Embracing the Rule of Law Rhetoric: A Case Study of the Adoption of Rule of Law in China and Vietnam through the Lens of Constitutive Rhetoric

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'In this fluid world without turf or ground, we cannot walk but we can swim. And we need not be afraid to do this – to engage in the rhetorical process of life – for all of us, despite our radical uncertainties, already know how to do it. By attending to our own experience and that of others, we can learn to do it better if we try.'[1]

[1] James Boyd White, "Law As Rhetoric, Rhetoric As Law: The Arts of Cultural and Communal Life" (1985) 52 U Chicago L Rev 684 at 696.

Abstract

Emerging as a global paradigm, the rule of law is widely accepted as an unqualified good, yet it has also come under criticism for its elusive nature and the wide divergence in its implementation. One of the clearest examples of this is in China and Vietnam, two states who have emphasized their adoption of a distinctly 'socialist' version of rule of law, in which their respective Communist Parties play a leading role. China and Vietnam's claim to have adopted rule of law is widely seen as a symbol of how the term has devolved into empty rhetoric.

The rhetorical nature of the rule of law is widely invoked, yet seldom analysed. This thesis re-imagines the adoption of rule of law in China and Vietnam through James Boyd White's framework of law as constitutive rhetoric. I begin with the inherited language *of the Western liberal concept of rule of law, which is contested and subject to a range of meanings. Contestations over its definition and elements have fuelled its rhetorical power, by arming it with a meaning and authority that is arguable and uncertain.*

Driven by the desire to integrate into the global economic order, both China and Vietnam have made deliberate attempts to frame and align domestic legal reforms in the inherited language *of rule of law. However, in adopting the language of rule of law, both countries have engaged in a '*rhetorical process of remaking and reshaping*' Western rule of law principles by citing their socialist and Confucian traditions as a way to re-constitute an indigenous version of rule of law. Concurrently, in both countries the official adoption of the rhetoric of rule of law has created a wider* rhetorical community *in which legal scholars, the media and reformists within the Party and State have co-opted the rhetoric of rule of law to push for establishing a constitutional review mechanism. This has made it increasingly difficult for the Party and state to maintain a hegemony over the discourse of legal reform.*

Re-imagining rule of law adoption in China and Vietnam through the framework of constitutive rhetoric reminds us that conceptions of rule of law are not merely asserted by the state, but emerge out of ongoing interactions between the State and society. For rule of law, its elusive and contested nature is also its strength, as the ends that are sought by reforms are continually remade through the rhetorical process which infuse rule of law with meaning.

L'État de droit a largement été adopté, apparaissant ainsi comme un paradigme universel, mais il a également été critiqué pour son caractère insaisissable et pour les grandes divergences dans sa mise en œuvre. Deux exemples clairs de cette situation sont la Chine et le Vietnam, deux États qui ont fait valoir leur adoption d'une version nettement «socialiste» de l'État de droit, dans lequel leurs partis communistes respectifs jouent un rôle de premier plan. Les revendications de la Chine et du Vietnam voulant qu'ils aient adopté l'État de droit sont largement considérés comme un symbole de la façon dont le terme a été vidé de son sens rhétorique.

La nature rhétorique de l'État de droit est souvent invoquée, mais rarement analysée. Cette thèse réinvente l'adoption de l'État de droit en Chine et au Vietnam par le biais du cadre d'analyse du droit en tant que rhétorique constitutive de James Boyd White. Je commencerai par analyser le langage hérité *de la conception libérale occidentale de l'État de droit, qui est contesté et est l'objet d'un éventail de significations. Les contestations sur sa définition et ses éléments ont alimenté sa puissance rhétorique, en l'armant d'un sens et d'une autorité qui est contestable et incertaine.*

Animés par le désir d'intégrer l'ordre économique mondial, la Chine et le Vietnam ont délibérément tenté d'aligner les réformes juridiques nationales au langage hérité *de l'État de droit. Cependant, en adoptant le langage de l'État de droit, les deux pays se sont engagés dans un «* processus rhétorique de refaire et de remodeler *» les conceptions occidentales de l'État de droit en utilisant leurs traditions socialistes et confucéennes afin de reconstituer une version autochtone de l'État de droit. Parallèlement, dans les deux pays, l'adoption officielle de la rhétorique de l'État de droit a créé* une communauté de rhétorique *plus large dans laquelle les juristes, les médias et les réformistes au sein du Parti et de l'Etat ont dénaturé la rhétorique de la primauté du droit pour promouvoir un mécanisme de révision constitutionnelle. Cela a rendu le maintien d'une hégémonie sur le discours de la réforme juridique plus difficile pour le Parti et l'Etat.*

Ré-imaginer l'adoption de l'État de droit en Chine et au Vietnam à travers le cadre de la rhétorique constitutive nous rappelle que les conceptions de l'État de droit ne sont pas simplement affirmées par l'Etat, mais émergent des interactions continues entre l'État et la société. La nature insaisissable et contestée de l'État de droit est aussi sa force, puisque les buts qui sont recherchés par les réformes sont continuellement revisités grâce au processus rhétorique qui infuse une signification à l'État de droit.

Introduction

Rethinking the Rule of Law

Touted by countries on all sides of the globe, the rule of law has increasingly berated for its misuse. Countries as diverse as the United States and China have proclaimed their commitment to rule of law, while simultaneously clamping down on civil liberties in the fight against terrorism[2] or undertaking a coordinated crackdown on lawyers.[3] At the same time, the rule of law has become a global paradigm, where it serves a central policy in international development cooperation. Promoted by donors and development banks as a key foundation for economic and social development, it has since been fervently advocated in almost all corners of the world. Under the guidance of development practitioners, rule of law reform efforts have traditionally targeted the institutions deemed necessary to establish a modern legal order such as courts, law enforcement and lawyers. Yet, the modest achievements made by the rule of law movement have resulted, more recently, in a shift away from institution-based definitions in favour of ends-based definitions which demand greater attention to be focused on 'the end goals the rule of law serves within a state'.[4] This brings to the seemingly undefinable question of what exactly it is that rule of law seeks to achieve.

This question has been further complicated by the adoption of rule of law in one-party states like China and Vietnam who have both emphasised their adoption of a distinctly "socialist" version of rule of law in which their respective Communist Parties play a leading role. China has coached their vision of rule of law in terms of a "socialist legal system that maintains Chinese characteristics," while Vietnam has concentrated on the creation of a "socialist law based state". Both versions reject many of the elements traditionally closely associated with the traditional Western model of rule of law, such as multi-party democracy and a liberal convention of privileging individual rights.

There continues to be ongoing debate over whether a distinctly socialist version of the rule of law can be compatible with the original aims and goals of the rule of law which has its

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[2] Conor Friedersdorf, "America Fails the 'Rule of Law' Test", *The Atlantic* (11 July 2014), online: <http://www.theatlantic.com/politics/archive/2014/07/how-america-fails-the-rule-of-law-test/374274/>; Owen Fiss, "The War against Terrorism and the Rule of Law" (2006) 26:2 Oxford J Legal Stud 235.

[3] Carrie Gracie China editor, "Rule of law in China, a country which locks up its lawyers", online: *BBC News* <http://www.bbc.com/news/world-asia-china-33502955>; Andrew Jacobs & Chris Buckley, "China Targeting Rights Lawyers in a Crackdown", *The New York Times* (22 July 2015), online: <http://www.nytimes.com/2015/07/23/world/asia/china-crackdown-human-rights-lawyers.html>; "China's 'Rule by Law' Takes an Ugly Turn", online: *Foreign Policy* <https://foreignpolicy.com/2015/07/14/chinas-rule-by-law-takes-an-ugly-turn-rights-lawyers-crackdown-xi-jinping/>.

[4] Rachel Kleinfeld, *Advancing the Rule of Law Abroad: Next Generation Reform* (Washington, D.C.: Carnegie Endowment for International Peace, 2012) at 12.

origins in a Western liberal context. Whilst some have concluded that a formal version of the rule of law is theoretically compatible with one-party rule,[5] others dismiss it as 'rhetorical window dressing whose principle intent is simply to perpetuate the [Communist Party's] existing totalitarianism.'[6] Their concerns are bolstered by the fact that it is also becoming increasingly clear that rule of law is unlikely to lead towards multi-party democracy nor substantive improvement in civil liberties in either country. Both countries continue to score poorly on global rule of law indicators[7] despite China's assertion that it is well on its way in creating a rule of law state.[8] In this way, China and Vietnam's claim to have adopted rule of law have been perceived to serve as empty rhetoric and has become a symbol of a wider apprehension that the concept of rule of law has become no more than a 'self-congratulatory rhetorical device' which has devolved into an 'empty phrase' completely lacking in meaning.[9]

Frequently described as a 'rhetorical tool'[10] and perceived to be infused with 'rhetorical appeal',[11] the rhetorical nature of the rule of law is widely invoked, yet it is seldom analysed.[12] In this thesis, I undertake a case study of the adoption of rule of law in China and Vietnam using the framework of James Boyd White's conception of law as constitutive rhetoric in order to argue that the rhetorical nature of the rule of law is something that should be embraced rather than disparaged.

The Theoretical Framework – From a Pejorative to a Constitutive Conception of Rhetoric

[5] Randall Peerenboom, "Let One Hundred Flowers Bloom, One Hundred Schools Contend: Debating Rule of Law in China" (2001) 23 Mich J Int'l L 471.

[6] Stéphanie Balme & Michael Dowdle, "Exploring for Constitutionalism in China" in Stéphanie Balme & Michael W Dowdle, eds, *Building Constitutionalism in China* (New York: Palgrave Macmillan, 2009) at 8.

[7] For example, in the 2015 World Justice Project Rule of Law Index, Vietnam received an overall score of 0.5 out of 1.0 giving it a global rank of 64/102. China received a score of 0.48 out of 1.0, giving it a global rank of 71/102. See: http://worldjusticeproject.org/sites/default/files/roli_2015_0.pdf

[8] PRC State Council, *White Paper: China's Efforts and Achievements in Promoting the Rule of Law* (2008).

[9] Peerenboom, *supra* note 5 at 315; Brian Z Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge; New York: Cambridge University Press, 2004) at 114.

[10] Amichai Magen, "The Rule of Law and Its Promotion Abroad: Three Problems of Scope" (2009) 45-115 Stan J Int'l L 51 at 96.

[11] R P Peerenboom, *Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France, and the U.S.* (London; New York: Routledge, 2004) at 10.

[12] In addition, a number of writers who have criticised the rule of law as 'an ideological mask which in effect uses the rhetoric of equality before the law and impartiality to mask an underlying reality of inequalities and exploitation': David Clarke, 'The Many Meanings of the Rule of Law', in *Law, Capitalism and Power in Asia,* 28. See also: Carol Jones, 'Capitalism, Globalization and Rule of Law: An Alternative Trajectory of Legal Change in China' *Social and Legal Studies* 1994, 1:195-221; and Roberto Unger, *Law in Modern Society: Towards a Criticism of Social Theory,* 1976.

In the Aristotelian tradition, rhetoric is traditionally defined as the art of persuasion.[13] It denotes the 'linguistic processes by which a speaker can create, address, avoid or shape issues that the speaker wishes or is called upon to contest, or that a speaker suspects (at some level of awareness) may become contested.'[14] Rhetoric helps us to observe '"in any given case the available means of persuasion" in order to assign meaning to events and to convince others that the meaning so assigned is reasonable if not right.'[15] Given that the law fundamentally seeks 'to persuade the people about matters of justice and injustice',[16] rhetoric and law have 'long had strong connections'.[17] However, as demonstrated above, the equation of rule of law with rhetoric is usually 'explicitly pejorative', where it often used as a 'standard modern condemnation' of the adoption of rule of discourse in countries like China and Vietnam as 'government propaganda'. [18] Used in this sense, rhetoric is relegated to 'a way of dealing with people instrumentally or manipulatively in an attempt to get them to do' or believe whatever you want.[19]

In response, James Boyd White, described as the 'foremost rhetorician of law in our academic culture',[20] proposes a new way to think about rhetoric – what he calls 'constitutive rhetoric'. He argues that law is a species of rhetoric which is 'most usefully seen not, as rhetoric is usually is either as failed science or the ignoble art of persuasion, but as the central art by which community and culture are established, maintained and transformed.'[21] Constitutive rhetoric, beyond being merely persuasive, also constructs and provides its audience with an identity. It emphasizes the 'contingent and conventional nature of knowledge' – so that discourse becomes 'as productive of the very categories by which the world, and indeed the self, are understood.' [22] Law, he argues, is firmly a species of constitutive rhetoric, since law is both culturally and socially specific in that it always takes place in both a social and cultural context in which there is an intervention.[23] Extending from this, he identifies three aspects of law as constitutive rhetoric.

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[13] James Boyd White also points to another 'mode' of rhetoric which is commonly invoked – in comparison to science – where rhetoric is 'the art of establishing the probable by arguing from our sense of the probable. It is always open to replacement by science when the truth or falsity of what is now merely probable is finally established.' See White, *supra* note 1 at 687.

[14] Anthony G Amsterdam & Jerome S Bruner, *Minding the Law* (Cambridge, Mass.: Harvard University Press, 2002) at 165.

[15] Austin Sarat & Thomas R Kearns, *The Rhetoric of Law* (Ann Arbor: University of Michigan Press, 1994) at 7.

[16] White, *supra* note 1 at 684.

[17] Gerald B Wetlaufer, "Rhetoric and Its Denial in Legal Discourse" (1990) 76:8 V L Rev 1545 at 1547–8.

[18] White, *supra* note 1 at 687.

[19] *Ibid* at 687–8.

[20] Richard H Weisberg, "Law and Rhetoric" (1987) 85:5/6 Mich L Rev 920 at 920.

[21] White, *supra* note 1 at 684.

[22] Thomas O Sloane, *Encyclopedia of Rhetoric* (Oxford; New York: Oxford University Press, 2001).

[23] White, *supra* note 1 at 691.

1. **The Inherited Language:** Law is always culturally specific and must commence with 'an external, empirically discoverable set of cultural resources.' As a general rule of persuasion, the speaker in a legal setting always begins by speaking in the language of his or her audience in order to effectively put an argument that his or her audience regards as valid and intelligible.[24]
2. **The Art of the Text:** In using the available cultural resources to do the work of persuasion, these resources are inevitably modified or rearranged to serve the speaker's own particular purpose. The rhetorical process of remaking and reshaping these cultural resources includes being willing to add or drop a distinction, to admit a new voice and to claim a new source of authority. In this way, 'legal rhetoric is always argumentatively constitutive of the language it employs.'[25]
3. **The Rhetorical Community:** Since law is always socially constitutive in character, the rhetoric of law becomes 'argumentative not just about results in specific cases but about visions of self and of community'. This means that law should not be seen a set of commands working their way down from a group of legislators, bureaucrats and judges to a population who serve as the mere objects of manipulation through a series of incentives or disincentives, but instead as a culture of argument that is perpetually remade by its participants.[26]

This thesis applies each of these three aspects to a case study of the adoption of rule of law in China and Vietnam, two countries which have explicitly sought to adopt distinctly "socialist" versions of the rule of law and in doing so have borne considerable reproach for using rule of law as mere rhetoric. It is my hope that by explicitly pairing rule of law with rhetoric it will open the way for a deeper inquiry that considers rule of law reform from the perspective of 'a discourse that is maintained by the process of persuasion and argument.'[27] Such an approach invites us to look beyond the rule of law as a tool for economic development or political liberalization and to instead conceive of it as a way to simultaneously maintain and transform the culture in which it is located.[28]

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[24] James Boyd White, *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law* (Madison, Wis.: University of Wisconsin Press, 1985) at 33; White, *supra* note 1 at 688–9.
[25] White, *supra* note 24 at 34; White, *supra* note 1 at 690.
[26] Sarat & Kearns, *supra* note 15 at 8; White, *supra* note 1 at 686; White, *supra* note 24 at 31.
[27] James Boyd White, "Imagining the Law" in Austin Sarat & Thomas R Kearns, eds, *The Rhetoric of Law* (Ann Arbor: University of Michigan Press, 1994) at 37–8.
[28] *Ibid*.

Comparing Rule of Law Rhetoric in China and Vietnam

With more than ten times Vietnam's population, thirty times its landmass and many more times its purchasing power, considerably more international attention has been paid to China's rule of law reforms, compared to the relatives sparse foreign sources available on Vietnam. Yet in spite of their unique histories or economic, social and cultural differences, China and Vietnam also have much in common. From a shared Confucian tradition to the 'striking similarities' between their history of communism and socialist development models, both countries have, in recent decades, also 'embarked upon the road of economic reform towards privatization, marketization and opening to the global economy and thereby achieved spectacular economic growth.'[29] Furthermore, recent developments that have taken place in both countries have seen rule of law re-emerged as an important topic. In late 2014, rule of law was, for the first time, the subject of the annual plenary meeting of the Chinese Communist Party's Central Committee. In Vietnam, rule of law emerged as an important reference point in the recent constitutional amendments that took place in late 2013. These developments offer an important opportunity to reflect on the adoption of rule of law in China and Vietnam.

Existing writings have already explored a variety of different aspects and implications of the adoption of rule of law, particularly when it comes to China. They have analysed in considerable depth whether China's legal reforms are better categorised as rule of law or rule by law,[30] they have debated the relative applicability of procedural versus substantive versions of the rule of law,[31] they have studied the influence of Confucian traditions on the way rule of law is interpreted and understood,[32] and have even attempted to conceptualize what a distinctly socialist version of the rule of law as applied in China and Vietnam looks like.[33] These writings have been invaluable in scrutinizing and expanding traditional Western liberal conceptions of rule of law. My aim with this thesis is to take these existing writings and to offer a new framework within which to conceive of the adoption of rule of law in

[29] Albert Chen, "Legal Thought and Legal Development in the People's Republic of China 1949-2008" in *Legal Reforms ini China and Vietnam: A Comparison of Asian Communist Regimes* (Milton Park, Abingdon, Oxon; New York, N.Y.: Routledge, 2010) 50 at 51.
[30] Jiefen Li, *Legal Reform Versus the Power of the Party and State in the People's Republic of China: Rule of Law or Rule by Law?* (Lewiston, NY: Edwin Mellen Press, 2008).
[31] Baohui Zhang, "Toward the Rule of Law: Why China's Path will be Different from the West" in Suisheng Zhao, ed, *Debating Political Reform in China Rule of Law vs Democratization* (Armonk, N.Y.: M.E. Sharpe, 2006); Peerenboom, *supra* note 5.
[32] Mo Zhang, "The Socialist Legal System with Chinese Characteristics: China's Discourse for the Rule of Law and a Bitter Experience" (2010) 24 Temp Int'l & Comp LJ 1; Karin Buhmann, "Reforms of Administrative Law in the PRC and Vietnam: The Possible Role of the Legal Tradition" (2003) 72:2 Nordic Journal of International Law 253; Ta Van Tai, "Confucian Influences in the Traditional Legal System of Vietnam, With Some Comparisons with China: Rule by Law and Rule of Law" (2009) 129 Vietnam Social Sciences 11.
[33] Peerenboom, *supra* note 11.

China and Vietnam. I attempt to (re)imagine the adoption of rule of law in China and Vietnam through the three aspects of White's constitutive rhetoric. Such a conception not only directly confronts the inherently rhetorical nature of rule of law, but demonstrates that we need to move beyond dismissing the adoption of rule of law by the Party and the state in China as merely disingenuous. Viewing the adoption of the rule of law in China and Vietnam as an act of constitutive rhetoric instead enables us to recognise it as an ongoing 'process of meaning-making and community-building'[34] in which the Party and the state are critical, but not the only players. The framework of constitutive rhetoric ultimately invites is to take a critical legal pluralist approach which acknowledges the vast variety of interacting and competing orders existing both within and outside the state, that together influence the emergence and operation of official conceptions (and limits) of rule of law whose meaning is not merely asserted or imposed by the state, but instead develops out of an ongoing interaction between the state and wider society.

Structure

Beginning with the first aspect of constitutive rhetoric which focuses on the importance of an inherited language, the first chapter locates the inherited language in the Western discourse of rule of law. The rule of law is a deeply contested concept. There is a lack of agreement over what it means and what elements are necessary to achieve it. Its contested nature has fuelled the rhetorical power of the rule of law by animating it with an ambiguity and elasticity that makes it capable of being exported virtually anywhere. Rather than seeing its rhetorical character as a limitation, the primary value of rule of law lies in the opportunities it provides for contestations over its meaning and principles.

The second chapter analyses how the inherited language of rule of law has been used in the context of China and Vietnam. The appeal of legal reforms in both China and Vietnam are primarily linked to economic reforms and a desire to integrate into the global economic order. As a result, while legal reforms in China and Vietnam are often dismissed as something other than the rule of law, the Party and the state in China and Vietnam have made deliberate and calculated attempts to frame and align domestic legal reforms in 'rule of law' language inherited from Western governments, foreign investors and development banks.

[34] White, *supra* note 1 at 695.

In accordance with the second aspect of constitutive rhetoric, by adopting the language of rule of law, both China and Vietnam have engaged in a 'rhetorical process of remaking and reshaping' traditional western liberal rule of law principles by putting forward distinctly "socialist" versions of rule of law. Although China has been more forceful in articulating a distinctly 'Chinese' or 'socialist' vision of the rule of law, both versions are underscored by the leading role of the Communist Party and an underlying tension between rule of law and the rule of man. To legitimate these alternative "socialist" versions of the rule of law, both China and Vietnam have relied heavily on their country's socialist and Confucian traditions as sources of authority in order to present them as indigenous versions of the rule of law.

In line with the third aspect of legal rhetoric as communal and socially constitutive in nature, the final chapter looks beyond the official articulation of the rule of law as put forward by the Party and the State to efforts by legal scholars to enlarge and influence domestic interpretations of the rule of law and the rhetorical community which has been established as a result. The debates have not only influenced the official articulation of rule of law, but have posed a challenge to state power and control over official rule of law discourse. This challenge has emerged most clearly in efforts to 'co-opt' the rhetoric of rule of law push for the establishment of a constitutional review mechanism. In these cases, legal scholars, reformists within the Party and State, and a discontented public have managed to successfully overturn laws and regulations for being inconsistent with Constitutional guarantees and brought the need for a constitutional review body squarely into the spotlight. These achievements pose important challenges to the official discourse over law reform and ultimately to the leading role of the Communist Party under a socialist rule of law.

Efforts by a range of actors within the community to co-opt the language of rule of law demonstrates that inherent in this process of meaning-making and community-building is the great uncertainty as to the meaning of terms like rule of law, 'uncertainty as to their effect on others, uncertainty as to our own character and motivations'.[35] This calls for a re-conception of the fundamental role and use of rule of law in development efforts. The rule of law is cannot be 'reducible to rules or subject to expression in rules', though many rule of law practitioners may wish that it were; rather it is the 'knowledge by which we learn to manage, evade, disappoint, surprise, and please each other, as we understand the expectations that other bring to what we say'.[36] At the global law, it demonstrates that the rule of law cannot be

[35] *Ibid*.
[36] *Ibid* at 695–6.

conceived of as a set of concrete, neutral and measurable indicators, yet it is also not as simple as 'focus[ing] on the end goals the rule of law serves within a state'.[37] Instead, the value of rule of law, as a form of rhetoric, lies in the very process of establishing a conversation by which communities 'can determine what [their] "wants" are and should be.'[38]

1. The Inherited Language: Rule of Law Discourse in International Development

1.1. Overview

Rhetoric begins with 'an external, empirically discoverable set of cultural resources' which the speaker must adopt in order to persuade its audience that what they are saying is both valid and intelligible.[39] To place China and Vietnam's adoption of the rule of law within the framework of constitutive rhetoric, this chapter locates the external set of cultural resource in the inherited language of rule of law, which has spread across the globe via the field of international development. Considered key to a country's sustainable political and economic development, rule of law has become a central policy in international development cooperation

The rule of law is a deeply contested concept. There is not only a lack of agreement over what it means, but also a great divergence in perspectives over what elements are necessary to achieve it. This has made the concept of rule of law ripe for rhetorical use by animating it with an ambiguity and elasticity that shields its Western liberal origins and presents it as an 'intrinsically positive and politically neutral tool that is universally valid and capable of being 'exported' everywhere.'[40] It is only due to this rhetorical power that countries which have rejected democracy and liberalism capitalism, such as China and Vietnam, have nonetheless warmly embraced the language of rule of law.

[37] Kleinfeld, *supra* note 4 at 12.
[38] White, *supra* note 1 at 698.
[39] White, *supra* note 24 at 33; White, *supra* note 1 at 688–9.
[40] Ugo Mattei & De de Morpurgo, *Global Law and Plunder: The Dark Side of the Rule of Law*, Bocconi School of Law Student-Edited Papers ID 1437530 (Rochester, NY: Social Science Research Network, 2009) at 1.

1.2. Locating Rule of Law in International Development

1.2.1. The Global Rule of Law Revival

Almost twenty years ago, Thomas Carothers described the emergence of a 'rule of law revival'. Rule of law was 'suddenly everywhere' as it constantly surfaced in foreign policy debates where it was proposed 'as a solution to the world's troubles'.[41] Prescribed as the cure-all for the 'ills of countries in transition from dictatorships or statist economies,'[42] the rule of law revival began in the mid-1980's in Latin American and has since been promoted by international donors and development banks in almost all corners of the world.[43] Stemming from the perceived failures of the Washington Consensus, which promoted economic liberalization and a limited role for the state, governments were gradually recognized as playing a legitimate role and, if acting the right way, could have a positive influence over the implementation of economic development. By the turn of the century, models of good governance were being developed, with the rule of law identified as a key pillar.[44] The World Bank, the United Nations and the World Justice Project have all developed their own sets of rule of law indicators which measure the level of rule of law according to a wide range of factors varying from the relative strength of a country's legal institutions, its ability to enforce contracts and control violent crime, to its level of corruption and ability to protect fundamental rights. In this way, the rule of law became 'both a model and measuring tool' to assess the necessary state systems and good governance needed to guarantee the success of economic development.[45]

Fast forward to almost two decades later, the rule of law *revival* has since transformed into a 'rule of law *paradigm'*.[46] Today, more than ever before, the rule of law is considered key to 'sustainable political and economic development in society' where it has become '*the* central policy' in international development cooperation.[47] However, the rule of law in development policy is not only expected to expedite sustainable economic growth, it also carries with it underlying assumptions of facilitating a natural transition to democratization and market

[41] Thomas Carothers, "The Rule of Law Revival" (1998) 77:2 Foreign Affairs 95 at 95–6.
[42] *Ibid*.
[43] Thomas Carothers, *Promoting the Rule of Law Abroad: In Search of Knowledge* (Washington, D.C.: Carnegie Endowment for International Peace, 2006) at 15.
[44] See for example Daniel Kaufmann, Aart Kraay and Pablo Zoido-Lobaton, "Governance Matters" (1999) *World Bank Policy Research Working Papers No. 2196.*
[45] Matthias Kötter & Gunnar Folke Schuppert, "Applying the Rule of Law to Contexts Beyond the State" in James R Silkenat, James E Hickey & Petr Barenboïm, eds, *Legal Doctrines of the Rule of Law and the Legal State (Rechtsstaat)* (Berlin: Springer, 2014) 71 at 71.
[46] *Ibid*.
[47] *Ibid* at 71–2.

liberalization. Eastern Europe, the most active region in the world for rule of law reform, is a poster-child for this. Since 1989, countries in the region have taken significant steps to 'de-Sovietize' and transition into democratic and liberal market liberal societies.[48] O'Donnell argued that the rule of law, in the context of Latin America, should be seen as a means of 'encouraging the transition of hybrid regimes into substantive and sustainable democracies.'[49] Magen would later reiterate this at a global level, contending that the rule of law essentially helps to uphold the same virtues of democracy by protecting civil liberties and rights and establishing horizontal accountability to provide checks and balances on government.[50]

1.2.2. From Operational and Conceptual Anxieties towards Context and Process

The rule of law has also come under increasing criticism for its modest achievements. Despite pouring billions of dollars over the past two decades into rule of law reform initiatives that strengthen legal institutions, laws and lawyers in developing countries, few countries have made concrete improvements in global rule of law indicators.[51] As a tool of international development, the rule of law has largely failed to deliver wholesale improvements in economic prosperity nor has it led to the anticipated transition to democracy, as transplanted legal institutions and laws rarely end up looking the way they were originally envisioned.[52] Much of the criticism points to the elusive nature of rule of law and the wide divergences in its implementation in practice as the rule of law has been plagued by both operational and conceptual anxieties.

Discussions on how to move forward have been dominated by a debate between whether rule of law reform should focus on institutional form, notably what institutions and statutes look like and how they should operate; *versus* the ends-based function which is concerned with what the legal system seeks to do. Under the guidance of development practitioners, rule of law reform initiatives have traditionally taken an institutional-based approach by targeting institutions, such as courts, police, prisons and laws, that are deemed to be 'necessary for a

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[48] Carothers, *supra* note 41 at 100–1.

[49] Magen, *supra* note 10 at 70.

[50] *Ibid* at 62–3.

[51] Michael J Trebilcock & Ronald J Daniels, *Rule of Law Reform and Development: Charting the Fragile Path of Progress* (Cheltenham: Edward Elgar, 2008) at 37–9.

[52] Deval Desai, Rosie Wagner & Michael Woolcock, "The Missing Middle: Reconfiguring Rule of Law Reform as if Politics and Process Mattered" (2014) 6:02 Hague Journal on the Rule of Law 230 at 235; Thomas Carothers, "How Democracies Emerge: The 'Sequencing' Fallacy", online: *Carnegie Endowment for International Peace* <http://carnegieendowment.org/2007/01/10/how-democracies-emerge-sequencing-fallacy>.

country to have a modern legal order'.[53] Development practitioners have been predisposed to focus on institutional form over function, since factors such as the number and quality of 'laws passed', 'courts constructed' and 'training courses taught' provide visible and measureable indicators that enable them to demonstrate concrete outcomes to donors.[54] In contrast, legal scholars have increasingly criticized the use of rule of law in development policy as being inadequately theorized due to considerable disagreement over its contents and its application in practice. This has further spurned fears that the rampant uncertainty over its contents may result in the rule of law devolving into 'an empty phrase' which is completely lacking in meaning.[55] Scholars have instead advocated for a shift away from institution-based definitions in favour of ends-based definitions which focus on 'the end goals the rule of law serves within a state'.[56] This shift has seen to be more in line with theoretical foundations of the rule of law and 'implicitly pushes reformers to look at the actual needs of societies, rather than apply cookie-cutter programs.'[57]

The ends-based approach can be seen as part of a wider move to encourage rule of law reform efforts to pay greater attention to local context and culture. It is part of a growing tendency to see the rule of law as 'not so much a fixed, unchanging concept' but rather as a 'set of cultural understandings and practices that vary depending on the organization and collective power of interests in society.'[58] Stemming from this, a number of scholars and practitioners have advocated the inclusion of a third dimension which looks the process of rule of law reform, to supplement the predominant focus on institutional form versus ends based function. They encourage a shift from contemplating 'the *what* of reform to the *how*'.[59] Rather than 'concentrating solely on legal forms, or the outcomes that these forms produce' they suggest that rule of law reform efforts must also remain 'firmly focused on the *institutional processes* facilitating equitable contests between competing meaning systems, making politics a foundation for, rather than an impediment to, rule of law reform.'[60] Such a shift is ultimately underlined by a dual recognition. Firstly, it recognises that a multiplicity of

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[53] Kleinfeld, *supra* note 4 at 7.

[54] Desai, Wagner & Woolcock, *supra* note 52 at 233.

[55] Tamanaha, *supra* note 9 at 114. See also Judith Shklar, "Political Theory and the Rule of Law" in Allan C Hutchinson & Patrick Monahan, eds, The Rule of Law: ideal or ideology (Toronto: Carswell, 1987) who describes rule of law as 'becoming meaningless thanks to ideological abuse and general overuse.

[56] Kleinfeld, *supra* note 4 at 12.

[57] *Ibid* at 14.

[58] James A Goldston, "New Rules for the Rule of Law" in David Marshall, ed, *The International Rule of Law Movement: a Crisis of Legitimacy and the Way Forward* (2014) at 10.

[59] Randell Peerenboom, "The Future of Rule of Law: Challenges and Prospects for the Field" (2009) 1:01 Hague Journal on the Rule of Law 5 at 9; Desai, Wagner & Woolcock, *supra* note 52.

[60] Desai, Wagner & Woolcock, *supra* note 52 at 252.

actors – both elites and non-elites, domestic and international – are active participants in rule of law reforms. Secondly, it is based on the understanding that an equitable, locally-legitimate and participatory process in rule of law reforms has an inherent value in and of itself.[61]

The following chapters on a study of the rule of law in China and Vietnam builds upon this shift towards placing greater focus on the process of rule of law reform. In putting forward China and Vietnam's adoption of the rule of law as examples of constitutive rhetoric, the following chapters will inevitable study the process of rule of law reforms in an attempt to move beyond *what* constitutes rule of law in these two countries, to not only the *how* meanings and understandings of rule of law are constructed and contested, and consider perhaps most importantly *why*. Before moving onto this, the next section will break down the definitional challenges faced by the concept of rule of law and analyse its inherently contested nature, to demonstrate why the language of rule of law is ripe for rhetorical use.

1.3. Defining Rule of Law

1.3.1. An Essentially Contested Concept

The enormous success of the rule of law revival in the field of international development is both an example and product of its contested nature. While there is 'almost no disagreement' with the proposition that the rule of law is an essential good, identifying a shared interpretation and application of the rule of law is much more problematic.[62] Despite the pervasiveness of rule of law as an ideal, it is essentially a contested concept as the 'term is afflicted by an extraordinary divergence of understandings.'[63]

Definitional Challenges

The ideals behind the rule of law are commonly traced back to the writings of political theorists and jurists, such as Aristotle, Montesquieu, Locke or Dicey, for authority on its meaning.[64] Their writings, which span over the course of two millennium from 300 BC Greece to 19th Century England, have been used to equate the rule of law with subjecting

[61] *Ibid* at 233, 252.
[62] Spencer Zifcak, *Globalisation and the Rule of Law* (New York: Routledge, 2005) at 1.
[63] Magen, *supra* note 10 at 55.
[64] Alvaro Santos, "The World Bank's Uses of the 'Rule of Law' Promise in Economic Development" in David M Trubek & Alvaro Santos, eds, *The New Law and Economic Development a Critical Appraisal* (Cambridge; New York: Cambridge University Press, 2006) at 257; T H Bingham, *The Rule of Law* (London; New York: Allen Lane, 2010); Tamanaha, *supra* note 9; Jeremy Waldron, "The Rule of Law in Contemporary Liberal Theory" (1989) 2:1 Ratio Juris 79.

government officials to the law; a system of separation of powers with an independent judiciary playing a central role to provide a check and balance on institutional authority; the protection of property rights; and the idea that no man is punishable except for a distinct breach of law. While these sources are often relied on as authority for what the rule of law means, there is 'little agreement on how the conceptions of these different authors and their positions relate to one another,' instead these sources and their conceptions have been 'deployed by different actors for a variety of purposes.'[65] Consequently, the diversity of theoretical underpinnings appear to have contributed to greater ambiguity rather than coherence when it comes to defining the rule of law as it becomes 'subject to a broad array of interpretations and theoretical explanations.'[66]

In grappling with the seeming insurmountable challenge of how to define the rule of law, many scholars have instead turned to defining the rule of law by what it is not. Most commonly, the rule of law is presented as the antithesis to the 'rule of men' where societies are governed by law rather than the desires of powerful individuals who are inevitably vulnerable to human weakness, bias and corruption.[67] The rule of law thus provides a measure of protection against arbitrariness and tyranny through 'fair and impartial rule rather than subjugation to human whim.'[68] At its most basic, rule of law has been taken to mean that 'the government shall be ruled by law and subject to it'[69] and that the law 'is able to impose meaningful restraints on the state and individual members of the ruling elite.'[70]

In addition, the rule of law is also frequently differentiated from rule *by* law which is perceived to be narrower in its scope. Comprising of the basic notion that government action should be conducted through the law, rule by law forms a core aspect of the rule of law ideal and has been described as both a 'stepping stone' towards the rule of law and the most basic and minimal version of the rule of law. [71] Nonetheless, it is widely agreed that rule by law, on its own, is not enough to constitute rule of law as it inevitably 'collapses into the notion of rule by government'.[72] Beyond general agreement that the rule of law is the antithesis to the

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[65] Santos, *supra* note 64 at 257.

[66] David Barnhizer & Daniel D Barnhizer, *Hypocrisy and Myth: the Hidden Order of the Rule of Law* (Lake Mary, Fla.: Vandeplas, 2009) at 13.

[67] Teemu Ruskola, "Law Without Law, or is 'Chinese Law' an Oxymoron" 11 Wm & Mary Bus L Rev 655; Tamanaha, *supra* note 9; Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford; New York: Oxford University Press, 2009); Ernest Weinrib, "The Intelligibility of the Rule of Law" in Allan C Hutchinson & Patrick Monahan, eds, *The Rule of Law: Ideal or Ideology* (Toronto: Carswell, 1987).

[68] John Hasnas, "The Myth of the Rule of Law" (1995) 1 Wis L Rev 199 at 201.

[69] Raz, *supra* note 67 at 212.

[70] Peerenboom, *supra* note 59 at 2.

[71] Barnhizer & Barnhizer, *supra* note 66 at 19; Tamanaha, *supra* note 9 at 92.

[72] Tamanaha, *supra* note 9 at 92; Raz, *supra* note 67 at 212–3.

rule of men and goes beyond mere rule by law, theorists have 'struggled to provide an accepted description' of the necessary element to achieve the rule of law.[73]

Disagreement over Formal and Substantive Versions

In addition to these initial definitional challenges, attempts to identify the key elements of the rule of law are dominated by ongoing debate and disagreement over whether to adopt a narrow or 'thin' formal conception, which focus on legal procedure and sources; or whether rule of law should be understood in 'thick' substantive terms that also includes requirements about the content of the law.[74]

Formal conceptions of rule of law are primarily focused on the necessary elements to safeguard the formal quality of laws and to ultimately enable the legal system to operate effectively. It demands that 'government be conducted in accordance with established and performable norms' although it 'remains silent' on the issue of substantive policies.[75] The 'most influential account'[76] of a formal conception has been attributed to Fuller's "internal morality of law" which comprises of eight formal characteristics of legal rules, requiring that laws be made public and readily accessible; generally applicable; clear, consistent and applied prospectively rather than retroactively; and to be enforced and applied fairly to all.[77] More recently, efforts have been made to extend the list of formal requirements to include also institutional and procedural arrangements,[78] such as an independent and accessible judiciary; open and fair hearings without bias; legal review over legislative and administrative action; and clear limitations on the discretion of law enforcement agencies, which are all seen as necessary to enable the legal system to function effectively, particularly in providing effective remedies in cases where there has been a deviation from the law.[79] These additional elements form part of an expanded formal conception of rule of law, as they remain 'substantively empty' and focus only on the procedural requirements which merely restrict the form that the law can take. They say nothing about what areas or activities should

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[73] Barnhizer & Barnhizer, *supra* note 66 at 19.

[74] In addition, there also appears to be some inconsistency between scholars on the application of the terms 'thick', 'thin', 'formal', and 'substantive'. For example, Peerenboom equates 'thin' to formal or procedural versions of the rule of law; and 'thick' to substantive versions of the rule of law which incorporate elements of political morality such as particular economic arrangements, forms of government or conceptions of human rights. In contrast, Tamanaha envisions that both formal and substantive versions can have thin and thick elements. According to him, a 'thin' formal versions of the rule of law would only require law to be used as an instrument of government action; while a 'thicker' formal version would require democracy or some form of public consent to determine the content of laws.

[75] Allan C Hutchinson & Patrick Monahan, *The Rule of Law: Ideal or Ideology* (Toronto: Carswell, 1987) at 101.

[76] James E Fleming, *Getting to the Rule of Law* (New York: New York University Press, 2011) at 65.

[77] Lon L Fuller, *The Morality of Law* (New Haven: Yale University Press, 1964).

[78] David Clark, "The Many Meanings of the Rule of Law" in Kanishka Jayasuriya, ed, *Law, Capitalism and Power in Asia: the Rule of Law and Legal Institutions* (London; New York: Routledge, 1999) at 32.

[79] Raz, *supra* note 67 at 217–8; Jeremy Waldron, "The Concept and the Rule of Law" (2008) 43:1 Ga L Rev 1; Geoffrey de Q Walker, *The Rule of Law: Foundation of Constitutional Democracy* (Carlton, Vic: Melbourne University Press, 1988).

be governed by legal rules and should be free from government interference, whether it be fundamental rights, equality or justice.[80]

In contrast, a substantive version of the rule of law 'holds that the rule of law embodies tenants of a particular political morality'.[81] While there remains ongoing contests between formal and substantive conceptions, the distinction between them is not always clear as the two are closely interlinked.[82] The relationship between formal and substantive versions of the rule of law has been conceptualised in terms of concentric circles, where the smallest circle consists of the most basic elements of a formal rule of law, which is embedded within a substantive rule of law conception or framework that is in turn part of a broader social and political philosophy that addresses a range of issues beyond those relating to the legal system.[83] As a result, there is a 'necessary connection between procedural and substantive justice'.[84] Substantive versions of the rule of law build on the formal versions outlined above by infusing the laws and institutional arrangements with the desired economic arrangements, forms of government or conceptions of human rights.[85] The most common substantive version of the rule of law is a western liberal democratic version which has been typically associated with a package of individual rights, democracy and also principles of a free market economy.[86] More recently, Peerenboom has advocated for the recognition of alternative substantive versions of rule of law beyond the traditional liberal democratic version. For example, he suggests that the official version of the rule of law being promoted in China and Vietnam 'endorse a state-centred socialist rule of law defined by, inter alia, a socialist form of economy' where public ownership still plays a large role, a non-democratic system in which the Communist Party plays a leading role and an interpretation of rights that emphasize stability, collective rights over individual rights and subsistence as the basic right rather than civil and political rights. [87]

[80] Raz, *supra* note 67 at 214.
[81] Margaret Jane Radin, "Reconsidering the Rule of Law" (1989) 69 BULR 781 at 783.
[82] John Gillespie, *Transplanting Commercial Law Reform: Developing a "Rule of Law" in Vietnam* (Aldershot, England; Burlington, VT: Ashgate Pub. Co., 2006) at 72.
[83] Peerenboom, *supra* note 11 at 5.
[84] Hutchinson & Monahan, *supra* note 75 at 102.
[85] Peerenboom, *supra* note 11 at 3–4.
[86] Tamanaha, *supra* note 9 at 110; Waldron, *supra* note 79 at 1.
[87] Peerenboom, *supra* note 5 at 475.

1.3.2. A Distinctly Liberal Heritage

Despite ongoing contestations over its meaning and key elements, rule of law is widely agreed and recognized as having a distinctly liberal heritage. Rule of law is repeatedly described as one of 'the 'mainstays of liberal thought', it is 'thoroughly understood in terms of liberalism' and 'integrally related to the rise of liberal democracy in the West'.[88] The primary connection between rule of law and liberalism lies in the fact that both are 'premised on the ideal of limited government.'[89] This commitment to liberalism is represented in both formal and substantive versions of rule of law.[90] In substantive conceptions of rule of law, this connection is more explicit, since the most common substantive version is a liberal version focused on individual rights. However, even formal conceptions, despite their ostensible neutrality, are heavily influenced by liberalism as they enhance individual autonomy by providing 'some degree of predictability and some limitation on arbitrariness' in the laws governing society.[91] Even the most minimal elements of formal conceptions that merely require laws to be publically accessible, clear and consistent, are fundamentally aimed at protecting people against the perceived dangers of rule by law by allowing people to plan their activities according to an advanced knowledge of the law and any implications the law may have on the individual's actions. In doing so, rule of law preserves 'the freedom to do what one pleases outside of what the law prohibits', underscoring the fundamental notion of legal liberty.[92]

The political liberalism underlying rule of law also implies a 'considerable degree of economic liberalism.'[93] In setting up a system of predictable, enforceable and efficient legal order, rule of law provides the bargaining chips, entitlements and rights that support 'transactions to be carried out between various market participants' and ultimately enable a market economy to flourish.[94] As a result, it has now become conventional wisdom that rule of law is 'crucial for economic growth'[95] and serves as 'the backbone of an ideal market

[88] Randy Barnett, "Unenumerated Constitutional Rights and the Rule of Law" (1991) 14 Harvard Journal of Law and Public Policy 615 at 615; Tamanaha, *supra* note 9 at 32; Peerenboom, *supra* note 11 at 4.
[89] Hutchinson & Monahan, *supra* note 75 at 100.
[90] *Ibid* at 99.
[91] Peerenboom, *supra* note 11 at 6.
[92] Tamanaha, *supra* note 9 at 71.
[93] *Ibid* at 44.
[94] Kanishka Jayasuriya, *Law, Capitalism and Power in Asia: The Rule of Raw and Legal Institutions* (London; New York: Routledge, 1999) at 6.
[95] Santos, *supra* note 64 at 253.

economy'.[96] As a testament to this, the World Trade Organization includes stringent rule of law requirements which are imposed on all member countries.[97]

The collapsing of rule of law into an economic mode of thought has helped to reduce it into a single dimension of policy that becomes largely instrumental in nature.[98] Rule of law becomes a technological framework to help facilitate an efficient market.[99] It is this view which has propelled the eager adoption of rule of law reforms by international development banks and donors who, as described above, use rule of law as 'both a model and measuring tool' to pave the way for economic development. Ironically, the economic aspect of the rule of law has helped to shield its ideologically liberal origin by cloaking it in a 'crypto-technocratic aura' of technical legal reforms that is noticeably void of any explicit mention of democratization or political reforms.[100] This has helped to bolster rule of law as an intrinsically positive and politically neutral tool that is universally valid and capable of being 'exported' everywhere.'[101]

1.3.3. The Contested Nature of Rule of Law as Key to its Rhetorical Power

Rule of law's distinctly liberal heritage has spurred its eager promotion by development banks across the world, however the widespread acceptance of the concept lies in its essentially contested nature which has helped to strengthen the value and benefit that rule of law is perceived to bring. The extraordinary divergence of definitions and elements attributed to the rule of law has provided it with 'ample basis for contestation', as its internally complex character enables contenders to 'legitimately advance contrasting understandings of the rule of law'.[102] The resulting 'ambiguity' or 'elasticity' of the concept has helped to deflect any criticism of rule of law by 'alternating between the purposes of the different conceptions at play.'[103]

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[96] Mattei & de Morpurgo, *supra* note 40 at 6.
[97] Pamela S Poland, "Rule of Law and China's WTO Accession: Why the Extensive Concessions, The" (2003) 6 Duq Bus LJ 57 at 63.
[98] For a more in-depth discussion of the features of economic thought in law, see James Boyd White, "Economics and Law: Two Cultures in Tension" (1986) 54 Tenn Law Rev 161.
[99] Mattei & de Morpurgo, *supra* note 40 at 1.
[100] Magen, *supra* note 10 at 96.
[101] Mattei & de Morpurgo, *supra* note 40 at 1.
[102] David Collier, Fernando Daniel Hidalgo & Andra Olivia Maciuceanu, "Essentially Contested Concepts: Debates and Applications" (2006) 11:3 Journal of Political Ideologies 211 at 230.
[103] Mattei & de Morpurgo, *supra* note 40 at 1; Kötter & Schuppert, *supra* note 45 at 71; Santos, *supra* note 64 at 266; Joel M Ngugi, "Policing Neo-Liberal Reforms: The Rule of Law as an Enabling and Restrictive Discourse" (2005) 26 U Pa J Int'l Econ L 513.

For example, formal conceptions, which focus on safeguarding the formal quality of laws and are more amenable to universal application, are used to quash concerns that 'thicker' more substantive versions of rule of law could not be successfully implemented in other countries as they promote 'a cultural idea with substantive, values-driven content' which 'different cultures – and different countries' will face great difficult in agreeing on.[104] The ostensible neutral nature of formal conceptions of rule of law thus help to facilitate the exportation of rule of law to regimes and cultures 'otherwise incompatible with or even hostile to, the ideals of classical liberalism of the kind advanced by the rule of law.'[105] When it comes to China and Vietnam, in particular, formal versions of the rule of law are more likely to be accepted compared to a 'larger package of political reforms that includes democracy and an expansive liberal interpretation of civil and political rights.'[106]

At the same time, substantive versions of rule of law remain available to counter fears that formal versions of the rule of law are vulnerable to instrumentalization, particularly by authoritarian governments. Theorists have shirked at the proposal that rule of law should serve merely an instrument, which like a knife, is capable of being used for both proper and improper purposes,[107] and challenge the idea that a rule of law regime may be compatible with 'inequitable or evil content' such as slavery or apartheid. A substantive version of the rule of law has been increasingly advocated in response to the human rights abuses that took place in apartheid South Africa and even Nazi Germany which both operated under formal rules and laws.[108] In such cases, a 'thick' or substantive conception of the rule of law has been promoted in order to 'relate political and economic problems to law, legal institutions and particular conceptions of legal systems' and allow activists and legal reformers to discuss controversial political issues under the banner of rule of law reforms.[109]

Emerging from this, the plurality of conceptions that are connected to rule of law have greatly contributed to the 'strength and appeal of the rule of law as it is used today.'[110] This provides the foundation for the persuasive rhetoric of rule of law, by enabling actors to switch between formal and substantive conceptions in order to 'accommodate itself to changing

[104] Carothers, *supra* note 43 at 45.
[105] Barnhizer & Barnhizer, *supra* note 66 at 19.
[106] Peerenboom, *supra* note 11 at 10.
[107] Raz, *supra* note 67 at 211.
[108] Clark, *supra* note 78 at 33.
[109] Peerenboom, *supra* note 11 at 9.
[110] Santos, *supra* note 64 at 256.

governmental situations and political forces'[111] and convince others of both the benefits and viability of the rule of law in virtually every political and cultural setting. It is only due to this rhetorical power that rule of law has enjoyed such ready acceptance 'traversing all fault lines' that the rule of law is 'good for everyone.'[112] While this belief is orthodox amongst Western states, governments with a wide divergence of political, cultural and economic preferences – some of which have 'rejected democracy and individual rights', some of which who 'reject capitalism' and many of which who 'oppose liberalism and are explicitly anti-Western' have increasingly spoken up to claim the essential role of the rule of law in their own political systems[113] As a result, it has been suggested that the unanimous support for the rule of law 'is a feat unparalleled in history' as '[n]o other single political ideal has ever achieved global endorsement.'[114]

Consequently, the contested nature of rule of law has resulted in a wide-ranging plurality over its meaning. Part and parcel to the essentially contested nature of the rule of law is that it results in a considerable 'proliferation of conflicting definitions' as debates over its meaning cannot be fully resolved.[115] This resulting plurality subsequently helps to fuel the rhetorical power of rule of law. The rhetoric of rule of law is also the key value to be gained from the concept, as there is potentially much to be lost from condensing rule of law into a singular definition or a set mandatory minimal requirements.

2. Adopting the Inherited Language of Rule of Law in China and Vietnam

2.1. Overview

Having set the backdrop to the enormous success of the rhetoric of rule of law in its promotion across the globe, this chapter turns to studying how the inherited language of rule of law has been used in the context of China and Vietnam, where rule of law has been eagerly adopted by the ruling Communist Parties. The rule of law has faced increasing criticism in recent years. Critics point to its contested nature and the wide divergences in its implementation in practice to argue that the rule of law is in danger of 'rampant uncertainty'

[111] Hutchinson & Monahan, *supra* note 75 at 99.
[112] Tamanaha, *supra* note 9 at 1–3.
[113] *Ibid*.
[114] *Ibid* at 3.
[115] Collier, Daniel Hidalgo & Olivia Maciuceanu, *supra* note 102 at 233.

and may 'devolve to an empty phrase' which is completely lacking in meaning.[116] In this context, China and Vietnam provide important case studies as both countries have made careful efforts to emphasise that they are adopting a distinctly "socialist" version of the rule of law, under which their respective Communist Parties play an eminent role, deviating from traditional Western liberal models. This has led to concerns that China and Vietnam are not actually adopting rule of law, but something else – something most commonly perceived to be closer in line with 'rule by law'.

To analyse the rhetorical challenge posed by rule of law, this chapter applies the first aspect of White's framework of constitutive rhetoric to China and Vietnam's adoption of the rule of law. The first aspect of constitutive rhetoric states that the speaker always begins speaking in the inherited language of his or her audience, in order to persuade them his or her points are both valid and intelligible.

I trace the background for the appeal of rule of law in China and Vietnam to argue that both countries were attracted to legal reforms based on a dual desire to fuel economic growth and to strengthen the legitimacy of their respective Communist Party. These two points are inter-connected as the legitimacy of the Party in both countries rests, to a large extent, on its ability to sustain economic growth. Given that, as outlined in Chapter 1, the rule of law has come to be perceived as crucial for economic growth, adopting the language of rule of law enabled China and Vietnam to 'speak' in the language of Western governments, foreign investors and development banks to help facilitate its entrance into the global economic order. As a result, the respective Communist Party and the Government in China and Vietnam have made deliberate attempts to not only frame and align domestic legal reforms in the language of 'rule of law', but have also adopted selected rule of law principles such as the supremacy of the law, equality of all before the law and the notion that rulers need to be bound by the law.

2.2. The Appeal of Rule of Law in China and Vietnam

In both China and Vietnam, the key impetus behind the turn to rule of law have been two-fold. It has been driven by the dual desire to fuel economic growth and to strengthen the legitimacy of the Communist Party and the government.[117] The two are connected as the legitimacy of the Party in both countries has been seen to be based primarily on 'its ability to

[116] Tamanaha, *supra* note 9 at 114.

[117] John Gillespie & Hongyi Chen, *Legal Reforms in China and Vietnam: a Comparison of Asian Communist Regimes* (Milton Park, Abingdon, Oxon; New York, N.Y.: Routledge, 2010) at 136; Weijiu Zhu, "Towards Governance by Rule of Law" in Dingjian Cai & Chenguang Wang, eds, *China's Journey Toward the Rule of Law: Legal Reform, 1978-2008* (Leiden; Boston, Mass.: Brill, 2010) at 111–5.

sustain economic growth.'[118] This dual appeal must first be understood in the context of the political, economic and legal developments that have taken place in China and Vietnam over the past six decades.

2.2.1. The Rise of the Communist Party and its Implications for the Law

The Communist Party came into power in China in 1949 after more than two decades of intermittent civil war with its rival political party, the *Kuomintang*. Following their victory in 1949 and the creation of the People's Republic of China (PRC), the Communist Party of China (CPC) abolished the prevailing legislation which had existed under the Nationalist *Kuomintang* government and set out to develop in its place a Soviet inspired socialist legal system.[119]

In neighbouring Vietnam, the Communist Party gradually gained control over the north of the country between the 1940 to the 50s. However, during this period, the development of the legal system took a backseat due to the ongoing war with the French which would last until 1954 and later the thirty year civil war between North and South Vietnam who were supported by the United States.[120] The Communist Party of Vietnam (CPV) would eventually gain control over the whole country after the reunification of North and South Vietnam in 1975. Early experience during the CPV's rule demonstrated that leadership by moral virtue was insufficient and that there was an important place for laws to regulate state-society relations. In particular, excesses in the execution of Chinese style land reforms in Vietnam during the 1953-56 would result in public apologies by Ho Chi Minh and Vo Nguyen Giap – top CPV leaders who were regarded as 'highly virtuous' – along with the demotion of Party Secretary Truong Chinh.'[121] As a result, the CPV would import the Soviet doctrine of socialist legality into North Vietnam in the late 1950's, officially endorsing the doctrine at the CPV's Third National Congress in 1960. While the doctrine of socialist legality attached increasing importance to the role of law in governance, it was underlined by four fundamental principles: the Party's leadership rule; the class based nature of law; the ready substitution of policy for law; and the predominance of the collective interest over individual

[118] Peerenbom, *China's Long March Towards Rule of Law,* 189.
[119] Zhang, *supra* note 32 at 32–33.
[120] Gillespie, *supra* note 82 at 56.
[121] Thiem Hai Bui, "Deconstructing the 'Socialist' Rule of Law in Vietnam: The Changing Discourse on Human Rights in Vietnam's Constitutional Reform Process" (2014) 36:1 Contemporary Southeast Asia 77 at 80.

rights. [122] Following reunification in 1975 laws and political legal institutions from the North were transplanted into the South.[123]

During this time, legal developments had taken an abrupt turn in China in 1957 with the beginning of the Anti-Rightest Movement. The Movement witnessed the purging of many jurists, the abolition of the Ministry of Justice and ideas such as judicial independence and the right of the accused to criminal procedures were criticised as 'reactionary bourgeois ideas that should be rejected'.[124] In particular, Mao Zedong explicitly stated that 'what is needed is the Rule of Man, not the Rule of Law'.[125] As a result, both legislative activities and legal scholarship in China began to decline following 1957. By the end of the Anti-Rightest Campaign in 1959 all law offices were shut down and the Ministry of Justice was abolished.[126] It would further deteriorate during the Cultural Revolution, which took place in the decade following 1966, as Mao openly advocated that 'revolutionary violence and the dictatorship of the proletariat need not be subject to legal restraint'.[127] The Cultural Revolution would witness 'massive killings and beatings of people, and massive violations of all kinds of human rights.'[128] Law schools closed and 'most traces of a formal legal system disappeared"[129] during the period as the country descended into 'legal anarchy'.[130]

2.2.2. Legal Reforms as a Source of Political Legitimacy and Economic Growth

The death of Mao in 1976 and the downfall of the Gang of Four – who had been the main drivers of the Cultural Revolution – marked the beginning of a new chapter in China's legal history. [131] Many leaders in the CPC had personally suffered from arbitrary violence and lawlessness during the Cultural Revolution and were, as a result, eager to 'advocate greater reliance on law as a means of preventing the reoccurrence of policy driven excesses'.[132] Legal reforms thus became 'a way for the CPC, whose image had been badly tarnished, to regain legitimacy both domestically and abroad'.[133]

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[122] *Ibid*.
[123] Gillespie, *supra* note 82 at 62.
[124] Chen, *supra* note 29 at 53.
[125] *Ibid*.
[126] Elizabeth M Lynch, "China's Rule of Law Mirage: The Regression of the Legal Profession since the Adoption of the 2007 Lawyer's Law" (2010) 42 Geo Wash Int'l L Rev 535 at 536.
[127] Chen, *supra* note 29 at 53.
[128] *Ibid*.
[129] William Jones, "Trying to Understand the Current Chinese Legal System" in *Understanding China's Legal System Essays in Honor of Jerome A Cohen* (New York: New York University, 2003) 7 at 34.
[130] Zhang, *supra* note 32 at 34.
[131] Gillespie & Chen, *supra* note 117 at 54.
[132] R P Peerenboom, *China's Long March Toward Rule of Law* (Cambridge, UK; New York: Cambridge University Press, 2002) at 55.
[133] *Ibid*.

In contrast, the Communist Party in Vietnam had gained considerable popular support up to the 1970's following its military successes over the French and Americans. However, as the country entered peacetime following more than three decades of war, the Party began searching for new sources of legitimacy.[134] This became increasingly urgent as the Party faced increasing complaints and denunciations from the public.[135] After decades of applying socialist legality, reformers during the Fifth National Congress of the CPV held in 1982, began to question whether revolutionary ideology should continue to dominate legal thinking and argued for a 'separation of the party from the day to day running of the government' and 'regulation through law, rather than moral rule and administrative edict'.[136]

However, legal reform in China was also 'inextricably linked with economic change',[137] while in Vietnam market reforms have influenced legal discourse 'more than any other single factor'.[138] In late 1978 Deng Xiaoping rose to power as China's "paramount leader" when he spearheaded massive economic reforms by arguing that China could only reach its ideal of a communist society by first passing through a capitalist phase.[139] In 1978, the 'now legendary' Third Plenum of the Eleventh Central Committee of the CPC inaugurated China's new "reform and open door" (*gaige kaifang*) policy.[140]

Several years later, faced with rampant inflation, falling production, a vibrant informal economy,[141] Communist Party leaders in Vietnam would themselves come to the conclusion that 'central planning, trade with Eastern bloc countries and import-replacement strategies could not replicate the economic growth experienced by Vietnam's neighbours'.[142] However, it was not until the next National Congress of the CPV in 1986 that *Doi moi* was introduced, mirroring the *Gaige kaifang* policy that the China had instigated eight years earlier.[143] Both *Doi moi* and *Gaige kaifang* abolished the centrally planned economy with the goal of moving towards a socialist-oriented market economy that directly opened the country up to export

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[134] Gillespie & Chen, *supra* note 117 at 91.
[135] *Ibid* at 136.
[136] Gillespie, *supra* note 82 at 87.
[137] Karen Turner-Gottschang, James V Feinerman & R Kent Guy, *The Limits of the Rule of Law in China* (Seattle: University of Washington Press, 2000) at 306.
[138] John Gillespie & Pip Nicholson, *Asian Socialism & Legal Change: The Dynamics of Vietnamese and Chinese Reform* (ANU E Press, 2005) at 55.
[139] Peerenboom, *supra* note 132 at 55.
[140] Gillespie & Chen, *supra* note 117 at 54.
[141] John Gillespie, "Concepts of Law in Vietnam: Transforming Statist Socialism" in R P Peerenboom, ed, *Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France, and the US* (London; New York: Routledge, 2004) 142 at 147.
[142] Gillespie & Nicholson, *supra* note 138 at 58.
[143] Chen, *supra* note 29 at 54.

oriented trade, foreign direct investment and fostered the development of the private sector.[144] However, leaders in both countries were aware that it was necessary to create an institutional environment conducive to economic growth. Law was seen to provide an 'important ingredient' in this environment and instigated a number of widespread efforts to create and modify laws in order to accommodate the desired change in the economy.[145] In particular, foreign investors in both countries pushed for greater stability and certainty in the law, along with greater protection of property rights and contracts, leading to substantial changes in the commercial law regime.

The accession of China into the World Trade Organization (WTO) in 2001 and Vietnam in 2007 cemented the need to adjust their legal frameworks in order to accommodate the legal standards expected by foreign investors under the notion of rule of law reforms.[146] In particular, China's Accession Protocol to the WTO was notable for containing 'extensive rule of law obligations, over and above the requirements of the WTO Agreement and the obligations of other acceding countries.'[147]

2.3. Emergence of a Rule of Law Discourse

Shortly after economic reform policies were instigated in 1979 in China and 1986 in Vietnam, discussions on the rule of law began to unfold domestically. Over the course of the next two decades academics and policy makers discussed the relative merits and applicability of the Western concept of rule of law in China and Vietnam as rule of law discourse gradually entered into official Party and government policy.

2.1. A Review of Terminology – Rule of Law or Rule by Law?

Before moving into an analysis of the emergence of rule of law discourse in China and Vietnam, this section will provide a broad overview of rule of law terminology. The most commonly used term for the rule of law is *fazhi* (法治) in Chinese and *nha nuoc phap quyen* in Vietnamese. However, both these terms have been criticized as inexact approximations or

[144] Gillespie, *supra* note 82 at 87.
[145] Turner-Gottschang, Feinerman & Guy, *supra* note 137 at 306.
[146] Thi Lan Anh Tran, *Vietnam's Membership of the WTO: An Analysis of the Transformation of a Socialist Economy into an Open Economy with Special Reference to the TRIPS Regime and the Patent Law* University of Leeds, 2009) [unpublished]; Pitman B Potter, "Legal Implications of China's Accession to the WTO, The" (2001) 2001 China Quarterly 592; Jianming Cao, "WTO and the Rule of Law in China" (2002) 16 Temple International & Comparative Law Journal 379.
[147] Poland, *supra* note 97 at 57.

mistranslations of the English term 'rule of law'. In particular, both *fazhi* and *nha nuoc phap quyen* have been described as closer in meaning to rule *by* law rather than rule *of* law.

In Chinese, the term *fazhi* is an amalgamation of the word *fa* (法) meaning law, with *zhi* (治) meaning to rule or to govern. Since no proposition is used, the term *fazhi* (法治) is linguistically indefinite and could be translated as either 'rule *of* law' or 'rule *by* law'.[148] Similarly, *nha nuoc phap quyen*, an amalgamation of 'state (*nha nuoc*)', 'legal (*phap*)' and 'rights (*quyen*)' – and commonly translated as 'law-based state' – has also been criticised for being closer in meaning to 'rule by law' rather than rule of law.[149] This is due to the fact that, as described below, *nha nuoc phap quyen* was directly inspired by the Russian doctrine of *pravovoe gosudarstvo,* which was itself based on the German principle of *rechtsstaat*.[150] It is frequently pointed out that *rechtsstaat* is 'by no means synonymous' with the rule of law.[151] The most obvious point of divergence is the notion of the state, which is missing from the common law terminology of 'rule of law', but is built into and forms an inextricable part of all civil law versions, where the state is both the subject of the concept and the source of law.[152] As a result, *rechtsstaat* and, by default, *nha nuoc phap quyen* have been seen to be closer in meaning to rule *by* law as they do not 'presuppose a fundamental law which is derived from a source outside the state and which the state is legally powerless to change'.[153]

On top of this, the term *fazhi* continues to be used interchangeably in China with the terms 'ruling the country according to the law' (*yifa zhiguo*[154]) and 'building a socialist country ruled by law' (*jianshe shehui zhuyi fazhi guo*[155]) in official policies, speeches and decisions in a way that has been described as deliberately blurring 'the distinction between rule by law

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[148] John W Head, *China's Legal Soul: The Modern Chinese Legal Identity in Historical Context* (Durham, N.C.: Carolina Academic Press, 2009) at 116.

[149] Melanie Beresford, "Southeast Asia - Vietnam and the Rule of Law" (1995) 54:3 The Journal of Asian Studies 910 at 911.

[150] Developed in the early 19th century, rechtsstaat was used to describe a version of the state that was 'law-based', where the supreme political authority no longer lay, like in earlier centuries, with the 'arbitrary will of an absolute monarch' but required public power to be assigned to bodies on the 'basis of a legal rule and implemented in compliance with other rules'. From its origins in Germany, the concept of Rechtsstaat migrated in the early 20th century to other countries in continental European. For further information, see: Harold Berman, "The Rule of law and the Law-Based State (Rechtstaat)" in Toward the "rule of law" in Russia?: political and legal reform in the transition period (Armonk, N.Y.: M.E. Sharpe, 1992); and Gianmaria Ajani, "The Rise and Fall of the Law-Based State in the Experience of Russian Legal Scholarship" in Toward the "rule of law" in Russia?: political and legal reform in the transition period (Armonk, N.Y.: M.E. Sharpe, 1992).

[151] Duncan Fairgrieve, "Etat de Droit and Rule of Law: Comparing Concepts - A Tribute to Roger Errera" (2015) 1 PL at 46.

[152] Martin Krygier, "Rule of Law and Rechtsstaat" in James R Silkenat, James E Hickey & Petr Barenboïm, eds, *The Legal Doctrines of the Rule of Law and the Legal State (Rechtsstaat)* (2014) 45 at 47.

[153] Berman, *supra* note 30 at 47.

[154] *Yifa zhiguo* has also been translated into English as: 'ruling the country in accordance with the law" or "governs the country according to law" according to the People's Daily and the official web portal of the PRC Government respectively. See Head *supra* note 148 at 115 for further information.

[155] *Jianshe shehui zhuyi fazhi guo* (建设社会主义法制国家) has also been translated as 'building a socialist country of law' by the official web portal of the PRC Government; and as 'building a socialist rule of law country' by Peerenboom.

and rule of law.'[156] Even the most recent official statements on the rule of law continue to be pervaded by descriptions of the law in instrumentalist terms. For example, in President Xi Jinping's 2014 Explanation of the decision on 'Some Major Questions in Comprehensively Moving Governing the Country According to Law Forward', the law is described as 'a strong weapon for ruling the country' while 'the rule of law is a basic method to govern the country'.[157]

Despite ongoing contention that both *fazhi* and *nha nuoc phap quyen* are actually closer in meaning to rule *by* law, I will use the following sections to argue that the terms *fazhi* in China and *nha nuoc phap quyen* Vietnam are strongly influenced by Western rule of law discourse. As demonstrated below, careful efforts have been made to align the state and Party Constitutions with selected rule of law precepts such as the supremacy of the law, equality of all before the law and the notion that rulers need to be bound by the law.

2.3.2 China

Beginning in 1979, shortly after the inauguration of China's new "reform and open door" (*gaige kaifang*) policy, an internal discourse on the rule of law began to unfold within the country. A national debate emerged over whether the concept of rule of law could be reconciled with both the country's socialist political system and the leading role of the Communist Party; and the country's traditional reverence for the rule of man (See Chapter 3).[158] By the early 1980's, it was clear that select rule of law precepts were gaining support as they began to successfully penetrate official party and political discourse. The 1982 Constitution, which 'symbolised a new, reformist order'[159] incorporated the basic rule of law principles, including the supremacy of the law and the equality of all before the law.[160] Reflecting the country's new constitutional principles, the Communist Party's own 1982 Constitution also required the CPC to act in accordance with the law.[161]

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[156] Li, *supra* note 30 at 26; Zhang, *supra* note 32 at 6.

[157] Jinping Xi, "Explanation concerning the 'CCP Central Committee Decision concerning Some Major Questions in Comprehensively Moving Governing the Country According to the law Forward'", online: *China Copyright and Media* <https://chinacopyrightandmedia.wordpress.com/2014/10/29/explanation-concerning-the-ccp-central-committee-decision-concerning-some-major-questions-in-comprehensively-moving-governing-the-country-according-to-the-law-forward/>.

[158] The debate deliberated the merits of the rule of law versus the rule of man. Whilst one camp supported the rule of law over rule of man others favoured a synthesis between rule of law and rule of man in recognition that no legal system could operate without human intervention. A third camp completely rejected rule of law as not only unscientific and incoherent, but also incompatible with socialism and the leading role of the CPC.

[159] Qianfan Zhang, *The Constitution of China: a Contextual Analysis* (2012) at 49.

[160] Article 5 required all state organs, armed forces, political parties, enterprises and institutions to abide by the law; and explicitly stated that no organisation or individual was to be held beyond the constitution or the law; and Article 33 declared all citizens to be equal before the law. Refer to 1982 Constitution of the People's Republic of China (amended 2004).

[161] Peerenboom, *supra* note 132 at 56.

Nonetheless, it would be another decade before the term 'rule of law' would appear in Party and government policy documents and finally become 'an official term in China'.[162] In February 1996, then President of the People's Republic of China (PRC) and the General Secretary of the CPC, Jiang Zemin, delivered a widely publicised address on the importance of 'ruling the country according to law' (*yifazhiguo*), which he described as an important mark of social process and a necessary requirement of the modern socialist state.[163] One month later, the National Party Congress adopted its *9th Five Year Plan and Outline of Objectives for Longterm Development Towards 2010*, which included 'ruling the country according to law and constructing a socialist state based legal system' among its objectives.[164] In 1997, the report adopted at the Fifteenth Party Congress officially embraced the idea of 'ruling the country according to law and constructing a socialist rule of law state.'[165] In contrast to the preceding decade when proponents of the rule of law and rule of man debated one another on which path the country should follow, there was now unanimous support for the rule of law amongst Chinese legal scholars and CPC members.[166] In 1999, the 1982 Constitution was amended to explicitly recognize China as being committed to the 'administration of the state according to law' and the construction of a 'socialist rule of law state'.[167]

The 1999 Constitutional amendments also indicated the official acceptance of the term *fazhi* (法治) as the Chinese translation for the rule of law. Despite ongoing disagreement over whether *fazhi* is closer in meaning to rule *of* law or rule *by* law, the official adoption of the term *fazhi* was, in itself, of significant semantic importance. It was officially embraced after decades of debates which sought to distinguish it from its homophone 法制 (also pronounced *fazhi*) which meant a more generic 'construction of a legal system'. The official use of *fazhi* (法治) was seen to exhibit an acceptance of the ethos of the supremacy of law and equality before the law over merely having 'an expedient set of legal rules and processes facilitating state policy.'[168] In a similar fashion, the phrase *yifazhiguo* (依法治国) gradually replaced its homophone 以法治国 (*yifazhiguo*) which means 'to rule the country using law' and implies a

[162] Zhang, *supra* note 32 at 38.
[163] Gillespie & Chen, *supra* note 117 at 57–8.
[164] *Ibid*.
[165] *Ibid* at 58.
[166] *Ibid* at 57–8.
[167] Article 5, 1982 Constitution of the People's Republic of China (1999 amendment).
[168] Ronald C Keith & Zhiqiu Lin, *Law and Justice in China's New Marketplace* (Houndmills, Basingstoke, Hampshire; New York: Palgrave, 2001) at 29.

more instrumental rule by law. In contrast, the version used in official policy today means 'to rule the country in accordance with the law' and has been argued to imply that the government is also bound by law.[169]

2.3.3 Vietnam

As in China, discussions on the rule of law in Vietnam emerged after the country adopted its own *Doi moi* policies in 1986. From 1989 until the early 1990s, a number of central government institutions were tasked with studying the rule of law as a 'theoretical concept for organizing the political regime and governing society.'[170] The introduction of rule of law concepts in Vietnam is seen to be inspired by the doctrine of *pravovoe gosudarstvo*[171] that developed in the Soviet Union during the *perestroika* reforms under Milkhail Gorbachev in the mid 1980's.[172]

Although China was undergoing similar legal reforms around the same time, Vietnamese reformers were increasingly turning to the Soviet Union for inspiration, particularly after the 1979 conflict between China and Vietnam significantly reduced the influence for the Chinese socialist model and public support for sinic reforms.[173] *Pravovoe gosudarstvo* was designed to formalize economic and social liberalisations (*perestroika)*, by claiming the supremacy of the law and the constitution, without fundamentally disrupting communist party power.[174] As noted above, while there is some disagreement over whether the civil law doctrines of *pravovoe gosudarstvo* or *rechtsstaat* are direct equivalents to the common law concept of rule of law, both the rule of law and 'law based state' are fundamentally concerned with 'the relationship between law and the exercise of power' and are based on the premise that the law contributes to 'articulating, channelling, constraining and informing – rather than merely

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[169] Peerenboom, *supra* note 132 at 64.

[170] Truong Trong Nghia, "The Rule of Law in Vietnam: Theory and Practice" in *The Rule of Law: Perspectives from the Pacific Rim*, Mansfield Dialogues in Asia at 130.

[171] However, a number of Vietnamese writers and scholars attempt to trace the importation of rule of law ideals back to Ho Chi Minh, the founder of the Communist Party of Vietnam (CPV) and first President of the Democratic Republic of Vietnam (North Vietnam) after independence, in the early half of the century. They point to a number of texts drafted by Ho Chi Minh, including the Revendication du Peuple Annamite (Demands of the Annamese People), his Appeal to all Other Nations and The Revolutionary Road, which all emphasised his commitment to the adoption of a constitution, rule by law rather than government orders and fundamental rights and freedoms for citizens. These texts have been seen to incorporate the 'core elements' of the rule of law. See Gillespie, *supra* note 82 at 90. See also, Nghia *supra* note 170 at 123-6.

[172] Peerenboom, *supra* note 11 at 147.

[173] Gillespie, *supra* note 82 at 61.

[174] *Ibid* at 87.

serving'[175] the exercise of such power.[176] Like in Russia, *nha nhuoc phap quyen* was a significant departure from the prevailing model of 'socialist legality' which promoted the supremacy of the party and state administration, by advocating a 'stable, authoritative and compulsory law; equality before the law; and the use of law to constrain and supervise enforcement and administration' thereby introducing limits to party and state power.[177]

In 1991, the Seventh Party Congress added the concept of a law-based state (*nha nuoc phap quyen*) into the socialist political-legal canon alongside socialist legality, democratic centralism and collective mastery.[178] The terminology 'rule of law' was officially used for the first time in the documents of the 8th Party Congress in June 1996 in the implementation of the resolution of the previous Congress. The Congress' Political report recognised the 'successful realization of a number of important renovations of the political system' including the 'continuously building and improvement of the Rule of Law state of the Socialist Republic of Vietnam'.[179] In 2001, the 1992 Constitution was amended to include a definition of Vietnam as a 'state governed by law' into the all-important article 2 which 'defined the nature of the Vietnamese state'.[180]

2.4. Aligning Legal Reforms in the Language of Rule of Law

Despite criticisms that *fazhi* and *nha nuoc phap quyen* are linguistically closer in meaning to rule *by* law, both China and Vietnam have made concrete efforts to align their legal reforms in the language of rule of law. In China, the official endorsement of *fazhi* as 法治 and *yifazhiguo* as 依法治国 held significant semantic importance as, in contrast to their predecessors, both terms could be used to argue that the government is also bound by law. In addition, both China and Vietnam have introduced into their Constitution and laws a number of fundamental rule of law principles, including the supremacy of the law, the equality of all before the law, and importantly limits to party and state power.

[175] Krygier, *supra* note 152 at 46.

[176] For a more in-depth discussion on rule of law versus law based state see: Fairgrieve, *supra* note 151; Berman, "*supra* note 30; Ajani, *supra* note 150; James R Grote, "The German Rechtsstaat in Comparative Perspective" in The legal doctrines of the rule of law and the legal state (Rechtsstaat) (2014); Krygier, *supra* note 152 at 45; James R Nedzel, "Rule of Law v. Legal State: Where Have we Come from, Where Are we Going to" in The legal doctrines of the rule of law and the legal state (Rechtsstaat) (2014) 289.

[177] Peerenboom, *supra* note 11 at 143–147.

[178] Gillespie & Nicholson, *supra* note 138 at 54.

[179] Documents of the 8th Party Congress (National Politics Publishing House, Hanoi, 1996) 61 as cited in Nghia *supra* note 170 at 133.

[180] Mark Sidel, *The Constitution of Vietnam: A Contextual Analysis* (Oxford; Portland, Or.: Hart Pub., 2009) at 120.

These moves are unsurprising if we consider that both countries were attracted to the concept of rule of law largely as a means to fuel economic growth and in doing so to strengthen the legitimacy of their respective Communist Party. After all, the first rule 'to persuade anybody you must in the first instance speak a language that he or she regards as valid and intelligible.'[181] To achieve their goal of economic growth, the rhetoric of rule of law offered both China and Vietnam an opportunity to 'speak' in the language of Western governments, foreign investors and development banks to help facilitate its entrance into the global economic order.

Yet, this is only one part of the picture. Although the rule of law has been adopted as official policy, it is often qualified by terms "socialist" or "with Chinese characteristics". Having adopted the rhetoric of rule of law, the next chapter will explore the way in which the both China and Vietnam have engaged in a 'rhetorical process of remaking and reshaping' traditional western liberal rule of law principles by putting forward distinctly "socialist" versions of rule of law.

[181] White, *supra* note 1 at 689.

3. The Art of the Text: (Re)constituting the Rule of Law in Socialist Terms

3.1 Overview

In using the available cultural resources to undertake the work of persuasion, the speaker inevitably modifies and re-arranges those available cultural resources to serve their own particular purpose. This is the second aspect of White's constitutive rhetoric in which the rhetorical process of remaking and reshaping those resources includes being willing to add or drop a distinction, to admit a new voice and to claim a new source of authority. This chapter will analyse how, in adopting the inherited language of rule of law, both China and Vietnam have gone on to undertake a rhetorical process of reshaping traditional Western liberal rule of law discourse by putting forward distinctly socialist versions of rule of law.

Since the official adoption of the rhetoric of rule of law in China and Vietnam, a 'flurry of legal reform' has taken place over the past three decades.[182] During this time, numerous new laws and regulations have been enacted, steps have been undertaken to legally constrain the acts of public officials, while the court system and the legal profession have undergone considerable expansion and development.

There is no denying that both countries are moving towards more law-based orders. China, in particular, has been recognised as moving 'at breathtaking speed' towards the goal of rule of law or at least a 'thin' procedural version of rule of law.[183] Following the decimation of the legal profession during the Cultural Revolution, the country's legal system has since been virtually rebuilt from scratch from having 'no law at all'.[184] Between 1978 and 2011, 240 laws, 706 administrative regulations and more than 8,600 local regulations were passed in China.[185] This included the promulgation of the Law of Administrative Litigation in 1989, which allowed Chinese citizens, for the first time to challenge the legality of government actions in court. Shortly afterwards in 1996, Vietnamese courts also began to handle administrative litigation and in 1998, the Law on Administrative Complaints and Denunciation was adopted. In addition, there was an explosive proliferation in the number of lawyers in both countries. By 2007, there were 4,000 lawyers in Vietnam compared to only

[182] Gillespie & Chen, *supra* note 117 at 11.
[183] Head, *supra* note 148 at 147.
[184] Randall Peerenboom, "Ruling the Country in Accordance with Law: Reflections on the Rule and Role of Law in Contemporary China" (1999) 11:3 Cultural Dynamics 315 at 334; Zhang, *supra* note 32 at 12.
[185] Katrin Blasek, *Rule of Law in China: A Comparative Approach* (2014) at 37.

800 in 1997; and 150,000 lawyers in China compared to only a few thousand in early 1990.[186] Efforts have also taken place to strengthen the institutional arrangements in which laws are passed and adjudicated. Both China and Vietnam have paid increasing attention to improving the professionalism and efficiency of their courts,[187] while China's National Party Congress and Vietnam's National Assembly have both been given increasingly powers and authority.[188]

Beyond these steps to establish a law-based order, the Party and the state in China and Vietnam have also taken a significant departure from traditional Western liberal rule of law discourse. Having adopted the language of rule of law, both China and Vietnam have gone on to engage in a 'rhetorical process of remaking and reshaping' traditional Western concepts of rule of law by both dropping and adding certain distinctions in their articulation of "socialist" version of rule of law. While both countries continue to emphasise the principles of equality before the law and refer to the restraint of public power, critical components of a liberal conception of the rule of law, they drop any references to the protection of individual rights, linkages to the separation of powers, or multi-party democracy.

China has been more forceful in articulating a distinctly 'Chinese' or 'socialist' vision of the rule of law, however both countries have reiterated a version of the rule of law which is underscored by the leading role of their respective Communist Parties. Unsurprisingly, this has come under considerable criticism, both domestically and internationally, for being inconsistent with the central purpose of the rule of law in imposing restraints on the ruling elite. To legitimate their alternative "socialist" versions of the rule of law, both China and Vietnam have relied heavily on their country's legal history and traditions. The leading role of the Communist Party is justified by references to a carefully crafted revival of centuries old Confucian traditions and more recent socialist precepts. In doing so, both countries have presented their own socialist version of the rule of law as an indigenous variant of the rule of

[186] Alison Conner, "China's Lawyers and their Training: Enduring Influences and Disconnects" in John Gillespie & Chen, Hongyi, eds, *Legal Reforms in China and Vietnam: a Comparison of Asian Communist Regimes* (Milton Park, Abingdon, Oxon; New York, N.Y.: Routledge, 2010); Bui Thi Bich Lien, "Legal Education and the Legal Profession in Contemporary Vietnam" in John Gillespie & Chen, Hongyi, eds, *Legal Reforms in China and Vietnam: a Comparison of Asian Communist Regimes* (Milton Park, Abingdon, Oxon; New York, N.Y.: Routledge, 2010).

[187] For example in China, the Supreme People's court has issued four "five year reform" programmes since 1999. In Vietnam, Resolution 49-NQ/TW was issued in 2005 to provide a strategy for Judicial Reform Strategy Towards 2020.

[188] Keyuan Zou, "Judicial Reform in China: Recent Developments and Future Prospects" (2002) 36 International Lawyer 1039; R P Peerenboom, *Judicial Independence in China: Lessons for Global Rule of Law Promotion* (Cambridge [U.K.]; New York, N.Y.: Cambridge University Press, 2010); Penelope Nicholson, "Vietnamese Courts: Contemporary Interactions Between Party-State and Law" in Stéphanie Balme & Mark Sidel, eds, *Vietnam's New Order: International Perspectives on the State and Reform in Vietnam* (New York: Palgrave Macmillan, 2007); Carlyle A Thayer, "Political Legitimacy in Vietnam: Challenge and Response" (2010) 38:3 Politics & Policy 423.

law which amalgamates their country's history and traditions with its contemporary political ideology.

3.2. Articulating a Distinctly Socialist Rule of Law

In China, the Party has recently re-affirmed their commitment to a socialist rule of law with Chinese characteristics and articulated a series of key principles that include the insertion of the leadership of the Party and the rule of virtue into existing rule of law discourse. In contrast, in Vietnam, the concept of a socialist law based state remains subject to a lack of consensus over its key characteristics as the term is given multiple meanings. Despite these differences, the leadership of the Party remains a central tenant of both China's vision of a socialist rule of law with Chinese characteristics and Vietnam's socialist law based state. It also remains a critical source of tension.

3.2.1. China's 'Socialist Rule of Law with Chinese Characteristics'

China has continually reiterated that the rule of law does not have universal application and insisted that the application of rule of law in China must draw from the 'quintessence of Chinese legal culture' and be determined by the country's national conditions and social system.[189] In 2008, the White Paper on "China's Efforts and Achievements in Promoting the Rule of Law" concluded that although it is important to draw 'on valuable foreign experience for reference' in establishing rule of law in the country, it warned that China cannot 'copy indiscriminately other countries' legal systems or political mechanisms' as the rule of law is ultimately 'determined by and conforms to [a country's] national conditions and social system.' [190]

However, the task of identifying the key elements of the rule of law as implemented and practiced in China is much harder to distinguish. Like elsewhere in the world, descriptions of the central elements or principles of the rule of law in China are intermingled with its core aspirations and institutional attributes. As a result, it is not easy to know where to begin when it comes to distinguishing what makes the Chinese conception of rule of law distinct. The official meaning of the Chinese conception of the rule of law is often traced back to the statement made by then-President and General Party Secretary Jiang Zemin's at the CPC's

[189] Communist Party of China, *Central Committee Decision concerning Some Major Questions in Comprehensively Moving Governing the Country According to the law Forward*; Zhang, *supra* note 32 at 6.
[190] PRC State Council, *supra* note 8.

15th National Congress in 1997, where the Party first formally accepted the idea of 'ruling the country according to law and constructing a socialist rule of law state'. [191] According to him:

'*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 change with changes in the leadership or changes in the views or focus of attention of any leader.*'[192]

Jiang went on to further outline how the establishment of a 'socialist legal system with Chinese characteristics' requires the country to 'safeguard the dignity of the Constitution and other laws,' to ensure 'that all people are equal before the law and that no individuals or organizations have the privilege to overstep it' and compels all government organs to 'perform their official duties according to law'.[193] This statement has been widely perceived as setting the foundation for incorporating components that are central to the rule of law, such as the principle that all are equal before the law and that no one is beyond the law requiring all Party members and government officials, at least in theory, to act in accordance with the law.[194]

At the same time, Jiang's statement has been described as both 'mixed' and 'confusing'.[195] In the same speech, Jiang simultaneously emphasized the core leadership of the Party in ruling the country by law, which he saw as unifying 'the adherence to Party leadership, development of people's democracy and doing things in strict accordance with the law' thus ensuring 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'.[196] Early on, Jiang intertwined rule of law with rule of virtue, emphasizing that ruling the country according to law must be accompanied by 'governing the country with high morals,' as neither is 'dispensable, or should be overemphasized to the neglect of the other.'[197] The growing issue of corruption

[191] Zhang, *supra* note 32 at 36.

[192] Zemin Jiang, *Hold High the Great Banner of Deng Xiaoping Theory for an All-round Advancement of the Cause of Building Socialism With Chinese Characteristics' Into the 21st Century* (1997). Full English version of the speech can be found at the Beijing Review: http://www.bjreview.com.cn/document/txt/2011-03/25/content_363499_4.htm

[193] Ibid.

[194] Zhang, *supra* note 32 at 37; Peerenboom, *supra* note 132 at 59; Blasek, *supra* note 185 at 14.

[195] Zhang, *supra* note 32 at 37.

[196] Jiang, *supra* note 192.

[197] Ronald C Keith, Zhiqiu Lin & Shumei Hou, *China's Supreme Court* (2014) at 21.

was seen to further spurn the synthetization of rule of law with the rule of virtue. Corruption posed a major challenge in undermining Party legitimacy, one of the key drivers which had originally fuelled the appeal of rule of law to Chinese leaders. Yet, the Party was also deeply sceptical of an 'exclusive rule of law solution to corruption, based on judicially independent supervision of privilege and power' and instead preferred a comprehensive strategy, which converged on the Party's moral responsibility to fight corruption and charged the Party with leading mass campaigns and coordinating all anti-corruption efforts by Party, state agencies and mass organizations.[198] As the problem of corruption swelled, the concept of the rule of virtue enabled the Party to appeal to the country's imperial traditions (see below) to highlight the importance of 'clean and virtuous officials' as the basis for the 'moral application of law in meeting the needs of the people.'[199]

The Party's move to take the lead on corruption further propelled the alignment of rule of law with the leadership the Party under Hu Jintao, who announced in December 2007 the doctrine of the "Three Supremes".[200] Under this doctrine, senior judges and procurators are required to regard the Party's cause, the people's interests and the Constitution and the laws as supreme in their work. The "Three Supremes" raised some anxiety over which would prevail cases of conflict between the Party cause, the people's interest and the Constitution and laws and has been interpreted as indicating the ascendency of the Party over both the people and the law, due to the placement of the Party's cause as the first of the three supremes.[201] In combination with the "Three Supremes", Hu placed greater focus on the function of rule of law in facilitating stability and harmony, while adjusting the focus away from rights 'in a time of heightened competition and stressful transition to the socialist market economy.'[202]

Xi Jinping's entrance as Party General Secretary in 2012 was seen to bring a significant shift in marking the CPC's 'ideological return to the rule of law rhetoric', as Xi abandoned the previous pattern of 'maintaining stability' and 'harmonious society' while increasingly reiterating the importance of freedom, justice and rule of law.[203] In October 2014, the 4th

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[198] *Ibid* at 28.

[199] Randall Peerenboom, *Fly High the Banner of Socialist Rule of Law with Chinese Characteristics! What Does the 4th Plenum Decision Mean for Legal Reforms in China?*, SSRN Scholarly Paper ID 2519917 (Rochester, NY: Social Science Research Network, 2014) at 9; Keith, Lin & Hou, *supra* note 197 at 28.

[200] Keith, Lin and Hou suggest that the Party's move to take the lead on corruption was a 'precipitating factor inspiring Hu Jintao's advocacy of the "Three Supremes", see Keith, Lin & Hou, *supra* note 197 at 36.

[201] Taisu Zhang, "Pragmatic Court: Reinterpreting the Supreme People's Court of China, The" (2012) 25 Colum J Asian L 1 at 4; Rui Guo, "He Weifang: Which one of the 'Three Supremes' is truly supreme? | Home Is Where The Heart Dwells", online: <https://blogs.law.harvard.edu/guorui/2008/10/23/he-weifang-which-one-of-the-three-supremes-is-truly-supreme/>.

[202] Keith, Lin & Hou, *supra* note 197 at 42.

[203] Jiajun Luo, *China Towards Constitutionalism? Institutional Development Under Socialist Rule of Law System* The University of British Columbia, 2015) [unpublished] at 61.

Plenum of the 18th Central Committee of the CPC focused, for the first time, on the topic of the rule of law.[204] The Plenum's Decision is seen to serve as a 'confirmation of the status quo rather than a Great Leap forward' or backward,[205] however it does outline in explicit terms four principles behind a 'socialist rule of law with Chinese characteristics'. [206] Having been consistently emphasised since the rule of law rhetoric was first adopted almost two decades earlier, the leadership of the Party is, unsurprisingly, the first principle. Under a socialist rule of law with Chinese characteristics, the Party is charged with overseeing everything from 'leading legislation, guaranteeing law enforcement, supporting the judiciary and taking the lead in respecting the law'.[207] The Decision further calls for Party leadership over rule of law work to be bolstered by 'strengthening the authority of Party leadership to determine the principles, policies and deployment for ruling the country according to the law.' [208] However, perhaps in an attempt to address the growing discontentment over corruption, the Decision also recognised that strengthening the Party's leadership over rule of law work means that Party members must act within the limits of the law. The next two principles outline the dominant position of the people and the equality of all before the law and are more reminiscent of elements which are more traditionally associated with Western liberal conceptions of rule of law. The Decision repeatedly emphasizes the need to persuade the Chinese people of the benefits of rule of law and rule based order and to understand 'that the law is a powerful tool to guarantee their own rights, and is a behavioural standard that must be respected.' [209] Furthermore, equality before the law is explicitly noted to require all organisations and individuals to respect the authority of the Constitution and the law and the Decision specifically points to the need to focus on restraining public power and supplementing power with supervision and responsibility.[210] Finally, the Decision revives Jiang Zemin's attempts to combine the rule of law with 'rule of virtue'.[211] As outlined line in the following section, the rule of virtue reflects an attempt to appeal to traditional Confucian legal traditions which afforded to the role of a moral and benevolent ruler.

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[204] Peerenboom, *supra* note 199 at 1.
[205] *Ibid* at 19.
[206] An English translation of the decision is available at: https://chinacopyrightandmedia.wordpress.com/2014/10/28/ccp-central-committee-decision-concerning-some-major-questions-in-comprehensively-moving-governing-the-country-according-to-the-law-forward/
[207] Communist Party of China, *supra* note 189.
[208] *Ibid*.
[209] *Ibid*.
[210] *Ibid*.
[211] *Ibid*.

3.2.2. Vietnam's Dualist 'Socialist Law-Based State'

In contrast to China, where there is now an official articulation of the key principles that constitute a distinctly socialist rule of law with Chinese characteristics, exactly how the CPV and the Vietnamese state view the rule of law remains 'an open question.'[212] Although the doctrine of a 'socialist law based state' has been claimed by CPV theorists as a 'distilled version of the rule of law towards which Vietnam is marching',[213] its characteristics remain 'highly abstract and vague'.[214] National and international scholars have identified its core characteristics as including the sole leadership of the CPV; the supremacy of the Constitution and laws; and the equality of the people before law meaning that people are permitted to do anything that the law does not ban and that everyone, including all party organisations or state institutions, have to comply with the law without exception.[215] Yet, the existing literature on the 'socialist law based state' has been described as 'confusing' as writers 'rarely acknowledge sources', and ideological precepts are 'frequently thrown together with little explanation, much less logical organisation.'[216] As a result, the concept of has been given 'multiple meanings and dimensions' due to the lack of consensus over its key characteristics.[217] At one end of the 'ideological continuum, the term means little more than legal formalism in which the party and state rule through law. At the other end, it approaches a procedural 'rule of law' where the party and state are bound by legal rule' and presupposes a functional separation of party and state, where the party formulates the broader socioeconomic objectives, while the state apparatus enacts and implements the Party line.[218]

This vague and confusing nature of the socialist law based state has been attributed to the fact that it is fundamentally 'dualist' character in that it juxtaposes rule of law principles with socialist legality.[219] Rather than articulating like China, an official vision of the socialist rule

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[212] Martin Gainsborough, "Elites vs. Reform in Laos, Cambodia, and Vietnam" (2012) 23:2 Journal of Democracy 34 at 36. Gillespie, *supra* note 95 at 103.

[213] Bui, *supra* note 121 at 78.

[214] *Ibid* at 84.

[215] Gillespie, *supra* note 82 at 88–9; Nguyen Quoc Viet, *Explaining the Transition to the Rule of Law in Vietnam* Universität Kassel, 2006) [unpublished] at 57; Nghia, *supra* note 170 at 132.

[216] Gillespie, *supra* note 141 at 170.

[217] Bui, *supra* note 121 at 78.

[218] Gillespie, *supra* note 82 at 88.

[219] Matthieu Salomon and Vu Doan Ket suggest that the efforts to build a socialist 'law based state' in Vietnam is a result of dualist thinking which mixes "rule of law" and "rule of the Party", More recently, Bui and Gillespie have argued that the conception of a socialist 'law based state' instead represents a "*syncretism"* of socialist legality and the law-based state. They argue that this is broader than the original notion of a mix of "rule of law" and "rule of the party" since the "rule of the party" is only one, although arguably the most important, principle of socialist legality. Refer to: Matthieu Salomon & Doan Ket Vu, "Achievements and Challenges in Developing a Law-Based State in Contemporary Vietnam: How to shoe a turtle?" in Legal reforms in China and Vietnam: a comparison of Asian communist regimes (Milton Park, Abingdon, Oxon; New York, N.Y.: Routledge, 2010) 134 at 136; Bui T.H, *supra* note 121 at 82–3; and John Gillespie, "The Juridification of State Regulation in Vietnam" in John Gillespie & Albert H Y Chen, eds, Legal Reforms in China and Vietnam: a Comparison of Asian Communist Regimes (Milton Park, Abingdon, Oxon; New York, N.Y.: Routledge, 2010).

of law with Chinese characteristics, in Vietnam the concept of the socialist law based state has been used to modify and re-arrange Western rule of law discourse through the 'syncretism' of socialist legality and the rule of law. Syncretism 'allows new and contradictory substantive ideas to enter and enlarge the range of values applied to new situations' so that imported precepts are 'understood in a dialogical context that constructs social truths in different ways' from the way they were understood in their original form.[220] In particular, rule of law principles have set in motion an 'ideological contest'[221] with core principles of the preceding legal doctrine of socialist legality which was underscored by the Party's leadership rule; the role of law as an expression of the will of the ruling party; and the ready substitution of policy for law. While reform minded party and state leaders use the ideology of the socialist law-based state to smuggle in rule of law principles and slowly build inroads into socialist legality via the incorporation of procedural elements of the rule of law, the rule of law still 'encounters strong ideological resistance' from Party and state officials, especially at the provincial level.[222] This resistance is largely centred on the ongoing struggle between rule of law ideology and Communist Party paramountcy as most party leaders have 'not yet accepted that party policy needs state legislation to acquire force,[223] while the role of the Constitution and laws in relation to party policies and its power to regulate party organisations and members remain unclear.

3.2.3. Central Role of the Party

In both the officially articulated version of a socialist rule of law with Chinese characteristics and the more contested notion of a socialist law based state, a central role is afforded to the Communist Party. The Party is charged with everything from leading legislation, guaranteeing law enforcement, supporting the judiciary and taking the lead in respecting the law.[224] As a result, in both China and Vietnam, the Communist Party's leadership 'determine[s] the trend of legal development' and 'affects how the law is made and enforced'.[225] Since traditional western conceptions of the rule of law, despite its contested nature, is primarily defined in opposition to the rule of man and equated with imposing restraints on rulers, the leading role of the Party has created considerable tensions.

[220] Gillespie, *supra* note 82 at 167.
[221] Gillespie, *supra* note 141 at 170–1.
[222] Gillespie, *supra* note 82 at 101.
[223] *Ibid* at 91–4.
[224] Communist Party of China, *supra* note 189.
[225] Peerenboom, *supra* note 184 at 325.

The Communist Parties in China (CPC) and Vietnam (CPV) do not serve as political parties in the traditional sense, but control 'society and social life in every aspect from top to bottom through organisational cells'.[226] As a result, the relationship between the Communist Party, the state and the legal system play a vital role in discussions about the rule of law. The exclusive leadership of the CPC is mandated by the 1982 Constitution through its "four adherences" – adherence to the leadership of the Communist Party, Marxist-Leninist-Maoist thought, the socialist road and the people's democratic dictatorship.[227] In China, while other political parties, known as 'democratic parties and groups' are legally permitted and eight minor parties participate in the political system, they are constitutionally prohibited from seeking ruling power. [228] The function of democratic parties and groups are largely consultative and such groups can only be formed with the CPC's approval.[229] In Vietnam, the CPV is the only officially recognised political party. Although alternative political parties are not explicitly banned by law, article 4 of the 2013 Constitutions stipulates that the Communist Party of Vietnam is 'the force leading the State and the society',[230] while the 1999 Penal Code is used to sanction individuals who attempt to establish alternative political parties.[231]

Arguably, nothing about the leading role of the Communist Party contravenes a procedural version of the rule of law, which simply 'requires that laws be passed by entities with the authority to make law in accordance with proper procedures' but 'does not dictate where the ideas for law must come from.'[232] So long as the Party's role is defined by the law, Party organs and members act in accordance with the law and individual Party members are subject to the law, the Party's leading role could theoretically be 'compatible with rule of law' since laws deriving from the Communist Party are just as legitimate as laws deriving from private interest groups or by the legislature.[233] The retreat of the Party over the past two decades

[226] Keyuan Zou, *China's Legal Reform Towards the Rule of Law* (Leiden; Boston: Martinus Nijhoff Publishers, 2006) at 41.

[227] Preamble of the 1982 Constitution of the People's Republic of China (amended 2004).

[228] The eight democratic parties/groups are the Revolution Committee of the Chinese Guomingtang (RCCK), China Democratic League, (CDL), China Democratic National Construction Association (CDNCA), China Association for Promoting Democracy (CAPD), the Chinese Peasants and Works Democratic Party (CPWDP), China Zigong Dang, Jiu San Society and the Taiwan Democratic Self-Government League. See Xin Ren, *Tradition of the Law and Law of the Tradition: Law, State and Social Control in China* (Westport, Conn.: Greenwood Press, 1997) at 56.

[229] Zhang, *supra* note 32 at 50.

[230] Previously, article 4 of the 1980 Constitution designated the Communist Party of Vietnam as the **only** force leading the State and society, the word 'only' was removed in 1992 Constitution. This article has been interpreted as affording the Communist Party of Vietnam with an extraordinary role in the political system particularly when compared to the China and the former Soviet model, which provide no formal grant of power to the role of the Communist Party. See: Vietnam's National Integrity System Study, political parties pillar, forthcoming.

[231] Particularly Article 79 on carrying out activities, establishing or joining an organisation aimed at overthrowing the people's administration; and Article 88 on conducting propaganda against the Socialist Republic of Vietnam.

[232] Peerenboom, *supra* note 132 at 213.

[233] *Ibid*.

from their role in daily governance has lent further support to the compatibility between single-party Communist Party rule and the rule of law, as increasing authority has been transferred to the legislature, executive and judiciary. This has also been accompanied by a growing separation of the Party and the state in both China and Vietnam.[234] Nonetheless, the indeterminate status of law in relation to the Party and the Party's extensive influence over the entire legal system continues to fuel discomfort and debate over whether single party rule is reconcilable with the rule of law.

Early on in their adoption of the rule of law as official policy, both China and Vietnam took steps to formally place the Party under the law. In China, the 1982 Constitution requires that 'no organisation or individual is privileged to go beyond the Constitution or other laws'.[235] This is reiterated in the CPC's own 1982 Constitution which stipulates that 'the Party can engage in activities only within the domains permitted by the Constitution and the law.'[236] Similarly, in Vietnam, since 1992 all versions of the Constitution, including the more recent 2013 Constitution, explicitly require all organisations and members of the Party to 'operate within the framework of the Constitution and law'.[237] Nonetheless, in both China and Vietnam, an intricate system of Party regulatory documents and internal inspection commissions continue to exist in parallel to the operation of the law and the state judicial organs. This system creates great uncertainty not only for the status of the law in regards to Party policy, but also to the extent to which the state Constitution and laws have the power to regulate Party organizations and its members.

In China, regulations were passed in the early 1990s in an attempt to formalize the Party's quasi-legal powers.[238] These regulations sought to establish Party regulatory documents as 'extra-legal' sources of norms that are used to implement Party line and its guiding principles and policies, however Party members were still subject to criminal law provision in cases where their behaviour falls under statutory definitions of crime.[239] In principle this meant that

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[234] Jonathan D London, ed, *Politics in Contemporary Vietnam: Party, State, and Authority Relations* (Palgrave Macmillan, 2014); Murray Scot Tanner, "The Erosion of Communist Party Control over Lawmaking in China" (1994) 1994 China Quarterly 381; Peerenboom, *supra* note 132.

[235] Article 5, 1982 Constitution of the People's Republic of China (amended 2004). Although this provision has been included since the original 1982 Constitution, later 1999 amendments would later insert in the beginning of article 5 that China 'governs the country according to law and makes it a socialist country under rule of law.'

[236] Ren, , *supra* note 228 at 57.

[237] Article 4 of the 1992 Constitution

[238] See for example, Provisional Regulations on the Procedure to Draft Laws and Regulations Internal to the Chinese Communist Party issued on 31 July 1990; Chinese Communist Party regulations on the work of case investigation by discipline inspection organs issues on 25 March 1994. Out of the five different categories of regulatory documents which Party organs at the central and provincial levels can issue, two categories (regulations and rules) have binding force and can result in sanctions to those who do not comply.

[239] Flora Sapio, *Sovereign Power and the Law in China* (Leiden; Boston, Mass.: Brill, 2010) at 72–3.

internal forms of party discipline would only be used 'in addition to criminal punishment as the Party commissions for discipline inspection have the obligation to refer alleged criminal cases to the judicial system'.[240] However, in actual practice, a number of manoeuvres are used place criminal offences committed by Party members 'within the scope of Party discipline and outside the state's jurisdiction'. For example, criminal provisions are often replicated by party discipline norms or criminal offences are redefined as "mistakes" or "minor infractions" in order to avoid meeting the threshold of criminal responsibility.[241] More recently in May 2013, the CPC issued two regulations which stipulated that central Party organs should conduct constitutional review before issuing any intra-Party rules and authorizing Party organs to repeal any Party rules which contravened the state Constitution.[242] These regulations have been seen as important moves to improve the consistency of internal Party regulatory documents with the state Constitution and laws.[243]

In contrast to China where it has become well-accepted, at least in theory, that Party policies must be transformed into laws and regulations by entities with law-making authority to be legally binding, in Vietnam, it is still considered 'uncertain whether the Party unequivocally accepts that its policy need state legislation to acquire coercive force.'[244] Recently, General Secretary of the CPV Nguyen Phu Trong asserted that the Constitution's significance is second to the of the CPV's political platform.[245] As a result, there remains a 'frequent conflation of policy and guidelines with laws and an absence of a clear delineation between them.'[246] Yet the CPV 'has signalled that it will refrain from using policies, guidelines, instructions and directives for the purpose of regulatory governance' as it faces increasing pressure to establish more concrete constitutional and legal constraints on the operations of the Party and its members in order to 'ensure equality of Party members and non-members before the law.'[247]

Finally, the Communist Party in China and Vietnam control the entire law-making and judicial process by infiltrating, managing and controlling all state institutions, including the

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[240] *Ibid* at 77–8.
[241] *Ibid*.
[242] The Regulation of Formation of Intra-Party Rules and Provision of Record System Intra-Party rules and Normative Documents.
[243] Luo, *supra* note 203 at 61.
[244] John Gillespie, "Understanding Legality in Vietnam" in Stéphanie Balme & Mark Sidel, eds, *Vietnam's New Order: International Perspectives on the State and Reform in Vietnam* (New York: Palgrave Macmillan, 2007) 138 at 150.
[245] Bui, *supra* note 121 at 85.
[246] *Ibid* at 82.
[247] For example, Nguyen Van An, former chairman of the NA; Nguyen Dinh Loc, former Minister of Justice and the Central Committee of the Vietnam Fatherland Front have all publically voiced their opinions about the need for a law on the CPV. See Bui *supra* note 121 at 85 for further information.

legislature and judiciary.[248] Although the independence of the legislature and the judiciary from the Communist Party has improved over the past decades, the Party continues to hold considerable sway and influence. In China, more than 70 per cent of representatives of the National Party Congress representatives are Party members.[249] In Vietnam, more than 90 per cent of National Assembly deputies are Party members.[250] When it comes to the judiciary, courts are expected to abide by the Party's lines and policies. In Vietnam, judges, like other public employees, are required to '[t]o be loyal to the Communist Party of Vietnam…and to safeguard the national honour and interests'.[251] In China, Deputy President of the Supreme People's Court, Jiang Changxing, reiterated in 2006 that irrespective of the deepening 'understanding of the rule of law with characteristics of socialism, the reform of the judicial system…need[s] to insist on the Party's leadership.'[252] This was further encapsulated in the doctrine of the "Three Supremes", which as outlined above, requires courts to regard the Party's cause along with the people's interests and the Constitution and the laws in their work.

The precarious relationship between the law and the Party can ultimately be traced back to questions over the role of the Party itself. While the explicit role of the Party is 'not clearly defined'[253] in either China or Vietnam's State Constitution or laws,[254] the Party is generally seen to set the broad policy direction for society, through which the Party's ideas are transformed into the states via a statutory procedure.[255] This is a remnant of both countries' socialist political ideologies, but also invokes their shared Confucian legal philosophy which has traditionally privileged the leadership of a benevolent ruler over the law.

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[248] Gillespie, *supra* note 141 at 151.

[249] Zou Keyuan, *China's Legal Reform: Towards the Rule of Law,* 46.

[250] The NA Leaders, the NA, (http://www.na.gov.vn/tailieukyhop/LDQHvaNN13/lanhdaoQH.htm) [accessed on 10 March 2015].

[251] Article 8, 2008 Law on Cadres and Civil Servants, No. 22/2008/QH12.

[252] Xiaoping Chen, "Difficult Road for Rights Advocacy - An Unpredictable Future for the Development of the Rule of Law in China, The" (2006) 16 Transnat'l L & Contemp Probs 221 at 250.

[253] Peerenboom, *supra* note 132 at 214.

[254] Article 4 of the 2013 Constitution of the Socialist Republic of Vietnam in Vietnam generally requires that the CPV is 'the Vanguard of the working class…faithfully represent[s] the interests of the working class, laboring people and entire nation, and…is the force leading the State and society. The preamble of the 1982 Constitution of China (amended in 2004) states that the Chinese people of all nationalities will continue to adhere to the people's democratic dictatorship and the socialist road 'under the leadership of the Communist Party of China and the guidance of Marxism-Leninism, Mao Zedong Thought, Deng Xiaoping Theory and the important thought of Three Represents.' There is no official laws guiding the role or operation of the Communist Party in either country.

[255] Li Zhongjia (1998), *Theories and Practice of Building of Legal System over the Past 20 Years,* as cited in Peerenboom, *supra* note 132 at 213.

3.3. Legitimating a Socialist Rule of Law with Confucian Traditions

Chinese and Vietnamese efforts to construct a distinctly socialist version of the rule of law represent an attempt to modify and re-arrange traditional Western rule of law concepts. On the one hand, both countries have explicitly sought to frame their legal reforms in the language of rule of law in order facilitate their integration into the global economic order. Official articulation of a socialist rule of law, as outlined in the previous section, invoke Western rule of law concepts, most notably the notion of equality before the law and the restraint of public power, in an effort to persuade development banks, Western governments and the international business community, that China and Vietnam are adopting genuine versions of the rule of law. At the same time, the Party and state in China and Vietnam have added and dropped certain distinctions in their articulation of a 'socialist' rule of law to claim a new source of authority.[256] Gone are any references to the protection of individual rights or linkages to the separation of powers or multi-democracy. This is part and parcel of the rhetoric of rule of law, which allows countries to exploit the ambiguity and elasticity inherent in the language of rule of law in order to select and apply the principles which resonate most readily with their own political ideals and objectives.

However, both China and Vietnam have gone beyond simply emphasizing certain rule of law principles while side-stepping others, they have also put forward the leading position of the Communist Party as a, if not *the,* key principle in their own conceptions of the rule of law. To legitimate the leading position of the Communist Party, both China and Vietnam have invoked a carefully crafted revival of centuries old Confucian traditions so that both the socialist rule of law with Chinese characteristics and Vietnams socialist law based state can be seen as a 'hodgepodge of various cultural, historical and political elements' that include the country's deep-rooted Confucian values, its more recent socialist ideology and general Communist Party policies.[257] In doing so, both countries have attempted to invoke their traditional culture and national identities to legitimate the socialist rule of law with Chinese characteristics and Vietnams socialist law based state and promote them as indigenous variants of the rule of law which amalgamate each country's 'native resources' – its culture, traditions and history – with its contemporary political ideology and institutions all while

[256] White, *supra* note 1 at 690.
[257] Li, *supra* note 30 at 33.

navigating the 'dramatic transition from a centrally planned economy to a more market-oriented one.'[258]

3.3.1. Influence of Confucian Traditions in Chinese and Vietnamese Legal Systems

The Chinese legal system extends back to ancient times. Written law was first promulgated in the Spring and Autumn and Warring States periods (770-221 BC) when a written code of laws began to appear.[259] However, the establishment of a unified Chinese legal system was only seen to have begun after the Qin Dynasty (221 BC to 206 BC) which united China into a single state, thus making it possible to have a state-wide legal system.[260] During the succeeding Han Dynasty (206 BC to 220 AD) Confucianism became the orthodox ideology of the state and would have a significant influence over the Chinese legal system for nearly two thousand years.[261] As a result, Confucian philosophy has been described as the 'most striking feature of the traditional Chinese legal system.'[262]

Chinese political-legal ideas would also go on to influence Vietnamese legal thinking and practices more than any other external source.[263] First introduced into present-day North and Central Vietnam, by the Chinese Han dynasty who invaded Vietnam in 111 B.C, Chinese political and social institutions were introduced into Vietnam, along with its three dominant religions – Confucianism, Taoism and Buddhism where they 'merged' into Vietnam's indigenous institutions over the next 1,000 years of occupation.[264] However, it was not until the Le dynasty (1428-1788), after the end of Chinese occupation, that Confucianism became the 'leading ideology of the Vietnamese monarchy' as rulers borrowed extensively from Chinese laws and bureaucratic processes.[265] Thus, from the fifteenth to the early twentieth century, Confucianism played a dominant role in the organisation of Vietnam's education, governance and legal systems.[266] Although Confucianism was not the only political-legal thinking shaping Vietnamese approaches to law, it did 'exert the most profound influence over political legal thinking and practices.'[267]

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[258] Peerenboom, *supra* note 5 at 475; Bui, *supra* note 121 at 79.
[259] PRC State Council, *supra* note 8.
[260] Zhang, *supra* note 32 at 20.
[261] *Ibid*.
[262] *Ibid*.
[263] *Ibid*.
[264] Nguyen Quoc Viet, *supra* note 215 at 91.
[265] Pham Duy Nghia, "Confucianism and the Concept of Law in Vietnam" in *Asian Socialism & Legal Change: The Dynamics of Vietnamese and Chinese Reform* (ANU E Press, 2005) at 79.
[266] Nguyen Quoc Viet, *supra* note 215 at 91.
[267] Gillespie, *supra* note 82 at 41.

3.3.2. Confucianism's Scepticism of the Law

The influence of Confucian philosophy over China and Vietnam has meant that in contrast to the West where the law is seen 'as almost sacrosanct,' law in both these countries is traditionally held law in 'low esteem'.[268] This has consequently incited a deep-rooted cynicism towards the rule of law. Confucian tradition was premised on the ideal of the rule of men – a 'kind of political utopia where those in power derive their authority to govern from their superior virtue.'[269] Firmly rooted in Confucius philosophy is the idea that the law plays a supplementary role to morality and to benevolent rulers as a means of governing. Deference to the law was seen to indicate 'that the rulers are weak in political power and the people are weak in character'.[270] This was because although legal punishment might alter a person's behaviour, it could not change their character in order to 'produce the kind of person required to realize a harmonious society.'[271]

While Confucians recognised that there was a risk of 'fallible humans wanting to gain unlimited power' they believed that moral education through strengthening internal character' to be the only response to this.[272] Confucians argued that rulers should be primarily guided by *li*[273] – a cultural norm and moral imperative under which the order of hierarchy had supreme importance.[274] This hierarchy was to be strictly followed to prevent society from descending into chaos and strengthened the idea that 'lay people owed obedience to government officials who knew best their interest and the interests of the whole society.'[275] Only *li* could provide a form of 'social control over the unrestrained expression of human desires.'[276] In addition, Confucius infused the idea of *ren* (benevolence) into *li*, stipulating that in order to comply with *li*, it was essential to possess morals such as righteousness, good faith, loyalty and basic norms of virtue. As a result, the fusion of *li* and *ren* became the two key elements of

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[268] Luke Lee & Whalen Lai, "The Chinese Conception of Law: Confucian, Legalists, and Buddhist" (1977) 29 Hastings LJ 1307 at 1308.

[269] Ruskola, *supra* note 67 at 660.

[270] P K Chew, "The Rule of Law: China's Scepticism and the Rule of People" (2005) 20:1 Ohio St J Disp Resol 43 at 50.

[271] According to Confucius, "If people are guided by *fa,* and order among them is enforced by means of punishment, they will try to evade the punishment, but have no sense of shame, but if they are guided by virtue, and order among them is enforced by *li,* they will have the sense of shame and also be reformed." Confucian Analects, bk. II, ch. III as cited in Lee and Lai, *supra* note 268 at 1310.

[272] Chew, *supra* note 270 at 51.

[273] The concept of Li originated from the religious rites that were used to worship heaven and ancestors and dates back to the Xia Dynasty (2070 BC to 1600 BC) considered to be the first dynasty in China. Several centuries later, during the Western Zhou dynasty (1100-771 BC) *Li* was infused with political and social functions as it began to be used as a hierarchical order to govern the state. Under the concept of *Li,* the people were subservient to the King, youth were obedient to their elders and the son was servile to his father. For further information, see: Zhang, supra note 39 at 9–23; Zhenbin Sun, Language, Discourse, and Praxis in Ancient China (Springer, 2014) at 12; and Kun Fan, Arbitration in China: a Legal and Cultural Analysis (United Kingdom: Hart Publishing, 2013) at 185-9.

[274] Chew, *supra* note 270 at 48–50; Zhang, *supra* note 32 at 15–17.

[275] Blasek, *supra* note 185 at 39; Zhang, *supra* note 201 at 22.

[276] Lee & Lai, *supra* note 268 at 1308.

Confucian philosophy. These moral norms were seen as 'essential to written law and sometimes play an even more important role in governing behaviour'.[277]

3.3.3. Converging Confucianism and Communism Under Socialist Rule of Law

The emergence of the Communist Party in China and Vietnam resulted in efforts to establish socialist legal systems in each country. However, rather than dissipating under Communist rule, Confucianism has been relied on to support the authority of the Communist Party. Previously vilified as 'as an archaic remnant of a feudal past', for the first thirty years of Communist rule in China, Confucianism was seen as 'an impediment to socialism and modernization.'[278] However, following the initiation of economic and legal reforms in the 1980's, Party leaders 'have been (slowly) resurrecting Confucius and his ideas' in an attempt to bolster official socialist ideology by harnessing the foundations of Chinese culture and traditions to gain more popular appeal.[279] The 'pivot back to Chinese history and "traditional culture"' has been observed to have further accelerated since 2012 following Xi Jinping's entrance as Party General Secretary.[280] In Vietnam, the CPV, from its inception, 'conflated neo-Confucian moral principles with Marxist Leninism to legitimize its rule'.[281] Confucian concepts such as virtue rule (*duc tri*) and assertions of moral righteousness *(chinh nghia)* were used to invest the party with a 'moral and historic mission to lead the nation'.[282] During the 1960s and 1970s, socialist law and legal institutions imported from the Soviet Union to Vietnam were 'filtered through neo-Confucian moral precepts'.[283] As a result, Confucianism can be seen as converging with Marxism in a number of respects under Communist China and Vietnam.[284] It is illustrated not only in the primacy 'afforded to public or common interests over individual interests', but also in 'the broad and active role of the ruler or state to

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[277] Zhang, *supra* note 32 at 43.

[278] Carl F Minzner, "What Does China Mean by 'Rule of Law'?", online: *Foreign Policy* <https://foreignpolicy.com/2014/10/20/what-does-china-mean-by-rule-of-law/>; Ruiping Fan & Erika Yu, *The Renaissance of Confucianism in Contemporary China* (Dordrecht; New York: Springer, 2011) at 1.

[279] Michael Schuman, "Xi Jinping's Love of Confucius May Backfire", *Time* (30 October 2014), online: <http://time.com/3547467/china-beijing-xi-jinping-confucius-communism/>; Fan & Yu, *supra* note 278 at 1. See also Samuli Seppanen, "Ideological Renewal and Nostalgia in China's Avant-Garde Legal Scholarship" (2014) 13 Wash U Global Stud L Rev 83 at 99–104.

[280] Minzner, *supra* note 278.

[281] Gillespie, *supra* note 141 at 145.

[282] *Ibid*.

[283] *Ibid* at 145–6.

[284] Nghia, *supra* note 265 at 84.

serve the common interests of the people', with suggestions that the Confucian authoritarian style of government has 'contributed to the unique characteristics of Asian Communism.'[285]

Appeals to the Confucian precepts stand front and centre of the core principles of a socialist rule of law with Chinese characteristics as articulated in the Plenum's Decision. The influence of the Confucian tradition is best exemplified in two principles behind the socialist rule of law with Chinese characteristics – the leading position of the Communist Party and the combination of rule of law and rule of virtue, two principles which are closely intertwined. Both principles rest on Confucianism's traditional privileging of *li* and the role of a 'benevolent government' or 'sage ruler' to supplement the rule of law, which was perceived on its own to be insufficient.[286] Confucianism has been used to help validate the sole leadership of the Communist Party. Just as under Confucianism, the 'king is the state and rules according to the principle of virtue-rule', similarly under Communism, the Party represents the 'collective mastery of the people' and is 'the central entity and the source of moral authority and the political force leading the whole system.'[287] As a result, Maoism, the guiding spirit of Chinese Communist law, has been described as 'the new *li* which replaced the Confucian *li'*.[288]

Rule of virtue has helped to bridge the gap between Confucianism with traditional Western liberal notions of the rule of law, which focus on constraining the ruling elite, who are inevitably vulnerable to human weakness, bias and corruption. Rule of virtue represents a 'quasi-Confucian aspirational idea that all legal systems involve both rule of man and rule of law' as legal systems inevitably require 'people to make decisions and exercise discretion' and such decisions are best made by 'wise and virtuous officials [who] exercise discretion and rule justly.'[289] However, the contemporary use of virtue rule is also a demonstration of the way traditional Confucian precepts have been altered to justify contemporary political ideology. Previously endorsed by Jiang Zemin who insisted that the rule of law and rule of virtue must go hand in hand, rule of virtue has increasingly come to be aligned with Marxism, collectivism and patriotism rather than its traditional meaning of benevolence and ethical rule, in an attempt to 'cure the moral decay associated with the introduction of the free

[285] *Ibid*.
[286] Li, *supra* note 30 at 27; Peerenboom, *supra* note 199 at 43.
[287] Lisa Toohey, "Judicialisation, Juridification and Legalisation: Themes in Comparative Legal Scholarship of Vietnam" (2010) 2010 Lawasia J 179 at 4.
[288] Lee & Lai, *supra* note 268 at 1326.
[289] Peerenboom, *supra* note 199 at 9–10.

market economy.'[290] This is reiterated by the Decision which describes the rule of virtue as carrying forward the Socialist core value system, China's traditional virtue, social morals, professional ethics and household virtues.[291]

Appeals to Confucian traditions in the articulation of the socialist rule of law with Chinese characteristics serves as a pragmatic and political strategy which aims to retain and strengthen public support for the CPC.[292] In face of the potential vulnerability of the Party's leadership to the discourse of the rule of law, reframing the language of the rule of law in the context of Confucian traditions represents an attempt to persuade both their citizens and foreign observers of the need for co-existence of the rule of law with one-party rule by linking the leading position of the Party with the idea that political and governing authority derives from a perceived superior virtue, which has transformed from a Confucian virtue in imperial times to a Communist virtue, in the case of socialist China.[293] Likewise, the renewed interest in 'rule of virtue' has been seen as a strategy to increase the 'legitimacy and appeal of concepts such as rule of law by grounding them in indigenous practices and giving them a distinctive Chinese flavour'.[294]

Similarly in Vietnam, as Marxist-Leninism 'loses heuristic power, party writers portray the party as defender and definer of core social customs and values.'[295] However, as demonstrated in the previous section, the doctrine of a 'socialist law based state' remains 'highly abstract and vague'. This difference in approach compared to a more direct articulation of socialist conceptions of the rule of law in China and Vietnam has been attributed to the fact that in contrast to Imperial China, where the Confucian canon was 'treated as an all-encompassing source of political, social and moral authority', Vietnamese emperors used imported Confucian texts as 'persuasive precedents guiding state policy' leading to a 'comparative lack of coherence or unity in Vietnamese moral and legal traditions.'[296] The importation of Confucian legal traditions from China became the first step in the layering of laws which has led to the Vietnamese legal system today being described as 'a jumble of laws'[297] and 'a rich tapestry of influences, contrasts and enigmas that can baffle

[290] Baogang Guo, "Virtue, Law and Chinese Political Tradition: Can the Past Predict the Future?" (2014) 19:3 Journal of Chinese Political Science 267 at 279.
[291] Communist Party of China, *supra* note 189.
[292] Zhang, *supra* note 32 at 46.
[293] Ruskola, *supra* note 67 at 659–660.
[294] Peerenboom, *supra* note 199 at 10.
[295] Gillespie, *supra* note 82 at 93.
[296] Gillespie, *supra* note 141 at 167.
[297] Nghia, *supra* note 265 at 88.

the observer'[298] as imported ideas have formed hybrids with local precepts and practices. As a result, the Vietnamese approach of syncretism in its efforts to build a law based state have been interpreted as influenced by a centuries old pattern of legality in Vietnam which overlays and interacts the teachings of its conquerors without precisely mirroring them.[299] The history of legality and state rule through law is 'inextricably bound up with the adaptation of foreign ideas' beginning with the importation of Confucian legal traditions from China, the civil law system from France, soviet legality from the former Soviet bloc and more recently commercial law from Western capitalist economies.[300]

Confucian traditions, which have long privileged the place of a 'benevolent government' or 'sage rulers' to supplement the rule of law, have been used to legitimate Chinese and Vietnamese conceptions of a socialist rule of law. In China, it has been used by the Party and the state to re-affirm their conception of a socialist rule of law with Chinese characteristics, whose key principles has been articulated as including both the leadership of the Party and the rule of virtue. In Vietnam, where the country's legal tradition are dually marked by the profound influence of Confucian thinking along with a centuries old pattern of overlaying legal thinking without precisely mirroring them, has similarly emphasized the importance of the leadership of the Communist Party, although beyond this, the doctrine of a socialist law based state remain 'highly abstract and vague'. There is increasing agreement that the rule of law is 'neither a matter of revealed truth nor of natural order, but 'a way of organizing a society under a set of beliefs that are constitutive of the identity of the community and of its individual members.'[301] The case of China and Vietnam illustrate efforts by the Party and the state to break away from Western liberal rule of law discourse by inciting reference to their own unique cultures, traditions and beliefs to justify an alternative 'socialist' concept of rule of law.

[298] Toohey, *supra* note 287 at 1.
[299] Gillespie, *supra* note 244 at 137.
[300] *Ibid.*
[301] Paul W Kahn, *The Cultural Study of Law: Reconstructing Legal Scholarship* (Chicago: University of Chicago Press, 1999) at 6.

4. The Rhetorical Community: Towards a Critical Legal Pluralist Understanding of Rule of Law

4.1. Overview

The past two chapters have focused on official conceptions of the rule of law as articulated by the Party and the state in China and Vietnam. However in keeping in mind that rhetoric is ultimately about 'visions of self and of community, it is necessary to consider the use of rule of law rhetoric as more than just 'a set of commands working their way down from a group of legislators, bureaucrats and judges' but to consider also the population who are made the objects of such rhetoric and who perpetually remake it through their participation.[302] In line with the third and final aspect of White's theory of legal rhetoric as communal and socially constitutive, this chapter will shift the focus from the official articulation of the rule of law as put forward by the Party and the State in China and Vietnam to the reception, interpretation and application of rule of law discourse across society.

As the rhetoric of the rule of law infuses official state and Party policy, legal scholars have long emphasised imposing restraints on rulers as a critical element of the rule of law and sought to expand its definition to incorporate core elements of traditionally liberal democratic conceptions such as human rights and democratic participation. This has enabled legal scholars, reformists within the Party and the State and increasingly citizens to 'co-opt' the rhetoric of rule of law in order to 'provide important capital for reform initiatives.'[303] This has emerged most clearly in debates over the role of the Constitution under a 'socialist' rule of law order through efforts to establish a mechanism for constitutional review where the rhetoric of rule of law has been relied on to bring about modest but meaningful changes. In these cases, legal scholars, reformists within the Party and the State and a disgruntled public, whose discontent was amplified via the media and through online forums, have managed to successfully overturn laws and regulations for being inconsistent with Constitutional guarantees and bring the debate over the implementation of the Constitution squarely into the spotlight.

[302] White, *supra* note 1 at 686; Sarat & Kearns, *supra* note 15 at 8.

[303] Keith J Hand, "Using Law for a Righteous Purpose: The Sun Zhigang Incident and Evolving Forms of Citizen Action in the People's Republic of China" (2006) 45:114 Colum J Transnat'l L at 187–8.

These achievements pose important challenges to the leading role of the Communist Party and ultimately also to the official version of a socialist rule of law put forward by the Party and the State. Not only have these moves made it increasingly difficult for the Party and State to maintain a 'hegemony over the discourse of legal reform',[304] but the rhetoric of rule of law and demands for the enforcement of the Constitution have also directly challenged the relationship between the Party and the government. This ultimately demonstrate that conceptions of rule of law are not merely asserted or imposed by the state, but that at the heart of this process is an ongoing 'state-societal interaction around legal rights and obligations' which are constantly subject to negotiation and contestation between the state (who make the law) and society (who make use of the law).[305] Viewing the adoption of rule of law in China and Vietnam through the framework of constitutive rhetoric ultimately invites us to assume a critical legal pluralist approach which rejects the State legal order 'as the lynch-pin of legal normativity' and to recognise that legal subjects are not merely "law abiding" but also "law inventing".[306]

4.2. Expanding Official Conceptions of Rule of Law

In both China and Vietnam, legal scholars have actively engaged in discussion and debate over the rule of law since the late 1970's in China[307] and the late 1980's in Vietnam[308] even before the concept was officially endorsed into state policy. Active involvement of scholars in these early debates influenced official conceptions of the rule of law, by reiterating that rule of law must extend to constraining the actions of a country's rulers.

In China, legal scholars played a major role in the official adoption of the term 法治 (*fazhi* – an amalgamation of "law" and "to rule" or "to govern"), as detailed in Chapter 2, over its homophone 法制 (*fazhi* – an amalgamation of "law" and "system") by pointing out that while the ultimate aim of constructing a legal system is to achieve the rule of law, the two are not mutually inclusive as the construction of a legal system does not automatically lead to rule of

[304] Pitman B Potter, "Legal Reform in China: Institutions, Culture, and Selective Adaptation" (2004) 29:2 Law & Soc Inquiry 465 at 482.
[305] Mary E Gallagher, "'Use the Law as Your Weapon!' Institutional Changes and Legal Mobilization in China" in Neil Jeffrey Diamant, Stanley B Lubman & Kevin J O'Brien, eds, *Engaging the Law in China: State, Society, and Possibilities for Justice* (Stanford, Calif.: Stanford University Press, 2005) at 75.
[306] Martha-Marie Kleinhans & Roderick A Macdonald, "What is a Critical Legal Pluralism?." (1997) 12:02 CJLS 25 at 39.
[307] Chenguang Wang, "From the Rule of Man to the Rule of Law" in *China's Journey Toward the Rule of Law: Legal Reform, 1978-2008* (Leiden; Boston, Mass.: Brill, 2010) at 11.
[308] Nghia, *supra* note 170 at 130. Nghia pays particularly attention to a government study project conducted by the National Administration School which produced the book "On the Reform of the State Apparatus".

law. In particular, scholars warned that merely focusing on the construction of a legal system could lead to an instrumentalization of the law, where rulers use the law to control others but are not themselves bound by the law. In contrast, they emphasized that rule of law requires the supremacy of the law to bind the government.[309]

In Vietnam, scholars have used the notion of the law-based state as a 'convenient rubric' to smuggle liberal democratic ideals into the rule of law discourse. Academic discussions on the rule of law frequently focus on the fact that laws should not merely be used by the state to govern its citizens, but to regulate the state itself.[310] For example, Vietnamese scholars have defined a rule of law state as enacting 'democratic freedoms of the people into law' and as being responsible for 'protecting and guaranteeing those rights and freedoms'.[311] More specifically the rule of law has been defined to encapsulate principles of human and democratic rights, equality before the law and independence of the judiciary.[312] Similarly in China, while there continues to be wide diversity in how legal scholars conceive of the 'true' meaning of the rule of law and how China should approach it,[313] many scholars have advocated a Western-oriented liberal democratic substantive version of the rule of law that includes elements such as human and civil rights and democratic participation.[314]

Through advocating for a substantive version of the rule of law, which include civil rights and multi-party democracy, legal scholars put forward competing conceptions that diminish the Party and the state's 'control over the content and interpretation' of the rule of law.[315] As the Party and the state's capacity to control the public rule of law discourse wanes, legal scholars are also increasingly posing a challenge to state power and control over the content and direction of their country's legal reforms.[316] In this way, the rhetoric of rule of law serves as more than just an instrument of legitimization for the Party and the state, but also a tool to

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[309] Peerenboom, *supra* note 132 at 63–4. See also Ronald C Keith, China's Struggle for the Rule of Law (Houndmills, Basingstoke, Hampshire; New York, N.Y.: Macmillan ; St. Martin's Press, 1994) at 15–7.
[310] Nghia, *supra* note 215 at 130–1.
[311] *Ibid*.
[312] Ngo Ba Thanh, "The 1992 Constitution and the Rule of Law" in Carlyle A Thayer et al, eds, *Vietnam and the Rule of Law* (Canberra: Dept. of Political and Social Change, Research School of Pacific Studies, Australian National University, 1993) at 110–2.
[313] For example, some scholars endorse certain aspects of a 'Western-oriented liberal democratic "thick" version of the rule of law – including, for example, participatory rights and other procedural safeguards in administrative law', while other Chinese scholars take a more gradualist approach, 'urging caution in China's legal development of legal changes that could be incompatible with China's current circumstances of long-held values.' See: Head, *supra* note 148 at 142.
[314] For example, Li Buyun of the Law Institute of the Chinese Academy of Social Sciences emphasise that rule of law includes the sovereignty of the people, protection of human rights and checks on power. See: Feng Lin, Constitutional law in China (Hong Kong: Sweet & Maxwell Asia, 2000) at 40; Randall Peerenboom, "Let One Hundred Flowers Bloom, One Hundred Schools Contend: Debating Rule of Law in China" (2001) 23 Mich J Int'l L 471 at 533.
[315] Potter, *supra* note 304 at 482.
[316] *Ibid*.

'serve those seeking further reforms.'[317] In recent times, rule of law reforms have also served as 'one of the main channels for political reform' as a broad conception of rule of law has provided a means to discuss issues such as democracy, separation of powers and human rights.[318]

4.3. Emerging Legal and Constitutional Consciousness

Rule of law discourse has been elicited by academics in China and Vietnam to advocate for everything from reforms in the existing system of 'legal explanation' by government agencies[319] and public administration framework;[320] the eradication of re-education through labour programmes;[321] the promotion of grassroots democracy;[322] to the transplantation of Western commercial laws.[323] However, it is through the issue of constitution review that the rule of law discourse has appeared most prominently, as the role of the Constitution has emerged as a key site of contestation. The Constitution poses significant challenges to China and Vietnam's official rule of law discourse and also provides considerable opportunities for legal scholars and reformists who attempt to use the rule of law rhetoric to push for more effective restraints on the Party and the State, greater checks and balances and to ultimately challenge the Communist Party's leading position.

Both the Chinese and Vietnamese State Constitutions explicitly commit each country to being 'governed according to law',[324] or a 'socialist rule of law state'.[325] Key to this commitment is the recognition and protection that '[n]o laws or administrative or local regulations may contravene the Constitution'[326] and that '[a]ll other legal documents must conform to the Constitution'.[327] Connected to this is the assurance that 'no organisation or individual is

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[317] Peerenboom, *supra* note 11 at 15.

[318] *Ibid at 36.* Bui, for example, suggests that the discourse of human rights emerged in Vietnam within the broader doctrine of a socialist law based state 'rather than evolving independently.' See: Bui, *supra* note 121 at 25.

[319] Bui Bich Lien, "Legal Interpretation and the Vietnamese Version of the Rule of Law" (2011) 6 National Taiwan University Law Review 321.

[320] Karin Buhmann, "Building Blocks for the Rule of Law? Legal Reforms and Public Administation in Vietnam" in Stéphanie Balme & Mark Sidel, eds, *Vietnam's New Order: International Perspectives on the State and Reform in Vietnam* (New York: Palgrave Macmillan, 2007); Ming'an Jiang, "Public Participation and Administrative Rule of Law" (2007) 2:3 Frontiers of Law in China 353.

[321] Jiang Shigong, Abandoning RTL a Critical Step Toward Complete Rule of Law, SINA.COM (Feb. 5, 2013), http://blog.sina.com.cn/s/blog_6d8baa340101drap.html.

[322] Jon R Taylor & Carolina E Calvillo, "Crossing the River by Feeling the Stones: Grassroots Democracy with Chinese Characteristics" (2010) 15:2 Journal of Chinese Political Science 135; John Gillespie, "Localizing Global Rules: Public Participation in Lawmaking in Vietnam" (2008) 33:3 Law & Soc Inquiry 673.

[323] Gillespie, *supra* note 82.

[324] Article 5, 1982 Constitution of the People's Republic of China (amended 2004).

[325] Article 2 of the 2013 Constitution of the Socialist Republic of Vietnam.

[326] Article 5, 1982 Constitution of the People's Republic of China (amended 2004).

[327] Article 119 of the 2013 Constitution of the Socialist Republic of Vietnam

privileged to go beyond the Constitution or other laws'[328] and more specifically that all organisations and members of the Party 'operate within the framework of the Constitution and law'.[329] However, the absence of an effective process for Constitutional review[330] to enforce the rules and protections spelled out in the Constitution has led to criticisms that China and Vietnam possess 'constitutions without constitutionalism'.[331] It poses considerable challenges to a rule of law order by fuelling ambiguity around critical questions regarding the hierarchy of laws, the relation of Party policy legal documents and ultimately to what extent the Party is bound by the Constitution and by law. Furthermore, the stark disparity between the protections contained in the Constitution and their application in practice have been used to symbolize how although China and Vietnam may have enacted laws and undertaken considerable steps to establish a law-based order, that this is not the same as having the rule of law.[332]

Following the adoption of rule of law as official policy, the rhetoric of rule of law has been co-opted by a wide range of actors in China and Vietnam to make demands for a more effective system of constitutional review.[333] Efforts to uphold the supremacy of the Constitution have been seen as an 'opportunity to face the Party-state directly' and provide a 'clear agenda to tame the Party through law.'[334] These efforts directly target the critical tension between the core objective of the rule of law as imposing meaningful restraints on the ruling elite and the central position afforded to the leadership of the Communist Party under China's socialist rule of law with Chinese characteristics and Vietnam's socialist law based state. This has taken place to such an extent that constitutionalism has now become 'code

[328] Article 5, 1982 Constitution of the People's Republic of China (amended 2004). Although this provision has been included since the original 1982 Constitution, later in 1999 amendments would later insert in the beginning of article 5 that China 'governs the country according to law and makes it a socialist country under rule of law.'

[329] Article 4 of the 2013 Constitution of the Socialist Republic of Vietnam.

[330] This thesis uses the term "constitutional review" to describe the review or evaluation of the constitutionality of laws. In China and Vietnam, the terms 'defence', 'protection' or enforcement of the Constitution are commonly used to describe this process. See for example Mark Sidel, *supra* note 180 at 184 for an in-depth discussion of the terminology.

[331] Albert Chen, ed, *Constitutionalism in Asia in the Early Twenty-First Century* (Cambridge: Cambridge University Press, 2014) at 1; Qianfan Zhang, "A Constitution without Constitutionalism? The Paths of Constitutional Development in China" (2010) 8:4 Int J Constitutional Law 950.

[332] Zhang, *supra* note 331 at 950.

[333] Rule of law discourse has been specifically recognised as contributing to a 'rise of constitutional consciousness' in both countries. In China, the 'argument that the rule of law means the rule of Constitution' has put the Constitution at the 'forefront of legal reforms'. In Vietnam, efforts by the CPV to build a socialist rule of law have been recognised as contributing to the 'vibrant constitutional politics in the country.' See: Yu Xingzhong, "Western Constitutional Ideas and Constitutional Discourse in China, 1978-2005" in Building constitutionalism in China (New York: Palgrave Macmillan, 2009) 110 at 114; and Bui, *supra* note 121 at 22.

[334] Hualing Fu, "Challenging Authoritarianism Through Law" in Jean-Philippe Beja & Hualing Fu, eds, *Liu Xiaobo, Charter 08 and the Challenges of Political Reform in China* (Hong Kong: Hong Kong University Press, 2012) at 200.

within Chinese political-legal discourse for the globally dominant liberal democratic conception of rule of law.'[335]

The active participation of a wide range of actors – from legal scholars, reformists within the Party and the State, the media and discontented citizens – in the push for a formal system of constitutional review reflects how constitutional development, like rule of law itself is 'part of a dynamic process' that is 'shaped not only by top down decision making but also by interactions between the government and ordinary citizens.'[336] These ongoing debates ultimately illustrate that the rhetoric of rule of law is 'always communal' as it always takes place in a 'social context' that it is 'constitutive of the community by which it works'.[337] While dismissals of China and Vietnam's adoption of rule of law as empty rhetoric have primarily focused on the official conceptions of a socialist rule of law as put forward by the Party and the state, the rhetorical nature of rule of law discourse as one that is inherently communal pushes us to reconceive the rule of law through a lens of language and community that are 'not fixed and certain but fluid, constantly remade, as their possibilities and limits are tested.'[338]

4.3.1. Absence of an Effective Constitutional Review Mechanism

Both China and Vietnam have provided for, under law, systems of legislative supervision which provide a potential source of constitutional review. In Vietnam, the current 2013 and the previous 1992 Constitution grant the National Assembly with the power to nullify unconstitutional laws enacted by other central institutions.[339] Similarly, in China, the Standing Committee of the country's legislature – the National People's Congress – has the function 'to interpret the Constitution and supervise its enforcement.'[340] Article 90(2) of the

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[335] Peerenboom, *supra* note 199 at 3.

[336] Keith Hand, "Citizens Engage the Constitution: The Sun Zhigang Incident and the Constitutional Review Proposals in the People's Republic of China" in Stéphanie Balme & Michael W Dowdle, eds, *Building Constitutionalism in China* (New York: Palgrave Macmillan, 2009) at 241.

[337] White, *supra* note 1 at 691.

[338] *Ibid*.

[339] Article 70, 2013 Constitution of the Socialist Republic of Vietnam; Article 91, 1992 Constitution of the Socialist Republic of Vietnam (amended 2001). Central institutions include documents of the President, Standing Committee of the National Assembly, Government, Prime Minister, Supreme People's Court and Supreme People's Procuracy that contravene the Constitution, laws or resolutions of the National Assembly. See also Article 74, 2013 Constitution of the Socialist Republic of Vietnam regarding the role of the NA Standing Committee. In addition, the Prime Minister with the authority to suspend or nullify legal documents passed by Ministries and the Provincial People's Committees which are deemed to be unconstitutional. Article 98, 2013 Constitution; Article 114, 1992 Constitution of the Socialist Republic of Vietnam (amended 2001).

[340] Article 67.1 of the 1982 Constitution of the People's Republic of China (amended 2004). Prior to the 1982 Constitution, this role was held by the National People's Congress. However, the new shift has been attributed to the fact that the NPC SC Is better positioned to undertake such a position, since the NPC is only in session once a year for less than 3 weeks, making it impossible to undertake such a role in such a short period. See Feng Lin, Constitutional Law in China (Hong Kong: Sweet & Maxwell Asia, 2000) at 298 for more details.

2000 Law on Legislation further grants Chinese citizens the right to propose administrative regulations and local laws for the National People's Congress Standing Committee to review which may be deemed inconsistent with the national laws or the Constitution.

The current system of legislative supervision comes with its own conceptual challenges. Both the National People's Congress and the National Assembly operate 'at the apex of the state pyramid' and are seen to enjoy a 'putative monopoly over the Constitution' as they both create and interpret law and have on paper 'significant formal authority over the executive and judicial branches of power'.[341] As a result, these bodies are placed in the precarious position of ascertaining the constitutionality of laws that they themselves have passed. In practice, each system of legislative supervision has been largely ineffective. Although a General Department for Inspection of Legal Documents was formed in 2003 within the Ministry of Justice in Vietnam to search for local laws which were in conflict with national law and to force local authorities to annul them, most of their work has resulted in merely 'informing' local governments their local regulations are in conflict with national laws and 'suggesting' that it be annulled.[342] In China, there are 'no known instances' of the National People's Congress Steering Committee 'using its constitutional authority to interpret the Constitution.'[343]

The following cases demonstrate how legal scholars and reformists within the state, supported by keen public and media interest, have attempted to use these legislative supervision bodies in China and Vietnam to establish a precedent for constitutional review. Nonetheless, despite making small concessions, the Party and the State continue to demonstrate strong reluctance in endorsing the existing legislative supervision as a system of constitutional review.

China's Sun Zhigang Incident

In China, the *Sun Zhigang* incident sought to use the system of legislative supervision to directly challenge the constitutionality of the country's custody and repatriation system. Introduced in 1958, China's *hukou* system tightly controlled internal migration between urban and rural areas. Custody and repatriation was a controversial form of administrative detention used to enforce these controls and gave civil affairs and public security bureaus

[341] Thomas E Kellog, "The Constitution in the Courtroom: Constitutional Development and Civil Litigation in China" in Margaret Y K Woo & Mary Elizabeth Gallagher, eds, *Chinese Justice: Civil Dispute Resolution in Contemporary China* (Cambridge; New York: Cambridge University Press, 2011) at 341–3.
[342] Sidel, *supra* note 180 at 195–6.
[343] Kellog, *supra* note 341 at 345.

virtually unchecked powers to detain beggars and vagrants in urban areas and to forcibly repatriate them to their place of registered residence.[344] Sun Zhigang was a migrant worker in Guongzhou province who had been detained by police in March 2003 and transferred to the Custody and Repatriation Centre under suspicion that he was an illegal migrant. Several days into his detention, Sun was suddenly pronounced to have died of heart problems. However, Sun's body showed signs of abuse and an autopsy performed nearly a month later found he had died of injuries caused by blunt trauma.

Sun's death caused widespread public ire after the local newspaper *Southern Metropolitan Daily* published a report and accompanying editorial which cited local regulations to argue that Sun was unlawfully detained and suggested that he had died as a result of being beaten in custody. Although Party authorities in Guangdong banned local media reports on the case, national media outlets picked up on the story. The case 'captured the attention of Chinese society and waves of protest filled online chatroom.'[345] Not only did the public response place pressure on authorities to investigate Sun's death,[346] but Chinese legal reformers used the controversy over his death to challenge the custody and repatriation system and to establish a broader precedent for constitutional review in China. In May 2003, two separate groups of legal scholars and professors[347] submitted formal review requests to the National People's Congress Standing Committee under Article 90(2) of the Law on Legislation, which challenged the legality and constitutionality of custody and repatriation measures and received 'overwhelming public support.'[348] These were the 'first high-profile move[s], where citizens used legal procedures…to initiate constitutional review processes and challenge a national regulation.[349]' Although there are no reports to indicate whether a review of the constitutionality of the system by the National People's Congress ever took place, the media reported on 18 June 2003 that the State Council had approved a new regulation to replace the custody and repatriation measures and prohibit forced repatriations. Although the custody and repatriation system was dismantled, the government 'never acknowledged the validity of the

[344] Hand, *supra* note 336 at 223.
[345] *Ibid* at 222.
[346] By early June 2003, a trial began for 12 defendants comprised of employees and patients from the clinic. According to published accounts of the courtroom testimony, clinic guards were angered that Sun had screamed for help and ordered eight detainees to beat him as punishment. The twelve defendants were convicted and given sentences ranging from three years' imprisonment to death. In separate trials, an additional six public security officers were convicted of dereliction of duty and sentenced to prison terms ranging from two to three years.
[347] On 14 May 2003, Yu Jiang, Teng Biao and Xu Zhiyong, who all held Ph.Ds in law and worked as junior staff members in law schools in Wuhan and Beijing submitted a joint petition to the NPCSC. On 23 May another five law processors submitted a request to the NPCSCC. See: Guobin Zhu, "Constitutional Review in China: An Unaccomplished Project or a Mirage?" (2010) 43(3) Suffolk UL Rev 625 at 118.
[348] Zhang, *supra* note 331 at 965.
[349] Zhu, *supra* note 347 at 119.

constitutional claims advanced by these proposals'.[350] They instead chose to 'settle the measure internally by abolishing the measures in question on its own rather than declaring them unconstitutional or illegal'[351] in order to avoid establishing a precedent for a formal constitutional review process.

In any case, Chinese commentators viewed the repeal of the custody and repatriation measures as a 'milestone' in the promotion of '"political civilization, the rule of law, and social progress in China".'[352] As a result of the incident, the Party and the state implemented a number of partial reforms to the constitutional review system. The following year, the National People's Congress Steering Committee established a new office to review and process legislative conflicts and in 2005 adopted revised Working Procedures for resolving legislative conflicts which expanded constitutional review to cover judicial interpretations by the Supreme People's Court and in doing so, established the 'embryonic institutions and procedures' for constitutional review. [353] Perhaps more importantly, the incident further 'raised public consciousness of the Constitution and constitutional review'.[354] Prior to the *Sun Zhigang* incident only a few proposals had been filed under Article 90, since the incident citizens have submitted at least 36 requests for constitutional and legislative review to the National People's Congress Steering Committee.[355] This has included a submission by scholars requesting a review of the legal basis of the system of re-education through labour, petitions by over one hundred residents of Hangzhou challenging the regulations on removal and relocation of urban houses and requests by over a thousand Hepatitis B carriers to review regulations that excluded the recruitment of Hepatitis B carriers as public servants.[356] Yet despite the proliferation of public submissions, the National People's Congress Steering Committee has not exercised its power a single time since the constitutional provision first came into force in 1982, 'even in the face of cases that involve egregious violation.'[357]

Vietnam's Motorbike Case

In Vietnam, the issue of constitutionality would be explicitly invoked for the first time in 2005 to withdraw a legal document in the famous 'motorbike case', reflecting a growing

[350] Michael Dowdle, "Popular Constitutionalism and the Constitutional Meaning of Charter 08" in Jean-Philippe Beja, Hualing Fu & Eva Pils, eds, *Liu Xiaobo, Charter 08 and the Challenges of Political Reform in China* (Hong Kong: Hong Kong University Press, 2012) at 216.
[351] Zhu, *supra* note 347 at 119.
[352] Hand, *supra* note 336 at 225–6.
[353] *Ibid* at 230.
[354] *Ibid*.
[355] *Ibid* at 233–9.
[356] Zhu, *supra* note 347 at 119–120.
[357] Zhang, *supra* note 159 at 85.

consciousness of constitutional rights among the general population. In 2003, the Hanoi People's Council passed a resolution restricting motorbike registration to one motorcycle to each resident. Later that year, the policy was applied across the whole country when the Ministry of Public Security promulgated a circular restricting motorbike registration. However, efforts were not taken to enforce the regulation until 2005 and immediately resulted in widespread anger amongst the public who submitted numerous to government offices, local and national level legislators and newspapers. In August 2005, the Ministry of Justice stepped forward to state that these regulations violated higher national regulations on administrative sanctions and transport safety. In follow up to this, several members of the Law Committee of the National Assembly explicitly argued that restrictions on motorcycle registration violated the right to property enshrined in both the Constitution and the Civil Code. By late November 2005, one day before the Ministry of Justice was scheduled to report to the National Assembly on the violation of the law by national ministries, the Ministry of Public Security issued a directive annulling the provision in its earlier regulation that limited registration of motorbikes to one per person.[358] This case became 'among the first mass claims to constitutional rights in recent Vietnamese history' and had 'enormous public appeal'.[359]

Although, like the *Sun Zhigang* incident in China, this dealt with a relatively 'safe constitutional claim' which 'posed no political threat to the Party',[360] in both cases, the regulations on custody and repatriation and motorbike registration were voluntarily revoked by the State Council in China and the Ministry of Public Security in Vietnam before they had the opportunity to be reviewed by the National People's Congress Standing Committee or the National Assembly. In doing so, the Chinese and Vietnamese state avoided forcing the exercise of formal constitutional review powers and 'sidelined the ground-breaking process of constitutional scrutiny'.[361] In particular, Chinese scholars observed that 'the failure of the National People's Congress Standing Committee to exercise its review powers made the *Sun Zhigang* incident less significant for the rule of law development in China than it otherwise would have been.'[362]

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[358] Chen, *supra* note 331 at 207; Sidel, *supra* note 180 at 197–200.

[359] Mark Sidel, *Law and Society in Vietnam* (Cambridge: Cambridge University Press, 2008) at 61.

[360] For example, in the Sun Zhigang incident in particular, it has been suggested that the government was already considering changes to the custody and repatriation system. See also Sidel, *supra* note 359 at 61.

[361] Hand, *supra* note 336 at 226.

[362] *Ibid*.

4.3.2. Advocating Alternative Constitutional Review Bodies

Stemming from these long-standing barriers to using the system of legislative supervision as a form of constitutional review, legal scholars, reformists within the system and other citizens have long advocated for an alternative mechanism of constitutional review via the judiciary or the establishment of a specialised constitutional court.

Judicial Review and the Qi Yuling *Case in China*

Calls for an alternative mechanism for constitutional review in China can be traced back to the *Qi Yuling* case, which is widely considered to be the first constitutional case in the history of the People's Republic of China. Taking place in 2001, less than a decade after the rule of law was officially endorsed as state policy and only two years since the 1984 Constitution was amended in 1999 to explicitly recognize China as being committed to the 'administration of the state according to law' and the construction of a 'socialist rule of law state'[363] the *Qi Yuling* case ignited the potential for the constitutionality of laws to be subject to judicial review. Involving a case of stolen identity, Qi Yuling brought a civil claim before the Intermediate People's Court in Zaozhuang in Shandong province for misappropriation of identity and violation of her right to education after her classmate enrolled in a vocational business school using Qi's name and entrance exam results.[364] She was awarded RMB 35,000 (then CAD 7,000) in compensation for Chen's misappropriation of her name but was not afforded any remedy for the violation of her right to education. Qi then appealed the decision to the High People's Court of Shandong Province, who due to the complexities of the case, filed an inquiry to the Supreme People's Court seeking direction on the issue.

In an unexpected move, the Supreme People's Court directed that the plaintiff's right to education was a *constitutional* right under Article 46 of the Constitution meaning that Qi should be awarded damages, making it the 'first time that a Chinese court had ever cited a constitutional provision in issuing a judicial interpretation'. [365] The case unsurprisingly generated a great deal of both political and legal controversy. Many viewed it as the country's first case of judicial review of the Constitution and hoped that it would open a new chapter in the country's constitutional development.[366] These hopes would be fuelled by an article

[363] Article 5, 1984 Constitution (1999 amendment).

[364] In this case, the plaintiff Qi Yuling sat for a provisional entrance examination and was accepted into a vocational business school. However, her admission letter was picked up by her classmate Chen Xiaoqi who enrolled in the school under Qi's name. In the meantime, Qi believed that she had failed the exam. Chen continued to work under Qi's name for ten years after graduation before her ruse was discovered by Qi.

[365] Yu, *supra* note 333 at 120.

[366] Although many legal scholars applauded the decision and saw it as opening a new chapter in sparking future litigation using the Constitution, others questioned where the Supreme People's Court had the power the invoke the Constitution perceived the decision to be

published by Justice Huang Songyou of the Supreme People's Court on the same day that the Court issued their response. In the article, Huong openly stated that the Court's interpretation of *Qi Yuling* was 'meant to trigger explicit use of the Chinese Constitution by the courts'[367] as the deepening of the country's ongoing reforms required courts to 'begin referencing constitutional provisions in order to more effectively uphold the law.' [368] In doing so, Huong explicitly elicited the rhetoric of rule of law to argue that '[c]onstitutional judiciacialization is the prerequisite to the realization of ruling the country in accordance with the law and to the building of a socialist country of rule of law' as the 'minimal requirement for ruling the country according to [the] law is to rule the country according to [the] constitution.'[369]

The Effects of the Qi Yuling *Case and the Rise of Rights Consciousness*

The perceived victory of the *Qi Yuling* case has been directly associated with the rise of rights consciousness amongst the public. In a 2002 survey conducted by Suzhou University, 97 per cent of people surveyed knew about the existence of the Constitution, 66 per cent believed that a Constitution is supposed to impose constraints on government and to provide protection for the rights of citizens, while 66 per cent of respondents believed that the main cause of corruption was the lack of checks and balances.[370]

In its immediately succeeding years, the *Qi Yuling* case has also been seen to have contributed to the rise of litigation which made references to the Constitution. In 2002, the year after the *Qi Yuling* case took place, Hu Jintao became General Secretary of the CPC and appeared to initiate a new governing ideology which promoted the authority of the Constitution. His first public appearance was at a ceremony to commemorate the twentieth anniversary of the Constitution, where although he 'made the customary references to socialist legality', he also emphasized the 'importance of enhancing the "authoritativeness" of the Constitution and noted that China's "masses" should view the Constitution as a "legal weapon for safeguarding citizen rights'.[371] This sentiment was also echoed by then President of the Supreme People's Court, Xiao Yang, who stated that only by improving mechanisms for constitutional supervision would the Constitution become a 'strong weapon for citizens to

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flawed. For example, it was argued that because this was a case involving civil law, the General Principles of Civil Law should have been applied rather than the Constitution. Others further argued that the Constitution itself was not justiciable. For an overview of debates see *Ibid* and Kellog, *supra* note 341 at 359–60.

[367] Zhu, *supra* note 347 at 121–2.

[368] Yu, *supra* note 333.

[369] Huong Songyou, 'Constitutional Judicialization and its Significance – A Comment on Today's "Response" by the SPC' in *The People's Court Daily,* 13 August 2001 as cited in Zhu, *supra* note 347 at 122-3.

[370] Jianfu Chen, *Chinese Law: Context and Transformation* (Leiden; Boston: Martinus Nijhoff Publishers, 2008) at 146.

[371] Thomas E Kellog & Keith Hand, "NPCSC: The Vanguard of China's Constitution?" 8:2 China Brief.

protect their own rights and freedoms'.[372] Chinese scholars and citizens read the seeming shift to a more liberal atmosphere as a 'call to take action' to 'advance the cause of constitutional reform.'[373]

Alongside increased efforts to access the National People's Congress Steering Committee's legislative supervision system that followed the *Sun Zhigang* incident, litigation through courts have also taken place to challenge laws perceived to be unconstitutional. Litigation has primarily focused on discrimination against Hepatitis B carriers in school admissions and job applications. Beginning in 2002, more than forty cases involving discrimination against Hepatitis B carriers have been brought by litigants across China. The focus on Hepatitis B discrimination has been seen as a strategic means to press constitutional claims. Since these cases focus on discrimination, they inherently implicate constitutional rights, most notably article 33 of the 1982 Constitution which guarantees that all citizens 'are equal before the law.' Nonetheless, the issue of Hepatitis B discrimination 'does not directly challenge governmental power in the way the other constitutional rights claims might' making it less politically sensitive.[374] However, working in a similar fashion to the approach taken by the National People's Congress Steering Committee, courts have failed to find local regulations to be in conflict with the Constitution or national regulations, even in cases where they have found in favour of the plaintiff.[375] These cases have resulted in numerous provincial governments revising their discriminatory regulations, the provision of a new national regulation jointly issued by the Ministry of Health and the Ministry of Personnel issued in January 2005 specifically declaring Hepatitis B sufferers to be eligible for public sector recruitment[376] and the passing of a law in 2007 preventing employers from refusing to employ applicant on the grounds that he or she is a carrier of an infectious disease.[377] This all

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[372] *Ibid*.

[373] *Ibid*.

[374] Kellog, *supra* note 341 at 364–6.

[375] See, for example, the 2004 *Zhang Xianzhu* case. In addition to raising right to equality under Article 33 of the Constitution, the plaintiff relied on a number of additional legal arguments, including the violation of various national laws and regulations – primarily the Anhui Province's National Civil Service Recruitment Physical Examination Standards. In a ruling delivered in April 2004, the Court declined to find local regulations in conflict with either national regulations or the Constitution, although the decision noted that Zhou had raised constitutional claims to equality, the right to work and the right to privacy which could arguably 'be interpreted as a tacit embrace of the idea that constitutional rights should be justiciable'. The court did nonetheless find in the plaintiff's favour by finding that the hospital failed to adhere fully to the provincial standards in reaching the conclusion that the plaintiff's health was substandard. See: *Ibid* at 371.

[376] Article 7, National Standards for Medical Exams for Public Servants (promulgated jointly by the Ministry of Health and the Ministry of Personnel, 20 January 2005) as cited in Kellog, *supra* note 341 at 375.

[377] Article 30 of the Employment Promotion Law. Prior to its issuance, the draft law was published on the website of the National People's Congress General Office of the Standing Committee. Between 25 March to 25 April 2007, the general public submitted over 11,000 opinions and comments on the draft law in which public opposition to discrimination against Hepatitis B carriers was 'particularly acute.' By 2011, the law had been used as the basis of 25 lawsuits across China, of which 22 were initiated by Hepatitis B carriers. See: Timothy Webster, "Ambivalence & Activism: Employment Discrimination in China" (2011) 44 Vanderbilt Journal of Transnational Law 643.

took place while courts effectively evaded the issue of the constitutionality of the previous regulations.

Calls for a Constitutional Court in Vietnam

Efforts to identify an alternative mechanism for constitutional review were also being echoed in Vietnam, where calls began to be made for the establishment of a specialised constitutional court around the time that the Party and Vietnamese State officially adopted their rule of law policy in the late 1990s. In 1997, three prominent dissidents petitioned the National Assembly to establish a constitutional court. In 2002, another group of 21 domestic critics again petitioned the National Assembly to 'establish a Constitutional Court to adjudicate violations of the Constitution,' which they believed 'any state ruled by law must have.'[378]

The occasion of amending of the 1991 Constitution in 2001[379] provided an opportunity for more outspoken National Assembly delegates, legal scholars, retired officials and citizens to begin pressing for greater reforms and push the limits of officially sanctioned constitutional discourse.[380] Although the issue of constitutional review was initially raised by a small group of legal scholars and overseas dissidents, the process of amending the Constitution helped to garner support amongst reformists within the Party and the state. In 2001, officials from the Vietnam Fatherland Front, the largest Communist Party sanctioned mass organization, called to establish a Constitutional Defence Commission or constitutional court to handle the task of constitutional review or to give such power to the existing National Assembly Law Committee. Later the same year, the *Communist Party Review*, the official journal of the Communist Party echoed calls for strengthening 'constitutional protection'. In addition, a number of legal scholars put forward a number of potential models for constitutional review.[381] Their appeals reflected 'a changed vision of the rule of the Constitution' closely interlinked with the perspective that the Party and the government should be at least partly subject to the law, rather than subjecting the law to Party policy.[382] Although the 2001 constitutional amendment process considerably expanded demands for a constitutional review process, such discussions still remained confined to the 'reasonably narrow circles of

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[378] Sidel, *supra* note 359 at 51.

[379] The 2001 amendments to the 1992 Constitution. Previous constitutional amendment processes in Vietnam had been largely been limited to party-state sponsored channels. Greater engagement of the public in the constitutional amendment process began with the drafting of the 1992 Constitution but would only come to the fore with the 2001 amendments when more outspoken National Assembly delegates, scholars, retired officials and citizens used the official constitutional amendment channels to press for greater reforms and push the limits of officially sanctioned discourse.

[380] Mark Sidel, "Analytical Models for Understanding Constitutions and Constitutional Dialogue in Socialist Transitional States: Re-Interpreting Constitutional Dialogue in Vietnam" (2002) 6 Sing JICL 42 at 58.

[381] Sidel, *supra* note 359 at 53–55.

[382] *Ibid* at 53.

domestic Party, government, legislative and judicial officials, legal scholars and some domestic and overseas dissidents.'[383] In the end, despite the increasingly strong push for a specialised constitutional review mechanism, no such mechanism was included in the final amendments to the Constitution passed in 2001.

When the Constitution underwent amendment again, more than a decade later in 2013, a Constitutional Council would be included in the proposed draft Constitution as a dedicated body of constitutional review. However, reformists and legal scholars criticized this draft provision for not going far enough. For example, former Vice President of the Vietnam Fatherland Front Pham Xuan Hang and Professor Nguyen Lang both criticised the draft Constitution for giving the Council only powers of recommendation regarding the consistency of laws, legal documents and decisions with the Constitution, rather than the power to make a final judgment.[384] Others went even further and used the constitutional amendment process to openly challenge the leading role of the Communist Party and call for greater separation of powers. Most prominently, the controversial Petition 72, submitted by a group of 72 senior scholars led by the former Minister of Justice and included former CPV officials proposed, in addition to the establishment of a specialized constitutional court, the complete removal of article 4[385] and any specific mention to the CPV in the country's Constitution and instead called for a multiparty system with free elections. The contested nature of the official discourse the socialist law-based state in Vietnam were used to support their demands. Two prominent figures behind Petition 72, Nguyen Trung and Tong Van Cong, who had both previously held high level Party and State positions, appealed to the concept of the rule of law and the law based state and its inextricable link to the separation of powers and democracy to challenge the principle of Party paramountcy which they saw as inherently inconsistent with the rule of law.[386]

Taking advantage of the unprecedented level of openness and public participation in the 2013 constitutional amendment process, which engaged and consulted a broader subset of the Vietnamese population than ever before, the media and the blogosphere helped to move the discussion and debate into the mainstream public as online forums and the media were used

[383] *Ibid* at 60.
[384] Vietnamnet, Vietnam will have Constitutional Council or Constitutional Court?, 21 February 2013, available at: http://english.vietnamnet.vn/fms/government/66904/vietnam-will-have-constitutional-council-or-constitutional-court-.html
[385] As outlined in Chapter 3, article 4 of the Constitution stipulates that the Communist Party of Vietnam is 'the force leading the State and the society'.
[386] Bùi Hải Thiêm, "Pluralism Unleashed: The Politics of Reforming the Vietnamese Constitution" (2014) 9:4 Journal of Vietnamese Studies 1 at 17.

to discuss the draft constitutional amendments.[387] Petition 72, in addition to being formally submitted to the NA's constitutional drafting committee, was also posted online where it received more than 12,000 online signatures along with considerable media interest and public attention.[388]

4.3.3. Retraction and Negotiation over the Limits of the Constitutional Review

In the end, these efforts made little concrete gains and have instead resulted in a push-back by Party and the State. In Vietnam, the final 2013 Constitution erased the draft provision for a Constitutional Council and replaced it with a more general provision that made the National Assembly, the Government, the courts, all other state agencies and the people all collectively responsible for 'defending'[389] the Constitution. A specific mechanism to 'defend' the Constitution would be later prescribed by law.[390] In addition, the final Constitution was also widely seen to cement the CPV's power by retaining the controversial Article 4 which safeguards the role of the CPV as the 'force leading the State and society'.[391] In the midst of the amendment process, 50 Vietnamese bloggers and activist were reported to have been convicted of crimes related to their advocacy to reform the Constitution,[392] journalist Nguyen Dan Kien was fired from his newspaper for his blog's implicit criticism of a CPV official in relation to the constitutional amendment process.[393]

In China, despite the initially positive signs that followed the *Qi Yuling* case in the immediate years, widespread pessimism has since emerged over the likelihood that robust constitutional review will become a viable reality in the near future. Instead, the *Qi Yuling* case has been seen to serve as a 'flashpoint in Chinese politics' as Party leaders have been hostile to initiatives which sought to enhance the Supreme People's Court's 'responsibility for the

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[387] For example, a copy of the previous 1992 Constitution with proposed revisions was delivered to every home in larger cities where residents could give comments on the proposed revisions and return their comments to their local authority. In rural areas, community organisations – such as youth, women's and farmer's associations – held meetings with local residents to discuss and feedback on the proposed revisions. Newspapers published the full text of the proposed amendments for readers to comment on and people could submit their comments directly on the website of the National Assembly. In addition, universities and institutes held numerous workshops, conferences and seminars to discuss the proposed revisions. According to official statistics, more than 25 million comments, from a population of less than 90 million people, were collected and more than 28 thousand conferences, workshops and seminars were organised as part of the public consultation process.

[388] "Opinion: The Promise of a Democratic Vietnam", online: *Asia Sentinel* <http://www.asiasentinel.com/politics/opinion-the-promise-of-a-democratic-vietnam/>.

[389] In Vietnam the terms 'defend', 'protect' or enforce the constitution are commonly used. See: Sidel, *supra* note 180 at 184.

[390] Article 119(2), 2013 Constitution of the Socialist Republic of Vietnam. However, up to now, no specific law has yet to be passed to establish such a mechanism.

[391] The retention of Article 4 was cushioned by its expansion to specify that the CPV is 'closely associated with the People, shall serve the people, shall submit to the supervision of the people, and is accountable to the People for its decisions. See: Le Hong Hiep, "The One Party State*," SEAS Perspective* at 7 as cited in Pamela S Katz, Vietnam: Government, Politics and Constitutional Revision (2014) at 11.

[392] Le Hong Hiep, "The One Party State*," SEAS Perspective* at 7 as cited in Katz, *supra* note 391 at 11.

[393] Chris Brummett, *Critics Pile on Vietnam in Rare Constitutional Debate*, Northwest Asian Weekly, March 10, 2013. http://www.nwasianweekly.com/2013/03/critics-pile-on-vietnam-in-rare-constitutional-debate/ (Last visited March 10, 2014) as cited in Katz, *supra* note 391 at 11

constitutional review of government conduct.'[394] However, in recognising that they could not simply 'engineer a rollback of legal reforms', the Party and state instead re-calibrated their rule of law rhetoric by rolling out the 'supremacy of law in "The Three Supremes" and called for a course correction based upon a renewed ideological synthesis that more closely tied the law to Party politics.'[395] (Refer to Chapter 3) Upon taking office in March 2008, President of the Supreme People's Court, Wang Shengjun, took a marked departure from the approach his predecessor, Xiao Yang, by instead calling on judges to 'consider both the interests of the Communist Party and public opinion' in deciding cases.[396] In August 2009, Justice Minister Wu Aiying called upon lawyers to 'above all obey the Communist Party and help foster a harmonious society.'[397] This stepping up of socialist rhetoric has been seen to serve as 'a signalling device to lawyers, implying that the profession has gone too far recently and needs to be reined in.'[398] In line with these moves, in December 2008 the Supreme People's Court formally voided the legal effect of the *Qi Yuling* case, in essence confirming 'that the Constitution was not a subject for litigation.'[399]

In addition, the proliferation of rights-based cases has propelled the tightening of control over civil society in recent years, specifically targeted lawyers and civil society groups who have taken the lead in bringing constitutional cases to court.[400] In July 2009, the Beijing based Open Constitutional Initiative was fined roughly $200,000 for unpaid taxes and penalties in a move that was seen to be politically motivated. Its founder Xu Zhiyong, one of the legal scholars who had successfully pushed to abolish the custody and repatriation system in the *Sun Zhigang* incident, was taken into custody for almost a month on suspicion of tax evasion. Soon after, the offices of Yirenping, who had been centrally involved in the Hepatitis B discrimination litigation, was raided by police as they too came under prolonged investigation over their activities and tax status. The following year, the Beijing University Centre for Women's Law Studies and Legal Services, a key player in public interest litigation who provided training for public interest lawyers was also closed down. These moves were seen

[394] Keith, Lin & Hou, *supra* note 197 at 22.
[395] *Ibid* at 45.
[396] Kellog, *supra* note 341 at 362.
[397] Lynch, *supra* note 126 at 575.
[398] *Ibid* at 579.
[399] Keith J Hand, "Resolving Constitutional Disputes in Contemporary China" (2011) 7:1 University of Pennsylvania East Asia Law Review 51 at 114. The *Qi Yuling* decision was largely seen to be the product of the progressive judge Huang Songyou, the chief judge of the civil section of the Supreme People's Court when the case was decided. Huong would later be sentenced to life imprisonment in 2010 for corruption charges. For more information, see: Associated Press in Beijing, "China jails former top judge for corruption", online: the Guardian <http://www.theguardian.com/world/2010/jan/19/china-supreme-court-judge-jailed>.
[400] Kellog, *supra* note 341 at 376.

by many Chinese 'as a signal of the government's increasing wariness of innovative rights-based litigation' and also of the increasing precarious legal and political environment in which such work was being pursued.[401]

The rhetoric of senior leaders is 'always a key signal of which way the wind is blowing in China' and an indication that 'change might be on the horizon.'[402] Just as Hu Jintao's speech in 2002 on the authority of the Constitution led to an influx of constitutional litigation and petitions to the National People's Congress Steering Committee, comments made by newly elected General Secretary of the CPC at the 30th anniversary of China's 1982 Constitution in December 2012 initiated a heated public debate on the Constitution. In his speech, Xi directly tied the issue of the rule of law to the implementation of the Constitution, by declaring that 'more attention must be paid to giving full rein to the important role of the rule of law in governing the country and managing society' and that to realize this objective 'we must completely implement the Constitution.'[403] In an attempt to deliberately leverage these statements, a group of 71 liberal minded intellectuals and lawyers published a "Proposal for a Consensus on Reform" online on 25 December 2012, where they demanded the enforcement of the Constitutional and a clearer definition of the relationship between the Party and the government. The petition was widely circulated on social media, before being removed and censored by state authorities. In January 2013, journalists at the Guangzhou based newspaper, *Southern Weekend*, staged a high-profile protest after their planned New Year editorial entitled 'Chinese Dream, the Dream for Constitutional Government'[404] was drastically revised by state propaganda authorities resulting in the removal of all 17 references to constitutionalism.[405] By May 2013, number of Party media outlets published a number of articles by Party conservatives who criticised constitutionalism as the product of western capitalism which had no place in socialist China. In response, between June-August 2013, a number of more liberal-minded Party theorists published articles online and in the liberal

[401] *Ibid* at 377; See also Carl F Minzner, "China's Turn against Law" (2011) 59 Am J Comp L 935 who suggests there has been a broader 'turn against the law' in China.
[402] Kellog & Hand, *supra* note 372.
[403] Jinping Xi, "Speech at the Capital Conference Commemorating the 30th Anniversary of the Promulgation and Entry Into Force of the Current Constitution", online: *China Copyright and Media* <https://chinacopyrightandmedia.wordpress.com/2012/12/04/speech-at-the-capital-conference-commemorating-the-30th-anniversary-of-the-promulgation-and-entry-into-force-of-the-current-constitution/>.
[404] The title weaved high-level official rhetoric with their liberal demands for political opening, by associating Constitutional Government with references to Xi Jinping's concept of the "Chinese Dream" which he raised in one of his first public speeches.
[405] Didi Kirsten Tatlow, "Calls for Press Freedom in China's South", online: *IHT Rendezvous* <http://rendezvous.blogs.nytimes.com/2013/01/07/calls-for-press-freedom-in-chinas-south/>; Samson Yuen, "Debating Constitutionalism in China: Dreaming of a Liberal Turn?", *China Perspectives* (2013).

press supporting constitutionalism. By August 2013 a crackdown on social media brought the debate to an end.[406]

While it is difficult to predict the future course of the debate, the fact that a debate was unleashed in such a public manner and was able to continue over the course of several months has been seen to imply that 'Party leaders, possibly even Xi Jinping, have given tacit endorsement' and to demonstrate that the 'new leadership has broken the tradition of "not arguing" about ideology and reform.'[407] This appears to be further supported by the fact that President Xi's continual reiteration of the important role the Constitution plays in the rule of law. In September 2013, President Xi again stated that the '[r]ule of the nation by law means, first and foremost, ruling the nation in accord with the constitution' as the 'crux in governing by laws is to govern in accord with the constitution.'[408] The Fourth Plenum which focused on the rule of law, initiated the establishment of an official Constitution Day, which was celebrated for the first time on the 32nd anniversary of the 1982 Constitution, 4 December 2014. This new push has been construed as inevitably 'rais[ing] public expectations regarding the rule of law in China, and particularly the implementation of the Chinese constitution.'[409]

4.4. Inherently Communal Nature of Rule of Law Rhetoric

Efforts to enforce the Constitution appear to have emerged more prominently in China, where the rhetoric of rule of law has been more forcefully adopted by the Party and the state. Ongoing endeavours continue to take place in both countries to establish an effective system of constitutional review. In China such moves have gained enormous traction, debates which were once confined between legal scholars and lawyers who tested the authority for constitutional review via the National People's Congress Steering Committee and the courts; are increasingly being embraced by the media and the wider public as these debates are now being played out through newspapers and online media. The shift in avenues to push for a system of constitutional review can be seen as a response to both the opportunities and limitations faced by reformists. Initially pursuing a dual strategy of submitting petitions through the National People's Congress Steering Committee and litigation in the courts, as

[406] Rogier Creemers, "China's Constitutionalism Debate: Content, Context and Implications" (2015) 74 The China Journal 91 at 95.
[407] Yuen, *supra* note 407 at 71.
[408] Gang Qian, "China's Constitution Roller-Caster", (6 November 2014), online: *China Media Project, The University of Hong Kong* <http://cmp.hku.hk/2014/11/06/36962/>.
[409] "For China, Constitution Day Comes Without Constitutionalism", online: *The Diplomat* <http://thediplomat.com/2014/12/for-china-constitution-day-comes-without-constitutionalism/>.

the Party and the state hampered down on these channels, reformists have turned to the media and public debate. Through these debates, the Party and state's use of the rhetoric of rule of law has given enormous currency to reformists, particularly as leaders have explicitly associated the rule of law with the implementation of the Constitution, re-igniting momentum over the issue by enabling reformist to speak back in the language of the Party.

In Vietnam, reformists are similarly confined by the opportunities and limitations established by the state. The opportunity of amending the Constitution, promises made for an open and participatory amendment process and the inclusion of a draft article establishing a Constitutional Council encouraged reformists to push for further constitutional guarantees. However, the more restrained and disjointed use of the rule of law rhetoric by the Party and the State in Vietnam, may be seen as a limitation that restricts the opportunities in which the discourse can be co-opted.

In both these cases, the rhetorical power of rule of law, which is by nature an essentially contested concept and largely denies definition, means that arguments over what the rule of law *is* are actually used to justify visions of what the rule of law *should be.* Consequently, the rhetoric of rule of law is always 'argumentative not just about results in specific cases but about visions of self and of community.' In this way, the use of rule of law as rhetoric is inevitably constitutive.

Viewing the adoption of rule of law in China and Vietnam through the framework of constitutive rhetoric ultimately invites us to move beyond traditional images of rule of law as about the forms, processes and institutions of normative ordering that originate from the state. It invites us to assume a critical legal pluralist approach which rejects the State legal order 'as the lynch-pin of legal normativity' acting upon a passive society as legal subjects.[410] Instead, the multiplicity of legal subjects, both within and outside the state, play a critical role in both re-producing and contesting official conceptions of rule of law; and shaping the structure and limits of rule of law reforms, so that these legal subjects are not merely "law abiding" but also "law inventing". A study of the rule of law in China and Vietnam must take into account the vast variety of 'interacting, competing normative orders' that mutually influence the emergence and operation of each other's conceptions and confines of the rule of law.[411]

[410] Kleinhans & Macdonald, *supra* note 306 at 30–1.
[411] *Ibid* at 31.

When analysing the rhetoric of rule of law in both China and Vietnam, a critical legal pluralist approach first enables us to account for the fact that there exists in both countries a wide plurality of views and opinions, both within and outside the Party and the State, over what the rule of law should encompass. As demonstrated by the debates over constitutional review, many of the reform efforts have been led by high level figures within the Party and the State, including officials from the Ministry of Justice, an activist judge of the Supreme People's Court and mass organizations, have lent their support for a constitutional review system and in doing so have distinguished themselves from the official line of a socialist rule of law. In addition, there also exists considerable disagreement from wider society, not only from lawyers and legal scholars, but increasingly also from the media and ordinary citizens who have questioned what the rule of law means for the protections provided for in the Constitution and also for the leading role of the Party.

To be successfully persuasive, the Party and state's rhetoric on the rule of law, must articulate a shared ideology that both convinces and resonates with its audience. Given that one of the two key reasons that both China and Vietnam turned to the rule of law was to gain greater political legitimacy, both country's face the difficult task of aligning their rhetoric on rule of law with the diverse plurality of views put forward by its citizens. To be convincing, the rule of law must be seen to 'display an independence from gross manipulation' and appear just.[412] This can only be achieved by 'upholding its own logic and criteria of equity' by on occasion actually being just making rulers the 'prisoners of their own rhetoric'[413] meaning that the Party and the state 'must not be seen [to be] constantly flouting the law'.[414] Consequently, while both China and Vietnam have failed to officially endorse a formal system of constitutional review, they have nonetheless been willing to overturn a range of laws and regulations on custody and repatriation, motorcycle registration and discrimination against Hepatitis B carriers in public employment, which have been publically deemed to be unconstitutional and do not challenge the pillars of Party and government power. In this way, the features and characteristics of the rule of law is established in response 'to a dialogical exchange between state and society.'[415] Following the adoption of rule of law rhetoric into official discourse, the Party and state has entered, to some extent, into 'a one-way street'

[412] E P Thompson, *Whigs and Hunters: The Origin of the Black Act* (London: Allen Lane, 1975) at 263.
[413] Daniel H Cole, "'An Unqualified Human Good': E.P. Thompson and the Rule of Law" (2001) 28:2 JL & Soc'y 117 at 2634.
[414] *Ibid* at 181.
[415] John Gillespie & Penelope Nicholson, *Asian socialism & legal change: the dynamics of Vietnamese and Chinese reform* (Canberra ACT: Australian National University E Press : Asia Pacific Press, 2005) at 3.

where it cannot repeal popular conceptions rule of law 'without inciting major protests from the intellectuals, media correspondents, and other public commentators.'[416] In this way, the state's rhetoric on rule of law has been described as a 'double edged sword that empowers various actors to engage in rightful resistance.'[417]

Over the past two decades, moves towards a system of constitutional review appear to have progressed at a snail's-pace, early successes such as the decision in the *Qi Yuling* case and the *Sun Zhigang* incident in China, along with the Motorbike incident in Vietnam appear to have stalled. However, the following years have demonstrated that the state cannot roll back on their legal reforms or their rhetoric of rule of law, they can only recalibrate it. In China, following the rise of constitutional litigation that stemmed from the *Qi Yuling* case and the *Sun Zhigang* incident, the State did not deny or drop their rule of law rhetoric, but instead sought to reframe it more heavily in socialist terms. Even when the rule of law does 'not come equipped with an effective implementation mechanism,' it nonetheless represents the normative consensus of society 'against which the clock cannot be turned back'.[418]

[416] Zhang, *supra* note 331 at 260.

[417] Randall Peerenboom, "Between Global Norms and Domestic Realities: Judicial Reforms in China" in John Gillespie & Penelope Nicholson, eds, Law and Development and the Global Discourses of Legal Transfers (2012) 181 at 200.

[418] Gillespie & Nicholson, *supra* note 417 at 3.

Conclusion

This thesis re-imagines the adoption of rule of law in China and Vietnam through James Boyd White's framework of law as constitutive rhetoric. I focus on the three aspects identified by White that form law as constitutive rhetoric. Firstly, the importance of an inherited language, as the speaker must always begin by speaking in the language of his or her audience in order to effectively put an argument that the audience regards as valid and intelligible. Secondly, in using the inherited language to do the work of persuasion, the speaker inevitably modifies or re-arranges the language, by adding or dropping a distinction, to serve the speaker's own particular purpose. Thirdly, since the rhetoric of law is argumentative not only about results in specific cases, but ultimately about visions of self and community, it must be seen as a culture of argument that is communal in nature because it is perpetually remade by its participants.

The first chapter analyses the inherited language of rule of law as the 'external, empirically discoverable set of cultural resource' which China and Vietnam have used to portray their legal reforms. The rule of law is a deeply contested concept. There is a lack of agreement over what it means and what elements are necessary to achieve it. Instead, the rule of law is more often defined by what it is not, as the antithesis to the 'rule of men', where the law imposes meaningful restraints on the state and the ruling elite. However, contestations over its definition and key elements have also helped to fuel its rhetorical power, by arming rule of law with an identity, a meaning and authority of materials that is 'always arguable, always uncertain' in which different sides will see analogies that others will deny.[419] This has facilitated the enormous proliferation of the rule of law, by Western donors and development banks across the globe who present it as an 'intrinsically positive and politically neutral tool that is universally valid and capable of being 'exported' everywhere', most commonly for the purpose of strengthening economic development.[420]

In the second chapter, I have shown that despite dismissals of China and Vietnam's legal reforms as more closely aligned to rule by law, the Party and the State in both countries have made deliberate and calculated attempts to frame and align their domestic legal reforms in the inherited language of 'rule of law'. This is due to the fact that Chinese and Vietnamese legal reforms were closely linked to their economic reforms and a desire to integrate into the global

[419] White, *supra* note 1 at 689.
[420] Mattei & de Morpurgo, *supra* note 40 at 1.

economic order. Consequently the adoption of the rule of law as an official policy enabled China and Vietnam to speak in a language which Western governments, foreign investors and development banks regard as 'valid and intelligible'.

However, in adopting the rule of law language, both China and Vietnam have engaged in a 'rhetorical process of remaking and reshaping' traditional western liberal rule of law principles by putting forward a distinctly 'socialist' versions of the rule of law. Although China has been more forceful in articulating their vision of a socialist rule of law with Chinese characteristics, both Chinese and Vietnamese versions are underscored by the leading role of the Communist Party. Yet, this creates significant tension as the central role afforded to the Communist Party is seen to be inconsistent with the central purpose of the rule of law in imposing restraints on the ruling elite. These tensions are heightened by the ongoing indeterminacy over the status of law in relation to the Party and the Party's extensive influence over the entire legal system. To legitimate their alternative socialist versions of the rule of law, both countries have relied heavily on their Confucian heritage which has traditional privileged the role of a 'benevolent government' or 'sage ruler' to supplement the rule of law. In doing so they have attempted to re-constitute a socialist rule of law as an indigenous version of a foreign legal concept.

In the final chapter, I show that these attempts to re-constitute the 'socialist rule of law with Chinese characteristics' or Vietnamese 'socialist law based state' as indigenous versions of rule of law make the Party and state's adoption of rule of law rhetoric as ultimately socially constitutive and communal in nature as these efforts are grounded in an attempt to identify a shared national and cultural identity. This requires us to look beyond the official articulation of the rule of law as put forward by the Party and the state towards the establishment of a broader rhetorical community engaged in discussions in the rule of law. In China and Vietnam, these efforts have been led by legal scholars who attempt to enlarge and influence domestic interpretations of the rule of law. Scholars have not only influenced official conceptions of rule of law, but have posed a challenge to state power and control over official rule of law discourse. This challenge has emerged most clearly in efforts to 'co-opt' the rhetoric of rule of law push for the establishment of a constitutional review mechanism. In these cases, legal scholars, reformists within the Party and State, and a discontented public have managed to successfully overturn laws and regulations for being inconsistent with Constitutional guarantees and brought the need for a constitutional review body squarely into

the spotlight. These achievements pose important challenges to the official discourse on law reform and to the leading role of the Communist Party under a socialist rule of law.

Conceiving of the adoption of rule of law in China and Vietnam through these three aspects of White's framework on constitutive rhetoric has important implications for both how we see the nature of the rule of law in China and Vietnam and also for how rule of law reforms are constructed in the field of international development.

For China and Vietnam, efforts by the Party and the state to frame their legal reforms in the language of rule of law are often dismissed as empty rhetoric. Their placement of the leadership of the Communist Party front and centre of their socialist versions of rule have law has led to a deep-seated scepticism that the legal reforms being implemented under the banner of rule of law are a genuine attempt to establish rule of law.[421] Viewing the adoption of rule of law in China and Vietnam as examples of constitutive rather than merely persuasive rhetoric invites us to re-adjust our field of vision and to re-frame our understanding of the trajectory of reforms. It invites us to consider China and Vietnam's attempt to remake and reshape traditional Western liberal rule of law concepts as more than just a disingenuous attempt to persuade foreign observers and discontented citizens that China and Vietnam are serious about rule of law. Instead it places China and Vietnam's attempt to reshape the meaning of rule of law in the broader context of the term's inherently contested nature. In such a setting, China and Vietnam's efforts to put forward their own 'socialist' versions of the rule of law can be seen as the inevitable next step in which everyone who uses the language of rule of law will always try to change it by adding or dropping a distinction, by admitting a new voice or by claiming a new sense of authority.[422]

All too often, analysis on the rule of law in China and Vietnam focus singularly on the extent (or lack of) reforms carried out by the Party and the state. Adopting a framework of constitutive rhetoric reminds us that the direction and nature of rule of law reforms 'hinges on more than the ideas of the top leadership'.[423] Not only do contestations over rule of law reforms exist within the state and even the Party, but in the cases of China and Vietnam, legal scholars, citizens and the media are also increasingly influencing and shaping the directions of reform, as 'people are not simply passive receivers of information from an external reality,

[421] "Rules of the Party", *The Economist* (1 November 2014), online: <http://www.economist.com/news/china/21629528-call-revive-countrys-constitution-will-not-necessarily-establish-rule-law-rules>.
[422] White, *supra* note 1 at 290.
[423] Peerenboom, *supra* note 5 at 536.

but are 'actively involved in producing their own reality.'[424] Viewing the adoption of rule of law in China and Vietnam through the framework of constitutive rhetoric ultimately invites us to take a critical legal pluralist approach which acknowledges the vast variety of 'interacting, competing normative orders' existing both within and outside the state, that together influence the emergence and operation of official conceptions and confines of the rule of law.[425] In China and Vietnam, efforts to 'co-opt' the rhetoric of rule of law to push for the establishment of a constitutional review mechanism have made it increasingly difficult for the Party and State to maintain a hegemony over the discourse of legal reform and ultimately demonstrate that conceptions of rule of law are not merely asserted or imposed by the state, but rather emerge out of an ongoing interaction between the state and wider society.

For the global field of international development, the rule of law lies at a crossroads. After more than two decades and billions of dollars spent on reforms, rule of law is being increasingly berated for failing to delivery on its promises, whether it be the absence of wholesale improvements to economic prosperity or the lack of anticipated transition to democracy. This has led to extensive self-analysis and introspection amongst scholars and development practitioners alike over what the rule of law is and how reform efforts can be improved. This has resulted in a shift from the traditional focus of rule of law as strengthening legal institutions, to an increased interest in the ends that legal systems are seeking to achieve. Accompanying this is a broader move encouraging rule of law reforms to pay greater attention to local context and views rule of law as a set of cultural understandings and practices rather than a fixed and unchanging concept.

Re-imaging China and Vietnam's experiences with rule of law through the framework of constitutive rhetoric supports the current calls for a shift away from the traditional focus of rule of law on institutional form. Traditional institution-based approaches imagine rule of law as an 'instrument for achieving social objectives' in which the principle question for rule of law reformers is how courts and law enforcement institutions can be improved and what laws need to be strengthened.[426] Once this is determined, reform efforts simply become a matter of implementation in which the strength of rule of law is determined by the extent to which legal institutions (or laws) work, or don't work. Re-imagining the rule of law as rhetoric requires us to stop thinking of the rule of law as a 'machinelike process of cause and effect, driven by a

[424] Gillespie, *supra* note 244 at 138.
[425] Kleinhans & Macdonald, *supra* note 306 at 31.
[426] White, *supra* note 27 at 33–4.

rationality that is fundamentally instrumental in kind' but rather as a 'discourse that is maintained by the process of persuasion and argument.'[427] As the analysis of the adoption of rule of law discourse in China and Vietnam demonstrate, the gains to be made from rule of law are not to be found in indicators measuring the number of laws that have been enacted nor their level of enforcement; it is not found in measuring the level of independence of the judiciary; or even the extent of the ability to provide constitutional guarantees. Instead, the benefits of such rhetoric come from its ability to create a 'community of people, talking to and about each other' who continue to push the limits of the meaning of the rule of law in their social context and community.[428]

This approach gives greater credence to the growing focus on the ends that the rule of law seeks to achieve along with the tendency to view rule of law as a set of cultural understandings and practices rather than a fixed and unchanging concept. However, it is important to keep in mind that those who use the language of rule of law are 'perpetually learning what can and cannot be said, what can and cannot be done with it' as they try to 'reach new formulations of their positions.'[429] This is ultimately the key value of rule of law rhetoric which stems from its essentially contested nature so that 'its value to development lies in the process (and their norms) by which it determines and establishes struggles over meaning'.[430] The turn towards ends-based conceptions of rule of law must keep in mind that both the identity and wants of the multiplicity of actors (as speakers), who are engaged in the process of rule of law reform, are in 'perpetual transformation'. As a result, the ends which are sought from rule of law reforms 'are constantly remade in the rhetorical process'.[431]

[427] *Ibid* at 37–8.
[428] White, *supra* note 1 at 690.
[429] White, *supra* note 24 at 35.
[430] Desai, Wagner & Woolcock, *supra* note 52 at 245.
[431] White, *supra* note 24 at 35.

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