China’s Legal Tradition and the Rule of Law

“The Rule of Law” is a rather nebulous notion. Commonly it refers to an idea that where there is a law it is to be applied equally to everyone. But this leads to a plethora of questions. Here are a few of them. (1) What is law? (2) How does it come about? (3) If it is a set of rules that govern human behavior, what makes it different from other norms? (4) Why “the rule of law” but not “the rule of any other norm or a group of norms”? (5) If law is made by humans, who are they? (6) What gives them the authority to make law? (7) For what purposes and according what procedures are laws made? (8) What if a law is in conflict with another law or norm? (9) Are there good and bad laws? (10) Who, using what criteria, are to evaluate a law and compare it with another norm? (11) What can be done if a law is bad? (12) What happens if there is not an applicable law? (13) Who has the authority to apply law? (14) Who has the authority to enforce law? (15) According to what procedure and with what means are laws to be applied and enforced? (16) Does “equality under the law” preclude consideration of inequality in reality? (17) What happens if those who make, apply or enforce law fail to carry out their responsibilities properly? (18) What if they violate law? (19) What recourse do people have if they foresee a damage to be caused by a law or actually suffer the damage because of the law’s improper application or enforcement? (20) Who are there to assist the individuals or groups in securing the recourse?

We cannot meaningfully discuss “the rule of law” without first address these crucial questions.

But even these questions are rudimentary. There are many more fundamental ones. (1) People live in society at a price – subjecting them to certain social control and thus losing some of their individuality. Why and for what purpose? (2) What is the meaning of life, what are humans seeking? (3) Does society has objectives (ideals) of its own? (4) How should one live in society – how should one interact with others, particularly those with societal authority? (5) What happens if there is a conflict of objectives, particularly between those of an individual and those of society? (6) How are conflicts to be avoided and solved after they have happened? (8) When a choice among various objectives is necessary, how should the choice be made and justified?

It should be obvious that these philosophical questions are at the root of the jurisprudential ones stated above. Thus they have been discussed by serious thinkers of the world since time immemorial.

In response to the jurisprudential questions the West has established a set of tenets, institutions, mechanisms, procedures and practices, including constitutionalism, universal human rights, equality under the law, due process, representative democracy,
separation and balance of government powers, a particularly strong judiciary protected by constitution and laws for its independence and endowed with power to review the constitutionality of the laws and the legality of executive actions, the right of the public as well as those whose interests are affected by a government action to challenge it, and a learned and disciplined legal profession to assist them in mounting such challenges. These are considered to be essential preconditions or core elements of “the rule of law”.

Many of the jurisprudential questions are recognized by the Chinese, and great thinkers of ancient times had addressed them in detail – Confucius was a bit dismissive of law, but later Confucians were quite aware of law’s importance; the Legalist theory, hailing law as the only norm, was dominant during the Qin (211-205BC), discredited immediately thereafter but resurrected by successive governments to support their hidden agenda; the Daoists and the Buddhists stressed limitation of political power after it became more concentrated.

Based on these theories and the experience in dealing with concrete social problems the Chinese have developed a view of law and government that is a mixture of various ideologies and pragmatic considerations. And to respond to the jurisprudential questions they too established a set of tenets, institutions, mechanisms, procedures and practices, some of them similar to those of the West, others quite different. Here I shall present an outline of them, try a bit of comparisons between the two sets, and finally go a step further to explore the possibility of developing another set of core elements of “the rule of law” that is acceptable to both China and the West.

I have an impression that in the West ‘law’ is used in a generic sense referring to various types of norms, including divine law and law of nature as well as man-made law. In traditional China ‘law’ was used very narrowly to refer to rules made by political authorities. Apart from law there are many other norms, including moral principles, custom, and a once well defined set of rules for civilized behavior known as li (禮 rites).

Why are there so many norms? Apparently most Chinese thinkers believe they are necessary for the existence of society and for making life in it better. But some have doubts about this. What is life for? Different Chinese thinkers have different ideas.

To the greatest majority of common people, to live is an objective in itself, and for this objective one must strive to preserve one’s own physical existence and the continuation of one’s blood line. To Confucians these are only the immediate, necessary objectives, but they think there is more to life. It is to pursue goodness and enlightenment in a person and harmony and progress in society. For these purposes norms are necessary, because people competing for limited resources can have conflicts, and norms are to guide them away from confrontation towards cooperation.
These ideas were articulated especially clearly by Mencius (390-305) and Xunzi (340-245).

Whence the norms? In ancient times they were believed to be made by gods. Confucius thought the most fundamental norm – morality – came from a lesson of reciprocity people learned from their interactions: if one wants to be treated by others in a certain way, one should treat them in the same way. Custom was formed by people through long practice. Most of the *li* had roots in custom but were refined by persons of wisdom. Law, obviously, was made by holders of political power.

Norms are not equal; they form a hierarchy. The position of a norm is decided by its closeness to reason and human feelings. Moral precepts, believed to be the closest to human consciousness, are at the top. Law is at the bottom because it is made by power holders who are not necessarily persons of best qualifications. On average they are beholden to their private interests and power-drunk, and therefore, biased and arbitrary. High and long-term objectives for society at large are beyond their view, and, in any event, they are incapable of foreseeing the future and make laws presciently.

Grading norms is not only conceptually but also practically important because it determines their priorities in application and enforcement. Morality, being at the top, should take precedence of the others. But how is it to be done? Since moral principles have to be learned Confucius emphasized self-cultivation and pedagogic education. This emphasis became the hallmark of Confucianism – Mencius stressed the former because he had faith in the goodness of human nature and hence he alleged that one can find moral principles in one’s own unadulterated heart; Xunzi gave more weight to the latter because of his belief that human nature is ‘bad’ in the sense of solipsistic; all later Confucians took a more balanced position. From their point of view when moral principles are “found” in one’s heart or internalized through education, there is little need to apply and enforce other norms, particularly law, because it is the lowest standard. Needless to say if a law is to be applied and enforced its content and the reason behind it must be made clear to the people first – as a way to educate people.

When some people have failed to observe moral principles, got involved in disputes and conflicts, and brought their case to a third person for a decision, what is he going to do? In ancient China he would not look for an applicable law first. Instead, he would, after considering every aspect of the case, including the immediate causes of the dispute or conflict and the long term effects of a decision on the parties and society, choose from the various norms one most surely to produce satisfactory results. This procedure, known as *yi-shi yi-zhi bu-wei xing-pi* (議事以制，不為刑辟), could be call the practice of “the rule of multiple norms”.

This rule of multiple norms has two problems. First, how is an appropriate norm chosen and made clear to those concerned that it should be applied? A wise, upright
person with uncommon ability of persuasion is needed to make this ‘rule’ work. Such persons are rare. Second, this rule can give rise to dissimilar decisions to similar cases and jeopardize judicial predictability. The Confucian answer to the first problem is to build a system that can educate and select good judges. It is not addressed by other schools. The second problem troubled all Chinese thinkers and many efforts were made to solve it.

In 536 BC the state of Zheng promulgated a criminal code, an action with two obvious objectives: to affirm that a clearly defined act was to be governed by a clearly defined law (thus ensuring judicial consistency in similar cases), and to demonstrate a determination that the law was to be observed by the government as well as the people (thus an exaltation of the rule of law). It was much criticized by those who believed in the rule of multiple norms. In 513BC the state of Jin also promulgated its laws. Confucius did not make the same criticism but thought the new laws were inferior to the old ones. Implicitly he conceded that there could be good laws. But in Lunyu (論語, The Analects) he did not discuss law. It seems that he thought law was merely a form of zheng (政 policy). And judging by his emphasis on the rulers’ need to zheng (正 rectify) and establish themselves as the model for the people, he evidently would prefer a ‘rule of morality’ and ‘rule of good man’. The trouble is, apart from the scarcity of good rulers, morality is susceptible to different interpretations, thus leading to different decisions for similar cases and unpredictability of the judicial process.

By the time of Xunzi (340-245) every state had promulgated laws. He was more positive about law, comparing it to tools of measurements, and said “where there is a law, abide by it.” Evidently he was conscious about the need of clear standards and the importance of judicial consistency. He did not make a distinction between good and bad laws, but apparently though law was less desirable than li and favored “the rule of li” because according to him, li, as a rule system that regulated comprehensively all aspects of human life, was more precise than morality and less arbitrary than law.

The problem with this idea is that li is highly formalistic and situational. When social conditions change, previously practiced li quickly becomes outdated. Although many of the ideas behind them may remain valid and admirable, some rituals may appear to be amazing, even laughable. Of course new li can be developed to accommodate new situations but it takes time to be generally accepted. Before that happens, people will be left without clear guidance. Xunzi was aware of this problem but dismissed its seriousness. First, he pointed out that li is not mere formality. This point had already been stressed by Confucius, but Xunzi went a step further, equating li with li (理 reason) and suggested that this could be made clear to people. Second,
he exalted the superiority of ‘the rule of junzi’ (君子 noble men), arguing that when there is a noble man who knows the essence of li and all other norms, even incomplete laws can be made useful in all circumstances, but when there is not such a man, even comprehensive laws cannot apply to unexpected cases.

How would a noble man apply law, or for that matter any norm? Despite his own advice to abide by an existing law Xunzi never thought law can be applied automatically. Only a law that is reasonable and not in conflict with higher norms could be applied. What happens if there is not such a law? Xunzi suggested that a good judge will yi (議 deliberate) the yi (義 the essence or the spirit) of law as a norm, and decide accordingly.

Noble people do not readily appear. All those who advocate the rule of man knew that and suggested various ways to bring such people about. Xunzi was particularly conscious about this and designed a specific curriculum to train people, making them noble. Then he suggested a procedure to select from them the best and brightest and make them officials. Thus in theory his ‘rule of man’ does not necessarily entail arbitrariness often associated with that idea. And in fact the risk of arbitrariness was not very high at his time because feudalism established in the beginning of the Zhou dynast (1122-221 BC) was still largely functioning. Power was dispersed among the Zhou king, the heads of many vassal states and the feudal lords under them. There was a system of checks and balances.

This fact also contributed to the relative reciprocity in the relationship between those in power and the others. Confucius said while the people should be loyal to their ruler he should treat them in accordance with li. Officials should never offend the ruler, but when he is wrong, resist him. While working for a ruler a great minister should follow the Way and, if that is impossible, he should resign. Mencius was more assertive. At his time the intelligentsia which first emerged with Confucius grew exponentially in size. Mostly descendents of aristocrats whose fortune had declined, they were educated and used their knowledge to earn a living. As instructors to the less knowledgeable – including the rulers as well as the common people – they entertained a heightened self-esteem. Thus Mencius insisted that a ruler must treat the intellectuals as teachers before employing them as officials. He even argued that a bad ruler does not deserve people’s loyalty. Thus to revolt against him is justifiable, killing a tyrant is not regicide.

By Xunzi’s time political power was more concentrated. With fewer employment opportunities available the intellectuals were humbled and many of them served the rulers obsequiously. Nevertheless, Xunzi exhorted government employees “to follow the Way, not just the ruler’s orders.” Indeed he went further, advising children “to follow what is right, not just their father’s wishes.” He did not explicitly support
revolution, but alleged that the ruler is like a boat, the people are the water – the water bears up the boat but can also capsize it. Thus, conceptually at least, although the Confucians did not accept the rule of law in the sense that law is to be applied to everyone equally, they did not support authoritarianism, they emphasized that though people occupy different status, their relationship should be reciprocal. It can then be argued that they would oppose irrational unequal application of law.

But they argued that in certain circumstances unequal application and enforcement of law is permissible, law should not be applied mechanically. Every case is different, not only its issues should be analyzed in detail, the characters and circumstances of a person involved must be taken into consideration, and his contributions to society as well as his liabilities should be carefully weighed. Those who have bestowed great benefits or done great harm to society should not be treated like ordinary people. It is also true in the case of the very young, the very old, the mentally or physically disabled, and those being in self-defense or caught in dilemmas of equally horrendous alternatives such as to kill the attacker of one's parents or let them be killed.

This rise of intellectuals and the cacophony of their criticism of various aspects of society and government posed a serious challenge to the status quo and produced great chaos. As the traditional order fell, the feudal lords fought against one another ever more ferociously and incessantly in order to gain more power, people and resources; many small states governed by inapt rulers were vanquished. Alarmed by these facts many thinkers proposed measures to keep domestic order and win foreign wars. For these purposes some, mainly the Confucians, suggested fundamental changes – raising the moral standards for the people as well as those in power, so that they could see the high ideals of society and strive for them in unison. To some other thinkers – chiefly Gongsun Yang (公孫鞅 commonly known as Lord Shang 商鞅, 390-338), Han Fei (韓非 280-233) and Li Si (李斯 280-208) – such measures were not only slow but unrealistic. To achieve urgent and concrete results a ruler has to suppress the belligerent aristocrats and insubordinate officials, wipe out the criticisms and misleading ideas of intellectuals and drive the common people to agriculture and military service. But ordinary people are solipsistic and will always seek only their narrow, immediate interests. Thus the ruler has to fight his subjects “a hundred battles a day” and his victory was uncertain. To help the rulers and their states to win these thinkers suggested a coordinated use of his superior status, a set of tactics and the law. Among the three elements these thinkers emphasized the law most, and hence earned the sobriquet “the Legalists” later.

They believed that law is a particularly effective weapon to silence contention and quell disorder because it can be used to determine right and wrong like a measuring instrument to determine length or weight, eliminating subjective views and achieving
objective results easily and precisely. To them law is for the interest of the state, its ultimate objective is to make the state rich and strong. For this purpose the entire state is to work like a machine with every individual as a part. The law is first to assign everyone a minfen (名分 a role and a share of the resources) and then to have the minfen properly kept and improper claims stopped. To function the law should have a number of essential characters, including being clear, definitive and yet not rigid, easy to understand, easy to observe, and above all, more authoritative than all other norms. Indeed the Legalists wanted to suppress morality, li, custom, etc. and make law the only norm, its contents beyond criticism, its authority unchallengeable, and its command of obedience absolute. They wanted it to be applied equally to everyone from the high officials down to the common folks. To enforce law they argued for rewarding compliance and report of violations. They were sure of the success of their scheme because they believed that people, by nature calculative, would invariably seek rewards and avoid punishments – especially if the severity of the punishments far exceeds the seriousness of the offenses.

The theory has many obvious merits but also some conspicuous flaws. Its most serious practical defect is its requirement of exceptional persons to make, apply and enforce law. According to Lord Shang good laws are made by shengren (聖人 sages) who alone can see the true interests of the state and have the will to prescribe measures pursuing them. Those who apply and enforce laws have to be fa-shu zhi-shi (法術之士 experts dedicated to law) who are prepared to sacrifice their personal interests, even their lives, in serving the law. Needless to say such persons are not common. Thus ironically and paradoxically the Legalist theory of the rule of law needs Confucian good men to begin and to complete.

Second, the Legalist principle of equality under the law has an exception. We note that it is to be applied to officials and the common people. The ruler is not included. Why? None of the advocates of this principle gave a reasonable explanation.

Third, it can reasonably be argued, as the Confucians did, that even if law were to be applied equally to everyone, the idea is intrinsically faulty and the practice could violate human feelings of compassion and magnanimity.

Fourth, the Legalists did not recognize the possibility that a law could be bad in the sense that it is inimical to society, and they suggested no criterion for evaluating law.

Fifth, despite the Legalist wishful thinking, laws were not given by a sages, but constantly made and changed by successive rulers. This fact forced them to accept every command from a ruler as law regardless of its value to society.

Sixth, law is inherently inadequate to regulate all human activities. In a case where there is no applicable law the Legalist theory provides no remedy and yet it
does not allow the case unprocessed. The decision will be left to a judge’s discretion which could likely cause uncertainty the theory is supposed to eliminate.

Seventh, the Legalist principle requiring everyone to serve as a government informant was particularly detested by the Confucians. They correctly pointed out that where everyone reports on everyone else, mutual trust among even those with the most intimate relations will be destroyed, cooperation will be difficult if not impossible, and society will cease to function properly.

Eighth, to many thinkers the idea that disproportionately harsh punishments can prevent crimes is absurd. Laozi asked rhetorically: When people are no longer fearful of death, what death penalty can do to them?

Finally, the Legalist ideals are very modest. Beyond making the state strong and rich there is not much on the horizon. The Legalists would like to ban ideas of other schools and want people to learn nothing but agriculture, war skills and a few other disciplines of practical use like medicine. Law is to be made the only subject for intellectual pursuit and legal officials the only teachers. What are people to do living in an orderly, well stocked, and invincible state? What can they look for in life?

Laozi (Li Dan 李聃), a contemporary of Confucius, doubted the value of all artifacts, particularly man-made norms. He believed in a utopia where everything observed da-dao (大道, the ‘Great Way’ or law of nature). When somehow it was lost people invented morality and various other norms, the worst being law. According to him where there are more laws there are more robberies and mayhem. In other words, humans are incapable of creating a good way of life that deviates from the Way. Because of his exaltation of dao and his suggestions of salvation by returning to it he was later honored as the founder of dao-jia (道家 the Daoist school). His ideas were expounded by Zhuangzi (Zhuang Zhou 莊周 365-290) who espoused a theory of relativity of all phenomena and ideas – the appearance of big and small, the concept of right and wrong, etc. All views are subjective and transient; nothing is objective and permanent. Humans trying to rescue themselves after losing the Way by making various laws are like a person who, fearful of his own shadow and footprints, tries to escape from them. He cannot get rid of his shadow, and the faster he runs, the more footprints he makes. For these reasons both Laozi and Zhuangzi advocated refraining from further efforts, eschewing existing civilization, and going back to a primitive state of nature.

The problem with this nihilism is that the utopia, like a mirage, is ever receding, and the majority of ordinary people is unprepared to abandon what they have achieved and head to an uncertain future. If civilization is hard to give up, the idea of getting rid of laws, being a part of the norm system which helps sustain civilization, is impractical.
It was against this negative thinking that the Confucians and, more strongly, the Legalists, urged people to continue the course they had taken and improve it. In the company of these two schools there was a third – the Moists. Its founder Modi (墨翟 480-390), a skilled craftsman turned a populist movement activist, went a step further, exhorting people to bind together tightly and strive work harder to make life better. His ideas were almost revolutionary – Instead of the existing system of inherited aristocracy he advocated a theocratic meritocracy. The tianzi (天子 emperor) is to be chosen by tian (天 Heaven) from the best of men and he is to chose good people as officials. The officials will rally the people to follow the way of the emperor. As a result the entire country will be unified under a single yi (義 definition of what is right and wrong). And as a check on the power of the emperor, he is to follow tian-zhi (天志 the will of Heaven) or to be toppled by tian through its agents gui-sheng (鬼神 gods and spirits). What is the will of Heaven? Mozi said it wants people to love one another and avoid war, the rich to share with the poor, the strong to help the weak, and everyone to work hard and live frugally. As a result there will be peace in the world, order in the state, harmony in society and happiness in the family. Resources and products will be abundant, and the common folks can be well fed and clad.

Because there were so many senseless wars and so much poverty and misery, peace and material wellbeing of the common people were the all consuming concerns for Mozi. Beyond these he established no other objectives for society. To address his concerns he in effect designed a totalitarian state in the disguise of a religious establishment – the officials were to convert the people to believers of the ruler as the Son of Heaven whose command is the only norm. And to insure its observance everyone is required to inform him what is happening under him. As a result the rewards and punishments dispensed by him will be swift and peace and order will universally prevail.

The principal problem with this theory is a lack of effective control of the ruler’s power. Being the norm maker and enforcer he is free to do what he wants although according to Mozi he must obey Heaven, which loves the people, or he would bring down its wrath in the form of natural disasters. But the punishment for him comes with great collateral damages to the people who have already victimized by him. It is unfair. Thus if there was a true believer in the rule of man, it was Mozi. And with religious justifications his theory needs no apologists.

The above is a very rough sketch of the views of several major ancient Chinese thinkers relevant to some of the questions raised in the beginning of this essay. Their theories all have some points on law and its application. During their times the ideas of Mozi, the Legalists and the Confucians were to different degrees put in practice. The effects of the Legalist schemes were most salient. Implementing them thoroughly,
the state of Qin indeed became rich and strong and succeeded vanquishing its rivals and united China. During the Qin dynasty the Legalists were in full control of the government, but soon the draconian laws and their brutal enforcement ignited widespread rebellion and in less than fifteen years the mighty dynasty was toppled. The Legalists were discredited and for a brief period the new regime of Han (206 BC – 25 AD) followed the Daoist principles to let people recuperate. Then the need of laws became apparent and after careful deliberation the ruling elites decided to reinstitute some of the statutes of the various states of the pre-Qin times, and trusted the enforcement to officials who were more or less Confucians. As there were not yet enough laws the Confucian judges resorted to higher norms as supplements. And then they went further, introducing more and more laws reflecting their views and values. This process continued through later dynasties, producing a compendium of statutes with features quite different from the Qin laws and laws of many other countries.

In addition to transforming the character of Chinese laws the Confucians created a structure and procedure for making, applying and enforcing laws. During the Zhou the ruler of a state usually delegated the judicial power to the minister of justice. This practice was changed by the First Emperor of the Qin who reportedly decided all matters of importance himself. The Han re-established the authority of the judicial minister except on some rare occasions where a case was already decided by the emperor before it was brought to a judge. In subsequent dynasties the judiciary was generally left with this kind of independence in handling ordinary cases, although in cases involving imperial privileges or vital interests of the state the emperor always interfered. Nevertheless, the imperial power was not quite absolute; the prime minister could advise against an imperial initiative or withhold its implementation. In addition, a group of officials known as censors were appointed to offer constructive criticisms to the emperor.

And then there were the intellectuals. While some of them (mainly the Legalists and disciples of Mozi) supported the concentration of political power because of their ideology, some lost their integrity and became imperial pets and tools, many true Confucians and Taoists stood firm by their principles and resisted the concentration. In a number of special cases they check the abuse of the imperial power and in many more discrete ways they helped limiting its expansion. It was against this force the First Emperor of the Qin persecuted these intellectuals.

But generally through Chinese history political power became more and more centralized. The situation dramatically worsened after 1381 when the founding emperor of the Ming abolished the post of prime minister, reduced the censors’ role to investigating and impeaching erring officials, and made it a capital crime for intellectuals who refuse to work for the government. Since then emperors have
become true dictators, clinching, at least in theory, all powers in their hands. Imperial interference in judicial matters became more often and pervasive, limited only by the emperor’s own interests, time and energy. In the Qing (1644-1911) it became institutionalized that all capital cases were to be finally reviewed by the throne.

But a close look at the judicial process shows that the reality is more complicated. A civil dispute or minor criminal offense was usually brought first to members of the families and local communities for mediation or arbitration. In such cases even when a formal complaint was filed the magistrate often advised the parties to go through those procedures. The main reason was to save his time. During the Qing he was the only judge of a district of several hundred thousand people. Moreover, as the head of the district government he was responsible for implementing policies of the imperial government, collecting taxes, keeping law and order, overseeing local agricultural, commercial, educational and defense matters. And he had no deputies but a very small staff of low status assistants. He was just too busy to handle trivial disputes and petty crimes.

In response to the magistrate’s inaction in those cases the local people took upon themselves the burden of finding solutions. Families, clans, neighborhoods, villages, schools, trade or professional associations, religious organizations, etc. joined the parties in mediation and arbitration. Judging by the relatively small number of such cases being tried by magistrates, the success of the community efforts was remarkable.

In a case where adjudication was necessary, the first draft of a decision was usually done by clerks who had been in service for years in the same district government. Their suggestions were normally in line with certain precedents because being custodians of government records they could readily dig up a decision of a similar case and following it was the easiest and safest course to do their job.

The clerks’ suggestions were first reviewed by the magistrate’s private law secretary. Normally appointed to his post after passing the national civil service examinations which tested mainly his knowledge of Confucian classics, the magistrate usually did not have much training or experience in law. In contrast, the law secretaries were usually Confucian scholars who after failing such examinations learned law and practiced it for a living. They were privately employed by officials to handle legal matters and check on the clerks. Because of the similar knowledge they shared, the law secretaries and the clerks often agree on how a case should be processed. But if a clerk was seriously wrong the law secretary would revise the draft or write a new one for the magistrate, which would be almost routinely accepted. In a civil case it would be the final decision unless appealed. In a criminal case the decision would be reviewed by the magistrate’s many superiors. In the Qing those
who review a capital case could include a prefect, a circuit intendant, a judicial commissioner, a governor and/or governor general, the Board of Punishments, the ‘Three Judicial Offices’ in the imperial capital, the ‘Nine Ministers’, the Grand Counselors, and the emperor. The reviewers were not only to check whether the facts were verified and a proper law applied, but also whether there were any irregularities in the procedure and whether the appropriate law was applied. In a case where, lacking a specific law, one governing a case with some similar characteristics would be suggested for analogous application or a new law had to be made and applied retroactively, the high officials had to participate in the deliberation and come up with a recommendation for imperial action.

But not all the high officials were versed in law. Those in the provinces, from the governor-general on down, depended on their private law secretaries; the members of the Board of Punishments relied on the permanent staff of the Board, mainly the long experienced clerks and some true legal scholars.

In a great majority of the cases the magistrate’s preliminary decisions passed the review process with only minor revisions, plausibly because the law secretaries and the clerks on various levels had similar education and followed the established path in making decisions. Although not being required to cite precedents they often used the same reasoning, even the same wording, in their opinions.

If so, why were the other high officials involved in the review? It was because since ancient times those who specialized in law had been despised as narrow minded, capable of seeing only the fine prescriptions of laws but not the long term results of their application and the ideals of society. In the Western Jin dynasty (265-316), after Confucianism had become the orthodoxy, it was established as a judicial principle that while the lower judges were to strictly apply the law, the high officials were to deliberate the law’s appropriateness in the light of higher norms and social ideals, and where they could not agree, the final decision was left to the emperor who could revise or rescind a law or make a new law and have it applied thereafter or even retrospectively. The justification for this imperial prerogative could be found in the Moist as well as the Legalist theories.

After taking a brief look at the traditional Chinese legal theories and practices, we can now turn to the questions: Was there rule of law in traditional China? Is the idea of the rule of law compatible with those theories and can it be accepted by China at the present or in the future?

Since ‘the rule of law’ is largely a modern Western notion I shall present below a cursory observation of its ‘core elements’ and then look into the Chinese theories and practices to see whether such elements exist in there.

(1) There is in the West a belief that human beings are born equal with certain
rights which can be generally defined and, in concrete cases, spelled out in concrete terms. This belief is alien to the Chinese, they can understand it as an ideal but not a fact. They see as a fact that humans are born into different social circumstances, what a person actually gets is what his parents bestow upon him and what society, in response to his own action, gives him in return. Everyone’s fortune is situational; there are no universal specific ‘human rights’. (Thus, for instance, it would quite ludicrous for a youngster of a family struggling for subsistence living to claim a right against child labor.) Nevertheless, the Chinese hold that human beings ought to be treated as human beings, not as animals or inanimate objects. Hence we can say that they recognize a universal general ‘human right’.

(2) The West resorts to man-made law as the means to define and spell out "human rights" and prescribe equal protection of these rights for everybody, and therefore holds that law should be applied and enforced equally in all cases, and for these purposes law is to take precedence to other norms.

However, in reality, thanks to its pragmatism, the West did not always apply and enforce law equally in all cases. The ‘sentencing guidelines’ in many countries allow judges certain latitudes in imposing different penalties on people with different social status as well as physical and psychological conditions.

More flagrantly in some Western countries people are divided into different classes according to their race, religion, sex, wealth and/or social positions, and laws are not applied to them equally.

The Chinese do not think man-made laws are capable of defining rights and obligations in every situation. Effective laws have narrow focuses and therefore they are never adequate but are always imbedded with loopholes. Making more laws to address the problems often create more problems. (The recent efforts in the West to regulated wayward financial institutions and practices, such as the horrendous 848 pages ‘Dodd-Frank law’ passed in the US in 2010, are vivid illustrations of the trouble.) Instead, the Chinese hold that the relative rights and obligations people have toward one another are defined by higher norms which, growing from the experience of social interactions, are capable of adjusting such rights and obligation to changing circumstances. Rights and obligations arbitrarily created by law could damage human relations and mechanical application of such law can actually result in inequity.

Social stratification was accepted in traditional China. It was provided in the Tang Lü (唐律 the Code of the Tang [618-906]) which was inherited by all subsequent dynasties, that eight classes of people (those related or particularly close to the imperial family, the sagacious, the great statesmen, those who fought for and preserved national security, the high and meritorious officials, and the descendants of previous dynasties) were granted special procedural treatments. But the provision was
infrequently and carefully applied. Slaves, indentured servants and some ethnic minorities were treated as inferiors. All the privileges and discriminations were formally abolished in late Qing.

(3) Laws can be good or bad. But in the West there is a positivist view that law is simply the command of the sovereign, and as long as it is issued by a recognized government authority it is valid regardless of its merits. After the establishment of “constitutionalism” the positivists turn to the constitution as the final standard against which the validity of a law is to be judged. Opposite to this view is one insisting that law should have a “morality” of its own, consisting of two parts – an “internal morality” requiring mainly procedural justice and an “external morality” demanding substantive justice. The former, concerning how a law should be made, applied and enforced, is easy to recognize and accept. The latter is about a law’s objectives which usually are connected to broader objectives of society. According to this view the validity of a law must be determined by how well its objectives match those of society.

In traditional China the Legalists held the positivist view; all other schools, particularly the Confucians, emphasized the need of a morality of law. When laws proliferated and legal formalism more accepted the Chinese looked for a more concrete standard to judge their laws. There was not a constitution but a compendium of basic laws, most of them rules for the organization and operation of government offices and rules for disciplining errant officials. A relatively smaller number of rules prescribing penalties for actions that were harmful to those organizations and operations or vital interests of society and its members were collected in a compilation known as lü (律 ‘The Statute’). Although largely a criminal code it also contained some provisions on civil matters. More significantly, as it is generally true with all criminal codes, its provisions not only explicitly proscribe but also implicitly guide and thus affirm certain rights and obligations.

The problem with a constitution is that in it the societal objectives are usually expressed in broad terms. When the objectives change these terms have to be interpreted to accommodate. Thus a written constitution is not necessarily a guarantee against bad laws (e.g., the “equal protection under the law” clause in American constitution did not prevent the adoption of racial segregation laws in America. Many of them were declared unconstitutional only very lately). And its interpretations often lag long behind social changes and can be vacillating and contradictory.

In traditional China there were no such problems since it did not have a formal constitution. There was a different way for people to judge the value of laws. The criteria were tian-li (天理 heavenly reason) and ren-qing (人情 human feelings and wishes). Even today when people discuss a matter of legal significance they almost
always consider *guo-fa* (國法 state law) together with *tian-li* and *ren-qing*, and insist that three should be congruous. *Tian-li* and *ren-qing* may sound vague but the Chinese think they can be found reflected in commonly accepted moral principles and established custom. They are flexible and adaptable to changing circumstance and therefore will not only be useful in evaluating laws but also make it easy to adopt good laws and abolish bad ones.

(4) The principle of treating similar cases similarly was much emphasized in the West. It is on the basis of this principle the Common Law tradition of taking established precedents as a source of law. The principle and its practice certainly help prevent arbitrary decisions and make judicial actions more predictable. In this manner the principle and practice contribute significantly to the rule of law, although, of course precedents can be disregarded or overruled.

In traditional China because of the very early emergence of a large number of written and promulgated laws there was not a similar emphasis. But in fact precedents were largely followed in most similar cases simply because it was a convenient and safe way of making decisions.

(5) In the West there is a generally accepted idea that to guarantee against their abuse, powers, particularly those exercised by the government – the executive, the legislative and the judiciary – should be separated and mutually checked. Based on this idea most countries created three government branches each with one of the powers. (Countries with a parliamentary system like that of the United Kingdom blended the first two, but in the parliament the party out of office serves as a check on the one in office.) And to ensure that law is being properly made, applied and enforced the judiciary is given particular weight. It is to be free from political influence. (However, such influence is not totally absent. It may not appear in direct intervention in individual cases, but through appointment and in some cases election of judges, political leaders inject their views into the courts rather perceivably.) The courts form a hierarchy so that decisions of the lower ones can be reviewed by the higher ones and corrected of mistakes. A law or an executive act can be made null and void if it is declared unconstitutional by the highest court. A decision is honored before being overturned in a later case or overruled by a new law and all decisions must be made known to the persons concerned and available for public scrutiny.

The Chinese were aware of the perils of concentrated power but they did not see the necessity of dividing it into three kinds to be exercised by three separate groups of people. Instead, they think it should be shared by many more. Thus in traditional China many high officials were allowed to suggest new laws and participate in the debate concerning adoption or abolition of laws. Although not elected they were able to represent views of the people for two reasons. First, being selected through the
national civil examination system they had a common understanding of the Chinese culture. Second, like all Chinese, they had deep roots in their native communities (in which most of their relatives lived and to which they were to retire), and therefore always remained in touch with the local people and consulted them while participating in the law-making process. The final act in this process was taken by the emperor who could be arbitrary or capricious but unless a suggested law infringed upon imperial prerogatives he usually would not overrule his officials.

The power to implement and enforce law too was shared by a large number of officials; some of them also had adjudicatory power. While acting as a judge an official was supervised by many more superiors on many different levels than he would be while acting as an administrative or a law enforcement officer, and a wrong move would subject a judge to much severer disciplinary sanctions or criminal punishments. But these measures were not enough to insure judicial integrity. With his many other roles a judge could not be free from political influences. If he resisted he could be removed from his job for any other reasons. His position was precarious.

Nevertheless, the judiciary in traditional China was not completely under the control of the political system. This is because contrary to the perception of being a totalitarian state China used to have a small government relative to its vast territory and population. The local government was especially understaffed. In time of peace the magistrate’s primary responsibility was to collect tax and keep basic order. Judicial work, apart from trials of some serious crimes such as homicide and armed robbery which were few and far in between, was not given much attention. As a result political intervention was not as serious a problem as might be imagined – not in ordinary cases any way.

(6) In the West it is much emphasized that the trial of a case must be open. “Due process” prescribed by the constitution and valid laws and practices must be strictly followed. An accused must be presumed innocent until proven guilty. He shall not be forced to incriminate himself. Torture must not be used on the accused or a witness in order to extract confession or evidence. But rigid application of the procedural rules can lead to perversion of justice. Many evidently guilty criminals were left at large because of technical errors in the prosecution’s case. In any event, violations of those rules could not be completely eliminated, especially where racial and social biases are rampant. In such society due process is only a faint ideal. More cynically, some Western countries have recently created special courts both at home and abroad where the due process is brazenly and patently disregarded.

In traditional China trials were generally open as a way to “educate” the people about what could and could not do in similar situation. There were detailed and reasonable procedural laws. Confession, as an expression of remorse, was encouraged
and torture, as a means to compel recalcitrant suspect of serious crime to tell the truth, permissible. In both cases there were rules against abuse but they were not rigorously enforced. Officials who disregarded the procedural rules but were able to find the truth in ingenious ways were lauded as judicial heroes. Apparently to the Chinese it was more important to achieve substantial justice than mechanically observing the procedure.

(7) In the West it has long been accepted that the rule of law requires availability of legal counsel for the litigants and especially to a person facing criminal charges. The main assumption is that ordinary people are not familiar with the arcane intricacies of law, therefore a learned and disciplined legal profession is needed to provide assistance. The trouble is that legal counseling is not free. The rich can afford to have extremely effective (and priced) “hired guns” while the poor can only have counsels or court appointed lawyers often of lesser caliber.

Traditional China never acknowledged this necessity because of a notion that the officials ought to act as parents of the people – when children bring their dispute to their parents there is no need of the intervention of a third party. But in reality since ancient times the need of legal counsel was felt and some clever people rose to meet it. In later times they, like the law secretaries, were scholars who learned law for a living after having failed official qualification examinations. But instead of working for officials they offered their help to private individuals involved in litigation or criminal trial, often challenging the investigating and prosecuting officials. Because of this and the notion stated above, their service was not appreciated by the judiciary. They were often pejoratively called song-gun (訟棍 pettifoggers) and persecuted by the government, although some officials did recognize that good private counsels (known as song-shi 訴師 litigation masters) helped clarifying issues and made the search of truth easier. They and the law secretaries and law clerks, especially those in high judicial offices, had similar training and formed a legal profession which in different degrees helped making law function more properly and restraining government power.

(8) The idea that there ought not to be “cruel and unusual punishments” inflicted on a particular convict is closely connected to the rule of law. In the West nowadays the normal punishment is deprivation of freedom. But in many countries there are different types of prisons that feature different treatments for inmates of different social status.

In traditional China numerous cruel punishments were tolerated although the Tang Code listed only five officially sanctioned penalties – beating with the light and the heavy sticks, penal servitude, exile and death. Imprisonment was not considered a punishment, only for temporary custody of criminal suspects pending trial, but in fact
because the judicial process allowed repeated appeals and required multi-level reviews the incarceration could be prolonged indefinitely. In serious criminal cases witnesses could also be detained for questioning. But the number of facilities for these purposes was rather small mainly due to limited government budget. Abuse by runners and jailers was widely reported despite strict proscriptions. This was the biggest and darkest stain on the traditional Chinese jurisprudence and legal history.

(9) To make the rule of law meaningful the West has since very ancient times tried to make law comprehensive, covering as many aspects of people’s life as possible. In contrast traditional China had an enormous amount of administrative laws, a rather small criminal code and very few provisions governing civil matters. When disputes over such matters arose each case had to be solved according to family tradition, local custom, trade rules, moral principles and special consideration of the particular facts. The rule of law did not make sense, and since the judiciary, an especially small part of a small government with limited budget, had not been able to decide most such cases according to law, the people resorted to various civil groups – clans, villages, and professional and religious organizations – for help, and these groups worked efficiently and made the idea of rule of law further remote.

Now, after taking a quick look at some of the essential elements of the rule of law, I get an impression that neither China nor the West had a clean record of upholding all of them and realizing their ramifications. It is important to note that China actually recognized many of the elements but in several ways she had views on how to achieve justice different from those of the West. The crucial point of departure was a conceptual one at the very beginning of two diverse courses – China, unlike the West, did not see law as the principal or even a superior norm.

Apart from what are mentioned above there are other explanations for the divergence. I am here recapturing (not necessarily endorsing) a few of them in order to invite further investigation.

One of the theories emphasizes the difference in the two predominant economies of the past – the Western, being more pastoralist, emphasized individual freedom; the Chinese, being more agricultural, stressed communal cooperation. They led to different views on what rules were for and how they were to be applied and enforced.

Another suggests that the Judaic- Christian monotheism, which invented the ideas of basic laws being given by God and all humans being His children, fostered the claim that they should be equal under law. The Chinese believed in polytheism. Norms governing human behavior were not given by a particular god but, as mentioned before, are products of social interaction. Human relations require reciprocity, absolute, abstract equality is neither meaningful nor practical.

Yet another points out that certain historical developments in the West did not
happen in China. They include the initiation of democracy in ancient Greek city-states; the creation of *ius gentium* by the Roman empire to govern its colonies; the English feudal lords’ imposition of the Magna Carta on King John; the Protestant challenge to the Catholic Orthodox; Locke’s assertion of popular consent as the basis of government; Montesquieu’s suggestion of separation and balance of powers; the French revolutionaries; the American independence and the establishment of constitutionalism. These events, separately and jointly gave support to the ideas of individual rights, the supremacy of law and the equal application of it to everyone, including the government.

The Chinese on the other hand, went through centuries under basically the same social, economic, political and legal systems with only minor and subtle changes despite some earnest and occasionally disruptive attempts to overhaul them. The ideologies remained largely intact and so were their influence – people revered authority conceptually but skeptical about laws and depended heavily on community self-regulation and assistance.

Further scrutiny of the two cultures can uncover more reasons for the separate ways the West and China took to achieve justice. But I will stop here, and venture to address the question how is China to react to the call for the rule of law by many of her own people as well as the West.

As pointed out above the essential elements of this ideology are not completely alien to the Chinese. Basically they agree that norms (not just laws) should be equally applied to everyone, except in cases where there are acceptable justifications for different treatments. They also see the need of more comprehensive laws, consistency and predictability of judicial actions, and prevention of abuse of power, but they do not have the same institutions, mechanisms and practice the West has. Should they adopt the Western ones as many have suggested? A rational and practical decision can only be made after evaluating how effective the Western approach can be in China under present conditions and how conducive it will be to her future development. A great effort needs to be made to investigate the facts on the ground.

Such investigation is beyond the scope of this paper. It is however possible to have a quick glance at what happened in the last hundred fifty years or so when China was dramatically transformed. In late nineteenth century numerous foreign powers invaded and colonized parts of China. These events galvanized the Chinese people. Rallying around the Nationalists they toppled the Manchu dynasty of the Qing, subdued the warlords and fought an existential war against the Japanese aggressors. After the defeat of the Japanese, the struggle for national survival was replaced by the fight for social justice and economic equality as the most pressing task. During and immediately after the war the Nationalists were slow to take on that task. The
Communists who avoided direct confrontation with the Japanese as much as possible focused first on organizing the economically deprived masses and then launched a war of hatred against the Nationalists, branding them as corrupt elitists. The Communists won and established a “New China”.

What the “New China” is like? Here are some of its widely observed features relevant to the questions raised in this paper.

(1) The one-party political system

The Communists are in control of China, although a few small parties exist nominally. All powers concentrate in the hands of a few at the top of the Communist party, the government is used by the party as a tool to carry out “proletariat dictatorship.” There are power struggles inside the party but institutional checks and balances, if in existence at all, are not easily discernable. This is an experience China never had before. Throughout Chinese history there were political factions but they were generally frowned upon and usually disbanded quickly. And while in existence none had the organization, mechanism, and apparatus to enforce its schemes. Even rebels and revolutionaries (including the Nationalists) paled in comparison with the Communist machinery which controls not only those with any status but also every common person.

(2) The Communist orthodoxy

China used to have dominant political and legal theories – the Legalist theory during the short-lived Qin and Confucianism thereafter. But Confucianism was not exclusive – it allowed other schools of thought to coexist and prosper along, and was itself open to different interpretations, never doctrinaire, never a real strict orthodoxy. More important, it was a well structured philosophy complete with rational premises, ultimate objectives and concrete steps to pursue them. In these regards, it is a far cry from Communism. Marxist theory predicts withering away of the state but is unclear what kind society is left behind. Chinese Communism seems to be unsure what its ultimate objectives are, and yet it does not tolerate discussion let alone an open-ended search for them.

(3) A class system.

China used to have a class system, but again it was different from the one created by the Communists. Traditionally people were classified according to their current political and economic positions but the dividing lines were thin, porous and permeable, and therefore upward mobility was possible for those who passed the national civil examination or excelled in business or other worthy professions. The classification was initially based on people’s backgrounds in pre- society and later on their personal political views. The peasants and laborers (the “proletarians”), having endured tremendous sacrifices in supporting the Communist regime and been
promised to have total control of it, remained deprived, down trodden and exploited. The intellectuals, once lumped into a class and despised, are now under constant surveillance to ensure their submission to the Communist orthodoxy. Other classifications are more arbitrary and inscrutable. As an example, in today’s China the universities, all of them financed and administered by the government, are ranked by it according to standards unrecognized elsewhere, and it is extremely difficult for a school to have its rank changed, no matter how its faculty and students perform. To a large extent this happened also to many individuals in certain classes until very recently. They could not improve their lot by their own effort, there was little social mobility.

(4) A virulent assault on everything traditional

The targets of this assault included cherished Chinese values, even the almost universally accepted moral principles, and, of course, the laws in existence before the Communist takeover. They, together with the institutions, mechanisms and practices for their implementation were vilified and discredited, and for several decades no effort was made to create viable substitutes. There was a conspicuous absence of norms and people were lost. The only act they naturally did was to keep surviving. They became solipsistic, knowing no social ideals and incapable of trusting and helping others. They avoid responsibility and seek no honor. They have no shame in betraying and cheating to get what they want. The degeneration of the moral fiber of the ordinary people is palpable, tragic and disastrous.

(5) The rule by orders, policy directives and “laws”

For a long while the Communists drove people with their orders and policy directives. Because they were changed so quickly and frequently without advance notice, the people were pushed left and right, not knowing what to expect next. Finally the orders and directives turned up in the form of laws. But the process of law-making is pure formality as the contents of all laws are predetermined by the Communist orthodoxy. Moreover, as mentioned above, the orthodoxy does not have a clear and constant objective – once it was to redistribute wealth and then to create it, determined by a handful of leaders of the party. Laws made to accommodate these wild swings are dramatic and unpredictable.

The Communist orthodoxy has created other difficulties for making and implementing laws. As an example the Communist doctrine vesting land ownership in the state has caused infinite problems regarding the use of land and the long delay of adoption of a law on this subject.

Where the Communist orthodoxy is not obstructing, there is another problem: laws, national and local, many poorly crafted, confusing and often conflicting, proliferated. In practice the local ones often take precedence of the national ones
because of the ineffectiveness of the national law enforcement institutions and mechanisms. This has caused confusion, injustice, and distrust among the people of the legal system. There is no standard against which a law can be evaluated. In any event the public has no way to express its judgment.

(6) A complex and complicated law implementation system

First of all there is a problem internal to the judicial system – there are just too many government institutions, party agencies, and pseudo civic organizations involved, each with large personnel, but it is unclear which one is responsible for what. Second, the procedural rules, if existent, are murky and unknown to most people. As a result the discretion of those who apply the rules is immense and hardly challengeable. Third, the quality of judges, prosecutors, and law-enforcement personnel, generally leaves much to be desired – for a long while they were simply “revolutionaries” and military men (including retired officers and military police in active duty). Recent appointees are not much better trained in law because legal education, being yoked to Communist orthodoxy, has not greatly improved. There are now practicing lawyers, but for the same reason, they are incapable of providing competent counsel to litigants and defense to criminal suspects, let alone checking the irregularities and abuses of the court and the prosecution, which, under these circumstances, are inevitable and well documented.

(7) Political interference.

The one party system, the strong orthodoxy, the lack of strict procedure for decision-making, and the fact that all members of the legal system have to be cadres of the party make political influence on judicial matters inevitable and expected. In fact the party has mechanisms and procedures to process civil disputes before and after a judicial trial. Criminal cases were handled not just according to law but also (perhaps more closely) in compliance with general party policy or specific instruction from superior cadres. This fact makes a mockery of the appellate system which is supposed to correct the mistakes of the lower courts. The ordinary ways to ensure judicial independence by giving judges life tenure, high remuneration and freedom from job transfer are irrelevant. The entire judiciary can be better seen as an extension and a tool of the political system.

(8) Corruption

Corruption, a plagued to China for thousands of years, is now especially monstrous. In the past it was less serious because for a considerable period of time power was not yet extremely concentrated, the government was relatively small with some checks and balances built in it and there were values other than material gain and more power for people to pursue. The situation dramatically changed in Communist China. The power is more concentrated and the power holders see few
other values worth having. As it is well said, power corrupts and absolute power corrupts absolutely. Now all power is in the hands of the party cadre and they are in enormous numbers and ubiquitous, demanding bribes for everything a less privileged person requests their action. This is especially true with people ensnared in legal problems, because laws are in some cases inadequate and in others too numerous and unclear and ever changing; the institutions and their personnel are grotesque in number and operate in opacity, subjecting to practically no effective challenges. In this dark pit most of those who were unfortunately caught in this trap would, if capable, pay bribes to its guards – the judges, prosecutors, the law enforcement personnel and practicing lawyers – in order to get out. The consequence is glaringly clear – the judicial process is corrupted and discredited.

(9) Disappearance of an alternative dispute-solving system

In traditional China when people found the official judicial recourse dissatisfactory they turned to an alternative system of mediation and arbitration. Lately, because of urbanization and massive population movement the system became ineffective for those who are now outside of closely knit communities and isolated in crowds of strangers. The Communist party has created local mechanisms as substitutes but they do not have the same degree of respect and trust from the disputants. Those who cannot solve their disputes have to resort to the official judiciary, however problematic it is.

Thus there is in China a chasm between the past and the present. Traditional China rejected the rule of law because of a belief in the rule of multiple norms. Law was recognized as one of the norms and accorded more and more importance as time went by. In any case many essential elements of the rule of law were present in the traditional legal system, and more importantly, where some of the elements were absent there were devices that made the system function, in certain ways even more smoothly. It was not without shortcomings, many of which were indeed regrettable. But the people were allowed to solve most of their problems through an alternative system, which served as a safety valve. Together the two worked well enough to keep peace and order for stretches of centuries.

China in the present also rejected the rule of law but for a different reason – the regime does not want itself to be restrained by law, or for that matter, any norm. For decades only the wild, whimsical, capricious political will of practically one dictator ruled. Meanwhile all the defects in the traditional legal system were aggravated. Now there are new laws. But many of them have neither internal nor external moralities, and are used as tools to support government policies. Most essential elements of the rule of law are glaringly absent. The masses survived and are even prospering thanks
to their ingenuity and cunning, but they know that they have been paying a horrendous price in sacking the vitality of their environment and eroding the moral foundation of their nation. It cannot go on like this. What must be done in order to change the trend and build a society with objectives more than that of making the state rich and strong (as the Legalists wanted)?

Many in and out of China point to the necessity of the rule of law. I am skeptical because one of the most essential elements of the rule of law — a political system that can let people express and implement their will and check the power of the government, is not incipient. Nevertheless, I believe certain initial steps can be taken, leading towards the development of some other essential elements, including defining the precise roles of the various agencies that make, apply and enforce the laws; making laws, particularly the procedural ones, clear and certain; applying existing laws strictly; explaining the reason behind judicial and law enforcement decisions, especially those that deviate from well recognized precedents and practices and those give different treatments to parties in similar cases; banning judicial and law enforcement personnel from participation in party politics; providing better legal education to the public as well as the judicial and law enforcement personnel and practicing lawyers and establishing a high qualifying standard for them; creating mechanisms that facilitate self-critiquing in the judiciary and law enforcement establishment; enforcing strict disciplinary actions and heavy punishments against the establishment’s wayward members; and above all, promoting transparency in the operation of the establishment. These measures can help correct many of the problems of China today in spite of the fact that the fundamental one mentioned above cannot be solved quickly.

But even if the political conditions in China are made compatible with the Western idea of the rule of law I still think its full implementation is not good enough. Apart from some specific instances of difficulties it encounters which I have alluded to, a fundamental problem makes it inadequate. The problem is both conceptual and practical: Law is by nature not a self-sufficient, all-purpose norm; society needs many other norms to function properly. Law cannot justify itself; it must be evaluated by its “morality.” Law cannot be implemented automatically; it has to be interpreted to fit the conditions and objectives of ever changing society, and for this purpose, persons of wide knowledge, practical wisdom and high moral character are needed.

For these reasons I would consider the said measures only as a few small steps forward. What should follow are many more big steps to establish a set of new ideals and new norms for the “new China” that faces a new world. This is a tremendous task. I think we can do it by combining some of the good elements of the Western rule of law and some good features of traditional Chinese way to attain justice. The result...
will be a widely acceptable “rule of…”, whatever it may be called.