

TRADITIONAL CULTURE V. WESTERNIZATION: ON THE ROAD TOWARD THE RULE OF LAW IN CHINA

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Meaningful studies on China cannot ignore traditional Chinese culture and its influence in the country. A study of the *rule of law* of China is no exception. Generally speaking, China is not governed primarily by the *rule of law*. China has traditionally been an agrarian state—a characteristic that has historically fostered a strong family system. China’s agrarian nature also shaped traditional characteristics of Chinese culture in which *rule of law* is largely non-existent. Historically, the *rule of man*, a traditional Chinese value, has served as one of the major obstacles to China achieving legal modernization. Substantial legal westernization is an essential and practical way for China to develop into a meaningful *rule of law* state.

Section I of this Article provides an effort to define a basic Western idea of the *rule of law* and, based on that, examines the status of the *rule of law* in China regarding the supremacy of the Constitution, court independence, and the *rule by law* constitutional amendment. Section II explores the *rule of man* nature of the Chinese traditional culture through analyses of the Chinese family system and ethnic society, power-over-right tradition, and the comparison between Confucianism and Legalism. Section III investigates the conflicting roles of traditional values and legal westernization in China’s pursuit of the *rule of law*, looking at case studies into the Self-Strengthening Movement and Taiwan’s transition to the *rule of law* since 1987. This Article concludes by proposing specific issues for further studies on the topic of traditional culture and westernization in searching for a road toward the *rule of law* in China.

I. THE STATUS OF “RULE OF LAW” IN CHINA

“Western culture as a whole is marked by the ‘rule of law.’”¹ This is not the case in China, which remains subject to governance primarily based on the *rule of man*. However, China is arguably transitioning toward a *rule of law* system.²

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1. Bernhard Grossfeld & Edward J. Eberle, *Patterns of Order in Comparative Law: Discovering and Decoding Invisible Powers*, 38 TEX. INT’L L.J. 291, 295 (2003).

2. Randall Peerenboom, *China’s Long March Toward Rule of Law* 6 (2002) (“Although it may be too early to declare definitely that China will succeed in fully implementing rule of law, there is considerable direct and indirect evidence that China is in the midst of a transition toward

A. Defining the Rule of Law

It is difficult to define a universal concept of the *rule of law* because “thanks to ideological abuse and general over-use,” the phrase has become almost “meaningless.”³ The *rule of law* is certainly a contested concept, and some scholars even conclude that “there is no single correct theory or interpretation.”⁴ As Rachel Kleinfeld Belton observed, when reading articles that discuss the *rule of law*, “the concept emerges looking like the proverbial blind man’s elephant – a trunk to one person, a tail to another.”⁵ The *rule of law* has turned into the unclear term it is today arguably because “[h]ow one defines rule of law depends largely on one’s purposes.”⁶

Although the traditional idea of *rule of law* traces its history to the time of Aristotle,⁷ it is nonetheless significant to modern States. The International Bar Association (IBA) regards the *rule of law* as “the only mechanism so far devised to provide impartial control of the use of power by the State.”⁸ As Michael Oakeshott commented, “the *rule of law* bakes no bread, it is unable to distribute loaves or fishes (it has none), and it cannot protect itself against external assault, but it remains the most civilized and least burdensome conceptions of a state yet to be devised.”⁹ The Chinese government also acknowledges its universal value: “[t]he rule of law signifies that a political civilization has developed to a certain historic stage. As the crystallization of human wisdom, it is desired and pursued by people of all countries.”¹⁰

Ancient Greek philosophers such as Plato and Aristotle are regarded as the founders of the idea, and their teachings represent the early understanding of the essence of the *rule of law*.¹¹ Plato wrote:

Where the law is subject to some other authority and has none of its own, the collapse of the state, in my view, is not far off; but if law is the master of the government and the government is its slave, then the situation is full of promise and men enjoy all the blessings that the gods shower on a state.¹²

some version of rule of law . . .”).

3. Judith N. Shklar, *Political Thought and Political Thinkers* 21 (1998).

4. Peerenboom, *supra* note 2, at 102.

5. Rachel Keinfeld Belton, *Competing Definitions of the Rule of Law Implications for Practitioners*, 55 CARNEGIE ENDOWMENT FOR INT’L PEACE (2005), at 5.

6. Peerenboom, *supra* note 2, at 102.

7. Lawrence B. Solum, *Equity and the Rule of Law*, in *The Rule of Law* 120, 121 (Ian Shapiro ed., 1994).

8. INT’L BAR ASS’N, *THE RULE OF LAW: A COMMENTARY ON THE IBA COUNCIL’S RESOLUTION OF SEPTEMBER 2005* 3 (2009), available at <http://www.ibanet.org/Document/Default.aspx?DocumentUid=A89CFFB1-BD4A-445C-8CAB-553AF21BD7A7>.

9. Michael Oakeshott, *THE RULE OF LAW*, in *On History and Other Essays* 129, 178 (1999).

10. State Council Info. Office, China, *China’s Efforts and Achievements in Promoting the Rule of Law*, 7 CHINESE J. INT’L L. 513, 514 (2008).

11. Tsinghua Forum of Rule of Law 59 (2001).

12. Plato, *LAWS*, in *Plato Complete Works* 1318, 1402 (JOHN M. COOPER & D.S.

Aristotle also commented in 350 B.C. that “it is more proper that law should govern than any one of the citizens: upon the same principle, if it is advantageous to place the supreme power in some particular persons, they should be appointed to be only guardians, and the servants of the laws.”¹³ The works of John Locke, Montesquieu, Dicey, and Weber are deemed to be the theoretical bases of the traditional idea of *the rule of law*.¹⁴ Dicey coined the term *rule of law* and was the first to define it.¹⁵ According to Dicey,

It means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government It means, again, equality before the law . . . [which] excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals. . . . The “rule of law,” lastly, may be used as a formula for expressing the fact that . . . the constitution is the result of the ordinary law of the land.¹⁶

The three features of the *rule of law* are of enduring significance and capture the essence of the concept in its modern sense: the supremacy of law, equal protection, and the court’s function in the lawmaking process that makes an independent judiciary absolutely necessary.¹⁷

Contemporary definitions of the *rule of law* arguably fall into two basic theoretical categories: thin and thick.¹⁸ Thin theories simplify and focus on the *rule of law’s* formal or instrumental features as minimum requirements for an effectively functioning system of law, while disregarding substantive content, such as moral values (e.g., democratic or non-democratic, and good versus evil).¹⁹ The thin conception satisfies the most basic elements of the *rule of law*: “meaningful restraints on the state and . . . ruling elites,” “supremacy of the law,” and “equality of all before the law.”²⁰ A thin theory’s concentration on legal techniques and institutions potentially risks its use to support an evil end. It was regarded as a “sharp knife” with a morally neutral value of the law.²¹ Professor Randall

HUTCHINSON EDS., TREVOR J. SAUNDERS TRANS., 1997).

13. Aristotle, *A Treatise on Government* 101 (WILLIAM ELLIS TRANS., J.M. DENT & SONS LTD. 1912).

14. Jiang Mingan, *Xing Zheng Cheng Xu: Dui Chuan Tong Kong Quan Ji Zhi de Chao Yue* [*Administrative Procedures: Beyond the Traditional Mechanisms of Power Control*], 4 *Xing Zheng Faxue Yan Jiu* 16 [Administrative L.J.] 16 (2005) (China).

15. TOM Bingham, *The Rule of Law* 3 (2010).

16. A.V. Dicey, *Introduction to the Study of the Law of the Constitution* 202-03 (1964).

17. See Bryan A. Garner, *A Dictionary of Modern Legal Usage* 776 (1995).

18. Peerenboom, *supra* note 2, at 3. Rachel Kleinfeld Belton divides *rule of law* definitions between those that highlight institutional attributes and “those that emphasize the ends that the rule of law is intended to serve within society.” Belton, *supra* note 5, at 3.

19. Peerenboom, *supra* note 2, at 3.

20. *Id.* at 2.

21. JOSEPH RAZ, *THE AUTHORITY OF LAW* 225 (1979) (“That does not show that it is not a

Peerenboom defines the constitutive elements of a thin theory, besides the effective restraints on state actors, as follows:

- (a) There must be procedural rules for law-making and to be valid, laws must be made by an entity with the authority to make laws in accordance with such rules;
- (b) Transparency: laws must be made public and readily accessible;
- (c) law must be generally applicable: that is, law must not be aimed at a particular person and must treat similarly situated people equality;
- (d) Laws must be relatively clear;
- (e) Laws must generally be prospective rather than retroactive;
- (f) Laws must be consistent on the whole;
- (g) Laws must be relatively stable;
- (h) Laws must be fairly applied;
- (i) Laws must be enforced: the gap between the law on the books and law in practice should be narrow;
- (j) Laws must be reasonably acceptable to a majority of the populace or people affected (or at least the key groups affected) by the laws.²²

In contrast, a thick (substantive) theory additionally includes political values and moral concerns (e.g., a particular economic system and or governmental structure, democratic versus non-democratic values, and human rights status).²³ Although it has tried to avoid providing a definition, the IBA has listed “fundamental principles” of the *rule of law* incorporating a liberal democratic version of the thick theory:

An independent, impartial judiciary; the presumption of innocence; the right to a fair and public trial without undue delay; a rational and proportionate approach to punishment[;] a strong and independent legal profession; strict protection of confidential communications between lawyer and client; equality of all before the law Accordingly, arbitrary arrests; secret trials; indefinite detention without trial; cruel or degrading treatment or punishment; intimidation or corruption in the electoral process, are all unacceptable.²⁴

Based on these descriptions, the IBA identifies essentially two pillars of the *rule of law*: “(1) [s]ubmission of all to the law/[s]upremacy of law; [and] (2) [t]he separation of powers.”²⁵ Specifically, “[t]he law is the ruler, the supreme authority. No-one is above or beyond the law. Everyone is subject to and governed by the law,” and “the independence of both the Legislature and the Judiciary is . . . 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.”)

22. Peerenboom, *supra* note 2, at 65. Lon Fuller identifies eight principles laws should satisfy: generality, promulgation, prospectiveness, clarity, consistency, no impossible obligation, constancy, and congruence. Lon L. Fuller, *The Morality of Law* 39 (1964).

23. Peerenboom, *supra* note 2, at 3.

24. INT'L BAR ASS'N, *supra* note 8, at 2.

25. *Id.* at 3.

fundamental requirement of the Rule of law.”²⁶

Discussing the advantages and disadvantages of thin versus thick theories is beyond the scope of this Article.²⁷ However, it is safe to conclude that even the thinnest conception of the *rule of law* requires the supremacy of law and judicial independence to ensure proper enforcement. An examination of these elements within the Chinese legal system follows.

B. The Status of the Rule of Law in China

Scholars engaged in Chinese legal studies generally agree that while China has made great achievements in its legal development during the past three decades, much work remains to develop China’s legal system into a *rule of law* system.²⁸ Reformist China “gradually took the road of building a socialist country under the rule of law,”²⁹ as required by its Constitution: “[t]he People’s Republic of China governs the country according to law and makes it a socialist country under rule of law.”³⁰ It is widely recognized that China has made tremendous progress in developing a law-based order through legislation, legal enforcement, and legal education. Professor Cohen’s observation offers an overview of the progress China has made:

Thirty years later, China plainly has a formal legal system incorporating many norms and concepts taken from continental European legal systems. It bears the earmarks of its Soviet origins, of more recent Anglo-American influence and, perhaps most important, of the country’s imperial past. The National People’s Congress, the State Council’s executive departments, and their provincial and local counterparts have promulgated a huge volume of legislation, regulations and other norms covering most spheres of human activity.³¹ The P.R.C. has also gradually

26. *Id.* at 3, 5.

27. A thin theory of the *rule of law* is regarded by some scholars as “a better benchmark for making cross cultural comparisons than a thick theory, and in particular that a thin theory is a better benchmark for judging the performance of China’s legal system than a liberal democratic theory since there seems to be little support for a liberal democratic rule of law in China at this time.” Randall Peerenboom, *China and the Rule of Law: Part I*, 1 Perspectives 5 (2000), available at http://www.oycf.org/Perspectives2/5_043000/china_and_the_rule_of_law.htm [hereinafter Peerenboom, *China and the Rule of Law*].

28. See *Human Rights in China in the Context of the Rule of Law: Hearing Before the Cong.-Exec. Comm’n on China*, 107th Cong. 63-67 (2002) (statement of William P. Alford, Henry L. Stimson Professor and Director of East Asian Legal Studies, Harvard Law School), available at <http://www.cecc.gov/pages/hearings/020702/alford.php?mode=print> (stating that China’s legal development has advanced but remains far from the accepted definition of *rule of law*).

29. State Council Info. Office, China, *supra* note 10, at 515.

30. XIANFA art. 5 (1982) (China).

31. “The NPC and its Standing Committee have enacted 229 laws currently in effect. . . . As supplements, the State Council has enacted nearly 600 administrative regulations currently in effect; local people’s congresses and their standing committees at various levels have enacted over 7,000 local regulations currently in effect; and the people’s congresses of the ethnic

formulated most of the domestic legal rules required by the many multilateral and bilateral international agreements that it has concluded, including its World Trade Organization commitments The P.R.C. has revived and strengthened its court, its procuracy, its Ministry of Justice, its legal profession, its commercial arbitration organizations and other relevant institutions. Legal education and scholarship have proliferated. China has well over 600 law schools of various kinds, several legal newspapers and a flourishing law-publishing industry. It has roughly 200,000 judges, 160,000 procurators, 150,000 lawyers and hundreds of thousands of legal specialists working as law teachers, legislative aides, government agency experts “in house” corporate counsel, publishing editors and even journalists. The country now has a series of burgeoning legal elites that did not exist in 1978.³²

It is equally recognized however that China’s legal system does not meet even the thinnest conception of the *rule of law*,³³ and “the realization of rule of law in any form will require significant changes to the present system.”³⁴ Achieving a more detailed understanding of the difficulties of the *rule of law* in China requires examining the status of constitutional supremacy, judicial independence in the legal practice, and the nature of the *rule by law* in the constitutional amendment.

1. A Supreme Constitution?

China is not without any formal *rule of law*. Indeed, it has a written Constitution. Since 1949, four formal constitutions have been promulgated, with the latest framed in 1982.³⁵ The preamble of the 1982 Constitution provides that the Constitution “is the fundamental law of the State and has supreme legal authority.”³⁶ However, the Constitution does not provide an effective and workable mechanism to put itself into force. The inability of Chinese courts to implement the Constitution is a key reason why the Constitution falls short of being China’s supreme, fundamental law.

The Chinese Constitution specifically provides that the Standing Committee

autonomous areas have enacted over 600 autonomous regulations and separate regulations currently in effect. The departments under the State Council, the people’s governments of the provinces, autonomous regions, municipalities directly under the central government, and the larger cities have also enacted numerous rules.” State Council Info. Office, China, *supra* note 10, at 521.

32. Jerome A. Cohen, *China’s Reform Era Legal Odyssey*, 171 *Far E. Econ. Rev.* 34, 35 (2008).

33. Jiangyu Wang, *The Rule of Law in China: A Realistic View of the Jurisprudence, the Impact of the WTO, and the Prospects for Future Development*, 2004 *Sing. J. Legal Stud.* 347, 372-73 (“[I]t 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 all aspects.”).

34. Peerenboom, *supra* note 2, at 6.

35. See XIANFA (1954) (China); XIANFA (1975) (China); XIANFA (1978) (China); XIANFA (1982) (China).

36. Xianfa pmb. (1982) (China).

of the National People's Congress (NPCSC) has the power to "interpret the Constitution and supervise its enforcement."³⁷ As a result of this provision, the Chinese judiciary is arguably not given the power to exercise any constitutional jurisdiction.³⁸ According to Alexander Hamilton, "[l]aws are a dead letter without courts to expound and define their true meaning and operation."³⁹ A unique dilemma exists in Chinese constitutional enforcement; namely, that the supreme law in the land cannot generally be enforced in court.

On July 30, 1955, the Supreme People's Court published its *Reply on Not to Cite the Constitution in Criminal Case Judgments*,⁴⁰ which suggests that Chinese courts should not cite the Constitution as a legal basis for either conviction or sentencing.⁴¹ This reply, although applicable only to criminal case judgments, is a large factor in why even non-criminal courts refuse to cite the Constitution.⁴² The decision by the Supreme People's Court on the application of the Constitution in *Qi Yuling v. Chen Xiaoqi*⁴³ on August 13, 2001 was once regarded as a turning point in Chinese constitutional jurisprudence.⁴⁴ The Court wrote,

[B]ased on the facts presented in front of us, we assert that, by means of violating the right to identity, Chen Xiaoqi and others have infringed upon the fundamental right to education that Qi Yuling should enjoy in accordance with the constitutional provisions, and caused concrete damages to the appellant; they should assume civil liabilities accordingly.⁴⁵

This interpretation triggered explicit support for use of the Chinese Constitution by courts and set a precedent of constitutional jurisprudence.⁴⁶ Some legal scholars even called it "a Chinese version of *Marbury v. Madison*."⁴⁷

37. Xianfa art. 67 (1982) (China).

38. Guobin Zhu, *Constitutional Review in China: An Unaccomplished Project or a Mirage?* 43 *Suffolk U. L. Rev.* 625, 644 (2010).

39. THE FEDERALIST NO. 22, at 55 (Alexander Hamilton) (Roy P. Fairfield ed., 1981).

40. *Zui gao Renmin Fayuan guan yu zai xing shi pan jue zhong bu yi yuan yin Xian Fa zuo lun zui ke xing de yi ju de fu han* [*Supreme People's Court Reply on Not to Cite the Constitution in Criminal Case Judgments*], SUP. PEOPLE'S CT. GAZ. 11298 (Sup. People's Ct. 1955) (China) Interpretation, YanZi (author translation).

41. *Id.*

42. Huang Songyou, *Xianfa sifahua qiji yiyi: cong zui gao renmin fayuan jitian de yige pifu tanqi* [*Constitutional Judicialization and its Significance: A Comment on Today's Response by the Supreme People's Court*], Renmin Fayuan Bao [People's Court Daily], Aug. 13, 2001 (author translation).

43. *Qi Yuling v. Chen Xiaoqi*, Sup. People's Ct. Gaz. (SUP. PEOPLE'S CT. 2011) (CHINA).

44. See Guobin Zhu, *supra* note 38, at 645 (regarding *Qi Yuling* as landmark case for establishing Chinese judicial review).

45. *Qi Yuling v. Chen Xiaoqi*, Sup. People's Ct. Gaz. (SUP. PEOPLE'S CT. 2011) (CHINA) (EMPHASIS ADDED).

46. See Huang Songyou, *supra* note 42.

47. Tong Zhiwei, *Xianfa shiyong ying yixun xianfa bensheng guiding de lujing* [*The Constitutional Application Should Follow the Route Provided for by the Constitution*], 6 *ZHONGGUO FAXUE* [CHINA LEGAL SCIENCE] (2008) (China); see also Guobin Zhu, *supra* note

However, the Supreme People's Court did not go much further in practice; rather, this interpretation was rejected by the Court on December 18, 2008 when the Court determined that it no longer applied.⁴⁸ Thus, the question of court implementation of the Constitution remains unanswered.

In *Marbury v. Madison*,⁴⁹ Chief Justice John Marshall wrote, “[t]he principle, supposed to be essential to all written constitutions, is that a law repugnant to the constitution is void.”⁵⁰ Article 5 of the Chinese Constitution also declares, “[n]o laws or administrative or local rules and regulations may contravene the Constitution.”⁵¹ Nonetheless, China still lacks a specific and effective way to deal with constitutional violations embodied in laws, regulations, or Party policies. Laws and policies thus have higher authority in practice because of their enforceability in courts and through the Party's discipline and personnel-control system.⁵² China's judicial review mechanism only applies to complaints against specific administrative actions. However, it is inapplicable in decisions of general binding force and is incapable of dealing with instances where the law itself violates the Constitution.⁵³

2. An Independent Court System?

The Chinese White Paper on the *rule of law* states that “China has established a sound judicial system, completed the adjudicative systems for civil, administrative and criminal cases, forming a modern judicial system in line with the requirements for building a socialist country under the rule of law, in a bid to safeguard judicial justice and social justice.”⁵⁴ Nevertheless, judging from the most basic *rule of law* requirements, the Chinese judiciary falls short on three vital dimensions: (1) independence, (2) competence, and (3) enjoyment of sufficient powers.⁵⁵

38, at 646 (comparing *Qi Yuling v. Chen Xiaoqi* to *Marbury v. Madison*).

48. See *Zui Gao Ren Min Fa Yuan Guan Yu Fei Zhi 2007 Nian Di Yi Qian Fa Bu De You Guan Si Fa Jie Shi (Di Qi Pi) De Jue Ding* [*The Supreme Court Decision on Canceling Relevant Interpretations Promulgated by the End of 2007 (the Seventh Version)*], SUP. PEOPLE'S CT., Interpretation, (No. 15) (2008) (China).

49. 5 U.S. (1 Cranch) 137 (1803).

50. *Id.* at 180.

51. Xianfa art. 5 (1982) (China).

52. Haiting Zhang, *Fa Lü Ying Fu He Xian Fa* [*The Law Should Conform to the Constitution*], (Zhong Wai Fa Xue) PEKING U. L.J. 243-48 (2001) (China).

53. Zhonghua Renmin Gongheguo Xing Zheng Su Song Fa [Administrative Procedure Law] (promulgated by National People's Congress, April 4, 1989, effective Oct. 1, 1990) arts. 11 & 12 (1989) (China) (“The people's court shall accept actions initiated by citizens, legal persons or other organizations against any of the following *specific administrative acts*. . . .” (art. 11) (emphasis added). “The people's courts *shall not* accept actions initiated by citizens, legal persons or other organizations concerning any of the following matter: (1) State acts in areas like national defense and foreign affairs; (2) Administrative rules and regulations, or decisions *with general binding force* formulated and promulgated by administrative organs. . . .” (art. 12) (emphasis added).

54. State Council Info. Office, China, *supra* note 10, at 534.

55. Peerenboom, *supra* note 2, at 280.

Article 126 of the current Chinese Constitution explains, “[t]he People’s Courts exercise judicial power independently, in accordance with the provisions of the law, and are not subject to interference by any administrative organ, public organization or individual.”⁵⁶ Yet, deliberately designed to reflect the current political reality, Article 126 has been interpreted to mean that the People’s Courts are still subject to interference at all levels from the Party organizations and the People’s Congress.⁵⁷ The 1954 Constitution established that “[t]he People’s Court tries cases independently and follows only the law.”⁵⁸ But the 1975 and 1978 Constitutions omitted this entire article, and the 1982 Constitution adopted the current version.⁵⁹

Su Li comments, “[t]oday, although the [Chinese Communist Party] has adopted ‘relying on law to rule the country’ (yifa zhiguo) and judicial independence is inscribed in the Constitution, Party organizations and individuals persist in influencing and interfering with the judiciary.”⁶⁰ At the county level and above the Party organization, there is an organ called the Committee of Politics and Law (*Zheng Fa Wei*).⁶¹ Its membership includes the President of the People’s Court, the Chief-Procurator of the People’s Procuratorate, the Director of the Public Security Bureau, and the Director of the Justice Bureau at the corresponding level.⁶² Although there is no provision either in the Party Constitution or in the Constitution of the People’s Republic of China regulating this committee, it practically operates to coordinate and ensure that all judicial organs—including the People’s Court—are subject to the leadership of the Party.⁶³

There are other factors that contribute to the courts’ lack of independence. Court expenses and judicial wages are part of the local governmental budget.⁶⁴ Courts’ financial dependence on local governments is debilitating. A president of a local court told journalists,

At one time, I was called by the County Secretary of the Party Committee and asked to reduce the sentence of a criminal case. The reason for this was local economic development; I could not just ignore the request, for the money bags were in the hands of the Party and government, and if I didn’t listen, the whole interest of the court would

56. Xianfa art. 126 (1982) (China).

57. Xiao Weiyun, *Xianfa de dan sheng* [The Birth of the Constitution] 78-79 (1986).

58. Xianfa art. 78 (1954) (China).

59. See Xiao Weiyun, *supra* note 57, at 78.

60. Zhu Suli, *Political Parties in China’s Judiciary*, 17 *Duke J. Comp. & Int’l L.* 533, 540 (2006).

61. See generally *Zheng Fa Wei* [Committee of Politics and Law], Baidu.com, <http://baike.baidu.com/view/730022.htm> (last visited Oct. 21, 2011) (describing the function of the Committee of Politics and Law).

62. *Id.*

63. Lin Feng, *Constitutional Law in China* 232 (2000).

64. See *Yu Suan Fa* [Budget Law of the People’s Republic of China] art. 5, ¶ 3 (China) (promulgated by Order No. 21 of the President of the People’s Republic of China, Mar. 22, 1994, effective Jan. 1, 1995) (relating to local government control over judicial budget).

be affected.⁶⁵

Unavoidably, courts have to serve the local economy, the central works of the local party committee, and the local government.

Another factor curtailing judicial independence is the lack of life tenure or term guarantees for judges.⁶⁶ Under the principle of party cadre control, personnel issues in courts still fall within the purview of Party organizations.⁶⁷ Professor Cohen wrote,

Judges [in China] are often vulnerable to corruption, political control and the pressures of “guanxi” (social connections based on family, friendship, school or local ties). Since their appointment, promotion, assignment, compensation and removal are all at the pleasure of local government and Party leaders rather than the Supreme People’s Court or provincial High Court, they and the litigants who appear before them are subject to the abuses of “local protectionism.”⁶⁸

Thus, the political pressure of local politics and limited resources contribute to the lack of judicial independence.

3. The Rule by Law and the Rule of Man (1999 Amendment to the Constitution)

The current Chinese Constitution has been amended four times since its promulgation in 1982.⁶⁹ At least one amendment is typically promulgated

65. See Guo Bensheng & Fu Peiyi, *Tan Suo Fu He Zhongguo Guo Qing De Fa Zhi Biao Zhun: Shen Pan Du Li Shi Zheng Tu* [Exploring the Rule of Law Standard Fitting Chinese Condition: Independent Adjudicating is the Right Choice], Liao Wang Zhou Kan [Liao Wang News Weekly], May 27, 2007 (author translation).

66. See generally *Fa Guan Fa* [Judge’s Law] (promulgated by the 9th National People’s Congress, July 1, 1995, amended June 30, 2001) (China) (highlighting the judicial appointment process and lack of judicial tenure).

67. P.R.C. President and Party General Secretary Hu Jintao proposed on the National Conference on Political–Legal Work that “judges and procurators ‘shall always regard as supreme the Party’s cause, the people’s interest and the Constitution and laws.’ This instruction soon became a doctrine known as ‘the Three Supremes’ . . . [The Party’s] cause is understood to be ‘more supreme’ than the Constitution and the laws.” Cohen, *supra* note 32, at 37. Due to Party control and the judiciary’s dependence on the government, it is not strange to find the following pledging words in the report by the President of the Supreme Court to the National People’s Congress: “In the last five years, centering on the general works of the Party and the Country, we strengthened our trial and enforcement works all around. In the future, we will tightly unite around the Central Committee of the Party with comrade Hu Jintao as the General Secretary, holding highly the flag of the theory of Deng Xiaoping and guided by the important thought of Three Representations . . . We would do our job better.” Chief Justice Wang Shengjun, *Zui Gao Renmin Fayuan Gong Zuo Bao Gao* [Report of the Supreme People’s Court on Session II of the Eleventh National People’s Congress], XINHUA NEWS AGENCY, Mar. 17, 2009 (author translation).

68. Jerome A. Cohen, *Law in Political Transitions: Lessons from East Asia and the Road Ahead for East Asia*, 37 N.Y.U. J. INT’L L. & POL. 423, 426 (2005).

69. Xianfa (1982) (CHINA) (AMEND. I APPROVED on Apr. 12, 1988, at the first session of the 7th National People’s Congress [NPC]; amend. II approved on Mar. 29, 1993, at the first session of the 8th NPC; amend. III approved on Mar. 15, 1999, at the second session of the 9th NPC; amend. IV approved on Mar. 14, 2004, at the second session of the 10th NPC).

following each National Congress Meeting of the Chinese Communist Party (CCP), which occurs every five years. The 1999 amendment added a section pledging to “rul[e] the country in accordance with the law” and to build “a socialist country under rule of law.”⁷⁰ Surely, the *rule of law* is a long-term goal, and China is currently making efforts to practice “ruling the country in accordance with law.”⁷¹ This is certainly a significant step forward in China’s adoption of the *rule of law*. But does this phrase go beyond mere *rule of man*?

Ruling the country in accordance with the law can easily support the definition of *rule by law*, a notion commonly utilized among academics, in contrast with *rule of law*. The *rule by law* and the *rule of law* can be differentiated in various ways. Linguistically, the prepositions “by” and “of” have different meanings. Generally speaking, “by” stresses the way or the method, “indicating the means of achieving something,”⁷² and “of” describes the character or nature.⁷³ In Chinese, *rule by law* translates as *Yi Fa Zhi Guo* (依法治国), a way or method of ruling a country, and *rule of law* translates as *Fa Zhi* (法治). *Rule by law* and *rule of law* also have different meanings from conceptual and objective points of view. Yingyi Qian regards constraining government arbitrariness as the fundamental difference between the two.⁷⁴ Randall Peerenboom argued that even a thin *rule of law* differs from *rule by law* in that “rule of law imposes meaningful restraints on state and government officials,”⁷⁵ whereas “rule by law refers to an instrumental conception of law in which law is merely a tool to be used as the state sees fit.”⁷⁶ Professor Wang Chenguang summarized this point, contrasting the *rule by law* with a thick theory of the *rule of law*:

- (1) Rule by law connotes a stable state for laws and the legal system—it is a static concept—while rule of law connotes laws and a legal system whose procedures and processes of operation are all changing, which is a dynamic concept.
- (2) Rule by law does not express some ideas included in the idea of rule of law; for example: some principles like the supremacy, impartiality, universality, and transparency of law, and law’s role in checking power and guaranteeing human rights.
- (3) Rule by law does not emphasize the “sovereignty of the people” and legal governance as much as rule of law, which could result in a situation where law is used as a tool for control under a rule of man system . . .
- (4) Rule by law can be built on any kind of economic foundation and can fit any type of political system; rule of law must be built on the bases of

70. Xianfa amend. III (1982) (China).

71. *Id.*

72. New Oxford American Dictionary 237 (2d ed. 2005).

73. *Id.* at 1180. The word “of” expresses “the relationship between a general category and the thing being specified which belongs to such a category (e.g. the idea of a just society).” *Id.*

74. Yingyi Qian, *The Modern Market Economy and the Rule of Law*, 1 PERSPECTIVES 5 (2000).

75. Peerenboom, *China and the Rule of Law*, *supra* note 27, ¶ 20.

76. Peerenboom, *supra* note 2, at 8.

a market economy.⁷⁷

Under China's current social and political circumstances, the *rule by law* and the *rule of law* contrast in a meaningful way.⁷⁸ Under *Yi Fa Zhi Guo* (依法治国), the question of who rules by the law and who is ruled by the law remains unanswered. Such questions fall within the sphere of the *rule of man*. The *rule by morals* (*Yi De Zhi Guo* (以德治国) concept, developed by the Party shortly after the *rule by law* constitutional amendment, supports this idea. It stresses moral education for all people—including officials—and seeks to establish stable rule based on the development of a good, moral society.⁷⁹ The Party leaders determined it was not only enough to *rule by law*, but that *rule by morals* was equally important.⁸⁰ Party Secretary of the Central Committee of the CCP Jiang Zemin argued,

Both laws and morals are important means to maintain social orders and to regulate people's thoughts and behaviors. They interact and support each other. The rule by law regulates behaviors of social members through its authority and coercion, while the rule by morals improves social members' ideological and moral consciousness through persuasion and exhortation strength. Moral and legal norms should be combined with each other, playing a unified role.⁸¹

In Jiang's report at the Sixteenth Party Congress on November 8, 2002, he proclaimed the Party should run the country by combining the *rule by law* and the *rule by morals*.⁸² The combined nature of these two conceptual rules is dependent on *rule of man*, which itself originated from China's long history and traditional culture, as discussed below.

II. THE RULE OF MAN CULTURE AND THE RULE OF LAW IN CHINA

The wise man delights in water;

The good man delights in mountains;

The wise move;

77. Wang Chenguang, *From the Rule of Man to the Rule of Law, in China's Journey toward the Rule of Law: Legal Reform, 1978-2008* 1, 9-10 (2010).

78. Professor Li Shuguang comments that "Chinese leaders want rule by law, not rule of law. . . . The difference . . . is that under the rule of law, the law is preeminent and can serve as a check against the abuse of power. Under rule by law, the law can serve as a mere tool for a government that suppresses in a legalistic fashion." Brian Z. Tamanaha, *On The Rule of Law: History, Politics, Theory* 3 (2004).

79. In June 2000, Party Secretary Jiang Zemin proposed, for the first time, the idea of "rule by morals (以德治国)" at the Central Ideological and Political Working Conference. Hao Tiechuan, *Review on the Rule of Law and the Rule by Morals*, PEOPLE.COM.CN (Mar. 30, 2001, 5:54 PM), <http://www.people.com.cn/GB/guandian/29/173/20010330/429554.html> (China).

80. See Jiang Zemin, Jiang Zemin Wen Xuan [Selected Works of Jiang Zemin] V. III 196-202 (2006) (China) (author translation).

81. *Id.*

82. See Jiang Zemin, *Build a Well-Off Society in an All-Round Way and Create a New Situation in Building Socialism with Chinese Characteristics*, BEIJINGREVIEW.COM.CN, http://www.bjreview.com.cn/document/txt/2011-03/24/content_360557.htm (last updated Mar. 24, 2011) (China).

The good stay still;
The wise are happy;
The good endure.
 – Confucius⁸³

Although not self-evident, it is the majority view that the *rule of law* and the *rule of man* are in direct opposition.⁸⁴ Aristotle concluded that “[t]he rule of law is better than that of any individual.”⁸⁵ John Adams wrote, “[t]hey define a republic to be a government of laws, and not of men.”⁸⁶ Denise Meyerson argued, “[t]he rule of law is the opposite of the rule of power. It stands for the supremacy of law over the supremacy of individual will.”⁸⁷

Scholars who deny the dichotomy or treat it as an oversimplification rely mainly on the belief that either “no system of rule is independent of those who hold political office”⁸⁸ or that “citing Confucius law alone cannot carry itself into effect.”⁸⁹ However, these views suffer from a confusion of concepts. Bi Xiaoqing reasoned,

People who advocate the combination of rule of law and rule of man base their view on the following argument: the law cannot work on its own. It is the man who makes, implements and observes the law. Some of them liken the law to weapon and man to soldiers. They say that rule of law is to rule of man just as the weapon to soldiers. Therefore, it is necessary to combine the two. Apparently, they have confused “rule of law” with “law” or “role of law,” and “rule of man” with “man” or “the role of man,” which are totally different concepts. If what these people say is true, then there would no rule of law, but only rule of man in history [T]he law could not come into being or act by itself; it was the man who made and implemented the law; and the law had no life in it without men; therefore, the so-called “rule of law” was a mere fiction; there was no such thing as rule of law, but only rule of man in the world. Apparently, this assumption did not tally with historical reality.⁹⁰

As discussed earlier, China is—by any definition—still far from being a *rule of law* State. Many factors contribute to this reality. Critically, China’s historical development has resisted adopting a system based on the *rule of law* because the

83. 6 Confucius, *The Analects* 112 no. 21 (2000).

84. See generally Wang Chenguang, *supra* note 77, at 11 (debating between *rule of law* and *rule of man*).

85. 3 Aristotle, *Politics* NO. 16 (8th ed. 1990).

86. JOHN ADAMS, *Novanglus No. VII*, in *REVOLUTIONARY WRITINGS: 1755-1775* 510, 517 (Gordon Wood ed., 2011).

87. Denise Meyerson, *The Rule of Law and the Separation of Powers*, 4 *MACQUARIE L.J.* 105, 105 (2004).

88. PAUL W. KAHN, *THE REIGN OF LAW* 26 (1997).

89. Wang Chenguang, *supra* note 77, at 11.

90. Bi Xiaoqing, *Basic Contradiction between Rule of Law and Rule of Man*, in *XIANZHENG YU ZHONGGUO [Constitutionalism and China]* 69 (Li Buyun ed., 2006).

very concept is largely irrelevant to traditional Chinese culture.⁹¹

A. Ethical Society and the Rule of Man

1. The Geographical Conditions and the Agrarian Country

Due to local geographical conditions, China was traditionally an agrarian country.⁹² This lifestyle infused Chinese culture with a different way of thinking and economic background from maritime countries. In his book, *A Short History of Chinese Philosophy*, Fung Yu-lan wrote:

China is a continental country. To the ancient Chinese their land was the world. There are two expressions in the Chinese language which can both be translated as the world. One is “all beneath the sky” and the other is “all within the four seas.” To the people of a maritime country such as the Greeks, it would be inconceivable that expressions such as these could be synonymous. But that is what happens in the Chinese language, and it is not without reason.⁹³

He then analyzed the experience of China’s great philosophers:

From the time of Confucius [who lived five hundred years before Christ] until the end of the [nineteenth] century, no Chinese thinkers had the experience of venturing out upon the high seas. Confucius and Mencius lived not far from the sea, if we think in modern terms of distance, yet in the *Analects*, Confucius mentions the sea only once.⁹⁴

Fung Yu-lan further commented, “Mencius is no better than Confucius, who thought only of ‘floating out to sea.’ How different were Socrates, Plato, and Aristotle, who lived in a maritime country and wandered from island to island!”⁹⁵

The geographical conditions not only limited the ways of thinking of the classic philosophers; they also shaped China’s economy. Chinese people traditionally made their living through agriculture.⁹⁶ In 2008, approximately 40% of the Chinese population was engaged in farming.⁹⁷ As to China’s traditional culture, Chinese philosophers distinguish between “‘the root’ and ‘the branch.’”

91. See Myron L. Cohen, *Religion in a State Society: China*, in *ASIA: CASE STUDIES IN THE SOCIAL SCIENCES: A GUIDE FOR TEACHING* 2, 9 (1992), available at http://afe.easia.columbia.edu/cosmos/main/religion_in_state_society.pdf (resisting *rule of law* as incompatible with China’s agricultural history).

92. See *id.* (describing China’s agricultural history).

93. Fung Yu-lan, *A Short History of Chinese Philosophy* 16 (1948).

94. *Id.* at 16-17.

95. *Id.* at 17.

96. See *id.* (noting that, due to geographical conditions, the Chinese people have had to make their living by agriculture).

97. JUDITH BANISTER ET AL., *POPULATION AGING AND ECONOMIC GROWTH IN CHINA* 18 (2010), available at http://www.hsph.harvard.edu/pgda/WorkingPapers/2010/PGDA_WP_53.pdf. There were still 674,149,546 rural residents, accounting for 50.32 percent of the total population by end of 2010 based on the major figures of the 2010 population census. *Communiqué of the National Bureau of Statistics of People’s Republic of China on Major Figures of the 2010 Population Census (No. 2)*, NATIONAL BUREAU OF STATISTICS OF CHINA (Apr. 29, 2011, 10:00 AM), http://www.stats.gov.cn/english/newsandcomingevents/t20110429_402722516.htm.

‘The root’ refers to agriculture and ‘the branch’ to commerce. The reason for this is that agriculture is concerned with production, while commerce is merely concerned with exchange.”⁹⁸

Therefore, throughout Chinese history, “social and economic theories and policies have all attempted ‘to emphasize the root and slight the branch.’”⁹⁹ This could be one of the reasons for modern China’s less developed commerce-related laws and systems. The *rule of law*, an idea that originated in Ancient Greece and was based on the development of commerce,¹⁰⁰ could not arise by itself from China’s agrarian society.

2. An Agrarian Country, Family System, and the Ethical Society

China’s agricultural economic model contributed to its family system in a cyclical fashion. A well-developed family system based on agriculture strengthened traditional ethical society, and the ethical standards then further enhanced the family system.

a. Agriculture Makes Strong Family Systems

In an agrarian country, land is the primary basis of wealth. Since land cannot be moved, people must live in one settlement from generation to generation. This led to the development of a complex family system organized by ethical regulations. Fung Yu-lan described the origins of the family system:

The farmers have to live on their land, which is immovable, and the same is true of the scholar landlords. Unless one has special talent, or is especially lucky, one has to live where one’s father or grandfather lived, and where one’s children will continue to live. That is to say, the family in the wider sense must live together for economic reasons. Thus there developed the Chinese family system, which was no doubt one of the most complex and well organized in the world.¹⁰¹

The family system makes family the social center of the Chinese people. In discussing the importance of the family in Chinese society, Liang Shuming clearly illustrated the difference between the Chinese family status and that of western societies,¹⁰² as summarized in Figure 1 below:

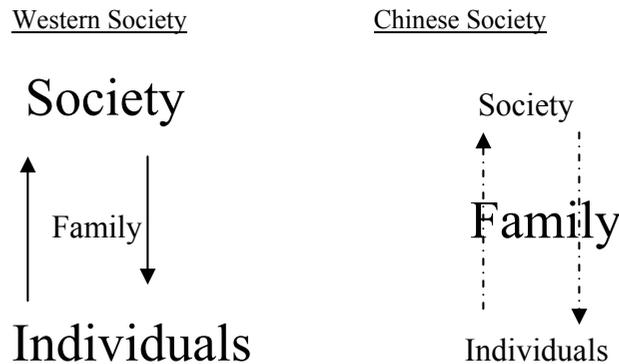
98. Fung Yu-lan, *supra* note 93, at 17-18.

99. *Id.* at 18. Even in the early 1980s, when my father began to operate a small family store in my hometown after China’s economic reform, he felt awkward selling items to villagers who were all familiar with each other.

100. Tsinghua Forum of Rule of Law, *supra* note 11, at 59.

101. FUNG YU-LAN, *supra* note 93, at 21.

102. Liang Shuming, *Zhongguo wen hua Yao Yi* [The Essence of Chinese Culture] 71 (2005) (China).

Figure 1. Family Status in Western and Chinese Societies

Notes:

- (1) Font size indicates social importance.
- (2) Arrow lines show direct relations.
- (3) Dotted lines indicate unclear relationships.¹⁰³

The figure reflects that family is generally much more important as a social institution in Chinese society than in the West. In China, the family is the core of an individual's everyday life, and this accordingly affects the Chinese way of thinking about other kinds of relationships. The Chinese people call officials “father and mother officials (父母官),” and the officials call the ruled the “son people (子民).”¹⁰⁴ They call all neighbors and acquaintances uncle, aunt, brother, or sister.¹⁰⁵ Additional common phrases include: “All beneath the sky are one family (天下一家),”¹⁰⁶ and “all within the four seas will be their brothers (四海之内皆兄弟).”¹⁰⁷ Thus,

The family system was the social system of China. Out of the five traditional social relationships, which are those between sovereign and subject, father and son, elder and younger brother, husband and wife, and friend and friend, three are family relationships. The remaining two, though not family relationships, can be conceived of in terms of the family. Thus, the relationship between sovereign and subject can be conceived of in terms of that between father and son, and that between friend and friend in terms of the one between elder and younger brother.¹⁰⁸

103. *Id.*

104. *Id.* at 73.

105. *Id.*

106. *Id.*

107. CONFUCIUS, THE ANALECTS bk. XII, ch. 5, at 128-29 (David Hinton trans., 1998).

108. Fung Yu-lan, *supra* note 93, at 21.

b. Strong Family, Ethical Society, and the Rule of Man

In China, family is “the starting-point for all moral conduct.”¹⁰⁹ As mentioned above, almost all social relationships resemble some kind of family relations. Ethical standards regulating families therefore naturally become wider social standards. Family ethics stress the feelings and duties individuals have towards others, and these easily apply to society as a whole.

Since members within a Chinese family generally feel obligated to keep good relations with each other and to help those in need, people significantly depend on *guanxi* (relationship). The importance of relationships is more obvious in the countryside, where public social security is severely weak. People rely on their large families and neighbors to live. The saying, “you are not rich if you have three poor relatives; you are not poor if you have three rich relatives” illustrates the situation.¹¹⁰ Lin Yutang observed,

Mutual helpfulness is developed to a very high degree, encouraged by a sense of moral obligation and family honor. Sometimes a brother will cross the sea thousands of miles away to redeem the honor of a bankrupt brother. A well-placed and comparatively successful man generally contributes the greater, if not the entire, share of the expenses of the whole household, and it is common practice, worthy of no special merit, for a man to send his nephews to school. A successful man, if he is an official, always gives the best jobs to his relatives, and if there are not ready jobs, he can create sinecure ones. Thus sinecurism and nepotism developed, which, coupled with economic pressure, became an irresistible force, undermining, rather than being undermined, by any political reform movement. The force is so great that repeated efforts at reform, with the best of intentions, have proved unsuccessful.¹¹¹

Thus, family and social-ethical standards also affect the law enforcement process and, in turn, resist the development of the *rule of law*. Professor John K. Fairbank commented that in traditional China, “Law was subordinate to morality. Its sanction lay in reason or the common social experience which underlay morals.”¹¹² There are some ethical regulations that Chinese people follow from

109. Lin Yutang, *My Country and My People* 170 (1962).

110. Liang Shuming, *supra* note 102, at 82.

111. Lin Yutang, *supra* note 109, at 172-73.

112. John King Fairbank, *The United States and China* 120 (1976).

The film *Qiu jū da guan si* [The Story of Qiu Jū], directed by Zhang Yimou, illustrates the conflict between law enforcement and ethics in modern Chinese countryside. Qiu Jū, the main character, is a typical, stubborn countryside woman. She wanted only a “fair statement” that the village head hurt her husband. After failing at the local level, she appealed to the city court. While the case was pending, Qiu Jū went into labor, a life-threatening emergency. The village head organized the villagers and neighbors and sent her to the hospital. During the celebration of her child’s birth, the court issued judgment, and the village head was arrested, a result far beyond her expectation. Is this the “fair statement” Qiu Jū really wanted? The *rule of law* here did not meet her needs but left her in a dilemma. The villagers will blame her, and she will blame herself for the result that was totally out of her control. How to mitigate the conflict between the law and ethics is the question the story left to common people as well as legal academics. *See* Videotape:

generation to generation. In conducting trials, courts rely not only on the text of the law itself, but also largely on ethical standards and social habits. Development of the *rule of law* in China is thus at least partly a process of interaction between the law and existing, sometimes quite old, social ethics. Traditional culture always remains behind the scenes, giving Chinese *rule of law* a very unique flavor.

B. The Power-Over-Right Culture

Under the wide heaven,

All is the king's land;

Within the sea-boundaries of the land,

All are the king's servants.

– 普天之下,莫非王土; 率土之滨,莫非王臣。¹¹³

China is a traditional society that stresses power rather than rights. Governmental power is much stronger than individual rights, leaving the latter vulnerable. This aspect of traditional Chinese culture remains basically unchanged since feudal times.

The power of the emperors, for example, was showcased by every possible means, including architecture. The design of the Forbidden City, where the Ming and the Qing royal family lived for several hundred years, fully expresses the dignity of emperor. The main building in the Forbidden City, Tai He Palace, was built to the highest standard, as evinced by its height, scale, color, and even the number and species of animals on the roof.¹¹⁴ No other building in the country could be built to an equal or higher standard. Another notable characteristic of the Forbidden City architecture is the sharp contrast between the emperor's palaces and the buildings of the other official departments. The Tai He Palace, where the emperor met officials, is prominently raised on a three-tiered terrace eight meters high; while buildings around the same courtyard, including the most important military department office Jun Ji Chu, are kept lower “so as to set off the magnificence of the hall.”¹¹⁵

The emperor was generally called “the son of Heaven ()”¹¹⁶ According to the Chinese, the emperor received his power from Heaven, and only Heaven could take this power away.¹¹⁷ In the Western context, Heaven is a place;¹¹⁸ in China, it

Qiu jū da guan si [The Story of Qiu Jū] (Sony Pictures 1992).

113. *XIAO YA BEI SHAN* [DECADE OF BEI SHAN] (Poem 205), IN Shi Jing [Book of Odes], available at <http://etext.lib.virginia.edu/chinese/shijing/AnoShih.html> (last visited Oct. 21, 2011).

114. “The Hall of the Taihedian, the main hall of the Forbidden City . . . is 27 m (90 ft) high, 64 m (210 ft) wide and 37 m (120 ft) deep. It has a roof with double eaves and is decorated with carved dragons and phoenixes . . . most of which are gilded.” SIR BANISTER FLETCHER, A HISTORY OF ARCHITECTURE 699 (1996).

115. *Id.*

116. [1 THE PERIOD OF THE PHILOSOPHERS] FUNG YU-LAN, A HISTORY OF CHINESE PHILOSOPHY 103 (Derk Bodde trans., 1983).

117. *Sightseeing in Beijing*, HUTONG SCHOOL, <http://www.hutong-school.com/sightseeing-beijing> (last visited Oct. 27, 2011).

118. It is used to refer to “the expanse of space that seems to be over the earth like a dome.”

is a divine/natural force where the emperor, the son of heaven, carries the mandate of heaven to rule.¹¹⁹ The emperor therefore had supreme authority and his word was the law, no matter how arbitrary.

In a power-dominated society, it is not easy to accept democracy and understand that “[i]t is emphatically the province and duty of the judicial department to say what the law is”¹²⁰ and that the court has the final judgment,¹²¹ both of which have been the essence of the *rule of law* in Western countries. Chinese culture so strongly stressed the exercise of power to the point that little room remained for individual rights. This tradition lasted for more than 2,000 years in China’s feudal society. Attempting to sever the connection between contemporary political practice and a two-thousand year tradition in about 100 years has been very difficult. In the previous two Chinese constitutions (effective 1975 and 1978), there were no specific articles protecting individual rights.¹²² The current Constitution has a specific chapter, “The Fundamental Rights and Duties of Citizens,” that regulates rights.¹²³ The inclusion of citizens’ duties in the Chinese Constitution can leave Western lawyers, who believe that a constitution functions only to control the government and safeguard the people’s rights, confused.¹²⁴ Liang Shuming explained the absence of individual rights in the traditional Chinese culture:

The *right* idea can only be the element in western political thought: Even the simplest and the closest relations between father and son, between husband and wife, are both operated according to this. If this kind of notion is put into our Chinese minds, it is totally beyond understandability. Why does there exist individual rights between father and son and husband and wife? We really cannot learn the point in it.¹²⁵

C. Confucianism (Ru Jia), Legalism (Fa Jia), the Rule by Morals, and the Rule by Law

In Chinese history, there were several schools of thought on how best to rule a country. Among these schools, Confucianism and Legalism had far-reaching influence and constitute the primary representations of traditional Chinese

Webster’s Ninth New Collegiate Dictionary 560 (Frederick C. Mish ed., 9th ed. 1983).

119. Xian Dai Han Yu Ci Dian [Modern Chinese Dictionary] (2005).

120. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

121. *Id.* (establishing judicial review).

122. Xianfa (1975) (China); Xianfa (1978) (China).

123. XIANFA ch. II (1982) (China).

124. Can a Constitution be used to control the people, or in other words, can a private party violate the Constitution and others’ constitutional rights? This has been a hot topic among Chinese constitutional scholars in discussing constitutional judicialization. See Lin Feng, *The Repeal of the “Qi” Case Reply and the Future of the Chinese Constitution Implementation*, FA XUE [LAW SCIENCE] 3 (2009); Zhu Xiaozhe, *The Judicial Implementation Between Knowledge and Ignorance*, HUA DONG ZHENG FA XUE YUAN XUE BAO [J. E. CHINA U. OF POL. SCI. & L.] 6 (2001).

125. LIANG SHUMING, *supra* note 102, at 256.

culture.¹²⁶ Confucius is the latinized name of a scholar born in 551 B.C.E., known in China as K'ung Tzu (Master K'ung).¹²⁷ Confucius was a *ju (ru)* and the founder of the *Ju (Ru)* school, also known as the Confucian School.¹²⁸ As for individual virtues, Confucius emphasized *jen (ren)* (human-heartedness) and righteousness, with special emphasis on the former.¹²⁹ *Jen* can be translated as “perfect virtue”¹³⁰ and “consists in loving others.”¹³¹ He stressed the virtue of *jun zi* (the superior man) and its merits, commenting: “[t]he superior man is always happy; the small man sad,”¹³² and “[t]he wise are free from doubts; the virtuous from anxiety; the brave from fear.”¹³³

Most of what is considered “Confucianism” was recorded in *Analects (Lun Yu)*, which is a collection of his scattered sayings compiled by his disciples.¹³⁴ Confucius codified the status of the ruler in Chinese political thought and emphasized that morality should govern the people, not law and punishment: “[m]oral persuasion was superior to the rule of law with its rigid, impersonal courts.”¹³⁵ He believed that moral men make good rulers and that “[t]he good ruler is obeyed even though he doesn’t give orders, while the bad ruler is not, even though he does.”¹³⁶ It can be imagined that the virtue-centric ideas of Confucianism were not held with the same regard by men such as James Madison, who believed that “[i]f men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.”¹³⁷

Han Fei Tzu was the synthesizer of the Legalism school.¹³⁸ To meet new political circumstances, Legalists proposed new ways of government other than *Ju Jia* and recognized that the codification of laws was a first necessary step.¹³⁹ Han Fei Tzu wrote, “[a] law is that which is recorded on the registers, set up in the government offices, and promulgated among the people.”¹⁴⁰ Once laws are

126. See Fung Yu-lan, *supra* note 93, at 30-31 (stating that Confucianism and Legalism were two of the major schools of thought from the fifth through the third centuries, B.C.).

127. *Id.* at 38.

128. *Id.* at 39.

129. *Id.* at 42.

130. *Id.* at 43.

131. *Id.* at 42.

132. Fung Yu-lan, *supra* note 93, at 45.

133. *Id.* at 45.

134. *Id.* at 39.

135. Shao-Chuan Leng, *The Influence of the U.S. Constitution on Both the Constitutions of the People's Republic of China and of Taiwan*, in *THE U.S. CONSTITUTION AND THE CONSTITUTIONS OF ASIA 3-4* (1988).

136. CONFUCIUS, *supra* note 107, bk. XIII, ch. 6, at 141. “A ruler who has rectified himself never gives orders, and all goes well. A ruler who has not rectified himself gives orders, and the people never follow them.” *Id.*

137. THE FEDERALIST NO. 51, at 160 (James Madison) (Roy P. Fairfield ed., 1981).

138. Fung Yu-lan, *supra* note 93, at 157.

139. *Id.* at 160.

140. *Id.*

promulgated, the ruler must keep a sharp watch on the conduct of the people and strictly enforce them by punishing violators and rewarding those who obey.¹⁴¹ By doing so, “[h]e can successfully rule the people, no matter how numerous they may be.”¹⁴² Han Fei Tzu stated:

In his rule of a state, the sage does not depend upon men doing good themselves, but brings it about that they can do no wrong. Within the frontiers of a state, there are no more than ten people who will do good of themselves, nevertheless, if one brings it about that the people can do no wrong, the entire state can be kept peaceful. He who rules a country makes use of the majority and neglects the few, and so does not concern himself with virtue but with law.¹⁴³

The fundamental objective of both Confucianism and Legalism was the reunification of a then-divided China; but their approaches differed. Historically, “Confucians always accused the Legalists of being mean and vulgar, while the Legalists accused the Confucians of being bookish and impractical.”¹⁴⁴ Confucianism depended on virtue and natural order; Legalism used an iron fist. Confucian ideas were idealistic, whereas the legalists’ were realistic.¹⁴⁵

Confucianism and Legalism, or their combination, could be regarded as the sources of today’s *rule by morals* and *rule by law*. It is hard to say whether they complement or counteract one another. Certainly, both belong to the notion of the *rule of man*, rather than the *rule of law*. Neither *rule by morals* nor *rule by law* reaches beyond the thoughts of traditional Chinese philosophers or moves outside the shadow of the traditional culture shaped and developed over the country’s long history.

III. TRADITIONAL CULTURE, WESTERNIZATION, AND DEVELOPING THE RULE OF LAW IN CHINA: CASE STUDIES ON THE SELF-STRENGTHENING MOVEMENT AND TAIWAN

Any study of Chinese traditional culture and the *rule of law* would be incomplete without examining the establishment of the *rule of law* in other East Asian countries and regions once dominated by traditional Chinese values. In 1987, Taiwan, with a Chinese community identical to that of mainland China, established a vibrant, multi-party democratic system employing the *rule of law*.

141. *Id.*

142. *Id.*

143. *Id.* (quoting 1 THE COMPLETE WORKS OF HAN FEI TZU, A CLASSIC OF CHINESE LEGALISM, ch. 50 (W.K. Liao trans., 1939).

144. Fung Yu-lan, *supra* note 93, at 165.

145. *Id.* Confucianism and legalism reached accommodation starting from Han Dynasty due to the “dismiss the hundred schools, revere only the Confucian” (罢黜百家，独尊儒术) policy. Imperial Chinese laws experienced a confucianization process since then. *See generally* QU TONGZU, ZHONGGUO FALÜ YU ZHONGGUO SHEHUI [CHINESE LAW AND CHINESE SOCIETY] ch. 6 (2003); QU TONGZU, *The Confucianization of Chinese Law*, in THE COLLECTIONS OF LEGAL WORKS OF QU TONGZU 361 (1998).

That system still thrives today. Why did the *rule of law* not take root and grow in mainland China despite occasionally bloody efforts spanning several generations? This avenue of research deserves a focused attention.¹⁴⁶

As discussed, the Western concept of the *rule of law* was largely alien to Chinese traditional culture.¹⁴⁷ During the pursuit of the *rule of law* in modern China, traditional cultural forces and conservative political interests successfully resisted. To further explore this issue, this Article contrasts China's Self-Strengthening Movement, Japan's Meiji Restoration, and Taiwan's transition to *rule of law*, against China's long-term legal westernization.

A. "Zhong Ti Xi Yong" and the Self-Strengthening Movement: Traditional Culture's Resistance

Chinese learning for fundamental principles (t'i); (中学为体)

Western learning for practical applications (yung) (西学为用)

– Zhang Zidong, *Exhortation to Study [Quan Xue Pian]* (1898)

"The Self-Strengthening Movement . . . was a series of institutional reforms that introduced Western military technology to strengthen China during the late Qing Dynasty. The Movement followed the Opium Wars, the formation of unequal treaties with Western powers, and many domestic mass uprisings."¹⁴⁸ The campaign vividly illustrated traditional culture's strong resistance to and deterrence of China's efforts to pursue constitutionalism and westernization.¹⁴⁹ From 1861 until 1895, Prince Gong (Yi Xin) and regional officials like Zeng Guofan, Li Hongzhang, Zuo Zhongtang, and Zhang Zidong championed the movement under the slogan of "learning the superior technology of the barbarian

146. Professor Cohen proposed in his written statement before the Congressional-Executive Commission on China to give this type of research the highest priority funding support. Jerome A. Cohen, *Congressional-Executive Commission on China Human Rights and the Rule of Law in China*, 2 CHINESE L. & POL'Y REV. 99, 106 (2007).

147. Some argue that elements of the rule of law can be found in the imperial Chinese legal system. However, under Confucianism, criminal punishments should generally not be imposed on government officials (*Xing Bu Shang Dai Fu*), and there was no equality in the enforcement of laws. See Tsung-fu Chen, *The Rule of Law in Taiwan: Culture, Ideology, and Social Changes*, in *Understanding China's Legal System: Essays in Honor of Jerome A. Cohen* 375 (2003) (discussing criminal punishments under Confucianism). According to Professor Randall Peerenboom, the emperor faced no legal constraints, and there was no separation of the judiciary and the state; thus, although imperial China had in many respects a well-developed legal system, including some facially appealing practices and mechanisms, it "could not be characterized in terms of rule of law if by that one means a system in which law imposes meaningful limits on the rulers"; deeper examination of the features of imperial China's system "often reveal[s] an ethical orientation at odds with rule of law," and "on the whole . . . China's traditions do not provide a very friendly environment for rule of law to grow in"; Chinese scholars generally agree that China's traditional *rule of man* culture not only barely supports the rule of law but "constitutes one of the biggest obstacles to the realization of rule of law." Peerenboom, *supra* note 2, at 41, 48-49, 161. Jiang Xianfu also concluded that "despite a few positive features, native ethics are obsolete and an impediment to rule of law." *Id.* at 161.

148. The Cambridge History of China, Late Ch'ing, 1800-1911, PT. 1, AT 491-99 (1978).

149. *Id.*

to control them” (师夷长技以制夷).¹⁵⁰ The military buildup included, among others, the Foochow Arsenal, the Jinling Arsenal, the Jiangnan Arsenal, and the Beiyang Fleet.¹⁵¹ The Movement was doomed however by the Qing’s humiliating defeat in the Sino-Japanese War (1894-1895).¹⁵²

Zhang Zidong’s *Exhortation to Study* (*Quan Xue Pian*), published in 1898, summarized the Movement’s philosophy:¹⁵³ “*Zhongxue Weiti, Xixue Weiyong*” (simplified: *Zhong Ti Xi Yong* 中体西用), or “Chinese learning for fundamental principles (*t’i*); Western learning for practical applications (*yung*).”¹⁵⁴ *Zhong Ti Xi Yong*, the core of the Self-Strengthening Movement, was limited to superficial reforms and did not meaningfully alter fundamental feudal governance.¹⁵⁵ Zhang urged the adoption of Western technology and learning only to the extent they helped preserve China’s culture, morality, and sociopolitical system; he strongly opposed introducing Western democratic institutions.¹⁵⁶ Zhang especially emphasized *San Gang Wu Chang* (三纲五常) as the foundation of Chinese learning¹⁵⁷ and used it to attack the reformist constitutional monarchy, claiming that the ancestors’ principles should not be changed. His treatise was criticized for

150. *Id.*

151. *Self-Strengthening Movement*, OXFORD DICTIONARY OF WORLD HISTORY, <http://www.enotes.com/wh-encyclopedia/self-strengthening-movement> (last visited Oct. 21, 2011).

152. The Sino-Japanese War (1894-1895) (*Jia Wu Zhan Zheng* (日 清 战 争)) between Qing Dynasty China and Meiji Japan was regarded as disastrous and humiliating for China. Japan captured Korea, annihilated the Peiyang Fleet (one of the Self-Strengthening Movement’s main achievements), and captured its base port at Weihaiwei. Japanese forces destroyed or took the remaining warships of the fleet and Admiral Deng Ruchang and several other military commanders committed suicide. Japan achieved six months of continuous success during the war, and, by the time the Qing sued for peace, Japan intended to advance on Peking, then China’s capital. On April 17, 1895, China and Japan signed the Treaty of Shimonoseki, with China ceding Taiwan, the Pescadores, and the Liaodong Peninsula, and giving Japan trading privileges and an indemnity several times Japan’s annual national income. The war marked the rise of Japan. 10 *The Cambridge History of China, Late Ch’ing, 1800-1911*, PT. 2, AT 269-73 (1980).

153. Zhang “presented this treatise to the emperor Kuang-hsü during the midst of the Hundred Days Reform movement, and the Emperor was so pleased that he ordered it to be distributed throughout the empire.” See *Chang Chih-tung*, ANSWERS.COM, <http://www.answers.com/topic/chang-chih-tung> (last visited Oct. 21, 2011). Samuel I. Woodbridge also translated Zhang’s book in *CHINA’S ONLY HOPE: AN APPEAL* (Samuel I. Woodbridge trans., 1901).

154. *Id.*

155. Li Hongzhang also believed Chinese culture was superior to foreign countries and “never dreamed of a fundamental reform of the Chinese political, educational, and social systems.” Li Chien-nung, *The Political History of China: 1840-1928* 104 (1956).

156. See KENNETH SCOTT LATOURETTE, *The Chinese: Their History and Culture* 313 (1946).

157. *San Gang Wu Chang* (三纲五常) is comprised of three principles—emperor is the principle of subjects; father is the principle of son; husband is the principle of wife—and five constants: Ren (仁) (kindness); Yi (义) (royalty); Li (礼) (courtesy and rites); Zhi (智) (wisdom); and Xin (信) (trust). XINZHONG YAO, *AN INTRODUCTION TO CONFUCIANISM* 34 (2000).

playing a critical role in the bloody defeat of the One Hundred Days Reform¹⁵⁸—China's short-lived experiment toward a constitutional monarchy.¹⁵⁹

The Meiji Restoration (1868), by contrast, achieved great success in modernizing Japan.¹⁶⁰ The Sino-Japanese War declared Japan the winner of the race for modernization. Different approaches to westernization are the key to explaining this part of history. Unlike Zhang Zidong, Japan's eminent author, educator, and political theorist, Fukuzawa Yukichi responded to the Western influence by urging Japan to flee from Asia and join Western civilization:

For those of us who live in the Orient, unless we want to prevent the coming of Western civilization with a firm resolve, it is best that we cast our lot with them. If one observes carefully what is going on in today's world, one knows the futility of trying to prevent the onslaught of Western civilization. Why not float with them in the same ocean of civilization, sail the same waves, and enjoy the fruits and endeavors of civilization?¹⁶¹

In clear contrast with Japan (in the second half of the nineteenth century), China responded more slowly and negatively to the trend of westernization.¹⁶² As

158. He Qi, *Quan Xue Pian Shu Hou* (劝学篇书后) [Post the Exhortation to Study] (1899).

159. The One Hundred Days Reform (*Bai Ri Wei Xin* (百日维新)) (June 11, 1898 to September 21, 1898), also known as *Wu Xu Bian Fa* (戊戌变法), was ordered by Emperor Guang Xu (1875-1908) in response to China's defeat in the Sino-Japanese War and the humiliating Treaty of Shimonoseki. See *supra* note 148. Recognizing the urgent need for more fundamental reform if China was to survive and inspired by Japan's achievements, a group of progressive scholar-reformers urged introduction of western learning in technology and parliamentary systems. The emperor accepted their proposal for a comprehensive reform plan. The reform decrees included wide-ranging changes which touched the economy, the postal services, the educational and legal systems, as well as adoption of a constitutional monarchy and student foreign exchange program. All these reforms would lead to a de facto constitutional monarchy. The reforms faced intense opposition from conservative groups, including the great majority of ruling elites who adhered to a completely reactionary position and "saw no need to adopt anything that the West had to offer in any field (with the possible exception of military technology)." Witold Rodzinski, *A HISTORY OF CHINA* 309 (1979). The defense of Confucianism, together with their vested interests in their livelihoods and careers, contributed to the elites' opposition to any western learning that could significantly alter the status quo supporting their "rice bowls." Backed by various reactionary groups, Empress Ci Xi led a coup, abolished the reform orders, secluded Emperor Guangxu for the rest of his life, and executed six of the chief reformists (Tan Citong, Kang Guangren, Lin Xu, Liu Guangdi, Yang Rui, and Yang Shenxiu). *Id.* at 361-62. Two other principal leaders, Kang Youwei (1858-1927) and Liang Qichao (1873-1929), fled abroad.

160. The Meiji Restoration refers to the restoration of the Meiji emperor and a series of reforms creating a constitutional monarchy. This systemic reform movement pursued westernization in Japanese politics, economics, and society. *The Meiji Restoration and Modernization*, ASIA FOR EDUCATORS, <http://afe.easia.columbia.edu/japan/japanworkbook/modernhist/meiji.html> (last visited Oct. 21, 2011); *Meiji Period (1868-1912)*, JAPAN-GUIDE.COM, <http://www.japan-guide.com/e/e2130.html> (last visited Oct. 21, 2011).

161. Fukuzawa Yukichi, *Japanese Enlightenment and Saying Good-bye to Asia*, in *JAPAN: A DOCUMENTARY HISTORY: THE LATE TOKUGAWA PERIOD TO THE PRESENT*, 351-53 (1997).

162. Kenneth Scott Latourette explored the background behind the scene: "The greater success with which the Japanese accepted the Occident does not prove them superior in ability to

The Cambridge History of China describes,

It is an important but often overlooked fact that for almost half a century after 1840 the influx of Western learning was slow and its impact on the Chinese gentry-literati superficial, especially when compared with the fast growth and transforming effect that Western culture achieved in nineteenth-century Japan. While Western learning rapidly became the focus of national attention in Japan after the middle of the century, in China it was confined for decades to the treaty ports and to a limited number of government officials concerned with the management of the so-called “Western affairs” The majority of Chinese gentry-literati still lived in the mental universe of their own tradition This imperviousness to Western culture on the part of the gentry-literati is not surprising when one recalls that up to the 1890s their education was still oriented to the civil-service examination system and to the Confucian learning which formed its foundation.¹⁶³

The Self-Strengthening Movement’s attempts to adopt Western commercial and industrial technologies without altering the feudal system proved unsuccessful, if not completely fruitless.¹⁶⁴ Stubborn retention of ancient traditional values cost China its first chance to modernize.

The establishment of the *rule of law*, especially in a society with well-developed opposing traditions, naturally faces strong political and cultural resistance to the necessary institutional, political, and cultural transformations.¹⁶⁵ As Rachel Kleinfeld Belton argued, “many rule-of-law ends are upheld even when institutional arrangements are far from supportive, if countries have social and political cultures that place a premium on the rule of law. The converse is also true: Recalcitrant cultures or balking politicians can undermine even well-organized rule-of-law institutions.”¹⁶⁶ In the case of the Self-Strengthening Movement, even the institutional changes were superficial. Resistance was so strong that traditional values dominated the Movement. When the elites’ interests were threatened during the One Hundred Days Reform, they ruthlessly suppressed reform, even resorting

the Chinese. China is so much larger that her task is much more difficult. The Japanese, too, had the tradition of learning from foreigners: they had adopted and adapted Chinese civilization, and most important movements in thought and culture in China had had repercussions in Japan. On the other hand, except for Buddhism, the Chinese had consciously learned little from anyone: they regarded themselves as teachers, not pupils.” LATOURETTE, *supra* note 156, at 377 (explaining the differences between China’s response and Japan’s response to westernization). It is therefore understandable that even though the movement introduced Western technologies, and its advocates were willing to learn militarily techniques from the West, it was nonetheless dubbed “Self-Strengthening” to disguise its Western influence. This mindset prevails in China even today.

163. *The Cambridge History of China*, *SUPRA* NOTE 148, AT 273, 275-276.

164. EDWIN PAK-WAH LEUNG, *Modern Chinese History Essentials: 1800-Present* 28 (2006).

165. See Belton, *supra* note 5, at 22 (discussing the problems associated with establishing the *rule of law*).

166. *Id.*

to killing. Revolution became inevitable.

B. Natural Destination of the Chinese Law Westernization Track: Transition to the Rule of Law in Taiwan

With multi-party democratic politics, Taiwan is widely recognized as subject to the *rule of law*. Its transition to the *rule of law* started in 1987, when long-term martial law was lifted and the court enforced the 1947 Constitution promulgated by the mainland's Kuomintang government. China's one-hundred year path towards legal westernization, combined with Taiwan's favorable legal and political conditions, resulted in Taiwan's realization of the *rule of law*.

1. The Westernization Track of Chinese Law and Resistance of Traditional Culture during the Mainland Republic of China Era (1911-1949)

Chinese law began the westernization process at the end of the nineteenth century. Throughout the mainland Republic of China (ROC) era (1911-1949), westernization was primarily limited to promulgating constitutional documents without meaningful or sincere enforcement. Traditional values still dominated mainstream political and social practice. During the first three decades of the existence of the People's Republic of China (P.R.C.), severance of legal continuity halted westernization, whereas marital law's suspension of the 1947 Constitution crippled its progress in Taiwan.

Western *rule of law* was first gradually imported into China and fashioned into Chinese legal thought at the end of the Qing Dynasty and the beginning of the Republic of China.¹⁶⁷ At the early stage of Chinese legal westernization (1902-1911), Qing legal reforms designed to revise old codes focused on abolishing cruel punishment in the criminal law in order “to pave the way for the transition from traditional law to modern Western law; to respond to Western criticisms on the cruelty of certain provisions in traditional Chinese law as reflected in the Great Qing Code[,]” and to adopt new codes modeled on Western laws.¹⁶⁸ Following the empire's collapse, “the westernization of Chinese law was accelerated in the Republic of China period (1911-1949), during which the Kuomintang (Nationalist) government promulgated the *Six Codes (liu fa)*,¹⁶⁹ covering all major aspects of social life, and established a European-style judicial system.”¹⁷⁰ In this era, Chinese law “was becoming Western law, in its form, terminologies, and

167. See Tsung-fu Chen, *supra* note 147; see also Jiangyu Wang, *supra* note 33, at 365 (“Both late Qing and Republic of China enacted Western-style constitutions.”).

168. Jianfu Chen, *Chinese Law: Context and Transformation* 25-26 (2008).

169. The Six Codes were KMT-promulgated laws, including the Constitution, Criminal Law, Criminal Procedure, Civil Law, Civil Procedure and Commercial Law. The Codes also broadly referred to all laws made by the KMT. See Qinhuo He, *Lun Xin Zhongguo Fa he Faxue de Qi Bu—Yi “Feichu Guomindang Liu Fa Quan Shu” he “Sifa Gaige Yundong” Wei Xian Shuo [The Start of the China Law and Legal Studies—Based on the Clues of the Abolishment of the Six Codes and the Judicial Reform Movement]*, in 4 *China L.J.* (2009).

170. Jiangyu Wang, *supra* note 33, at 368.

notions.”¹⁷¹

In fact, promulgating constitutions quickly became popular among Chinese political players after Qing.¹⁷² According to Professor Donald C. Clarke, “[e]ver since the fall of the Qing dynasty and the end of imperial China in 1911, Chinese governments have viewed a Western-style constitution proclaiming popular sovereignty as a necessary hallmark of legitimacy, something that would never have occurred to a Chinese government before contact with the West.”¹⁷³ Promulgation of the 1947 Constitution marked a peak achievement on the track toward legal westernization before 1949.

The 1947 Constitution enshrines the Three People’s Principles (*San Min Zhu Yi*; *San Min Chu I* (三民主义)): nationalism, democracy, and the people’s livelihood. Sun Yat-sen saw his *San Min Chu I* as “equivalent to government of the people, by the people, and for the people as declared by President Abraham Lincoln in his famous Gettysburg Address, and he compared his doctrine with the catchwords of the French Revolution—Liberty, Equality and Fraternity.”¹⁷⁴ Sun’s extensive Western experience explained his infusion of the *San Min Chu I* into China’s political structure. Born in 1866 in Canton, he was sent to Honolulu at thirteen for education.¹⁷⁵ A life-long Christian, baptized by an American missionary,¹⁷⁶ he traveled widely in Asia, Europe, and the United States.¹⁷⁷ Admiring the successful modernization of Japan, he repeatedly visited there and eventually founded the revolutionary organization, *Tongmenghui* (The Combined

171. Jianfu Chen, *Chinese Law: Towards an Understanding of Chinese Law, Its Nature and Development* 24 (1999) [hereinafter Jianfu Chen, *Chinese Law*].

172. Over ten constitutions were drafted or promulgated since the end of Qing and before 1949 by different political players, including: Constitutional Outline Made by the Imperial Order (1908, Qing Dynasty); Nineteen Significant Creeds of the Constitution (1911, Qing Dynasty); Provisional Constitution of the Republic of China (promulgated on March 11, 1912 by the Nanjing Provisional Government); The Draft of the Constitution of the Republic of China (drafted on October 31, 1913 by the northern warlord government); The Constitution of the Republic of China (promulgated on May 1, 1914 by the northern warlord government); The Constitution of the Republic of China (promulgated on October 10, 1923 by the northern warlord government); The Programme of the Political Tutelage (October 3, 1928 by Nanjing Kuomintang Government); The Constitution of the Republic of China during the Political Tutelage Period (promulgated on June 1, 1931 by Nanjing Kuomintang Government); The Draft of the Constitution of the Republic of China (published on May 5, 1936 by Nanjing Kuomintang Government); The Constitution of the Republic of China (promulgated on January 1, 1947 by Nanjing Kuomintang Government). ZHONGGUO XIAN FA WEN XIAN HUI BIAN [THE DOCUMENTARY COLLECTION OF THE CHINESE CONSTITUTION] 6-8 (2004) (discussing constitutions drafted between the end of Qing and 1949).

173. Donald C. Clarke, *Puzzling Observations in Chinese Law: When is a Riddle Just a Mistake?*, in *Understanding China’s Legal System: Essays in Honor of Jerome A. Cohen* 93, 107 (2003).

174. Jianfu Chen, *supra* note 168, at 31.

175. LATOURETTE, *SUPRA* NOTE 156, AT 313.

176. *Id.*

177. *Id.*

League Society), in Tokyo in 1905.¹⁷⁸

The 1947 Constitution introduced a five-power governmental structure, outlined a democratic republic, and provided citizens with a broad range of political rights.¹⁷⁹ The KMT claimed to rely on it in moving toward a constitutional government—the final phase of Sun’s political blueprint.¹⁸⁰ But during the mainland ROC era, no liberal democratic constitutions were implemented. The 1911-1949 period, while relatively brief, was extremely turbulent—characterized by revolution, warlords, Kuomintang political tutelage, eight years resistance against Japanese invasion (1937-1945), and three years of civil war (1946-1949). Although constitutionalism prevailed—sincerely or insincerely—among different political players, adoption and enforcement of constitutions was almost impossible under the particular circumstances.¹⁸¹

Traditional values still dominated China even in this turbulent time, strongly resisting any substantial application of westernized legal frameworks. The 1911 Revolution only passed down ideas of imperial authority developed over more than 2,000 years. The formation of the party-state system reinforced this tradition and the *rule of law* was never truly achieved.¹⁸² As William C. Jones observed,

Although on paper modern China has all of the apparatus of a western legal system, it is a country that is still heavily influenced by tradition, and any study of Chinese law that concentrates solely on the statutes and institutions copied from the West is bound to come to wrong conclusions.¹⁸³

Chiang Kai-shek, the President of the Kuomintang government, published *China’s Destiny* in 1943 during the extremely difficult resistance against the Japanese invasion, and was apparently influenced by the *Zhong Ti Xi Yong* philosophy.¹⁸⁴ He promoted Confucian traditions such as China’s inherent values, thoughts, spirits, feelings, and characteristics, and blamed Western culture’s invasion for destroying China’s originally superior ethics and family-social

178. Richard Jensen, *Biography: Sun Yat-sen, A BOOK ABOUT CHINA*, <http://www.abookaboutchina.com/biography/Sun-Yat-sen> (last visited Nov. 1, 2011).

179. Denny Roy, *Taiwan: A Political History* 83 (2003).

180. *Id.* Sun Yat-sen drafted the National Government Founding Outline (passed by the KMT First National Conference on January 23, 1924) and proposed a three-stage state building plan: military government period, political tutelage period, and constitutional government period. *Id.*

181. Wang Chenguang, *supra* note 77, at 3. “The Republic of China, established after the 1911 Revolution, abolished traditional feudal doctrine and, using the Western legal system as a blueprint, tried to establish a new legal order. But the chaos brought about by warlords, the revolutionary struggle, and the eight years of resistance against the Japanese rendered the goal of implementing a Western legal system impossible to fulfill.” *Id.*

182. *Id.* at 6.

183. William C. Jones, *Trying to Understand the Current Chinese Legal System, in Understanding China’s Legal System: Essays in Honor of Jerome A. Cohen* 7, 7-8 (2003).

184. *See generally* CHIANG KAI-SHEK, *China’s Destiny & Chinese Economic Theory* 236 (1947) (discussing how unequal treaties led to China’s need to be a strong nation through Nationalist Revolution and discussing how China’s War of Resistance will help Asian countries become independent after the Second World War).

institutions.¹⁸⁵ In this book, he paid special tribute to the Confucian way of life:

China's own philosophy of life, developed by Confucius, amplified and propagated by Mencius, and further explained by the Han scholars, automatically became a lofty system that is superior to any other philosophy in the world The glories and scope of our ancient Chinese learning cannot be equaled in the history of any of the strong Western nations of today.¹⁸⁶

In discussing the Western intrusion and their effects on ethics, Chiang denounced:

China's ancient philosophy of ethics is based on a careful and thorough study of the interrelations of human society. Although social organization is in a state of constant evolution, yet the principles of the relations between father and son, husband and wife, elder brother and younger brother, friend and friend, between higher and lower ranks, the honorable and the humble, men and women, old and young, down to the duty of neighbors to protect each other and care for the sick, have remained the unchangeable ethical rules of social life. During the past hundred years, with the spread of the wanton customs of the concessions, the people not only neglected these ethical principles, but discarded and scorned them. As a consequence, between father and son, husband and wife, brothers, friends, high and low, old and young, neighbors and communities, there was no thought of reciprocal love and reciprocal friendliness, and above all, the virtue of co-operation and sense of unity were lost. Everything was planned for material interest, with a total lack of self-discipline The people treated their own blood relations as strangers, and regarded their fellow countrymen as enemies. And they failed to recognize the error of such unethical and abnormal behavior. They transformed China, a propriety-loving and virtue-respecting country, into a country without modesty or shame. Such was the evil effect of the unequal treaties.¹⁸⁷

China's Destiny was criticized as urging people to follow traditional values to maintain Kuomintang rule.¹⁸⁸ Chiang also treated Zeng Guofan, another advocate of the Self-Strengthening Movement, as a model for national salvation and nation building.¹⁸⁹ The official promotion of traditional values, together with KMT political tutelage governance, left Chinese legal westernization largely on paper.

185. *See id.* at 79 (unequal treaties with foreign powers “rendered China no longer a state . . . made the Chinese people no longer a nation . . . [and] completely destroyed [Chinese] nationhood”).

186. *Id.* at 95.

187. CHIANG KAI-SHEK, *supra* note 184, at 93.

188. Chen Boda, *Ping “Zhongguo de Ming Yun”* [Review of *China's Destiny*], JIE FANG RI BAO [THE LIBERATION DAILY], July 21, 1943 (China).

189. Chiang wrote a preface for a booklet, *Zeng Guofan yu Hu Linyin lun junshi* (*Zeng Guofan and Hu Linyin on Military Affairs*), instructing his generals that “with this manual in hand, [they] could defeat the Communists just as Zeng’s army had routed the Taiping [uprising].” Yingjie Guo, *Cultural Nationalism in Contemporary China: The Search for National Identity Under Reform* 51 (2004).

2. Westernization Track Blocked in KMT Taiwan and in CCP Mainland China

Introducing the *rule of law* requires sufficient and efficient law enforcement. Chinese legal westernization was blocked in Taiwan by suspending the enforcement of the Constitution, particularly the articles relating to elections and citizens' rights. On May 20, 1949, the KMT declared martial law in Taiwan, which remained in effect until July 5, 1987.¹⁹⁰ Under military governance, opposition parties were prohibited and freedoms of speech, assembly, association, and communication were suspended, with "numerous special criminal laws . . . promulgated to eliminate rebellion, sedition, and other crimes."¹⁹¹ The *Temporary Provisions Effective During the Period of Communist Rebellion* went into effect on May 10, 1948 and was expected to remain in effect until the mainland could be retaken from the CCP.¹⁹² It finally terminated on May 1, 1991.¹⁹³ The temporary provisions overrode the Constitution, enhancing presidential powers and exempting the president and vice president from the two-term limit.¹⁹⁴ Martial law and the temporary provisions effectively suspended enforcement of the 1947 Constitution.¹⁹⁵ The *rule of law* principles enshrined in the Constitution became a mere declaration.

Chinese legal westernization was also blocked on the mainland after 1949, but in a different and more thorough way. The CCP simply abolished the *Six Codes* and all legal systems existing under the KMT.¹⁹⁶ According to the Common Program of the Chinese People's Political Consultative Conference (CCP China's provisional constitution), Article 17 declared: "All the laws, decrees and judicial rulings enacted by the reactionary Kuomintang government to oppress the people are to be abolished, laws and decrees are to be formulated to protect the people and the people's judicial system is to be established."¹⁹⁷ The old system was destroyed, but a new system was not timely established.¹⁹⁸ The Cultural Revolution (1966-

190. *Improper Judgments, Improper Remedies: Analysis of the 1998 Martial Law Period Compensation Law*, TAIWAN ASSOCIATION FOR HUMAN RIGHTS, <http://www.tahr.org.tw/site/english/wtre.htm> (last visited Oct. 22, 2011).

191. Tsung-fu Chen, *supra* note 147, at 377.

192. *See History of Constitutional Revisions in the Republic of China*, Taiwan Documents Project, <http://www.taiwandocuments.org/constitution07.htm> (last visited Oct. 28, 2011) (stating Temporary Provisions enhanced Presidential power during the Communist movement).

193. *Id.*

194. *Id.*

195. Jean-Pierre Cabestan, *China's Constitutionalism and its Recent Developments in China and Taiwan*, in SYMPOSIUM 2004: CULTURE, LAW AND ORDER: CHINESE AND WESTERN TRADITIONS: ABSTRACTS, MACAU RICCI INSTITUTE (Nov. 24, 2004), <http://www.riccimac.org/eng/symp2004/abstracts.htm#JeanPierreCabestan>.

196. SHIPPING ZHENG, PARTY VS. STATE IN POST-1949 CHINA: THE INSTITUTIONAL DILEMMA 53 (William Kirby ed. 1997).

197. Common Program of the Chinese People's Political Consultative Conference, art. 17 (promulgated by First Plenary Session of the Chinese People's PCC, Sept. 29, 1949); *see also* ZHONGGUO XIANFA WEN XIAN HUI BIAN [THE DOCUMENTARY COLLECTION OF THE CHINESE CONSTITUTION] 6-8 (2004) (China).

198. Wang Chenguang, *supra* note 77, at 4.

1976) pushed the mainland further from legal westernization.¹⁹⁹ During this stage, “[r]ule of man had totally overtaken the newly established and vulnerable legal system; citizens’ rights were limited or completely taken away, and democratic legal order ceased to exist. Many citizens, including the state chairman and other governmental officials, were persecuted without any legal basis or procedure.”²⁰⁰

3. Enforcing the Constitution: Taiwan’s Transition to the Rule of Law

In modern Taiwan, “the judiciary is able to exercise independent authority; the political power is subordinate to the law; and human rights are proclaimed to be the ultimate value of Taiwanese society.”²⁰¹ Taiwan is currently subject to the *rule of law*.²⁰² Consequently, its legal system, politics, and society have been transformed tremendously since 1987.²⁰³ Major events associated with the transition include:

- (a) October 25, 1971: Taiwan “expelled” from the United Nations (P.R.C. assumes seat),²⁰⁴
- (b) January 1, 1979: United States established diplomatic relations with Taiwan,²⁰⁵
- (c) 1985: Chiang Ching-kuo proclaimed that Taiwan should no longer be ruled by the military but instead under the Constitution,²⁰⁶
- (d) September 28, 1986: the Democratic Progressive Party (DPP), a formal opposition party, was allowed to be formed,²⁰⁷
- (e) July 5, 1987: Martial law lifted (Chiang Ching-kuo announced that “only the Constitution is our *fa-tong*,” or constitutional continuity),²⁰⁸
- (f) Economic Growth: per capita GNP rose from U.S. \$167 in 1953, to U.S. \$3,784 in 1986, reaching U.S. \$10,566 in 1993,²⁰⁹
- (g) January 13, 1988: Chiang Ching-kuo died, and Lee Teng-hui became Taiwan’s first native-born president;²¹⁰

199. *Id.* at 5.

200. *Id.*; see also Randall Peerenboom, *The X-Files: Past and Present Portrayals of China’s Alien “Legal System”*, 2 Wash. U. Global Stud. L. Rev. 37, 49 (2003) (“China [] only [began] to rebuild legal institutions that had withered and in some cases died during the Mao era.”).

201. Tsung-fu Chen, *supra* note 147, at 380.

202. *Id.*

203. *Id.*

204. John Gettings & Beth Rowen, *Timeline: Taiwan: Key Events in Taiwanese History from World War II to the Present*, INFOPLEASE (2007) <http://www.infoplease.com/spot/taiwantime1.html>.

205. *Id.*; *Taiwan History: Chronology of Important Events*, CHINADAILY.COM.CN (July 21, 2003, 6:44 PM), http://www.chinadaily.com.cn/china/2003-07/21/content_539034.htm.

206. Tsung-fu Chen, *supra* note 147, at 378.

207. *Id.*

208. *Id.*

209. *Id.*

210. Gettings & Rowen, *supra* note 204; see also *Taiwan History: Chronology of Important*

(h) May 1, 1991: Taiwan abolished the *Temporary Provisions Effective During the Period of Communist Rebellion*.²¹¹

(i) Repeated amendments to the Constitution of 1947 (1991, 1992, 1994, 1997, 1999, 2000 and 2005): transformed old institutions to adapt them to the island environment with no change to territory; three principles of the people; five government branch powers; added direct election; adjusted power structure between executive and legislative branches; etc.;²¹²

(j) Milestone Constitutional Court decisions: held null and void administrative rules, legislation, and even constitutional amendments in 1995, 1996 and 2000, demonstrating confidence in judicial independence;²¹³

(k) March 18, 2000: Chen Shui-bian (DPP) was elected President of Taiwan. KMT became the opposition party. Chen was re-elected in 2004;²¹⁴

(l) March 22, 2008: Ma Ying-jeu (KMT) won the presidential election.²¹⁵

Taiwan was sharply isolated when it lost its U.N. seat and the United States shifted diplomatic recognition to the P.R.C.²¹⁶ The KMT was forced to turn to the Taiwanese people for legitimacy on the island, influencing them to recruit Taiwanese elites into the power system.²¹⁷ Domestic demands for more freedoms and constitutional rights were stirred by remarkable economic growth, and it is no coincidence that the DPP opposition party was allowed to form in 1986, when Taiwan's per capita GDP reached U.S. \$3,784.²¹⁸

Ironically, the authoritarian KMT's lip service to the *rule of law* provided dissenting intellectuals a supporting argument for constitutionalism, which made it more difficult for the ruling party to deny reformers' demands. Repeatedly, and at every National Day ceremony, Chiang Kai-shek claimed to be carrying out democracy, *San Min Chu I*, and to be ideologically committed to building a political system under the *rule of law*.²¹⁹ As Chen observed, "[s]ince the regime always declared that it was pursuing the Rule of law, it was extremely difficult for it to reject claims made to achieve the Rule of law although it never sincerely carried out this policy."²²⁰ When KMT became an opposition party, it also used the

Events, supra note 205.

211. Tsung-fu Chen, *supra* note 147, at 379.

212. *See id.* (stating power to dissolve political parties transferred to Constitutional Court and President is elected through popular election).

213. *Id.* at 387-398.

214. Gettings & Rowen, *supra* note 204.

215. *Id.* On January 14, 2012, Ma won the presidential re-election with 51.6% of the votes. *Taiwan President Ma Ying-jeou Handily Wins Re-Election*, FORBES, January 14, 2012, <http://www.forbes.com/sites/russellflannery/2012/01/14/taiwan-president-ma-ying-jeou-handily-wins-re-election/>

216. Tsung-fu Chen, *supra* note 147, at 378.

217. *Id.*

218. *Id.*

219. *Id.* at 375-76.

220. *Id.* at 402.

rule of law to fight for more political powers within the constitutional framework.²²¹

Realization of the *rule of law* in Taiwan proved to be difficult. In addition to martial law and military suppression, conservative forces utilized Chinese traditional values to deter the introduction of genuine *rule of law*. Although Taiwan enjoys a hybrid culture incorporating the peculiar history and ancestral origins of its current residents, it remains a Chinese society dominated by traditional Chinese values.²²² After more than 200 years of rule by Manchu China, traditional Chinese legal culture prevailed throughout the island and survived the fifty-year Japanese occupation.²²³ During the first four decades of KMT control, traditional Chinese values were promoted to maintain authoritarian rule.²²⁴ Beginning in 1950, national education and media continuously deified Chiang Kai-shek and his son, trying to present them as sage monarchs or sons of heaven,²²⁵ they argued that, so long as political leaders were wise with superior morality, there was no need to limit their powers, and thus the Constitution existed simply “for reference.”²²⁶ The official promotion of traditional values assisted the KMT in deterring the introduction of the *rule of law* in Taiwan for decades.

Continuous Western influence in Taiwan catalyzed the *rule of law* adoption process. The Taiwanese people closely encountered modern constitutionalism during the Japanese occupation.²²⁷ During KMT governance, Western ideas maintained an influence through Western educated elites in Taiwanese society.²²⁸ A new generation of legal and political scholars gradually emerged during the late 1960s and early 1970s as spokespeople for liberal democratic constitutionalism and positively affected many intellectuals who participated in political activities thereafter.²²⁹ Later, many young Taiwanese-educated legal scholars studied in Europe, the United States, and Japan, and returned home to advocate liberal democratic constitutionalism through teaching or publication.²³⁰ Western influence can also be found in the backgrounds of most of the Grand Justices on the Constitutional Court. Among the fifteen justices, eight received German training,

221. *Id.* at 375-76.

222. See Tsung-fu Chen, *supra* note 147, at 396 (stating Chinese legal culture prevailed among public officials and judges).

223. *Id.*

224. See *id.* at 382.

225. Tay-sheng Wang, *Ziyou minzu xianzheng zai Taiwan de shixian: yige lishi de qiaohu* [*The Realization of Liberal and Democratic Constitutional Order in Taiwan: A Coincidence in the History*], 11 TAIWAN HIST. RES. 167.

226. *Id.*

227. *Id.* (“Japanese rulers, who were influenced by the traditional idea of Eastern Asia and colonialism, did not sincerely abide by their own constitution in Taiwan. However, the ruled Taiwanese, who were a majority on the island, struggled for liberalism and democracy by means of applying the Japanese constitution.”) (author translation).

228. Tsung-fu Chen, *supra* note 147, at 376.

229. Tay-sheng Wang, *supra* note 225.

230. *Id.*

and four completed advanced work in the United States.²³¹ Accordingly, “[t]hese Grand Justices referred to European and American jurisprudence to interpret the Constitution demanding that political activities could not violate people’s fundamental freedom and rights; the constitutionalism notions of the rule of law and the balance of powers were realized unobtrusively.”²³²

Most importantly, Taiwan achieved adoption of the *rule of law* by way of lifting martial law, abolishing the *Temporary Provisions Effective During the Period of Communist Rebellion*, and enforcing the Constitution, as well as through breakthroughs in Constitutional Court decisions regarding constitutional review. Promulgation of the 1947 Constitution represented a symbolic achievement in the long march of Chinese legal westernization. Modeled on post-World War II European and American constitutional systems, “the Constitution of the Republic of China is completed and advanced on the provisions of Human Rights protection.”²³³ The Justices of the Constitutional Court (The Council of Grand Justices)²³⁴ pioneered efforts to make the Constitution live. Some scholars have recognized the Constitutional Court as a model for achieving the *rule of law* in the Chinese political culture.²³⁵ Professor Tsung-fu Chen observed three milestone cases that the Constitutional Court decided that demonstrate the Court’s substantial contribution to the establishment of the *rule of law* in Taiwan.²³⁶ In the 1995 *Factory Closing Down* case, the Court declared an administrative rule void and found an executive order valid “only if it was delegated by a statute that provided clear and specific purposes, contents, and scope. Without such clear legislative delegation, any executive order shall be void.”²³⁷ In the 1996 *Educators* case, the Court held void a revision by the legislature, insisting that the legislative power could not transgress the Constitution and the Court’s decisions.²³⁸ In 2000, the

231. Jerome A. Cohen, Op-Ed., *Taiwan’s Constitutional Court: A Model for Beijing?*, South China Morning Post, Oct. 29, 2009, <http://www.cfr.org/china/taiwans-constitutional-court-model-beijing/p20567> [hereinafter Cohen, Op-Ed.].

232. Tay-sheng Wang, *supra* note 225.

233. Zhongli Hsu, *Ji Ben Quanli de Qiyuan yu Fazhan* [*The Origin and Development of Fundamental Rights*], in Yuedan FAXUE JIAOSHI [YUEDAN LAW CLASS] 89 (2002) (China).

234. The Court’s jurisdiction includes interpretation of the Constitution, statutes, and regulations. MINGUO XIANFA art. 78 (1947) (Taiwan). It also includes impeachment of the ROC’s president and vice president and dissolution of political parties in violation of the Constitution. *Id.* art. 5.

235. Cohen, Op-Ed., *supra* note 231 (“Can contemporary Chinese political culture sustain a constitutional court? The best evidence is Taiwan, whose long-standing Council of Grand Justices serves as a constitutional court. During the decades of Kuomintang dictatorship, the council was mere window dressing for supposedly ‘Free China.’ But, in the last generation, as Taiwan developed a true democracy, the council made major contributions to the political system, rule of law and human rights.”).

236. Tsung-fu Chen, *supra* note 147, at 386-89. “The Constitutional court is the sole organ with judicial review power in Taiwan, [i]t is entrusted to protect the rights of the people and [it] is theoretically ‘the guarantor of the Constitution.’ This Court, however... was once the tool of the party-state regime... Yet, in the course of Taiwan’s democratization, the Constitutional Court has become the most important organ for carrying out the Rule of Law.” *Id.* at 386.

237. Dafaguan Jieeshi [The Constitutional Court’s Interpretation] No. 390 (1995) (Taiwan).

238. Dafaguan Jieeshi [The Constitutional Court’s Interpretation] No. 405 (1996) (Taiwan).

Court bravely declared certain 1999 constitutional amendatory provisions unconstitutional and void, asserting that:

[T]he act to amend the Constitution in question is clearly and grossly flawed and has violated the fundamental rule to render any constitutional amendment effective Although the Amendment to the Constitution has equal status with the constitutional provisions, any amendment that alters the existing constitutional provisions concerning the fundamental nature of governing norms and order and, hence, the foundation of the Constitution's very existence destroys the integrity and fabric of the Constitution itself. As a result, such an amendment shall be deemed improper. Among the constitutional provisions, principles such as establishing a democratic republic under Article 1, sovereignty of and by the people under Article 2, protection of the fundamental rights of the people under Chapter Two as well as the check and balance of governmental powers are some of the most critical and fundamental tenets of the Constitution as a whole. The democratic constitutional process derived from these principles forms the foundation for the existence of the current Constitution and all [governmental] bodies installed hereunder must abide by this process.²³⁹

Because the Court voided a constitutional amendment, it is now difficult to identify any governmental actions beyond the scope of judicial review.²⁴⁰ According to Chen, “[t]he Court’s brave decisions to fight the executive, the legislature, and the National Assembly demonstrated the judiciary’s powerful authority and its independence [which showed] [p]olitical powers in no way retained influence on the judiciary.”²⁴¹ Judicial independence—the key element of Western *rule of law*—was thus achieved through the Court’s faithful and courageous enforcement of the Constitution.

IV. CONCLUSION

China is an ancient country with over 2,000 years of history and a deep-rooted, well-developed traditional culture and values-system. The *rule of man*, rather than the *rule of law*, marks the essence of traditional Chinese civilization. As a nation that was able to assimilate its conquerors, such as the Mongols and the Manchus,²⁴² and came into modern times as “the proud heir of a high culture heritage, not as a grateful recipient of outsiders’ instruction but as a civilization-giver,”²⁴³ China faces more challenges with its longstanding tradition to have any real radical change, especially compared with smaller countries and regions in East

239. Dafaguan Jieeshi [The Constitutional Court’s Interpretation] No. 499 (2000) (Taiwan); see also MINGUO XIANFA (ADDITIONAL ARTICLES) (2005) (Taiwan).

240. Tsung-fu Chen, *supra* note 147, at 389.

241. *Id.*

242. Julia Lovell, *The Great Wall: China Against the World (1000 BC-AD 2000)* 302 (2006).

243. Charles O. Hucker, *China’s Imperial Past: An Introduction to Chinese History and Culture* 427 (1975).

Asia with similar but borrowed historical and cultural backgrounds. “The great size of the Chinese Empire, which made it potentially a world power, also retarded its response in many ways,”²⁴⁴ Professor John K. Fairbank and Professor Edwin O. Reischauer’s observance are thought provoking:

The main fact influencing China’s modern transformation was that China’s center of gravity lay deep within. Her long history as the ancient center of East Asian civilization had given her people an inborn sense of superiority to all outsiders. The inertia and persistence of traditional patterns and both material and intellectual self-sufficiency all made China comparatively resistant and unresponsive to the challenge of the West.²⁴⁵

Historically, traditional values decisively resisted, primarily in a political manner, the introduction of Western constitutionalism in modern China. Case studies on the Self-Strengthening Movement and Taiwan’s transition to the *rule of law* further demonstrate this point.

Chinese law has experienced a comprehensive westernization since late Qing Dynasty, and the process continued under the KMT governance before 1949. Nonetheless, there is no universal agreement on the evaluation of the significance of the legal westernization during these periods.²⁴⁶ Westernization did not establish the *rule of law* in China before 1949 because of the turbulent conditions and conflicting political interests. In the mainland after 1949, the westernization process was blocked when the CCP abolished all existing laws but failed to timely establish a new legal system. It was also blocked by the ROC in Taiwan by thirty-eight years of martial law and the suspension of the 1947 Constitution. Taiwan’s transition to the *rule of law* since 1987 required enforcement of the Constitution and an end to military governance. The transition can thus be regarded as the resumption and a natural result of the century-long track of the Chinese legal westernization. Taiwan’s experience also demonstrates that, after the successful westernization of statutes and laws, genuine enforcement is the key to finally achieving the *rule of law*.

Japan, Korea, and especially Taiwan, smaller than mainland China and/or geographically and culturally parametric, illustrate that, whatever the difficulties, the achievement of *rule of law* within a traditional East Asian culture is not an impossible goal. Indeed, the specific styles of the cultural resistance could be different, and the breakthrough points to *rule of law* could be achieved under different models. The *rule of law* is not intended to, and pragmatically cannot, substitute China’s mainstream traditional culture and values. The distinctive Japanese, Korean, and Taiwanese/Chinese traditions and culture continue to thrive even after the adoption and practice of the Western *rule of law*. China should accordingly be able to identify a way to develop the *rule of law* within the unique

244. John K. Fairbank and Edwin O. Reischauer, *China: Tradition & Transformation* 387 (1973).

245. *Id.* at 258.

246. Jianfu Chen, *Chinese Law*, *supra* note 171, at 36.

parameters of Chinese characteristics.²⁴⁷

247. Further research on the following issues shall benefit such a pursuit:

- How did Taiwan, Japan, and Korea retain traditional values during the *rule of law* practice? What are the compromises and adjustments from the traditional values and from the *rule of law* practice in these locations?
- Are there any breakthrough points in Japan's and Korea's introduction of the *rule of law* during their legal westernization periods? What was the role of traditional values during that process?
- Evaluating the legal reforms since 1978 in mainland China, at or until what point can we feel confident that China is ready to implement the *rule of law*, if the promulgation of the 1947 ROC Constitution could be such a point with its implementation forty years later that enabled the rule of law in Taiwan? Are these reforms a mainland resumption of the legal westernization track since the late Qing period? And what connections exist between the contemporary legal reforms and the legal westernization in Chinese history?