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# Forty-Years of the Modernization of Chinese Socialist Legality: Strategy, Lacuna, and Outlook

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## Abstract

It has been forty years since the Chinese Communist Party (CCP) initiated the modernization project of Post-Mao China. As with other sectors, learning from the West was one of the basic strategies taken by the CCP to achieve the modernization of Chinese socialist legality, even as Chinese law is meant to be grounded in the orthodoxies of Marxism-Leninism. In order to learn from the West, the CCP generally adopted an elastic and dualistic approach to reform that is based on the utilitarian incentives of Deng Xiaoping. In the political sector, for example, the CCP looked back into the past and the CCP's successful experiences under Marxist-Leninist doctrine. The aim was to immunize politics from the influence of western liberal-democratic ideology. But in the economic area, the CCP moved toward the West by vigorously adopting advanced western rules and institutions for managing the economy. This article examines how this strategy formed the basic contours of Chinese socialist legality in the past forty years. The article identifies the resulting internal lacuna, especially with respect to the realization of the “rule of law.” This article also analyses the possible future of a Chinese-socialist rule of law. That possibility will be affected by changing external circumstances, particularly the deterioration of China-US relations.

**Keywords:** Chinese Modernization; Learning from the West; Chinese Communist Party; Elastic and Dualistic Strategy; Liberal Constitutionalism

## A. Introduction

Although burdened, the paradigm “modernization (*xiandaihua*, 现代化)”<sup>1</sup> can still function as a basic explanatory framework for the development of Chinese socialist legality in the past forty years. In the early stages of the People's Republic the state was underdeveloped.<sup>2</sup> One of the

<sup>1</sup>As a crucial paradigm for social sciences, the conception “modernization” mainly originated from the theories of German sociologist Max Weber, especially his theory of “rationalization.” Generally, this paradigm is used to describe and analyze the transition from traditional to modern society. As the previous empire China gradually collapsed since the late Qing dynasty and was rebuilt to the new Marxist-Leninist China in 1949, “modernization” in the case of the People's Republic of China (PRC), however, principally describes and analyzes the transition of the PRC from a state strictly disciplined by Marxism-Leninism to a state with partial openness to the outside—Western—world since 1978.

<sup>2</sup>The founding of the PRC in 1949 ended the long history of the old China under the so-called “three big mountains”—imperialism, feudalism and bureaucrat-capitalism—since the Opium War (1840). The history in this phase was generally characterized as “enduring impoverishment and long-standing debility (*jipin jiruo*, 积贫积弱)”. Politically, the PRC achieved the national independence and regained the sovereignty of the Chinese nation. However, economically, the way to build a socialist modern state, remained unclear for the long term. The rigid model of “planned economy” under the strict Marxism-Leninism practiced before 1978 was proved to be inefficient and unproductive. Further, the internal circumstance of the PRC

strategies adopted by the Chinese Communist Party (CCP) for developing the state and achieving China's modernization was a systematic program of "learning from the West."<sup>3</sup> This strategy played a particularly important role in the economic, scientific, technological, and legal sectors—beginning with the Reform and Opening policy in 1978.<sup>4</sup>

Viewed historically, the western model of the state governed by the rule of law has been pivotal to the modernization of Chinese law, which effectively began from scratch after the long-term political turmoil—and the related legal nihilism—that characterized the ten years' Cultural Revolution (1966–1976).<sup>5</sup> The western model of the rule of law provided the process of legal modernization in China with technical and operational references for law-making, judicial power, and the administration. The elements of the Western model are embodied in concrete institutional designs. But it also presented guiding ideas (or, more accurately, external pressure) for the pursuit and realization of some kind of Chinese version of the "rule of law" even as this concept in China departs from its original, Western ambition.<sup>6</sup>

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was often disrupted by continuous political movements of class struggle. See RODERICK MACFARQUHAR, 14 THE CAMBRIDGE HISTORY OF CHINA, THE PEOPLE'S REPUBLIC. PART I, THE EMERGENCE OF REVOLUTIONARY CHINA 1949–1965 293–391 (John K. Fairbank ed., 2008); KLAUS MÜHLHAHN, MAKING CHINA MODERN: FROM THE GREAT QING TO XI JINPING 353–486 (2019).

<sup>3</sup>Learning from the West [*xuexi xifang*, 学习西方] was a general strategy adopted by the CCP for implementing the Reform and Opening Policy since 1978. Formally, learning from the West was embodied in a series of reform policies of the CCP in the 1980s. One representation of which was the Decision of the CCP Central Committee on the Economic System Reform (*zhong-gong zhongyang guanyu jingji tizhi gaige de jue ding*), adopted at the Third Plenary Session of the 12<sup>th</sup> Central Committee of the Communist Party of China on October 20, 1984). The Decision stipulated, "We must absorb and learn all the advanced management methods that reflect the law of modern socialized production from all countries in the world, including those developed capitalist countries." Learning from the West was strongly economically driven and it aimed to change the backwardness of the PRC and build a modern socialist state [*shehui zhuyi xiandaihua guojia*, 社会主义现代化国家], as Deng Xiaoping pointed out, "We do not want capitalism, but neither do we want to be poor under socialism." See Deng Xiaoping, *We Can Develop a Market Economy Under Socialism*, November 26, 1979, in 2 DENG XIAOPING'S SELECTED WORKS 231 (1994).

<sup>4</sup>The Reform and Opening policy was officially defined in the Communiqué of the Third Plenary Session of the 11<sup>th</sup> CCP Central Committee (adopted on December 22, 1978). In this Communiqué, the CCP decided to abandon "taking class struggle as the key link" and shift its work focus to the economic construction and put forward the task of Reform and Opening up. This Communiqué marked the beginning of the reform era of the PRC. Mainly initiated in the economic area, the Reform and Opening program also accelerated the institutional evolution in the legal era.

<sup>5</sup>The Cultural Revolution began with the "Notice of the Central Committee of the Chinese Communist Party" [*zhongguo gongchandang zhongyang weiyuanhui tongzhi*, 中国共产党中央委员会通知] on May 16, 1966, known as the "May 16 Notification" [*wu yi liu tongzhi*, 五一六通知]. Formally, it ended with the removal of the "Gang of Four" [*si ren bang*, 四人帮] from power in October, 1976.

<sup>6</sup>From the perspectives of western legal scholars who have interests in the Chinese legal system, there are basically two ways for evaluating the current Chinese rule of law—a formal—thin—and a substantial—thick—way. The former emphasizes the formality of a legal system and the latter stresses the underlying values which a legal system contains. In the thin theory of rule of law of Joseph Raz, he stresses following components:

Laws are prospective, open, and clear; laws are relatively stable; the making of particular laws is guided by open, stable, clear, and general rules; independence of the judiciary must be guaranteed; principles of natural justice must be observed; courts have review powers over the implementation of the other principles; courts are easily accessible; the discretion of the crime-preventing agencies is not allowed to pervert the law.

JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 214–18 (1979). Measured by Raz's standards, the Chinese socialist rule of law can indeed be categorized as some kind of rule of law, as a legal sinologist said, "I do believe that rule of law, even socialist rule of law with Chinese characteristics, is better than socialism with no rule of law at all, and, for the moment at least, the only type of rule on offer in China is socialist rule of law." Randall Peerenboom, *Rule of Law Political Legitimacy and Civil Disobedience in China: A Reply*, 7 HAGUE J. RULE L. 92 (2015); RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARD RULE OF LAW 3–4, 6 (2002).

On the contrary, when measured by a substantial evaluation which is often grounded in western pattern of rule of law, the Chinese rule of law merely means a formal—skeletal—legal system and is dismissed an instrument for implementing the will of the CCP. See Eva Pils, *China, The Rule of Law, and the Question of Obedience: A Comment on Professor Peerenboom*, 7 HAGUE J. RULE L. 88 (2015). For a detailed discussion on the typology of the rule of law in China, see Xiaodan Zhang, *Rule of Law within the Chinese Party-state and Its Recent Tendencies*, 9 HAGUE J. RULE L. 374–77 (2009).

The CCP more-or-less completely embraced western, values-free science and technology.<sup>7</sup> But in the legal sector, learning from the west has always been reticent, selective, and tangled. This is due to the significant and fundamental discrepancies in the political realities in China and the West. The former is a Communist Party-state conforming to Marxist-Leninist ideology. The sum of the latter's variants might be characterized as liberal-democratic.<sup>8</sup> The inherent affinity between law and politics, and the indivisibility between political values and legal ideals, led to the paradox that learning the rule of law from the West could be both constructive and destructive for the CCP. For this reason, the CCP has been scrupulously strategic about the elements of western law it adopted, and it endeavored to confine and eliminate those elements that could endanger and imperil its political and ideological primacy.<sup>9</sup>

This delicate process took place against the backdrop of a chaotic pre-history produced by the Cultural Revolution.<sup>10</sup> To restore order after that period the CCP has taken an elastic and dualistic approach to modernization based on Deng Xiaoping's utilitarian incentives for learning from the West.<sup>11</sup> In the political sector, the CCP has stepped back into the past, drawing on the successful experiences the Party made under Marxist-Leninist doctrine. In the economic sector, the CCP has vigorously moved toward its western counterparts, absorbing the rules and institutions that were indispensable for carrying out its internal economic reconstruction and reform. This included the embrace of rules and institutions necessary for China's rule-based economic interaction with the West, principally in the fields of investment and trade. This strategy resulted in two different paths for legal development, one in the political sector and the other in the economic sector.<sup>12</sup> This article argues that the CCP's elastic and dualistic strategy contains inherent tensions between Chinese communist political localism and the universals central to economic progressivism. This tension is the space in which legal reform and evolution has taken place, often even touching political and legal "forbidden areas." The result has been the facilitation of some kind of limited

<sup>7</sup>As clearly stated in the Decision 1984 concerning the reform of economic system, "The new technological revolution rising in the world is a new opportunity and challenge for China's economic development. This requires our economic system to be more capable of absorbing the latest scientific and technological achievements of our time, promoting scientific and technological progress and creating new productive forces."

<sup>8</sup>Notwithstanding concrete institutional divergencies, the Western liberal-democracy shares some common cores, for example: general election, separation of powers, human rights protection, judicial independence, and so on. The legal system under a liberal-democracy entails, for example in Germany, reservation and priority of statutes, the legality of the administration, wide-ranging legal protections of courts against interferences of executive, constitution as the highest norm, the obligation to provide state judicial guarantee, and so on. See Gerhard Anschütz, *Richard Thoma, Handbuch des Deutschen Staatsrechts [The Handbook of the German State Law]*, 1. BAND, MOHR SIEBECK 198 (1930); Ernst Rudolf Huber, *Rechtsstaat und Sozialstaat in der modernen Industriegesellschaft [Rule of Law and Welfare State in the Modern Industrial Society]*, RECHTSSTAATLICHKEIT UND SOZIALSTAATLICHKEIT, WISSENSCHAFTLICHE BUCHGESELLSCHAFT DARMSTADT, 593 (Ernst Forsthoff ed., 1968).

Contrary to the Western liberal-democracy, "the People's Republic of China is a socialist state governed by a people's democratic dictatorship that is led by the working class and based on an alliance of workers and peasants." CONST. OF THE COMMUNIST PARTY OF CHINA art. 1 (2004) (China). Compared with its Western counterpart, the legal system in China, often defined as "the socialist rule of law with Chinese characteristics," obviously plays a different role in the society and articulates and realizes different underlying values. In 1962, a sinologist wrote, "[In the PRC] law is clearly defined in them as a 'weapon' of the state to enforce Communist policy, and, since policy changes, 'law' has to be elastic and ever-changing." See Franz Michael, *The Role of Law in Traditional, Nationalist and Communist China*, 9 CHINA Q. 147 (1962). In the criminal area, for example, a Western observer wrote in the 1980s, "China's emphasis on 'law' as a means of solving social problems such as crime is closely connected with political developments." See *Concepts of Law in the Chinese Anti-Crime Campaign*, 98 HARV. L. REV. 1890, 1894 (1985).

<sup>9</sup>The dangerous elements from the West was summarized as "bourgeois liberalization (资产阶级自由化)" after 1978. Deng Xiaoping clearly pointed out, "Bourgeois liberalization means rejection of the Party's leadership." Deng Xiaoping, *qizhi xianming di fandui zichan jieji ziyouhua* [旗帜鲜明地反对资产阶级自由化] [Take A Clear-Cut Stand Against Bourgeois Liberalization, December 30, 1986], in 3 SELECTED WORKS OF DENG XIAOPING 196–97 (1993).

<sup>10</sup>See *infra* Part B. I.

<sup>11</sup>See *infra* Part B. II.

<sup>12</sup>See *infra* Part B. III.

legal modernization that can be characterized as the so-called Chinese “socialist rule of law state”.<sup>13</sup> That process, however, has not extended to a comprehensive adoption of or “learning” from western liberal constitutionalism. The CCP’s strategy would not tolerate the total westernization of the political and legal sectors.<sup>14</sup> With this clearer view of the strategy pursued by the CCP in the past forty years, this article offers an outlook for Chinese socialist legality that also accounts for changing external circumstances, including deteriorating relations between China and the USA.<sup>15</sup>

## B. Learning from the West: An Elastic and Dualistic Strategy

Notwithstanding its seventy-year history, the most relevant legal development and modernization of the People’s Republic of China (PRC) only commenced in the late 1970s with the adoption of the Reform and Opening Policy in 1978.

### I. A Pre-History with Chaos and Instability

Except for a few early years,<sup>16</sup> the pre-history of the PRC from its founding in 1949 up to 1978 is characterized by constant political turmoil, such as the Anti-Rightist Movement (*fanyou yundong*, 反右运动, 1957–1958) and the Great Leap Forward (*dayuejin*, 大跃进, 1958–1960).<sup>17</sup> For decades after 1949, the CCP and the whole state were gripped by the tension between revolutionary destructive inertia, on the one hand, and emergent constructive, post-revolutionary forces for order and stability, on the other hand. The revolutionary inertia generally transferred the logic and praxis of the CCP from the revolutionary phase to the state and governance. This force was hostile to any rational institutional building within the state and it impeded the growth of a new political and legal order. The relative stability experienced until the middle of the 1950s was based on the fragile balance of these two forces. The ensuing political movements were, in their essence, the direct result of the imbalance of these forces with the former—revolutionary inertia—overwhelming the latter—post-revolutionary institution building. The imbalance

<sup>13</sup>See *infra* Part C. I.

<sup>14</sup>See *infra* Part C. II.

<sup>15</sup>See *infra* Part D.

<sup>16</sup>The phase between 1949 and the middle of the 1950s was a relatively stable period for the legal development of the PRC. In this phase, the top leaders of the CCP still realized and emphasized the functions of law for defining and building the basic framework of the young state. Some important laws in the form of “organic law” [*zuzhifa*, 组织法] were promulgated which aimed especially to institutionalize state organs, for example, Organic Law of the Central Government of the PRC (zhonghua renmin gongheguo zhongyang renmin zhengfu zuzhifa, 1949), Organic Law of the National People’s Congress of the PRC (zhonghua renmin gongheguo quanguo renmin daibiao dahui fayuan zuzhifa, 1954), Organic Law of the People’s Procuratorate of the PRC (zhonghua renmin gongheguo renmin jianchayuan zuzhifa, 1954), Organic Law of the People’s Courts of the PRC (zhonghua renmin gongheguo renmin fayuan zuzhifa, 1954), Organic Law of the Local People’s Congresses and Local People’s Committees at Various Levels of the PRC (zhonghua renmin gongheguo difang geji renmin daibiao dahui he difang geji renmin weiyuanhui zuzhifa, 1954) and Organic Law of the State Council of the PRC (zhonghua renmin gongheguo guowuyuan zuzhifa, 1954). The greatest achievement of this era was the adoption of the first Constitution of the PRC (the Constitution of 1954) which lay down the foundation for the whole state.

<sup>17</sup>Initiated in 1957, the Anti-Rightist Movement aimed to resist “the attacks of the bourgeois rightists” on the newly founded communist regime of the CCP. At the beginning of this movement, it only focused on intellectuals who criticized the CCP, however, extended to wide-range “class enemies” within and outside the Party. Key guiding thoughts of this movement, see Mao Zedong, *Things Begin to Change* [*shiqing zhengzai qibianhua*, 事情正在起变化], (May 5, 1957); *The Instructions of the Central Committee of the CCP on Organizing Forces to Prepare to Strike Back the Attacks of Rightists* [*guanyu zuzhi lianang zhunbei fanji youpai fenzi jingong de zhishi*, 关于组织力量准备反击右派分子进攻的指示] (June 8, 1957).

In the economic area, the CCP defined and practiced the extreme-leftist road in 1958 to reconstruct the country from an agrarian economy into a communist society by the establishment of “People’s Communes” [*renmin gongshe*, 人民公社]. Instead of having achieving the “communist society,” the Great Leap Forward brought enormous damages on the basic economic and social order of the PRC.

reached its destructive climax in the Cultural Revolution (1966–1976).<sup>18</sup> Prompted by the theoretical understanding of “cultures,”<sup>19</sup> the Cultural Revolution rapidly evolved into an over-arching class struggle within the CCP’s organs, state institutions, social fields, and organizations.<sup>20</sup> Guided by the “theory of continuous revolution under the dictatorship of the proletariat (*wuchan jieji zhuanzheng xia jixu geming lilun*, 无产阶级专政下继续革命理论)”<sup>21</sup> led by Mao Zedong, the recessive revolutionary force regained prominence and was used to justify the elimination of the CCP’s—mostly imaginary—bourgeoisie enemies, the so-called “capitalist roaders” (*zouzipai*, 走资派).<sup>22</sup> The class struggle within the CCP and imposed on the rest of society triggered large scale mass movements and it impeded nearly all constructive and effective economic development.<sup>23</sup> The fragile institutional achievements gained in the political and legal sectors in the early years after the founding of the PRC were completely wiped out.<sup>24</sup> State organs—including

<sup>18</sup>Actually, revolution [*geming*, 革命] and construction [*jianshe*, 建设] can function as two key concepts to understand the history of the PRC before 1978. The CCP experimented with these two methods to endeavor to build a communist China. The former continued class-narratives in the revolutionary period before 1949, it comprehensively employed class-analysis to deal with domestic problems in the fields of economy, politics and culture, etc. To govern the state and society in a revolutionary way expressed itself in the campaign-style governance, as the continuous political movements showed from the 1950s to the 1970s. The latter, however, lacked a clear strategy for a long period. Compared with the successful revolutionary experiences, how to construct a state modelled on the Marxist-Leninist communist society in a post-revolution phase, was a totally new challenge confronting the CCP. Historically viewed, the constructive force within the PRC had been weak before 1978, which is conducive to explain the instability in a long period after the founding of the PRC.

<sup>19</sup>The initial purpose of the Cultural Revolution was to “thoroughly criticize the bourgeois reactionary thoughts in the fields of academia, education, press, literature and art as well as publishing and to seize the leadership over these fields.” See *The Notification of the Central Committee of the CCP* [*zhongguo gongchandang zhongyang weiyuanhui tongzhi*, 中国共产党中央委员会通知] (May 16, 1966) (marking the beginning of the Cultural Revolution and is its guiding thought).

<sup>20</sup>The comprehensive influences of the Cultural Revolution on the whole Chinese society were decided in the May 16 Notice. The Notice stipulated that:

The whole Party must obey Comrade Mao Zedong’s instructions, hold high the banner of the Proletarian Cultural Revolution, thoroughly expose the anti-Party and anti-socialism bourgeois reactionary stand of the so-called ‘academic authority,’ thoroughly criticize the bourgeois reactionary thoughts in the academic, educational, press, literary and art and publishing areas, and seize the leadership in these cultural fields. To achieve this, we must at the same time criticize the representatives of the bourgeoisie penetrating into the Party, the government, the army and the cultural field, purge them, and some of their positions must be adjusted.

See CHINESE COMMUNIST PARTY, CIRCULAR OF THE CENTRAL COMMITTEE OF THE COMMUNIST PARTY OF CHINA (May 16, 1966).

<sup>21</sup>The theory of continuous revolution under the dictatorship of the proletariat was the guiding thought of Mao Zedong for launching the Cultural Revolution. According to this theory, under the condition that the proletariat has obtained political power and established the socialist system, it is still necessary to carry out a political revolution in which one class overthrows another, and the Cultural Revolution is the way to continue the revolution. For a typical propaganda for this theory, see *Renmin Ribao*, 人民日报 [*Editorial offices of People’s Daily*], *hongqi zazhi*, 红旗杂志 [RED FLAG MAG.]; *Jiefangjun Bao*, 无产阶级专政下的文化大革命胜利万岁——庆祝中华人民共和国成立十八周年 [*Long Live the Victory of the Cultural Revolution under the Dictatorship of the Proletariat—Celebrate the 18<sup>th</sup> Anniversary of the Founding of the People’s Republic of China*], *解放军报* [PLA DAILY], (Oct. 1, 1967).

<sup>22</sup>The term “capitalist roaders” was used to describe especially those officials in the Party organs who were deemed to advocate capitalist thoughts. It was first defined by the Politburo of the Central Committee of the CCP in its document *non-gcun shehui zhuyi jiaoyu yundong zhong muqian tichu de yixie wenti*, 农村社会主义教育运动中目前提出的一些问题 [*Some Current Problems Emerging from the Socialist Education Campaign in the Rural Areas*], (Jan. 14, 1965).

<sup>23</sup>Deng Xiaoping—the then vice-premier—delivered some authoritative descriptions about the economic situation of the PRC during the Cultural Revolution: “What is the actual situation in production? Agriculture appears to be doing comparatively well, but the per-capita grain yield is only 304.5 kilograms, grain reserves are small and the income of the peasants is pretty low. As for industry, it deserves our serious attention.” See Deng Xiaoping, *The Whole Party Should Take the Overall Interest into Account and Push the National Economy Forward*, March 5, 1975, in 2 DENG XIAOPING’S SELECTED WORKS 4 (1994).

<sup>24</sup>The institutional achievements in the initial phase of the PRC mainly contained the enactments involving the organization of state organs on the central as well as the local level, for example, *zhengwuyuan jiqi suoshu gefiguan zuzhi tongze*, 政务院及其所属各机关组织通则 [Organizational General Rules on the Government Council and Its Subordinate Organs] (1949); *zhonghua renmin gongheguo zhongyang renmin zhengfu zuzhi fa*, 中华人民共和国中央人民政府组织法

legislative, judicial, and administrative institutions—were abolished and re-organized in the form of “revolutionary committees (*geming weiyuanhui*, 革命委员会)”<sup>25</sup> at various levels. State laws were replaced by the CCP’s policies, or even the orders and instructions of the CCP’s leaders. The Constitution of 1954 was the representative achievement of the PRC’s early legal construction. Its core function had been to move China to a post-revolutionary posture in order to promote the normalization of state order. The 1954 Constitution was replaced by the “Cultural Revolution Constitution” of 1975, which legalized the ideology of class struggle, enshrined the dictatorship of the proletariat, and justified returning the state to a revolutionary posture.<sup>26</sup>

## II. The Desire for Order: Twofold Approach

As stated by Deng Xiaoping—the core leader of the CCP in the post-Mao era: “Things must be put in order in all fields.”<sup>27</sup> This epitomizes the fact that the desire for order was the principal driver of legal development in the period following the Cultural Revolution. The restoration of domestic order was mainly based on a reassessment of the Cultural Revolution and a subsequent real and thorough push to move the state beyond a revolutionary posture. For the restoration of order, which was facilitated by a significant reformist agenda, Deng Xiaoping generally adopted a twofold approach that relied on an elastic and dualistic, utilitarian strategy: “Stepping back into the past in the political sector” and “moving toward the West in the economic sector.”<sup>28</sup>

### 1. Stepping Back into the Past in the Political Sector

In the political sector, there were two main reasons for the convulsive Cultural Revolution: the destruction of the CCP’s collective leadership and the personality cult of Mao Zedong.<sup>29</sup>

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[Organizational Law on the Central People’s Government of the PRC] (1949); *zhongguo renmin zhengzhi xieshang huiyi zuzhi fa*, 中国人民政治协商会议组织法 [Organizational Law on the Chinese People’s Political Consultative Conference] (1949); *zhonghua renmin gongheguo quanguo renmin daibiao dahui ji difang geji renmin daibiao dahui xuanju fa*, 中华人民共和国全国人民代表大会及地方各级人民代表大会选举法 [Electoral Law of the People’s Republic of China for the National People’s Congress and People’s Congresses at All Local Levels] (1953); *zhonghua renmin gongheguo guowuyuan zuzhi fa*, 中华人民共和国国务院组织法 [Organizational Law of the State Council of the People’s Republic of China] (1954), and so on. These organizational laws signify the great efforts made by the CCP to rationalize and institutionalize the newly founded state. The climax of these efforts was the adoption of the first Constitution of the PRC in 1954.

<sup>25</sup>Revolutionary committees were tripartite bodies established during Cultural Revolution in the PRC to facilitate government by the three mass organizations in China—the people, the army, and the Party. They actually cancelled the separation between the Party and the government and ruined the formality and independence of state and law.

<sup>26</sup>As the first constitution of the PRC, the Constitution of 1954 is generally deemed as an advanced Constitution in the sense that it defined the basic institutional framework of the state, confirmed the basic rights of citizens and, more importantly, diluted the class narrative. Conversely, the Constitution of 1975 legalized the “continuous revolution” and class struggle, deviated fundamentally from the previous order-oriented Constitution. See CONST. OF THE COMMUNIST PARTY OF CHINA pmb. paras. 3–5; arts. 1, 11–13 (1975) (China).

<sup>27</sup>In this speech, Deng Xiaoping said:

There is at present a need to put things in order in every field. Agriculture and industry must be put in order, and the policies on literature and art need to be adjusted. Adjustment, in fact, also means putting things in order. By putting things in order, we want to solve problems in rural areas, in factories, in science and technology, and in all other spheres.

Deng Xiaoping, *Things Must be Put in Order in all Fields, September 27 and October 4, 1975*, in 2 DENG XIAOPING’S SELECTED WORKS 25 (1994).

<sup>28</sup>The utilitarian thoughts of Deng Xiaoping are concentrated in his “Cat Theory”, “It does not matter if it is a yellow cat or a black cat, as long as it catches mice.” See Deng Xiaoping, *Restore Agricultural Production, July 7, 1962*, in 1 DENG XIAOPING’S SELECTED WORKS 323 (1994). As to be explained in the following part, the utilitarian thought of Deng Xiaoping helped reduce the ideological antagonism between China and the West, facilitated the political localism and economic progressivism during his Reform and Opening policy after 1978.

<sup>29</sup>“[Comrade Mao Zedong] . . . acted more and more arbitrarily and subjectively, and increasingly put himself above the Central Committee of the Party. The result was a steady weakening and even undermining of the principle of collective leadership and democratic centralism in the political life of the Party and the country . . . Conditions were present for the

Responding to these problems, the restoration of political order resorted firstly to, somewhat embellished, early ideal images that were deemed to be successful examples of the CCP's self-governance and its state-governance.<sup>30</sup> Reviving these ideal images prioritized the correct practice of so-called "democratic centralism (*minzhu jizhong zhi*, 民主集中制)."<sup>31</sup> The principle of democratic centralism was crucial to the CCP's organization and decision-making during the war period before 1949 and it contributed to the successful operation of state organs after the founding of the PRC in 1949. It was deemed to be an enshrined "fine tradition of the Party (*dang de youliang chuantong*, 党的优良传统)."<sup>32</sup> For a key factor in the eruption of the Cultural Revolution was the deviation from and abandonment of this principle.<sup>33</sup> As Deng Xiaoping pointed out concisely:

During the period from the Zunyi Meeting of the Political Bureau of the Central Committee [in 1935] to the socialist transformation [in the mid-50s], the Central Committee and Comrade Mao Zedong invariably paid due attention to collective leadership and democratic centralism, so that democratic life within our Party was quite normal. Unfortunately, this fine tradition has not been upheld, nor has it been incorporated into a strict and perfected system. For example, when major issues are discussed inside the Party, very often there is insufficient democratic deliberation. Hasty decisions are made by one or a few individuals and votes are seldom taken, as they should be under the principle of majority rule. This shows that democratic centralism has not yet become a strictly applied system. After the criticism of the opposition to rash advance in 1958 and the campaign against "Right deviation" in 1959, democratic life in the Party and state gradually ceased to function normally. There was a constant

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over-concentration of Party power in individuals and for the development of arbitrary individual rule and the personality cult in the Party." See *zhongguo gongchandang zhongyang weiyuanhui guanyu jianguo yilai dang de ruogan lishi wenti de jueyi*, 中国共产党中央委员会关于建国以来党的若干历史问题的决议 [Resolution on Certain Questions in the History of Our Party since the Founding of the People's Republic of China], para. 24, pt. 2 (June 6, 1981), <https://digitalarchive.wilsoncenter.org/document/121344.pdf?v=d461ad5001da989b8f96cc1dfb3c8ce7>.

<sup>30</sup>For example, "correctly handling and distinguishing between the two types of social contradictions differing in nature in a socialist society" and "the creation of 'a political situation in which we have both centralism and democracy, both discipline and freedom, both unity of will and personal ease of mind and liveliness.'" COMMUNIST PARTY OF CHINA, *Resolution on Certain Questions in the History of Our Party since the Founding of the People's Republic of China*, para. 16 (June 27, 1981).

<sup>31</sup>The principle of democratic centralism in the Chinese context is, first of all, an organizational principle of the CCP. It includes, as stipulated in the Constitution of the Chinese Communist Party, many implications, the most important of which is Article 10 of the Constitution of the Communist Party of China. See CONST. OF THE COMMUNIST PARTY OF CHINA art. X (2017) (revised and adopted at the 19<sup>th</sup> National Congress of the Chinese Communist Party on October 24, 2017).

1) Individual Party members defer to Party organizations, the minority defers to the majority, lower-level Party organizations defer to higher-level Party organizations, and all organizations and members of the Party defer to the National Congress and the Central Committee of the Party.

2) Party committees at all levels shall function on the principle of combining collective leadership with individual responsibility based on the division of work. Decisions on all major issues shall be made through discussion by the Party committee concerned in accordance with the principles of collective leadership, democratic centralism, pre-meeting contemplation, and meeting-based decision making. Members of Party committees shall act in earnest to fulfill their respective obligations in accordance with the collective decisions made and the division of work.

3) The Party proscribes all forms of personality cult. It shall be ensured that the activities of Party leaders are subject to oversight by the Party and the people, while at the same time upholding the standing of all leaders who represent the interests of the Party and the people.

Simultaneously, the principle of democratic centralism is also applied to the state organs for their organization and decision-making and defined as a constitutional principle. See CONST. OF THE COMMUNIST PARTY OF CHINA, art. III, para. 1.

<sup>32</sup>This principle was already defined in the Third Amendment to the Constitution of the Communist Party of China (中国共产党第三次修正章程决案, adopted at the Meeting of the Political Bureau of the CCP Central Committee on June 1, 1927). See CONST. OF THE COMMUNIST PARTY OF CHINA amend. III.

<sup>33</sup>"Democratic centralism was impaired, and so was collective leadership. Otherwise, it would be hard to explain how the 'Cultural Revolution' broke out." Deng Xiaoping, *Answers to the Italian Journalist Oriana Fallaci on August 21 and 23, 1980*, in 2 DENG XIAOPING'S SELECTED WORKS 348 (1994).

growth of such patriarchal ways as letting only one person have the say and make important decisions, practicing the cult of personality and placing individuals above the organization.<sup>34</sup>

The extreme concentration of intra-party power during the Cultural Revolution necessitated the resuscitation of democratic centralism as one of the key political measures taken in the reform era. As Deng Xiaoping explained:

We need unified and centralized leadership, but centralism can be correct only when there is a full measure of democracy. At present, we must lay particular stress on democracy, because for quite a long time democratic centralism was not genuinely practiced: centralism was divorced from democracy and there was too little democracy. Even today, only a few advanced people dare to speak up.<sup>35</sup>

It must be noted, however, that the “democracy” Deng Xiaoping advocated as the key political measure to restore order was not a turn toward liberal democracy in the western sense.<sup>36</sup> This use of the concept “democracy” must be fitted into its Chinese context and interpreted in the framework of the Chinese Communist Party’s principle of democratic centralism. Deng Xiaoping’s reference to “democracy” refers to a step back to a class-conscious democracy based on the classic theory of Marxism-Leninism.<sup>37</sup> This understanding of “democracy” only emphasizes its organizational function for decision-making within the Party (that is, it merely strives for some kind of intra-Party democracy, *dangnei minzhu*, 党内民主).<sup>38</sup> More significantly, this understanding of “democracy” does not grant general electoral rights and other pertinent rights to common citizens within the state. As Deng Xiaoping explained:

What kind of democracy do the Chinese people need today? It can only be socialist democracy, people’s democracy, and not bourgeois democracy, individualist democracy. People’s democracy is inseparable from dictatorship over the enemy and from centralism based on democracy. We practice democratic centralism, which is the integration of centralism based on democracy with democracy under the guidance of centralism. Democratic centralism is an integral part of the socialist system. Under this system, personal interests must be subordinated to collective ones, the interests of the part to those of the whole, and immediate to

<sup>34</sup>See Deng Xiaoping, *On the Reform of the System of Party and State Leadership on August 18, 1980*, in 2 DENG XIAOPING’S SELECTED WORKS 330 (1994).

<sup>35</sup>See Deng Xiaoping, *Emancipate the Mind, Seek Truth from Facts and Unite as One in Looking to the Future, December 13, 1978*, in 2 DENG XIAOPING’S SELECTED WORKS 144–46 (1994).

<sup>36</sup>As to be explained below, Deng Xiaoping was firmly opposed to the total westernization in the political sector. The core of the total westernization, he deemed, is to transplant the western democracy into the PRC. What the CCP needed is a kind of “socialist democracy,” which does not necessarily entail the elements of western democracy—for example, universal suffrage.

<sup>37</sup>“While propagating democracy, we must strictly distinguish between socialist democracy on the one hand and bourgeois, individualist democracy on the other. We must link democracy for the people with dictatorship over the enemy, and with centralism, legality, discipline and the leadership by the Communist Party.” Deng Xiaoping, *Uphold the Four Cardinal Principles, March 30, 1979*, in 2 DENG XIAOPING’S SELECTED WORKS 175–76 (1994).

<sup>38</sup>In essence, the intra-Party democracy serves the optimization of decision-making within the CCP, by guaranteeing and enlarging the Party members’ rights of election, participation, suggestion and supervision. However, any real competitive democracy in the Party that could jeopardize the unity of the Party is excluded, as stated in the Constitution of the Chinese Communist Party:

The Party must fully encourage intra-party democracy, respect the principal position of its members, safeguard their democratic rights, and give play to the initiative and creativity of Party organizations at every level and all Party members. Correct centralism must be practiced; all Party members must keep firmly in mind the need to maintain political integrity, think in big picture terms, uphold the leadership core, and keep in alignment, and firmly uphold the authority and centralized, unified leadership of the Central Committee with Comrade Xi Jinping at the core.

See CONST. OF THE COMMUNIST PARTY OF CHINA, General Program.



long-term interests. In other words, limited interests must be subordinated to overall interests, and minor interests to major ones.<sup>39</sup>

The restoration of political order also involved institutional reconstruction. But, corresponding to the total repudiation of western democracy in the ideological sphere, it also was strictly forbidden that China's reformed institutions would adopt western democratic structural arrangements such as the division of power, multi-party system, and direct elected representation. In fact, institutional reform confronted a uniquely Chinese problem, namely the readjustment of the relationship between the Party and the state to achieve a benign interaction between them. In the post-Cultural Revolution era the realization of a benign interrelatedness between the Party and the state was principally achieved through the rebuilding of state organs. The renewed state apparatus strengthened its independence relative to the Party and achieved considerable separation between the Party and the state—albeit, and paradoxically, under the leadership of the CCP.<sup>40</sup> The state's independence relative to the Party does not suggest the erosion of the CCP's absolute leadership over the state. On the contrary, it only emphasizes the institutional rationality of state organs and their regulatory functions for the day-to-day function of the state and governance of society. This replaced the Party's role, which, in the Cultural Revolution, dominated these functions but in a manner that was characterized by fragmentation, arbitrariness, and intermittence. In truth, the function of the state in that period had degenerated into little more than the personal orders of the CCP's leaders.<sup>41</sup>

<sup>39</sup>Deng Xiaoping, *Uphold the Four Cardinal Principles, March 30, 1979*, in 2 DENG XIAOPING'S SELECTED WORKS 175–76, (1994).

<sup>40</sup>For the restoration of domestic order after the Cultural Revolution, the CCP defined already at the end of the 1970s Four Cardinal Principles (*sixiang jiben yuanze*, 四项基本原则) that must be upheld. One of these four principles is insisting on the leadership of the CCP (*jianchi gongchandang de lingdao*, 坚持共产党的领导). Notwithstanding the errors and failures of the CCP and its top leaders made in the Cultural Revolution, the monopolistic leading status of the CCP was still emphasized and justified:

In reality, without the Chinese Communist Party, who would organize the socialist economy, politics, military affairs and culture of China, and who would organize the four modernizations? . . . Party leadership, of course, is not infallible, and the problem of how the Party can maintain close links with the masses and exercise correct and effective leadership is still one that we must seriously study and try to solve. But this can never be made a pretext for demanding the weakening or liquidation of the Party's leadership.

Deng Xiaoping, *Uphold the Four Cardinal Principles, March 30, 1979*, in 2 DENG XIAOPING'S SELECTED WORKS 170 (1994). The reinforcement of state organs and the requirement of separation between the Party and the state were also initiated and defined by Deng Xiaoping:

It is time for us to distinguish between the responsibilities of the Party and those of the government and to stop substituting the former for the latter. Those principal leading comrades of the Central Committee who are to be relieved of their concurrent government posts can concentrate their energies on our Party work, on matters concerning the Party's line, guiding principles and policies. This will help strengthen and improve the unified leadership of the Central Committee, facilitate the establishment of an effective work system at the various levels of government from top to bottom, and promote a better exercise of government functions and powers. A truly effective work system will be set up for the State Council and the various levels of local government. From now on, all matters within the competence of the government will be discussed and decided upon, and the relevant documents issued, by the State Council and the local governments concerned. The Central Committee and local committees of the Party will no longer issue directives or take decisions on such matters. Of course, the work of the government will continue to be carried out under the political leadership of the Party. Strengthening government work means strengthening the Party's leadership.

Deng Xiaoping, *On the Reform of the System of Party and State Leadership, August 18, 1980*, in 2 DENG XIAOPING'S SELECTED WORKS 321, 339 (1994).

<sup>41</sup>A stable relationship between the Party and the state was, in the period of political turmoil, hardly imaginable. Mao Zedong personally led the political movements in the Cultural Revolution to purge the "capitalist roaders" in the state organs and, as described above, governments as formal state organs were replaced by the Revolutionary Committees. In this context, the fledgling space of state organs and their regulatory functions for the whole society was greatly diminished.

From the foregoing discussion it can be concluded that in the post-Cultural Revolution era a liberal democracy in the western sense was never part of the CCP's efforts to restore domestic political order. This was true on the purely ideological level as well as with respect to concrete institutional design. Rather, the CCP appealed to its past political practices and experiences under Marxist-Leninist doctrine and insisted that the future political order should also be based on restoring, continuing, and improving these practices and experiences. This makes the underlying strategy of the political restoration and reform after 1978 a distinctly sinicized phenomenon that is fundamentally immune to any western political solutions or edifications. A series of speeches from Deng Xiaoping confirm that, in the political sector, class narrative and class antagonism would continue to serve as an ideological firewall against the influence of western political traditions as China consolidated the political particularism of the post-Cultural Revolution era. These concepts would play this role notwithstanding their abuse in the Cultural Revolution and their domestic attenuation after the Cultural Revolution.<sup>42</sup>

## 2. *Moving Toward the West in the Economic Sector*

The reassessment of the Cultural Revolution also led to economic reconstruction by transforming the conceptual focus of the whole CCP from class struggle to “socialist modernization (*shehui zhuyi xiandaihua*, 社会主义现代化).”<sup>43</sup> Since the founding of the PRC, the CCP was committed to and practiced a centrally-planned economy informed by classic Marxism-Leninism. This kind of centrally-planned economy was regarded as one of the core characteristics of Chinese socialism, which is—and must be—distinguished from the market economy under the western capitalism. The market economy and its underlying values, such as “private property,” “competition,” “limited government,” “free market,” and its ultimate philosophical assumption “individual liberty,” were seen as natural enemies of the centrally-planned economy under socialism and were strictly rejected in a socialist state.<sup>44</sup>

Due to the large scale of mass political movements and the concentration on class struggle during the Cultural Revolution, the centrally-planned economy did not succeed in practice.<sup>45</sup> But different to the political sector, there were no ideal images or “successful experiences” in the economic sector to which the CCP could turn to inspire economic reconstruction in the aftermath of the Cultural Revolution. For this reason, economic reconstruction and the ensuing

<sup>42</sup>The rejection of western political values was the main task of the CCP for maintaining the security of its leadership and built redline for the political development in the reform and opening era. Deng Xiaoping emphasized his firm standpoint against the western liberal democracy again in the mid of 1980s:

The mainland will maintain the socialist system and not turn off onto the wrong road, the road to capitalism . . . . Since the downfall of the Gang of Four an ideological trend has appeared that we call bourgeois liberalization. Its exponents worship the ‘democracy’ and ‘freedom’ of the western capitalist countries and reject socialism. This cannot be allowed. China must modernize; it must absolutely not liberalize or take the capitalist road, as countries of the West have done.

Deng Xiaoping, *Bourgeois Liberalization Means Taking the Capitalist Road, May and June 1985*, in 3 DENG XIAOPING'S SELECTED WORKS 123 (1994).

<sup>43</sup>The Four Modernizations (*sige xiandaihua*, 四个现代化) of industry, agriculture, national defense, and science-technology was considered as the Party's key tasks for the new era. See *Communique of the Third Plenary Session of the 11<sup>th</sup> Central Committee of the Communist Party of China* (Dec. 22, 1978).

<sup>44</sup>The planned economy was the basic economic system of the PRC before 1978. It was first defined in the Constitution of 1954: “By economic planning, the state directs the growth and transformation of the national economy in order to bring about the constant increase of productive forces, thereby improving the material and cultural life of the people and consolidating the independence and security of the state.” XIANFA, *supra* note 26, at art. XV.

<sup>45</sup>The extreme form of the planned economy was the People's Commune in the rural areas. The People's Commune typified the collectivization of productive materials and abolished any forms of private property. Contrary to its original goals, what the People's Commune brought was not the agricultural prosperity. Rather, like the planned economy in industry and commerce areas, the People's Commune led to the long-term stagnation and even retrogression of the agriculture and the whole national economy.

economic reform did not look to the PRC's past. Rather, it widely and deeply turned to western ideas, including an embrace of science and technology, methods for organizing and managing modern business enterprises, and the necessary state rules and institutions.

Deng Xiaoping adopted a more open and elastic approach to the West for the restoration of the economic order and the ensuing economic reform. This was distinguished from the strict insistence on the class demarcation and identification between China and the West in the political sector. The open and elastic approach to the West in the economic sector involved softening and diluting the theoretical antagonism between the—socialist—planned economy and the—capitalist—market economy based on Deng Xiaoping's pragmatic philosophy. This, in turn, achieved the de-antagonization with the West. Deng Xiaoping explained:

It is wrong to maintain that a market economy exists only in capitalist society and that there is only “capitalist” market economy. Why can't we develop a market economy under socialism? Developing a market economy does not mean practicing capitalism. While maintaining a planned economy as the mainstay of our economic system, we are also introducing a market economy. But it is a socialist market economy . . . Taking advantage of the useful aspects of capitalist countries, including their methods of operation and management, does not mean that we will adopt capitalism. Instead, we use those methods in order to develop the productive forces under socialism.<sup>46</sup>

The flexibility and the utilitarian orientation of Deng Xiaoping's pragmatism lowered the ideological fence between China and the West and paved the way for vigorously learning from the West in the economic area. Naturally, the adoption of Western economic models and structures never meant a total abandonment of some key economic elements of the socialist system, such as “socialist public ownership (*shehui zhuyi gongyoushi*, 社会主义公有制).”<sup>47</sup> The basic and relatively mature theory for how western economic elements can be combined with socialist public ownership—namely, the “socialist market economy (*shehui zhuyi shichang jingji*, 社会主义市场经济)”<sup>48</sup>—was formulated in the “Decision of the Central Committee of the Communist Party of China on Some Issues concerning the Establishment of the Socialist Market Economy” of 1993 (Decision of 1993).<sup>48</sup> In the same year, the “socialist market economy” was incorporated into the Constitution.<sup>49</sup> The establishment of the theory of the socialist market economy helped overcome the chasm between the Chinese socialist system and the western market economy. It also

<sup>46</sup>Deng Xiaoping, *We Can Develop a Market Economy under Socialism*, November 26, 1979, in 2 DENG XIAOPING'S SELECTED WORKS 236 (1994).

<sup>47</sup>As stipulated by the current Constitution of the PRC, “The basis of the socialist economic system of the People's Republic of China is socialist public ownership of the means of production, namely, ownership by the whole people and collective ownership by the working people.” CONST. OF THE COMMUNIST PARTY OF CHINA art. VI, para. 1. “In the primary stage of socialism, the State upholds the basic economic system in which the public ownership is dominant and diverse forms of ownership develop side by side.” *Id.* at para. 2.

<sup>48</sup>Adopted by the Third Plenary Session of the 14<sup>th</sup> Central Committee of the Communist Party of China, on November 14, 1993. This Decision delivered clear explanations for the theory of socialist market economy:

The socialist market economic structure is linked with the basic system of socialism. The establishment of this structure aims at enabling the market to play the fundamental role in resource allocations under macro-economic control by the state. To turn this goal into reality, it is necessary to uphold the principle of taking the publicly owned sector as the mainstay, while striving for a simultaneous development of all economic sectors, to further transform the management mechanism of state-owned enterprises, and to establish a modern enterprise system which meets the requirements of the market economy and in which the property rights as well as the rights and responsibilities of enterprises are clearly defined, government administration and enterprise management are separated and scientific management is established.

COMMUNIST PARTY OF CHINA, *Decision of the Central Committee of the Communist Party of China on Some Issues Concerning the Establishment of the Socialist Market Economy*, para. 2 (1993).

<sup>49</sup>By constitutional amendment, Article 15 of the Chinese Constitution provides, “The State practices socialist market economy.” CONST. OF THE COMMUNIST PARTY OF CHINA art. XV (1993) (specifically the March 29, 1993 amendment).

facilitated and accelerated learning from the West in the economic area and shaped China's economic progressivism towards the West.<sup>50</sup>

### III. Incongruent Paths of Legal Development in the Political and Economic Sectors

The core of the elastic and dualistic strategy for learning from the West has involved, on the one hand, the strict rejection of western political values and institutions, and on the other hand, the positive embrace of western approaches to science, technology, and economic organization and regulation. This strategy has resulted in different paths for China's legal development in the political and economic sectors.

In the political sector, the political requirement of regaining domestic order informed legal developments after 1978 and provided an initial incentive and continuous force for reform. Reform focused mainly on restoring the state organs and laws that were destroyed after the late 1950s. Some values and virtues of law, such as stability and predictability, were emphasized.<sup>51</sup> The restoration of legal order first took the form of significant legislative efforts concerning the organization of state organs.<sup>52</sup> Deng Xiaoping strongly combined the reconstruction of the legal order with a strengthening democracy at the beginning of the Reform and Opening.<sup>53</sup> But laws reinforcing and institutionalizing democracy and individual freedom—the kind of laws needed to create a more open and liberal politics—never reached the standards of western liberal democracy. This, for example, is reflected in the long-term stagnation election rights for ordinary citizens.<sup>54</sup>

In the economic field, vigorous efforts to learn from the West delivered different legal developments. In order to reduce the legal and institutional gaps between China and the West, and to

<sup>50</sup>The socialist market economy shares with its western counterpart some common points, for example, protecting property rights, encouraging free competition as well as protecting intellectual properties, and so on. These common points contribute to the access of the PRC into the world market led by the West and later facilitated the entry of China into the World Trade Organization in 2001.

<sup>51</sup>“Surviving Party leaders wished to substitute the predictability of socialist legality for the arbitrary politics of large-scale mass action in their bid to achieve political unity and stability.” Ronald C. Keith, *Chinese Politics and the New Theory of “Rule of Law,”* 125 CHINA Q. 111 (1991). “When the Chinese leadership turned its attention to creating a legal order after the end of the Cultural Revolution, one of its expressed concerns was to reduce official arbitrariness.” Stanley Lubman, *Introduction: The Future of Chinese Law,* 141 CHINA Q. 1 (1995).

<sup>52</sup>For example, organic laws regarding the National People's Congress, the State Council, people's procuratorates, people's courts, local people's congresses and local people's governments were already rapidly re-adopted at the early stage of the Reform and Opening.

<sup>53</sup>“To ensure people's democracy, we must strengthen our legal system. Democracy has to be institutionalized and written into law, so as to make sure that institutions and laws do not change whenever the leadership changes, or whenever the leaders change their views or shift the focus of their attention. The trouble now is that our legal system is incomplete, with many laws yet to be enacted. Very often, what leaders say is taken as the law and anyone who disagrees is called a law-breaker. That kind of law changes whenever a leader's views change.” Deng Xiaoping, *Emancipate the Mind, Seek Truth from Facts, and Unite as One in Looking to the Future, December 13, 1978,* in DENG XIAOPING'S SELECTED WORKS 146 (1994). The Democracy emphasized by Deng Xiaoping, in its essence, remained an organizational principle for CCP's organs and state organs which aimed to guarantee more democratic participation for organic decision-making, however, it contained no references to strengthening democratic rights of common citizens.

<sup>54</sup>In 1982, the Electoral Law of the National People's Congress and Local People's Congresses at All Levels was re-adopted. This electoral law defines the basic electoral system of China up to now. According to the Chinese Constitution, the National People's Congress and the local people's congresses at various levels are the organs through which the people exercise state power. This law defines a hierarchical electoral system for the Chinese electoral system: Deputies to the National People's Congress and to the people's congresses of provinces, autonomous regions, municipalities directly under the Central Government, cities divided into districts, and autonomous prefectures shall be elected by the people's congresses at the next lower level. Deputies to the people's congresses of cities not divided into districts, municipal districts, counties, autonomous counties, townships, nationality townships, and towns shall be elected directly by their constituencies. This hierarchical electoral system limits the people's direct democratic participation to the lowest level of state power organs and distinguishes itself remarkably from the western electoral system.

facilitate the adoption of western investments and technology, law in the economic sector began to “westernize” already at the very beginning of the Reform and Opening.<sup>55</sup> The 1980s saw a boom of such legislation. Three important laws concerning foreign investment were enacted.<sup>56</sup> The aim of this regime was to lay down a “legal framework for foreign trade and investment.”<sup>57</sup> Other laws concerning civil and commercial activities, such as contract, intellectual property, tax, bankruptcy, civil procedure, and marriage were promulgated.<sup>58</sup> Naturally, legislation in this period was not limited to economic and civil subjects. Framework laws that are indispensable for a legal order, such as criminal and administrative laws, also were enacted.<sup>59</sup> The establishment of the socialist market economy reinforced and improved the status and function of law as part of China’s economic reconstruction. As the Decision of 1993 stated:

The establishment and improvement of the socialist market economy system must be regulated and ensured by a complete legal system. It ought to put great importance on the legal system construction, realize the unification of the Reform and Opening and the legal system construction and master the regulation of economy through laws. In accordance with principles of the Constitution, the goal of legal system construction is to accelerate economic legislation, improve civil and commercial, criminal laws and laws concerning state executive institutions and public administration, and primarily establish a legal system corresponding to the socialist market economy by the end of this century.<sup>60</sup>

Compared with the early period of the Reform and Opening Up, the legislation enacted in support of the development of the socialist market economy in the 1990s resorted more extensively to western models for theory as well as concrete, technical details.<sup>61</sup> The need for economic legal reform was a matter of quantity and quality. Regulating the socialist market economy propelled the whole Chinese legal development,<sup>62</sup> which is characterized by continuous elaboration, sophistication, and specialization of legislation, as well as the gradual growth

<sup>55</sup>“An evolving domestic market based on any type of market economy depends on a reliable and workable legal framework. Similarly, international business and investment in foreign countries rely on a reliable legal framework.” Volker Behr, *Development of a New Legal System in the People’s Republic of China*, 67 LA. L. REV. 1161, 1165 (2007).

<sup>56</sup>Law of the PRC on Chinese-Foreign Equity Joint Ventures [zhonghua renmin gongheguo zhongwai heziqiye fa] (1979), Law of the PRC on Foreign-Capital Enterprises [zhonghua renmin gongheguo waizi qiye fa] (1986) and Law of the PRC on Chinese-Foreign Contractual Joint Ventures [zhonghua renmin gongheguo zhongwai hezuo jingying qiye fa] (1988). Special tax and contract laws concerning ventures with foreign interest were also enacted: Income Tax Law of the PRC of China on Chinese-foreign Equity Joint Ventures (1980), Income Tax Law of the PRC for Foreign Enterprises (1981) and Law of the PRC on Economic Contracts Involving Foreign Interest (1985).

<sup>57</sup>As an observer pointed out:

Of all the legal institutions that have appeared since the reforms began in the 1980s, those concerned with foreign investment have developed the fastest. Chinese legal reform is by no means intended to benefit only foreigners, or even principally, but the policy of ‘opening’ and the consequent influx of foreign direct investment into China added urgency to the effort to create a foreign investment regime.

Stanley Lubman, *Introduction: The Future of Chinese Law*, 141 CHINA Q. 7 (1995).

<sup>58</sup>Marriage Law of the PRC (1980), Individual Income Tax Law of the PRC (1980), Economic Contract Law of the PRC (1981), Civil Procedure Law of the PRC (1982), Trademark Law of the PRC (1982), Patent Law of the PRC (1984), General Principles of the Civil Law of the PRC (1986), Enterprise Bankruptcy Law of the PRC (1986).

<sup>59</sup>Criminal Law of the PRC (1979), Criminal Procedure Law of the PRC (1979), Administrative Procedure Law of the PRC (1989).

<sup>60</sup>Decision of 1993, para. 44.

<sup>61</sup>In some legal areas, which are crucial to a market economy, such as patent, copyright, banks, negotiable instruments, insurance, company and bankruptcy, there existed no corresponding legislative experiences in the history of the PRC before 1978 as well in the old Chinese legal tradition. Thus, the western solutions and experiences in these fields offered the Chinese legislators with crucial references notwithstanding undertaking some necessary local adaptations.

<sup>62</sup>As observed by one scholar: “The economic reforms add complexity to Chinese society that must be addressed by new legislation.” Stanley Lubman, *Introduction: The Future of Chinese Law*, 141 CHINA Q. 3 (1995).

of judicial professionalism.<sup>63</sup> All of this has made it possible to speak of “commonalities, compatibilities, and convergences of Chinese law in a global context.”<sup>64</sup> In 2011—over thirty years after the Reform and Opening policy—it was officially declared that “the socialist legal system with Chinese characteristics has been established.”<sup>65</sup>

### C. The Tension Between Political Localism and Economic Progressivism—Legal Evolution in the “Forbidden Areas” and its Limits

The elastic and dualistic strategy for learning from the West defines the political sector as a “forbidden area” in the Reform and Opening agenda. This strategy aims to learn from the West in the economic sector while resisting the values of western liberal democracy and their political influence. The goal is to achieve ideological security and maintain the CCP’s rule. Still, the elastic and dualistic strategy, involving the simple demarcation between political and economic sectors, cannot be—and are not—maintained in reality.

#### I. The “Socialist Rule of Law State” as the Limit of Legal Modernization

It is inevitable that, with the opening in the economic sector, the underlying values of the western market economy, which are simultaneously of great political significance, permeated and eroded the politically and ideologically forbidden areas upon which the CCP has insisted. Deng Xiaoping’s softening of the antagonism with the West, which was viewed as necessary for carrying forward his economic progressivism, further stimulated the possibility of west-oriented political reforms within China. This imperceptibly nudged the rigid political localism of the CCP. The tension between political conservatism and economic progressivism created the necessary space for legal evolution in the “forbidden areas.”

Under classic Marxism-Leninism law is understood as nothing more than an instrument of class rule and it only reflects the will of ruling class.<sup>66</sup> But in the Reform and Opening era law attained connotations that previously were seen as incompatible with socialism and therefore forbidden. Similar to the minimization of the “class struggle” in the CCP’s governing ideology undertaken by Deng Xiaoping at the beginning of the Reform and Opening, the legal sector experienced changes in the 1990s. Fundamentally, the “rule of law” was no longer regarded as a thing of the

<sup>63</sup>One recent observation saw the strengthening of judicial professionalism in the enormous increase of the courts’ caseload: “In 2015 the overall number of cases that were registered in Chinese courts amounted to over 19.5 million, among them were 241,000 administrative.” Björn Ahl, *Judicialization in Authoritarian Regimes: The Expansion of Powers of the Chinese Supreme People’s Court*, 17 INT’L J. CONST. L. 256 (2019).

<sup>64</sup>Hualing Fu, *Duality and China’s Struggle for Legal Autonomy*, 1 CHINA PERSP. 4 (2019).

<sup>65</sup>Wu Bangguo, Chairman, Standing Comm. of the Nat’l People’s Cong. (Mar. 10, 2011).

<sup>66</sup>The fundamental view of Marxism on state is its class nature:

As the state arose from the need to keep class antagonisms (Klassengegensätze) in check, but also arose in the thick of the fight between the classes, it is normally the state of the most powerful, economically ruling class, which by its means becomes also the politically ruling class, and so acquires new means of holding down and exploiting the oppressed class.

Friedrich Engels, *Der Ursprung der Familie, des Privateigentums und des Staats* [Origin of the Family, Private Property, and the State], 21 KARL MARX, FRIEDRICH ENGELS WERKE 166–67 (1962).

In one of the most important works of Marx and Engels, *Die deutsche Ideologie* (The German Ideology), a series of highly abstract philosophical reasoning processes leads to the following concise conclusion: “Law = Dominant will of the state = State will” (*Gesetz = Herrscherwille des Staats = Staatswillen*) and “Law = the state’s declaration of will” (*Gesetz = Willenserklärung des Staates*). Thus, corresponding to the class nature of state, law as will of the ruling class is also of class nature. See Karl Marx & Friedrich Engels, *Die deutsche Ideologie. Kritik der neuesten deutschen Philosophie in ihren Repräsentanten Feuerbach, B. Bauer und Stirner, und des deutschen Sozialismus in seinen verschiedenen Propheten*, 3 KARL MARX, FRIEDRICH ENGELS WERKE 313, 318 (1978).

western bourgeoisie. Instead, “the rule of law” was celebrated as “the common achievement of the whole human civilization, which both capitalism and socialism can employ.”<sup>67</sup> The traditional narratives on the class-nature of law were greatly weakened.<sup>68</sup>

Together with learning from the West in the economic sector, western legal ideas and values have seeped into the Chinese legal sector.<sup>69</sup> Some crucial elements of the western notion of the rule of law were adopted and transformed into some kind of institutional reality. In the Reform and Opening era the traditional narratives on the class-nature of law were replaced, in Chinese legal scholarship as well as in official statements, with an emphasis on a number of western legal-political concepts, including: the “supremacy of constitution (*xianfa zhishang*, 宪法至上),”<sup>70</sup> the “supremacy of law (*falü zhishang*, 法律至上),”<sup>71</sup> “rights (*quanli*, 权利),”<sup>72</sup> “equality before the law (*falü mianqian renren pingdeng*, 法律面前人人平等),”<sup>73</sup> “due process (*zhengdang chengxu*, 正当程序),” “check and supervision of public power (*gongquanli de zhiyue he jiandu*, 公权力的制约和监督).”<sup>74</sup> These western-oriented values are institutionally implemented by corresponding

<sup>67</sup>See Shengping Liu, *shixing fazhi shi lishi fazhan de biran* [Practicing Rule of Law Is Necessity of Historical Development], 10 FAXUE 5 (1996); Jiafu Wang & Buyun Li, *On Governing State in Accordance with Law*, 2 FAXUE YANJIU 7 (1996); Anliang Gu, *shitan yifa zhiguo de gainian* [A Tentative Discussion on the Concept of Governing the State in Accordance with Law], 6 ZHENGFA LUNTA 1–2 (1999); Buyun Li & Zhiming Zhang, *kua shiji de mubiao: yifa zhiguo, jianshe shehui zhuyi fazhi guojia* [A Cross-century Goal: Governing the State According to Law, Constructing A Socialist Rule of Law State], 6 ZHONGGUO FAXUE 19 (1997); Guohua Sun & Wenyi Huang, *lun shehui zhuyi de yifa zhiguo* [On the Socialist Governing the Country According to Law] 6 ZHONGGUO FAXUE 12 (1996).

<sup>68</sup>The market-oriented reforms adopted after 1978 greatly impeded the possible applications of class nature in the legal arena and led to an inevitable withering away of the law’s class narrative in the Reform and Opening era. With the decline of political coercion, the parochial and thoroughly politicized understanding of law as a mere instrument of class rule appeared more powerless and ivory-towered. See also Chih-Yu Shih, *China’s Socialist Law under Reform: The Class Nature Reconsidered*, 44 AM. J. COMPAR. L. 631–32 (1996).

<sup>69</sup>A similar observation: “Western institutions and values have significantly influenced Chinese legislation, the creation of new legal institutions and orientations towards law . . . . More generally, some Chinese law professors have been influenced by Western theories of the rule of law.” Stanley Lubman, *Introduction: The Future of Chinese Law*, 141 CHINA Q. 18 (1995).

<sup>70</sup>See Hongwang Liu & Min Wang, *fazhi xiandaihua yu zhongguo jingji fazhan xueshu yantao hui zongshu* [Review of the Academic Symposium on Legal Modernization and The Economic Development of China], 6 ZHONGGUO FAXUE 125 (1996); Jialin Wu, *xianfa zhishang shi jianshe fazhi guojia zhi guanjian* [Supremacy of Constitution Is the Key of Building Rule of Law State], 3 FAXUE LUNTAN 18 (1998); Hainian Liu, *A Concise Discussion on the Principles of Socialist Rule of Law*, 1 ZHONGGUO FAXUE 10 (1998); Zengyuan Pu, *san lun yifa zhiguo bixu quelie xianfa de quanwei* [A Third Discussion on “Governing the State according to Law must Establish the Authority of Constitution”], 6 ZHENGZHI YU FALÜ 10 (2001).

<sup>71</sup>See Mujun Wu, *lun woguo fazhi jianshe de zhanlue mubiao jiqi fazhi tezhen* [On the Strategic Goal of the Legal Construction of Our State and Its Legal Characteristics] 9 FAXUE 8 (1991); Buyun Li, *yifa zhiguo, jianshe shehui zhuyi fazhi guojia* [Governing the State in Accordance with Law, Constructing a Socialist Rule of Law State], 2 ZHONGGUO FAXUE 20–25 (1996); Jiafu Wang & Buyun Li, *On Governing State in Accordance with Law*, 2 FAXUE YANJIU 3 (1996); Shengping Liu, *shixing fazhi shi lishi fazhan de biran* [Practicing Rule of Law Is Necessity of Historical Development] 10 FAXUE 5 (1996).

<sup>72</sup>See Ziyi Huang, *guanyu zai woguo jianshe shehui zhuyi fazhi guojia de ruogan wenti* [Some Problems Concerning the Construction of Socialist Rule of Law State in Our Country], 4 ZHONGGUO FAXUE 9 (1996).

<sup>73</sup>Anliang Gu, *shitan yifa zhiguo de gainian*, [A Tentative Discussion on the Concept of Governing the State in Accordance with Law], 6 ZHENGFA LUNTA 3–4 (1999).

<sup>74</sup>See Han Liu & Pengcheng Xie, *zhongguo faxuehui falixue yanjiuhui 1996 nian nianhui zongshu* [Review of the 1996 Academic Annual Conference of the Jurisprudence Association of the China Law Society], 6 ZHONGGUO FAXUE 119 (1996); Hainian Liu, *yifa zhiguo: zhongguo shehui zhuyi fazhi jianshe xin de lichengbei* [Governing the State in Accordance with Law: A New Milestone of the Chinese Socialist Legal Construction], 3 FAXUE YANJIU 32–33 (1996); Jinwen Xia & Daotong Cai, *lun zhongguo fazhijia de guannian jichu* [On the Conceptual Basis of Rule of Law in China], 5 ZHONGGUO FAXUE 48 (1997); Chuanming Deng, *lun fazhi guojia de quanli zhiyue* [On the Restriction of Power under Rule of Law State], 2 FAXUE PINGLUN 6 (1997); Ji Zhang, *fazhi de lixiang yu xianshi –yifa zhiguo lilun yu shijian yantaohui ji zhongguo faxuehui falixue yanjiuhui nianhui zongshu* [Ideal and Reality of Rule of Law—Review of the Symposium on Theory and Practice of Governing the State According to Law and the Annual Meeting of the Jurisprudential Association of the China Law Society], 2 ZHONGWAI FAXUE 128 (1998); Pingan Tian & Wenxian Zhang, *maixiang fazhi xinshiji, zhanwang faxue daqushi* [Step towards A New Century of Rule of Law, Outlook the Megatrends of Legal Science] 1 XIANDAI FAXUE 5 (2000); Guixiang Chang, *goujian shehui zhuyi fazhi guojia de sanda jishi* [Building Three Cornerstones of the Socialist Rule of Law State], 4 FAXUE LUNTAN 16 (2001).

legislation.<sup>75</sup> Learning from the West in separate legal areas eventually led to the adoption of the omnibus conception of the “rule of law” as part of the Chinese socialist legality. The constitutional amendment of 1999 confirmed, for the first time, the conception of “socialist rule of law state (*shehui zhuyi fazhi guojia*, 社会主义法治国家).”<sup>76</sup> The establishment of the concept of the “socialist rule of law” marks the apex of the legal modernization initiated during the Reform and Opening. The concept “moves beyond ‘government of laws, not men’ to incorporate liberal democratic notions that presume limitations on the state and the expansion of individual private liberty and the market exchange economy.”<sup>77</sup> The “socialist rule of law” also contributed greatly to the further evolution of Chinese socialist law towards the western understanding of the “rule of law.” In the first decade of the 21<sup>st</sup> century it was embodied in the constitutional confirmation of two crucial conceptions, namely “private property (*siyou caichan*, 私有财产)” and “human rights (*renquan*, 人权).”<sup>78</sup> Compared with other “imported” western values, these two conceptions were more politically sensitive and had been, up that point, excluded from the learning from the West agenda.

Naturally, the “socialist rule of law” is not a total transplant of its western counterpart. The so-called “socialist rule of law” is more strongly keyed to its earlier manifestation: “governing the

<sup>75</sup>A notable example to numerate is the new Criminal Law of the PRC enacted in 1997. Although the first Criminal Law after the Cultural Revolution was promulgated as early as in 1979, the Criminal Law of 1979 is hard to categorize as a Criminal Law in the modern sense due to the absence of some important values of western criminal law. Conversely, the Criminal Law of 1997 recognizes and adopts firstly two important principles of western criminal law, namely “*Nulla poena sine lege* (no penalty without a law)” and “equality before the law.” Article 3 of the new Criminal Law stipulates, “Any act deemed by explicit stipulations of law as a crime is to be convicted and given punishment by law and any act that no explicit stipulations of law deems a crime is not to be convicted or given punishment.” And its Article 4 provides, “Everyone is equal before the law in committing crime. No one is permitted to have privileges to transgress the law.” These two crucial principles of the Chinese Criminal Law aim to protect the rights of the criminal suspects and demonstrate a great progress towards its western counterpart.

Similar examples can also be found in the limitation of state power. The limitation of state power is an unimaginable conception in the pre-reform era in which the state under the Party’s leadership was enshrined as an unquestionable legitimate authority. The rise of the conception of limitation of state power was accompanied by the rise of the consciousness of rights protection of citizens during the market-oriented reform in the economic area which in its core requires the guarantee of private autonomy and private property and objects the unnecessary and undue intervention of government power into the market. In order to normalize the exercise of the government power and prevent its abuse in a market environment, China has developed a relatively complete system by the adoption of Administrative Litigation Law in 1989. Other laws helping restrain state power are also enacted, for example, State Compensation Law (1994), Administrative Penalties Law (1996), Administrative Reconsideration Law (1999), Administrative License Law (2003), and so on.

<sup>76</sup>Article 5 of the Chinese Constitution provides: “The People’s Republic of China governs the country according to law and makes it a socialist country under rule of law.” See XIANFA, *supra* note 26, at art. V.

<sup>77</sup>Ronald C. Keith, *Chinese Politics and the New Theory of “Rule of Law,”* 125 CHINA Q. 109 (1991).

<sup>78</sup>The constitutional amendment of 2004 confirmed these two conceptions for the first time in the PRC’s history. Article 13 paragraph 1 and 2 of the Constitution stipulate, “Citizens’ lawful private property is inviolable” and “the State, in accordance with law, protects the rights of citizens to private property and to its inheritance.” See CONST. OF THE COMMUNIST PARTY OF CHINA art. XIII, paras. 1–2. Article 24 paragraph 3 provides: “The State respects and preserves human rights.” CONST. OF THE COMMUNIST PARTY OF CHINA art. XXIV, para. III.

The constitutional confirmation of private property is, on the one hand, a product of the market-oriented reform in the economic area since 1978. On the other hand, it is also a result of the “socialist rule of law state.” The reality that the constitutional confirmation of “private property” occurred twenty-six years later after 1978 reflects the difficulty of adopting this western conception in China. The main reason lies in the incompatibility of private property with the Chinese socialist public ownership defined by the Chinese Constitution. The establishment of the “socialist rule of law” encouraged and strengthened further the protection of general individual rights and, consequently, stimulated the constitutional protection of property rights which is one of the most important individual rights.

Distinguished from the “private property,” the high political sensibility of “human rights” derives principally from external circumstances. This conception has been in a long-term employed as a main instrument of exercising political pressures on the CCP by the West. Any acknowledgement of this conception seemingly means a political “surrender” to the West. The adoption of the western conception of “rule of law” which is a superordinate, or at least parallel, conception of the “human rights” facilitated the adoption of the latter.



country according to law (*yifa zhiguo*, 依法治国).” The main function of that concept had been to guarantee the superior and transcendental status of the CCP over the state.<sup>79</sup> Core elements of the western notion of the rule of law, which are politically sensitive and at odds with the Chinese political reality of the Party-state, have been excluded from the connotations of the “socialist rule of law.” Still, the western notion of the rule of law shares with the socialist rule of law the core status of law in the modern governance of the state and society. Under the “socialist rule of law,” as distinguished from the previous history, law is used to regulate most domestic areas.<sup>80</sup> The space created by the tension between political localism and economic progressivism enabled institutional evolution and modernization within the state and it fostered the establishment of a more instrumentalist legal system. Still, crucial values that underpin the western notion of the rule of law were excluded because they might endanger the CCP’s rule under the Party-state reality.<sup>81</sup> In this sense, the “socialist rule of law” only signifies a—consciously pursued—limited legal modernization under the circumstance of the Chinese Party-state.

<sup>79</sup>The term of “*yifa zhiguo*” was systematically defined in the Jiang Zemin’s Report at the 15th National Congress of the Communist Party of China. Its core connotation is to build a legal system governing wide-range of social fields under the leadership and control of the CCP:

Governing the country according to law means that the broad masses of the people, under the leadership of the Party and in accordance with the Constitution and other laws, participate in one way or another and through all possible channels in managing state affairs, economic and cultural undertakings and social affairs, and see to it that all work by the state proceeds in keeping with law, and that socialist democracy is gradually institutionalized and codified so that such institutions and laws will not change with changes in the leadership or changes in the views or focus of attention of any leader. Governing the country according to law is the basic strategy employed by the Party in leading the people in running the country.

Jiang Zemin, General Secretary, Chinese Communist Party, Report delivered at the 15<sup>th</sup> National Congress of the Communist Party of China, Hold High the Great Banner of Deng Xiaoping Theory for an All-round Advancement of the Cause of Building Socialism with Chinese Characteristics’ into the 21st Century, pt. VI “Reforming the Political Structure and Strengthening Democracy and the Legal System” (Sept. 12, 1997).

<sup>80</sup>As the concept “*yifa zhiguo*” emphasizes, legal norms in various forms function as the main measures to regulate state and society, instead of the previous policies of the Party, or even the personal orders of Party leaders. Law is used to regulate, *inter alia*:

1. Political democracy (in the Chinese own sense): “Developing democracy must go hand in hand with the efforts to improve the legal system so that the country is ruled by law. Governing the country by law means that the broad masses of the people, under the leadership of the Party and in accordance with the Constitution and other laws, participate in one way or another and through all possible channels in managing state affairs, economic and cultural undertakings and social affairs, and see to it that all work by the state proceeds in keeping with law, and that socialist democracy is gradually institutionalized and codified so that such institutions and laws will not change with changes in the leadership or changes in the views or focus of attention of any leader.”
2. Economy: “Ruling the country by law is the objective demand of a socialist market economy.”
3. The Party’s own relationship with law: “The Party has led the people in drawing up the Constitution and other laws, to which it confines its activities.”

These connotations as the prelude of the constitutional confirmation of the “socialist rule of law” in 1999 were primarily defined by Jiang Zemin. See Jiang Zemin, *supra* note 79.

<sup>81</sup>As concisely described by one scholar:

The Party creates and sustains a normal legal system for legitimacy, governance, and economic growth. While there may be little, if any, moral commitment to rule of law, in particular the use of law to curb arbitrary power, a well-functioning legal system renders credibility to the otherwise undemocratic and more than occasionally repressive system.

Hualing Fu, *Duality and China’s Struggle for Legal Autonomy*, 1 CHINA PERSP. 3 (2019).

## II. Liberal Constitutionalism: The Abandonment of Total Westernization

More radical political demands, especially the attempt to realize western liberal constitutionalism in China—a kind of total political and legal westernization—sharply contradict the political reality of a Party-state with the CCP being the unique ruling party. For this reason, western legal-political concepts such as the separation of power, a multi-party system, general and direct elections, and judicial independence encountered resolute opposition from the CCP.<sup>82</sup>

The relatively open and loose political circumstances in the Hu-Wen era (2003–2013), the establishment of “socialist rule of law,” and the adoption of laws permitting “private property” and enshrining “human rights” encouraged more radical theoretical attempts to realize western liberal constitutionalism in China around 2013. This triggered a great debate over constitutionalism (*xianzheng*, 宪政).<sup>83</sup> Chinese liberal intellectuals’ vigorous appeals for China to adopt western constitutional democracy aimed to propel political reforms that had, at least by the standard of the western liberal democratic model, stagnated since the Reform and Opening. The aim was to achieve the political transformation necessary to move China towards constitutionalism in the western model.<sup>84</sup>

The CCP did not treat the calls for the western liberal constitutionalism as another form of learning from the west. Instead, the CCP quickly and categorically classified this agenda as a new round in the enduring ideological struggle between China and the West. To do this the CCP revived the traditional narrative of the class-nature of liberal constitutionalism, which was an argument that had been softened and deprioritized as part of other legal reform developments that drew on learning from the west. In a top Party journal it was argued that:

The term ‘constitutionalism,’ whether it is discussed as a theoretical concept or as an institutional practice, refers to the implementation of a bourgeois constitution. It is the political standpoint and institutional arrangement of Western liberalism.” Constitutionalism is, in the final analysis, a tool for the bourgeoisie to safeguard their own domination and to implement class oppression. Although Socialist countries have constitutions, because they implement a Socialist system that is opposed to a capitalist system, they naturally do not fall into the scope of constitutionalism in the Western conception.<sup>85</sup>

<sup>82</sup>The Party-state reality empowers the CCP to stay above the state. The liberal constitutionalism essentially contradicts with this reality in the sense that it tries to “subject the Party to democratic and judicial controls.” See SAMULI SEPPÄNEN, *IDEOLOGICAL CONFLICT AND THE RULE OF LAW IN CONTEMPORARY CHINA* 2–3 (2016).

<sup>83</sup>The Constitutionalism which the Chinese liberal intellectuals strived for at that time was exactly equal to its Western counterpart. The CCP, however, resolutely rejected it. “The theory of constitutionalism comes from the liberalism and individualism promoted by the western capitalist countries. The constitutionalism is based on the capitalist constitution, and it serves as the ruling tool of the bourgeoisie.” Cheng Song, 我国依宪治国与西方宪政的本质区别 [*The Essential Difference between Running a Country According to Constitution and Western Constitutionalism*], HONGQI WENGAO (红旗文稿), (Feb. 24, 2018), [http://www.qstheory.cn/dukan/hqwg/2018-02/24/c\\_1122443411.htm](http://www.qstheory.cn/dukan/hqwg/2018-02/24/c_1122443411.htm).

<sup>84</sup>The debate erupted mainly between liberal and (political) reformist intellectuals and conservative socialist theorists. The former advocated the western constitutionalism, the implementation of a multi-party system, parliamentary democracy, a tripartite separation of power and the acceptance of so-called (western) universal values, whereas the latter insisted on the existing political system led by the CCP as well as the surrounding and underlying theoretical argumentations of “socialism with Chinese characteristics”. For more detailed descriptions of this debate, see Rogier Creemers, *The Chinese Debate on Constitutionalism: Texts and Analyses (Part I)*, <https://chinacopyrightandmedia.files.wordpress.com/2013/06/constitutionalism-debate-part-i.pdf>; Rogier Creemers, *The Chinese Debate on Constitutionalism: Texts and Analyses (Part II)*, <https://chinacopyrightandmedia.wordpress.com/2013/06/13/the-chinese-debate-on-constitutionalism-texts-and-analyses-ii/>; Rogier Creemers, *China’s Constitutionalism Debate: Content, Context and Implications*, 74 CHINA J. 91–109 (2015).

<sup>85</sup>Zhengzhi Xue, *renqing “xianzheng” de benzhi* [Clearly Understanding the Essence of “Constitutional Governance”], 6 DANGJIA 29–30 (2013), <https://chinacopyrightandmedia.wordpress.com/2013/05/29/clearly-understanding-the-essence-of-constitutional-governance/>.

More significantly, the call for liberal constitutionalism was directly regarded as an attack on the rule of the CCP and the whole Chinese socialist system:

For a long time, some liberalist intellectuals at home and abroad saw the advocacy of ‘constitutionalism’ as the breakthrough point that was most likely to change China’s political system and a political strategy and means to deny the Four Cardinal Principles. They have done their utmost to propagate the transcendent nature and universal value of ‘constitutionalism.’ The direction of these ‘constitutionalism’ viewpoints is extremely clear, namely, they intend to abolish the leadership of the Communist Party of China and overthrow the Socialist regime.<sup>86</sup>

The theoretical debate on constitutionalism was ended by strong official intervention.<sup>87</sup> The years after 2013 saw the fading away of Chinese liberal intellectuals, the disillusionment of their dream of “constitutionalism,” and the gradual reinforcement of regulation in the ideological spheres by the CCP. The attempt of a total political westernization was abandoned shortly after it began to resonate, even if only on a theoretical level. This seems to be where learning from the West in the political and legal sectors reached its limits.

Imported western values that accompanied the market-oriented reform led to the eruption of the more radical call for realizing liberal constitutionalism in China, a development marked by the constitutionalism debate in 2013. This sounded the alarm for the CCP. In order to resist the penetration of the western constitutional thought, the CCP has strengthened its control over the ideological realm. During the Xi-era, the CCP began to emphasize the “Four Confidences (*sige zixin*, 四个自信),” namely, “confidence in the path, theory, system and culture of socialism with Chinese characteristics.”<sup>88</sup> This new theoretical construction aims to strengthen the legitimacy of the CCP and the capacity of the pattern of Chinese socialism to resist the path of the western democratic-liberal system. Further, the overall leadership of the CCP (*dang de quanmian lingdao*, 党的全面领导) has been stressed in a series of decisions of the CCP and a recent remarkable move is that the leadership of CCP was re-incorporated into the main body of the Chinese Constitution by the constitutional amendment of 2018.<sup>89</sup>

#### D. Changing External Circumstances and Their Possible Influences on the Future of Chinese Legal Development

In the last forty years, the CCP has fostered the modernization and transformation of Chinese socialist legality from a system dominated by the narrative of the class-nature of law to a system now shaped by a limited form of the “rule of law.” It cannot be denied that this legal modernization depended on the CCP’s will to advance the reform and was the result of the CCP’s positive

<sup>86</sup>Zhengzhi Xue, *renqing “xianzheng” de benzhi* [Clearly Understanding the Essence of “Constitutionalism”], 6 DANGJIAN 30 (2013).

<sup>87</sup>Some journals and newspapers were placed under the strict official scrutiny due to supporting liberalists and publishing their constitutionalist points of view, for example, “炎黄春秋, *China Through the Ages (Yanhuang Chunqiu)*” and the “南方周末, *Southern Weekend (nanfang zhoumo)*”, both of them are regarded as liberalist. More details, see Creemers, *supra* note 78. Further, 宪政 (*xianzheng*), the Chinese phraseology of “constitutionalism”, has also been forbidden in the ordinary academic discussions, especially in the political and legal areas. Articles and papers containing this phraseology are hard to pass the political scrutiny of each journal.

<sup>88</sup>The “Four Confidences” theory was proposed by Xi Jinping in 2014 at his speech at the 95th Anniversary Conference of the Communist Party of China. In 2017, the “Four Confidences” was incorporated to the Party’s Constitution.

<sup>89</sup>For a detailed discussion, see Xiaodan Zhang, *Rule of Law Within the Chinese Party-State and Its Recent Tendencies*, 9 HAGUE J. RULE L. 373–98 (2017); *The Leadership of the CCP: From the Preamble to the Main Body of the Constitution—What Are Its Consequences for the Chinese Socialist Rule of Law?* 2 HAGUE J. RULE L. 147–66 (2020).

embrace of parts of western legal civilization.<sup>90</sup> But this has not been a process of thorough positive adoption. The CCP's interaction with the western mode of the rule of law exerted crucial influences on China's legal evolution. Western law provided the Chinese legal modernization with technical and operational points of reference for law-making, judicial power, and the administration. But, objectively, it also provided external ideological pressure on the CCP to propel the internal political and legal reform towards the West. The external pressures carried within all that China has learned from the west set up the basic preconditions that forced the Party-state under the leadership of the CCP to embrace the same game rules on the international plane.

The CCP successfully resisted a total westernization in the political and legal areas. Still, many western values managed to penetrate into the Chinese constitutional framework and legal order. These included values such as "private property" and "human rights." And they included many concrete institutions, notwithstanding their local adaptation undertaken by the CCP. To some extent, all of this evolution fulfilled the West's "expectations" for Chinese legal and political transformation and, most importantly, enabled and facilitated the CCP Party-state's access to and its engagement with the western world in a wide range of fields—especially economy, investment, technology, and trade. In this process the western model of the rule of law has been an attractive paragon to which the CCP's legal reform could refer—albeit selectively and cautiously.

The external western pressure on Chinese legal reform has been dramatically counteracted in recent years. On the one hand, this is the result the resurgence of the CCP's mighty narratives in the political and legal areas since the emergence of Xi's leadership.<sup>91</sup> On the other hand, the west's declining influence has been greatly facilitated by aroused national and populist emotion that has accompanied the deterioration of China-US relations.<sup>92</sup> The latter has become the biggest variable of the external circumstances for China since the Reform and Opening policy began. The years 2018 and 2019 saw the eruption and gradual escalation of the trade war between China and USA. The tariff measures and other protectionist and unilateralist measures taken by the USA according to its domestic laws against China were widely viewed as "arbitrary, capricious and hegemonic" by Chinese officials, intellectuals, as well as ordinary people.<sup>93</sup> Further, the Trump Administration's intention to use the "whole-of-government" to counter China led to aggravated sanction measures aiming to force China to change its "improper activities."<sup>94</sup> This induced greater nationalist sentiment in China. The aroused nationalist and populist feeling strengthened the authority and legitimacy of the CCP, as it depicted itself as the resolute defender of the interests of the Chinese state and the Chinese people.

<sup>90</sup>As explained in Part B, the positive gesture of the CCP to learn from the West principally originated from its desire to restore the domestic political and economic order. The western development model provided the CCP a helpful reference point which it could turn to.

<sup>91</sup>With the increased economic power of China, the CCP has become more confident in its narratives on the Chinese socialist road in comprehensive aspects: Guiding ideology, political system, legal system, culture and so on, and begins to advocate the superiority of the Chinese socialist road over, or at least its comparability with the western capitalist pattern, as demonstrated in the theorization of "Four Confidences" [sige zixin, 四个自信].

<sup>92</sup>As explained in the following content, the "trade war" between China and US has been perceived by the Chinese society as hostile actions taken by the US to interrupt the process of the national rejuvenation of China. This widely aroused nationalist sentiment objectively help the CCP strengthen its own path for China's development, dilute the attraction of the western model and consolidate the political particularism under the Party-state reality.

<sup>93</sup>These standpoints were repeatedly stated by the Ministry of Foreign Affairs of the People's Republic of China in its Regular Press Conferences since 2018. For a list of press conferences, see Ministry of Foreign Affairs of the People's Republic of China, *Spokesperson's Remarks*, [https://www.fmprc.gov.cn/mfa\\_eng/xwfw\\_665399/s2510\\_665401/2535\\_665405/](https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2535_665405/).

<sup>94</sup>United States Strategic Approach to the People's Republic of China, WHITE HOUSE, (May 26, 2020), <https://trumpwhitehouse.archives.gov/wp-content/uploads/2020/05/U.S.-Strategic-Approach-to-The-Peoples-Republic-of-China-Report-5.24v1.pdf>.

Naturally, it is somewhat unjustified to argue that the deterioration of the China-US relation and the tit-for-tat measures from both sides would reverse the existing CCP's rule-based practices in regulating its domestic affairs and ruin the achievement of the limited "rule of law." Actually, as one crucial measure to counter the USA's hostile acts, the CCP has endeavored to describe itself as the defender of the international multilateralism in the changing world.<sup>95</sup> This puts China in the position of emphasizing more rule-based governance in domestic and international affairs as a way of maintaining its gesture to advance the process of Reform and Opening.<sup>96</sup> Further, in a series of decisions as well as institutions in the Xi-era, the CCP expressed continuously its firm will to strengthen the role of law in the governance of state and society.<sup>97</sup>

Still, the soaring nationalist and populist sentiment has allowed the CCP to continue to advance its political localism with the perpetuation of its leadership as the core. By doing this, it located itself in a more conducive environment to resist the liberal-democratic transformation that has been externally expected or, more accurately, required by the West. Isolated from western ideological pressures, the CCP is also more determined to practice those means for legal reform that not only obviously depart from China's practices of the legal reform in the past forty years with the functional separation between Party and state as their keynote and precondition,<sup>98</sup> but also more sharply depart from the western model of the rule of law. The legal reform in the Xi-era is aligned with the increased political localism characterized by the Party's overall leadership and the functional atrophy of state organs against their Party counterparts.<sup>99</sup>

<sup>95</sup>On many occasions, President Xi Jinping described China as the defender of international multilateralism. For example, in one recent speech, he argued, "The problems facing the world are intricate and complex. The way out of them is through upholding multilateralism and building a community with a shared future for mankind." Xi Jinping, President, People's Republic of China, Speech at the Virtual Davos Agenda Event (Jan. 25, 2021), <https://news.cgtn.com/news/2021-01-25/Full-text-Xi-Jinping-s-speech-at-the-virtual-Davos-Agenda-event-Xln4hwjO2Q/index.html>.

<sup>96</sup>Such kind of declarations are pervasive in considerable official statements, one to enumerate is the speech of Xi Jinping at the Grand Gathering to Celebrate the 40th Anniversary of Reform and Opening Up (zai qingzhu gaige kaifang sishi zhounian dahui shang de jianghua, 在庆祝改革开放四十周年大会上的讲话) on December 18, 2018. See Xi Jinping, President, Chinese Communist Party, Address at Celebration of the 40th Anniversary of Reform and Opening Up (Dec. 18, 2018).

<sup>97</sup>For example, the "Decision of the CPC Central Committee on Major Issues Pertaining to Comprehensively Promoting the Rule of Law" [zhonggong zhongyang guanyu quanmian tuijin yifa zhiguo ruogan zhongda wenti de jue ding, 中共中央关于全面推进依法治国若干重大问题的决定], adopted at the Fourth Plenary Session of the 18th Central Committee of the Communist Party of China on December 10, 2014; the establishment of "the CCP Central Committee for Comprehensive Law-based Governance" [zhongyang quanmian tuijin yifa zhiguo weiyuanhui, 中央全面推进依法治国委员会] in 2018. In the report to the 19th National Congress of the CCP, Xi Jinping emphasized, "The overall goal of comprehensively advancing law-based governance is to establish a system of socialist rule of law with Chinese characteristics and build a country of socialist rule of law." See Xi Jinping, President, Chinese Communist Party, Address at the 19th National Congress of the Communist Party of China, Secure a Decisive Victory in Building a Moderately Prosperous Society in all Respects and Strive for the Great Success of Socialism with Chinese Characteristics for a New Era, (Oct. 18, 2017), <https://www.mfa.gov.cn/ce/cejo/eng/dtxw/P020171107148482980205.pdf>. Similar narratives and propagandas pervaded also in other official documents as well as in the Chinese legal scholarship.

<sup>98</sup>See Xiaodan Zhang, *Rule of Law Within the Chinese Party-State and Its Recent Tendencies*, 9 HAGUE J. RULE L. 379–90 (2017).

<sup>99</sup>One key move was the Decision of the CCP Central Committee on Deepening the Reform of the Party and State Institutions (zhonggong zhongyang guanyu shenhua dang he guojia jigou gaige de jue ding, 中共中央关于深化党和国家机构改革的决定) [Adopted at the Third Plenary Session of the 19th Central Committee of the Communist Party of China on February 28, 2018]. This Decision reverses the basic direction of the legal reform in the past 40 years through reviving the fusion of the Party and state, as it asserts:

The Party exercises overall leadership over all areas of endeavor in every part of the country. It is the primary task for deepening the reform of the party and state institutions to strengthen the party leadership over the work in all aspects. The organizational structure of the party shall be optimized to ensure pervasive party leadership and firmer and more forceful party leadership.

Chinese Communist Party, Decision of the CPC Central Committee on Deepening the Reform of the Party and State Institutions, part III (Feb. 28, 2018).

## E. Conclusion

Trapped in the ideological conflicts and the discrepancies of the political reality between China and the West, learning the West in the political and legal areas has been a double-edged sword for the CCP to achieve its legal modernization. To maintain its leadership, the CCP generally adopted an elastic and dualistic strategy based on the political localism and the economic progressivism. The positive embrace of the western rules and institutions in the economy and other related areas gave birth to the so-called “socialist rule of law”—as a kind of limited legal modernization—which was not designed to challenge the prerogative status of the CCP over the state, accelerated, however, the growth of a functionally independent state characterized with the continuous rationalization and institutionalization in the day-to-day governance of state and society. Under the elastic and dualistic strategy, the model of the western liberal constitutionalism has never become a choice for the CCP to advance the Chinese political and legal reform during the Reform and Opening era. This rigid standpoint of rejecting the western liberal constitutionalism was defined by Deng Xiaoping at the very beginning of the Reform and Opening policy, insisted on in the following forty years and newly evidenced and reinforced by the rapid abortion of the theoretical debate over the constitutionalism in 2013.

The resurgence of the CCP’s mighty narratives in the political and legal areas since the Xi’s leadership as well as the nationalist and populist emotion in China aroused by the struggles against the USA facilitate the CCP to strengthen its further control over ideological spheres and the tendencies of the political localism in the Xi-era which fortify the Party-state system, enshrine the comprehensive leadership of CCP will aggravate. In this sense, the basic direction of the legal reform in the past forty years with the functional separation of the Party and the state as its precondition will be inevitably reversed. Consequently, in the foreseeable future, the hope of some kind of democratic transformation towards the West and the realization of liberal constitutionalism will become, when not totally impossible, slim.

Nonetheless, the continuous institutional and legal evolution within the state will not likely cease. With describing China as the defender of the international multilateralism during the trade war and the ensuing struggles between China and the USA, the CCP can be further open to its trade partners and the whole world which will enhance the necessity to achieve the adaptations of China’s domestic rules with the international, and western, rules and practices abided by the most countries. This will propel the Chinese legislators and reformers to rely more and more on the western experiences and rules and advance the further consummation, professionalization, and sophistication of the Chinese socialist legality. Those “marginal”—that means they don’t directly threaten and challenge the rule of the CCP—imported values of the western rule of law accompanied the market-oriented reform will also obtain the continuous institutional guarantee and realization under the framework of the “socialist rule of law state.” The newest evidence is the adoption of the Civil Code of the PRC in 2020, which signifies the further rationalization of the Chinese socialist legality. However, it is also predicable that—with the full resurgence of the fusion of the Party and the state—the formal legal system and state organs can confront greater pressures from the Party’s direct and expedient interventions in various forms like in the pre-reform era.