

INTERNATIONAL JOURNAL  
OF LAW IN CONTEXT



CAMBRIDGE  
UNIVERSITY PRESS

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---- A Contextual Analysis of Legal Instrumentalism in ROC  
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Journal:	<i>International Journal of Law in Context</i>
Manuscript ID	IJLC-OA-2016-0019.R1
Manuscript Type:	Original Article
Keywords:	China, The Rule of Law, Legal borrowing, Legal Culture

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How has China formed its conception of the rule of law?

-- A Contextual Analysis of Legal Instrumentalism in the ROC and the PRC Law-making

**I Introduction**

The rule of law as a globally recognized concept is multifaceted (Chesterman, 2008). In the Common Law tradition it is conceived through a formal and substantive framework. In essence, it centres on the supremacy of the law over the arbitrary exercise of power and the formal legality of the law (Tamanaha, 2004, p.115; Cotterrell, 1992, p.157). The rule of law concept has been criticized as being of unique European origin, where plural social organization and universal natural law constitute its two preconditions (Unger, 1977, pp.80-110). It has, however, been advocated around the world as one essential principle leading to modernity, where the legitimacy of the law based on the formal and substantive rule of law serves as a strong symbol for a modern society (Deflem, 1996, p.5).

The modernization of China started by the imperial Qing court at the end of the last Qing Dynasty at the beginning of 20<sup>th</sup> century, continued during the time periods of the Republic of China (ROC 1911-1949) and the People's Republic of China (PRC 1949-). Despite their political and ideological differences, both the ROC and the PRC have striven to build up modern legal systems with the aim of leading China into modernity. However, the formation of the legal system in both the ROC and the PRC has been criticized for conferring a strong instrumental role onto the law to achieve policy goals (Chen, 2008) and, therefore, suffering from the underdevelopment of the rule of law.

In its modernization efforts in the past hundred years, China has been well exposed to the legal norms of western legal systems including the concept of the rule of law. The formation

of the legal system in the ROC was carried out with international legal assistance and the advice of American jurist Roscoe Pound (Kroncke, 2012). The PRC showed enhanced participation in international legal systems through the membership of the World Trade Organization (WTO) in 2001 (Qin, 2003). The question arises, therefore, as to why both the ROC and the PRC have chosen to focus on the instrumentality of the law in their construction of the rule of law, and shied away from viewing the law as an autonomous and neutral institution imposing constraints on the exercise of power.

This question requires an answer because the rule of law development in the PRC cannot escape from its past. However, western studies on the rule of law in China tend to focus on traditional Chinese law and the PRC law (Peerenbolm 2002, 2004). Moreover, although studies have pointed out the instrumental role of the law in Chinese legal history (Chen 2008), little efforts have been made to analyse to what extent and why such a view persists in the Chinese society and the impact of such a view on China's rule of law today. More importantly, the PRC has become increasingly assertive in its legal practice in the context of economic globalization, and reveals a desire to become a norm-maker rather than a norms taker. Hence to critically understand the contextual and historical factors shaping China's rule of law would be beneficial for understanding the Chinese perspectives of the rule of law and the impact of such perspectives on China's legal practice today.

For the first time this paper compares the ROC Statute Legislative Order of 1928 and the PRC Legislation Law of 2000 in Chinese legal history. The ROC Statute of Legislative Order and the PRC Legislation Law serve as the first and essential building blocks for the respective legal systems. They serve, therefore, as good case-studies when seeking to

understand how the notion of the rule of law has been conceived in the ROC and the PRC, and if there are any similarities between them.

By briefly reviewing China's legal modernization reform since the late Qing period, this paper compares the Statute of the Legislative Order enacted by the ROC and the Legislation Law enacted by the PRC. It argues that strong similarities exist between the two legislations in terms of definition of sources of law; law making procedure; and the role played by the ruling party in the law making process. The similarity, as this paper argues, reveals that the ROC and PRC favour the instrumentality view of the law to the extent that such a view has become the main basis of China's conception of the rule of law. This paper argues that two reasons contribute to the formation of such a view: a China-centred legal borrowing strategy designed by elites in late Qing Dynasty and inherited by the ROC and PRC; and, the instrumentality view of the law consistently held by Chinese traditional philosophies and ideologies upheld by the ROC and the PRC. Hence, China's consistent legal borrowing strategy and continuous interaction between traditional philosophies and state ideologies in the ROC and PRC have shaped and continue to shape the formulation of the rule of law in China.

## **II Law-making in the ROC and the PRC**

### **2.1 Legal System Reform in the Late Qing Period, the ROC and the PRC**

The reform of China's legal system started in the early 20<sup>th</sup> century, when China's last Dynasty, the Qing (1644-1911), was in decline and was seeking a means for revival (Chen, 2008: 23). Having pursued a closed and centralized form of imperial rule, the Qing was forced open by the industrialised West and faced external and internal pressures to engage in modernization reform (Tay, 1969). International legal norms embodied in the unequal treaties concluded between China and the western powers served as the incentive for Chinese

elites to urge reform by referring to state building models in Europe and elsewhere (Horowitz, 2004).

Reformists maintained that a key part of the Dynasty's reform efforts should be in the development of a new legal system, modelled on western examples. In January of 1901, the Empress Dowager, Ci Xi (1835-1908), issued an edict calling for the reformation of Chinese law along the lines of western models. However, these efforts ended abruptly when the Dynasty was overthrown during the Xin Hai revolution in 1911, and replaced with the Republic of China. Although the Qing Court's legal reforms were short-lived, they marked the beginning of the reform of Chinese law on the basis of international legal norms, and the Civil Law tradition exhibited by leading European legal systems (Chen, 2008, 24).

The ROC continued to face the task of modernization through state building. Constitutionalism and authoritarianism dominated China's institutional design efforts. Presidential and cabinet styles of government alternated in China during this period, which saw the country racked by corruption and war (Zhao, 1996, p.28). With the success of the Northern Expedition (1926-1928) against local warlords, the Guomindang (GMD, or the Nationalist Party) unified China and established a national government on 1 July 1925 in Guangzhou.

Dr Sun Yat-Sen (1866-1925), the founder of the GMD set out the blueprint for the ROC of China in his publication *Jian Guo Fang Lue (A Program of National Reconstruction 1924)*. He argued that given China's millennium of imperial history, the revolution work led by the GMD in ROC should be undertaken in three stages. These three stages were the Military Tutelage to destruct the Manchu Tyranny in the Qing Dynasty; the Political Tutelage to develop the provisional Constitution, train the mass public on political rights and promote

local county self-governance; and the stage of the Constitutional state. (Sun Yat-Sen, 1924, p.64 ).

Sun argued that the GMD should complete the state building in the political tutelage. The state structure should include the National Congress and the Central Government covering five Councils (*yuan*) of administration, legislation, judiciary, examination and supervision. (Sun, 1924, p.65).

During the Military Tutelage (1925 -1928), the government and the military establishment were combined together, and legislative procedures had not yet been established. In April of 1927, Chiang Kai-Shek (1887-1975), the successor to Sun Yat-Sen and then head of the GMD, moved the nationalist government from Guangzhou to Nanjing and set up a central government in line with Sun Yat-Sen's design.

In 1928, the GMD publicised the Political Tutelage guidelines following the GMD 2<sup>nd</sup> Congress fifth Plenum. The Guideline set out the policy basis for the GMD to play a leading position in the law-making process. It ensured that during the Political Tutelage, the GMD National Congress would replace the National Congress to lead the ROC; when the GMD National Congress is not in session, the power would be delegated to the GMD Central Executive Committee; the GMD central executive committee would supervise the central government's execution in the five *yuan*; and, that the GMD central executive committee was responsible for the amendment and interpretation of the National Government organization law.<sup>1</sup>

In terms of legal system building, the ROC continued the unfinished reforms of the Qing period. In 1925, the ROC central government conducted a review of all applicable laws,

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<sup>1</sup> GMD Political Tutelage Guideline, Chinese Encyclopaedia On Line, available at <http://ap6.pccu.edu.tw/Encyclopedia/data.asp?id=3392>.

which were based on the Qing legal code and customary laws. It then set up the Legal Code Draft Committee (LCDC), with the aim of reducing litigation and taking back the consular jurisdiction, formerly held by foreign powers in China.<sup>2</sup> In 1927, it decided that all preceding laws could be applied until new laws had been enacted, except for laws that contravened the GMD's party ideology or other orders issued by the ROC government.<sup>3</sup>

On 27 February 1928, the ROC enacted the Statute of Legislative Order (Statute), and on 23 June 1932, the Amendment of the Statute of Legislative Order. These statutes set out the main legal basis for regulating the law-making process. After the enactment of the Statute, the ROC went through a rapid process of law-making and completed the enactment of six codes, namely the Constitution, the Civil Code, the Criminal Code, the Civil Procedure Code, the Criminal Procedure Code and the Administrative Code. The enactment of the six codes was regarded as a landmark event in the achievement of legal modernization in the ROC (Tay, 1969).

The ROC's legal system building was interrupted by World War II and then the Civil War between the Chinese Communist Party (CCP) and the GMD, from 1945 to 1949. In 1949, the Chinese Communist Party (CCP) came into power and established the People's Republic of China (PRC). The CCP is organized with a strict institutionalized structure. It is headed by the CCP National Congress and Standing Committee, which is led by the Politburo (Political Bureau). The Members of the Politburo serve as state leaders and oversee corresponding state matters. Within the State apparatus, the National People's Congress (NPC) and its Standing Committee (NPCSC) serve as the legislature. It creates and supervises other state organs,

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<sup>2</sup> Legislative Committee Report on the Review of Six Laws 17 October 1925. The Legislative Committee decided that no amendment was needed to the Organization Law of the ROC government, Regulation on the Organization of Secretariat of the ROC government, Organization Law of the Department of Finance of ROC, and Organization Law of Provincial Government.

<sup>3</sup> Nationalist Party Central Political Congress Document on Law-Making issued on 12 August 1927.

including the government administrative system, the Supreme People's Court, the Supreme People's Procuratorate. (Wu, 2013, p.72)

The CCP began its socialist state building, including legal system building, with reference to the USSR's socialist legal tradition. However, from the 1950s to 1978, the formal legal order building in the PRC suffered serious setbacks and was paralyzed due to continuous political movements (Zhu Sanzu, 2011, pp.91-133). In 1978, the CCP resumed its legal system building, with the aim of supporting its market-oriented reforms (Potter, 2003, p.107). This process was reinvigorated by China's membership of the World Trade Organization (WTO) in 2001, as the PRC had an international legal obligation to ensure legal and regulatory consistency with WTO agreements and its WTO-plus commitments (Qin, 2003).

From 2001 China has speeded up its legal system building and pledged to have completed the Socialist Legal System with Chinese Characteristics (SLSCC) in 2011. During the process, the State Council (central government) published the White Paper on the Rule of Law in China in 2008.<sup>4</sup> The White Paper essentially reviewed China's legal system building in the law-making process; the facilitation of the market economy; governments' rule by law; the judiciary; human rights; legal education and international legal collaboration. In 2011, the State Council published the White Paper to declare the completion of the SLSCC, on the grounds that China has built up an institutionalized and legalized system for law-making, and has promulgated a complete and comprehensive body of laws with the Constitution as the cornerstone.<sup>5</sup>

Since 1980, the PRC's law-making principles have been developed through practice yet not legalized. Leading CCP law-makers argued that these principles included that the law-making

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<sup>4</sup> White paper on the Rule of Law in China in 2008, available at [http://www.china.org.cn/government/news/2008-02/28/content\\_11025486.htm](http://www.china.org.cn/government/news/2008-02/28/content_11025486.htm).

<sup>5</sup> White paper on Socialist Legal System with Chinese Characteristics in 2011, available at [http://www.china.org.cn/government/whitepaper/node\\_7137666.htm](http://www.china.org.cn/government/whitepaper/node_7137666.htm).



should be based on the reality of China and be compatible with China's economic and class relationships; that the law-making should uphold socialist ideology and serve the purpose of protecting the socialist political and economic systems; that the law-making should be based on socialist democracy and encourage public participation; and the law should be less punitive and cruel. (Zhang Youyu, 1980).

By 2000, China had achieved remarkable GDP growth yet faced pressing challenges in the legality of the law making. These challenges can be observed in the lack of consistency in law making and the abuse of discretion by local law-makers due to local protection. This, consequently, caused contradictory laws and the enactment of laws with no legal basis.<sup>6</sup> In the meantime, China was under increasing pressure to review its legal system with the aim of joining the WTO. Amidst this background, the Legislation Law, which started its preparation in 1993, was promulgated in 2000 and amended in 2015. The Law served as a starting point for China to build a socialist legal system in the post-WTO membership era.

It was in the Legislation Law that the practice-based law-making principles were, for the first time, legalized (Zhou Wangshen, 2009, p.71). Art. 3 to 6 of the Legislation Law provides that law making should uphold Constitutional principles, including the upholding of socialist ideologies, the CCP leadership, the economic reform and opening up; law making should follow legally provided procedures, protect the uniformity and dignity of the socialist legal system and achieve collective state interests; law making should reflect the people's will and promote socialist democracy and safeguard people's participation; law-making should be

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<sup>6</sup> Mr Gu Angran, Director of Legislative Affairs Committee of NPCSC, Statement on the Necessity to promulgate the Legislation Law, delivered at the 9th National People's Congress 3rd Plenum held on 9 March 2000. [http://www.npc.gov.cn/wxzl/gongbao/2000-12/16/content\\_5008936.htm](http://www.npc.gov.cn/wxzl/gongbao/2000-12/16/content_5008936.htm).

based on reality and set out the rights and obligations for citizens, legal persons and other organizations as well as the rights and responsibilities for state institutions.<sup>7</sup>

## 2.2. Law-making process in the ROC and the PRC

Hence to legalize the law-making process was the first step undertaken by the ROC and the PRC in their respective legal system building. A comparison between the ROC Statute of the Legislative Order in 1928 and the PRC Legislation Law in 2000, and their subsequent amendments, reveal strong similarities with respect to the definitions of sources of law, law-making procedure and the relationship between the ruling party and law-making.

First, the Statute of Legislative Order and the Legislation Law provide similar definitions of the sources of Chinese law, and have the common goal of building a hierarchical system of law and regulation.

The Statute defines the sources of law in the ROC as including primary law (*Falu*), which is debated for up to three readings in the Legislative Yuan and promulgated by the central government; secondary rules for the enforcement of the law, i.e., regulations (*Guizhang*) enacted by the central government and its departments; and rule (*Tiaoli*) by provincial and municipal governments (Gilpatrick, 1950). The Statute states that regulation and rules cannot contravene law.<sup>8</sup> In particular, when the departments of the central government make departmental regulations, such regulations should be scrutinized by the central government regarding its uniformity with relevant laws.<sup>9</sup>

Similarly, the Legislation Law sets out the sources of Chinese law. These include the law (*Falu*) enacted by the National People's Congress; administrative regulations (*Tiaoli*, *Guiding* or *Banfa*) enacted by the State Council (central government); administrative rules

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<sup>7</sup> Art.3-6 the Legislation Law 2000.

<sup>8</sup> Art. 4 the Statue of Legislative Order 1928.

<sup>9</sup> Art. 3 *supra*.

(*Guizhang*) enacted by the State Council organs; local regulation enacted by the local People's Congress (*Di Fang Tiaoli*); and local rules (*guizhang*) enacted by local governments. The State Council regulation and rules are enacted with the aim of enforcing laws, particularly within relevant sectors. Local regulations and local rules are enacted with the aim of enforcing primary laws and State Council regulations within local areas, and are applicable only within local jurisdictions.<sup>10</sup> These sources of law exist within a hierarchical order, in terms of their respective legal powers.<sup>11</sup> Hence, the Statute and Legislation Law establish a similar structure for the legal system in the ROC and PRC, which is composed of codified legislations in the order of primary law, regulations and rules.

Second, both the Statute and the Legislation Law regulate the law-making process with the aim of making the process rational and ordered. Whereas, law-making in the ROC was led by the *legislative yuan* of the central government, it is overseen by the legislature, namely the NPC and NPCSC, in the PRC. Furthermore, the PRC's Legislation Law amendment in 2015, has shown enhanced efforts to improve the transparency, legality and consultation of its law making process.

Under the framework of the Statute of the ROC, the law-making body of the ROC is the legislative yuan of the central government. Legislative proposals can be initiated by the Central Political Council of the GMD, and the organs of the National Government, including the five *yuan*s.<sup>12</sup> Debates on the contents of a bill are placed before the executive yuan with possible reference to the relevant *yuan* for consultation. After approval by the executive yuan, the bill goes to the legislative *yuan* for three readings. The bill is then passed to the central government for promulgation (Gilpatrick 1950).

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<sup>10</sup> Art.5 *supra*.

<sup>11</sup> Art. 3 *supra*.

<sup>12</sup> Art. 1 of the Statute Amendment.

Under the framework of the Legislation Law of the PRC, the law-making bodies in the PRC are the National People's Congress (NPC) and its Standing Committee (NPCSC). State institutions including the central and local governments, or a group of thirty or more NPC deputies, can submit a legislative bill to the NPC presidium for scrutiny, in order for the bills to be listed on the agenda of the National People's Congress for deliberation.<sup>13</sup> The bills listed on the agenda can be deliberated up to three times for promulgation by the NPC and NPCSC.<sup>14</sup>

In comparison, the Legislation Law amendment in 2015 reveals the PRC's efforts to improve the transparency and consultation of the law-making process. Pursuant to the amendment, the NPCSC, in deliberation, should collect feedback from the NPC through various means, including in the format of a hearing or on-site field research.<sup>15</sup> The NPCSC undertakes an assessment on the feasibility, timing and social impact of the potential bill, and the results are considered by the NPC Legislative Committee in its production of the final bill.<sup>16</sup>

Furthermore, this amendment increased the legality and certainty when making secondary legislations. It explicitly states that the making of secondary legislations must be consistent with their legal basis. Hence, State Council administrative regulation, local people's congress regulation, and local city rules cannot reduce rights and welfare, or add new obligations to citizens, legal persons and other organizations, without a legal basis in law.<sup>17</sup> The PRC central government acts as a protagonist in making secondary legislations and can, based on necessity, adopt secondary legislations when there is no prior primary law in place, with a

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<sup>13</sup> Art. 12 and 13, the Legislation Law 2000.

<sup>14</sup> Art. 20 and 21, the Legislation Law 2000.

<sup>15</sup> Art. 16, 28 and 26 of the Amendment of the Legislation Law 2015.

<sup>16</sup> Art. 39 of the Amendment of the Legislation Law 2015.

<sup>17</sup> Art. 80 and 82 of the Amendment of the Legislation Law 2015.

delegation of power from the NPCSC.<sup>18</sup> The amendment ensures that the delegation of power is under more stringent scrutiny in terms of its necessity and application.<sup>19</sup>

Third, whereas the GMD was, in the Statute, formally provided as one party with competence to submit legislative proposals, the CCP in the Legislation Law is more invisible. However, in both legislations the law making process is led and subject to legally provided scrutiny by the GMD and CCP.

Pursuant to the Statute, each legislative proposal is required to submit its legislative principles explaining the rationale for the law-making. The Statute provides that for the legislative proposal, put forward by the GMD, the legal principles would be set out by the GMD Central Political Council and, hence, subject to no further scrutiny. For legislative proposals put forward by the central government, the five *yuan*, or other institutions, the legal principles of the proposal were reviewed and decided by the GMD Central Political Council itself.<sup>20</sup>

The Statute provided that the legislative yuan did not have the competence to change the legislative principle set out by the Central Political Council, though it had the competence to state its opinions at the Council. Further, the legislative bill, produced and reviewed by the *legislative yuan*, could be subject to changes when the Central Political Congress deemed this necessary, before publication.<sup>21</sup>

Art.3 of the Legislation Law in the PRC provides that the law-making must comply with the principles of China's Constitution, which are to "... uphold the ideology of socialism, ... [as well as] the leadership of the Chinese Communist Party, [and] the thought of Marx, Lenin,

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<sup>18</sup> Art.11 and 12 of the Amendment of the Legislation Law 2015.

<sup>19</sup> Art.11 and 12 of the Amendment of the Legislation Law 2015.

<sup>20</sup> Art. 5 the Statute Amendment.

<sup>21</sup> Art. 10 the Statute Amendment.

Mao Zedong and Deng Xiaoping. ....”.<sup>22</sup> The NPC interpretation of the Legislation Law provides that to uphold the leadership by the Chinese Communist Party is a Constitutional Principle of the Chinese legal system. Therefore, pursuant to the NPC, the CCP leads China by focusing on the ideology, direction and policy of China’s development and the law-making process serves the purpose of enabling the CCP to transform its party policies into legal instruments, which are then enforced through the state apparatus.<sup>23</sup> In practice the CCP initiates legislation proposals to the NPC and NPCSC for law-making. The CCP members and party secretary within the NPC and NPCSC are the main channels to express the Party opinions on the proposal and bear the obligation to develop relevant proposals into state-made laws (Wang Lifeng, 2014, 128)

A comparison of the Statute of Legislative Order 1928, and the Legislation Law 2000, reveals that the ROC and PRC both view law essentially as an instrument, on the one hand, to facilitate the GMD’s and CCP’s administration of Chinese society through rationalizing the legal structure and filling the gap of substantive legal subjects, and, on the other, to translate the ruling party’s policies into state-enforced laws. This view reflects the fact that the essence of the rule of law embodied by the Statute 1928 and the Legislation Law 2000, is not based on the formal rights-based rule of law principle, but rather based on seeing the law as an empty vessel to achieve the common social good defined and/ or compatible with the ruling party’s ideology and interests.

Why have the ROC and the PRC shared a similar instrumentality conception of the rule of law, despite their political and ideological differences? This paper argues that a China-focused legal borrowing strategy developed from the late Qing period and the continuous focus on the instrumentality of the law running through the traditional Chinese philosophies,

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<sup>22</sup> Art. 3 the Legislation Law.

<sup>23</sup> NPCSC interpretation of the Legislation Law 2000 available at [http://www.npc.gov.cn/npc/flsyywd/xianfa/2001-08/01/content\\_140406.htm](http://www.npc.gov.cn/npc/flsyywd/xianfa/2001-08/01/content_140406.htm)

GMD's San Min Zhu I and CCP's socialist ideological reinventions contribute to providing the answer.

### III China's legal borrowing strategy in the ROC and the PRC

Legal borrowing has played an indispensable role in the process of China's legal reform efforts, starting in the late Qing period. However, the Qing Dynasty's reference to the western legal system did not aim to westernize the failing Qing Court. Instead, as Zhang Zhidong (1837-1909), one of the Qing Court's conservatives advocated, things were to be done in a proper sequence:

*In order to render China powerful and at the same time preserve our own institutions, it is absolutely necessary that we should utilize western knowledge. But unless Chinese knowledge is made the basis of education and a Chinese direction given thought, the strong will become anarchist and the weak the slave (Zhang and Translated by Woodbrige, 1900, p.63).*

Zhang's argument can be summarized into his famous proposal as *Zhongxxue wei ti, Xixue wei yong*; namely, that Chinese scholarship should be the foundation and western scholarship the application. The argument was widely accepted by the Chinese elite and continued to exert an influence on Chinese society in the century that followed.

A legal reform commission was set up which followed this principle. The commission carefully examined different foreign models, including those from Japan, Europe and the US. Japan's model was recommended given that China and Japan were similar in terms of history, culture and political ideology, and because Japan had successfully transformed into a powerful constitutional monarchy as a result of introducing western-style legal reforms (Huang, 2013). The commission revised the punitive old law, the Qing Code by abolishing

the cruelty provisions. It then made efforts to make a new code, namely the *Da Qing Ming Lu*, which provided regulation for civil and commercial legal relationships that were non-existent in the Qing Code (Philip Huang, 2001, p.15). Foreign legal norms were referred to in the drafting of general principles and obligations in the new code. However, drafting on the topics of family and succession, which the Qing Code already contained, were left to Chinese scholars (Chen, 2008, p. 26).

When the ROC continued with legal reforms following the Qing Court's efforts, it also refused to "westernize" Chinese law. It separated laws regulating private relations from the previous Qing Code and enacted new laws to fill in legal gaps (Philip Huang 2001, p.56). By the time the Statute of Legislative Order was enacted, the ROC had clearly identified the principles it would adhere to in its legal modernization. These principles can be observed in the making of the ROC Civil Code -- one of the fundamental Six Codes regulating private parties' civil and commercial relations. The Civil Code purported to have referred to and absorbed a rich body of civil laws from other legal systems, in particular from German law. It purported to have taken into consideration the local customs of China and, more importantly, that it had a deliberate social character, in order to pursue collective rather than individual interests (Ching Lin Tsai et al, 1930 p.xxi).

Hu Hanming (1879-1936), one of the leading law-making figures of Republican China, indicated that the Civil Code should seek a path superior to communism and capitalism, based on San Min Zhu I (the Three Principles of the People) -- the guiding ideology of the GMD (Ching Lin Tsai et al 1930 p.xxi ). Thus, the overarching aim of the Civil Code in the Republic of China was to achieve social equilibrium between individual interests and collective interests. The jurists, or the members of the drafting committee, were determined to bring Chinese law up to the standards of what they believed to be the most advanced international legal norms. For them, the modernization of Chinese law could only be



achieved by drawing on what they considered the best from the West, while adapting this 'best' to Chinese realities (Philip Huang, 2001, p.53).

This was also the case in the PRC. In Mao's China (1949-1976), the development of the Chinese legal system referred heavily to the USSR socialist legal system and the latter's legal doctrines. China applied the socialist legality doctrine where the law should be subordinated to political flexibility. However, China showed a more obvious instrumentality conception of legal rules in comparison with the USSR (Castellucci 2012).

After the Cultural Revolution, Peng Zhong, one of the CCP reformists (1902-1997) designed and led the legal reform from 1978. Peng held a strongly socialist and legalist view of the law, under which the law was viewed as an instrument to achieve the CCP's policy goals (Cai Dingjian, 2010). In this period, the law governing China's economy was regarded as an area in which the CCP lacked the most experience. Reference was inevitably made to international legal norms by the CCP in this area. However, such reference, according to Peng Zhong, was to be made on the precondition that they served the CCP's policy goals (Potter, 2003, p.201).

A China-focused legal borrowing strategy has been developed to become one of the principles supporting the PRC legal reform. The 2008 white paper provides that the construction of the socialist rule of law must be based on the needs of societal economic development. It should not copy other legal systems and political systems but should refer to international experience by referring to the reality of Chinese society.<sup>24</sup> The same argument was provided by the 2011 White Paper, where China's reference to foreign laws was required

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<sup>24</sup> 2008 China's White Paper on the Rule of Law, part 8, available at <http://www.china-un.org/chn/zjzg/zfbps/t411158.htm>.

to enable the law-making in China to be compatible with China's context and consistent with the trends of global legal development.<sup>25</sup>

A China-focused legal borrowing strategy can be observed in the PRC's enactment of the Contract Law in 1999, which was a cornerstone in the construction of a market economy. In developing its Contract Law, China turned to international legal norms for reference, including the UNIDROIT principles (Bonell, 2005, p.38). Consequently, the 1999 Contract Law reflects a strong convergence with UNIDROIT principles in areas such as the formation and performance of contracts (Zhang and Huang, 2003). However, the PRC's reference to the principle of freedom to contract reveals its legal borrowing strategy. Art. 1 of the UNIDROIT sets out that the parties are free to enter into a contract and to determine its content. It further sets out that the principle is subject to limitations set out by mandatory rules at the national and international levels, and can be derogated in economic sectors where there is no competition.<sup>26</sup>

However, echoing the principle of freedom to contract, Chinese contract law provides to endorse the principle of voluntariness instead.

Art. 4 of the Contract Law provides that the parties shall, pursuant to law, have the right to enter into a contract of their own free will, and no unit or person may unlawfully interfere.<sup>27</sup> The principle of voluntariness in the Chinese Contract Law includes the following:

- Voluntariness in whether to enter into a contract.
- Voluntariness in with whom to enter into a contract.
- Parties voluntarily decide the content of a contract, provided the content does not violate state laws and regulations.

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<sup>25</sup> 2011 China White Paper on the Completion of Socialist Legal System with Chinese Characteristics , part 3 para4. [http://www.scio.gov.cn/zfbps/ndhf/2011/Document/1034943/1034943\\_4.htm](http://www.scio.gov.cn/zfbps/ndhf/2011/Document/1034943/1034943_4.htm).

<sup>26</sup> Art. 1 of the UNIDROIT Principles 2010.

<http://www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf>

<sup>27</sup> Art. 4 of the Contract Law 1999. English Translation available at [http://www.npc.gov.cn/englishnpc/Law/2007-12/11/content\\_1383564.htm](http://www.npc.gov.cn/englishnpc/Law/2007-12/11/content_1383564.htm).

- In the performance of contract, parties can supplement or modify contract or terminate the contract.
- Parties can by consensus decide the liabilities in breach of contract and can choose dispute resolution on a voluntary basis.<sup>28</sup>

The NPCSC, in its interpretation of the Contract Law, states that both the principle of freedom of contract, and the principle of voluntariness, are general principles of the Contract Law. It states that “in preparing the law, suggestions were made for the Contract Law to explicitly provide the principle of freedom of contract”. However, the NPC does not provide the principle of freedom of contract in the Contract Law, for the following reasons. First, it argues that the concept of freedom, as contained in the principle of freedom of contract, is difficult to handle for ideological reasons. Second, it argues that the principle of freedom of contract is not absolute, and that many contract laws provide that the principle of freedom of contract is endorsed within the legally permissible sphere.<sup>29</sup> Hence, the Chinese principle of voluntariness recognizes a limited level of freedom of contract. Therefore, it provides legitimacy for the Contract Law to impose control over the format of contract for transactions under the state planning order,<sup>30</sup> and over the choice of dispute settlement for joint ventures located in China.<sup>31</sup> Hence, the principle of freedom to contract was examined both in substance, and against state ideology (Zhang Mo, 2006, p.51). As China aimed to create a socialist market economy order, led by the state-owned sector, the freedom of contract principle was socialized to become the principle of voluntariness into its Contract Law.

Hence, the reference to international legal norms in the ROC and the PRC contain the following common features. First, international legal norms are not examined or selected on a random basis. Rather, international legal norms are carefully examined in terms of their compatibility with Chinese conditions. Second, international legal norms are referred to on

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<sup>28</sup> The NPCSC Interpretation of the Contract Law available at [http://www.npc.gov.cn/npc/flsyywd/minshang/node\\_2196.htm](http://www.npc.gov.cn/npc/flsyywd/minshang/node_2196.htm).

<sup>29</sup> *Supra*.

<sup>30</sup> Art. 38 of the Contract Law.

<sup>31</sup> Art. 126 of the Contract Law.

the precondition that the norms are compatible with China's state ideology, collective interests as well as China's incumbent legal doctrines. Third, international legal norms are instrumentally adapted to China's context and interests, and institutionalized into Chinese society, through enforcement by the government administration system and the judiciary. This shows that in both the ROC and PRC, law-makers do not focus on viewing law as an autonomous, self-productive normative system. Rather, both legal systems have adopted pragmatic and instrumental attitudes towards international legal norms, including the rule of law.

#### **IV Philosophical and Ideological origins of China's Conception of the Rule of Law**

The following analysis shows that a certain historical continuity exists in terms of the emphasis on the instrumental role of the law, from traditional Chinese philosophies to the San Min Zhu Yi upheld by the GMD, to Marxism and Socialist Reinventions upheld by the CCP.

##### **4.1 Law in Imperial China as Confucius Legalist State**

In imperial China (1600BC-1911AD), Legalism and Confucianism were the two main traditional Chinese philosophies that had a far reaching impact on Chinese Law. Legalism as represented by Han Feizi (280-233BC) holds that good ruling, to a large extent, relies on a punitive set of rules institutionalized by the ruler. Confucianism, developed by Confucius (551-479 BC), does not completely deny law, but has a narrow conception of the role played by law in society. It emphasizes self-cultivation built upon values such as *ren* (benevolence), *li* (ritual) and *de* (virtue). A harmonious society, as advocated by Confucians can only be achieved if everyone performs such values pro-actively, and the implementation of law alone, can hardly achieve this (MacCormack, 1996, p.52). Hence, law remains secondary to self-cultivation, based on values.

Despite their different attitudes towards law, Legalism and Confucianism shared one common objective: namely, to achieve effective social governance. Confucians and Legalists viewed law as an instrument for achieving this. Law was indeed viewed as an institution separate from, and in some cases inferior to, moral norms, local customs and natural principles. However, society's embrace of Confucianism in China's imperial past means that the law was widely accepted as a coercive, but secondary, instrument used by rulers to maintain order.

Throughout the history of Imperial China, Confucianism and Legalism have never been mutually exclusive but, rather, been organically combined by the rulers in their rulings (Xiao Gongquan, 2005, p.49) Imperial China, it is argued, was a Confucians-Legalist State, where it relied on practical Legalist measures for ruling and Confucian morality for legitimacy (Zhao Dingxin, 2015, p.294). Confucian Morality finds its roots in the institutions set up by the Western Zhou Dynasty (1046-771 BC). The Mandate of Heaven (*Tian Ming*) was one of these institutions, where the ruler is thought to have a divine right to rule as long as he looks after the welfare of the people. It is the ruler's good conduct that enables him to keep the power. The ruler's bad behaviour risks him being overthrown and punished from heaven in the form of natural disasters (Chesterman, 2008) The Mandate of Heaven was incorporated by Confucius in his teaching to his disciples and became one integral part of Confucianism. Confucian Morality built upon the Mandate of Heaven thus served as the cornerstone for state legitimacy throughout Imperial China (Zhao Dingxin, 2015, p.79)

While the law-making power was solely vested in the emperor, the Mandate of Heaven sets out *de facto* constraints on the exercise of power by the emperor, and the seed for the rule of law to develop closer to the European conception. However, the Mandate of Heaven does not put the ruler and the ruled on an equal footing; nor does it subject both to the binding power exerted by Heaven. Further, Heaven's punishment in the form of natural disasters influence

the way of thinking of both the ruler and ruled who, consequently, incline to conduct more correlative, thinking to associate the concept by meaningful disposition rather than rational causation analysis. The Mandate of Heaven sets out the foundation for China to develop its own tradition of humanism and historical rationalism and, in the meantime, prevents China from developing the theoretical-formal rationality in its traditional philosophies (Zhao Dingxin, 2015, p.54). The combination of Confucianism-Legalism with origins from the Mandate of Heaven, diverged imperial China's conception of law and the rule of law from that of other pre-modern societies.

#### **4.2 Law and San Min Zhu I in the ROC**

The ROC in its legal system building was faced with the pressing task of modernizing China through state building and saving China from the threat of invasion and domestic turmoil at the same time (Wu and Huang, 1937, p. 909). It saw heated debates among social elites on the way to save China. The debates centred on whether China should focus on social and cultural development, prior to rushing into republican system building, as maintained by Liang Qichao (1873-1929), or whether a constitutional parliamentary government would educate the mass population and transform Chinese society, as held by Zhang Shizhao (1881-1973). Li Dazhao (1888-1927) argued that law alone could not transform society and that the rule by law and rule by man should be combined together in the transformation process (Jenco, 2010). The debate produced few theoretical findings. Nonetheless, it shows that the elites were disenchanted with western liberalism and rights-based legal system building, and strove to find China's way.

It was the San Min Chu I (Three Principles of people) architected by Dr Sun Yat-Sen that eventually served as an ideological basis to provide legitimacy for the ROC and its legal system. The GMD advocated that the ROC should uphold the following three Principles of

Peoples: nationalism (*minzuzhuyi*), democracy (*minquanzhuyi*) and the people's livelihood (*minshengzhuyi*). Sun utilized three methods in developing this ideology: namely, returning to ancient notions of Chinese morality; returning to ancient Chinese learning; and, the adoption of western science (Linebarger, 1937, p.79).

With respect to ancient Chinese morality, a Confucian-based ethical system and traditional wisdom in social organization were strongly advocated by Sun. With respect to ancient Chinese learning, Sun believed in Chinese superiority in the social sciences, particularly in the field of political theory. With respect to the adoption of western science, Sun showed a preference for western natural science, and its methodology, over the western social sciences. This was because Sun believed that the west did not have similar customs and human sentiments as China and, therefore, was not a useful reference (Linebarger, 1937, p.79). Based on this, Sun argued that it was regressive for the ROC to be preoccupied with limiting government power (Lee, 2015). State building efforts, therefore, were made primarily towards the design of an authoritarian government system, rather than on how to impose constraints on state power (Zhao, 1996, p.29). The Three Principles of the People, hence, modernized traditional Chinese elitism into a Leninist principle of enlightened leadership (Greiff, 1985).

Sun's conception of law is fundamentally different from the individual-rights-based conception of law. He denies natural rights and de-emphasizes the role of law to maximize individual interests based on inalienable rights held by individuals. His social service theory of law argues that law is a means to harmonize social interests, and every agent and institution in Chinese society should serve for collective societal purposes. Sun referred back to Confucianism, where he stressed natural human sympathy and the sense of social duty in

the Confucianism tradition served as the basis for law and justice. He further argued that human feelings (Qing) and the rationality of matter (Li) are interwoven with the law. State made law and Li, according to Sun, are integrated into one body to bind the whole of Chinese society (Shia Ling Liu, 1966). It was in this background that the legal system in the ROC was predominantly viewed as the instrument to realize statist interests rather than individual interests. The GMD declared that law-making must serve and be consistent with GMD ideology and doctrines, on the ground that such a legal system would be able to save China from the threat of invasion and domestic chaos (Wu Jingxiong et al, 1937, p.909).

#### **4.3 Law and the CCP's Socialist Ideological Reinvention**

In the P.R.China, the CCP under the leadership of Mao Zedong (1893-1976), Deng Xiaoping (1904-1997), Jiang Zeming (b1926), Hu Jintao (b1942) and Xi Jinping (b1953) have experienced continuous ideological reinventions, with the aim of strengthening its ideological legitimacy in line with China's fast developing economic reform. These ideological reinventions have adapted Marxism and Leninism theories into China's context, and referred to traditional Confucian morality for inspiration. Both Marxism and the CCP's ideological reinventions have exerted a far-reaching impact on the conception of law and the rule of law in China.

Marxism was regarded as the original and most authoritative source for the conception of law in the jurisprudence of contemporary China (Zhang Mo, 2010). Marx recognized Law in its positive forms but focused on understanding the role of law in society, rather than on law *per se* (Barron et al, 2002, p.240). In Marx's theory of class struggle, law reflects the will of the ruling class and is an instrument used by the ruling class. Hence Marx's sociological understanding of law focuses on the instrumentality role of law in social evolution (Collins, 1982, pp. 2-14).



In Mao's ideological reinvention, the ruling class was expanded from the working class to include the peasantry and others, and the role of law was, hence, viewed as an instrument used by the ruling class to suppress and eradicate the capitalist class through a Leninist style state apparatus (Wu, 2013, p.72). During this period, Mao Zedong returned to traditional values in Confucianism, when necessary, and viewed the law as a useful tool to achieve political ends, ensuring that the formal legal system did not hinder the interests of his broader political movement (Leng, 1977, p.356). At the 12th CCP congress in 1982, Deng Xiaoping pledged to construct socialism with Chinese Characteristics.<sup>32</sup> Deng's proposal officially set China on the trajectory of an alternative development model. In this trajectory, the CCP has the determination to redress development and faces the tasks of regaining socialism in terms of common prosperity, social justice, freedom and democracy (Lin Chun, 2006, p.12)

Jiang Zeming reinvented China's state ideology with the three Represents theory, with the aim of expanding the CCP's ideological legitimacy. The theory argues that given Chinese characteristics of socialism, the productivity of society is no longer represented by the working class. The CCP represents the development trends of all advanced productive forces, the orientations of an advanced culture, and the fundamental interests of the overwhelming majority of the people of China.<sup>33</sup> At the 15<sup>th</sup> CCP Party Congress in 1997, Jiang Zemin proposed that rule by law should be the core component of a socialist legal system and formally started the CCP's efforts to theorize the socialist legal system. It provides that:

Ruling the country by law means that the broad masses of the people, under the leadership of the Party and in accordance with the Constitution and other laws, participate in one way or another and through all possible channels in managing state affairs, economic and cultural undertakings and social affairs, and see to it that all work of the state proceeds in keeping with law, and that socialist democracy is gradually institutionalized and codified so that such institutions and laws will not

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<sup>32</sup> Deng Xiaoping Opening Speech on the CCP 12<sup>th</sup> Congress in 1982, available at [http://www.china.com.cn/17da/2007-10/10/content\\_9029167.htm](http://www.china.com.cn/17da/2007-10/10/content_9029167.htm).

<sup>33</sup> Jiang Zeming Speech on the 80<sup>TH</sup> Anniversary Conference of the CCP in 2001, available at <http://www.china.com.cn/chinese/2001/Jul/42177.htm>.

change with changes in the leadership or changes in the views or focus of attention of any leader.

However, the rule by law emphasized setting out institutionalized rules for governance and particularly in ensuring that the Party's basic policies were achieved successfully. It did not touch on the issue of imposing meaningful constraints on the CCP as the ruling Party (Peerenboom, 2001). The main challenge encountered by the CCP in the theorization process is the tangled relationship between the Supremacy of the CCP in the law-making process based on the state ideology on the one hand, and the CCP's increasingly need for subjecting itself to a rules-based system in order to strengthen its regulatory capacity as a ruling party on the other.

In response, Jiang Zeming highlighted that it is essential to unify the relationship among the CCP leadership, the People's Congress System and the rule by law:

In ruling the country by law, we can unify the adherence to Party leadership, the development of people's democracy and do things in strict accordance with the law, thus ensuring, institutionally and legally, that the Party's basic line and basic policies are carried out without fail, and that the Party plays the role of the core of leadership at all times, commanding the whole situation and coordinating the efforts of all quarters.

In 2003, Hu Jintao proposed the "scientific outlook of development theory". It aimed to tackle the widening social discrepancies in Chinese society by, among other things, improving the legal system. This ideological innovation interpreted Confucian values through a socialist lens and pledged to build a harmonious society (*hexie shehui*) (Wu, 2013, p.74).

However, the CCP's governance of Chinese society relied mainly on traditional grievance processing (Gallagher, 2005). Law, in the process, continued to be conceived as one instrument to achieve the CCP's goal of stability, and ideological control was imposed onto the functioning of the legal system towards this goal (Minzner, 2011).

In the CCP's annual national conference on political-legal work attended by judges and procurators in 2007, Hu Jintao urged the attendees to uphold the Three Supremes, namely, the Supremacy of the CCP causes, the Supremacy of the People's Interests and the Supremacy of the Constitution and Laws. The Supremacy of CCP causes means that the socialist rule of law is to serve the socialist construction led by the CCP. The Supremacy of People's Interests is embodied mainly through the National People's Congress system. The Supremacy of the Constitution and Laws refers to the fact that no organization or individual can have a prerogative that exceeds what is provided by laws, and must comply within the law.<sup>34</sup>

The Three Supremes can be regarded as a continued effort made by the CCP in its theorization of the socialist legal system. Chinese scholars' theoretical explorations centre on the argument that there are no conflicts of interests among the CCP, the National People's Congress System and the Law, as all three are concerned with the same goal of representing and achieving the people's interest. First, The CCP as the leading party is determined to serve the people. In order to achieve this, it must act within the law. Second, the socialist ideology determines that the PRC's constitution and laws serve the people and are made under the leadership of the CCP. Third, to uphold the supremacy of the Constitution requires the upholding of the supremacy of the CCP and people's interests (Zhu Liheng 2009). Despite the theoretical vagueness, the key argument used to justify the Three Supremes lies in the conception of law as an instrument to serve the people. Such an instrumental conception is then used to connect the CCP, the NPC and the state-made law, under one framework.

At the 3<sup>rd</sup> Plenum of the 18<sup>th</sup> CCP Central Congress, the CCP under Xi's leadership issued the *Decision on Some Major Issues Concerning Comprehensively Deepening the Reform* and

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<sup>34</sup> Dong Hua, comment on Upholding the Three Supremes and Developing the Scientific Outlook to a New High Level, available at <http://old.chinacourt.org/html/article/200812/04/333915.shtml>

pledged to strengthen the rule of law construction in China.<sup>35</sup> At the 4<sup>th</sup> Plenum of the 18<sup>th</sup> Central Congress in 2014, the CCP issued the *CCP Central Committee Decision Concerning Several Major Issues in Comprehensively Advancing Governance according To Law* (Decision). The Decision aims to establish a system of socialist rule of law, which is composed by a complete system of laws and regulations; an effective law enforcement system; a system to supervise the rule of law; a system to safeguard the rule of law; and, a complete Intra-CCP rules system.<sup>36</sup>

The CCP's Decision reveals the determination to expand its socialist legal system theorization building. To this end, two observations can be made. First, the CCP proposes to build the principle of "*Liang Fa shi Shan Zhi de Qian Ti*" (*good law serves as the precondition for good governance*). The principle was originally developed from the work of Wang Anshi (1021-1086 AD), a prominent politician and thinker in the Song dynasty (960-1127AD). Wang Anshi argued that "*Li Shan Fa Yu Tian Xia, Ze Tian Xia Zhi; Li Shan Fa Yu Yi Guo, Ze Yi Guo Zhi*" (*make good law in the world, then the world can be governed; make good law in a country, then the country can be governed*). Wang Anshi advocated this principle to be upheld by a ruler who had the quality as a Jun Zi (Gentry) and highlighted that Gentry had eternal virtues not to be changed by environment.<sup>37</sup>

The principle of *Liang Fa and Shan Zhi* is regarded as the foundation for China's substantive rule of law discourse. However, the CCP's definition of good law is not restricted to the morality of law as advocated by Wang Anshi. Nor does the definition aim to develop a rights-based internal morality of law, supporting the western conception of the rule of law.

<sup>35</sup> CCP Decision on Some Major Issues Concerning Comprehensively Deepening the Reform CCP, available at [http://www.china.org.cn/chinese/2014-01/17/content\\_31226494\\_3.htm](http://www.china.org.cn/chinese/2014-01/17/content_31226494_3.htm).

<sup>36</sup> CCP Decision Concerning Several Major Issues In Comprehensively Advancing Governance According To Law, available at [http://news.xinhuanet.com/politics/2014-10/29/c\\_1113033772.htm](http://news.xinhuanet.com/politics/2014-10/29/c_1113033772.htm).

<sup>37</sup> Chapter on Zhou Gong, in Wang Anshi Work, available at <http://www.readers365.com/8dajia/html07/mydoc07067.htm>.

The Decision provides that a law is good when, substantively, it is based on people's interests; serves the people; is consistent with socialist core values<sup>38</sup>; is compatible with the Constitution; and when formally, it is made through open, fair and just law making procedures; and is made in a timely, systematic, precise and effective manner.<sup>39</sup> The CCP, clearly, calls for a formal rule of law construction within its legal system. However, in its formulation of a substantive rule of law discourse, it awaits to be seen how core socialist values will be developed through political theories compatible with China's context. At this stage the principle of serving the people plays a key role in China's substantive rule of law discourse. This conception originates, in a fundamental way, from Marx's instrumental conception of law and serves, in a functional manner, to strengthen the legitimacy of both the socialist legal system and the CCP.

Second, the CCP aims to consolidate the formal rule of law construction by strengthening its intra-party disciplinary rules system. The CCP has started its intra-party disciplinary system reconstruction in 2012 and striven to regulate the Party with a more stringent rules-based intra-party disciplinary system, following the 18<sup>th</sup> CCP Congress 6<sup>th</sup> Plenum in October 2016.

<sup>40</sup> Such a reform is deemed necessary as the CCP, as a ruling party, requires an institutionalized and rules-based system to impose constraints on the exercise of power by party members; support the sustainability of the CCP; and improve the compatibility of the CCP rules and the state-made law (Wang Zhengming and Shi Xingzhou, 2016, p.83). Such a reform is deemed beneficial to China's construction of the rule of law, because the CCP intra-party rules are regarded as a more effective tool to curb the Party's exercise of power, which would then, effectively, safeguard the equality of law within the state law system (Wang

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<sup>38</sup> Pursuant to the CCP's 18<sup>th</sup> Congress 4<sup>th</sup> Plenum in 2014, the CCP has proposed the socialist core value systems to include "Prosperity, Democracy, Civilization, Harmony, Freedom, Fairness, Justice, the Rule of Law, Patriotism, Dedication, Integrity and Friendship" available at <http://theory.people.com.cn/GB/40557/120709/>.

<sup>39</sup> Same as 35.

<sup>40</sup> The CCP Intra Party Supervision Rule, adopted and publicized at the CCP 18<sup>th</sup> Congress 6<sup>th</sup> Plenum in 2016, available [http://news.xinhuanet.com/politics/2016-11/02/c\\_1119838242.htm](http://news.xinhuanet.com/politics/2016-11/02/c_1119838242.htm).

Liming, 2016, p.31). Hence, the rebuilding of the intra-party disciplinary system can be viewed as an effort made by the CCP to disentangle the CCP, the National People's Congress and the state-made law from their origin. It waits to be seen to what extent the development of the intra-party rules system and its linkage with state-made law, would be subject to the rule of law. Nonetheless, the CCP has chosen to turn away from state-made law and return to its intra disciplinary system, to tackle its rule of law challenges. This reflects the fact that the CCP has not shifted from the conception that the state-made law functions as an instrument through which to channel policy goals. While the CCP has expanded its rule of law discourse, its conception of the instrumentality of the law continues to dominate thus far.

In reviewing legal modernization reforms carried out in the ROC and in the PRC, it becomes clear that the Chinese favouritism towards the instrumentality of the law is historical and continuous. The Confucianism-Legalism tradition sets China apart from other pre-modern societies, with respect to the understanding of legality, the internal morality of the law and the social roles of the law. This fundamental, instrumental conception of the law has set the philosophical and historical basis for the GMD and the CCP to strengthen the legitimacy of their instrumental conception of the law and expand their construction of the rule of law discourse. The GMD and the CCP's continuing instrumental conception of the law has, historically, led China on a rule of law path which has diverged from the west. The historical legacy of this development has strengthened and solidified the conception of law as an instrument, in Chinese society. The interaction of Confucianism and Legalism, and the rule of law construction, in both the ROC and the PRC have shaped the rule of law discourse to centre on the instrumentality of the law. This, in turn, makes the instrumental role of the law a strong feature of China's legal culture.

## V Conclusion

Since the PRC started its market oriented reform, it has made massive efforts to enact, amend or revoke laws, with the aim of building up a structured and comprehensive legal order. Despite its rapid enactment of numerous laws, China's rule of law has made little progress in the eyes of the international legal community.

This experience is, however, not new in China. Similar efforts were made by the GMD in the ROC and similar criticism was received from the international legal community regarding its rule of law.

By comparing the Statute of Legislative Order of the ROC in 1927, and the Legislation Law of the PRC in 2000, this paper shows that there exists a strong similarity with regard to the conception of the rule of law during these two periods. The instrumental role of the law was treated as the predominant content of the rule of law. The formation of such a local perception, on the rule of law, is largely due to the historical continuity of China's legal borrowing strategy on the one hand, and the favour over law's instrumentality running through Chinese legal culture in the past hundred years on the other.

However, such a strong emphasis on the instrumental nature of the law poses challenges to both China's and the world's sustainable development. First, there is a limited and ineffective role played by law in China's social governance. Second, the law-making process in China becomes vulnerable to manipulation by interest-driven agents within the process. It waits to be seen how these challenges will be tackled by China's on-going rule of law construction. China's rule of law discourse does not, however, take place in a vacuum. Hence, critical analysis on the historical and contextual factors which have shaped China's rule of law conception in its modernization efforts, can establish the basis for us to better understand the embeddedness which continues to guide, shape and influence the rule of law in China.

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