

## **“RULE OF LAW” WITH CHINESE CHARACTERISTICS: EVOLUTION AND MANIPULATION**

**International Journal of Constitutional Law, Vol. 19 (forthcoming 2021).**

**Jerome A. Cohen\***

I was reluctant at first to consider the invitation of the International Journal of Constitutional Law to comment on a Chinese scholar’s disquisition on the “socialist rule of law” in the People’s Republic of China (PRC). What might I expect? Another legal rationalization of the latest developments in China’s “people’s democratic dictatorship” by a scholar demonstrating regime loyalty in the tradition of the intellectual servants of the country’s millennial emperors? Or another ingenious attempt by one of the country’s liberal law professors to concoct a subtle theory that purports to remain consistent with the current Communist Party line while actually seeking to constrain it?

Happily, I was surprised and pleased by the formidable essay of Professor Ruiping Ye. She, it turns out, is not based in the PRC but in the law faculty of New Zealand’s Victoria University of Wellington and is therefore literally remote from the conflicting pressures to which Chinese scholars of constitutional law are generally subject.

Also, having vowed to work on my memoirs instead of responding even to the best of law journal articles, I was personally delighted to see that Professor Ye not only traces the constitutional and ideological debates over the proper meanings to be attributed to two contending Chinese terms relating to “rule of law”, both pronounced “fa-zhi”, but also clearly links these struggles to the real-life political-legal events of the past four decades that spawned them. After waiting impatiently for too many years for the opportunity to work in China rather than merely visit, I became a participant-observer in some of those events, starting in late 1978, and can attest to the accuracy of her characterizations and analysis.

The periodization that the author imposes upon the post-Cultural Revolution PRC determination to replace Chairman Mao’s cruel chaos with an appropriate legal system

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\* Founding Faculty Director Emeritus of New York University School of Law’s US-Asia Law Institute; Adjunct Senior Fellow for Asia, Council on Foreign Relations, New York, USA. Email: jerome.cohen@nyu.edu. For biographical details, see [www.jeromecohen.net](http://www.jeromecohen.net).

seems correct. Her insights into the 1978-89 era recall the exciting essential spirit of an age of great, groping, intellectual ferment. Despite many disagreements about details and their implications, there was, as Professor Ye points out, a broadly-shared felt, if inchoate, need to work toward the goal of subjecting “government”, including the Communist Party that controlled the government, to the law that was gradually being enacted and that would embrace concepts such as “equality before the law” and “judicial independence”.

To be sure, there was “old guard” opposition to the new era initiated by Deng Xiaoping. There was the ever present threat of yet another political campaign like the 1983 Party movement to suppress “spiritual pollution”, or of another blow to liberal leadership like the 1987 ouster of Hu Yaobang, the progressive Party General Secretary whom Party elders including Deng held responsible for failing to prevent public protests in favor of “bourgeois democracy”.

Yet Hu’s immediate successor as formal Party leader was also a reformer, the able and dynamic Zhao Ziyang, who continued the vaguely-articulated quest to find a way to limit the power of the Party and produce “government under law”. Zhao promptly proposed disentangling the Party from day-to-day state operations, confining it to policy formulation, selection of personnel and other general matters. As Professor Ye recognizes, this, “if successful, would have further developed the rule of law in China.”<sup>1</sup>

The author’s summary of the optimistic aspirations and incomplete achievements of the 1980’s is worth quoting: “Given that China was at the beginning of rebuilding a legal system, fundamental rule of law principles could not be realized overnight, but the blueprint was drawn and the foundation was laid, upon which details could be added and structures could be built.”<sup>2</sup>

Sadly, this was not to happen. The military massacre of at least hundreds of peaceful protesters that took place June 3-4, 1989 near Beijing’s Tiananmen Square ended the era. Threatened with popular overthrow, the Party’s suddenly revamped leadership, after actually placing the newly-deposed Zhao Ziyang under house arrest for what would be the last sixteen years of his life, promptly abandoned its flirtation with Westernized “government under law”. In its stead, with the aid of some fancy legal and linguistic legerdemain, it chose what may be encapsulated as “law under

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<sup>1</sup> Ruiping Ye, *Towards Socialist Rule of Law: the Meanings of “Fazhi” and China’s Journey*, 19 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW (forthcoming 2021), see text at note 42.

<sup>2</sup> *Id.* text following note 41.

government”, a path much more congenial to the imperial traditions of the “Central Realm”.

Indeed, Professor Ye rightly emphasizes the marked similarity between the Party-state’s enthusiastic embrace of “rule BY law” and the Legalist philosophy of government adopted by China’s first emperor. Over two thousand years ago, his Qin dynasty unified the country through uniform application of laws authorizing unchallengeable harsh punishments.

There was during this second post-1978 period, which can be seen as lasting roughly from mid-1989 until the 2012 ascension of Xi Jinping as Party General Secretary, an enormous amount of apparent legal progress. It featured Constitutional amendments, legislation on many topics including administrative law and government information disclosure authorizing the right to sue officials in circumscribed circumstances, other procedural and institutional improvements, development of an increasingly sophisticated judiciary and legal profession, and a huge expansion in the number of law schools and university legal departments. The prime motivation for these ambitious achievements was the Party leaderships’ desire to successfully develop a “socialist market economy” and reap the benefits of cooperation with the world community, as symbolized by PRC acceptance into the World Trade Organization.

Yet, as Professor Ye hammers home, this turn toward the new and attractive slogan of “ruling the country according to law”, was in fact a betrayal of the hopes for a genuine “rule of law”. Some of these achievements did put certain restraints on the conduct of the official government bureaucracy, as imperial law did too, but in neither case did law restrain the ruling power — in our day the Party leadership and, until the twentieth century, the emperor.

Moreover, Professor Ye introduces another interesting point – the ostensible revival of respect for Confucian philosophy - that reinforces the perception that China’s current regime, despite its persisting allegiance to Marxism-Leninism and Mao Zedong Thought, bears the hallmarks of inherited national tradition. Until recent years, the country’s Communist revolutionaries, like other twentieth century Chinese radicals and reformers, condemned Confucius and his disciples as the fount of the “feudalism” that had consigned the once great imperial “Central Realm” to the “century of humiliation” that began, according to Party scriptures, with the Opium War of 1839 and lasted until Communist “Liberation” in 1949.

Recognizing from historical experience that Chinese, like others, are best governed not by coercion alone but by the ruler's parallel resort to ideology and moral suasion, and seeking to bolster the nation's sagging faith in Communism, the Party has lately sought to broaden its appeal by invoking a selective version of Confucianism to serve, like the legal system, as another instrument of political control. As Professor Ye elaborates, this appears to be a replay of what occurred when China's first, short-lived Qin dynasty was succeeded by a far more stable Han dynasty that initiated a millennial process of blending the harsh Legalist philosophy of governance with the more humane, society-centered, virtuous prescriptions of Confucius and his interpreters. Although the threat of potential loss of the "Mandate of Heaven" was supposed to restrain the emperor from serious misdeeds, in practice neither Confucianism nor Legalism seriously limited the exercise of imperial power.

The third and present period in the post-1978 contest between "rule of law" and "rule by law" began, as the author notes, about a decade ago and moved into high gear in 2012 when Xi Jinping assumed Party leadership and shortly thereafter also became both President of the state and Chairman of the National Military Commission. Although the current era might be characterized as essentially a further application of the principle of "governing according to law", i.e., "rule by law", that dominated the second stage, the recent changes wrought in the name of "doing everything through law" have been so distinctive as to warrant separate attention.

Professor Ye calls this third stage "rule with legal legitimacy", a label that makes me uncomfortable, since it seems to give the Devil more than his due. Surely it is Xi Jinping's attempt to complete the process, already well under way, of cloaking Party monopolization of government power with the mantle of legality. It is, of course, a far cry — indeed at the opposite end of the spectrum — from the hope of the long-deposed Zhao Ziyang to largely separate the Party from the government. Three bold constitutional amendments, secretly prepared and rapidly bulled through the National People's Congress (NPC) in early 2018, have brought the Party closer to integration with, and almost congruence with, the government than ever before.

The most publicity-generating amendment was the abolition of the two-term limit for the office of the nation's President. Although the PRC Constitution grants the President few important powers, the position is prestigious at home as well as abroad as the symbol of the country's leadership. It has gradually come to rival the prestige of Party General Secretary, for which there is no term limit under Party rules. The sudden elimination of any presidential term limit, opening the possibility that Xi

Jinping might remain President as well as General Secretary for life, came as a huge shock to the nation, despite Xi's ever increasing accumulation of power during the previous five years. It legally formalized congruence at the very top of the Party, government and military hierarchies.

To ensure legal confirmation of the principle of Party control over the government, the Constitution was further amended to insert that principle into the document's body, rather than allowing it to rest, as before, in the oft-perceived ambiguity of the Constitution's preface.

And, to leave no doubt that this principle would be implemented more thoroughly than ever, the third Constitutional amendment, to the disbelief of many PRC legal officials, established a fourth branch of government under the NPC. It was designed to consolidate in real life the Party's control over the other three branches and even over the theoretically all-powerful NPC. The new, rather innocuous sounding National Supervisory Commission (NSC) is the most significant innovation yet made in the Soviet government model imported from the late USSR by all other "socialist" states, past and present. It has been endowed with the power to coerce not only all of the Party's 92 million members but all public officials and others who exercise public functions broadly construed.

The NSC builds upon, and shares offices, personnel and practices with, the Party's long-feared but legally unauthorized "discipline and inspection" system that has played a key role in enforcing the Party's will among Party members through surveillance, incommunicado detention and torture so effective that many targets committed suicide after being summoned. The NSC, and its sub-units at every level of government, although supposedly restricted by legislation enacted to channel its powers, is considered in fact to be more powerful than the other, pre-existing branches of government – the executive branch including the public security force, the procuracy and certainly the courts. Although nominally required to report to the NPC like the other branches, the NSC, as the Party's key legally-authorized official suppressor of not only corruption but also Party discipline and state law in any respects, is widely thought to be more powerful in affecting individuals and practical affairs than even the NPC and its staff.

In these circumstances, it is easy to see why Professor Ye gloomily concludes that the Party has obliterated prospects for the "rule of law" even while endlessly hijacking its name in order to impose "rule by law". Yet, if one steps away from her

learned and important preoccupation with theory to focus on practice, the situation is actually worse than it appears. In many spheres the police, and sometimes the procurators who are supposed to serve as both general “watchdogs of legality” and prosecutors, have long acted in total disregard for law or have indulged in twisted interpretations of legislation designed to restrict their powers. They can be confident that there will seldom be opportunities for judges, criminal defense lawyers, government officials, civil society groups or the media to successfully call them to account. It may be useful to remind readers of this journal that we are talking about the fate of the “rule of law” in the world’s most populated country that, seventy years after establishment of its current government, has yet to authorize an effective means to challenge the constitutionality of legislation and official actions.

Having proved her case, Professor Ye understandably seems aghast at her conclusion and appends a final paragraph that seeks to end her study “on a positive note”. The arguments that she musters, however, in a too brief effort at optimism that is the least persuasive part of her impressive essay, require fuller development. Otherwise it will be too easy for astute observers of the PRC to dismiss her “hope that, in the distant future” the Party’s “supreme ruler may choose to relinquish its supremacy”.<sup>3</sup> The circumstances surrounding the decisions of Deng Xiaoping to end Chairman Mao’s “class struggle” in 1978 and of Chiang Kaishek’s heirs’ to peacefully transform his Leninist-type totalitarian regime on Taiwan during the decade beginning 1987 were very different from those that are likely to prevail for the foreseeable future in twenty-first century China.

Yet history is notoriously adventitious, China’s progress under Communism has witnessed many swings of the pendulum, and “revolutionary successors” to the ill-fated Zhao Ziyang, prepared to pursue a liberalizing path, amply exist among today’s dissatisfied but suppressed Party elite.

Writing in another grim era — mid-1966, after the outbreak of the Cultural Revolution but before its worst excesses — I pointed out that Chairman Mao’s heirs would have to cope with the pent-up aspirations of the suppressed Chinese people. In assessing prospects for eventual criminal justice reform, I concluded that: “Perhaps the least hazardous prediction one can make … is that, as long as Mao remains in power, we are unlikely to witness any substantial improvement in the plight of the individual

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<sup>3</sup> *Id.* text following note 114.

in relation to the state.”<sup>4</sup> Perhaps, after thanking Professor Ye for her stimulating study, we should all review the film “The Death of Stalin”, a reality-based comedy that is no laughing matter for students and subjects of the “socialist rule of law” in contemporary China.

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<sup>4</sup> JEROME ALAN COHEN, THE CRIMINAL PROCESS IN THE PEOPLE’S REPUBLIC OF CHINA, 1949-1963: AN INTRODUCTION (HARVARD UNIVERSITY PRESS 1968), at 53.