

## **“China’s Long March Toward Rule of Law” or “China’s Turn Against Law”?**

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In 2002, Professor Randall Peerenboom published a major work on legal reforms in post-Mao China, entitled “China’s Long March Toward Rule of Law”. In 2011, Professor Carl Minzner published a major article on trends of legal development in China in the first decade of the 21<sup>st</sup> century, entitled “China’s Turn Against Law”. Has China really embarked upon a “long march toward Rule of Law” since Deng Xiaoping initiated the era of “reform and opening” in the late 1970s? If so, has there been a regression or retrenchment in Rule of Law developments in China in recent years?

These questions cannot be properly addressed without first reflecting on what methodology or approach we should adopt in describing and assessing legal developments in contemporary China. This paper therefore consists of two main parts. Part I engages in methodological reflections on the study of contemporary Chinese law as an exercise in comparative law, by reviewing and commenting on some relevant writings of leading scholars in the field. Part II of the paper then proceeds to evaluate the legal reforms in post-Mao China and recent trends in the Chinese legal system.

### I

Edward Said’s work on “Orientalism” has posed important challenges for Western scholars who study societies in the non-Western world. It raises the question of whether it is possible for Western scholars to study non-Western societies in an objective manner, or a way free of cultural bias and prejudice. Orientalism is relevant to the study of comparative law. The application of Orientalism to the study of comparative law, particularly Chinese law, was considered in detail by Professor Teemu Ruskola in an article published in 2003 on “Legal Orientalism”. This

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\* Faculty of Law, University of Hong Kong. This is a conference paper presented at Leiden University in December 2012. Endnotes have not been completed.

article provides a good starting point for our methodological reflections on the study of contemporary Chinese law.

Ruskola points out that in Western scholarship, there is often a negative perception regarding the existence or practice of law in Chinese history and in contemporary China (which implicitly condemns the Chinese as uncivilized), and this perception is shaped by what he calls "legal orientalism". Ruskola argues that law is an important element of the cultural identity of the West and of its self-understanding. Legal orientalism involves projecting onto the Other (in this case China) an image of the Other's legal practice that is opposite to that of the West. Thus whereas the West (or the Westerner) is a legal subject and practices the Rule of Law, China (or the Chinese) is a "non-legal non-subject"<sup>1</sup> and practices "lawlessness."<sup>2</sup>

To use Ruskola's own words: "Today, many American policy-makers still view the Chinese as essentially law-less and unindividuated subjects of Oriental Despotism, the latest despot being the Communist Party, rather than the imperial state."<sup>3</sup> "Western representations of Chinese law tell us far more about the Western idea, and ideology, of law than they do of any equivalent (or even nonequivalent) phenomenon in China."<sup>4</sup> Ruskola discusses the "legal construction of the national subject" and emphasizes "law as constitutive": "[L]aw participates in the construction of our social worlds and, ultimately, of ourselves."<sup>5</sup> His article "sketches how the Euro-American legal subject has imagined its relationship, in various historical contexts, to its Oriental counterpart, the Chinese non-legal non-subject,"<sup>6</sup> and analyzes "how the West has constructed its cultural identity against China in terms of law."<sup>7</sup> In his view, this exemplifies "Orientalism as a discourse [which] entails the projection onto the Oriental Other of various sorts of things that we are not."<sup>8</sup> Thus "legal subjectivity has constituted a standard for measuring non-Western societies—here, China's—civilizational fitness to enter into a law republic."<sup>9</sup>

There is probably no disagreement among scholars that "legal orientalism" should be avoided as far as possible in the study of Chinese law or law in any non-Western society. The real question is what is the proper approach to be adopted in such study, and how not to be influenced by legal

orientalism. Here Ruskola recognizes the impossibility of finding an Archimedean point of observation<sup>10</sup> in the study of foreign law. Following Gadamer's hermeneutics, he acknowledges that all understanding is situated,<sup>11</sup> belonging to a tradition is a condition of hermeneutics,<sup>12</sup> and no researcher can ever be completely free of bias or prejudice. Prejudice can only be managed, not eliminated.<sup>13</sup> Hence Ruskola proposes an ethics of Orientalism<sup>14</sup> for the purpose of comparative law.

According to such ethics of Orientalism, we may begin our study of the foreign object with preconceptions and legal categories derived from our own tradition, but they are no more than a provisional point of departure,<sup>15</sup> to be questioned by ourselves in the course of our research and to be revised over time. This is how we should encounter and enter into relations with the other, and as our understanding deepens and our horizons broaden in the course of the encounter, what Gadamer calls a fusion of horizons<sup>16</sup> becomes possible. A corollary of this approach in the study of Chinese law is that whether we articulate our criticisms in terms of human rights or some other discourse, we must not proceed to condemn China without a hearing.<sup>17</sup>

The ethics of orientalism as formulated by Ruskola thus attempt to avoid ethnocentrism and to achieve a sympathetic understanding of the other society or culture concerned. As applied to the study of foreign law, this approach invites the Western researcher to reflect on the Western concept of law and other Western legal categories before applying them to describe or assess law-related phenomenon in a non-Western society like China. In another article, on "Law without law, or is Chinese law an oxymoron?", Ruskola points out that in the study of Chinese law, it may not be appropriate to define the Rule of Law as the opposite of the Rule of Men. "[T]he radical rule-of-law/rule-of-men distinction that structures so explicitly or implicitly so much of our comparative understanding of Chinese law is simply not a helpful analytic framework."<sup>18</sup>

This is because traditional Confucian China believed in the rule of men of moral virtues, and contemporary socialist China also believes in the importance of great leaders who understand what path China should

take.<sup>19</sup> 'Insofar as the definition of the rule of law is a negative one – the rule of law *means* –not the rule of men– this dichotomous understanding threatens always to condemn –Chinese law– to the status of an oxymoron,<sup>20</sup> and 'China will remain banished to indefinite legal alterity.'<sup>21</sup> Thus Ruskola proposes that 'we must deconstruct the radical normative contrast between the rule of law and the rule of men, and use more modest and definable concepts instead.'<sup>22</sup> He also suggests that the category of 'law' should be better understood as 'an unstable mix' of rule of law and rule of men.<sup>23</sup> 'Ultimately, the rule-of-law/rule-of-men distinction is too moralistic and too black-and-white to be of analytic utility.'<sup>24</sup>

Ruskola's critique of the use of a vague and Western-centric notion of the Rule of Law in the study of Chinese law is useful in reminding us that the notion of the Rule of Law and other concepts in Western jurisprudence need to be carefully analysed before being employed in evaluating law-related phenomena in traditional and contemporary China. However, his idea that law consists of 'an unstable mix' of rule of law and rule of men does not completely answer the question of what is the rule of law. Nor is it an adequate answer to the question of what is the appropriate conceptual framework to be used in studying Chinese law from a comparative law perspective. This question has been tackled by Professor Donald Clarke in 'Puzzling observations in Chinese law: When is a riddle just a mistake?' (in C. Stephen Hsu (ed), *Understanding China's Legal System: Essays in Honour of Jerome A Cohen* (2003)), to which we now turn.

Clarke's essay contains thought-provoking reflections on the methodology for the study of comparative law and Chinese law. He points out that in describing and evaluating law-related phenomena in China, some kind of 'model or paradigm or ideal type' must be presupposed, no matter whether the researcher is conscious of it or not. He suggests that the dominant model in Western scholars' study of Chinese law is what he calls the 'Ideal Western Legal Order' (IWLO) model or approach, which uses an idealized version of the legal order in Western society as the standard for the purpose of viewing and assessing law-related phenomena in China. The adoption of this model often results in observations about deficiencies, dysfunctions and aberrations in the

operation of the Chinese legal system. Clarke suggests that alternative models can and should be explored that can explain the same phenomena not as aberrations but as normal and natural features of the operation of the alternative model, and that the development of such alternative models can contribute to a better understanding of Chinese law.

As Clarke puts it: “[T]he IWLO approach assigns an end state to the Chinese legal system and evaluates it both statically (how far away is it?) and dynamically (in which direction is it going?) with reference to this end state.”<sup>25</sup> He identifies two assumptions behind the IWLO approach:

The first assumption is that China *has* legal institutions. In other words, the IWLO approach assumes that we can talk meaningfully about Chinese law and institutions; that China has a set of institutions that can meaningfully be grouped together under a single rubric, and that it is meaningful (i.e., it clarifies more than it obscures) to label this rubric “legal” the same word we use to describe a set of institutions in our own society. Thus, even to embark on the study of something called “Chinese legal institutions” involves an *a priori* assumption that China has a set of institutions largely similar to the institutions we call “legal” in our society. More specifically, the very act of naming certain institutions involves drawing conclusions about them before the investigation has even begun. If we call a certain institution a “court,” then we are claiming that this word conveys to the listener a more complete and accurate picture of the institution in question than some other word.<sup>26</sup>

According to Clarke, the IWLO approach involves also a second assumption, which is that Chinese legal institutions are “developing” in the sense of “moving from a more primitive and inferior stage to become something similar to the ideal Western legal order.”<sup>28</sup>

What, then, are the alternative models or approaches which would have greater explanatory power than the IWLO model, or which would amount to “a more internally consistent model of the Chinese legal system that does not require the use of imported and possibly misleading categories?”<sup>29</sup> Here Clarke recognizes that there does not exist any “single ‘right’ model,”<sup>30</sup> and that even among the Chinese themselves

there are struggles taking place regarding what legal model China should adopt.<sup>31</sup> He also points out that "different models may be appropriate for different fields of law, or even for the same field at different times."<sup>32</sup> Clarke does venture in his article to discuss some possible models that might deserve to be considered in the context of several legal domains, including contract law, constitutional law, administrative law.

For example, Clarke suggests that one possible way of understanding the Chinese constitution is to regard it as a declaration of policies rather than as a legally binding document. From this perspective, "violations" of the constitution would not be legally significant, and can even be considered "normal or insignificant". As regards the Chinese system in which the authority of different state organs to promulgate regulations is not clearly defined and conflicts among regulations issued by different bodies often exist, Clarke suggests that it is possible that in the Chinese system, what is legally significant is which body has the power to enforce rules, rather than which body has the power to make rules, and the allocation of rule-making power is a political decision rather than a legal question. Viewed from this perspective, "it is not a sign of immaturity or inadequacy of the system that China has no effective rules governing lawmaking competence."<sup>33</sup>

Clarke himself recognizes the limitations of these alternative models which he puts forward in his essay. In particular, he is aware that some Chinese people in the legal field concerned may not themselves accept the models which Clarke is proposing, and may actually be pushing for Chinese legal institutions to move towards what Clarke calls the ideal Western legal order. For example, he points out that "plenty of Chinese inside and outside the community of legal specialists are not content with a model that denies legal significance to China's constitution. "They *want* it to have legal significance and are working to ensure that it does."<sup>34</sup> In the context of administrative law, Clarke also recognizes that "[t]here are a number of actors in China that are not satisfied with a descriptively more accurate model. They *want* the model contained in the IWLO approach, and they want to change the way China operates until that model is in fact descriptively quite accurate."<sup>35</sup>

The issues raised by Clarke are indeed fundamental issues in the study of

Chinese law from a comparative law perspective. Clarke's major contribution in this regard lies in his pointing out that many researchers unconsciously adopt the IWLO approach, his describing how the IWLO model is used in practice, and his raising the question of whether the IWLO model is appropriate in the study of Chinese law and comparative law. However, it seems that Clarke is less successful in suggesting viable alternative models or paradigms for such study. As he himself recognizes, the models which he formulates as examples of alternative models may not be acceptable to the Chinese themselves. Although he recognizes this, he has not explored *why* many Chinese are not or would not be happy with such alternative models and may actually prefer the IWLO itself as a model which the Chinese legal system should aspire to and develop towards. Furthermore, the alternative models he proposes may actually be inconsistent with the texts of Chinese law itself; he has not investigated into the texts of Chinese law and what legal model they presuppose or affirm. For example, the Chinese constitution itself claims to be a fundamental law that is binding not only on citizens but also on the government and political parties. The Law on Legislation enacted by the Chinese National People's Congress actually attempts to delineate the scope of the law-making power of various state organs. These constitutional and statutory provisions do not sit comfortably with the 'alternative models' formulated by Clarke.

Another possible problem in Clarke's critique of the IWLO model is that it might actually increase the risk of 'legal orientalism'. For example, Clarke raises the questions of whether China really has 'legal' institutions, and whether China really has 'courts' and 'judges'. He suggests that if we do not regard the judicial institutions and personnel in China as courts and judges and impose on them the Western conceptions of courts and judges, then the question of judicial independence does not arise, and it is not an aberration for Chinese 'shenpanyuan' (translated as adjudicators or judges) not to be independent in their decision-making. Clarke writes:

'If we see an oak tree without bark, we would characterize it as 'lacking' bark. We would not so characterize a concrete (or even a wooden) telephone pole, although it is equally barkless. To return to the Chinese legal system, it is often said that Chinese judges lack judicial

independence. The perception of this lack stems from an interpretation of the institution of Chinese courts and judges that sees them as embryonic courts and judges in ideal Western legal order. If we interpreted the institution of Chinese courts and judges in another light -- for example, if we saw them as developing into professional basketball teams -- we would discern a completely different set of shortcomings, such as height and athletic ability.<sup>36</sup>

However, these ideas are inconsistent with the self-understanding of the Chinese people themselves. The Chinese believe that they have law-making institutions, courts and judges, and the Chinese themselves consider the Chinese term for courts (*fayuan*) to be a direct translation of and equivalent of the word "court". There is also a Chinese term (*faguan*) which is a direct translation of the word "judge". Many members of the Chinese legal community and many Chinese citizens believe that the question of judicial independence is a real question for contemporary China, and believe that they would be better off if courts and judges can become more independent. In these circumstances, what is the value of an "alternative model" which suggests that there are no real courts or judges in China and thus no question of judicial independence in China? Would this not fall into the trap of "legal orientalism"?

Let us now turn to yet another approach to the study of Chinese law, which is that adopted by Professor Randall Peerenboom. Peerenboom, like Clarke, has written extensively on contemporary Chinese law, but for our present purposes we will focus on that part of his work which touches on methodological issues, particularly his article on "The X-files: Past and present portrayals of China's alien legal system". As he points out at the beginning of this article, "Chinese legal scholars face a daunting challenge simply to obtain and present an accurate view of the legal system. But we face an even more daunting challenge in trying to analyze and conceptualize such changes."<sup>37</sup> How then should we go about doing this?

Peerenboom advocates a balanced approach to the study of contemporary Chinese law, instead of overly negative depictions and assessment of the Chinese legal system. He attaches considerable weight to the self-understanding on the part of the Chinese people, particularly the

legal community, regarding what legal developments in contemporary China are intended to achieve. Instead of privileging elements of Chinese tradition, culture or philosophy that seem to be inconsistent with the concept of the Rule of Law, Peerenboom emphasizes economic, political and social factors that are relevant to Chinese legal developments, as well as the forces at work in the globalized world today that would lead to convergence among legal systems of different countries. He rejects the view that China does not have a real "legal system", and argues that China is clearly moving toward the Rule of Law in the "thin" sense.

Peerenboom points out that there is "a tendency in much foreign scholarship to portray China's legal system in excessively negative terms and to unduly dismiss developments and trends suggesting that China is moving toward some form of rule of law."<sup>38</sup> "The biggest problem was the assumption, sometimes implicit and sometimes explicit, that a socialist system that rejected liberal democracy could not be serious about legal reforms and rule of law."<sup>39</sup> In response, Peerenboom makes "a plea for moderation"<sup>40</sup> and "suggest[s] that what is needed is a more balanced approach, informed by a broader historical and comparative perspective."<sup>41</sup> It is "preferable to at least attempt to present an impartial and even-handed account of reforms rather than simply seizing whatever explanation would put the legal system and the ruling regime in the worst light."<sup>42</sup> Peerenboom also cautions against "exaggerat[ing] the differences between legal systems and í mak[ing] a system appear more alien and dysfunctional than it is, particularly with respect to the contemporary system."<sup>43</sup>

As regards the question raised by leading scholars of Chinese law such as Stanley Lubman and Donald Clarke regarding whether China today really has a "system" that deserves to be called a "legal" system, Peerenboom disagrees with Clarke's suggestion that there can be "alternative models" to describe, understand and evaluate law-related phenomena in China. "One of the problems in heeding Clarke's warning about relying on rule of law as a benchmark is that there is no other credible theory that better describes the current system."<sup>44</sup> "In the absence of a better theoretical framework to describe China's contemporary system than as a legal system, í the better approach would seem to be to describe what exists in China today as a legal system."<sup>45</sup>

The main conceptual apparatus used by Peerenboom to study the legal system in contemporary China is what he calls the "thin" theory or the "thin" conception of the Rule of Law, as distinguished from "thick" conceptions of the Rule of Law. The thin conception emphasizes the formal characteristics and procedural aspects of the existence and operation of laws and legal institutions, while thick conceptions of the Rule of Law link the law to particular forms of economic, social and political systems. For example, the dominant thick conception of the Rule of Law in the Western world today is the liberal democratic version of the Rule of Law, which sees the recognition and protection of civil liberties, human rights (particularly civil and political rights) and fundamental freedoms as an essential ingredient of the Rule of Law.

Peerenboom explains the thin conception of the Rule of Law as follows.

[A] thin theory stresses the formal or instrumental aspects of rule of law – those features that any legal system allegedly must possess to function effectively as a system of laws, regardless of whether the legal system is part of a democratic or non-democratic society, capitalist or socialist, liberal or theocratic. Although proponents of thin interpretations of rule of law define it in slightly different ways, there is considerable common ground, with many building on or modifying Lon Fuller's influential account that laws be general, public, prospective, clear, consistent, capable of being followed, stable, and enforced.<sup>46</sup>

Apart from distinguishing between thin and thick conceptions of the Rule of Law, Peerenboom also recognizes the distinction between Rule by Law and Rule of Law: "Legal systems in which the law is only or primarily a tool of the state are best described as rule by law, whereas legal systems in which the law imposes meaningful limits on state actors merit the label rule of law."<sup>47</sup>

The next question is whether the state of the legal system in contemporary China satisfies the requirements of at least the thin theory of the Rule of Law. Peerenboom writes: "China seems to be moving toward some form of rule of law, but not the liberal democratic form of

rule of law.<sup>48</sup> "There have been continuous attempts at major legal reform for the last twenty years, with many reforms being modeled on Western laws and institutional arrangements. But shortcomings [in the Chinese legal system] are to be expected. Establishing a modern rule of law system takes time – several centuries in the case of European countries. The government is aware of the many problems in the legal system and is taking steps to address them."<sup>49</sup>

Apart from relying on his own assessment of legal developments in post-Mao China, Peerenboom also refers to the state of the debate in China itself about the direction of legal development. He notes that although "there is considerable debate about competing thick conceptions of rule of law (in which what Peerenboom calls "liberal democratic", "statist socialist", "neo-authoritarian" and "communitarian" schools of thought contend against one another),<sup>50</sup> there seems to be a consensus among the Chinese that a "thin" Rule of Law is good for China, is what China needs and is what legal reforms should try to achieve. It is generally accepted that China should build a legal system that satisfies the requirements of the thin conception of the Rule of Law, or "a system in which law is able to impose meaningful restraints on the state and individual members of the ruling elite, as captured in the rhetorically powerful if overly simplistic notions of a government of laws, the supremacy of the law, and equality of all before the law."<sup>51</sup>

Peerenboom's call for a balanced approach to the study of legal developments in contemporary China that takes into account historical and comparative dimensions and the self-understanding of the Chinese people regarding what they are doing deserves to be supported. It steers clear of legal orientalism, which tends to dismiss the idea that China has a genuine legal system or is practicing or moving toward the Rule of Law either on the ground that the Rule of Law is absent in the Chinese cultural tradition or on the ground that China is ruled by the Chinese Communist Party. The distinction drawn by Peerenboom between thin and thick conceptions of the Rule of Law is useful particularly for the purpose of studying legal reform in an authoritarian regime like China's. Peerenboom is correct in pointing out that if the liberal democratic conception of the Rule of Law – as a thick conception of the Rule of Law – were to be applied to assess the state of Chinese law and the

Chinese legal system, it would inevitably produce an overly negative assessment, and ignore the genuine progress that has been made in the development of laws and legal institutions in post-Mao China. A sympathetic understanding of what the Chinese people have been doing in reconstructing their legal system after the leftist excesses of Maoist rule and the terror of the Cultural Revolution era can and should take as its point of departure the thin theory of the Rule of Law.

Peerenboom's study of Chinese legal reform hinges not only on the distinction between the thin and thick conceptions of the Rule of Law, but also the distinction between Rule of Law and Rule by Law. Peerenboom recognizes that Rule of Law, unlike Rule by Law as an instrument of the state or party-state, requires the power of rulers to be subject to meaningful restraint. One of his main theses is that contemporary China is moving towards Rule of Law in the thin sense, while his adversaries would argue that the Chinese Communist Party (CCP) is practicing, intends to continue to practice, and is only capable of practicing Rule by Law, and that the CCP has no intention of subjecting itself to law, or to allow the development of legal and judicial institutions strong enough to challenge the supremacy of and monopoly of power by the CCP. Peerenboom's work does not close, but only opens, the debate on these questions.

## II

The trajectory of legal reform in post-Mao China has been well documented. Putting aside the debate about whether China is moving towards the Rule of Law or only Rule by Law, there is no doubt that China has moved from a state with hardly any law (as of the end of the Cultural Revolution era in 1976) to a state in which, as was officially declared in 2011, a "socialist system of laws with Chinese characteristics" has been established, and a state with sizeable legal institutions, including law-making authorities and courts at national, provincial and local levels, large numbers of judges, procurators, lawyers, legal aid workers, law schools, government organs charged with promoting legal knowledge among members of the public, etc. It is not possible in this essay to cite the huge amount of evidence for what Peerenboom calls "China's Long

March Toward Rule of Law. It may suffice to cite the conclusions reached by several leading scholars of contemporary Chinese law.

In Professor William Alford's view, "The People's Republic of China's (PRC) post-Cultural Revolution project of legal development is an event of epic historic proportions. No other major modern society has endeavored in so short a time to reconstruct its legal system in so extensive and novel a fashion."<sup>52</sup> In a similar vein, Professor Benjamin Liebman writes: "Over the past thirty years China has engaged in what is perhaps the most rapid development of any legal system in the history of the world."<sup>53</sup> Even Professor Stanley Lubman, who published in 1999 his book on "Bird in a Cage: Legal Reform in China After Mao", in which he suggests that "China does not have a legal *system*" (emphasis in original)<sup>54</sup> and describes himself as "a cautious pessimist about the future of legality in China",<sup>55</sup> acknowledges in the same book as follows:

"The accomplishments of the legal reform to date are impressive given the need to overcome the burden of Chinese tradition, thirty years of Maoism, and the hostility of the institutional environment in which reform must take place. Law has gained more importance than it has ever possessed in Chinese history. China's emergent legal institutions have begun to define and protect expectations arising out of economic transactions among Chinese citizens, to settle an increasing number of disputes among them, and to generate new conceptions of legal rights."<sup>56</sup>

Given that post-Mao China has indeed made significant progress in the development of its legal system and there has indeed been an attempt to move towards at least the thin form of the Rule of Law as suggested by Peerenboom, the next question to be tackled is whether there has been in recent years a "turn against law" as suggested by Minzner's article mentioned at the beginning of this paper. The remainder of this paper will examine Minzner's thesis and explore whether there has been retrogression or retrenchment in Chinese legal developments in recent years.

Minzner's main thesis is that in the first decade of the 21<sup>st</sup> century, the Chinese party-state changed the direction of, or turned away from, the

legal reforms it introduced in the last two decades of the 20<sup>th</sup> century because of concerns about social stability and in response to the rising numbers of petitions and protests by citizens with various kinds of grievances, including dissatisfaction with courts' decisions. Instead of emphasizing adjudication of civil cases in accordance with legal norms, the new policy has been to encourage mediation by courts (in addition to extra-judicial mediation or mediation by people's mediation committees and other mediation efforts coordinated by government bodies), and to require courts to make decisions that are acceptable to the litigants and public opinion and that minimize social discontent, even if such mediation effort and judicial decision-making involves departure from what legal norms require. In Minzner's view, this new policy or trend can be regarded as the party-state's "politicized rejection"<sup>57</sup> of many of the legal reforms it introduced in the last two decades of the 20<sup>th</sup> century, and amounts to what Minzner calls a "turn against law". It has adverse implications for the long-term development of the Chinese legal system and also for social stability in the long term.

Minzner also tries to situate this trend in China in the context of what he perceives as a worldwide trend to promote alternative dispute resolution (ADR), including developments in developing countries which have imported Western legal models of legality and subsequently found that they are not so suitable to their indigenous circumstances after all. There is indeed "a global reconsideration of legal norms and institutions imported or transplanted from the West."<sup>58</sup> However, Minzner argues that the "turn against law" in China can be distinguished from apparently similar cases elsewhere because in the case of China, the phenomenon is "a top-down authoritarian response motivated by social stability concerns."<sup>59</sup>

In his article, Minzner also mentions other recent phenomena in the Chinese legal system, including the crackdown on activist lawyers, the campaign to promote "socialist" rule of law, the strengthening of political control on judges and lawyers, and the promotion of the doctrine of the "Three Supremes" in the context of legal and judicial work (the supremacy of the CCP's cause, the supremacy of the interests of the people, and the supremacy of the Constitution and the law). However, Minzner has not discussed or analyzed these developments in detail in his

article which, as he points out in the introductory section of the article, focuses on the “Chinese judiciary’s treatment of civil and administrative grievances – the centerpiece of earlier legal and court reform efforts.”<sup>60</sup>

Despite his generally negative assessment of recent trends in the Chinese legal system, Minzner has taken care not to be too one-sided in his account. Thus he enters the “caveats” that “[l]aw has not been abandoned in China; law-making still goes on, and [c]itizens and corporations continue to invoke legal norms as they seek to protect their interests. There is still some (albeit reduced) room for progressive institutional reform in China under the ‘rule of law’ rubric.”<sup>61</sup> He also acknowledges that the results of the emphasis on mediation are “not entirely negative,”<sup>62</sup> and “some reforms may be positive.”<sup>63</sup> And he recognizes that “[m]any of the critiques of the 1990s-era legal reforms have merit. Excessive reliance on imported legal norms and institutions may not respond fully to the needs of rural China.”<sup>64</sup>

Finally, Minzner in his article investigates into the means by which the Chinese authorities have implemented the party-state’s new policy towards dispute resolution, including the propaganda campaigns to promote certain “model judges,”<sup>65</sup> and the “target responsibility system”<sup>66</sup> and performance incentives used by the leadership to encourage judges to conclude more cases by mediation and to minimize decisions that result in petitions and protests. As regards future scholarship on Chinese law, he suggests that “[s]cholars too, may need to ‘turn away from law’ in their studies. If they want to understand how the Chinese state operates, they may need to directly incorporate the study of Party propaganda and bureaucratic personnel tools in their research.”<sup>67</sup>

Minzner’s thesis about “China’s turn against law” rests mainly on two policies or practices that became emphasized in the domain of civil dispute resolution in the first decade of the 21<sup>st</sup> century – the emphasis (or “re-emphasis”) on mediation, including mediation conducted by judges after litigation has been initiated (for the purpose of reaching a settlement that is acceptable to the parties concerned), and the emphasis (or “re-emphasis”) on judicial decision-making that is consistent with public opinion and that minimizes dissatisfaction and grievances on the part of litigants. Both practices are designed to avoid protests and petitions to

higher authorities (particularly through the letters and visits (*xinfang*) system), and to promote social stability or the harmonious society advocated by the CCP.

As Minzner well recognizes and as well researched by other scholars, both the practice of mediation and the populist inclination in the administration of justice are not new, but have firm roots in the revolutionary ideology and practices of the CCP that dated back to decades before the establishment of the People's Republic of China in 1949. In the case of mediation as a means of dispute settlement, it is well-known that it was positively regarded even in traditional China, before the advent of communism, where Confucian thinking viewed litigation in a negative light. The Chinese communists developed the system of people's mediation committees and considered mediation an important part of the Party's political work among the people, particularly in educating them about Party policies. There was also in the CCP's history a long tradition of the mass line, a policy designed to bring the Party close to the people and to win popular support for the Party. Populism in the administration of justice is therefore nothing new.

Faced with rising numbers of petitions and protests in the first decade of the 21<sup>st</sup> century, the Party became increasingly concerned about social stability and the survival of the regime itself. The revival of mediation as a means of dispute settlement (after many years during which, as pointed out by Minzner, the proportion of civil cases settled by mediation has continued to drop) and the re-emphasis of aspects of the mass line in the administration of justice are evidently attempts by the party-state to draw on the traditional experience and resources of the CCP for the purpose of facing and resolving new problems. This swing of emphasis from adjudication to mediation in civil dispute settlement and from professionalism to populism in the administration of justice is not necessarily a rejection or repudiation of post-Mao legal reforms in constructing a credible legal system. It may also be interpreted as a moderate policy adjustment in response to changing social circumstances. After all, the legal system that has been constructed remains alive and well. The Chinese legal system still retains both elements of adjudication and mediation, and both elements of professionalism and populism. Indeed, the number of cases litigated before the courts has continued to

rise in recent years, and the average educational standards of judges have also risen to an unprecedented level. There is nothing sinister or unhealthy in the balance between adjudication and mediation or between professionalism and populism changing from time to time as social circumstances change. It is true that the policy has swung in the direction of mediation and populism in recent years, but it may well swing again in the direction of adjudication and professionalism some time in the future if different sociopolitical forces come into play.

On a more philosophical level, it may also be pointed out that the tension between adjudication and mediation, and that between professionalism and populism, exist in every modern legal system. It is true that mediation may not result in outcomes that converge with adjudication strictly in accordance with legal rules. However, there do exist circumstances in which a mediated settlement acceptable and accepted by the parties is preferable, from the point of view of justice and humanity, to the strict application of legal rules in a judicial decision that is imposed on the parties. Most of the civil cases upon which mediation efforts focus are simple disputes among individuals in matters such as family, debt, housing or employment. Can it be fairly said that active promotion of mediation in such cases is detrimental to the legal system or inconsistent with the Rule of Law?

As regards professionalism versus populism in the administration of justice, it is by no means clear as a matter of legal philosophy or the Rule of Law that populism is bad and professionalism good. Whereas trial by public opinion or the media is definitely questionable, there is nothing wrong in expecting that the operation of the legal system should result in outcomes that, by and large, are consistent with the people's sense of fairness and justice. If, within a particular legal system, judicial decisions made by highly educated and professionally trained elite are often perceived as unjust and unreasonable by many members of the public, this will reflect a significant gap in that system between the law as made, interpreted and applied by the legal elite and the people for whom and on behalf of whom the law is made and administered. Surely, the Rule of Law should not be narrowly interpreted to mean the strict application of legal rules in producing outcomes that are contrary to popular perceptions of justice.

In the light of these reflections, the practices of mediation and populist influence on judicial behaviour documented in Minzner's article do not justify the assessment that there has been in China a 'turn against law' or a turn against the Rule of Law in the first decade of the 21<sup>st</sup> century. Furthermore, if we adopt a broader perspective of the overall developments in Chinese law and legal institutions in this decade, including the last few years, we will see that China has continued in the first decade of the century and the last few years the 'long march toward rule of law' (in Peerenboom's words) that it embarked upon since the late 1970s. Given space limitations, it would not be possible in this paper to discuss all the details of these developments. Selected examples to illustrate the point will be given below.

On the legislative level, it should be noted that some of the fundamental components of the Chinese legal system were enacted in the first decade of the century and in the last few years. They include, in the area of civil, commercial and economic law, the Law of Property (2007), the Law of Tort (2009), the Law on Application of Law in Foreign-related Civil Law Relationships (2010), the Anti-monopoly Law (2007), the Enterprise Bankruptcy Law (2006), and the Law on Enterprises' State-owned Assets (2008). Major enactments in the same period in the domain of public law include the constitutional amendment of 2004 (which, inter alia, introduced into the Constitution express provisions on human rights and private property rights), the amendment in 2010 of the Electoral Law of the National People's Congress and Local People's Congresses, the amendment in 2010 of the Law on Deputies to National People's Congress and Local People's Congresses, the Law on Supervision by Standing Committees of People's Congresses at Various Levels (2006), the Law on Civil Servants (2005), the amendment in 2010 of the State Compensation Law, the Law of Administrative Licensing (2003) and the Law of Administrative Coercion (2011). The two latter laws are particularly significant from the perspective of the Rule of Law understood as legal restraint on the exercise of state power, as these two laws limit the scope of the power of administrative organs, regulate the exercise of their power and discretion, and introduce principles of due process. The enactment by the State Council of the Regulations on Openness of Government Information (2007) was also a milestone in the

codification of the right to access of government information in China. These regulations have given rise to administrative litigation (suits against government organs) to enforce the right, which has been further elaborated in the latest *Provisions on Several Questions regarding the Adjudication of Administrative Law Cases on Openness of Government Information* (2011), which is a *judicial interpretation* document promulgated by the Supreme People's Court.

Regarding the role of law in public administration, a significant development in the first decade of the century was the promulgation by the State Council in 2004 of a detailed and elaborate *Implementation Outline for the Comprehensive Promotion of Administration in Accordance with Law*. The document sets a 10-year timetable for achieving the target of a *government based on the rule of law* (*fazhi zhengfu*). Earlier, the concept of *administration in accordance with law* (*yifa xingzheng*) had already been codified in the State Council's *Decision on the Comprehensive Promotion of Administration in Accordance with Law* (1999), which was made soon after the constitutional amendment of March 1999 which introduced into China's Constitution a provision on *ruling the State in accordance with law* and *building a socialist Rechtsstaat (Rule of Law state)*. Following the promulgation of the *Implementation Outline of 2004*, the State Council in 2010 promulgated an *Opinion on Strengthening the Construction of Rule of Law Government*, which sets out eight sets of tasks relating to this project.<sup>68</sup> Some municipal governments (e.g. Beijing, Yuhang, Shenzhen, etc) have engaged in the project of designing an index or a set of indicators for evaluating their degree of success in practicing administration in accordance with law. There have also been experiments to enhance the Rule of Law at provincial level. For example, Hunan province introduced a project on *Rule of Law in Hunan* (*fazhi hunan*), and enacted (in the absence of national laws on the subjects) as provisional-level legal norms its own *Provisions on Administrative Procedure* (2008) and *Measures on the Control of Administrative Discretion* (2011).<sup>69</sup>

One of the significant features of law-making in China in the second half of the first decade of the 21<sup>st</sup> century is the increasing attention paid to the domain of labour law and social security law, as distinguished from the domains of civil, commercial, economic, intellectual property and

criminal law that have previously been the foci of legislative efforts. Relevant recent enactments in this area of what has officially been termed "social law" include the Law of Labour Contracts (2007), the Law on the Promotion of Employment (2007), the Law on the Mediation and Arbitration of Labour Disputes (2007), and the Social Insurance Law (2010).

In the last three years, significant legislative reforms have been introduced in the domains of criminal law, criminal procedure and civil procedure. For example, in 2010, the 8<sup>th</sup> amendment to the Criminal Code (1997) was enacted. The amendment is well-known for reducing the number of capital offences by 19% (the death penalty for 13 non-violent economic crimes was abolished), and for its express provisions for lenient treatment of juvenile and elderly offenders. The extensive revision of the Criminal Procedure Law in 2012, inter alia, provided expressly for human rights protection, extended the rights of defence lawyers and of defendants, and introduced for the first time the principle of exclusion of illegally obtained evidence (extracting confessions by torture had already been criminalized under the pre-existing law). The extensive revision of the Civil Procedure Law in 2012, inter alia, provided for the coordination between mediation and litigation, adopted a simplified or summary procedure for dealing with small claims, and for the first time provided a legal basis for social organizations initiating public interest litigation in matters such as environmental and consumer protection.

At the annual meeting of the National People's Congress (NPC) in March 2011, it was announced that the goal set by the 15<sup>th</sup> National Congress of the CCP in 1997 of forming a "socialist system of laws with Chinese characteristics" by 2010 had now been achieved. Speaking to the Congress, Wu Bangguo, Chairman of the NPC Standing Committee, pointed out that the economic and other achievements made by China so far "cannot be separated from the protection offered by the legal system; neither can the better future that we are striving to create be separated from the protection offered by the legal system. The formation of a socialist system of laws with Chinese characteristics brings our nation's developments in various domains within a legalized path." Now that the system of laws has been formed, the more pressing tasks (apart from continuing legislative work) are, Wu explained, to defend the authority

and dignity of the Constitution and the law, to insist on administration in accordance with law (including the construction of a Rule of Law government (*fazhi zhengfu*)) and fair administration of justice, and to promote legal consciousness and the concept of Rule of Law among all members of society, including leaders, cadres and officials.

In October 2011, the State Council's Information Office published a White Paper to publicize China's achievements in forming its socialist system of laws (alternatively translated as "legal system" – the Chinese original is *falü tixi*). The White Paper explains that the socialist system of laws with Chinese characteristics is based on the Constitution, and consists of laws at its main body and administrative regulations and local regulations as its important components; it is an organic unity of various areas of the law, including constitutional law, civil and commercial law, administrative law, economic law, social law, criminal law, and the law on litigation and non-contentious procedures. The White Paper points out that as of August 2011, China has enacted, in addition to its Constitution, 240 laws (counting only those that are currently in force), 706 sets of administrative regulations, and more than 8,600 sets of local regulations.

We now turn from the domain of legislation to the judicial domain, in which significant developments have also occurred in the first decade of the century and in recent years. The topic of "judicial reform" was discussed in the CCP General Secretary's report at each National Congress of the CCP since the 15<sup>th</sup> Congress in 1997. Five-year Reform Plans for the Chinese judiciary were published by the Supreme People's Court in 1999, 2005 and 2009.<sup>70</sup> In 2003, the CCP established a "Leading Group on Judicial Reform", which made major decisions in 2004, 2006 and 2008 on various aspects of judicial reform.<sup>71</sup> For example, the 2008 decision reformed the existing system for the funding of Chinese courts, regulating the funding to be provided by the central, provincial and local governments and increasing the level of central funding for courts in the poorer regions of the country.<sup>72</sup>

In the course of the first decade of the century, various other initiatives were introduced for the purpose of improving the Chinese court system. In 2002, the unified national examination for all intending lawyers, judges and procurators was introduced, to be held annually.<sup>73</sup> As a result

of this reform and other related efforts, the average educational standards of Chinese judges have improved considerably in the course of the decade. In 2004, the existing system of popular participation in the administration of justice – the “people’s assessors” system in which ordinary citizens sit together with professional judges in a collegiate bench – was strengthened by the Decision on the Improvement of the System of People’s Assessors enacted by the National People’s Congress Standing Committee.<sup>74</sup> Since 2007, all death sentences imposed by lower courts in criminal cases have to be approved by the Supreme People’s Court (SPC). This reform not only resulted in capital cases to be scrutinized more rigorously than before, but also resulted in the significant expansion of the SPC in terms of its number of judges.<sup>75</sup> Efforts were made to promote public trials and the publicity and transparency of the work of the courts. For instance, the SPC promulgated “Several Opinions on the Strengthening of the Work of Open Adjudication by the People’s Courts” in 2007, “Six Provisions on Open Justice” in 2009, and the “Standards for Courts that are Exemplars of Open Justice” in 2010.<sup>76</sup>

To further regulate the behaviour and professional ethics of judges, the SPC promulgated in 2010 revised versions of the “Basic Norms of Professional Ethics of Judges” and the “Norms of Behaviour for Judges”.<sup>77</sup> As a starting point for the establishment of a system of judicial precedents and case law, the SPC promulgated in 2010 the “Provisions on the Work of Cases for Guidance”, which provide for the selection, compilation and publication of “guiding cases” which lower courts should refer to when they try similar cases.<sup>78</sup> The Law of Civil Procedure as amended in 2012 contains provisions requiring court judgments to explain the reasons for the judicial decisions<sup>79</sup> and requiring judgments to be made available to the public, with the exception of cases involving trade secrets, national security or the privacy of individuals.<sup>80</sup>

The SPC’s report to the NPC in March 2009 stated that in the period 1978-2008, the caseload of the Chinese courts had increased 20 times. Between 2005-2009, the annual number of cases handled by the courts increased by 5.95% per year on the average.<sup>81</sup> Figures released since 2009 show that the number of cases litigated before the courts has

continued to increase. The total numbers of cases (including criminal, civil, commercial, and administrative law cases) accepted by the courts (excluding the SPC itself) for handling were 11.37 million in 2009 (representing a 6.3% increase compared with 2008); 11.7 million in 2010 (2.8% increase from previous year); and 12.2 million in 2011 (4.4% from previous year). According to the SPC's annual reports to the NPC, the proportion of civil cases (including commercial cases) settled by mediation and withdrawal of suits was 62% in 2009 and 65% in 2010, and the proportion of civil cases (excluding commercial cases) settled by mediation and withdrawal of suits was 67% in 2011.

Apart from the steady increase in the number of cases that went before the courts, the first decade of the century has also witnessed spectacular expansion in the legal aid system and in the numbers of lawyers, law schools and law students in China. The figures below are noteworthy:

*Funding for legal aid (in RMB) (M means million)*<sup>82</sup>

2002 (year)	78M
2003	152M
2004	217M
2006	370M
2011	1,280M

(According to the White Paper on 'Judicial Reform in China' published in October 2012, the annual funding for legal aid has on the average increased by 26.8% per year since 2009.)

*Number of lawyers*<sup>83</sup>

2003 (year)	120,000
2008	140,000
2011	215,000

(Among these 215,000 lawyers, 89.6% are full-time lawyers working in law firms; 4.5% are part-time lawyers; 5.9% are lawyers working in corporations, government organs, legal aid offices and the army.)

As reported in White Paper on 'Judicial Reform in China' (2012), the number of litigated cases handled by lawyers in 2011 was 2.315 million,

representing a 17.7% increase from the number in 2008; the number of items of non-contentious matters handled by lawyers in 2011 was 625,000, a 17% increase from the number in 2008. Commenting in 2008 on Chinese legal developments at a conference to celebrate the 30<sup>th</sup> anniversary of reform and opening up in China, Professor Benjamin Liebman remarked that China now had the third largest number of lawyers in the world.<sup>84</sup>

In the first decade of the 21<sup>st</sup> century, legal education at the undergraduate and postgraduate levels has also witnessed a tremendous expansion, which was partly a result of the government policy to increase vastly the number of student places in university education, which resulted in the percentage of young people in the relevant age group who were able to receive college education to increase from 9.8% in 1998 to 22% in 2007.<sup>85</sup> According to figures in 2008, there were 634 law schools in China with a student population of 400,000, with an annual undergraduate intake of 100,000 law students.<sup>86</sup>

Both Chinese government publications and scholarly literature published in China and the West point out that the development of the Chinese legal system and successive government campaigns to popularize legal knowledge among members of the public have resulted in increasing levels of legal consciousness and awareness of rights among the Chinese people. As the data above indicates, increasing numbers of Chinese citizens are taking their cases to courts. Although the high expectations generated by the official promotion of legal consciousness have led to disillusionment in some cases where litigants had negative experience when they came into close contact with China's judicial institutions, it has also been reported that some citizens felt empowered by their knowledge and use of the language of law and rights, and by the opportunities to have their day in court.

Apart from the context of litigation and courtrooms, the discourse of law and rights which the party-state has not only permitted to grow but also contributed much to promote has also changed the mentality and attitudes of countless Chinese citizens who have various kinds of grievances or suffer from various forms of injustice. Scholars, activists and ordinary people have sought to rely on the provisions of, and the rights enshrined

in, China's constitution and laws in voicing their grievances, criticizing injustice, campaigning for change and even in enacting public acts of resistance and protests. Thus, one of the consequences, whether intended or not, of the creation of the "socialist system of laws with Chinese characteristics" and the development of legal and judicial institutions in the PRC is that the world is no longer the same for many Chinese citizens. A brave new world has been born in which the language and discourse of and thinking about constitutionality, legality, rights and legal justice become available to countless citizens as vehicles for enlightenment, empowerment, resistance against injustice and oppression, and struggles for a better world.