

China's Socialist Rule of Law

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On the 11th of March, 2018, at the thirteenth National People's Congress, a specific phrase in the preamble to the Constitution was amended: 'improve the socialist legal system [*fazhi*]' became 'improve the socialist rule of law [*fazhi*]'. The change was only in the final character of the phrase, from 制 to 治 – although they have exactly the same pronunciation: *zhì*. The amendment may seem simple enough, but there was a long history – with intricate legal debate – of development to get to this point.¹

Legal System and Rule of Law

Three parallel debates influenced the change from 'legal system' to 'rule of law', the first of which concerned these two terms. Some background: 'legal system' is an ancient term in China, while 'rule of law' – in its modern sense – is a relatively recent term, appropriated from Western liberal discourse and sinified. In more detail, 'legal system' appears already in the *Yueling* chapter of the *Book of Rites*: 'restore the legal system [*xiu fazhi*]'.² Further, 'legal system' appears with two overlapping senses: a static meaning with reference to the existing laws and regulations of a country; a dynamic sense, which includes formulating legislation, revision, enforcement and supervision – all of which comprise components of the overall legal system.³ In this light, 'legal system' seems like a neutral term, designating the reality that every country has a legal system, in both static and dynamic dimensions.

By contrast, 'rule of law' in its modern sense is not attested in the Chinese tradition,⁴ and Chinese scholars acknowledge the influence of the Western liberal

1 The most comprehensive history of the development of rule of law in China is by Zhang Wenxian (2018). For useful surveys, with copious references, of developments in Chinese jurisprudence since the beginning of the Reform and Opening-Up, see Liu, Li and Feng (2008), and Chen and Li (2018). One of the few English works that at least attempts to understand rule of law on Chinese terms is by Peerenboom (2002), although the work is notable for its complete misunderstanding of the central role of Marxism.

2 The Chinese text may be found at ctext.org/liji/yue-ling. For further examples, see He and Qi (2018, 7).

3 The *Cihai* (2009, 560) distinguishes three senses of 'legal system': the widest, which incorporates all the laws (written and unwritten) of a state and its various political, economic and cultural components; a medium sense, which incorporates legal system and legal order; and the narrowest, the legal system itself (*falü zhidu*). The narrowest is the most common usage.

4 The term itself appears in the Chinese tradition, but with the combined sense of 'law-and-governance'. A good example is the *Huainanzi* (compiled in the second century BCE), in the *Fanlun* chapter: 'If you understand from whence law-and-governance arise [法治], then you can respond to the times and alter. If you do not understand the origin of law-and-governance [法治], even if you accord with antiquity, you will end up in disorder' (Liu An 2010, 611). The Chinese text may be found at ctext.org/huainanzi/fan-lun-xun. For further examples, see He and Qi (2018, 8).

tradition in spurring the development of a distinct Chinese approach.⁵ Further, the Reform and Opening-Up, with its myriad economic and social transformations, has generated the need for a robust rule of law to ensure the smooth working of the socialist market economy (Li 2011, 75–77; Gong 2015, 36–39). However, Chinese scholars are very clear that the concept of ‘rule of law’ should not be appropriated in its liberal and capitalist sense, since this would be an ill fit indeed in China’s socialist system (Yao and Huang 2012, 11–13; Fu and Zhu 2015, 23–24, 27–28; Zhang Wenxian 2017b, 11). Instead, ‘rule of law’ needs to be sinified in two related ways. The first is China’s long legal tradition, specifically in terms of the intersections between the Legalist and Confucian traditions (see more below). The second type of sinification involves the Marxist tradition. This is where the full term ‘socialist rule of law [*shehuizhuyi fazhi*’] comes into play, which entails not only in-depth research on Marxist jurisprudence all the way from the classics of the Marxist tradition to the implications of the sinification of Marxism in light of China’s concrete conditions and the Reform and Opening-Up, but also the insistence that a rule of law developed in China should arise from and undergird its socialist system (Fu and Zhu 2015, 19–21; Chen and Li 2018, 73).⁶

In light of this brief exposition, it remains unclear why there was a distinct shift in the constitutional amendment of 2018, from ‘legal system’ to ‘rule of law’. On initial appearances, there appears to be little conflict between the two terms. ‘Legal system’ is ancient, with static and dynamic senses, while ‘rule of law’ is more recent, undergoing a full sinification in terms of Chinese Marxism. Why then make the shift? In the 1990s, there was considerable debate over the two terms, with positions taken falling into three main types (Sun Shoujuan 2006, 43–44). The first was that ‘legal system’ and ‘rule of law’ are identical, with the same basic sense of following or working according to the law. The second position was that the two terms are related but distinct: assuming that ‘legal system [*fazhi*’] is an abbreviation of ‘a system of laws [*falü zhidu*’], scholars argued that a legal system concerns the reality of a system with components, such as constitution, laws, judiciary, enforcement, and legal profession, while rule of law concerns the underlying principles of the legal system, such as the supreme authority of law, justice, stability, universality, openness and equality of law, checks on political power and protection of human rights. It follows that while all countries have a legal system, they do not necessarily have the rule of law. The third position was that the two terms are dissimilar. In contrast to a legal system, rule of law entails that governance, society, economy, and

5 He Qinhua (2011; 2015, 34–36), a leading legal scholar, has particularly emphasised this aspect, albeit always with a need to ‘localise’ such an influence in light of Chinese conditions.

6 For a detailed overview of scholarship on this emphasis, see by Yao and Huang (2012, 5–9).

ecology are all subject to the law, and that a country cannot develop a democratic system – of whatever type – without a rule of law in which everyone is equal.

The outcome of these debates was a combination of the second and third positions: legal system and rule of law are different, in the sense that they concern distinct realms of meaning, but they relate to one another precisely through such a demarcation: rule of law provides the principled framework for the functioning of a concrete legal system (Liu and Li 1998).

Rule of Law and Rule of Virtue

This debate was by no means the end of the matter, for the distinctly sinified version of 'rule of law' was influenced by the Chinese tradition. Earlier, I mentioned that the term itself – in its modern sense – does not appear in the tradition. But Chinese scholars have been wary of simply appropriating the Western sense of the term, since that sense is a superstructural feature of a capitalist system.

On this matter, we need to go back to the intersections between Legalism (*fajia*) and Confucianism (*ruxue*). It is not my task here to delve into the vast complexities of these two lines of jurisprudence,⁷ since my purpose is to draw out a dialectical point. Thus, He Qinhua (2015, 36–38) identifies two lines or emphases. The loose collection of pre-Qin legal scholars who later became known as the Legalists emphasised that governance should work 'according to law as the basis [*yifaweiben*]' and that all, from highest to lowest, should follow the law. This approach, however, was predicated on the assumption that 'human nature is evil [*xing'elun*]' and thus required strong punishments and appropriate rewards for the sake of social order. The Legalists are often maligned as instigating harsh punishments, and the adoption of Legalism by initial dynasty that unified China – the Qin Dynasty – is often given as a reason for its relative brevity (221-206 BCE). The sheer harshness of the laws soon led to revolt and overthrowing of the dynasty. At the same time, scholars are keen to point out that whenever a government has needed to root out corruption and ensure stability for the sake of economic improvement, it has resorted to the Legalist tradition.

The other emphasis is Confucian, which sought 'both hands [*liangshou*]' of legal sanction and virtue, albeit with a distinct emphasis on the latter: benevolence, righteousness, ritual (propriety), wisdom and faithfulness (*renyilizhixin*) are the five key virtues, which would ensure stability and harmony – and indeed a concern with the

⁷ For an excellent overview in English, see Zhang Jinfan (2013), while one may also consult in Chinese the works of He Qinhua (2017; 2018).

common people's livelihood (so Mencius). As the *Analects* (1993, 2.3) put it: 'If the people are guided by law, and kept in order by punishment, they may try to avoid crime, but have no sense of shame. If they are guided by virtue, and kept in order by the rules of propriety, they will have a sense of shame, and moreover will come to be good'. In short, the Confucian emphasis is both 'rule of virtue [*dezhi*]' and 'rule of propriety [*lizhi*]'. As we will see in a moment, there is a danger within this Confucian emphasis that virtue, as embodied in the ruler, would mean diminution of law. Indeed, it was precisely this risk that led to an explicit dialectical connection between law and virtue through the work of Dong Zhongshu (179-104 BCE), who was instrumental in establishing Confucianism as the state system for the Han Dynasty (202 BCE – 220 CE). He did so by drawing on the Daoist tradition of yin-yang: the two lines are inescapably connected in governance, in which the positive yang is virtue and the negative yin is punishment. The two are inescapably connected: while 'virtue is more vital than punishment [*rende bu renxing*]', it would be vain to imagine that one can do without the sanction of law.

In light of this tradition, there are those in recent debates who have argued that rule of virtue is a feature of feudal and patriarchal society and is thus not appropriate for modern China (Sun Li 2002; Sun Shoujuan 2006). Theirs was not the majority view: they argued not that the rule of law embodies the Legalist emphasis and that rule of virtue is a Confucian addition, but that in a Chinese context the modern sense of rule of law itself includes both law and virtue.

Rule of Law versus Rule by a Person

Yet, it was not the law-virtue debate that was the primary trigger for the 2018 constitutional amendment from 'legal system' to 'rule of law'. The key was a third debate – usually interwoven with the preceding two debates – concerning the rule of law and rule of a person (*renzhi*). This opposition was the main impetus for emphasising the rule of law, for specific historical reasons in relation to the Cultural Revolution. Chinese scholars generally agree that the initial foundations for China's modern 'legal revolution' go back to Liberation in 1949 (Gong 2015, 30–32; Zhang Wenxian 2017b, 6–7).⁸ However, the deviation of the Cultural Revolution disrupted this process, with Mao Zedong raised to a whole new level as the leader who would keep matters on the correct path.⁹ The twist is that during

8 Article 17 of the 'Common Program' (1949) reads: 'Abolish all laws, decrees and judicial systems of the reactionary Kuomintang government that oppress the people, enact laws and decrees to protect the people and establish the people's judicial system [*sifa zhidu*]'.
9 For a detailed account of struggles leading up the Cultural Revolution, in which 'rule of a person' gradually came to the forefront, see Hao Tiechuan (2015).

the Cultural Revolution Mao unwittingly embodied a tendency in Confucianism to emphasise the virtuous ruler – the risk of pushing virtue too far. As the *Zhongyong* section of the *Book of Rites* puts it ‘governance depends on a human being [*weizheng zairen*]; indeed, ‘if a person exists, the government will flourish; if a person dies, the government will cease’.¹⁰ This emphasis came to be known as ‘a person of virtue rules the country [*xianren zhiguo*]’. In short, left to its own devices the emphasis on virtue can lead to the ‘rule of a person’, which may produce ‘evil fruit [*eguo*]’ (He and Qi 2018, 14).¹¹ It is this historical background that Deng Xiaoping (1986a, 177; 1986b, 179) had in mind when he observed: ‘through the reform, we intend to straighten out the relationship between the rule of law [*fazhi*] and the rule of a person [*renzhi*]’.¹²

But I have leapt ahead in the narrative, for Deng’s usage of ‘rule of law [*fazhi*]’ appeared in 1986, in the midst of a significant debate. Back in 1978, he did not use such terminology, finding that reforming and strengthening the ‘socialist legal system’ was sufficient.¹³ However, ‘legal system’ would soon prove to be insufficient in light of a significant debate that turned on the question of rule of law and rule of a person.¹⁴ In this debate, which ran from 1978 to 1997, three main positions were argued (Chen and Li 2018, 67–68; Liu, Li, and Feng 2008, 15). First, laws are made human beings and carried out by human beings, which in a Marxist framework entails the proletariat, Communist Party and people. Thus, all a socialist country needs is a legal system developed by human beings; it does not need rule of law. Second, the opposition between ‘rule of law’ and ‘rule of a person’ is a false one, for a country requires both. Third, the rule of law is clearly superior

10 The Chinese text may be found at cctext.org/liji/zhong-yong.

11 Note also Deng Xiaoping’s observation (1989b, 325; 1989a, 314–15) as he was planning retirement: ‘I have never believed in exaggerating the role of any one individual, because that is dangerous and makes it difficult for others to carry on. The stability of a country and a party cannot be based merely on the prestige of one or two persons. That tends to create problems’.

12 See also Xi Jinping’s (2015, 12) observation: ‘The rule of law and the rule of a person is a basic problem in the history of human political civilisation, and also a major problem that all countries must face and solve in the process of modernisation. Looking at the modern history of the world, no country that has successfully realised modernisation has failed to solve the problems of the rule of law and the rule of a person. On the contrary, although some countries achieved rapid development for a time, they did not reach the threshold of modernisation smoothly, but fell into one or another “trap”, resulting in stagnation or even retrogression in economic and social development. The latter situation is largely related to the lack of rule of law’.

13 For example, in the key document from the Third Plenary of the CPC’s Eleventh Central Committee we find ‘turn the socialist legal system into a powerful instrument for protecting the rights of the people’ (CPC Central Committee 1981, 17).

14 A trigger for this debate was Deng’s observation in 1978: ‘Democracy has to be institutionalised and written into law, so as to make sure that institutions and laws do not change whenever the leadership [*lingdaoren*] changes, or whenever the leaders change their views or shift the focus of their attention’ (Deng 1978b, 146; 1978a, 156).

to the rule of a person. Thus, the rule of a person risks emphasising that it matters not whether the law is good or bad, but rather that the ruler is wise and virtuous. By contrast, the rule of law is inseparable from socialist democracy: it is the basis of rule of law and rule of law is the guarantee of socialist democracy.

The third position came to be accepted by the end of the 1990s, but a question remains: what happened to 'legal system'? It came to be seen as inadequate on its own. As mentioned earlier, it was agreed that every country may have a legal system, but not every country has a rule of law. Indeed, a legal system could be used by a few, or even one person, to advance their own agenda. 'Legal system' left to its own devices risks becoming 'rule by law' – a common translation of the term *fazhi* – in which the legal system becomes an instrument deployed in the rule of a person. This is not to say that a 'legal system' should be abandoned, but it needs a rule of law to prevent its deployment under rule by a person (He and Qi 2018, 11). Thus, the legal system requires rule of law to enable its improvement; at the same time, rule of law is meaningless without a legal system in which rule of law can be embodied. In other words, the legal system is the basis of the rule of law, but rule of law constitutes the goal and value of the legal system.

Governing the Country According to Law

Finally, we come to the practical implications of all this legal debate, which are embodied in the phrase, 'governing the country according to law [*yifazhiguo*]'. This phrase indicates the connection between theory and practice: the development of the theory of rule of law is inescapably related to the practice of governing the country according to law. The key moment came in Jiang Zemin's (1997a, 28; 1997b, 29) report to the CPC's Fifteenth National Congress: here he spoke for the first time of 'governing the country according to law' and building a – literally – 'socialist rule of law country [*shehuizhuyi fazhi guojia*]' – a phrase that was incorporated into the constitutional amendments of 1999. Over the next decade, we find Hu Jintao (2012, 18) speaking of 'the rule of law' as the 'fundamental way of ruling the country', the Central Committee issuing a major statement on promoting the rule of law as one of the 'four comprehensives [*si ge quanmian*]' (2014),¹⁵ and the constitutional amendment of 2018, which then lays the foundation for a whole new development.

¹⁵ The other three 'comprehensives' are building a *xiaokang* society, deepening reform, and strict Party discipline (Wang Yujue 2015). As Xi Jinping's observations (2014b, 2–3) make clear, the decision by the Eighteenth Central Committee was based on extensive consultations and soliciting of opinions and proposals – as one would expect in terms of consultative democracy.

This is all very well, but I have not yet addressed how it is a Marxist or socialist rule of law. On this matter, the leading Chinese legal scholars are keen to offer their perspectives,¹⁶ so let me draw from their work the following key points. First, rule of law ensures and promotes the people as masters of the country. This entails both rights before the law – understood in terms of the Chinese Marxist approach to human rights – and responsibilities, such as ensuring social fairness and justice, and promoting common prosperity. It also includes a transparent and well-administered legal system subject to high standards. Second, rule of law means equality before the law. It applies uniformly and strictly to everyone, from the Central Committee to the common person working hard for the advancement of China. As Xi Jinping (2017a, 16; 2017b, 35) points out in his major speech at the CPC's Nineteenth Congress: 'We must promote the rule of law and work to ensure sound lawmaking, strict law enforcement, impartial administration of justice, and the observance of law by everyone'.¹⁷ Third, rule of law ensures not merely that every component of the socialist democratic system works, but also that electoral and consultative democracy (including grassroots democracy) have a substantive – rather than merely formal – influence on decisions. Fourth, rule of law functions as the most comprehensive level of checks on and supervision of the exercise of power CPC, but also of the NPC and CPPCC, so as to ensure transparency and institutionalised processes. Fifth, rule of law must include the rule of virtue.¹⁸ Let us recall the earlier observations on the Chinese tradition and quote Xi Jinping (2014c, 141; 2014a, 170): 'law is written morality [*daode*], while morality is inner [*neixin*] law. We should persist in combining the rule of law with the rule of virtue' – or, as the Chinese text puts it, 'ruling the country according to law [*yifazhiguo*] and ruling the country according to virtue [*yidezhi*]'.¹⁹ Sixth, rule of law is forward-looking and dynamic. Not only does it release social vitality, maintain social fairness and justice, and promote social harmony and stability, but it is part and parcel of the whole process of socialist modernisation and Chinese rejuvenation. Finally, and most importantly, rule of law relies on and ensures the leadership of the CPC, which includes comprehensive legal structures within the Party.

¹⁶ In drawing up the following points, I have consulted a number of leading scholars (Sun and Huang 1998; Li 2011; 2015; Fu and Zhu 2015; Ma 2015; Zhang Wenxian 2017a; 2017b; Chen and Li 2018; Hu Jianmiao 2018; Liu Shaojun 2018). See also the important decision on from the Fourth Plenary of the CPC's 18th Central Committee (2014), along with Xi Jinping's observations (2014b) on the decision.

¹⁷ We are by now far from any Western-derived notion of an 'authoritarian regime' using rule of law to further its agenda (Wang Yuhua 2014).

¹⁸ For significant debates concerning this pairing in a modern context, see Liu, Li and Feng (2008, 16–17).

¹⁹ The combination of rule of law and rule of virtue was initially made by Jiang Zemin (2000, 91). He deployed the combination on many occasions afterwards.

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