so-called traditional group might lead to the realization of the rule of professional law, in that he places Japan into this same category despite the widespread recognition of Japan to be a modern country governed by the rule of law.[114] Though Mattei acknowledges the dynamic and evolutionary nature of law in its entiretyin his description and discussion of legal systems in the rule of

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109 *Ibid.* at 30-31.

110 *Ibid.* at 35.

111 *Ibid.* at 36: "In the rule of traditional law the hegemonic pattern of law is either religion or a transcendental philosophy in which the individual's internal dimension and the societal dimension are not separated."

112 *Ibid.*

113 *Ibid.* at 39.

114 *Ibid.*

political law group, especially the further division of that group into two subsystems of "law of transition" and "law of development",[115] Mattei is reluctant to accept that the rule of traditional legal systems can evolve into the rule of professional legal systems,[116] such that traditional legal systems are virtually beyond redemption. Mattei's descriptions of the professional legal systems and traditional legal systems suggests that he perceives and judges the distinction as a "good" or "bad" system, despite his repeated disclaimer on Euro-American centricity. As Randall Peerenboom points out, "denying these [so-called traditional] legal systems could develop rule of law legal systems hold them out as 'other' in the same fashion as previous Orientalist schemas."[117] The implication is that "Asian countries are apparently so different that they can never adopt 'our' Western legal institutions."[118]

A China law scholar would find the application of Mattei's theory to Chinese law be especially problematic. As noted by Peerenboom, "there are even doubts as to how well Mattei's criteria of traditional law square with the realities of law in imperial China."[119] For example, ancient Chinese people's unwillingness to litigate was not necessarily linked to the purported culture of emphasizing harmonization.[120]

A much less radical view about Chinese law—which appears to be more objective yet still is very close to the orientalist view—is that the Chinese society is just so different that it would be futile to apply any Western-style theories to "measure" China's legal system (assuming that it exists). I will not label this as real orientalism as this view is after all a sincere and courageous attempt to comprehend Chinese law in its particular context. In effect, this approach may be called "quasi-legal orientalism". It differs from the orientalist position (as the one presented by Mattei) in that it does not have the same kind of ignorance of either traditional or contemporary Chinese law and Chinese society as Mattei does. The problem with this view is that it tends to be overly "appreciative" of the existing background and as such exaggerate the differences between legal systems. Donald Clarke, a distinguished China-law scholar in the United States, articulates this argument forcefully. He criticizes an "Ideal Western Legal Order" or "IWLO" approach to comparative law to measure Chinese law.[121] The mistake of this approach, according to Clarke, is that it assumes without support "that China has legal institutions" and that China is developing towards some form of the rule of law.[122] Clarke claims that it is wrong to assume "that we can talk meaningfully about Chinese law and legal institutions; that China has … institutions that can meaningfully be grouped together under a single rubric, and that it is meaningful … to label this rubric 'legal'—the same word we

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115 *Ibid.* at 41.

116 Randall Peerenboom, "The X-Files: Past and Present Portrayals of China's Alien 'Legal System'" (2003) 2 Washington University Global Studies Law Review 37 at 49 (Peerenboom, "*The X-Files*").

117 *Ibid.* at 49.

118 *Ibid.*

119 *Ibid.* at 50.

120 *Ibid.* at 50 and 53.

121 See Donald C. Clarke, "Puzzling Observations in Chinese Law: When is A Riddle Just a Mistake?" in C. Stephen Hsu, ed., *Understanding China's Legal System: Essays in Honor of Jerome A. Cohen* (New York: New York University Press, 2003) 93 at 95-96. In an earlier work of Clarke on the same topic, this approach was called "imperfect realization of an ideal" or "IRI" approach. See Peerenboom, *supra* note 12 at 526-27.

122 See Clarke, *ibid.* at 97.

use to describe … institutions in our own society."[123] Further, it is also erroneous to accept a second assumption that these Chinese institutions are "developing" toward "a well-understood end."[124] Clarke argues that the substantive content of this end is typically a Western rule of law ideal.[125]

In terms of the analytical approach, Clarke is definitely correct in noting that, as a general matter, one can not, without studying carefully the particular context of the subject matter itself, dictate the questions to a subject matter, determine the standards by which we evaluate its system, and predict the answers by assigning an end state to its development.[126] True, doing that is just like having a biased standard in mind in advance based on which judgments are made later on. However, it is similarly wrong to assume that any effort to compare the legal institutions of another system with "ours" is wrong in the first place. A practice of such comparison *may* or *may not* be right. The answer to the comparability between two societies depends on the nature, structure, history, and evolutionary trends of the societies in question. To the extent that it is unsupported to assume that a theory, be it Western or not, can be *a priori* applied to a particular society, it is equally erroneous to exclude the applicability of the theory to a society without carefully examining of the realities of that society. In other words, unless Clarke can build his argument on the conclusion that the determinants of the Chinese society have demonstrated that China indeed cannot develop functional legal institutions which perform same or similar functions like "ours" and which "we" can effectively understand—and the conclusion should be based on serious analyses of both the present realities and the evolutionary trends of Chinese law, his view can not escape from being regarded as looking at the Chinese legal system in a static way which is effectively very close to legal orientalism.

Take Clarke's analysis of the PRC Constitution (*xianfa*) as an example. Clarke holds that, unlike the American Constitution or the unwritten constitution of the UK (and implicitly the constitution of any other Western democracy), the Chinese *xianfa* is not a constitutional document in any Western sense.[127] In fact it should not even be called "constitution", despite so translated by the Chinese government, because it is not a kind of contract representing a political deal, "an accommodation among competing political groups on how the government of the state should be carried out."[128] On the contrary, with the current regime as "the result of a one-sided military victory" rather than a result of a political deal,[129] China's *xianfa* is not a constitution in a meaningful sense—"in part because it just doesn't do the things that documents labeled constitution are supposed to do."[130] Clarke proposes an understanding of the PRC Constitution as a kind of "National Declaration" and holds that it even should be translated as such.[131] He claims that, legally, the PRC Constitution is just like the *American Declaration of Independence*, which certainly has significance but nevertheless is not a source of law. Similarly, all the versions of

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123 *Ibid.*
124 *Ibid.* at 97-98.
125 *Ibid.* at 95-96.
126 *Ibid.* at 526-27, 528.
127 See Clarke, *supra* note 121 at 104.
128 *Ibid.*
129 *Ibid.*
130 *Ibid.*
131 *Ibid.* at 105.

the PRC Constitution "have not been binding law and no Chinese government has ever treated them as such."[132] Therefore, the so-called "violations" of them should be understood as "normal phenomena" rather than "errors or aberrations."[133] Clarke even goes so far to criticize a Chinese scholar who held that violations of the PRC Constitution are "abnormal phenomenon".[134]

In using the example of the Chinese *xianfa* to support his "China-is-just-different" argument, Clarke has seriously misunderstood and misinterpreted the document itself as well as the constitutional practice within and without China. There are three reasons to explain that the PRC Constitution is still a constitution rather than simply a "National Declaration".

First, the PRC Constitution, although enacted by the communist government, was not a totally new creation of the CCP. As Jianfu Chen observes, "modern constitutional law in China is a result of Western influence brought in by the legal reforms stated at the turn of this century."[135] Both late Qing and the Republic of China enacted Western-style constitution. The term *xianfa* was translated from and as "constitution" many decades before the PRC was established.[136] The PRC Constitution, in the sense that it attempts to formalize and institutionalize the administration of the state, inherited many elements of its predecessors.

Second, it is questionable that only "a kind of contract", implicitly a social contract, forms the basis for constitution. Clarke's assumption is that the American Constitution is indeed a social contract among the people. This, unfortunately, cannot be taken for granted. Dworkin writes about how the force of the U.S. Constitution came into being: "A group of people met in Philadelphia and there wrote a document, which was accepted by the people in accordance with the procedures stipulated in the document itself, and has continued to be accepted by them in the way and to the extent that it has."[137] If a contract can be formed in this way, then formally this was also how the PRC Constitution came into being: a party took over the power of the country by military victory and wrote a document to formalize its administration of the country which was formally accepted by the people "in accordance with the procedures stipulated in the document itself" and has continued to be accepted as such. Still, we have to admit that there are substantial differences in both the contents and the actual implementation the two documents. After all, the Chinese government is a widely recognized authoritarian regime while the U.S. is a democracy. This fact, however, does not lead to the conclusion that the PRC Constitution is not a constitution but rather a National Declaration. If we must use contractual theory to interpret the origin and operation of a constitution, then the PRC Constitution can be viewed as a set of promises from the CCP to the people as to how the country was to be governed by the ruling party and where is the boundary defining state rights/duties and private rights/duties.

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[132] *Ibid.*

[133] *Ibid.* at 104-05.

[134] *Ibid.* at 108.

[135] Jianfu Chen, *Chinese Law: Towards An Understanding Of Chinese Law, Its Nature And Development* (The Hague: Kluwer Law International, 1999) at 58.

[136] *Ibid.* at 59. The first western-style constitutional document was issued in 1908, titled *Qinding Xianfa Dagang* (Royal-Enacted Principles of Constitution).

[137] Dworkin, *supra* note 34 at 36.

Third, it is seriously erroneous to view the PRC Constitution as a "National Declaration" without legal binding force. It has legal binding force both in theory and in practice. Clarke here confuses the binding force of a law and the actual enforcement of the law. The fact that the legal provisions of the PRC Constitution have not been well enforced does not negate their status as binding law. In fact, many laws in the PRC, such as the contract law, company law, environmental protection law, maritime law, criminal law, criminal procedure law etc., to name a few, are not well enforced, but this cannot lead the conclusion that they are as such not binding. Further, it is true that the PRC Constitution contains many policy statements, but it also contains many operational provisions such as how the state organs (including the President, the NPC, the State Council, and the Judiciary) are elected as well as many citizen rights provisions. Although the CCP is in the actual control of the process to appoint key positions, it must also follow the procedural requirements of the constitution. Chapter II of the Constitution, containing "the fundamental rights and duties of citizens", is also more than a policy statement. A few recent constitutional cases brought before and supported by Chinese courts show that Chinese citizens have been increasingly aware and assertive of their freedom and rights granted by the PRC constitution.[138] Moreover, even those policy statements are not merely statements for policies. They are instead constitutional sources empowering the NPC and other authoritative state organs to enact implementing laws. For instance, Article 25 of the PRC Constitution stipulates that "the state promote family planning", which is exactly the source of power for the NPC to promulgate the PRC Law on Population and Family Planning.[139]

Clarke's critique of the Chinese scholar's view of violations of the PRC Constitution as "abnormal phenomenon" is likewise not helpful, presumably because his failure to comprehend the realities in China. After all, the CCP's monopoly of the power is backed up by its control of state machineries such as military and police. There is little chance for anyone to change this fundamental reality overnight. But the CCP, in the form of China's constitution, also commits itself to the rule of law and

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[138] The first influential constitutional case concerned the "right to education" granted by Article 46 of the PRC Constitution. In 1999, Ms. Qi Yuling, the plaintiff, sued her classmate for misusing her name to gain admission into college and even get a job after graduation. The claims, among others, included an infringement of the plaintiff's constitutional right to education. In response to this case, the Supreme People's Court of China issued a judicial interpretation in 2001 saying that, through the means of infringing upon Qi Yuling's right of personal name, the defendant actually infringed upon the plaintiff's fundamental rights to education as stipulated in the PRC Constitution, and should bear the legal liabilities accordingly. Based on this, the Court of Appeal for this case decided that "in essence this kind infringement upon citizen's right of personal name is an infringement upon citizen's right to education granted by the Constitution" and awarded appropriate damages. See "Guanyu Yi Qinfan Xingmingquan de Shouduan Qinfan Xianfa Baohu de Gongmin Shoujiaoyu de Jiben Quanli Shifou Yingdang Chengdan Minshi Zeren de Pifu" (Reply of the Supreme People's Court on Whether Civil Liabilities Should be Borne in Cases Whereby Citizen's Right to Education Protected by the Constitution Was Infringed Upon through the Means of Infringement upon Right to Personal Name), *Fashi* [2001] 25 Hao (*Judicial Interpretation No. 25 of 2001*), 18 August 2001. See also Huang Songyou, "Xianfa Sifahua Jiqi Yiyi" ("Judicialization of the Constitution and Its Implication"), *Renmin Fayuan Bao* (*People's Courts Daily*) (13 August 2001), online: <http://www.law-thinker.com/show.asp?id=205>

[139] *Zhonghua Renmin Gongheguo Renkou Yu Jihua Shengyu Fa* (*Law of the People's Republic of China on Population and Family Planning*), promulgated on 29 December 2001 by the Standing Committee of the 9th National People's Congress. Article 1 of the Law expresses that it is enacted based on the PRC Constitution.

to the protection of citizen's rights. Although most of these commitments have not been effectively enforced, it is meaningful and helpful in terms of marching towards a constitutional structure for rights protection if Chinese citizens vigorously assert those rights and press the regime to honor its own commitments.

In short, Clarke quite rightly notes that the PRC Constitution is perhaps "the least important" legal document in China.[140] Even so, it has legal significance and is not that different from a Western-style constitution in terms of its form and functions. More importantly, reformers in and outside China are working hardly to make it works as a constitution for limiting the arbitrary power of the government and protecting citizen rights. Transforming the constitutional practice is indeed part of the efforts to build a thin rule of law in China.

It is not the task of this Article to analyze the accuracy of the description of ancient Chinese society by the old Orientalist ideals, even with regard to their unfounded accusation of the nature of the Chinese language. However, if a contemporary analyst still builds his/her understanding of China (including Chinese law) on those ideals without taking into account of the events in Chinese and world history in the recent century that have changed certain fundamental aspects of Chinese society, this is really problematic. Although one can argue that the basic nature of a society is indeed difficult to alter, certain events are just not minor things to be ignored, which include, among others, massive foreign invasion and semi-colonization, republican revolution (repealing the monarchy) and the building of modern institutions, civil wars and wars against Japanese and Western imperialists, communist revolution, socialist construction, Cultural Revolution, Reform and Open Door Policy, globalization, and the development of market economy. Modern orientalists have greatly overstated the role of traditional elements in China's contemporary legal systems.[141] Indeed, Peerenboom correctly says that "few elements of the traditional legal system even managed to survive the intervening Mao period and the implementation of a socialist legal system."[142] The fact that China's contemporary legal system is fundamentally different from its imperial tradition is a result of a variety of interrelated factors.

2. *The Evolution of the Chinese Legal System: Suggestions from the Past and the Present Realities*

First, the major theme of China's legal history in the past century has been the Westernization of Chinese law.[143] The initial reform to the traditional systems started in the late Qing Dynasty (the late 19th century), half a century after the first military invasion from the Great Britain in the Opium War in 1840.[144] After the War, traditional Chinese values and systems were strongly challenged and pressed for reform by internal and external forces, which included domestic social unrest threatening to overthrow the monarchy, intellectuals attempting to modernize and reform the systems, the penetration of Western economic, cultural, and political ideals, repeated

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[140] Clarke, *supra* note 121 at 103.
[141] Peerenboom, "The X-Files", *supra* note 116 at 50.
[142] *Ibid.* at 53.
[143] See generally, He & Li, *supra* note 83 and Chen, *supra* note 83.
[144] Chen, *supra* note 135 at 17.

Western military victories over China, and Western claims for extra-territorial jurisdiction on Chinese territory.[145] In this period, the idea of the rule of law was fashioned into Chinese legal thoughts for the first time in the country's history.[146]

At the very beginning, the Qing Dynasty's legal reform was designed to serve a two-fold purpose: "to pave the way for the transition from traditional law to modern Western law; and to respond to Western criticisms on the cruelty of certain provisions in traditional Chinese law as reflected in the Great Qing Code."[147] As a result, certain traditional elements in Chinese law (such as cruel punishment) were abolished—and never reappeared in the official codes of China in any period thereafter—and a variety of codes, modeled after the civilian systems of Japan and European countries, were also drafted.[148] With the collapse of the empire, the westernization of Chinese law was accelerated in the Republic of China period (1912-1949), during which the Kuomintang (Nationalist) government promulgated the Six Codes (*liu fa*), covering all major aspects of social life,[149] and established a European-style judicial system. As one commentator observes, at this period Chinese law "was becoming Western law, in its form, terminologies, and notions."[150] However, there is still no basis to assert that China's legal system was a liberal democratic-oriented one at that time as law was actually regarded as an instrument to govern the society by the Kuomintang Government.[151] Nevertheless, almost all the legislations were indeed borrowed from foreign laws on a sincere belief—or excuse—that "the prevailing legal thoughts and legislative trends in the West at that time happened to match perfectly the Chinese national sentiments."[152] As Jianfu Chen rightly notes, despite the fact that the reforms initiated in late Qing and developed in the Republic period had only limited impact on the society at large, their effects are still significant:

> [T]hey introduced, for the first time, Western law and legal systems into China. As a result, they broke down traditional systems, values and practices and separated private law from public law, civil law from criminal law, and the legal system from the administrative hierarchy. Most importantly, they laid down a foundation for Western law and legal systems to be further studied, developed and adapted in China. In these sense, the late Qing and KMT legal reforms may well be said to have brought about a revolution in Chinese legal thought and to have provided a foundation upon which modern Chinese law is being developed in the PRC.[153]

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145 *Ibid.* at 17-18: "(T)he Western Powers promised to relinquish extra-territorial rights and to assist in law reform and thus propelled a concentrated effort to adopt or adapt Western law at the turn of this century".

146 For example, Zhang Jinfan's textbook on Chinese legal history points out that the emergence of the ideal of the rule of law, mainly advocated by thinkers like Yan Fu, Liang Qichao, and Sun Yat-Sen, was one of the several major aspects of the new legal thoughts in the late Qing after the Opium War. See Zhang Jinfan, ed., *Zhongguo Fazhi Shi* (*Chinese Legal History*) (Beijing: Gaodeng Jiaoyu Chubanshe, 2003) at 291.

147 Chen, *supra* note 135 at 20.

148 *Ibid.*

149 The Six Codes originally referred to the Constitution, the Civil Code, the Commercial Code, the Civil Procedure Code, the Criminal Code, and the Criminal Procedural Code. It is used later generally to refer to the collective body of statutes of the Republic of China.

150 Chen, *supra* note 135 at 24.

151 *Ibid.* at 24-26, noting that Dr. Sun Yat-Sen, the founder of the Republic of China, was not meant to establish a democratic government.

152 *Ibid.* at 27.

153 *Ibid.* at 30.

After the communists took over the country, one of the first decisions the new government made was to abolish the Six Codes. Thereafter, Chairman Mao reigned over the country for almost three decades without relying on a legal system.[154] Shortly after Mao's death, Deng Xiaoping launched his "Reform and Open Door" programs, adopting policies such as economic development (in lieu of political campaigns in Mao's era), opening up to foreign countries, and began constructing a legal system. One of the major principles guiding all the programs (including the legal projects) in the reform era was Deng's policy to learn experience from foreign countries.[155] Western style legislative work started from the fields of foreign investment and trade, steadfastly expanding to social and other economic areas. The CCP's adoption of the notion of "Socialist Market Economy" in 1992 further led to a breakthrough in legal westernization, making new slogans such as "assimilation or harmonization with international practice" and "doing things in accordance with international practice" a prominent theme in China's socio-legal studies.[156] These were also associated with massive legislative work and building of institutions. In short, "law-makers in China are looking for experience and models in Western countries, particularly in the pursuit for 'rational' law since 1992. In doing so, Chinese law is increasingly becoming 'Weberian' rather than 'Marxist.'"[157]

The second factor is the consensus of "*fazhi*" rather than "*renzhi*" in China. As articulated by Hon. Xiao Yang, the Chief Justice of the Supreme People's Court of China in a public speech,

> Today's world is one of the rule of law. The prosperity of a nation, the integrity of its politics, the stability of its society, the development of its economy, the solidarity of its ethnic groups, the flouring of its culture and the contentment and well-being of its people, all hinge upon the maintenance of law and order and the soundness of the legal system. China is no exception. The national strategy of a country determines its future and destiny. At the end of the 20th century, China … publicly proclaimed to the world that we would adopt the rule of law as our governance strategy.[158]

While the term *renzhi* can smoothly be translated as "rule of men" in English language, a translation for *fazhi* is a bit difficult to produce, as it can be translated either as *rule of law* or *rule by law*. In fact, many observers tend to interpret China's

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154 *Ibid.* at 34-40.

155 See Deng Xiaoping, "Carry Out the Policy of Opening to the Outside World and Learn Advanced Science and Technology from Other Countries" (10 October 1978), in *Selected Works of Deng Xiaoping*, online: <http://english.peopledaily.com.cn/dengxp/contents2.html> He notes that "China made contributions to the world down through the ages, but for a long time conditions have been at a standstill in China and development has been slow. Now it is time for us to learn from the advanced countries" and criticizing the characterization of learning foreign experience as "blindly worshiping foreign things" is a "stupid" argument.

156 See Chen, *supra* note 139 at 48.

157 *Ibid.* at 55.

158 See Hon. Xiao Yang, Chief Justice and President of the Supreme People's Court of PRC, "Economic Development and Legal Evolution in China" (Speech delivered at the Singapore Academy of Law on 2 September 2003), [on file with the author] [*Economic Development and Legal Evolution in China*].

legal projects as efforts to establish *rule by law*.[159] However, without touching upon the reality of *fazhi* in China at this moment, it is important to note that the CCP, in the reform period, never declared that the goal of the legal construction is to establish "rule by law." Instead, the official policy statement is actually *"yifa zhiguo, jianshe shehui zhuyi fazhi guojia"*, which can be fairly translated as "run the country according to law and build a socialist rule of law country".[160] If it is true that "rule by law" dictates that the elite group or a single person (*i.e.*, the emperor according to the Legalism thought in ancient China) should be exempt from being governed by law—and instead should use law to govern others, it is obvious that both the CCP's policy and the PRC Constitution exclude this possibility. Article 5 of the Constitution stipulates that "all state organs, the armed forces, all political parties and public organizations and all enterprises and undertakings must abide by the Constitution and the law."[161] Further, "no organization or individual may enjoy the privilege of being above the Constitution and the law."[162] Certainly observers care about the self-defined role of the CCP. According its official policy, "the Party leads the people to enact Constitution and laws, to which it confines its activities."[163]

It is certainly an understandable position not to take those legal provisions and statements too seriously, given the fact that there is a tremendous gulf between the law on paper and the law in reality.[164] However, the CCP's official commitment to subject itself to law naturally give reformers in China the room, in an authoritarian society, to advocate for—and even institutionalize—the ideas of limiting the arbitrary power of the Party and the Government, of the rule of law, and even of political reform. For example, Peerenboom identified four major current schools of thoughts on the ideal of the rule of law advocated and debated among different groups of Chinese scholars and officials: Statist Socialists, Neo-Authoritarian, Communitarian, and Liberal Democratic.[165] Despite their differences, all schools agree that law should provide predictability and certainty for citizens and prevent arbitrariness in government.[166]

A third, but very crucial, factor in formulating contemporary Chinese law is the development of market economy. Deng Xiaoping advocated the development of market economy in China when he launched the "reform and open door" programmes[167] but this policy was not officially accepted by the CCP until 1992.[168] Once adopted

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[159] See *e.g.* Orts, *supra* note 5 at 56-73 (describing the instrumental role of law in China). See also David Clarke, "The Many Meanings of the Rule of Law", in *Law, Capitalism and Power in Asia*, *supra* note 81 at 28, 35-38 (noting East Asia's practice is rule by law).

[160] See *The 15th Party Report*, *supra* note 1, Part VI. This statement is codified in Article 5 of the PRC Constitution.

[161] Article 5, PRC Constitution.

[162] *Ibid.*

[163] *The 15th Party Report*, *supra* note 1 at Part VI.

[164] Orts, *supra* note 5 at 66.

[165] Peerenboom, *supra* note 12 at 486.

[166] *Ibid.* at 497.

[167] Deng Xiaoping, "We Can Develop A Market Economy Under Socialism", (26 November 1979) in *Selected Works of Deng Xiaoping*, *supra* note 159: "It is wrong to maintain that a market economy exists only in capitalist society and that there is only 'capitalist' market economy. Why can't we develop a market economy under socialism?"

[168] Chen, *supra* note 135 at 43-44.

as official policy, it has become the dominant platform for legal discourse and fundamentally changed the practice in legal construction in China. Chinese scholars favor the assertion that "a socialist market economy is an economy under the Rule of Law (*fazhi jingji*)".[169] The CCP's official policy takes the view that ruling the country according to law is "the objective demand of a socialist market economy".[170] Li Buyun, an active jurist for the rule of law in China, once told the members of the Standing Committee of China's National People's Congress in a lecture:

> Market economy is an economic form based on exchanges …. Its major characteristics include diversified economic stakeholders, clear economic property rights, competition-based mechanism, norm-based market behaviors, and scientific macro control tools. This economic form, based on autonomy, equality, credit and honesty, and competition … needs to be maintained primarily by legal tools …. Further, in the light of the trend of world economic integration, our economy must participant in the global cycle …. Therefore, it can be concluded that market economy inherently demands "rule of law" but not "rule of men".[171]

The assertion that market economy is law-based, of course, was not invented by the Chinese for the sake of supporting Deng Xiaoping's policy. The scholars of the new institutional economics and development economics schools articulated this principle long ago.[172] The prominent economist Ronald Coase writes the relationship between the markets and the law as follows: "It is evident that, for their operation, markets such as those that exist today require more than the provision of physical facilities …. They also require the establishment of legal rules governing the rights and duties of those carrying out transactions in these facilities."[173]

In conclusion, Chinese law is an evolutionary system and it now is in its most dramatic period in the evolutionary process since the country adopted market economy. In the past century, the evolution is focused on westernization, modernization, marketization and globalization. At this stage, the evolution has built a basis for constructing a thin version of the rule of law in China. The problem of legal orientalism or quasi-legal orientalism is that they refuse to recognize this evolutionary nature and its impact on the Chinese legal system.

It is, of course, still too early to conclude that all these efforts can mean that even a thin rule of law will inevitably be established in China any time soon. However, a realistic view always requires an objective assessment of the achievements of the Chinese legal reform. Harvard law professor William Alford's excellent summary of the results of China's Westernization-oriented legal reform might be very helpful

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169 *Ibid.* at 44.

170 *The 15th Party Report*, *supra* note 1, Part VI.

171 Li Buyun, "Yifa Zhiguo, Jianshe Shehui Zhuyi Fazhi Guojia—Jiujie Quanguo Renda Changweihui Fazhi Jiangzuo Dier Jiang" (Running the Country according to Law, Establish a Socialist Rule of Law Country—The Second Lecture on the Legal System for the 9th Standing Committee of the National People's Congress) (13 June 2003), online:<http://www.people.com.cn/GB/14576/15097/1912676.html>

172 See generally, R.H. Coase, *The Firm, The Market, and The Law* (Chicago: University of Chicago Press, 1988). See also generally Edgardo Buscaglia *et al*., eds., *The Law and Economics of Development* (London: Jai Press, 1997).

173 *Ibid.* at 10.

in facilitating an objective understanding in this regard:

> Over the past quarter century, the PRC has been engaged in the most concerted program of legal construction in world history. At the end of the Cultural Revolution (1966-1976), the PRC's modest legal infrastructure lay in near ruin—with but a skeletal body of legislation, a thinly staffed judicial system, and a populace having scant awareness of law. Today, the PRC has an extensive body of national and sub-national legislation and other legal enactment, concentrated on, but not limited to, economic matters, and has joined major international agreements covering trade, the environment, human rights, intellectual property and a host of other issues …. The Chinese judicial system now has a nation-wide presence, with specialized chambers to address criminal, civil, economic, administrative and, in some instances, intellectual property law questions. Whereas a generation ago, China had fewer than 3,000 lawyers and approximately a dozen law schools, today there are over 125,000 lawyers and hundreds of law schools, with law a very popular subject for university study and well over 150,000 candidates yearly taking the bar exam. Chinese citizens now avail themselves of the formal legal system in an unprecedented manner ….[174]

C. *Conclusion: The Unfinished Business of Legal Reform and Its Impact on the Development of the Rule of Law in China*

Since we cited Alford's compliments of China's legal reform in the preceding paragraph, it will be unfair if we don't also quote his criticism of the not-so-bright side of the same reform:

> [Chinese legal reform's] accomplishments need to be taken seriously, but so do the many respects in which the legal system continues to fall well short of meeting any widely accepted definition of the rule of law …. [T]he legal system has yet to prove itself adequate to protect the rights of all Chinese citizens. … The judiciary clearly does not enjoy the degree of independence from political authority that we associate with the rule of law. Judges typically are chosen from among Party members at the same time that actions of the Party itself are not reviewable in a court of law. Corruption plagues the legal system as it does Chinese society more generally …. The legislative and rule-making processes are expanding to hear from a broader spectrum of interests, but they remain heavily top-down, typically lacking regular opportunities for in-put by ordinary citizens. And enforcement of the law can be problematic … as is manifested by what Chinese authorities themselves describe as "local protectionism," meaning undue favoritism shown by the courts at local levels to the "home team."[175]

Alford's praises and criticism of China's legal construction accurately reveal the true face of the current state of the legal system: it is marching towards establishing a thin version of the rule of law; nevertheless it falls short of meeting even the requirements of the thin theories at the current stage. Using Fuller's eight principles as a benchmark, we can see that China's legal reform has shortcomings in almost

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[174] Alford, *supra* note 1.
[175] *Ibid.*

all aspects. If Raz's certain requirements such as judicial independence are also counted, China's record is even worse. However, it is important to note that there can never be perfect compliance with those requirements in any country and that there has been remarkable improvement with respect to all of these dimensions in China. In other words, the signs are clear that China is moving towards the rule of law. In observing China's legal construction, wrong conclusions often come from a style which tends to overstate the non-compliance aspects of the legal system and to overlook the trends of the development. Bearing in mind the evolutionary trends of the Chinese legal system, it is not surprising to conclude that the regime is marching towards at least a "thin" rule of law.

On the other hand, China's legal reform cannot set a goal other than at least a "thin" rule of law. The requirements of the "thin" theories are inherent for any legal system to be effective and even to survive. They are minimum requirements for the rule of law. It is inconceivable that there can be a "socialist rule of law" country, which is the goal of development as enumerated by the PRC Constitution and the CCP's flagship documents, without having a legal system that complies with the principles of generality, transparency, clarity, regularity and congruence, among others. As Peerenboom notes,

> At this point, it is unlikely that China will develop a legal system so radically different as to render a thin rule of law conceptually inapplicable. The applicability of a thin theory of rule of law is not therefore simply the unreflective a priori imposition of a Western ideal. Actually, it is not an imposition of a Western ideal at all because there is widespread acceptance of, and support for, a legal system that meets the requirements of a thin rule of law in China.[176]

This proposition is supported by China's expressed goal of legal construction. Actually, the adoption and codification of the policy to "run the country according to law and build a socialist rule of law country" by the year 2010 have been interpreted as having the following implications: (1) the rule of law is recognized as a universal value and the long-held prejudice against this "Western" concept is therefore eliminated; (2) it is further recognized that the rule of law is not yet fully established in China; and (3) China, under the CCP leadership, is determined to construct a rule of law system in a given period.[177]

Having discussed the objective need for a thin rule of law in China, it is also meaningful to note that applying the "thin" theories in China has certain highly practical—and as such realistic—advantages. First, it is a pragmatic approach. Unlike the "thick" theories which demands democracy and liberal interpretation of human rights and as such are often disliked by authoritarian regimes, a "thin" version of the rule of law is much less likely to be opposed by the CCP. In fact, recent trends in China show that the Party is looking at rule of law for legitimacy and encouraging the development of the "thin" rule of law, although no signs of welcoming a liberal democratic version of the rule of law have been displayed. More significantly, it can facilitate the building of legal institutions to provide infrastructures for economic growth, and predictability and freedom for individuals to plan their lives. Thirdly,

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[176] Peerenboom, "The X-Files", *supra* note 116 at 63.

[177] Chris X. Lin, "A Quiet Revolution: An Overview of China's Judicial Reform" (2003) 4 Asian Pac. L. & Pol'y J. 256 at 261.

although no one can be certain whether China will establish liberal democracy, the "thin" rule of law can definitely help achieve that purpose in that the formal aspects provided by the "thin" theories constitute an indispensable part of a liberal democratic rule of law. The analysis of this Article shows that the formal aspects of the rule of law and a liberal order are inextricably intertwined: neither can exist without the other.

III. WTO's Limited Contribution to the Development of Rule of Law in China

A. *A Realistic View on WTO's Impact on the Rule of Law in China*

By acceding to the WTO China has agreed to abide by the entire package of the GATT/WTO law, including, notably, market economy-based international legal standards such as non-discrimination, transparency and predictability, fair competition, uniform and impartial administration of laws, and judicial review. China's commitments, detailed by lengthy documents running to over 800 pages, have aroused reasonable expectations as well as fantasies about the development of the rule of law in China. The Vice President of the Supreme People's Court of China so states his view in this regard:

> Joining the [WTO] is China's major decision to further open itself up to the outside world and its natural choice to develop its market economy. China's entry into the WTO will not only profoundly impact the rule of law in China, but will also call for higher standards for China's judicial system. As a result, it has become an important and urgent task for China to further promote judicial reform and justice and to speed up China's opening-up to the outside world and construction of rule of law.[178]

Among China law observers, although there is a consensus about WTO's positive influence on the legal construction, there are two representative views which differ in the assessment of the degrees of impact. One view claims that WTO entry will bring fundamental changes to the Chinese society, in particular the political life. Pitman Potter holds that, although China's WTO entry is often portrayed as "a matter of economics and commerce", it is indeed "at root a fundamental challenge of politics and governance."[179] The reason is that "the GATT/WTO principles of transparency derive broadly from liberal principles of government accountability".[180] Thus, political leaders are required to be accountable "through democratic elections, and from administrative agencies through norms of transparency and the rule of law."[181] With this observation, Potter claims that China is required to revamp its legal and political

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178 Cao Jianming, "WTO and the Rule of Law in China" (2002) 16 Temp. Int'l & Comp. L.J. 379.

179 Pitman B. Potter, "Globalization and Economic Regulation in China: Selective Adaptation of Globalized Norms and Practices" (2003) 2 Washington University Global Studies Law Review 119 at 124.

180 *Ibid.*

181 *Ibid.*

system in order to comply with WTO liberalism. Potter states:

> Perhaps the most fundamental legislative changes that will be required for China to conform to the disciplines of the GATT will be the revision of the PRC Constitution. In order to meet the transparency and rule of law requirements of the GATT as well as national treatment requirements, constitutional provisions permitting control by the Chinese Communist Party in the operation of the legal system may have to be revised …. This may also require deletion or amendment of the term "socialism" in the constitutional references to the rule of law, to the extent that this term implies or authorizes Party control over the operation of the legal system as it affects trade and investment activities that are subject to GATT principles. The removal of references to Party control will be required to the extent that these support reliance on Party edicts rather than legal principles as the basis for administration of foreign trade. This is a basic rule of law concept contained in GATT Article X(3)(b), on independent adjudication and review of trade regulation matters. Transparency requirements will dictate that the Party's internal non-public decision-making process will not be permitted to govern the regulation of economic and commercial affairs.[182]

Donald Clarke correctly observes that this view "is going too far."[183] To counter Potter's idealism, Clarke maintains that "the WTO does not mandate a perfect legal system, or even a basically fair one, outside a few specific areas":[184]

> [T]here is no general obligation under the WTO agreements to have a fair and well functioning legal system. That obligation applies only to specific actions in specific sectors. Of course, it is unlikely that a state can produce a fair and well-functioning legal system in those sectors and be unable or unwilling to produce it in others. Nevertheless, it is important to bear in mind that the undoubted problems of China's legal system cannot uniformly be condemned as violations of its WTO commitments. Many WTO members have or used to have legal systems of questionable fairness, yet nobody has ever suggested they were therefore disqualified from WTO membership. The fact that China happens to be a major actor in the world trading system … does not change the argument.[185]

Clarke's critique points out a major defect in Potter's argument, which understands the GATT/WTO as an anti-socialism, anti-authoritarianism, and liberal democracy-oriented machine. However, the legal theories, principles, and provisions of the multilateral trading system as well as its institutional practices does not suggest that the WTO mandates a legal system based only on the liberal democratic rule of law. In GATT/WTO's historical and present practice, many Members (or Contracting parties) have joined and stayed in this trading system with either a socialist and/or authoritarian regime (such as the East European countries which were in the Soviet Camp when they joined the GATT in the 1970s and 1980s).[186] After all, non-democratic governments greatly outnumber Western style liberal democracies in the

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[182] See Potter, *supra* note 9 at 603.
[183] See Clarke, *supra* note 11 at 111.
[184] *Ibid.*
[185] *Ibid.* at 112.
[186] See information on WTO Membership, online: <http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm>

WTO membership. So, in putting forward his account of WTO's impact on national legal systems, Potter utters an idea, or a hope, rather than an argument.

But Clarke also has gone too far in one front: he is erroneous in asserting that the WTO does not mandate even a fair legal system. The wide coverage and deep penetration of WTO laws, including both the principal agreements and individual countries' commitments and schedules,[187] have however gone beyond certain specific areas and touched the entire body of any Member's economic, commercial, and even political and social laws. For instance, GATT Article III:1 and III:4 indicate that GATT is applied in respect of all "law, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use".[188] GATT Article X, which deals with transparency and administration of trade law, stipulates that all "laws, regulations, judicial decisions and administrative rulings of general application" are subject to the surveillance of the WTO as long as they pertain to "the classification or the valuation of products for customs purposes, or to the rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefore, or affecting their sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use".[189] In respect of China, its WTO Accession Protocol requires, among others, fair administration of "all its laws, regulations and other measures" of the central and local level affecting "trade in goods, services, trade related aspects of intellectual rights ("TRIPS") or the control of foreign exchange."[190] One can hardly raise an example of law or regulation that does not belong to this wide range. Indeed, even a Member's criminal code is covered as the Agreement of Trade-Related Aspects of Intellectual Property Rights ("TRIPS") requires the application of criminal procedures under stipulated circumstances.[191]

Further, as a U.S. official states, "commerce is one of the ways in which you build the trust in society and a foundation for the rule of law."[192] The Chairman of American Chamber of Commerce in China notes that "the rule of law is not easily compartmentalized or confined to a single sector, such as commercial transactions of foreign companies."[193] The rule of law established in one area, for the benefit

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[187] The legal texts of the WTO law consist of a common three-part outline: the broad principles (such as GATT, GATS, and TRIPS), the extra agreements and annexes dealing with specific areas and sectors, and schedules of commitments of individual countries. See WTO, *Understanding the WTO* (Geneva: WTO, 2003) at 23.

[188] *General Agreement on Tariffs and Trade* (30 October 1947), Article III:1 and III:4, online: <http://www.wto.org> [*GATT*].

[189] *Ibid.* Article X:1.

[190] World Trade Organization, *Accession of the People Republic of China*, WT/L/432, Document No. 01-5996 23 November 2001, *Protocol on the Accession of the People's Republic of China*, Part I:2(A):2 [*China's WTO Accession Protocol*] online: <http://docsonline.wto.org/gen_home.asp>

[191] *Marrakesh Agreement Establishing the World Trade Organization* [*WTO Agreement*], Annex 1C, *Agreement on Trade-Related Aspects of Intellectual Property Rights* [*TRIPS*], Legal Instruments—Results of the Uruguay Rounds Vol. 31, 33 I.L.M. 81 (1994) online: <http://www.wto.org/english/docs_e/legal_e/legal_e.htm#wtoagreement>

[192] See Statement of Grant D. Aldonas, Under Secretary of Commerce for International Trade, to the Congressional-Executive Commission on China Hearing on *WTO: Will China Keep Its Promises? Can It?* (6 June 2002) online: <http://www.cecc.gov/pages/hearings/060602/aldonas.php>

[193] See Statement of Christian Murck, Chairman, American Chamber of Commerce in China, Beijing, to the Congressional-Executive Commission on China Hearing on *WTO: Will China Keep Its Promises? Can It?* (6 June 2002) online: <http://www.cecc.gov/pages/hearings/060602/murck.php>

of one group of people in the society (such as foreign investors), will inevitably lead to its application in other areas for other groups. In the end, "it will strengthen the accountability of institutions and generally improve the protection of rights of individuals."[194]

Thus there is a need for an objective, realistic assessment of the impact of WTO accession on China's rule of law construction. In the present author's view, a realistic observation about the WTO's impact entails several meanings.

First, China's compliance with the WTO will *directly* contribute to the country's construction of a "thin" rule of law. As will be discussed in detail below, WTO's requirements and principles, especially those relating to transparency, uniform and fair application of laws and judicial review are exactly the same principles required by the "thin" theories. The rule-based WTO regime also can foster the growth of professionalism within the government, which in turn can strengthen the legislative, administrative and judicial works in China.

Second, the role of the WTO accession and compliance in China's construction of the "thin" rule of law, albeit significant, should not be overstated. The fact is that China has been undertaking a "thin" rule of law-oriented legal construction for two decades. The WTO accession represents a new height in these endeavors, but was never the start of this movement.

Third, it is likely that the WTO will also have profound social and political implications on China, especially when one can accept the long-established discourse that trade liberalization, free market-based competition and adoption of Western-style international legal practice can limit the government's arbitrariness and facilitate the growth of middle class and civil society. The universal support of China's accession to the WTO among the liberal intellectuals in China indicates the deep apprehension of the liberal implications of WTO. On the other hand, the strong resistance against China's WTO accession from the "New Left", a school of thought within China which dislikes globalization, capitalism and democracy, is very telling of the conservative fears about WTO's spread of liberal ideas.[195] But in any event, WTO's impact in this regard can only be *indirect*. Under the WTO, the Chinese government is obligated to enact and implement rules for the construction of a "thin" rule of law. However, the WTO cannot legally require the Chinese government to construct a liberal society.

In the next few sections, this article will evaluate the impact of the WTO on various aspects of China's rule of law construction. However, it is important to put them in the context of the major post-WTO legal developments that have been or are being undertaken in China.

B. *An Overview of the Major Post-WTO Legal Developments in China*

Empirical evidence of China's post-WTO is as yet thin, but certain important developments in the recent years are too significant to be ignored, as they are indicative

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[194] *Ibid.*

[195] Joseph Fewsmith, "The Political and Social Implications of China's Accession to the WTO" (2001) *China Quarterly* 574 at 584-586.

of the trend and direction of China's legal reform, helping support the view that a "thin" model of the rule of law is being constructed.

A direct impact of the WTO accession to the Chinese legal system is the enormous work undertaken by the Chinese authorities to revise laws. Thousands of statutes were made, abolished, or amended pursuant to China's WTO obligations. In the area of foreign trade and investment alone, in the two and half years around China's accession (from the end of 2000 to August 2002), 210 laws were revised and 559 were abolished.[196] In the judicial branch, since China joined the WTO, the Supreme People's Court has reviewed more than 1,200 judicial interpretations with a view to "applying the WTO principles of non-discrimination, transparency, and uniformity of the legal system".[197]

A second major development is the fourth amendment of the PRC Constitution. The new amendments, passed by the National People's Congress on March 14, 2004, contain two major new additions to the Constitution, including that "The State respects and preserves human rights" and that "Citizen's lawful private property is inviolable."[198] Despite the strong doubts expressed by law scholars and lawmakers in China,[199] the new amendments are regarded by many others in and outside China as marking an ideological breakthrough and paving the way for profound changes to China's social and political life.[200] One vivid example is the drafting of the PRC Property Law, which is being reviewed and debated by China's top legislature, the Standing Committee of the National People's Congress. The draft Property Law is a key step taken by the Chinese lawmakers to implement the private property protection clause in the PRC Constitution,[201] especially in the sense that it provides a body of operational rules for protecting various ownership forms.[202] Significantly, it stipulates that all shareholders or investors in enterprises shall have the equal rights

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196 Under the leadership of the WTO Leading Panel of the State Council, the Ministry of Foreign Trade and Economic Cooperation (MOFTEC, now merged into the Ministry of Commerce) established a "Leading Panel of WTO Legal Work" in early 2000 to review China's foreign trade and investment statutes. Before the MOFTEC's panel was dissolved in August 2002, it examined a total of 1,413 laws. See Zhang Yuqing & Yang Guohua, "In Response to WTO Accession, Establishing A New Foreign Trade Legal System of China", *China Law* 46:1 (2004) 57.

197 Xiao Yang, "Economic Development and Legal Evolution in China", *supra* note 158.

198 PRC Constitution, *supra* note 2 Amendment Four, amendments to Art. 13 and Art. 32, respectively.

199 Chris Buckley, "China Approves Amendments to Constitution on Human Rights", *New York Times*, (15 March 2004) (LexisNexis) (quoting observations made by law professor He Weifang that the new amendments are "more important symbolically rather than legally").

200 See Edward Cody, "China Codifies Property and Human Rights", *The Washington Post*, (15 March 2004) (LexisNexis) (noting the comments of Mr. Zong Qinghou, a private entrepreneur as well as a NPC lawmaker, that "[The new constitutional amendments] will prompt people to make more fortunes in the future", and noting the observation of law professor Ying Songnian that the amendment on private property could offer increased protection to small real estate owners whose property has been and may be confiscated in the future by local governments eager to please big developers, and that the amendment on human rights "constitutes a written obligation by the Chinese leadership and … puts the government on record for officials up and down the hierarchy, that, in principle at least, human rights must be respected.")

201 See Shen Lutao, Zou Sheng Wen and Zhang Xudong, "Siyou Caichan Baohu: Cong Xianfa Yuanze Maixiang Zhidu Goujian" ("Protecting Private Property: From Constitutional Principle to Institutional Building"), *Xinhua News Agency*, (25 October 2004), online: < http://www.xinhuanet.com>

202 *Draft of the PRC Property Law* (on file with the author).

with regard to income earning, decision-making and management selection.[203] This effectively puts private property on equal footing with state property in China, a socialist state which once regarded private property as harmful to the society.

The most significant development so far is the legalization and institutionalization of the role of the Chinese government in relation to the civil society. The role of the government, as recent CCP and State Council documents suggest, is transiting from an almighty regulator as well as a property owner to a public goods provider and a regulator whose authority is both established and constrained by law. The endeavors for establishing a *Youxian Zhengfu* ["limited government"] is most comprehensively articulated in a notice adopted and issued by the State Council on March 22, 2004 under the title "The Implementation Programme to Comprehensively Promote Administration of the Country in Accordance with the Law".[204] Ambitiously aiming at establishing a *fazhi zhengfu* [rule of law government] in 10 years, the programme requires the government to satisfy six principles in governing the country, including, significantly, administrating by law, administrating on the principles of fairness and equality, and administrating by following due process.[205] The principle of administrating by law mandates that the government, when it administrates, must act in accordance with existing laws, regulations and rules. Absent of such legal authority, the government is prohibited from making decisions which may negatively impact the lawful rights or increase the obligations of natural and corporate citizens.[206] Furthermore, the Programme requires a separation of the government from the society. The government's power should be confined to macroeconomic adjustment, market regulation, social administration and public services provision.[207] It emphasizes that, whatever the matters are, to the extent that they can be resolved by citizens themselves, by the market and competition mechanisms, or by self-regulatory associations or intermediate agencies, the government should not get its hands on them unless explicitly authorized by law.[208]

The efforts to establish a limited government have recently been codified in the Administrative Licensing Law, adopted by China's national legislature in August 2003.[209] The omnipresence of the Chinese government is largely caused by its excessive interference with the social, economic and political matters, and even the daily life of citizens, largely through the power to license.[210] The new law limits the government's power of licensing to six areas, including mainly matters directly

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[203] See "Wuquanfa Caoan Youwang Sanshen Tongguo" ("Draft of Property Law is likely to be adopted after a third reading"), *Xin Jing Bao* (*New Beijing News*) (24 October 2004) at A04.

[204] *Quanmian Tuijin Yifa Xingzheng Shishi Gangyao* [*The Implementation Programme to Comprehensively Promote Administration of the Country in Accordance with Law*], adopted by the State Council of the People's Republic of China on 22 March 2004, online: <http://www.people.com.cn/GB/shizheng/2459126.html> [*Administration by Law Programme*].

[205] See *Administration by Law Programme*, *supra* note 204 para. 5.

[206] *Ibid.* at para. 5.

[207] *Ibid.* at para. 6.

[208] *Ibid.*

[209] *Zhonghua Renmin Gonghe Guo Xingzheng Xuke Fa* (*PRC Administrative Licensing Law*), adopted at the 4th Meeting of the Standing Committee of the 10th National People's Congress on 27 August 2003, with effective from 1 July 2004 (*PRC Administrative Licensing Law*).

[210] Li Yuan, "Law on Administrative License: New Creation of Chinese Litigation", *China Law* 44:5 (2003) 59.

relating to state and public security, macro-economic control, environmental protection, exploration of natural resources, professional services, important equipment, business establishment, among others.[211] In addition, at the national level, it provides that only laws (enacted by the National People's Congress) and administrative regulations (enacted by the State Council) can establish administrative licenses, thus depriving government agencies at lower level the power to set up licenses.[212]

C. *Transparency*

Transparency is one of the pillar principles of the WTO, underpinning all substantive areas of the multilateral trading system.[213] It is also a legal obligation, embedded in GATT Article X, GATS Article III and TRIPS Article 63. All the three legal provisions require that all laws, regulations, judicial decisions and administrative decisions relating to trade (and probably all economic activities) of a Member should be made public. Transparency is also one of the most crucial aspects of the "thin" rule of law, encompassing mainly its key principle of promulgation but also relevant to the principles of clarity stability, and prospectivity.

Although Sylvia Ostry attacks the definition of the word "transparency" as "the most opaque in the trade policy lexicon",[214] its replication in China' WTO accession protocol looks both clear and operational. The transparency provisions in the protocol have five facets:[215]

(1) China shall make public all relevant laws, regulations and other measures (hereinafter the "laws") before they are implemented or enforced;
(2) China will only enforce those laws that are published and made readily available to other WTO Members, individuals and enterprises;
(3) China shall establish or designate an official journal dedicated to the publication of all relevant laws which should be made readily available to the public;
(4) After publication of laws in such a journal, China shall provide a reasonable period for comments to be made to the appropriate authorities before such measures are implemented;
(5) China shall establish or designate an entry point where the published laws can be obtained and requests from the public can be replied in an authoritative way.

The transparency commitment in the Protocol is a quite comprehensive rule of law requirement. It is designed to cure a long-established tradition in the Chinese legal system from ancient to contemporary ages that promulgation of law sends wrong message to the subjects so that they would know the bottom line of the discipline

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211 *PRC Administrative Licensing Law*, Art. 12, *supra* note 209.
212 *Ibid.* Art. 14.
213 See *Understanding the WTO, supra* note 187 at 11-12.
214 Sylvia Ostry, "Transparency and the Rule of Law: Legal Reform in China", in Sylvia Ostry *et al*., eds., *China and The Long March To Global Trade: The Accession Of China To The World Trade Organization* (London: Routledge, 2002) at 123 [*China And The Long March To Global Trade*].
215 China's WTO Accession Protocol, *supra* note 194 at art. I:2(C).

and would not pursuit *li*—the virtues.[216] Even for a long time in the reform era, it was unlawful to publish state statutes absent permission from the government. A draft law would be state secrecy even though it would be made public when passed. As such, the public virtually had no access to the legislative process, not to mention making comments. Ironically, as observed by Donald Clarke, foreigners sometimes had more access to the legislative process than Chinese people. For example, an early draft of the Foreign Trade Law was made available to the GATT Working Party of China but was never showed to the Chinese public until its formal passage and promulgation in May 1994.[217] The judicial system was opaque as well. Public attendance at court proceedings, whether civil or criminal, was possible only with the permission of the court involved. Furthermore, the publication of transcripts was extremely restricted, sometimes unlawful.[218]

For a long period, China's legal system in respect of economic and trade activities was overwhelmed with enormous "*neibu guiding*" (meaning "internal documents") which no one outside the relevant ministry or department could have access to. Professor Jerome Cohen, an American lawyer who had been engaging Chinese law for decades, testified the situation he often encountered when dealing with Chinese negotiators: "… in some cases they have the regulations in their laps and they keep it … under the table, like a good poker player. And they say, 'I'd like to tell you what these rules are and why they're against you, but I am sorry, I can't show them to you."[219] In fact, in the under-regulated areas or areas the laws appear to be too general or ambiguous, those classified internal documents in effect became the real "law", plaguing both foreign business and Chinese people more severe than any other problems. For a considerable period, "foreign trade is not governed by laws enforced by courts in open proceedings. It is governed by rules formulated by various concerned bureaucracies and implemented through the everyday acts of those bureaucracies."[220]

Impressive measures, largely prodded by the globalization-oriented "Reform and Opening Up" policies and the GATT/WTO application, have been taken by the Chinese government in the past decade to attack this culture of opacity. As early as 1989 and 1987 the National People's Congress (NPC) and the State Council promulgated rules to require laws passed at the level of the NPC and the State

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[216] Shu Xiang, a proto-Confucian (*circa* 536 B.C.) once criticized the publication of the criminal code of the State Zheng as follows: "Anciently, the early kings conducted their administration by deliberating on matters [as they arose]; they did not put their punishments and penalties (into writing), fearing that this would create a contentiousness among the people which could not be checked. Therefore they used the principle of social rightness (*yi*) to keep the people in bound, held them together through their administrative procedure ... activated for them the accepted ways of behavior (*li*) …". See *Zuozhuan: Zhaogong Liunian* and its *Zhusu*, translated and cited in Derk Boddle & Clarence Morris, *Law in Imperial China* (Cambridge, Massachusetts: Harvard Universtiy Press, 1967) at 16.

[217] Donald C. Clarke, "GATT Membership for China" [1994] 17 University of Puget Sound Law Review 517 at 528.

[218] *Ibid.*

[219] Statement of Jerome Cohen, Professor of Chinese Law, New York University to U.S.-China Economic and Security Review Commission Hearing on *China Trade / Sectoral and WTO Issues*, 14 June 2001, online: <http://www.uscc.gov/textonly/transcriptstx/tescoh.htm>

[220] Clarke, *supra* note 217 at 528-530

Council level be published.[221] The *Legislation Law of 2000*,[222] the *Regulation on the Procedure for Formulating Administrative Regulations of 2001*[223] and the *Regulation on the Procedures for Formulating Administrative Rules of 2001*[224] now mandate that laws, regulations and administrative decisions at all levels of the government to be published.[225]

The disturbing "*neibu guiding*" had been gradually eliminated since the early 1990s. From 1993 the Ministry of Foreign Trade and Economic Co-operation (MOFTEC) has been publishing a periodical journal entitled the *Gazette of the Ministry of Foreign Trade and Economic Cooperation of the People's Republic of China,* disclosing to Chinese and foreigners all laws, administrative regulations and decrees including those which were previously "internal documents" related to foreign trade and investment. In the meantime, thousands of previously undisclosed internal documents were repealed and the decisions for repealing were also published in the Gazette.[226] On January 1, 2002, twenty days after China's accession to the WTO, the MOFTEC issued a circular establishing the WTO Information and Inquiry Bureau as the "single inquiry point" where WTO Members, foreign and Chinese businesses or individuals can request information regarding Chinese laws, regulations, judicial decisions or other rules.[227] The circular provides that the Chinese government will render authoritative views to WTO members and accurate information to business and individuals.[228]

There are no longer regulations or practice restricting the publication of collections of statutory or judicial decisions. Since mid-1990s numerous press companies have published countless collections of laws, regulations, and court cases. All governments and legislative authorities have now established their own gazettes which contain official version of laws or policy documents within their jurisdiction. In addition, the National People's Congress (NPC) has established a website providing free information of all statutory laws at central and local government levels (including administrative rules of cabinet department level) to the public.[229] In addition, most national agencies and many local agencies have created their own websites through which new laws and policies are promptly released.[230] The Supreme Court and

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221 Sarah Biddulph, "China's Accession to the WTO: Legal System Transparency and Administrative Reform", in *China and the Long March To Global Trade*, *supra* note 214 at 154 and 164.

222 *Lifa Fa* in Chinese pinyin.

223 *Xingzheng Fagui Zhiding Chengxu Tiaoli* in Chinese Pinyin.

224 *Guizhang Zhiding Chengxu Tiaoli* in Chinese pinyin.

225 See *e.g.*, Articles 23, 41, 52, 53, 62, 70 and 77 of the *Legislation Law of 2000*, Articles 28 and 29 of the *Regulation on the Procedure for Formulating Administrative Regulations of 2001*.

226 Kui Wa Wang, *Chinese Commercial Law* (Oxford: Oxford University Press, 2000) at 149.

227 *Zhongguo Zhengfu Shimao Zuzhi Tongbao Zixun Ju Zixun Banfa* (*Circular on the Method of Requesting for Information from the WTO Information Bureau in the People's Republic of China*), 1 January 2002, Chinese text online: <http://sms.mofcom.gov.cn/article/200209/20020900039080_1.xml>

228 *Ibid.*

229 The website is http://www.npc.gov.cn, which contains a very comprehensive Chinese statute database. The *People's Daily* Law database, http://law.people.com.cn, is also considered an official website for publication of Chinese laws.

230 Jianfu Chen, "China and the WTO: Legal Implications and Challenges", *CCH China Law Update* 4:11 (November 2001) 7 at 9. For directory of Chinese government websites please refer to the following sources: http://www.net.gov.cn (the official Government-Online Project), http://www.sohu.com (search engine), http://www.sina.com.cn (search engine), http://www.chinalawinfo.com (law website), http://www.Eastlaw.net (law website).

numerous local courts also established their websites publishing judicial decisions and interpretations.[231] On January 1, 2001, the court system opened a website called "China Foreign-Related Commercial and Maritime Trial Net",[232] featuring foreign-related trial information, transcripts of commercial and maritime court proceedings, legislative information of the Supreme Court, as well as tremendous articles and legal commentaries mainly produced by Chinese judges.[233]

In short, transparency with respect to promulgation of laws has been tremendously improved and one can fairly say that publicity of legal information is no longer an obstacle to the construction of a thin rule of law. Problems, however, remain with the "right to comment". Despite an emerging trend that the practice of consultation has been in formulation,[234] China has not yet imposed a universal requirement in the form of legislation for public consultation during the drafting process of laws.

D. *Uniform and Impartial Administration of Laws*

Jerome Cohen states that "the major legal challenges confronting China's WTO accession do not lie in transparency and law-making but in application and enforcement of the law."[235] China's accession Protocol requires the country to apply WTO agreements "to the entire customs territory of China", including all the areas in the complex political map such as border trade regions, minority autonomous areas and Special Economic Zones, among others.[236] It is further required to administer "in a uniform, impartial and reasonable manner" all its laws of both the central and the sub-national levels.[237] In addition, it shall establish a mechanism under which the public can bring to the attention of the national authorities cases of non-uniform application of the trade regime.[238]

This commitment is crucial to the "thin" rule of law, conforming to the principles of generality and congruence. *Uniform* law is required to attack the notorious "local protectionism" in China, so that the provinces, municipalities and counties cannot

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[231] The website of the Supreme People's Court is http://www.court.gov.cn. The Supreme People's Court has also established a law website, http://www.chinacourt.org, which is one of the best in China in terms of its services for searching Chinese statutes.

[232] The URL of the site is http://www.ccmt.org.cn or http://www.ccmt.com.cn.

[233] In the first six months of its opening, the website published 286 court trial news, 76 transcripts of court rulings, 76 summaries of typical cases, and 188 court notices. See Xiao Wenfeng, Hu Houbo, "Woguo Shewai Shangshi Haishi Shenpan Gongzuo Tongguo Wangluo ZuXiang Guoji 'Touming"' [Our Country's Foreign-related Commercial and Maritime Trial Becomes Internationally Transparent through Internet], *Xinhua News Agency* (23 June 2002), online: <http://news.xinhuanet.com/newscenter/2002-06/23/content_453376.htm>

[234] For a number of years, the National People's Congress, the State Council and the Supreme Court (which has the authority to issue judicial interpretations) have engaged in extensive consultations with the business and academic community in the making of laws, and legislative drafts were sent to universities, academic institutions, think tanks, banks, and big companies to solicit comments. When the author was working for the Bank of China during 1997-1999 as an in-house attorney, he participated on many occasions of commenting on drafts of laws and regulations, including drafts of the Foreign Exchange Regulations, the Contract Law, the Securities Law, and the Supreme Court Interpretations on China's Guarantee Law, all of which were sent by the relevant authorities.

[235] See Cohen, *supra* note 219 at 132.

[236] *China's WTO Accession Protocol*, *supra* note 194, I:2(A):1.

[237] *Ibid.* I:2(A):2.

[238] *Ibid.* I:2(A):4.

pass local rules that are at odds with WTO norms and the central government must be responsible for any such inconsistency. *Impartial* enforcement renders illegal the practice of using arbitrary decisions to favor a particular group of people in the society. Finally, *reasonable* administration of laws entails the requirement that legal and administration measures should comply with the basic principles of fairness (*i.e.*, Raz's fifth criteria of the rule of law—the principles of natural justice).[239]

The central concerns of foreign businesses engaging with China is the uniform application of domestic laws as well as international agreements to both the national and sub-national levels to attack the problems of "local protectionism." Cohen notes that "contrary to American images of the PRC as a ruthlessly-effective authoritarian regime whose writ runs from the Standing Committee of the Party Poliburo in Beijing to the most remote hamlet, in many respects contemporary Chinese government resembles a series of feudal baronies more than a totalitarian dictatorship."[240] While this statement is not without a bit exaggeration, it reveals largely a phenomenon that local resistance can constitute effective impediment to the construction of the rule of law in China. Various reasons, including lack of required knowledge and experience, corruption, and most commonly the desire to protect local industry, provide explanations for such obstacles. While this problem can certainly be alleviated by the improvement of judicial capacity, judicial independence, the development of a common internal market as well as harmonization of domestic standards, it cannot be substantially solved unless China can successfully address a constitutional flaw in its political structure: the lack of a clear separation of power between the central government and the localities.

E. *Judicial Review*

Article X of GATT mandates the establishment of judicial, arbitral or administrative tribunals or procedures to promptly review and correct administrative action relating to trade. Further, such tribunals shall be independent of administrative organs.[241] Judicial review and procedures are also stipulated in Article 6 of GATS, Articles 42-50 of the TRIPS Agreement, Article 13 of the Antidumping Agreement and Article 23 of the Agreement on Subsidies and Countervailing Measures. In China's WTO accession Protocol, it is required to establish tribunals, contact points and procedures for the prompt review of all administrative actions relating to the implementation of laws concerning the WTO's subject areas. The tribunals are required to be "impartial and independent of the agency entrusted with administrative enforcement and shall not have any substantial interest in the outcome of the matter."[242] They can be administrative tribunals or judicial tribunals, but right to appeal to a judicial body must be granted if the initial right of appeal is to an administrative body. In addition, due process shall be followed to the extent that notice of the decision on appeal shall be given to the appellant and the reasons for such decision shall be provided in

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[239] See Raz, *supra* note 27 at 217.
[240] See Cohen, *supra* note 219.
[241] *GATT*, *supra* note 188 at Art. X:3(b).
[242] *China's WTO Accession Protocol*, *supra* note 194 at Art. I:2:(D):1.

writing and the appellant's further right of appeal, if any, shall be duly communicated to him.[243]

Effective judicial review depends minimally on three factors: a capable judicial system (including courts and judges with competence and integrity), the reviewing power delegated by law, and true judicial independence. An independent, effective judicial authority is a key aspect of the "thin" rule of law. Measured by these factors, China's judicial system is far from being able to provide the judicial review of administrative actions as required by the WTO. Nonetheless, trends are that the situation is steadily improving because of the effective measures that were taken in China in the recent years. However, although those measures undertaken can enhance the judicial competence, it is difficult for them to address the lack of independence in the judiciary.

In the reform era China has erected a court system with nationwide organizations. At least in terms of civil and economic cases, its major function is to resolve disputes between citizens and as such it is groundless to assert that China's judicial system is fundamentally different from that in the West. However, insofar as administrative and constitutional reviews are concerned, Chinese courts occupy a very different position.

The lack of judicial competence is well-known within and without China. This is caused by the low level of legal education and professionalism among the judges as well as by corruption.[244] In terms of the scope of judicial review authorized in domestic law, the courts are granted the power to review administrative actions according to the *Administrative Litigation Law of 1989* ("ALL"). Under this law, the courts have the capacity to scrutinize the lawfulness of administrative decisions. Individuals or enterprises (including foreign companies) can bring suits before the Administrative Adjudication Chambers of the People's Courts, challenging administrative decisions to impose punishments and fines, restrict personal freedom or use of property, intervene in business operations, refuse to grant licenses, refuse to perform statutory duties, and a number of other matters.[245] In administrative litigation the plaintiffs are equal with the defendant government agencies.[246] The courts can issue judgments to annul illegal administrative decision, to compel administrative action, and to revise inappropriate administrative sanctions.[247]

For WTO cases, the Supreme People's Court issued two judicial interpretations, the *Provisions on Certain Issues Related to Hearing of International Trade Administration Cases* and the *Provisions on the Jurisdictional Matters Concerning Foreign-related Civil and Commercial Disputes*,[248] in August and February 2002,

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243 *Ibid.* Part I:2:(D):2.

244 See Cohen, *supra* note 219.

245 *Zhonghua Renmin Gongheguo Xingzheng Susong Fa* (*The Administrative Litigation Law of the People's Republic of China*) [*ALL*], Art. 2, 3, 11.

246 *Ibid.*, Art. 7.

247 *Ibid.*, Art. 54.

248 *Zuigao Renmin Fayuan Guanyu Shenli Guoji Maoyi Xingzheng Anjian Ruogan Wenti de Guiding* (*Provisions of the Supreme People's Court on Certain Issues Relating to Hearing of International Trade Administration Cases*), adopted on 27 August 2002. *Zuigao Renmin Fayuan Guanyu Shewai Minshangshi Anjian Susong Guanxia Ruogan Wenti de Guiding* (*Provisions of the Supreme People's Court on the Jurisdictional Matters Concerning Foreign-related Civil and Commercial Disputes*), adopted on 25 February 2002.

respectively, to meet the pleas from foreign businesses for better judicial protection. The two laws designate certain higher level courts to hear cases involving administrative actions concerning international trade covered by the WTO agreements. This is perceived as an effort to address foreign concerns on judicial competency and local protectionism, as it is understood that judges in higher courts are more experienced, well-educated and less susceptible to local influence.

While the ALL is intended to limit the arbitrariness of governmental agencies and introduce norms of accountability, this purpose is firstly undermined by the law's limited delegation of power to the judiciary. For example, courts can only adjudicate on the legality of a specific administrative action (*i.e.*, whether a license should be revoked by the administrative authority), but they have no power to examine the inherent validity (*i.e.*, constitutionality) of laws and regulations.[249] As Potter observes, this "suggests that the political system retains ultimate authority to determine the validity of laws and regulations."[250] However, to regard this as a fault of the Chinese administrative law might be a too Americanized criticism. China's political-legal system in this regard is closer to the United Kingdom (UK) than the U.S. separation of power model. In the UK system, the power of judicial review on legislations conflicts with the principles of parliamentary supremacy and is therefore unconstitutional.[251] In China, theoretically the NPC is the highest authority which supervises the work of court system. Thus constitutionally the judiciary is not in the legal position to review the validity of laws that are the products of the NPC.

This naturally leads to the need to analyze the separation of power issue in China and its impact on the independence of the judiciary. China observers claim that "the essence of the problem is that there is no clear separation of *powers* in China—only a separation of *functions*."[252] This obviously is a true statement given the monopoly of power by the CCP in both law and practice, as well as the NPC supremacy in China's constitutional structure. Art. 57 of the PRC Constitution stipulates that the NPC is the highest organ of the state power. Art. 128 says that the Supreme People's Court is responsible to the NPC and its standing committee, and local people's courts at different levels are responsible to the organs of state power which created them. Article 126, which stipulates the judicial independency of PRC courts, provides that the courts are not subject to the interference by administrative organs, public organizations or individuals. The interference from the NPC and its Standing Committee is however not excluded. Clearly, judicial independence in China is confined within the framework of NPC supremacy.

Just like parliamentary supremacy does not render the UK a non-rule of law country, NPC supremacy is not likely to be an obstacle to judiciary independence (and further to the construction of the "thin" rule of law) in China. After all, the NPC, like the British Parliament, is mainly a legislative organ and can hardly be a source of undue interference with the judicial matters. In a rule of law framework,

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[249] ALL, *supra* note 245, Art. 12.

[250] Potter, *supra* note 179 at 138.

[251] This parliamentary supremacy over judicial review has been eroded in the European Union (EU) legal system as the European Court of Justice can assert the power to exercise judicial review over UK domestic law according to the laws of the EU. But theoretically this has not an erosion of parliamentary supremacy as this is only allowed because of an Act of Parliament, which can be repealed by the Parliament.

[252] Ostry, *supra* note 214 at 128-29.

even a judiciary subordinated to parliamentary supremacy can exercise its judicial power independently. One can fairly say that China's courts would have achieved real judicial independence should they be submissive only to the NPC.

The problem of Chinese courts with respect to judicial independence, however, is chiefly related to the illegal interference from the CCP, the local governments, and sometimes even from the central administrative organs. In other words, the constitutional structure at least expects the courts be able to exercise without interference from other agencies or individuals, but currently the judiciary is even not able to perform its adjudication function in accordance with its limited, yet legally granted mandates.

Interference from local governments is a major problem impeding the establishment of judicial independence in China. As Cohen notes, Chinese judges, "who enjoy no tenure of office, are, by and large, appointed, promoted, compensated and removed not by the Supreme People's Court or Ministry of Justice in Beijing but by the local party and government elite."[253] The results are that "they and their courts are usually responsive to local influence more than legal norms" and that "this is the root cause of the 'local protectionism' that the Supreme People's Court condemns in its annual report …"[254]

Another concern is that the courts are also interfered with by the CCP. The Party's leadership of the country is one of the four "cardinal principles" uttered by Deng Xiaoping and provided in the Preamble of the PRC Constitution. But the Constitution also legally—and theoretically—prevents the CCP from interfering with court adjudication by stipulating judicial independence from external bodies which include any political party. It is important to note the present reality that the CCP leaders see the rule of law as a way of gaining legitimacy. As such, it currently has a larger stake in fair adjudication of civil and economic disputes (and to a large extent also administrative and criminal cases) as a whole than in the outcome of a particular case between company A and company B, because fair trial can certainly enhance people's confidence in the regime and thus enhance its legitimacy. Corruption and local protectionism erode this legitimacy basis as much as they damage the rule of law. However, although the current situation arguably supports the argument that the CCP might be a positive force for constructing the rule of law, it is difficult to say that this is sustainable in the long run, and it is even not true that the CCP is not interested in any case other than its trial is fair. It is widely known that politically dissidents were cruelly prosecuted in court trials, the procedures of which were even in violation of China's own Criminal Law and Criminal Procedure Law. Further, there is no institutional guarantee that the Party will not step in an administrative case or even a civil or commercial case. It has always preserved the power in practice to do so and this threat has always put the judiciary in danger of losing more of its autonomy.

IV. Concluding Remarks: Rule of Law Beyond WTO's Direct Impact

The concept of rule of law, once a venerable part of Western political philosophy, now enjoys a new run as a rising imperative in the era of globalization. A multitude

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253 See Cohen, *supra* note 219.

254 *Ibid.*

of nations in the world are engaged in a wide-range of rule-of-law reform initiatives, including those in Asia, East Europe, former Soviet Union, Latin America, Africa and even Middle East. To develop a market economy and to look for new legitimacy, both the Chinese people and the ruling CCP have embraced the rule of law concept. However, given China's authoritarian regime, the best China can get in a foreseeable future is a "thin" rule of law, which pays more attention to principles such as generality, prospectivity, clarity, reasonability, stability, congruence, judicial independence, among others, but cares less about the substantive content of the law, such as whether it is a rule of law in a liberal democracy.

The "thin" theories of the rule of law, albeit originally a Western idea, can be applied in the Chinese context, largely because of the evolutionary nature and trends of the Chinese legal system. Against this view are legal orientalism and quasi-legal orientalism, which, unfortunately, overlook the transitional nature of the Chinese society as well as its purported destination. As Christian Murck, the Chairman of American Chamber of Commerce in China, observes, "in thinking about China, it is always useful to consider trends, as well as conditions at a particular point of time."[255] The rule of law construction in China must be apprehended in the country's rapidly developing legal system and economic transition. In addition, the "thin" rule of law has certain irreplaceable advantages in the Chinese context. Fuller's "inner morality of law" discourse, suitable for the Chinese context, shows that even a "thin" rule of law can bring welfare to individuals as well as to the society.

China's construction of a "thin" rule of law has been accelerated by the country's accession to the WTO, which has brought about massive revision of WTO-inconsistent laws and promulgation of new ones. Specifically, WTO can greatly and effectively foster China's legal projects for the "thin" rule of law because WTO's requirements on uniform, impartial and reasonable application of laws, transparency and judicial review obligate China to take measures which constitute key elements of the thin theories. Thus the WTO has direct, albeit limited, impact on the rule of law construction in China.

But can the WTO's impact go beyond this? Even towards democracy and human rights? Probably it is only possible if one accepts this proposition: economic development brought by trade and investment (covered by the WTO) contributes to the establishment of a civil society under the rule of law. Such a civil society will, in turn, lead to the protection of human rights and political rights. Following the growth of civil society, the political and economic infrastructures required for freedom and democracy will be gradually built up, which will eventually lead to the establishment of democratic institutions. Whether or not this is true, this cannot be the WTO's direct effect on the development of the rule of law in China.

The major teaching we can get from the theoretical studies of the "thick" and "thin" theories in the Chinese context is that it is always good to continue the development of the infrastructure of formal rules and institutions. The universal philosophy underlying today's development policy assumes that a country must adopt the proper institutions to facilitate growth and that institutions can be transferred across border, although local conditions obviously need to be taken into consideration. In China, impressive records have been shown with respect to legal reforms in the areas

[255] Murck, *supra* note 193.

of international trade, investment, domestic commerce and others business related areas. As noted by observers, the legitimacy of the CCP to rule the country is now based on economic growth rather than democracy. However, "on any variant of the economic-performance-based claim to undemocratic political legitimacy in China, law is called upon to play a vital role in creating the framework of rules and institutions for market-oriented economic growth."[256] Regardless of the utilitarian intention, formal institutions and rules are gradually developed in China to address needs of international business and the construction toward a functional legal system for market economy is smoothly going on.

The analysis of this article also shows that certain problems associated with Chinese legal reform, such as judicial independence and congruence of law and its enforcement, cannot be effectively solved under the current regime. They can only be meaningfully addressed by redefining the relations among the CCP, the legislature, the government, and the judiciary. While China should continue the institutions-building projects, it should also bear in mind that only political initiatives for reforming the role of the CCP in the country's political structure can eventually help the establishment of a "thin" rule of law and probably a "thick" rule of law in the long run.

[256] See Jacques deLisle, "Chasing the God of Wealth while Evading the Goddess of Democracy: Development, Democracy and Law in Reform-Era China", in Sunder Ramaswamy & Jeffrey Cason, eds., *Development and Democracy: New Perspectives on an Old Debate* (Hanover: University Press of New England, 2003) at 252.