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RULE OF LAW WITH CHINESE CHARACTERISTICS

IGNAZIO CASTELLUCCI*

This writing is based on a paper I presented first in Macau in 2004 and in Beijing in 2005, which I subsequently developed to its present state.

Due to its comparative approach and its east-meets-west implications, it is quite appropriate, and a particular pleasure for me, to have developed it for a collection of essays in honor of a truly eastern-western international and comparative law scholar – and not only that – such as the Distinguished Professor Dr. Sompong Sucharitkul, DCL, Associate Dean and Director for the Advanced International Legal Studies of the School of Law at the Golden Gate University of San Francisco.

I. INTRODUCTION

The “rule of law” is a western concept, associated with societies regulated solely by the law. In such societies, the law is a set of general rules that apply to all its citizens, particularly the State and ruling elite, and which covers nearly all areas of life. Such rules are always enforceable by a court of law, according to legal procedures, free from any interference from other sources of behavioral rules – such as tradition, politics, religion, or administrative praxis.

The concept of the rule of law originated and developed within the framework of capitalist, market-based economic systems. For many, the notion of the rule of law is associated with liberal democratic political regimes. However, after much debate, and many public speeches by the

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political leadership, China enacted in 1999 a Constitutional amendment making a reference to a concept akin to that of the rule of law.¹

The current debate in comparative law circles worldwide, in order to better understand the implications of the Constitutional amendment, and in general the evolutionary trend of the Chinese legal system, anyway, warrants the previous understanding of the historical fact that the *role* of law in China is different than the Western one; consequently, even the Chinese notion of the rule of law differs from its western counterpart, based on two main factors: China's socialist experience and its unique history.

We can identify the obvious influence of the former, for instance, in the very constitutional indication of the Chinese one as a "socialist market economy," introduced in 1993.² Well-known references to a new kind of socialism "with Chinese characteristics" was also introduced in 1993 in the Preamble of the Country's Constitution; similar references, also found in the Communist Party Constitution³ and in the legislation,⁴ indicate the influence of the Chinese history and context (on economy, politics and legal conceptions) as the second factor to be considered.

In this essay, I will discuss some peculiarities of socialist law, making some comparative references and reflections, mainly, but not only between the former USSR and the Chinese legal systems; I will then indicate possible lines of discussion or research on how the Chinese political and legal system is accommodating market-based legal institutions within its socialist frame, and how this will, in turn, contribute to shape a Chinese concept of the rule of law.

1. Const. of the People's Rep. of China, amend. 3 (1999). Amendment 3 added a new section to article 5 of the Constitution, stipulating that "The People's Republic of China practices ruling the country in accordance with the law and building a socialist country of law," according to the official English translation of the Constitution of the People's Republic of China, *available at* <http://english.people.com.cn/constitution/constitution.html> (last visited Apr. 5, 2007).

2. *See id.* at amend. 2 provision 7 (amending article 15 in 1993: "The state has put into practice a socialist market economy. The State strengthens formulating economic laws, improves macro adjustment and control and forbids according to law any units or individuals from interfering with the social economic order."). A further reference to socialist market economy is made in the Preamble as revised after amendment 3 of the constitution in 1999. *Id.* at amend. 3.

3. *See, e.g.*, Const. of the Communist Party of China, General Program, ¶ 1 (2002). An English translation has been published by the Chinese Government (Beijing, Foreign Language Press, 2003), *available at* <http://www.china.org.cn/english/features/49109.htm>.

4. *See, e.g.*, Legislation Law of the People's Republic of China (promulgated by Order No. 31 of the President of the People's Republic of China No. 31, Mar. 15, 2000) Ch. 1: Gen. Provisions, art. 1 (hereinafter "Legislation Law of Mar. 15, 2000"), *available at* http://english.gov.cn/laws/2005-08/20/content_29724.htm.

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II. SOCIALIST LAW

1. Socialist law in China

Scholars that have written on the rule of law in China have noted that the Chinese system, more than many other socialist legal systems, for long time downplayed the role of statutes, regulations, and of the law, in general, because of the idea that such centrality of law is a Western-created bourgeois superstructure, not useful for the cause of socialism.⁵ In the traditional socialist view, law is a tool available to the political authority for government and policy (“rule by law”); it is “impossible to understand Soviet law, or communist law generally, without taking into account its political dimension, or to be more explicit, without recognizing that law under those circumstances was almost totally dependent on political determinants.”⁶

This concept is often referred to as “socialist legality,” and consists, in extreme synthesis, in the “oriented” application of relatively few, generally drafted legal rules according to the policy needs of the political authority, to which the law should be subordinated⁷ according to the principles of “political flexibility” rather than those of strict legality⁸. Legal texts are often made of very ample and generic formulations of policy, not directly aimed at the citizens but very often addressing the administrative authorities who are in charge of the relevant sector at the different levels, who should in turn issue appropriate by-laws and case-by-case authoritative decisions – not necessarily made public and known to citizens – for the implementation of the general law. This model was introduced in the Soviet Union by Stalin and Višinskij in the mid-1930s, and

5. Good books in the English language on the legal system of China are, for instance, INTRODUCTION TO CHINESE LAW (Wang Chenguang & Zhang Xianchu, eds. 1997); ALBERT H.Y. CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE’S REPUBLIC OF CHINA (Hong Kong, Butterworths, 1998) (2nd ed. 2004)—especially the latter with a copious and relatively recent amount of Chinese legal literature cited therein; specifically on the issue of rule of law in China, a very thorough and accurate analysis is made by RANDALL PEERENBOOM, CHINA’S LONG MARCH TOWARD RULE OF LAW (2002); see also IMPLEMENTATION OF LAW IN THE PEOPLE’S REPUBLIC OF CHINA (Jianfu Chen, Yuwen Li & Jan Michel Otto, eds. 2002).

6. Ferdinand Feldbrugge, *The Rule of Law in Russia in a European Context*, in RUSSIA, EUROPE AND THE RULE OF LAW 203 (Vol. 56 in the series, *Law in Eastern Europe*) (Ferdinand Feldbrugge, ed. 2007).

7. *Id.*; see also Nicola Picardi & Rossella L. Lantieri, *La giustizia civile in Russia da Pietro il Grande a Krushev*, in CODICE DI PROCEDURA CIVILE DELLA REPUBBLICA SOCIALISTA FEDERATIVA SOVIETICA DI RUSSIA xxxvi (Nicola Picardi & Alessandro Giuliani, eds. 2004); Harold J. Berman, JUSTICE IN THE USSR. AN INTERPRETATION OF SOVIET LAW 36 (Cambridge Mass. 1963), *Italian translation* (Milan, 1963).

8. Berman, *supra* note 7, at 30-36.

reached its maturity and full implementation only in the late 1950s or early 1960s, after the death of Stalin.⁹

Instrumentality of legal rules in the Chinese environment is even more obvious, with respect to other socialist experiences such as the USSR. The Chinese culture and legal tradition have never known any pre-socialist western-style legal system, interacting with subsequent strata of political-legal conceptions, as it happened in the USSR and Eastern Europe bloc countries. The legal tradition of China developed throughout the centuries in different ways, based on the specificity of Chinese history, tradition, Confucianism, and on the importance of the administrative authority, rather than on vast sets of pre-determined abstract rules. Moreover, China also underwent the traumatic experience of the “Cultural Revolution,” which brought about a complete annulment of whatever legal system had been built by the time, which was being developed based on the idea of “socialist legality” hailing from the Soviet Union.¹⁰

Article 1 of the Chinese Legislation Law of March 15, 2000, reveals the state of the system, with very interesting references in the same provision to a socialist legal system “with Chinese characteristics;” to ruling the country “through (by) law”; and to the concept of “socialist rule of law.”¹¹ This single provision, then, is ambiguous and flexible enough to justify both a rule by law and a (socialist) rule of law reading.

Similarly, many other legal and political documents published by the Chinese Communist Party¹² and by the Government use different formulas expressing both concepts of rule of law (r.o.l.) and rule by law (r.b.l.)—such as in governing the country “in accordance” to the law or “through” law—using the Chinese words *fa zhi* (which can be translated as both “rule of law” and “rule by law”) and *yifa zhiguo* (ruling the country “in accordance to” or, also, “through” the law), with the result that the ambiguity is not resolved in one clear sense or the other. An *Outline for Promoting Law-based Administration in an All-round Way* (hereinaf-

9. For a discussion of the Soviet experience, see relevant sections on the USSR legal system, *infra* notes 129 – 151, and accompanying text.

10. To the extent of considering the legalist choices made in the USSR in those years as “revisionist,” see Chen, *supra* note 5, at Ch.3, esp. at 33.

11. Legislation Law of Mar. 15, 2000 art. 1 (“This Law is enacted in accordance with the Constitution in order to standardize lawmaking activities, to perfect state legislative institution, to establish and perfect our *socialist legal system with Chinese characteristics*, to safeguard and develop socialist democracy, to promote the *governance of the country through legal mechanism*, and to build a *socialist country under the rule of law*.”) (emphasis added).

12. See, e.g. Const. of the Communist Party of China General Program, as amended in 2002.

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ter “Outline 2004” or “2004 Outline”)¹³ issued by the State Council in March 2004 following a decision issued in November 1999, named *Decision on Promoting Law-based Administration in an All-round Way*, for instance, uses several of those formulations, especially “governing the country according to the law”¹⁴ and “government ruled by law”¹⁵ in the English translations.

The latter formulation is especially ambiguous: the reference to a “government ruled by the law” could sound to western ears as a reference to the rule of law concept, applicable to the government as well as to the citizens; however, the use of past participle (“ruled”) in an adjective function suggests a heavy question about *who* rules the government by law. The obvious answer being the Party—which still keeps its role of providing political leadership as stipulated in the Preamble of the Constitution—the question is transferred at that different level: is the Party also ruled by law? The answer also looks obvious in the negative sense, and the “rule by law” model remains confirmed.

Similarly, in a report written by a Deputy Auditor General of the National Audit Office of China, available in English on the Internet,¹⁶ terms referring to both concepts of rule of law and rule by law can be found. Maybe this is all about a westerner’s attitude in classification; the Chinese vagueness of terms reflects the inherent flexibility of the Chinese concept, able to cover several of our western ones; western scholars should avoid trying to make subtle, clear and rigid of what is a fundamentally fuzzy and flexible distinction, to say the least; and which might well be non-existent in the Chinese tradition and mentality. *Fa zhi*, after all, does not mean “rule by law,” nor “rule of law”; in a legal sense, it only means. . . *fa zhi*. A precise and accurate translation of *fa zhi* into English language can be possible just as much as it is possible to translate any English term expressing a legal concept into a single-word Chi-

13. State Council, *Outline for Promoting Law-based Administration in an All-round Way* (Beijing, China Legal Publishing House, 2005) (P.R.C.). The Outline 2004 is available in Chinese government bookstores, also in a bilingual, Chinese-English translation. The document is made, according to its preamble, “in accordance with the Constitution and relevant laws and administrative regulations to carry out the basic strategy of governing the country according to law, act in the spirit of the 16th National Congress of the Communist Party of China... promote law-based administration in an all-round way, and build the government up into one that is ruled by law.” *Id.*

14. See, e.g., *id.* at Ch. I, ¶ 1.

15. See, e.g., *id.* at prbl.

16. Dong Dasheng, *The Practice of Rule of Law in China*, (n.d.), available at www.cnao.gov.cn/UploadFile/NewFile/2006628152356558.doc. The author translates Article 5 of the Constitution of China as making a reference to “ruling the country in accordance with the law.” *Id.* The author makes several references to the Chinese construction of a modern *socialist* legal system, to be completed by year 2010 (*id.* at 3) and explicitly to the fact that “government should act in accordance with law...[as] an indispensable part of ruling the country by law.” *Id.* at 4.

nese concept having the same legal meaning.¹⁷ *Traduttori traditori*, as the Italians say. The actual legal meaning of *fa zhi* cannot come from any more or less accurate translation, but from observation of the Chinese history and present reality.

In the Chinese tradition and socio-political environment, pure administrative discretion has always had wider latitude with respect to the USSR environment. In the former USSR, certainly a “strong” socialist legality concept has been enforced, based on the actual recourse of governing organs to their regulatory power for providing final rules, normally enforced, if always subject to an “oriented” interpretation/enforcement.¹⁸ On the other hand – notwithstanding a similar presence of legal rules of a very general type with guiding functions – China, even before the “Cultural Revolution,” has had a remarkable lack of detailed administrative by-laws in many areas. This very often made rules completely inapplicable, and consequently created latitude for political and administrative discretion, to say the least.¹⁹ Additionally, there is a frequent by-pass of existing laws and regulations in favor of the policies of the specific organs vested with the authority to implement the rules. Within the socialist legal “family,” it would be possible to contrast the Soviet model based on a “strong” socialist legality, which we could refer to as “rule by law,” to the Chinese model developed after 1949, originally based on a “weak” socialist legality, and on the officers’ very wide discretion,²⁰ which many refer to as “rule of men.”

The Chinese sources of legal rules constitute nowadays a very vast system, featuring complex and often intricate interactions amongst sources at the different hierarchical and territorial levels. The plurality of sources mentioned, with their increasingly frequent interventions *in idem* despite their formal hierarchy, brings about a remarkable complexity, and a plu-

17. The problems related to legal translations are well-known in comparative law literature; see the collection of essays *ORDINARY LANGUAGE AND LEGAL LANGUAGE* (Barbara Pozzo, ed. 2005); and Rodolfo Sacco, *Language and Law*, in *ORDINARY LANGUAGE AND LEGAL LANGUAGE* (Barbara Pozzo, ed. 2005).

18. For a synthesis on this issue see Gianmaria Ajani, *IL MODELLO POST-SOCIALISTA* Ch. 4, esp. 56-58 (1st ed. 1996).

19. “The present problem is that the laws are incomplete; many laws have not yet been enacted. Leaders words are often taken as ‘law’, and if one disagrees with what the leaders say, it is called ‘unlawful’. And if the leaders change their words, the ‘law’ changes accordingly.” It is a very well-know remark made by Deng Xiaoping during the third plenary session of the eleventh Central Committee of the Communist Party of China, in December 1978. *COLLECTED WORKS OF DENG XIAOPING* (1975-1982) at 136-137 (Beijing, People’s Press, 1983).

20. The evidence of the very wide administrative and political discretion of the organs of government in China is easily found in literature, also in the literature cited in this essay, e.g., in footnote 4, above. I do not want to oversimplify the issue, but its amplitude makes it impossible to deal with it here with any completeness.

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rality of possible solutions in the management of concrete cases, both by the administrative organs and by the courts.

Constitutional provisions related to hierarchy of norms,²¹ providing for the usual Constitution-laws-regulations order of prevalence, remain to some extent ineffective.²² Generally, in socialist countries, the Constitution has a different, and possibly lesser, legal value from what is attributed to the document in other countries, primarily because Constitutions are perceived as political documents rather than strictly legal ones.²³ Chinese courts have had, for a long time, the prohibition on making direct references to articles of the Constitution when making judgments under direction by the Supreme People's Court in 1955.²⁴ This approach is now being questioned, as in a few cases the courts has given direct enforcement to Constitutional rules and rights.²⁵

Moreover, there are mechanisms in place—in order to provide coherency between the rules stemming from legal sources of different levels—which are different from the judicial ones, and perfectly consistent with the underlying philosophy of the Chinese state. These mechanisms are generally perceived as inefficient or purely nominal.²⁶ Of course, the issue of abstract appropriateness of these mechanisms should be considered separately from their actual efficiency. Particularly, in a transition period, those mechanisms could either end up being scrapped, or being enhanced and made more effective; either possibility cannot be ruled out at present. Further reforms, including other mechanisms—such as the judicial review of laws and regulations, or the creation of special courts

21. Const. of the People's Republic of China, arts. 5, 89(1), 100 (1999); *see also* Legislation Law of Mar. 15, 2000, arts. 78 & ff. ones.

22. As observed by all the scholars who have written on the Chinese legal system. *See, e.g.*, Chen, *supra* note 5, at 111-115; Peerenboom, *supra* note 5, at Ch. 6.

23. "In short, Chinese constitution law concerns itself more with the state organizational structure than with the checks and balances of governmental powers, more with the future direction of the society than the protection of fundamental rights of citizens, and more with general principles than with detailed rules capable of implementation. However, one must not dismiss the Chinese Constitution out of hand. Seen as the 'mother of all laws', the Chinese Constitution does set the parameters for legal developments." Jianfu Chen, CHINESE LAW: TOWARDS AND UNDERSTANDING OF CHINESE LAW, ITS NATURE, AND DEVELOPMENT 58, 93-95 (1999); *also see* Chen, *supra* note 5, at 39-41.

24. The document was a Supreme Court "Reply on the Non-Desirability of Referring to the Constitution in the Determination of Crimes and Sentences in Criminal Judgments," as reported by Chen, *supra* note 5, at 47.

25. Such as in a Supreme people's Court reply to the Shandong High Court on the case *Qi Yuling v. Chen Xiaopi*, *Case of Infringement of Citizen's Fundamental Rights of Receiving Education Under the Protection of the Constitution by Means of Infringing Right of Name*, 5 *Zuigao Renmin Rayuan Gongbao* [Gazette of the Supreme People's Court of the People's Republic of China] 158 (2001), in relation to the constitutional rights to Education and to one's own name, reported in the People's Court daily of August 13, 2001. There also seem to have been previous cases related to constitutional protection of labourers' rights, as reported by Chen, *supra* note 5, at 48.

26. *See* Chen, *supra* note 5, *supra*, 114-115; Peerenboom, *supra* note 5, at 259.

or organs having judicial or quasi-judicial nature and authority to solve legislative conflicts— are very likely to require amendments in the Constitution.

The People's Republic of China Legislation Law of March 15, 2000, describes the mechanisms currently in place. The system basically consists of a supervisory and revisionary process of legislation and regulative activity at every level: laws and regulations are to be submitted from the issuing authority to the supervising one within 30 days of their promulgation.²⁷

Legislation stemming from the Standing Committee of the National People's Congress (hereinafter "NPC") shall be submitted to the NPC;²⁸ congress provincial legislation shall be submitted to the NPC Standing Committee;²⁹ governmental rules at central or provincial levels to people's congresses standing committees at the corresponding level;³⁰ rules issued by single departments of governments at all levels shall be submitted to their relevant governments;³¹ rules from all governments below the provincial level shall be submitted to the relevant provincial government;³² rules issued by special agencies or other bodies enabled to issue regulations shall be submitted to the departments or Ministries of the relevant governments which enabled them.³³

In principle, this should allow a legality check of the rules against the higher level rules issued by the supervising authority, the latter having the power to identify illegalities in the scrutinized rules and ask the supervised regulator to rectify them, as well as having the power to amend or annul the illegal provision.³⁴ It is important to observe that the mechanisms put in place with the Legislation Law also allow the supervising authority to go beyond a mere legality check.³⁵

27. Legislation Law of Mar. 15, 2000, art. 89.

28. *Id.* at art. 88(1), in accordance with article 62(11) of the Country's Constitution, for the relation between the NPC and its Standing Committee; the same relation is established between provincial people's congresses and their Standing Committees according to article 88(4) of the Legislation Law.

29. *Id.* at art. 88(2), in accordance with article 67(8) of the Country's Constitution.

30. *Id.* at art. 88(2), in accordance with article 67(7) of the Country's Constitution, for the NPC Standing Committee with respect to the central government; article 88(5) with respect to local governments and the relevant local congresses.

31. *Id.* at art. 88(3), in accordance with article 89(13) of the Country's Constitution.

32. *Id.* at art. 88(6).

33. *Id.*, at art. 88(7).

34. *Id.*, at art. 87.

35. *Id.* According to article 87(4) of the Legislation Law revision can lead to amendments or annulment when "the provision of an administrative or local rule is deemed inappropriate and should be amended or canceled."

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After the rules are in force, the constitutionality or legality verification process can be initiated by the enforcing administrative authority, or by other government organs, or by every citizen or entity; it consists of the request made to the Standing Committee of the NPC to assess the constitutionality or legality of the supervised rules. A supervision process will follow, with a process of consultations between the supervising organ and the supervised one,³⁶ and rules which need to be amended or annulled should, in principle, so be dealt with.³⁷ Even the Supreme Court and Procuratorate must follow these rules, referring the issue to the Standing Committee of the NPC, whenever they find that a legal rule is against the Constitution or that a provincial law is against a central law of the state.³⁸

The well-known underlying political doctrine is that there is no separation of powers, but just one power vested in the people (represented of course by the Communist Party, its politically conscious *avant-garde*) and then in the National People's Congress, which appoints and supervises the central Government, the Supreme Court and Procuratorate;³⁹ the absence of separation of powers in the State also having been the doctrinal basis of the Soviet political-legal system and of its judiciary.⁴⁰ The mentioned system of governance is present at all different levels of the Chinese government from central to local government, without a Western-style system of checks and balances – supervision being the key concept in the Chinese organization and control of any public power. For instance, the 2004 Outline indicates amongst the “basic requirements of law-based administration”⁴¹ the elements of due process and of “balance of powers and liability.” The balance of powers, though, is considered as a mere consequence of the imposition of liabilities and of supervision for the use of any given public power⁴² rather than a consequence of several powers checking one another. No special role is attributed to the court and procuratorate systems in this Outline for the transition towards a law-based administration. The courts are mentioned in just very few passages of the document, whereas the focus of the Outline is on promoting

36. *Id.*, at art. 91.

37. *Id.*, at art. 90.

38. *Id.*

39. See Xin Chunying, CHINESE COURTS HISTORY AND TRANSITION (2004), at 99-101. The absence of separation of powers in the State has also been the doctrinal basis of the Soviet political-legal system and of its judiciary.

40. See Picardi & Lantieri, *supra* note 7, at xxix; Berman, *supra* note 7, at 21-22; Albert K.R. Kiralfy, *Recent Changes in Soviet Criminal Procedure in L'Urss, Diritto, economia, sociologia, politica, cultura*, in L'URSS, DIRITTO, ECONOMIA, SOCIOLOGIA, POLITICA, CULTURA 521 (Michel Moushkely, ed. 1965); GABRIELE CRESPI REGHIZZI & PAOLO BISCARETTI DI RUFFIA, LA COSTITUZIONE SOVIETICA DEL 1977, at 220 (1979).

41. Outline 2004, *supra* note 13, at § III, ¶ 5.

42. *Id.*

the *administrative enforcement* of the laws by means of rationalization, enhanced supervision, improvement of the government's work at all levels and its discharge in accordance to the laws.⁴³

The described environment surely makes impossible for a Chinese court to declare a statute or even a local set of regulations invalid or unconstitutional.⁴⁴ A conflict between general rules stemming from different levels of normative power shall only be resolved within the relation between relevant legislative or regulative bodies –which theoretically is a relation of vertical supervision and control, if normally a quite loose one. The Chinese mechanisms for resolving normative inconsistencies, put in place with the Legislation Law of 2000, are a clear implementation of that doctrine.

Legislative organs have the monopoly of lawmaking activity; courts can operate as far as they can apply the rules easily, almost behaving as a mere *bouche de la loi*.⁴⁵ They should seek directions, as they regularly do, indeed,⁴⁶ from higher courts when deciding difficult, complex or sensitive cases. Moreover, a sort of *référé législatif*⁴⁷ has been put in place, at least in principle, with the Legislation Law and according to its article 90,⁴⁸ whenever a case involves the solution of a contrast between different legislative rules.⁴⁹

43. The need to implement effective institutional supervision by the People's Congress as well as democratic supervision by the political entities is further stressed in the Outline's Section IX paragraph 27, before the indication of the need for administrative organs to accept the supervision of the People's Courts according to the law, which only follows in paragraph 28.

44. See Xin Chunying, *supra* note 39, at 99-101.

45. "The mouth of the law." With this celebrated Montesquieu's aphorism the French revolutionary regime approached the issue of the role of judges, without any creative work allowed beyond the mere, almost mechanical application of legislative rules to real cases.

46. Chen, *supra* note 5, at 127.

47. Another legal tool developed in the French *Droit Intermediaire* (intermediate law) as the legal system in force between the revolution and the Napoleonic period is called. The *référé législatif* had been introduced with the Revolutionary constitution of 1791, which obliged the judge to suspend judgment and ask directions to the legislative body whenever the meaning of the law to be applied was unclear. This mechanism led to long delays in the administration of justice, and eventually disappeared with the Napoleonic Civil Code, the article 4 of which obliged the judge to find and provide a solution according to the law, however complicated the law might have been, lest being held responsible for denial of justice. The inception of those French ideas is described, for instance, in John Henry Merryman, *The French Deviation*, in *STUDI IN MEMORIA DI GINO GORLA*, at I, 619 (1994), republished in 44 AM. J. COMP. L. 109 (1996).

48. Legislation Law of Mar. 15, 2000, art. 90, as discussed above, regulates the requests for supervision that any court, procuratorate, state organ, entity or citizen can submit to the Standing Committee of the NPC whenever a conflict of rules of different hierarchical level is found.

49. This mechanism is not really unheard of: in addition to its French ancestor of the end of the XVIII century, it should also be remembered that a similar obligation to refer the case to the law-maker had been legislatively created in the VI century by Emperor Justinean in relation to the Ro-

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Simply put, the legislator is the almighty entity within the State, without a system of checks and balances. The legislator is directly representing, within the State, the political power of the people of China.

The government and the judiciary, on the other hand, perform their respective functions not as equal and separate powers; being appointed and having instead to accept the supervision by the congresses at their level, and having to discharge their functions based on and regulated by the enacted legislation. Courts do not stand on equal footing *vis-à-vis* the elective assemblies at their corresponding level, and it is only the latter assemblies which have the power to create and modify legal rules, which stand as far as they are not modified or repealed by the appropriate legislative or regulative organ, which issued the original rules.

Besides, according to the same doctrinal foundations, legislative organs are also the ones vested with the power of interpreting the rules they issue, their interpretation having the same force of the interpreted law (articles 42, 43, and 47 of the Legislation Law). The underlying implication is, in my reading of the socialist and Chinese legal mentality that courts—especially lower ones—should confine themselves to “applying” the rules. The adjective “judicial” is normally used in China before the noun “interpretation” to indicate judicial applications of the law to specific cases.⁵⁰ Plain, unspecified, “interpretation” normally refers to the legislative one, as shown for instance by article 42 of the Legislation Law of March 15, 2000. The clear meaning of that rule is that general “interpretation” of law is considered, and feared maybe, as something quite creative and different from the mere “application” of law; very akin, instead, to legislation, or anyway law-creation—not a completely unreasonable fear, in an environment characterized by the vagueness of many legislative rules.⁵¹

One of the pillars of the Western law is that the enacted legislation, however unclear or ambiguous, can be interpreted by lawyers and judges to find their applicable meaning. It follows that the applicable meaning given to the law by the courts might well be in some cases a meaning that the legislator would not have suspected to be implied in the legal

man law collected in the *Corpus Iuris Civilis*. See the Justinian's *Constitutio* (legislative enactment) named *Tanta* (Dec. 16, 533) (sanctioning the *Digest*, at ¶¶ 18, 21).

50. See NANPING LIU, *OPINIONS OF THE SUPREME PEOPLE'S COURT: JUDICIAL INTERPRETATION IN CHINA* (1997). The book, focused on the judicial interpretations given by the Supreme People's Court, is a precious testimony on the nature and functions of the Chinese judicial system.

51. The issue of interpretation of the laws in China is analyzed by Chen, *supra* note 5, at 118-128.

text – even a meaning contrary to the interests of the government in the specific case.

In a socialist context, the applicable doctrine is that legal rules represent the will of the people, or “the translation into normative enactments of the people’s will”;⁵² consequently, there is no technical process usable to extract a meaning from the written rules which goes against what had been meant as appropriate—by the legislator, by the state and, ultimately, by (the people and) the Party—at the moment of enactment, as well as subsequently, at the moment of every single case decision. When the meaning of a law is unexpressed or unclear, it shall not be construed in a way that will go against interest of the People, the legislator, the government, the party, which are all part of the same single political power to which the court belongs, too. Political considerations, in fact, play a major role in case-by-case judicial or administrative interpretation and enforcement; it is worth stressing again that it is “impossible to understand Soviet law, or communist law generally, without taking into account its political dimension, or to be more explicit, without recognizing that law under those circumstances was almost totally dependent on political determinants.”⁵³

To sum up, conflicts of sources can only be dealt with on a political level. Chinese citizens cannot attack any general set of regulations in court to contest their legality.⁵⁴ The mechanisms for solving a conflict of rules issued at different levels have so far been left unused by the relevant authorities. The result has been an extremely complex normative system characterized by a high number of inconsistencies –by some degree of chaos, some could say.⁵⁵

When dealing with specific cases, a court may selectively apply rules of a higher source, rather than apply contrasting ones from a lower source. However, the same court will not be permitted to declare one of the diverging rules unconstitutional, illegal or invalid, having instead to resort

52. Picardi & Lantieri, *supra* note 7, at xxxvi.

53. Feldbrugge, *supra* note 6, at 203.

54. Administrative Procedure Law of the PRC of 1990 art. 12 (“...court shall not accept suits brought... against... (2) administrative rules and regulations, regulations, or decisions and orders with general binding force formulated and announced by administrative organs.”). Of course, citizens have the right to request a verification to the NPCSC, as discussed, according to the Legislation Law.

55. See Peerenboom, *supra* note 5, at title of Ch. 6.

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to the mechanisms laid down in the Legislation Law to have the question submitted to the appropriate authority.⁵⁶

The inability to challenge illegal regulations with a general effect, the failure to effectively implement the mechanisms provided to solve conflicts of sources in the 2000 Legislation Law, and the absence of a strong judiciary, all add to the unpredictability of the outcomes in the Chinese legal system. When examining any piece of Chinese legislation, the importance of the political framework is to be considered as a factor having an impact on the interpretation and application of legal rules, and on the choice of the rule to be applied in the case at hand.

In addition to the importance of politics in general, *the policies of the State can also play a direct normative role whenever a gap in the laws becomes apparent*. According to Article 6 and 7 of the General Principles of Civil Law of the PRC of 1986, “civil activities shall be in compliance with laws; in the absence of relevant prescriptions in laws, they shall be in compliance with *the policies of the State* ...[and such] civil activities shall respect social ethics and shall not harm the *public interest*, undermine the *economic plans of the State* or disrupt the *social or economic order*” (emphasis added).

The relevance of non-merely-legal discourses in the development of present times’ China has been confirmed in a Resolution, adopted in the Sixteenth National Congress of the Party (2002), on the “amendment to the Constitution of the Communist Party of China”; the amended text makes a reference to “ruling the country according to law and building a socialist country under the rule of law; and combining the *rule of law* with the *rule of virtue*” (emphasis added).

A similar reference to ruling the country according to law and virtue is also made in the State Council Outline for developing the rule of law in

56. This can be inferred from the legislative framework just discussed. A clear case supporting this view has been made known to the international public after a young and legally trained judge of the intermediate court of Luoyang in the Henan province declared a piece of provincial legislation of Henan illegal and void, as being contrary to national law. The provincial people’s congress made an official protest to the intermediate court of Henan, considering the judge’s position as a serious political mistake as well as a serious breach of the law. As a consequence of this political initiative, the judge risked of losing her position and was subject to disciplinary action. Eventually, due to the publicity reached by the case and to a possible intervention of the Supreme Court, the young judge avoided being disciplined. The High People’s Court of Hunan reviewed the case and confirmed the applicability of the national law over the contrasting provincial one, but criticized the former judge as she had no right to declare the provincial law invalid. See coverage of this story in Jim Yardley, *A Young Judge tests China’s Legal System*, INTERNATIONAL HERALD TRIBUNE, Nov. 28, 2005.

the public administration.⁵⁷ Very significantly, at the time the notion of the “rule of law” (*fa zhi*) became a standard for ruling the country, a powerful antagonist to that concept has also been introduced, known as the “rule of virtue” (*de zhi*).⁵⁸

As a matter of fact, *de zhi* is an important concept in the Confucian tradition of the art of government, as opposed to ruling by the force of the law.⁵⁹ The well-known references made in those years by Jiang Zemin in his public speeches to *de zhi*, rule of virtue,⁶⁰ as well as the inclusion of the Chinese cultural heritage in his theory of the “Three Represents” introduced in the Constitution with the amendment of 2004,⁶¹ could to some extent be considered as grounds for defining that “rule of virtue” in Confucian terms.

Confucianism, indeed, is being re-discovered by Chinese political leaders, and is now being disseminated in the population, also through the school system⁶²—as a valuable part of the Chinese heritage and maybe as a source of inspiration in order to solve some of the problems brought about by rampant capitalism and by the new China materialist society. A

57. Outline 2004, *supra* note 13, at § III, ¶ 4 (“the basic principles of law-based administration”).

58. See the Constitution of the Communist Party of China, *as amended* at the 16th National Congress on Nov. 14, 2002, at 19 (Foreign Language Press, Beijing, 2003) (bilingual Chinese-English edition) (the introductory chapter titled “General Program”).

59. See Confucius, *Analects* at 13.6 (available worldwide in all languages, in countless editions, with minor language discrepancies in the different editions and translations) (“When a prince's personal conduct is correct, his government is effective without the issuing of orders. If his personal conduct is not correct, he may issue orders, but they will not be followed.”); *id.* at 12.19 (“Sir, in carrying on your government, why should you use killing at all? Let your evinced desires be for what is good, and the people will be good. The relation between superiors and inferiors is like that between the wind and the grass. The grass must bend, when the wind blows across it.”); *id.* at 13.11 (“If good men were to govern a country in succession for a hundred years, they would be able to transform the violently bad, and dispense with capital punishments.”), available at <http://classics.mit.edu/Confucius/analects.3.3.html>. Also, in the general principles contained in the T'ang Imperial Code of laws of year 624, a fundamental rule for government is that “virtue and rites are the basis for the government, law and punishment are its instruments,” in a typical rule-by-law conception.

60. Such as the meeting with the leading party officers in charge of propaganda held on January 11, 2001, promptly echoed on February 1, 2001, by an editorial published on the Party's *People Daily*; as reported by Zheng Yongnian & Lai Hongyi, *Jiang Zemin's New Moral Order for the Party*, available at <http://members.tripod.com/fieldworkchina/database/virtueen.doc> (last visited on Mar. 19, 2007).

61. According to this theory the Communist Party of China shall represent the requirements. In a word, the Party shall represent “the requirements to develop advanced productive forces, an orientation towards advanced culture, and the fundamental interests of the overwhelming majority of the people in China.” See the fundamental statement of the theory on the Chinese Government's *Xinhua* news agency website, at http://big5.xinhuanet.com/gate/big5/news.xinhuanet.com/english/2003-06/17/content_923052.htm (site last visited Mar. 19, 2007), with a full webpage containing references to books and studies on the “Three Represents” theory.

62. See, e.g., Editorial, *Confucian Teachings Stand Test of Time*, CHINA DAILY, Nov. 12, 2000, available at <http://www.china.org.cn/english/2000/Dec/5153.htm> (last visited Mar. 20, 2007).

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wealth of press sources in recent years have reported Hu Jintao's praises to China's Confucian heritage, both in the context of the launching of a nationwide moral campaign⁶³ and in relation with the aim of developing a "Socialist Harmonious Society."⁶⁴ Some commentators observe that Confucianism can be a valuable tool of governance, since it is based on an authoritarian and communitarian concept of society, while others remark, righteously enough, that Confucianism also conveys other less obvious values which can also be considered positive for the development of contemporary Asian societies.⁶⁵

However, the final text inserted in the Party Constitution does not explicitly mention "Confucian" virtue, but merely "virtue," in a context of strong references to socialist ideology as a guiding path for the progress of the Country.⁶⁶ If some ancillary role can be found for Confucianism in the official position of the Chinese elite, still socialist doctrines and a developing idea of socialist ethics, rather than Confucianism, are indicated as the main source of inspiration for government and policy-making.⁶⁷

The "rule of virtue" mentioned in the amended Party Constitution remains then a fuzzy concept that is molded according to what the Party considers "virtuous"—an express reference in the Party Constitution

63. It was the *Bao Xian* ("stay advanced") movement, a propaganda movement of years 2005-2006, aimed at fighting corruption, and is often regarded as the largest political campaign since Hu Jintao assumed Presidency. See <http://www.xinhuanet.com/newscenter/dyxjx/index.htm>; reported by Eric C.Y. Ip, *China's Moral Campaign: Implications and Important Issues* (last visited March 20, 2007).

64. See Eric C.Y. Ip, *supra* note 63; see also *Confucian Teachings Stand Test of Time*, *supra* note 62.

65. See, e.g., *CONFUCIANISM FOR THE MODERN WORLD* (Daniel A. Bell & Hahm Chaibong, eds. 2003). William T. De Bary, *Why Confucius now?*, in *CONFUCIANISM FOR THE MODERN WORLD* 369 (Daniel A. Bell & Hahm Chaibong, eds. 2003), in addition to the more common references to Confucian values such as the importance of family and community, makes an interesting remark on the Confucian tradition of study and self-cultivation as one of the reasons behind the economic success of Korea and of other Asian nations of Confucian tradition.

66. See Const. of the Communist Party of China, *supra* note 3, at 19 ("General Program") ("The Communist Party of China leads the people in their efforts... to combine ruling the country by law with ruling the country by virtue. *Socialist spiritual civilization provides a powerful ideological driving force and intellectual support...*") (emphasis added).

67. See Address by Hu Jintao on the CCP's 85th Anniversary Meeting ("We must agree that there are some advanced elements in Confucianism... these elements could effectively exert a positive influence to the establishment of a socialist harmonious society."), as reported by Eric C.Y. Ip, *supra* note 63. Confirming the existence of a mainly ideological, socialist approach, rather than a Confucian one, to moral issues, also see Alice Miller, *Hu Jintao and the Sixth Plenum*, 20 CHINESE LEADERSHIP MONITOR (2006), available at <http://media.hoover.org/documents/clm20am.pdf>; Zheng Yongnian & Lai Hongyi, *Jiang Zemin's New Moral Order for the Party*, available at <http://members.tripod.com/fieldworkchina/database/virtueen.doc> (last visited Mar. 19, 2007).

amendment to "Confucian" virtue would have implied some kind of external guideline for Party activity and policies.

We also need to keep in mind the influence of the Party, whose leading role is clearly stated in the Preamble to the Constitution, on Chinese government and administration;⁶⁸ and their paramount role in the Chinese legislative process, with formal and effectively established procedural and substantial controls over legislative, regulatory bodies and their activities at all levels. Beyond the historical fact that all major changes in the Constitution of the PRC have occurred following debates internal to the Communist Party, and often following a similar amendment of the Party Constitution, some Party directives are in the sense that all bills of law involving issues of major importance shall be reported to the Party Central Committee for approval, before going through the legislative process.⁶⁹ It seems clear to me that those Party directives have a *de facto* legal or quasi-legal nature, as their effectiveness is not confined within the scope of Party organization and activities and affects a fundamental function of the State such as the legislative process.

In other areas as well, Party documents and regulations and Party-government jointly issued documents are reported to have been observed and enforced by the relevant branches of the Chinese Government and judiciary, such as in relation to the civil servants' status, or to local elections.⁷⁰ In other cases, Party rules have been developed and applied within the Party environment, to subsequently become legislative rules.⁷¹

68. In the Preamble of the original 1982 text it is stipulated: "Under the leadership of the Communist Party of China and the guidance of Marxism-Leninism and Mao Zedong Thought, the Chinese people of all nationalities will continue to adhere to the people's democratic dictatorship and follow the socialist road, steadily improve socialist institutions, develop socialist democracy, improve the socialist legal system and work hard and self-reliantly to modernize industry, agriculture, national defence and science and technology step by step to turn China into a socialist country with a high level of culture and democracy." Subsequent constitutional amendments added references to the Deng Xiao Ping theory (1999) and to Jiang Zemin's "important thought" of the "Three Represents" (2004).

69. Quin Qianhong & Li Yuan, *Influence of the CCP over Legislation* (in Chinese language), available at http://article.chinalawinfo.com/article/user/article_display.asp?ArticleID=23338, as reported by Zou Keyuan, in *The Interplay of the Chinese Communist Party with the Chinese Law: Crippling Efforts Towards Rule of Law 3*, presented at the International Symposium *Culture, Law & Order: Chinese and Western Traditions*, Macau, (Nov. 24-26 2004) (proceedings to be published by the Matteo Ricci Institute of Macau in 2007). The contents of the Party document "Certain Opinions on Strengthening the Party Leadership over the State Legislative Work" of 1991, are described in CAI DINGJIAN, LISHI YU BIANGE—XIN ZHONGGUO FAZHI JIANSHE DE LICHENG (History and Reform—the Process of New China's Legal Construction) 165-166 (1999); see also Zou Keyuan, *supra* note 69.

70. Zou Keyuan, *supra* note 69.

71. *Id.*

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In conclusion, *Party policy and documents play a key role in the construction and interpretation of Chinese law by making policy a part of the law, and the law itself a special type of political directive.* From a political point of view, it is another tool to disseminate and implement the directives of the central policy-making organs in the government apparatus and amongst the citizens.

2. The role of courts and procuratorates in the Chinese context.

1. The Chinese court system works on an underlying philosophy different from that of Western courts, due to the absence of the Western doctrine of separation of powers in the foundations of the Chinese state. Chinese courts operate as specific organs of the State, implementing the State policy at a local level, through the legal system, through judicial directives, hierarchies and internal procedures.⁷²

At the highest level of the Chinese court system is the Supreme People's Court (hereinafter "SPC"),⁷³ which performs several key functions such as controlling the activities of lower courts through its decisions, directives and supervision,⁷⁴ harmonizing the application of the law not only within the framework of the system of legal rules, but also of the policies of the Party. It is of course also true that the Party interferes at local, horizontal level with the different levels of the judiciary—as well as of the other departments of the government⁷⁵ – the relation between local courts and local Party organs reproducing the one at higher and highest levels.

It is also worth mentioning, on the other side, that the Supreme Court exercises a *de facto* general normative power by means of issuing opinions on general matters of "interpretation" of given laws, lengthy and drafted in the form of general and articulated provisions. This is the

72. The basic philosophy of the Chinese judiciary is dealt with in Nanping Liu, *supra* note 50; an accurate depiction of how courts and procuratorates work is made by Chen, *supra* note 5, at 131-163; on current transition and its impact on the courts' system, see Xin Chunying, *supra* note 39.

73. See Nanping Liu, *supra* note 50, at 6-20 (describing the interference of the Communist Party on the Supreme People's Court; this Author analyzes how such an interference, or leadership, is *not excluded* by art. 126 of the Constitution, or by art. 3 of the law of Administrative Procedure of 1989—which only stipulate the freedom of courts from interferences of individuals or *other* organizations—and is indeed expressly provided for in the Preamble of the Constitution).

74. The political and hierarchical relation among the different courts of the Chinese system might be considered similar to the relation between different-level units of the Communist Party; see Nanping Liu, *supra* note 50, at 25.

75. Article 3 of the Law of Administrative Procedure of 1990 reproduces art. 126 of the Constitution; identical considerations can be done on the leadership exercised by the Communist Party over the public administration.

cause of some tension between the NPC and the SPC,⁷⁶ as well as a clear demonstration of how far the “interpretation” process can go, and why the socialist doctrines are inclined to reserve this activity to the legislator and not to the courts.⁷⁷ This tension demonstrates the complexities facing a socialist state transitioning from almost no legal system, as it used to be in the middle of the cultural revolution, to a modern state with a legal system founded on (some kind of) rule of law.

The scarcity of legislative norms, and/or their being exceedingly general and vague, left a normative space unoccupied; this in turn made possible, and to some extent necessary, for the SPC to intervene and fill the gap, *de facto* if not *de iure*—until reforms will accept this intervention as a lawful one, or will provide different solutions to substantial problem which caused the SPC’s intervention. The result is a non-constitutional, to some extent controversial exercise of normative power—yet useful for the functioning of the system—by the SPC on lower courts;⁷⁸ the lower courts being bound to comply with the SPC directives and opinions which, besides, do not necessarily have to be complied with by other departments of the government—the latter not being subject to the hierarchical control and supervision of the SPC (being subject, instead, to those of their respective governmental superior authority).

2. Another government institution playing administrative, supervisory and normative functions similar to those of the SPC, is the Supreme People’s Procuratorate, with respect to the underlying system of the People’s Procuratorates.⁷⁹

The People’s Procuratorates’ functions are not confined to prosecutorial work, as it happens in Western legal systems for public prosecutors. The major functions of the Supreme People’s Procuratorate⁸⁰ include many different ones, in addition to prosecution duties, such as leadership on lower level procuratorates; “to offer judicial interpretations in the actual application of law in the work of prosecution”; “to make stipulations, regulations and implementation rules on the work of prosecution”; “to be responsible for the political work and bringing up of the staff in the nation’s prosecution bodies.”

76. Quoting from Xin Chunying, *supra* note 39, at 102 (“it is agreed that judicial interpretation has gone far beyond its legal limits... judicial interpretation has become a very important source of law other than laws made by NPC and administrative regulations”).

77. See, *supra*, the discussion on the interpretation of the law in the socialist Chinese environment.

78. See Xin Chunying, *supra* note 39, at 102.

79. Nanping Liu, *supra* note 50, and Chen, *supra* note 5, at 159-163;

80. Listed on the Chinese government web portal, at http://english.gov.cn/2005/02/content_28500.htm (last visited Mar. 15, 2007).

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The Procuratorates had been abolished by Central Committee of the Communist Party at the height of the Cultural Revolution, in 1969, representing maybe too strong and legally structured state institution, *vis-à-vis* the political informality which was prevalent at the time and made Party organs run the state with the help of the Red Guards and the public security organs, which took over prosecutorial work.⁸¹ The abolition was confirmed in China's 1975 radical Maoist Constitution; the procuratorate's function of checking the legality of state organs' activities was then considered as anti-party and bourgeois.⁸² As China begun reconstructing its legal system, the procuratorates have been restored (1978) and disciplined with organic laws similar to those enacted for the judiciary.⁸³

Chinese Procuratorates have very peculiar and important functions, indeed, reproducing the model of the Soviet-developed *Prokuratura*,⁸⁴ an institution, created in 1722 in czarist Russia by Peter the Great, which was considered "the eyes of the Czar,"⁸⁵ enabling the Czar to exercise supervision, control on his extremely vast empire –the General Procurator of Russia enjoying an enormous power, that according to some made him almost a *de facto* vice-Czar.⁸⁶ As well as the Czarist one, also the Soviet *Prokuratura* had very wide duties and far-reaching powers, also a feature of their Chinese equivalent, with the aim of enforcing laws and party policies, through law and supervision on other state organs.⁸⁷

Thus, in addition to the direction of criminal investigations and to prosecutorial work for criminal cases, Chinese procuratorates represent public interests in every court, having authority to intervene in civil and administrative cases and to supervise the courts' judicial work and law enforcement. *Especially, procuratorates are in charge of supervising over all*

81. Chen, *supra* note 5, 160.

82. *Id.*

83. *Id.*

84. Chen, *supra* note 5, at 159.

85. Picardi & Lantieri, *supra* note 7, at xv-xvi.

86. WILLIAM MARSHALL, PETER THE GREAT 81 (1966) (Italian translation, Bologna 1999).

87. On the Soviet *Prokuratura*, see Glenn G. Morgan, *The Protests and Representations Lodged by the Soviet Procuracy Against the Legality of Governmental Enactments, 1937-1964*, in 13 LAW IN EASTERN EUROPE 103-118 (1966) (and literature in Russian language cited therein). The essay comes with a collection of protests lodged by Soviet procuracies in the indicated period, translated into English language. A more complete collection of protests between 1937 and 1973, translated by Leon Boim and Glenn G. Morgan, is available in *The Soviet Procuracy Protests: 1937-1973*, 21 LAW IN EASTERN EUROPE (1978). On the Russian *Prokuratura* after the collapse of the USSR, see Gordon B. Smith, *The Procuracy, Putin and the Rule of Law in Russia*, in RUSSIA, EUROPE AND THE RULE OF LAW 1-15 (Vol. 56 in the series, *Law in Eastern Europe*) (Ferdinand Feldbrugge, ed. 2007), and literature in Russian language cited therein.

*other governmental organs at their corresponding level, including the handling of petitions and complaints from the public.*⁸⁸

In civil cases, Chinese Procuratorates “shall have the right to exercise legal supervision over civil litigation” according to Article 14 of the Civil Procedure Law of the PRC of 1991. Moreover, article 186 states that “a people’s court shall retry cases in which a people’s Procuratorate has lodged a protest”—a similar supervisory power being also vested with upper courts with reference to lower courts’ decisions. The Procuratorates’ power to supervise the courts’ activities is also stated in the Administrative Procedure Law, with respect to administrative cases.⁸⁹ So even if the Party does not have a direct power of review and endorsement of courts’ decisions, (which was the case until 1979⁹⁰), ways still exist to indirectly exercise political supervision over the courts through the upper courts and Procuratorates.

Procuratorates, in turn, are in the process of being fully submitted to people’s supervision. Experiments started in 2003 and currently, procuratorial work is supervised almost nationwide by committees of selected citizens⁹¹ – a new tool to keep a political balancing element in the sys-

88. Chen, *supra* note 5, at 160-161.

89. The following are the relevant provisions of the Administrative Procedure Law (promulgated by the President of the People’s Republic of China, Apr. 4, 1989, effective Oct. 1, 1990), art. 62, available at <http://chinalaw.gov.cn> (last visited Apr. 5, 2007) (“If a party considers that a legally effective judgment or order contains some definite error, he may make complaints to the people’s court which tried the case or to a people’s court at a higher level, but the execution of the judgment or order shall not be suspended..”); *Id.* at art. 63 (“If the president of a people’s court finds a violation of provisions of the law or regulations in a legally effective judgment or ruling made by his or her court and deems it necessary to have the case retried, the president shall refer the matter to the adjudication committee, which shall decide whether a retrial is necessary. If a people’s court at a higher level finds a violation of provisions of the law or regulations in a legally effective judgment or ruling made by a people’s court at a lower level, it shall have the power to bring the case up for trial itself or direct the people’s court at the lower level to conduct a retrial.”). *Id.* at art. 64 (“If the people’s procuratorate finds a violation of provisions of the law or regulations in a legally effective judgment or ruling made by a people’s court, it shall have the right to lodge a protest in accordance with procedures of judicial supervision.”).

90. The review of courts’ decisions by the Party has been abolished with the Instruction of the CPC Central Committee on the Implementation of the Criminal Law and the Law of Criminal Procedure, of September 9, 1979. This principle, however, is not always observed by Party organs. See Chen, *supra* note 5, at 153.

91. State Council, White Paper, Building Political Democracy in China (Oct. 19, 2005), available at <http://www.china.org.cn/english/2005/Oct/145718.htm#11>. The tenth chapter of the white paper is devoted to “Judicial Democracy.” It is worth quoting verbatim the paragraph on “System of people’s supervisors”: “Adopting the system of people’s supervisors and placing procuratorial work under the effective supervision of the people embody the requirements of lawsuit democracy. Since October 2003, the procuratorial organs began to try out the system of people’s supervisors in 10 provinces, autonomous regions and municipalities directly under the central government. Later, this system was spread to 86 percent of all procuratorates nationwide. People’s supervisors are selected at the recommendation of various organs, groups, institutions and enterprises, with such major duties as conducting independent appraisals and submitting supervisory comments on cases the procuratorial organs have directly placed on file for investigation but have later decided to withdraw or halt the

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tem, *vis-à-vis* the incepting trend towards stronger rule of law and new generations of more law-oriented, legally-trained prosecutors.

3. A very peculiar feature of the Chinese judiciary is the existence of “political-legal committees” (*zhengfa weiyuanhui*) at all levels of the courts and Procuratorates pyramids.⁹² At central level the committee includes a Party representative in charge of political and legal issues—usually a very senior cadre and often having the concurrent institutional charge of head of police at the relevant level⁹³ – the Presidents of the SPC and Procuratorate, and the heads of government departments such as justice, law enforcement, public security, and others.⁹⁴ These committees also exist at each level of territorial government, where they replicate the structure of the central one described above, with the purpose of coordinating activities and establishing guidelines and policies in accordance with Party policy pertaining to the administration of justice and law enforcement.⁹⁵

The presence of these *zhengfa weiyuanhui* at all levels of the judiciary is an effective mechanism to convey and implement government and party policies.

Other committees (so-called “judicial committees”) are present in every court, formed by most senior judges of the relevant court, the corresponding Procuratorate having the possibility to sit in at the committee meetings,⁹⁶ with the purpose of determining local guidelines for decisions⁹⁷ and sometimes actually deciding sensitive cases outside the hear-

prosecution of, and in cases of refusal to submit to arrest. They can also participate, upon invitation, in other law-enforcement examination activities organized by the people's procuratorates regarding crimes committed by civil servants, and make suggestions and comments on violations of law and discipline discovered. By the end of 2004, a total of 18,962 people's supervisors had been selected, who had supervised the conclusion of 3,341 cases.” *Id.*

92. Zou Keyuan, *supra* note 69, at 5; Peerenboom, *supra* note 5, at 302-308.

93. Xin Chunying, *supra* note 39, at 281.

94. *Id.*

95. *Id.*

96. The committees are established by art. 11 of the Organic Law of the People's Courts, which also stipulates the possibility for the Chief Procurator at the same level of the relevant court to participate at the meetings. This participation right of the Procurator is also reflected to some extent by what occurred in the Soviet Union and in post-1991 Russia, where procurators held regular meetings with the courts' chairmen; see Peter H. Solomon, jr., *Informal Practices in Russian Justice*, in *RUSSIA, EUROPE AND THE RULE OF LAW* 86-91 (Vol. 56 in the series, *Law in Eastern Europe*) (Ferdinand Feldbrugge, ed. 2007).

97. Law of Civil Procedure of the People's Republic of China art. 39 (1982) (“The president of the court shall submit major and difficult civil cases to the judicial committee for discussion and decision. The collegial panel must carry out the decisions of the judicial committee.”). The provision has not been replicated in the Law of Civil Procedure of the People's Republic of China (1991), currently in force, maybe due to the criticism the system of judicial committees had attracted; how-

ing room.⁹⁸ It is important to stress that the independence of the judiciary in China provided for in article 126 of the Constitution is intended to be the independence of each Court, considered as a whole and as a single entity with respect to other State organs and other external influences – rather than the independence of each single person acting as a judge within a given court.⁹⁹ This idea gives some constitutional legitimacy to the activities of coordination committees within each single court established according to the Organic Law of the People's Courts of 1979,¹⁰⁰ as well as to the accepted practice of the need of signature of the President of the Court or of a Divisional head for any decision issued in the court by any of its judges to be valid.¹⁰¹

Moreover, the political leading role of the Party over every state organ is not excluded by art. 126 of the Constitution,¹⁰² and is in fact combined with the principle of the “double leadership,” according to which every court is subject, like central and local governments and procuratorates, both to the supervision of the court at the immediately higher level of government (in addition to the supervision of the Procuratorate at its level on its judicial work, as discussed above), and to that of the People's Congress at its corresponding level.¹⁰³ It must also be kept in mind that the vast majority of persons occupying senior positions in the Government and top courts' officials are party members, subject to party directives and discipline, whose loyalty to the Party normally prevails with respect to their institutional positions –also due to the fact that the Party significantly affects their life and career. Also, it cannot be disregarded that every Chinese court budget is financed by the government at its corresponding level and not by the central government. This allows the governments to effectively interfere with local courts, the latter depending on the former for funding, including staff salaries and other benefits.¹⁰⁴

Another feature of Chinese judiciary is the fact that in the courts of first instance non-professional judges (called “people's assessors”) may sit in collegiate benches along side professional judges (Article 40.1 of the

ever, the Chinese courts' praxis maintained the role of the judicial committee; see Chen, *supra* note 5, at 141-143, and literature mentioned therein.

98. In the USSR and in post-1991 Russia a similar pivotal policy role seems to be discharged by the Courts Chairmen; see Solomon, Jr., *supra* note 96, at 82-86.

99. Nanping Liu, *supra* note 50, at 6-20.

100. Organic Law of the People's Courts art. 11; see Xin Chunying, *supra* note 39, at 115.

101. Xin Chunying, *supra* note 39, at 275, where the author stresses the chairman's power to “review and sign”; also, Nanping Liu, *supra* note 50, at 17.

102. Nanping Liu, *supra* note 50, at 18-19.

103. See, e.g., Peerenboom, *supra* note 5, at 280.

104. Chen, *supra* note 5, 157-159; Peerenboom, *supra* note 5, 280-281; Xin Chunying, *supra* note 39, at 181-183.

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Law of Civil Procedure)—the former enjoying equal rights and obligations with the latter (Article 40.3); decisions are made by majority vote (Article 43), and dissenting opinions are recorded but not included in the judgment.¹⁰⁵ If one considers that lay judges are selected amongst those included in lists provided by the Party at the relevant level, it can be seen how it is not difficult for policy-making organs to indicate policy-oriented guidelines for decisions, and have them followed.

Finally, a very distinctive feature of the court system in a socialist context is always the court's responsibility for discharging a pedagogic role, which is formalized in important legal texts. According to article 6 of the Civil Procedure Law of the PRC of 1991:

the aim of the Civil Procedure Law of the PRC is to protect the performance of the litigation rights of the parties and ensure the ascertainment of facts by the people's courts, distinguish right from wrong, implement the law correctly, try civil cases promptly, affirm civil rights and obligations, impose sanctions for civil wrongs, protect the lawful rights and interest of the parties, *educate citizens to observe the law voluntarily*, maintain the social and economic order, and guarantee the smooth progress of socialist construction. (Emphasis added).

This specific responsibility of the socialist courts is completely absent in the duty list of their western counterparts. Socialist courts have to be conscious about the social impact of their decisions rather than just with their consistency with the system of applicable legal rules, especially when dealing with sensitive or highly visible cases.

In conclusion, courts and procuratorates in China have a clearly proactive role in making sure that State or local government policies are actually enforced in every case, with a combination of several revisionary and supervisory administrative and judicial tools provided by the procedural laws, in addition to the other more political tools such as committees, party loyalties, budgetary control described above. If the courts' and procuratorates' systems operate differently from other State organs,

105. The following are the mentioned articles of the Law of Civil Procedure of Apr. 9, 1991. Article 40.1 ("In civil cases of first instance in the People's Courts, justice is administered by a collegiate bench made up of either judges and assessors, or only of judges. Members of the collegiate bench must total an odd number."). Article 40.3 ("Assessors during the exercise of their functions have equal rights and obligations with the judges."). Article 43 ("The principle of minority being subordinate to majority is followed in the collegiate bench.... Differing opinions must be recorded."). An English translation of the Chinese Law of Civil Procedure is available on the website of the China International Economic and Trade Arbitration Commission (CIETAC), at http://www.cietac.org.cn/english/laws/laws_11.htm (last visited Mar. 6, 2007).

this surely does not make them a western-style judiciary, due to the specificities discussed.

3. Enforcement of the law

Even the enforcement of the law in China followed and often still follows patterns which are typical of political directives: enforcement may include judicial enforcement, but in some cases judicial enforcement might not be applied by the relevant judicial organs, or sought after at all by the state. In other cases enforcement might be applied while the effect of enforcement is overridden by some other kind of administrative and/or political action.¹⁰⁶

In other cases, additional, non-legal, tools of enforcement can operate together and in parallel with the judicial ones, in order to achieve the result devised by the state authorities. Non-legal means of enforcement in those cases may range from clearly political ones such as education and dissemination of information through Government and Party structures, in order to develop awareness on the importance of some rules and policies,¹⁰⁷ to political and administrative influences on the very legal mechanisms – as it is the case whenever a political campaign against criminality brings about stricter, faster, more summary judicial enforcement of legal rules,¹⁰⁸ or wide publicity to exemplary punishment of specific cases.¹⁰⁹

106. As it seems to have been the case for some State enterprises which received huge fines for violation of the laws on pollution control, then funded by local governments to be able to pay the fines in order to avoid the financial collapse of the enterprise and the associated social, economic, political problems that would have followed. For a case study on the enforcement of Chinese laws, see Ignacio Castelluci, *La tutela dell'ambiente nell'ordinamento giuridico della Repubblica Popolare Cinese: un case study sul funzionamento del sistema*, in RIVISTA GIURIDICA DELL'AMBIENTE 1, 59 (2003); see also Benjamin van Rooij, *Implementing Chinese Environmental Law through Enforcement*, in IMPLEMENTATION OF LAW IN THE PEOPLE'S REPUBLIC OF CHINA 149-178 (Jianfu Chen, Yuwen Li, Jan Michel Otto, eds. 2002).

107. Environmental protection could again be an example of that; see the Chinese Central Government *Agenda 21* document, Chapter 3, and my article cited in the previous footnote. Also see RANDALL PEERENBOOM, *CHINA'S LONG MARCH TOWARD THE RULE OF LAW* (2002) (Introduction, where the author stresses the many governmental activities aimed at promoting legal awareness in the population, through government, party, schools, etc., as a way to promote enforcement of the law).

108. As it happens periodically with the anti-crime campaigns named *yanda* ("striking hard"). See Zou Keyuan, *supra* note 69; Susan Trevaskes, *Severe and Swift Justice in China*, 47(1) BRITISH J. CRIMINOLOGY 23-41 (2007), available at <http://bjc.oxfordjournals.org/cgi/content/full/47/1/23> (last visited Mar. 18, 2007).

109. An important case of discretionary enforcement of the law for exemplary purposes has been the bankruptcy of the first financial institution of Guandong and the second in China, GITIC, occurred in 1999. The bankruptcy obviously took place according to legal procedures, but it had been decided by the political central authorities as a much needed exemplary measure to rein in the proliferation of investment companies too inclined to carry out their business disregarding regula-

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In fact, one specific feature of “political” legal systems, as it is any socialist one, in opposition with the Western-style rule of law, is *the severability of law from enforcement, where the law and its enforcement are actually two different issues*. Enforcement is neither a neutral, technical issue, nor an automatic consequence of law. In a “political” context (of which Chinese courts and law-enforcing agencies unquestionably are a part), law can be under-enforced or over-enforced according to policy needs.

This often degenerates in China in the total lack of enforcement, as it happens for instance for the payment of indemnifications for requisitions of land for reasons of public interest. The issue is one of the most sensitive ones in present times’ China, especially with respect to land development projects that produce extremely high benefits for few developers—and governments—to the detriment of the people previously living on the relevant land or of the peasants working on it. Evicted house-dwellers and peasants whom are normally forced to relocate sometimes are brutally dispossessed, and often receive purely nominal or no indemnification at all; the expropriations are often enough excessive and illegal, aimed at private development projects.¹¹⁰ The government for several years has not done much to confront this problem, more than launching mass-investigations on illegal takings.¹¹¹ The constitutional amendment of 2004 introduced a provision stipulating the necessity for a compensation for requisitions and expropriations.¹¹² The new law of property will contain the necessary implementing rules, including the standards required to determine the amount of the compensation. Of course, it remains to be seen whether the enactment of the property law will be a sufficient, satisfactory response to the problem of compensation for takings, or whether there will still be problems of enforcement of the enacted rules.¹¹³

tions and good management standards, which caused severe difficulties for the Chinese economic and financial system. A coverage of the story can be found in Laurence J. Brahm, ZHU RONGJI & THE TRANSFORMATION OF MODERN CHINA 67 (2002).

110. See, e.g., Nelson Chan, *Recent Reforms of China’ Rural Land Compensation Standards*, 12 PAC. RIM PROPERTY RES. J., available at http://www.prres.net/Papers/PRPRJ_No_1_2006_Chan.pdf (last visited Mar. 20, 2007).

111. Such as the one advertised in *9,900 Land Requisition Cases Investigated*, PEOPLE’S DAILY, May 14, 2004, available at http://english.people.com.cn/200405/14/eng20040514_143341.html (visited Mar. 20, 2007).

112. Const. of the People’s Republic of China art. 10.3 (“The State may, in the public interest and in accordance with the provisions of law, expropriate or requisition land for its use and shall make compensation for the land expropriated or requisitioned.”).

113. Approved by the plenary session of the NPC on March 16, 2007, during the revision of this essay.

Another well-known phenomenon related to the unsatisfactory level of enforcement of the laws is local protectionism, which has plagued the Chinese legal environment and is still today a major concern, for sure, for many citizens, scholars and foreign investors, as well as for the Chinese political elite.¹¹⁴ Local protectionism and other non-legal factors can affect (the case outcomes as well as) the enforcement of courts' decision, especially when they are against the interest of the central or local government more or less involved in the dispute (*e.g.*, when the local government is the owner of a public enterprise sued by a private plaintiff in the local court).¹¹⁵ Decisions, even when their merits are not disputed by the court in charge of the enforcement, have often been denied enforcement based on practical considerations such as "according to the current state policies and regulations, enforcement... would seriously harm the economic influence of the State and public interest of the society, and adversely affect the foreign trade order of the State."¹¹⁶

Governmental statistics at the end of the 1990s report a probably overoptimistic 30 percent of unenforced judgments, with a percentage of 60 or 70 reported for some courts.¹¹⁷ A higher and probably closer to reality 90% rate of unenforced or not completely enforced judgments was a circulating figure in the press as well as in the scholars' community in the same period.¹¹⁸

On the other side, the enforcement of the laws and of courts' decisions has been slowly but steadily increasing in the last decade or so. The enforcement rate in international or foreign-related arbitration having

114. Legal protectionism is one of the main topics in the "China and law" current debate, both at legal and at political level. *See, e.g.*, IMPLEMENTATION OF LAW IN THE PEOPLE'S REPUBLIC OF CHINA 149-178 (Jianfu Chen, Yuwen Li, Jan Michel Otto, eds. 2002), a collection of essays in relation to the problem of enforcing the law in China, and especially the following essays contained therein: Jianfu Chen, *Implementation of Law in China – an Introduction*, 1-21; Jianfu Chen, *Mission Impossible: Judicial Efforts to Enforce Civil Judgements and Rulings*, 85-111; Jan Michiel Otto, *Real Legal Certainty and Its Explanatory Factors*, 23-33. Also *see* Xin Chunying, *supra* note 39, at 205-207.

115. Xin Chunying, *supra* note 39, at 183-185 (defining local protectionism as "a problem threatening the unity of law and the public trust in the legal system."). The same author reports as an example, making clear that the case is probably replicated in different places and at different levels, that the Jilin provincial government issued a list of 94 protected public enterprises of the province, stating their being "*free from any liability in court ordered debt collecting actions.*" *Id.* at 206.

116. Dongfeng Garments Factory of Kai Feng City and Tai Chun Int'l Trade (HK) Co. Ltd. v. Henan Garments Import and Export Group Co., quoted by Jingzhou Tao, *Arbitration in China*, in INTERNATIONAL COMMERCIAL ARBITRATION IN ASIA 48 (P.J. McConaughay, T.B. Ginsburg, eds., 2d ed. 2006). The Supreme People's Court later reviewed this famous decision, overturning it.

117. Xin Chunying, *supra* note 39, at 205-206.

118. As reported by Yuwen Li, *Court Reform in China: Problems, Progress and Prospects*, in IMPLEMENTATION OF LAW IN THE PEOPLE'S REPUBLIC OF CHINA 67 n.35 (Jianfu Chen, Yuwen Li, Jan Michel Otto, eds. 2002).. The figures mentioned in the text correspond to the information I could gather through the years in my conversations with Chinese legal scholars.

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reached a figure of around 50%,¹¹⁹ probably due to the more favorable attitude towards enforcement related to the needs of international business activities; a directive issued by the Supreme People's Court on 28 August 1995 states that both the Intermediate Court (normally competent for enforcing awards) and the High Provincial Court must express a view against the enforcement, to be able to submit the issue to the Supreme People's Court. Only after the SPC confirms the views of both lower courts the award may be refused enforcement.

4. Present Chinese trend toward a stronger legal system

The Constitution of the Communist Party makes since the 2002 amendment a clear reference to the "ruling the country by law," as discussed *supra*. In recent years the Party elite has been sustaining the transition of the Country political-legal system towards a system recognizing greater importance of the law, with a reduced interference of the Party on administrative and judicial processes.¹²⁰ This of course does not mean that the strengthening of the legal system should be pursued primarily through judiciary action rather than through administrative reinforced control: the basic principles of the 2004 Outline include the separation between the public administration and the economy – in addition to the other basic separation between the party and the State re-introduced after the Maoist period; however, no idea of separation of powers in a Western sense is conveyed by the document. No special role is attributed to the court system in this Outline for the transition towards a law-based administration. The courts are mentioned in just very few passages of the document, whereas the Outline promotes alternative mechanisms for averting and solving disputes,¹²¹ including civil disputes by means of administrative mediation.¹²² The Outline is especially focused, instead, on the *administrative enforcement* of the laws, by means of rationalization, enhanced

119. Randall Peerenboom, *Truth from facts: an empirical Study of the Enforcement of Arbitral Awards in the People's Republic of China*, 49 AM. J. COMP. L. 249 (2001), also reported by Jingzhou Tao, *supra* note 116, at 50.

120. *The 2004 State Council's Outline for Promoting Law-based Administration in an All-round Way* indicates in ten years (counting from 2004) the time required to achieve the devised law-based administration; Outline 2004, *supra* note 13, at Ch. II.7. During the revision of this essay I could read the "Explanation on China's draft property law" delivered at the Fifth Session of the Tenth National People's Congress on March 8, 2007, before the enactment, on March 16, 2007, of the much expected Chinese Property Law, where it is stated, maybe a little bit optimistically, that the enactment of the Property Law is "necessitated by the goal of establishing a Chinese-style socialist legal system by 2010." See it on the official new agency Xinhua website, *available at* http://news.xinhuanet.com/english/2007-03/08/content_5816944.htm (last visited Mar. 17, 2007).

121. Outline 2004, *supra* note 13, at Ch. VIII.

122. *Id.* at Ch. VIII.25: "We shall proactively explore a new mechanism for solving civil disputes"; and the following section VIII.26 on the need to improve the role of administrative conciliation.

supervision, improvement of the government's work at all levels and its discharge in accordance to the laws.¹²³

Most of all, a strengthening of the legal system will not exclude that Party policies will still have comfortable and secure ways for being implemented, at general level or for specific sensitive issues – through the Party influence on officials, as well as through the presence of policy and/or controlling organs or committees within administrative and judicial institutions, enabling the Party to discharge its “leadership” role stipulated in the Preamble of the Constitution.

At this point, trying to summarize, I think some specific features can be recognized in the “socialist rule of law” model:

The first one is a systemic ability of policy-making organs to affect the interpretation and application of legal rules, in pursuing general political aims indicated by the political leadership.

The second one is the absence of external checks or balanced mechanisms of power, all the institutional power being entrusted to assemblies by the polity, as institutions representing the political power, and ultimately the Communist Party.

A third one, as discussed above, is the severability of law from enforcement, where the law and its enforcement are actually two different issues.

Having said that, a classification is proposed here with respect to the *role* of law and legal rules in organized societies:

We could identify a model labeled “rule of men” as that where there are no abstract, general, previously enacted rules, and where only case-by-case decisions of the authority are used to rule the society – this model cannot probably exist in its purest form, or even in a reasonably pure form, except in very small, chthonic¹²⁴ societies.

The “rule of law” model, as developed in the western experience and literature, is characterized by a set of technically managed, abstract, gen-

123. *Id.* at Ch. IX.

124. The use of this term is intended to be in accordance with Glenn's classification of legal systems; PATRICK GLENN, *LEGAL TRADITIONS OF THE WORLD: SUSTAINABLE DIVERSITY OF LAW* (Oxford, 2000 & 2006).

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eral, pre-existing rules applicable and necessarily to be enforced against anyone, including the political leadership on the relevant society; with the theoretical indifference of rules and their enforcement to extra-legal influences, and with a system of checks and balances in place to keep all the institutional and political actors in check *vis-à-vis* the legal rules.

The “rule by law” model features general and abstract rules, but the political leadership of the society has the systemic ability to affect their application and enforcement according to its political needs and objectives. The provisions of the law in the rule by law model basically amount to rules for private subjects, but soften into principles for public institutions’ activities. In the absence of legal, institutional checks and balances, the institutions are all emanations of the same monistic power – political dynamics and debate being internal to the relevant political entity controlling the polity, rather than present in the institutional structure of the state.

I think this very loosely sketched classification can be useful to grasp the core issues of this discourse. Of course, classifications can be many, and every partition can feature several sub-partitions: a very acute, useful analysis and classification of this kind is made, for instance, by Randall Peerenboom.¹²⁵

It follows from what has just been discussed that the western conception of the legal system, based on the idea of the *Isolierung*,¹²⁶ does not apply to the Chinese reality, as it has developed in the last decades. The legal system is not an isolated feature of the society, working for itself according to its rules, irrespective of other influences. Rather, it works as a part of an integrated political-legal system of governance.

Recent developments indicate a detectable shift of balance in this integrated system, which allows legal rules to solve conflicts by means of an increasing quality and quantity of judicial responses to the demands of the public—all in accordance with the policies indicated first by Deng Xiaoping in the late 1970s, and since then by all Chinese leaders, also due to the impact of (private first, then) global economy, of which China

125. Peerenboom, *supra* note 5, at 103-109, where the Author classifies and describes the features of the r.b.l. model *vis-à-vis* four possible sub-models of the r.o.l. one (namely: the liberal-democratic, the communitarian, the (neo)authoritarian, the statist socialist ones), which is useful to analyse the transition of the Chinese legal-political environment, as well as the ones of other societies. I found it especially interesting for the analysis of many Asian realities, indeed. This Author, however, also gives there a *caveat* against excessive classification which could lead to losing the forest for the trees.

126. See FRITZ SCHULZ, *PRINZIPIEN DES RÖMISCHEN RECHTS* (1934), in the Italian translation of VINCENZO ARANGIO-RUIZ, *I PRINCIPII DEL DIRITTO ROMANO* esp. 16-18 (Firenze 1949).

is nowadays one of the main participants. The WTO accession in 2001 put additional pressure on the Chinese economic and legal system to accelerate the transition towards more law-based socio-political and economic models. Evidence of this trend can be found in the State Constitution, with the 1999 amendment inserting in article 5 the express mention that "The People's Republic of China practices ruling the country in accordance with the law and building a socialist country of law"; in the Party's Constitution amendment of 2002 with the mention of "ruling the country by law"; and in a wealth of political statements and documents such as the 2004 Outline, discussed above. We can comfortably assume that strengthening the legal system has been in recent years a priority for the Chinese political *élite*. The results are visible, according to the data and discussion presented above,¹²⁷ and the quantity and quality of the presence of law in Chinese life is greatly increasing.¹²⁸

Yet, the shift toward a stronger legal system and a rule of law does not necessarily imply that the Chinese political-legal system should share the same values of the Western legal traditions. A "socialist" rule of law still implies the guiding role of a single, or preeminent, party over the political and legal system, as well as the prevalence of common interest over individual ones, and other fundamental values making China's popular democracy and Western liberal democracies two different things.

5. USSR's legal reforms in the 1960s¹²⁹

It is very interesting, at this point, to take a look at the homologous features of another socialist legal system, that of the USSR, by reviewing some rules issued when that system reached its maturity: the "Fundamen-

127. See *supra*, section on *Enforcement of the law*.

128. As reported by scholars and observers of the Chinese transition; a balance of the reforms coming from within China and in English language, as of 2004, is given by Xin Chunying, *supra* note 39, at 241-286, in the chapter entitled, "What Kind of Courts Does China Need for the 21st Century," including interesting data, indications of achievements as well as shortcomings of and criticism to the current state of the Chinese judiciary.

129. For more details on the issues dealt with in this section, there is some literature available in western languages, both from Russian and from western scholars. See, e.g., *Soviet Law After Stalin*, 20 LAW IN EASTERN EUROPE (Donald D. Barry, F.J.M. Feldbrugge, George Ginsburgs, Peter B. Maggs, eds., 1979); DEREK J.R. SCOTT, RUSSIAN POLITICAL INSTITUTION (1961); VIKTOR M. CHKHIKVADE, THE SOVIET STATE AND LAW (1969); WILLIAM E. BUTLER, SOVIET LAW (1983); Picardi & Lantieri, *supra* note 7, and Mark A. Gurvič, *Profili generali del processo civile sovietico*, in CODICE DI PROCEDURA CIVILE DELLA REPUBBLICA SOCIALISTA FEDERATIVA SOVIETICA DI RUSSIA xxxvi (Nicola Picardi & Alessandro Giuliani, eds. 2004) (a translation of an essay of the 1970s); MARK A. GURVIČ, DERECHO PROCESAL CIVIL SOVIETICO (1971). Also see, of course, the two relevant chapters in the two "classic" comparative law handbooks of RENÉ DAVID & JOHN E.C. Brierley, THE MAJOR LEGAL SYSTEMS IN THE WORLD TODAY: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW (2d ed. 1978) and KONRAD ZWEIGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW (Tony Weir, trans., Oxford Univ. Press 3d ed. 1998) (or any other edition or translated version).

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tal Principles of Civil Procedure of the USSR and the Federate Republics" of 1962 (hereinafter "FPCP"), to which all Soviet Republics would comply when issuing their civil procedure regulations. We find rules which have been reproduced, almost *verbatim* in some instances, in present times' Chinese fundamental procedural rules, such as the rules on the norms to be applied to decide cases;¹³⁰ on the composition of court benches;¹³¹ on powers and responsibilities of the *Prokuratura*¹³² and its supervisory power over decisions.¹³³

We can also find other provisions on the aims of the civil process, such as article 2 of the FPCP, on which the already cited Chinese article 6 of the Civil Procedure Code of 1991¹³⁴ is modeled. Article 2 of the FPCP stipulates that the aim of the civil process:

. . . is the just and prompt assessment and decision of civil cases, to guarantee the *defense of social and State structure of the USSR, of the socialist system of economy and of socialist property*; the protection of political, labor, housing and other personal and patrimonial rights of citizens as protected by the law, and the protection of State entities, enterprises, *kolhozy* and other cooperative and social organizations rights and legitimate interests.

The civil process shall contribute to the strengthening of *socialist legality*, to the prevention of violations of the law, *to the education of citizens to the constant compliance with soviet laws and to the respect of the principle of socialist coexistence.*" (Translation by author; emphasis added).

130. Fundamental Principles of Civil Procedure of the USSR and the Federate Republics art. 9 (hereinafter "FPCP") (noting that in the exercise of jurisdiction both professional and lay judges "...are independent and only subject to the law. Magistrates and lay judges shall decide the case based on the law and in conformity with socialist conscience, in conditions such as to exclude any interference from anybody."). *Id.* at art. 12.3 ("In case of lack of a precise provision regulating the case at hand the judge shall apply the provisions regulating analogous cases; in case of lack of such provisions, the judge shall decide according to the general principles and according to the spirit of the soviet legal system.") (emphasis added).

131. According to FPCP art. 8, one professional judge and two lay judges shall sit in all first instance courts.

132. According to FPCP art. 14, Procurators have the right to adopt at any moment measures to avoid violation of rules of law, "subject only to the law and... according to the directives of the Procurator General of the USSR." Procurators could actually start a civil case irrespective of the parties' will, "to protect the interests of the State and society, as well as of the rights and legitimate interests of citizens." *Id.* at art. 29 (author's translation).

133. FPCP art. 49 gives to Procurators and Courts' Presidents the power to lodge requests for re-trial.

134. The text of the mentioned Chinese article 6 is reported *supra*, in this section, section *The Role of Courts in the Chinese Context*.

The USSR courts also had the obligation to periodically submit to the workers their most significant decisions, to be discussed in public assemblies,¹³⁵ as a way of discharging their pedagogic mission.

The Code of Civil Procedure of the Russian Republic of 1964, reproduces faithfully the above mentioned rules, also adding other interesting articles, such as Article 42.1, where State, trade unions, state entities, *kolhozy*, other organizations and individual citizens may act for the protection of rights and interests of third parties, or Article 42.2, where the State may intervene “to opine regarding issues involving the merits of the case aimed at the protection of rights of citizens and the interests of the State.”¹³⁶

In a socialist context, as Višinskij put it, “law is politics.”¹³⁷

6. How the USSR “socialist rule of law” reached its maturity

For centuries Russia had been, with its immense territory and its old, weak, fragmented, incomplete czarist legal system, a country where rules and institutions were mostly based on the core role of government and administrative organs, even after the reforms introduced by Peter the Great in the early 18th century, by Katarina II in the late 18th century, and by Alexander II in the early 19th century.¹³⁸ These systems were supplemented through the important role played by local customs in non-sensitive areas, such as those related to personal relations amongst citizens.¹³⁹

The October revolution erased the old State and institutions completely; a completely new system was needed. Within a few years after 1917 a new socialist State, with its institutions and legal system, was in place. Lenin’s doctrine predicated a strong aversion towards the bourgeois conceptions of the law and the rule of law; the prevalence of the needs of socialist politics over the socialist law was affirmed. Under Lenin, judges were elected by assemblies of party members, their technical legal training and even general cultural background were minimal; even the legal

135. WILLIAM E. BUTLER, *SOVIET LAW* 103 (London 1983).

136. *Id.*

137. Picardi & Lantieri, *supra* note 7, at xxxvi; Berman, *supra* note 7, at 36.

138. *Id.*

139. Picardi & Lantieri, *supra* note 7, at xii-xx; for a general historical overview also see N.V. RIASANOVSKY, *HISTOIRE DE LA RUSSIE* (1996); M.RAEFF, *COMPRENDRE L’ANCIEN RÉGIME RUSSE* (Paris 1982), and translation into Italian by G.Ferrara degli Uberti, as *La Russia degli Zar* (Roma-Bari 1999).

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profession had just been abolished, as well as the *Prokuratura*.¹⁴⁰ In the early Soviet experience, legal nihilism was the accepted Leninist doctrine about law, and policy was the only guide for deciding cases in the courts.¹⁴¹

A first “revision” then took place under Lenin around 1921-1922: the original revolutionary impetus led to a re-engineering of the newborn Communist state in 1921, with the launch of the less radical “New Economic Policy” political campaign, or NEP (*Novaya Ekonomicheskaya Politika*). In the years 1922-1923 judiciary reforms were passed, with procedural laws enacted, and with the restoring of the *Prokuratura*, obviously perceived as a useful tool to supervise the state apparatus, for which the 1936 Constitution of the USSR stipulated the independence from any local organ¹⁴² and its function of supervising the exact application of the laws.¹⁴³ The *Prokuratura* system was funded and directed from the central authorities of the state,¹⁴⁴ much differently from the Chinese legal system’s procuratorates, which are funded, supervised, and chief procurators appointed, as already discussed, by the local government at their corresponding level: a clear proof of a weaker center-periphery supervision in the Chinese model, *vis-à-vis* the Soviet one.

After Lenin’s death, Stalin ascended to power (1928) and at first re-enforced the radical line of thought of the earlier days of the revolution, until he himself in the mid-30s initiated important reforms to implement a new policy based on the abolishing of the NEP and on the five-year plan, instead of law, as the main tool for policymaking and governmental activity.¹⁴⁵ A few years later, in the middle of the 1930s, under Stalin, and with the fundamental contribution of Andreij Višinskij, professor of law and Procurator General of the Union, the system produced the basic

140. “Decree on the judiciary” art. 3 (Nov. 20, 1917) (USSR); in just 8 articles this decree founded all the subsequent development of the soviet judiciary system.

141. Donald D. Barry, *The Development of Soviet Administrative Procedure*, in *SOVIET LAW AFTER STALIN*, 1-2 (vol. 20(III) in the series *Law in Eastern Europe*) (Donald D. Barry, F.J.M. Feldbrugge, George Ginsburgs & Peter B. Maggs, eds. 1979); Picardi & Lantieri, *supra* note 7, at xxvii-xxxiv. The actual term “legal nihilism” had, as a matter of fact, been introduced later, by A. Višinskij, as reported by UMBERTO CERRONI, *IL PENSIERO GIURIDICO SOVIETICO* 23 (Rome, 1969).

142. According to a specific requirement of V.I. Lenin; see Picardi & Lantieri, *supra* note 7, at xxxviii.

143. See Const. of the USSR art. 113, 117 (1936).

144. Picardi & Lantieri, *supra* note 7, at xxxviii.

145. See, e.g., Scott, *supra* note 129, at Ch. 1, in the section entitled “Periods” (at 52-58 in the Italian edition, Milan, 1968); Picardi & Lantieri, *supra* note 7, at xxxv.

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ideas for a fundamental change of philosophy: a major revision, some may say.¹⁴⁶

The radical ideas about the law generated within the Leninism, if acceptable as a first step in building the soviet State, were now believed to hinder economic and social development, if maintained for longer than necessary for the foundation of the soviet State. The further development of the State necessarily required more rules; more uniformity in application of those rules; and more technical training and professionalism in the courts, both on the bench and at the bar.

A new concept of "socialist legality" has been introduced in those years as opposed to the bourgeois concept of law, as theorized first by Višinskij.¹⁴⁷ The Soviet legal system, though, grew very slowly under the Stalin rule, and only reached its maturity in the following decades, in the 1950s and especially after Stalin's death –and Khrushchev's pledge made at the 20th Communist Party Congress in 1956, after Stalin's years,¹⁴⁸ to restore socialist legality.¹⁴⁹ Developments in the 1950s and 1960s were characterized by a wealth of legislation and codifications of the law, based on socialist legal principles and was paralleled by the improvement in the technical training of judges, increasingly chosen amongst jurists, in contrast with the previous attitude of choosing judges based on political reliability only.

Courts and judges were still accountable to the people, of course; with Stalinist reforms of 1958 judges could still be removed at any moment¹⁵⁰ upon action of party organs, who were also, coincidentally, in charge of providing lists of candidates for positions at the bench according to the usual *Nomenklatura* system of appointment of officials.¹⁵¹ Similarly to what happens presently in China, the independence of the courts stipu-

146. That was exactly, as already mentioned, how the USSR developments have been seen in China during the 1960s and early 1970s.

147. ANDREI VIŠINSKIJ, *THE LAW OF THE SOVIET STATE* 129 (Hugh W. Babb, trans., New York, 1948).

148. The prevalence of the political element over legality was a notorious characteristic of Stalin's authoritarian regime; see Picardi & Lantieri, *supra* note 7, at xxxvii-xxxix.

149. See the following essays, all published in *SOVIET LAW AFTER STALIN: VOL. 3: SOVIET INSTITUTIONS AND THE ADMINISTRATIVE LAW* (vol. 20 of the series *Law in Eastern Europe*) (Donald D. Barry, F.J.M. Feldbrugge, George Ginsburgs & Peter B. Maggs, eds. 1979); George Ginsburgs, *The Reform of Soviet Military Justice: 1953-1958*, at 42; Zigurds L. Zile, *Soviet Advokatura Twenty-five Years after Stalin*, at 207; Robert Sharlet, *The Communist Party and the Administration of Justice in the USSR*, at 321-392. See also Robert Sharlet, *Legal Policy under Khrushchev and Brezhnev: Continuity and Change*, in *SOVIET LAW AFTER STALIN: VOL. 2: SOCIAL ENGINEERING THROUGH LAW* 319-330 (Donald D. Barry, George Ginsburgs & Peter B. Maggs, eds. 1978).

150. Law of reform of the judiciary, art. 30 (Dec. 25, 1958) (USSR).

151. VLADIMIR GSOVSKI & KAZIMIERZ GRZYBOWSKI, *GOVERNMENT, LAW AND COURTS IN THE SOVIET UNION AND EASTERN EUROPE* 521 (London, Atlantic Press, 1959).

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lated in the Soviet Constitution (art. 112) does not mean that the courts could be considered independent from the political authorities and their more or less formal indications and guidelines.¹⁵²

In conclusion, striking similarities are easily found in the history, features and evolutionary path of the socialist experiences of both the USSR and the PRC: initially, two immense States, both with a legal system scarcely developed, based on the authority of administrative organs, working with obsolete, inefficient procedures, and on customary rules. Then, a revolutionary period, and the birth of the communist State, followed by a radical period of anti-legalism. Subsequently, an acknowledgement came of the importance of a stronger, more structured and technical legal system –of course, with socialist characteristics– and, eventually, the progressive implementation of such a system. A system strongly controlled by central political authorities through political supervision as well as through the recourse to procuratorial organs –in both cases abolished at first, then reintroduced to the benefit of the construction of a socialist legal system; both systems being characterized by several similar key provisions on the functions of the law and the judiciary, its structure, and on procedural and substantial applicable rules.

III. OTHER COMPARISONS

Some characteristics of the Chinese legal environment, namely its incompleteness and its frequent lack of enforcement, do puzzle many westerners, including western lawyers.

Yet, other well-known legal systems have similar features. The comparison with those systems may help in understanding some features of the Chinese legal environment as it has developed in the last few decades. Obviously, comparison does not imply any identity amongst the compared objects, but can help in the understanding of phenomena sharing some similarities.

1. An obvious case to mention is international law: very often political decisions, actions or inactions based on political convenience or based on a given national legal system prevail over the enforcement of international legal rules. Still, those rules discharge some important function even in that all-political international environment – providing general principles and indica-

152. See Scott, *supra* note 129, at 278-279; Feldbrugge, *supra* note 6, at 203; Picardi & Lantieri, *supra* note 7, at xxxvi; Berman, *supra* note 7, at 36.

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tions of what should be done; not unlike the way many Chinese legal rules work in their environment.

Extra flexibility in the international law environment, not at the enforcement level, but at the very level of law production, is also provided by the fact that general rules of international law can locally be derogated by some of the subjects of those rules, by agreement or custom. With the exception of the mandatory rules of *jus cogens*¹⁵³—not clearly defined themselves—all international law seems to be made of disposable default rules.¹⁵⁴ Those who should be subject to those general rules also have the power to modify them. It follows from what has just been said that international law interacts with politics, not being above it, nor being completely useless.

This model can also be effectively used as a comparative tool, to analyze some aspects of the Chinese transition of the last decades. I think these dynamics observed in the International Law between law, subjects and subjects creating new rules, also represent what often happened in China with central or higher-level rules, *vis-à-vis* the rules produced at a local or lower level: a complex normative model can be identified in both cases, based on the dialectics between different and different-level interacting normative orders and factual occurrences, often producing different rules or outcomes for similar issues.

In the suggested approach, the core of Chinese law *jus cogens*, so to speak, made of absolutely mandatory legal rules, binding even for the government itself, is now expanding, as reforms proceed, after having been for decades *de facto* confined to such fundamental principles as the unity of the Chinese State, the leadership of the Party and few more.

2. Often, as is widely mentioned in legal literature, the general Chinese laws and regulations issued at the central Government

153. According to article 53, titled "Treaties conflicting with a peremptory norm of general international law (*jus cogens*)," of the 1969 Vienna Convention on the Law of Treaties, "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 art. 53.

154. The concept of *jus cogens* and related problems are dealt with in any basic International Law handbook.. Amongst the many specific writings discussing it *see*, for instance, Levan Alexidze, *Legal Nature of Jus Cogens in Contemporary International Law*, 172 RECUEIL DES COURS 198 (1982); Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT. L. 529, 529-551 (1993); E. Leonardi, *The Jus Cogens in the 1969 Vienna Convention on the Law of the Treaties*, 19 THESAURUS ACROASIMUM 583-592 (1992).

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level have not been enforced at local level, due to the lack of local by-laws. This occurrence is not very dissimilar from what occasionally happens in the European Union with the EU directives. The EU directives are legal texts, meant to be implemented at the national level in accordance with the general guidelines provided therein, to harmonize the member States legislation. The nature of EU directives and their binding force is peculiar, before the required national legislation is enacted: member States are bound to implement them, and they have even at that stage, before being implemented nationally, some capacity to affect cases decisions, as their guiding nature can directly influence the courts, administrative action at all levels, and the development of scholarly law. Before being implemented at national level the EU directives are not, in most cases, “hard” law for the EU citizens; but neither are they mere political statements or legal wishful thinking. Some say they provide “soft law,” whatever the term might mean. They are legal texts having a specific nature, meant to shape the harmonious development of the EU legal environment at the member States level, by means of local legislation.¹⁵⁵

The Chinese general laws shared for long time some of these features. They originated at the central authority with a view to a complex system-building, so to speak, with devolution at the different local levels of the final authority to regulate the relevant areas, harmoniously but not necessarily uniformly.

Again, using comparative analysis, it is my submission that we could consider many general pieces of Chinese legislation issued at the central level as legal texts having (also) a directive nature and function, for lower-level lawmaking. These texts would discharge a propulsive, political, “pedagogic” role for local authorities. With a system in transition, or “under construction,” it is easy to see how local “legal” implementation of directive texts hailing from the center may take some time to be achieved completely and homogeneously everywhere; yet, those texts have some political and legal value, as directives for local bodies of governance and adjudication.

155. This discourse on the role of soft law or policy instruments of the EU Directives cannot be done here with any completeness. An accurate analysis can be found in GERDA FALKNER, OLIVER TREIB, MIRIAM HARTLAPP & SIMONE LEIBER, *COMPLYING WITH EUROPE: EU HARMONIZATION AND SOFT LAW IN THE MEMBER STATES* (Cambridge University Press, 2005).

3. Another interesting area for comparison and further investigation could be the historical development of the administrative jurisdiction and law in France during the nineteenth century. Due to the French philosophy of the separation of powers, and its post-revolutionary implementation, the administrative activity of the government could not possibly be interfered with by the judiciary.¹⁵⁶ Procedures and deciding bodies have been established within the administration, to review administrative acts, and they have been in place for decades before the *Conseil d'Etat* eventually became a full-fledged special court for administrative cases. The *Conseil d'Etat* has been until 1872 (except in the brief period 1848-1852) just an advisory organ for the government. Grievances against administrative activities could only be brought by citizens by lodging a petition to the same administrative authority issuing the decision, or to a higher one, to have the decision reviewed. The *Conseil d'Etat* would then advise the central government on these contentious issues; still, the government kept its ability to decide discretionally.¹⁵⁷ Italy followed the French model in the nineteenth century, with the creation of the *Consiglio di Stato*.¹⁵⁸ Remarkably, the historical all-administrative procedure is still available –if not frequently made recourse to– in Italy today, along with judicial actions in administrative courts and *Consiglio di Stato*.

Thus, the French public administrative activity in the nineteenth century was based on a rule-by-law principle, according to my scheme proposed above,¹⁵⁹ external checks and balances for the administrative activity being absent. The *Conseil d'Etat*, though, has always been very authori-

156. The issue is discussed in Merryman, *The French Deviation*, *supra* note 47.

157. For a historic overview of the French developments, see JEAN-LOUIS MESTRE, *UN DROIT ADMINISTRATIF A LA FINE DE L'ANCIEN REGIME: LE CONTENTIEUX DES COMMUNAUTES DE PROVENCE* (Paris, 1976); Jean-Louis Mestre., *Administration, justice et droit administratif*, 328 *ANNALES HISTORIQUES DE LA REVOLUTION FRANÇAISE*, available at <http://ahrf.revues.org/document608.html> (last viewed Mar. 10, 2007); ACHILLE MESTRE, *LE CONSEIL D'ETAT PROTECTEUR DES PREROGATIVES DE L'ADMINISTRATION – ETUDES SUR LE RECOURS POUR EXCES DE POUVOIR* (Paris 1974); SABINO CASSESE, *LE BASI DEL DIRITTO AMMINISTRATIVO* esp. 34-39 (Torino, 1989); MARIO NIGRO, *GIUSTIZIA AMMINISTRATIVA* esp. 25-65 (Bologna, 1983).

158. The Kingdom of Piedmont actually had special administrative courts, in the beginning of the nineteenth century; however, after the unification of the Italian state (1861), special administrative courts have been abolished (1865); administrative grievances were dealt with by the authorities the French way, in a purely administrative fashion, with the advisory function of the *Consiglio di Stato* –which later (1889) received judicial functions similar to those of its French counterpart in addition to its advisory ones. Many jurisdictions followed the French archetypal model, such as Spain, the Netherlands, Belgium, Norway, introducing during the nineteenth and twentieth centuries a similar advisory and judicial body.

159. See above, section II, subsection *Present Chinese trends towards a stronger legal system*.

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tative, and its opinions have always been followed by the French government, except in a case or two over about seventy years.¹⁶⁰

The French government, meanwhile, was developing during that century its tradition of a solid, fair and efficient public administration; a system eventually based on both an efficient administration in place and a credible external judicial check. A major shift in values, from rule by law to rule of law, according to our classification made above, was eventually acknowledged in 1872 with the formal introduction in the system of the judicial review of administrative acts by the *Conseil d'Etat* – which *de facto* had already been in place for decades,¹⁶¹ due to the prestige and credibility of the *Conseil d'Etat*, and to the government's will to almost invariably accept the advice of the *Conseil d'Etat* in order to carry out an impartial, efficient, legitimate administrative action. The following year, on February 8, 1873, with the famous decision known as the “*arrêt Blanco*,” the *Tribunal des conflits* (a new organ vested with the authority to solve jurisdiction conflicts between common and administrative courts), made clear that special legal rules existed, applicable to the administrative activity; a decision considered by many as representing the birth of modern administrative law.¹⁶² Modern administrative law being perceived as aimed at protecting citizens *vis-à-vis* the state as well as protecting the state's prerogatives and its actual administrative activities from unnecessary impairments that could come from the application of common rules of law in common courts:¹⁶³ “*Une bonne administration exige à la fois la protection de l'Administration et celle de l'administré. Le Conseil d'Etat doit donner à celui-ci le sentiment d'avoir un véritable juge impartial ; et à l'Administration l'impression de ne pas la gêner ou la paralyser inutilement.*”¹⁶⁴

Socialist China at the inception of the reforms period started with Deng can be considered a very loose system of rule by law where, by and large, all of the law was administrative law, due to its socialist nature

160. See Cassese, *supra* note 156, at 35. The same can be said about the reception by the Italian administrative authorities, in deciding petitions for review of administrative acts, of the opinions given by the *Consiglio di Stato*.

161. Merryman, *The French Deviation*, *supra* note 47; John Henry Merryman, *The Public Law-Private Law Distinction in European and United States Law*, in *THE LONELINESS OF THE COMPARATIVE LAWYER* (Kluwer, 1999).

162. Cassese, *supra* note 156, at 3.

163. Cassese, *supra* note 156, at 38.

164. Achille Mestre, *supra* note 156, at 287; Nigro, *supra* note 156, at 26-27, also observed that administrative law and administrative courts are related not only to a state governed according to the rule of law principles, having also been developed as guarantees for the authoritative prerogatives of the “administrative state.”

(according to Lenin "*all law is public law*"¹⁶⁵), private law being almost absent (as, conversely, "*all [bourgeois] law is private law*"¹⁶⁶).

Differently from the French one, the Chinese legal system, made of mostly public and administrative law, was weak and largely inefficient. Both laws and courts had the primary function of protecting the interests of the State and reinforcing its authority *vis-à-vis* private individuals. The Chinese system is now in transition to achieve solidity and efficiency, and, in addition, new areas of private law are being allowed in the system. When comparing these two experiences, China seems to be following an opposite path, with respect to the one followed by France: China has established *de jure* formal courts which are still *de facto* unable to affect the public powers' course of action in many instances (it is rather the other way around, in fact, as public powers *do* affect courts' activities); Chinese courts are often unable, as discussed above, to effectively protect the legal rights of citizens and other entities in private matters, especially *vis-à-vis* central or local governments, or public owned companies, or private entities with strong connections with the establishment.¹⁶⁷

Speaking of the more general structure of the legal system, France developed a separate body of administrative law centuries after having established the state and its common, private-law based, legal system. China, conversely, is moving only in recent years from an almost pure expression of the "administrative state" model¹⁶⁸ to a state featuring new, increasing areas of private law, as well as remedial means to protect citizens' rights and interests even with respect to the very government.

I think the lessons to be extracted from this comparative analysis are two. One is that, irrespective of the formal enactment of laws stipulating legal and institutional reforms, efficiency and legality in the exercise of public powers will only be achieved when the very government—and its political ghost in the machine—accept the idea of a government being subject to

165. Letter from Lenin to Kurskii in 1922, in 20 SOVIET LEGAL PHILOSOPHY 292 (H. Babb, trans. 20th Century Legal Philosophy Series, no. 5., 1951); reported by John Henry Merryman, *The Public Law-Private Law Distinction in European and United States Law*, in THE LONELINESS OF THE COMPARATIVE LAWYER 76, 86 n.36 (Kluwer, 1999); also in FESTSCHRIFT FOR CHARALAMBOS N. FRAGISTAS, at I, 31 (Thessaloniki, 1966); also in 17 J. PUB. L. (1968).

166. Pashukanis, discussed in W. FRIEDMAN, LEGAL THEORY 332 (4th ed., 1960). Also reported by J.H. Merryman, *supra* note 164, at 87.

167. See above, section II, subsection *Enforcement of the law*.

168. Defined as the State having unrestricted powers to affect subject's lives, by means of administrative acts, not being subject to courts or other external checks, and having at its disposal special organs and procedures to review its decisions and acts, especially in its own interest. See Nigro, *supra* note 156, at 27-30.

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both self-discipline, with laws being complied with by the administration, *and* to effective external checks. The two things are tied together – being not so relevant whether the external check be a full-fledged court with jurisdiction over the government or a simple, but prestigious and authoritative, advisory body, as French legal history demonstrates.

Conversely, the mere enactment of substantial and procedural laws stipulating powers of judicial review does not guarantee that the desired result will automatically be achieved. Thus, a change of mentality at the political level, of political and administrative culture, will be needed,¹⁶⁹ at least as much as new laws. The governments at the different levels should feel compelled to “rule by the law.” That change in attitude is the necessary way to achieve an overall better efficiency and credibility of the administrative action, and a higher general reliability of the system in the exploding private law sector, which can contribute to foster social and economic development. Time will be necessary, and it is still too early to foresee the duration and the outcome of the Chinese transition process.

The second consideration that can be made following this comparative analysis is that the Chinese process of developing areas of private law from an originally fully administrative state, where private law was vilified and interstitial, is following a reversed path with respect to the mentioned Western experiences. Chances are that in some instances, *when drawing lines between private and administrative law areas of the Chinese (still socialist) legal system, many relations of the general/special or of the rule/exception kind will have to be considered different, maybe fuzzier, if not reversed altogether, with respect to what would seem obvious in a western legal environment.*

IV. MACAO, HONG KONG AND OTHER SPECIAL ZONES OF CHINA AS LEGAL LABORATORIES

It cannot be overlooked that laboratories for economic and legal engineering have been at work for long in China, where several regions of the country have been designated to provide economic development and, possibly, models for further reproduction, such as the Special Economic Zones (Zhuhai, Shenzhen, Hainan, Xiamen, Shantou) and other areas enjoying special legal and economic regimes.

169. The Outline 2004 of the State Council for the promotion of law-based public administration goes in that direction, along with all the constitutional, political inputs, as well as slowly improving actual data on enforcement, as discussed throughout section II, and *supra* note 13.

At an even further level of autonomy, the two Special Administrative Regions (SARs) of Hong Kong and Macao, former western colonies returned to Mainland China in 1997 and 1999 respectively, have kept, in principle, their original western legal system. However, new Chinese institutions and attitudes are being introduced, affecting the two territories' legal systems, as it will be discussed in this chapter.

A peculiar feature of either SARs' legal systems, very relevant to the discourse on how the Chinese values are changing both, is the fact that the highest courts in either jurisdictions do not have, in the most important cases, the power to interpret their respective Basic Laws, the quasi-constitutional, fundamental laws of the Territories, according to article 143 of the Basic Law of Macao and article 158 of the Hong Kong one.¹⁷⁰

In short, the application of either Basic Laws can only be done in the relevant Territory by the local courts' system as long as it does not involve a sensitive issue. Whenever the case is connected to an issue which falls under the given authority of the PRC's central government, or to the relations between the central PRC authorities and either SAR, the interpretation of the relevant provisions of the Basic Law of Macao can only be made in Beijing, by the Standing Committee of the National People's Congress.¹⁷¹ The courts of both Territories, before issuing a final deci-

170. The Basic Law of the Macao Special Administrative Region (promulgated by the President of the People's Republic of China, Mar. 31, 1993, effective Dec. 20, 1999), art. 143, *available at* <http://chinalaw.gov.cn> (last visited Apr. 6, 2007) ("The power of interpretation of this Law shall be vested in the Standing Committee of the National People's Congress. The Standing Committee of the National People's Congress shall authorize the courts of the Macao Special Administrative Region to interpret on their own, in adjudicating cases, the provisions of this Law which are within the limits of the autonomy of the Region. The courts of the Macao Special Administrative Region may also interpret other provisions of this Law in adjudicating cases. However, if the courts of the Region, in adjudicating cases, need to interpret the provisions of this Law concerning affairs which are the responsibility of the Central People's Government, or concerning the relationship between the Central Authorities and the Region, and if such interpretation will affect the judgments in the cases, the courts of the Region shall, before making their final judgments which are not appealable, seek an interpretation of the relevant provisions from the Standing Committee of the National People's Congress through the Court of Final Appeal of the Region. When the Standing Committee makes an interpretation of the provisions concerned, the courts of the Region, in applying those provisions, shall follow the interpretation of the Standing Committee. However, judgments previously rendered shall not be affected. The Standing Committee of the National Peoples Congress shall consult its Committee for the Basic Law of the Macao Special Administrative Region before giving an interpretation of this Law."). The corresponding Hong Kong article 158 is very similar to it. *See* Basic Law of the Hong Kong Special Administrative Region (promulgated by the President of the People's Republic of China, Apr. 4, 1990, effective July 1, 1997), art. 158.

171. The NPCSC is also vested with the authority to interpret Mainland China national laws according to article 42 of the Chinese Legislation Law of Mar. 15, 2000, as discussed above, in section II, section *Socialist Law in China*.

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sion, *must* ask Beijing for a *binding* interpretation, to be applied to the case at hand.¹⁷²

Besides, the Standing Committee of the NPC has the inherent power to interpret and clarify the Basic Laws of both Territories whenever it feels appropriate, through the production of “interpretations” or “clarifications” adopted and sent to the SAR’s authorities for direct enforcement by the local government.¹⁷³

Three things are clear, then: 1) the highest courts of both SARs are not competent to interpret the top law of the territory in sensitive cases, for which must ask and follow guidelines from Beijing; 2) *no court, not even in Beijing, is competent to do that*; and, consequently and conclusively, 3) *it is not a court’s job, any court’s job*, to find the right interpretation of the Basic Law, whenever it is not *prima facie* obvious from its black-letter rules. Supreme interpretation, so to speak, of the supreme law of Macao and Hong Kong can only be made by the National People’s Congress Standing Committee, a top legislative/political organ of the PRC.

Sensitive interpretation of the law is for lawmakers, according to the same philosophy underlying article 42 of Mainland China Legislation Law.¹⁷⁴

This one is, basically, another¹⁷⁵ modern example of the *référé législatif*, which combines well with the idea of the courts being just *la bouche de la loi*; two French revolutionary ideas and tools which fit the needs for the transition of both SARs judiciary towards a model more consistent with the Chinese values already discussed above.¹⁷⁶

172. Basic Law of the Macao S.A.R., art. 143.

173. See, e.g., the *Esclarecimentos do Comité Permanente da Assembleia Popular Nacional sobre algumas questões relativas à aplicação da Lei da Nacionalidade da República Popular da China na Região Administrativa Especial de Macau* [Clarifications of the NPCSC in relation to the application of the Nationality Law of the PRC in the Macao SAR], a political document also having a direct normative function, directly and expressly referred to by the Macao SAR government in the subsequent Immigration Regulations issued on December 20, 1999 – the day after the handover of the Territory from Portugal to China – in order to define the status of Chinese citizens, at article 14.2: “Os cidadãos chineses... são aqueles que possuem a nacionalidade chinesa conforme a «Lei da Nacionalidade da República Popular da China» e os «Esclarecimentos do Comité Permanente da Assembleia Popular Nacional sobre Algumas Questões relativas à Aplicação da Lei da Nacionalidade da República Popular da China na Região Administrativa Especial de Macau» ” (original in Portuguese), available at <http://www.imprensa.macao.gov.mo/bo/i/1999/01/aviso05.asp#14>.

174. See above, section II, section *Socialist Law in China*.

175. In addition to the Mainland China mechanisms provided in the Legislation Law of 2000 to solve conflicts between rules originated at different levels, as discussed *supra*.

176. See above, section II, section *Socialist Law in China*.

Interesting comparative analyses could also be made between Macao and Hong Kong, with respect to these issues, to identify how the new political environment affected the legal system of both Territories. The Hong Kong common law heritage implies *stare decisis*, which makes the enforcement of the political circuit's policies through flexible interventions of the judiciary— in a still developing concept of a rule of law with Chinese characteristics – much more complex in Hong Kong than in Macao, a legal environment modeled on a low or nil binding force of precedent – as is also the case in Mainland China.

In fact, it has then been observed that since the handover of the former British colony to China (1997), very sensitive issues¹⁷⁷ involving the interpretation of the laws and of the Basic Law of Hong Kong have been dealt with by the National People's Congress Standing Committee issuing, so far, three binding interpretations; all of those have been considered by many local lawyers and jurists as being contrary to a "correct" technical interpretation of the Basic Law made in accordance with the consolidated standards, precedent cases of the common law tradition and the *stare decisis* principle; this further clarifies the legislative nature of "interpretation" of law in Chinese terms. As an example, we can analyze the first of the three cases, of 1999, related to the right of abode in Hong Kong for Chinese nationals, where the Hong Kong government (not the court) asked for an interpretation by the National People's Congress (NPC) Standing Committee (NPCSC).

The government so did *after a final judicial decision* issued by the Court of Final Appeal (CFA)¹⁷⁸ which was correct at common law but contrary to a more Chinese-oriented interpretation of both the Hong Kong and Beijing governments – extending the right of abode to the children of a person resident in the territory and declaring the more restrictive Hong Kong legislative provisions unconstitutional, as being contrary to the Basic Law and to the International Covenant on Civil and Political Rights.¹⁷⁹

The interpretation requested by the government of Hong Kong, and given by the National People's Congress Standing Committee, was a

177. Such as the right of Mainland China residents to move to Hong Kong and the right of abode, or the duration of the term of office for the Territory's Chief Executive Officer.

178. *Ng Ka Ling v. Director of Immigration*, [1999] 2 H.K.C.F.A.R. 4, 2, (C.F.A.) (Jan. 29, 1999); also available in [1999] 1 H.K.L.R.D. 315.

179. A final statement of the terms of the issue was made by in: Chief Executive's press release, *The Hong Kong Government: Right of Abode: The Solution* (May 18, 1999), (illustrating the request for interpretation sent to the NPCSC), available at <http://www.info.gov.hk/gia/general/199905/18/0518132.htm> (last viewed Dec. 30, 2006).

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more restrictive one, contrasting with the state of the common law, but consistent with both Beijing and Hong Kong governments' policies.¹⁸⁰ The Hong Kong government then took measures to implement the Beijing interpretation – which have subsequently been declared fully constitutional by the Hong Kong Court of Final Appeal, as being consistent with the binding interpretation given by the NPC Standing Committee.¹⁸¹ In that subsequent occasion the CFA also stressed the fact that the Standing Committee of the NPC has full power to interpret the Basic Law unrestrictedly¹⁸² – as it has also been observed in Macau with the issuing of guidelines made by the NPCSC, to be used by the local government as directly applicable rules.¹⁸³

In similarly sensitive cases,¹⁸⁴ policy enforcement is possible and/or smoother and more convenient, in Macao, as the system there is not based on *stare decisis*. The Macao courts can operate, at a micro-level, far more flexibly than in Hong Kong; actually there has not been any interpretation of the Macao Basic Law made by the NPCSC, so far.

180. *Id.* (“8. We have considered inviting the CFA to reconsider its decision when the relevant material issues are raised in a future case that comes before it. The advantage of this approach is that any change in the interpretation of the Basic Law would be achieved by judicial action in Hong Kong. 9. However, there is no guarantee that an appropriate case will emerge shortly. Even such a case does emerge, it would take a long time to reach the CFA and this would offer no quick solution to the problem. Moreover, we could not be sure that the CFA would reach a different conclusion on the relevant issues. If it did, the CFA might be criticized as having yielded to political pressure instead of making a rational judicial decision. This would damage its credibility. 10. Legal analysis indicates that the chance of the CFA reversing its judgment is slim. Under common law principles, there must be stability in case precedents. Unless there are changes in the circumstances or in legal viewpoints over a long period of time, the CFA will not easily reverse any of its previous decisions. The House of Lords in Britain has unanimously ruled that even if it considered that a previous judgment had been wrongly decided, this did not constitute sufficient grounds for reversion. If the CFA in Hong Kong adopts this principle, it could not possibly change its judgment made on 29 January within just a few months. 11. We must stress that by reversion we mean the CFA reverses its previous decision in a similar case in the future. We are not asking the CFA to reverse its original judgment when there is no case before it. Such an approach is without legal basis, nor is it acceptable.”).

181. On December 3, 1999, in case *Lau Kong Yung v. Director of Immigration* [1999] 3 H.K.L.R.D. 778 (C.F.A.).

182. “It is clear that NPCSC has the power to make the interpretation,” as “the power of interpretation of the Basic Law conferred by Article 158(1) is in general and unqualified terms.” *Lau Kong Yung v. Director of Immigration*, [1999] 3 H.K.L.R.D. 778 (C.A.).

183. See the *Esclarecimentos do Comité Permanente da Assembleia Popular Nacional sobre algumas questões relativas à aplicação da Lei da Nacionalidade da Republica Popular da China na Região Administrativa Especial de Macau*, *supra* note 172.

184. The other two cases of interpretation of the Hong Kong Basic Law made by the NPCSC were also related to very sensitive political issues: in the most recent case – in year 2005, related to the term of office of the Territory's Chief Executive – the local government (not the court) directly asked an interpretation from Beijing, bypassing the local court system and the established procedural pathways. In the previous case of interpretation, occurred in 2004 and also related to the issue of elections, the National People's Congress Standing Committee found that the general elections for the Territory's Chief Executive should not take place with universal suffrage in year 2007, as it seemed according to a (common law and) plain-word-meaning interpretation of the Basic Law.

We can observe, for instance, that in a case related to the request for residence of a child of two Macao authorized residents, similar to some extent to the Hong Kong mentioned *Ng Ka Ling v. Director of Immigration*, the Macanese court of appeal enforced a restrictive Macao piece of legislation, smoothly and without much ado; and without any need to ask Beijing for an interpretation. It has been possible to decide that case simply by using a legal reasoning consistent with government policy, to deny the foreign child the right to reside in the territory.¹⁸⁵ Of course Macao courts could also have declared the relevant legislation unconstitutional or invalid, as the Hong Kong Court of Final Appeal had done in the 1999 case, by applying the principles of the Basic Law in a western fashion. Of course, the fact that the court did not do so, is not merely because of the absence of *stare decisis*.¹⁸⁶

Yet, the absence of the latter principle in Macao made it much easier for the courts to smoothly implement new visions, policies and legal doctrines (including not questioning the legality or constitutionality of laws *vis-à-vis* higher-ranking sources), consistent with the new political environment brought about by the handover of sovereignty to China. These new legal doctrines in Hong Kong have required, in all three cases so far occurred of binding interpretation of the Basic Law from Beijing (one example of which has been discussed above), a much more sensitive intervention of the Standing Committee and a controversial intervention as an outcome, precisely due to the existence of a common law heritage and of the principle of *stare decisis*.

If Hong Kong has a strong economy based on western economic models, and a common law legal system that makes it a less likely field for legal experiments, Macao has a civil law legal system that could provide an interesting laboratory for legal-political-economic analyses of current transition. The importance and the interest of studying the Macao legal system, and especially of some of its particular features, is related to the fundamental shift in the political values underlying the system, formally unchanged in its general features; to the opportunity to better understand some of the relation between politics and the law; and also, of course, to better understand Mainland China.

185. Tribunal de Segunda Instância, July 13, 2006, file no. 82/2006. The decision (in Portuguese) is available on the web at www.court.gov.mo/pdf/TSI/TSI-A-82-2006-VP.pdf (last viewed December 30, 2006).

186. By the way, refraining from questioning the constitutionality of laws, or the validity of lower-level rules *vis-à-vis* higher level rules is another very typical attitude of the Mainland Chinese judiciary, as discussed *supra*, section II, section *Socialist Law in China*; Chinese political and legal doctrines obviously having penetrated Macao much earlier and much more than Hong Kong, for historical reasons too long to explain here.

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In Macao, in addition to the sort of *référé législatif* just mentioned in relation with the Basic Law, legal procedures are established to generate uniform judicial doctrines in the local courts, subject to a centralized control for their development and modification.¹⁸⁷

Moreover, Macao judges generally tend to act according to a model closer than that of their Western counterparts to the *bouche de la loi* idea, probably due to their Portuguese heritage as well as to the new socialist environment,¹⁸⁸ rather than taking more creative stances¹⁸⁹—as it seems to be the trend of current developments of the civil law model in Western countries, more inclined to relegate some of the rulemaking nature and function to case law.¹⁹⁰

These considerations all suggest further interesting comparisons and research, to be made with respect to the legal environment in China, Chinese Macao and even, why not, revolutionary/Napoleonic France. It must be stressed that this attitude, shown by the legal system of Macao, seems to be shared by other former socialist countries' jurisdictions.¹⁹¹ From the recognition just made, the idea of courts being just *la bouche de la loi* seems to have served well not only in the political-legal environment of France at the end of the eighteenth and beginning of nineteenth centuries; it probably also serves well in socialist contexts, in those in transition from socialism, or even in those in transition towards something related somehow to socialism – as is the case for Macao.

Obviously Hong Kong and Macao developments, from a western concept of legal system towards a more Chinese configuration, imply some kind

187. This mechanism and other details on the transition towards more Chinese models of the Macao legal system are described in my report for the Macao S.A.R.: Ignazio Castellucci, Report presented in 2006 at the International Conference of the International Academy of Comparative Law, held in Utrecht: Precedent and the Law (unpublished, as of January 2007) (on file with author).

188. *Id.*

189. Even the very Tribunal de Última Instância, the highest court in Macao, in case n. 4/2001 in the decision of July 4, 2001, Judge Lai Kin Hong, quoted R. David's *Les Grand Systèmes...*, and expressed the view that "[courts are] not bound by the rules they establish... if in a new decision the judges apply a rule they had previously applied, this is not due to the authority that rule acquired for the fact they have consecrated it; this rule has no binding effect. ...it is always possible a change in the case law without the court being obliged to justify it. Case law neither threatens the framework nor the very principles of the law. A case law rule only survives and is applied as far as the judges – each judge – consider it as a good one. At principles' level it seems important to us that the judge is not transformed into a legislator. This is what is sought in the roman-german family" (my translation from the original in Portuguese, available on the Macao SAR government website at <http://court.gov.mo/pdf/TUI/TUI-S-4-2001-VP-II.pdf>, last visited December 30, 2006). It couldn't have been clearer.

190. As observed by the *Rapporteur General* on the topic "Precedent and the Law" at the mentioned 2006 International Conference of the International Academy of Comparative Law, held in Utrecht, Prof. E. Hondius, in his General Report (unpublished, as of January 2007).

191. *Id.*

of convergence with the opposite transitional path of China. A convergence which could lead to identify and develop new models and solutions for Macao, Hong Kong, as well as for Mainland China and/or its different special regions, areas, economic zones; the function of Macao and Hong Kong becoming that of a political-legal laboratory of extraordinary interest.

For sure, the two SARs are valuable observation posts for the Beijing government, to monitor the interaction of advanced economy and a socialist political environment; and this in addition to the several other regions of the PRC enjoying special legal and economic regimes, such as the five SEZs, where socialist market economy experiments have been conducted for decades, so far.

V. LAW IN A SOCIALIST MARKET ECONOMY

The presence of a market economy, even within a socialist framework, will of course make present and future China very different from the Soviet Union or from other past socialist experiences.

The Chinese concept of “*socialist market economy*” formalized in the PRC’s Constitution is related to a market economy not entirely based on *laissez faire*, but is based instead on the proactive role of government policy; on the importance of the State as both a market regulator and as an economic actor –and then of administrative laws and procedures; on the prevalence of the public interest, represented through the institutions of the political circuit, over individual ones. Lawyers, politologists, economists are studying current developments to understand the idea of “socialist market economy” and define what in the beginning was thought by some to be almost an oxymoronic idiom, something unheard of. Study and research will tell in due course what it actually means, and whether the idea can be successfully transplanted elsewhere.¹⁹² So far, I think the attitudes of the Chinese political leadership and their official positions might have some relevance, together with the observation of the evolving reality, in trying to describe how the socialist market economy may develop. The amended (2002) Constitution of the Communist Party gives an overview of the basic policy in relation with the economic development: public property, regulatory activity and macro-control, in a pre-eminent position, and the public sector of the economy, shall go along with private property and economic activities, for the benefit of a just development and socialization of the advantages of such develop-

192. As it seems to be the case, for instance, of Vietnam.

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ment;¹⁹³ this attitudes have then been confirmed in the 2004 amendments of the Country's Constitution: "The State protects the lawful rights and interests of the non-public sectors of the economy such as the individual and private sectors of the economy. The State encourages, supports and guides the development of the non-public sectors of the economy and, in accordance with law, exercises supervision and control over the non-public sectors of the economy." ¹⁹⁴

Another, semi-official, statement of policy reads: "[We] believe that market economy is a stage that cannot be surpassed during socialist development. In terms of social development, the essential difference between the socialist system and the capitalist system does not lie in the role the planning and the market plays in allocation of resources. The planned economy does not belong to socialism, since the capitalist system also uses the planning methods. The market economy does not belong to equal capitalism either, since the socialist system also uses market means. Planning and market, both of which are ways to regulate the economy, are indispensable at certain development phases of a commodity economy, which is based on socialized production. Therefore, whether resorting to the planning or the market is not what differentiates a socialist economy from a capitalist economy. The most essential difference between a socialist market economy and a capitalist market economy is that the former is linked to the basic socialist system and is part of socialist economic mechanism. "This is also the fundamental condition to guarantee socialism as the nature and direction of the Chinese economy." ¹⁹⁵

Additionally, as mentioned above, the 2004 Outline, aimed at the reform of the public administration in a legalistic sense, indicates as one fundamental principle to be implemented the separation between the public administration and the economy.

Thus, the Chinese political leadership decided that a relatively free market economy shall actually be implemented within the framework of a socialist political system – where the consequent economic benefits shall at least partially be socialized. History, besides, has demonstrated the

193. The Const. of the Communist Party of China, at 33, "General Program" (bilingual Chinese-English text (Beijing, Foreign Language Press, 2002).

194. Const. of the People's Republic of China art. 11.5, *as revised* in 2004.

195. This statement of policy can be found, in the form of an editorial answer to a question from the public on the meaning of socialist market economy on the China Q&A webpage of the para-governmental China Internet Information Center, at: China Questions and Answers, <http://www.china.org.cn/english/features/Q&A/161615.htm> (last visited on Mar. 17, 2007).

existence of market economies worldwide long before western-style liberal democracy has been invented.¹⁹⁶

The economic development hailing from a market economy has been the main objective for the Chinese political leadership in recent years; an objective which enjoyed an obvious priority over other political reforms, which could maybe be devisable or desirable in a western approach, but have probably been deemed inappropriate for China, at least at present and/or in the way westerners would imagine them. This cautious approach of the Chinese leadership to the issue of political reforms, however, seems to be justified to some extent by an analysis of the situation of the former USSR and Russia during the 1989-1991 transition and in the following chaotic years. That experience demonstrated how unsatisfactory the application of political or legal conceptions out of their context can be. By transplanting a new system - mostly through political and legal reforms based on fully western values - abruptly, without paying attention to local specificities and to the need of appropriate transitional mechanisms, the country became a clear example of what not to do during such a delicate time of transition - remarkably during the El'tsin leadership period.¹⁹⁷

A more clearly defined development of the Russian legal system seems to have been introduced with Putin's leadership, reverting to a more centralized and controlled construction of a strong legal system¹⁹⁸ - sort of a reversed borrowing, if (maybe?) an unknowingly one, from the Chinese experience of the latest couple of decades. As a matter of fact, both countries being involved in a process of (post-)socialist transition, they seem to have much to learn from each other's experiences.

In fact, present Chinese transition could arguably be seen as also aimed at strengthening the control of central authorities over the peripheral administrative entities, through the reinforcement of a socialist legal system discussed above. Administrative and organizational rules still remain a fundamental part of the legal system; their importance should grow, according to the directives contained in the 2004 Outline discussed above -

196. Many examples of mercantile societies can be found in history, such as the Roman Empire, all medieval European states or city-states, Islamic khalifates and Hindu kingdoms and settlements of Southern and Southeastern Asia; even the traditional Chinese Empire allowed market mechanisms to function. In fact, the only complex political structure not allowing free market has historically been that based on the orthodox communist conception.

197. See Ferdinande Feldbrugge, *The Role of Law in Russia in a European Context*, in *RUSSIA, EUROPE AND THE RULE OF LAW* 205-208 (Vol. 56 in the series, *Law in Eastern Europe*) (Ferdinand Feldbrugge, ed. 2007).

198. *Id.* at 208-210.

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a truly pivotal document to understand the spirit of China's legal reforms.

Should this opinion of mine prove accurate, an improvement should follow of what in the socialist mentality can be considered as administrative law and procedure, governing the relations between central, local governments, public productive units and other public entities. This should occur in addition to the reforms being aimed at creating a more individual-friendly, "legalized" environment, for the new areas of private law being developed; areas of law which however will be characterized by significant regulatory and supervisory sets of rules and institutions.

As a combination of those two trends, stricter legality principles will probably have wider application in private and business matters. On the other hand, for more sensitive issues, involving public interest, policy considerations will probably continue to have a heavy impact on the legal system – stressing the legal system's function of becoming a stronger, more efficient tool of control by the center over the periphery of the country.

Clear examples of the former trend are the many laws enacted to improve the functionality of market and private economy mechanisms, such as the Contract Law of 1999, the Law on Trusts of 2001, the many others related to commercial, company, intellectual property, arbitration laws, etc., as well as the ones still to be enacted such as the one on competition and the one on property.¹⁹⁹ Also significant in this discourse are the organic reforms such as the one making a law degree a condition of access to the Judiciary and Procuratorates' careers (since 2001). In those areas, better laws, better courts, better lawyers – and a policy favorable to a legal environment unaffected by external influences on specific judicial cases – will probably lead the system toward outcomes which are at least comparable with western ones. This is to be expected in a fast-changing, more and more urban, individualist, litigation-prone, business oriented society; the political institutions are at work to satisfy this demand, to some extent, as new legality-enhancing legal formants are being introduced and/or old weak ones are undergoing a serious reinforcement process.²⁰⁰

199. The Chinese Law on property has been approved by the plenary session of the NPC on March 16, 2007, during the final revision of this essay. See China's Top Legislature Adopts Landmark Property Law, People's Daily Online (English Ed.) (2007), available at http://english.people.com.cn/200703/16/eng20070316_358242.html.

200. The obvious reference is to Sacco's theory of legal formants; see Rodolfo Sacco, *Legal Formants: a Dynamic Approach to Comparative Law: Installment I of II*, 39 AM. J. COMP. L. 1, 1-34

Besides, even “classical” socialist experiences, such as the USSR and associated countries, had legal tools such as civil codes and commercial laws, as well as banking, financial and arbitration institutions, related to foreign commerce and operations on foreign markets – both within the Council for Mutual Economic Assistance (CMEA, also known as COMECON) ambit, which provided the macro-planning of exchanges amongst the member countries, and outside of it. Foreign commerce mostly functioned at micro-level according to private law models, including legal norms and praxis related to arbitration, enforcement of foreign applicable laws or foreign decisions or awards through private international law mechanisms.²⁰¹ Socialist countries’ economic organizations continued for a good part of the twentieth century doing business with non-socialist entities, making negotiations, concluding contracts, going to court or through arbitration, in an environment much more “legalized” than the domestic planned economy environment. This makes market institution and legal institutions related to markets not completely unknown to socialist experiences. Legality principles have now been gradually reinforced, and their range of operation extended, in China, to include – in a socialist *market* economy – both international and domestic market, open to both foreign and national individuals and private business entities. This non-traumatic management of the transition is demonstrated by the progressive insertion of increasingly stronger references to the private sector of the economy and to the socialist legal system in the Country’s Constitution: the original reference to the protection of “urban and rural workers’ individual business” contained in the 1982 Constitution’s article 11 underwent several amendments to reach its present state mentioned above.²⁰²

Another example of progressive extension of the ambit of legality and private law is given by the unified law of contract of 1999,²⁰³ which is applicable to all contracts, both international and domestic, including those involving public-owned entities. Previous contract law was frag-

(1991); Rodolfo Sacco, *Legal Formants: a Dynamic Approach to Comparative Law: Installment II of II*, 39 AM. J. COMP. L. 343, 343-401 (1991).

201. See KAZIMIERZ GRZYBOWSKI, *SOVIET PRIVATE INTERNATIONAL LAW, Section III: The Trading State*, at 69-110 (Vol. 10 in the series *Law in Eastern Europe*, Leyden, 1965), and the literature and documents cited therein.

202. Article 11 had also been rewritten in 1988, including a reference to “the private sector of the economy,” indicated as a complement to the socialist public economy; in 1999, in addition to the reference to “ruling the country by law,” the private sector of the economy became “important,” before eventually becoming “encouraged” in 2004, with the amended text of article 11.5, reproduced at the beginning of this section.

203. On the 1999 Chinese law of contracts, see MO ZHANG, *CHINESE CONTRACT LAW* (Leyden-Boston, 2006).

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mented in three main different regimes for foreign commerce,²⁰⁴ whereas domestic economy was regulated by public planning and ordinary domestic transactions amongst citizens were in principle regulated by the very vague and few general rules stipulated in the 1986 General Principles of Civil Law.

In a few words, modern or even state-of-the-art legislation is actually being enacted for the private sector, studying the most advanced international models, such as the Contract Law,²⁰⁵ or the Arbitration Laws and related Regulations such as the CIETAC Arbitration Rules,²⁰⁶ recently revised (effective May 1, 2005) to make them more adherent to international standards and practice.

In other areas, where the political implications are heavier, the legal system will probably remain closer to the "classical" socialist model, to allow wider political guidance, effective supervision, and local administrative discretion in pursuing the public interest. A good example of the above could be given by the environmental protection laws: the area is very sensitive, as it lays at a crux of important socio-political issues, including: economic development, protection of environment and future generations, health, civil and military security, and others. All the laws in that area are modeled on the general environmental protection law of 1989, a typical socialist legal instrument; flexible enough to allow a strong centralized control over the peripheral administration and at the same time to allow political and administrative discretion, according to the variable needs of the public interest, in a vast and fast-changing world.²⁰⁷

204. Namely a Law on Economic Contracts of 1981, substantially revised in 1993; the Foreign Economic Contract Law of 1985; and the Law on Technology Contracts of 1987; none of these laws allowed private individuals to take part in the transactions regulated within their scope of applicability.

205. The 1999 Contract Law has heavily been influenced by the most recent comparative legal studies and legal texts, including the UNIDROIT Principles of International Commercial Contracts and the Vienna Convention of 1980 on the International Sale of Goods (CISG). See BING LING, CONTRACT LAW IN CHINA (Hong Kong, 2002); Zhang Yuqing & Huang Danhan, *The new Contract Law in the People's Republic of China and the UNIDROIT Principles of International Commercial Contracts: A brief comparison*, 5 UNIF. L. REV. 429 (2000); Xiao Ying Li Kotovtchikhine, *Le nouveau droit chinois des contrats internationaux*, JOURNAL DU DROIT INTERNATIONAL 113 (2002); Guy Lefebvre & Jie Jiao, *Le principes d'Unidroit et le droit chinois: convergence et dissonance*, 36 REVUE JURIDIQUE THÉMIS 519 (2002), available at <http://www.themis.umontreal.ca/pdf/rjtvol36num2/lefebvre.pdf> (last visited Dec. 20, 2006).

206. See Jingzhou Tao, *supra* note 116, at 1-54.

207. See Ignazio Castellucci, *La tutela dell'ambiente nell'ordinamento giuridico della Repubblica Popolare Cinese: un case study sul funzionamento del sistema*, in RIVISTA GIURIDICA DELL'AMBIENTE 1, 59 (2003).

It is to be considered at this point that many areas of law, that in the Western concept are essentially related to private economy and market institutions, in China are bordering what, in a socialist approach, can still be considered an administrative matter – or a matter having some kind of public relevance – such as property or antitrust law. Even the law of contract could be bordering public or administrative law in relation with some of its fundamental principles, *e.g.*, freedom of contract, limitations due to public policy or to the nature of the parties.²⁰⁸ Also, the very *nature* of contract can be different, between the *laissez-faire*, nominalist approach and the socialist market one – with all its communitarian, equitable, equality-based and good-faith-based implications, and subsequent ramifications.²⁰⁹ In all of those borderline areas, legislation, judicial interpretations, research and study will then be needed to draw and understand the actual limits of private law *vis-à-vis* the public and administrative one, and identify the mutual interactions of the two different modes of the law, so to speak, in a socialist legal system as a regulating frame for a socialist market economy.

From the Soviet legal experience China is probably borrowing the structural, more “socialist” part: the abstract model and the fundamental features and dynamics of a stronger, more centralized, socialist legal system, its legislative models and patterns for areas characterized by strong public interests. This will allow the central Government to better govern the Country, reducing the centrifugal forces created by the presence of a huge and not yet well coordinated and controlled peripheral apparatus – as well as, in principle, allowing the government to efficiently implement its macro-policy and discharge its supervisory and regulatory Constitutional duties over China’s market economy. Administrative and public economic laws may still be paramount in the foreseeable future, as parts of the legal framework of the socialist market economy, in a socialist legal system.

VI. CONCLUSIONS (IF ANY)

I think it is reasonable to see as the next, or possibly the current, transition step of the Chinese political-legal system – what the Chinese leadership often labels “socialist rule of law” – a stronger and more structured realization of the “rule by law” model, according to my simple classification made *supra*. The achievement of a mature “rule by law” model, in

208. *E.g.*, one of the parties, a public-owned enterprise, may be subject to operational restrictions stemming from public planning or policy according to article 38 of the Contract Law; *see* discussion in Mo Zhang, *supra* note 202, at 43-50; also *see* Bing Ling, *supra* note 204, at 47-48, for another instance of possible interference of a supervisory organ with negotiations.

209. *See*, for instance, Mo Zhang, *supra* note 202, 43-46; Bing Ling, *supra* note 204, at 51.

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the framework of a stronger socialist legal system, is the result of the borrowing of some crucial features from the mature USSR-style socialist legal system, combined with the Chinese experience. There is possibly a trend in the Chinese legal system towards what Peerenboom's classifies as the "statist-socialist rule of law" model, as the subsequent step,²¹⁰ a possible, even a probable one maybe, at this junction; but not certain, of course.

Whatever theoretical system of classification we decide to follow, the Chinese transition will probably lead anyway to outcomes unheard of; forcing then scholars to review their schemes and classifications *ex post*, according to actual products of the evolving reality. Classifications made *ex ante*, based on western ideas, are not necessarily the best ones to analyse, describe, and much less foresee developments in non-western contexts; they should be taken as approximate, tentative and merely indicative, rather than as firm and normative ones.

With recent decades' reforms, *two* different major occurrences are affecting the Chinese legal system: *one* is the transition from the rule of men, so to speak, to a mature rule by law system; *the other* is the introduction of a market economy, with the consequent explosion of private law, previously merely interstitial within a system which has basically been an administrative one and has not ceased to be so.

The areas for development of market legal institutions in a socialist context will have to be identified and studied, and boundaries found between what we may call the private law and the administrative law dominions – as it happened in other countries having a dual legal and jurisdictional system based on a similar dichotomy.²¹¹ The differences with those western experiences, though, will be substantial, and the very relation between public and private law might be based on a reversed concept of which is the general rule and which the exceptional one. Privileged laboratories for Beijing, and observatories for scholars for this transitional process could be the several regions and territories of the PRC enjoying special economic and legal regimes (such as the SEZs), or a higher degree of autonomy (such as the two SARs).²¹²

210. Peerenboom, *supra* note 5, at 103-109. Peerenboom's classification is "thicker" than mine, according to his point of view; mine being just focused on the relation between the politics and the law; his being more complex and also allocating several substantial legal and institutional features into a bigger number of partitions.

211. See above, section III, *Other comparisons*.

212. See above, section IV, *Macao, Hong Kong and other special zones of China as legal laboratories*.

Other Asian experiences could also be interesting for the Chinese development of a market economy strongly controlled by the state, and the related legal tools and institutions: Singapore and South Korea could be, in my opinion, reasonable models to look at, in addition to the usual Western ones and transnational ones – such as the UNIDROIT Principles, model laws, and other elaborations.

Certainly, a Chinese concept of “rule of law” is the rule of something different from what westerners think the law is; it is rather a rule, and a *role*, akin to what is referred to, in comparative law circles, as “socialist legality” or “*socialist rule of law*.” We may also call it “rule by law” recognizing in it the presence of what Professor Ugo Mattei calls “the rule of politics” element.²¹³ Whether “rule by law” equates to one possible declination of “rule of law” becomes a pure matter of taxonomy, and everyone can create their own. Substantially, the concepts of “socialist rule of law” or “rule by law” are flexible ones, whose meaning was originally based on the historical experience of the USSR. “Rule of law with Chinese characteristics” can be another way to describe the concept, taking into account the Chinese specificities, and the extra flexibility required to accommodate or transition towards a market economy within a socialist environment; *an environment which may warrant different degrees of political or administrative discretion in the general application of legal rules, according to the different relevant areas*.

It is probably conceptually inappropriate or incomplete to easily label the Chinese environment as unruly, or plainly plagued by illegality, and be content with that. Considering it as an environment where the *role* of law is different would be more fruitful for understanding. Thus, we cannot expect to see the usual western mechanics of the “rule of law” at work – at least, not solely nor prevalently. We should see China as a society that, in a political sense, *decided* not to adopt the Western concept of “law” and “rule of law.” China seems to prefer a different approach, with an undeniably increasing recourse to the law to solve conflicts, but also with other social institutions working along, at least for present times of transition.

213. See Ugo Mattei, *Verso una tripartizione non eurocentrica dei sistemi giuridici*, in *Scintillae Iuris – Studi in memoria di Gino Gorla*, Milan (1994); and Ugo Mattei, *Three Patterns of Law. Taxonomy and Changes in the World Legal Systems*, 45 AM. J. COMP. L. 5 (1997). This Author proposes a taxonomy for the world legal systems and traditions based on three basic influences: the rule of law, the rule of politics, the rule of tradition; then classifying the different legal systems according to the influence which is prevalent – still recognizing that these three basic factors are all present, in a combined fashion, in all legal systems.

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Interesting comparisons and research could be done to find similarities and differences between the current Chinese transition and the USSR history, as well between the Chinese transition and the French revolutionary and post-revolutionary transitions and legal ideologies. These studies would allow for a better understanding of the relation amongst law, legislation, politics, separation of powers or functions, the idea of checks and balances, and so on.

Moreover, comparison shows that the dominion of western-style “rule of law” does not include non-neutral, “political-legal” systems, such as socialist systems – like, maybe, the international law environment. Western-style “rule of law” also doesn’t apply easily to legal orders still in formation or in transition – as it has often been the case for the complex body of the EU Directives.

In last few decades China, featuring both a political-legal system and also a system “under construction,” featured both of those characteristics. Thus, the Chinese concept of “rule of law” cannot possibly be similar to the western one, at present or in the immediate future. Possibly the next phase will be a mature and more structured model of “socialist rule of law” or “rule *by* law” in the transition of the Chinese legal system.

If one should read the signals, the 2004 Outline on implementation of law-based administration stresses the idea of supervision, rather than suggesting the creation of checks and balances mechanisms in the Western style. Also, the outcomes of the recent case decided by the Intermediate Court of Luoyang (2003) and then by the High Court of the Henan Province (2005)²¹⁴ suggest that the devised socialist rule of law with Chinese characteristics will still be moving, in the next future, within the conceptual boundaries of a “rule *by* law” macro-model, according to our western standards.

On the other hand, an increased role of law and courts in Chinese life is clearly detectable, as well as an increasing amount and quality of legal services and institutions, as discussed above²¹⁵, probably due to both internal reasons, such as the creation of a market economy, the improved economic level and the increasingly individualist attitudes of the urban population; and to external reasons, like the participation of China to the international economy and its international obligations such as those hailing from its WTO accession.

214. See above, section II, section *Socialist Law in China*.

215. See above, section II, section *Enforcement of the Law*.

Understanding the specificity of the *role* of law in China as a tool of governance— interacting with non-legal factors for producing final outcomes— helps to understand socialist and Chinese “rule of law.” This understanding implies the development of the (non-western, to a big extent) ability to identify operational rules and foresee results in this different and more complex environment. This process includes learning to take into account, when reading the law, all the non-strictly-legal factors such as tradition, policy, economy, affecting its interpretation, application, enforcement. This is an obvious skill for Chinese lawyers, of course, like for all lawyers hailing from pluralist contexts.²¹⁶ Western lawyers and scholars should also be challenged to be willing to open their minds and make an effort to understand a reality that, if converging on its surface, is at its most basic level substantially different from their own.

It will take time to see where the Chinese transition is leading, and no conclusions can be drawn at present on where, exactly, the Chinese transition is leading. It is a reasonable assumption to foresee that stricter legality principles will be applied, more and more, at least in areas where private interests are involved. Further, the State will continue to maintain a strong guidance capability, through policy instruments, on matters of general interest.

Demarcation between the different fields of law, and the possible diversification by areas in the degree of implementation of legal principles vis-à-vis political considerations, especially in the mutable borderline areas between private and general interests, will probably be a necessary, as well as very interesting, field for research and study, both for Chinese lawyers and foreign scholars involved in comparative law.

216. On legal pluralism, *e.g.*, see Marco Guadagni, entry “*Legal Pluralism*,” in THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 542 (P. Newman, ed. 1998); John Griffiths, *What is Legal Pluralism?* 24 J. LEGAL PLURALISM & UNOFFICIAL L. 1 (1986); Sally Engle Merry, *Legal Pluralism*, 22 L. & SOC’Y REV. No.5 869 (1988).