

The Communist Party of China (CPC), Savior of the Nation: The Rule of Law with Chinese Characteristics

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The Communist Party of China

On July 1, 1921, twelve (12) people gathered in a modest building on Xingye Road in the French Concession of Shanghai. Their purpose: to found a new political party. On July 3rd, their meeting was broken up by policemen of the Kuomintang, and the delegates moved the proceedings to a small red tourist boat on South Lake in Jiaxing, Zhejiang province, where they continued their deliberations, and founded the Communist Party of China (CPC). Today the Party has 86.7 million members. Until recently, it was the world's largest political party. That distinction now belongs to the Bharatiya Janata Party (BJP) of India with 88 million registered members.

Although a CPC membership of 86.7 million persons may seem like a lot, one needs to remember that the current population of China is 1.36 billion people. Thus the number of "Communists" in China is only about 6 % of its population. By contrast, the population of the United States in 2015 is estimated to be 321 million. I am not sure how many of those are Democrats, and how many are Republicans. Hopefully more of the former than the latter.

The title of my talk today is ***The Communist Party of China (CPC), Savior of the Nation: The Rule of Law with Chinese Characteristics***. Before I get into how the Party saved China, perhaps it would be helpful to define the Rule of Law.

Rule of Law Defined

There are many definitions, but one of my favorites is found in a petition to King James by the English House of Commons in 1610: "Amongst many other points of happiness and freedom which your majesty's subjects of this kingdom have enjoyed under your royal progenitors, kings and queens of this realm, there is none which they have accounted more dear and precious than this, to be guided and governed by the certain *rule of the law* which giveth both to the

head and members that which of right belongeth to them, and not by any uncertain or arbitrary form of government...”

The *Oxford English Dictionary* has defined “Rule of Law” this way: “The authority and influence of law in society, esp. when viewed as a constraint on individual and institutional behaviour; (hence) the principle whereby all members of a society (including those in government) are considered equally subject to publicly disclosed legal codes and processes.”

In a Rule of Law society, every citizen—including the sovereign—is subject to the law, in contrast to earlier times when kings claimed to be above the law, ruling by divine right. Thus under the rule of law, the phrase *Rex Lex* (“the king is the law”) is turned around to become *Lex Rex* (“the law is king”). Another way of putting it is to say we aspire to “a government of laws and not of men.” During the most fevered time of the Cultural Revolution, Chairman Mao famously said, “Why do we need the Rule of Law when we have the Rule of Man?” And there was no law in China. Happily, times have changed.

As much as we may agree however that Rule of Law is a good thing, it has been described as “an exceedingly elusive notion.” That said, one may identify two very different lines of thought when it comes to defining this “elusive” concept: a formalist or “thin” definition, and a substantive or “thick” notion.

Under the formalist definition, one does not make a judgment about the “justness” of any given law, but rather simply specifies what characteristics a legal system must have to fall within the definition of Rule of Law, namely: a public statement of the law, a prospective application of it, and possession of such attributes as generality, equality, and certainty. The specific content of the law is not important.

By contrast, a substantive definition contemplates that in order to qualify as the rule of law, a legal system must also protect certain substantive rights, such as freedom of speech, freedom of the press, freedom of religion, and so forth, and even include a democratic form of government. Perhaps not surprisingly, the “formalist” approach is more widespread than the “substantive” view.

Rule of Law in United States

In the United States, we follow the “substantive” school of thought, and profess to value the human rights of all in a democratic society. Whether our governing bodies actually adhere to those values or not is the subject for another day. It is worth noting however that the Bill of

Rights was not part of the original draft of the United States Constitution, but was only adopted as a series of amendments to induce a sufficient number of states to accept and ratify that document. It has also been said that were the Bill of Rights put to a vote today, it would be resoundingly defeated. Whatever the case, we should not be quick to reject the legal systems of other countries just because in our view, their governments do not behave as we think they should. A country can have some laws with which we disagree, but still be a nation governed by the Rule of Law. History is full of examples.

Three Examples of Rule of Law

Take the Code of Hammurabi, a Babylonian law code dating back to around 1754 BC. The Code consisted of 282 laws covering a variety of subjects, perhaps best remembered for the *lex talionis*, or “an eye for an eye, and a tooth for a tooth.” But there were others. Here a few of my favorites:

- Slander, Law 127: "If any one "point the finger" at a sister of a god or the wife of any one, and can not prove it, this man shall be taken before the judges and his brow shall be marked (by cutting the skin)."
- Slavery, Law 15: "If any one take a male or female slave of the court, or a male or female slave of a freed man, outside the city gates, he shall be put to death."
- Theft, Law 22: "If any one is committing a robbery and is caught, then he shall be put to death."

Hammurabi had other punishments as well. If a son hit his father, the son’s hands were to be cut off.

Or more recently, we had the case of Michael Fay, an 18-year old American who was found guilty of theft and vandalism in 1994 in Singapore and sentenced to caning, an accepted judicial punishment in that city state. Although Fay’s sentence was entirely appropriate under Singaporean law, there was a huge outcry in the United States over this application of the Rule of Law. President Clinton called the punishment of this thief and vandal “extreme” and “mistaken” and put pressure on the government of Singapore to grant clemency. Two dozen United States senators signed a letter making a similar request. Such media as *The New York Times* and *The Washington Post* ran editorials condemning the practice of caning. Faced with this American pressure, President Ong Teng Cheong reduced Fay’s sentence from six (6) strokes of the cane to four (4) strokes. Young Mr. Fay returned to the United States where he ran up a number of criminal violations in Florida. His present whereabouts are unknown.

Finally, even more recently, there was the so-called “Occupy Central with Love and Peace,” a campaign of civil disobedience in Hong Kong, ostensibly to pressure the government of China to establish a legal system in Hong Kong that would satisfy “the international standards [for] universal suffrage.” Lasting almost two (2) years, from the publication of an article on January 16, 2013, by a Hong Kong law professor until December, 2014, when “Occupy Central” was disbanded and its founders surrendered to the police, a series of mass demonstrations almost shut down central Hong Kong, causing massive traffic disruptions, and threatening the economic well-being of the city and its residents. With few exceptions, the western media’s coverage was one-sided, decrying what was said to be government deprivation of the right to vote, and other “guaranteed” rights, and focusing on claims of police misconduct while overlooking the business community’s efforts to obtain relief through the courts.

The truth was that the people of Hong Kong had never had the right to vote, or some of the other alleged rights, and nothing had been guaranteed. Hong Kong (“Fragrant Harbour”) had been seized by the British from China after its defeat in the First Opium War—more about that later—and held as a crown colony until 1997 when it was returned to China and became a Special Administrative Region of the People’s Republic. Under the British, the residents of Hong Kong had no right to vote. Remember England’s treatment of its American colonies? 1776 and all that? When the U. K. returned Hong Kong to China, all that was “guaranteed” was the continuation of the then status quo, gradually evolving to eventual integration of the city into the mainland.

What do these three (3) examples have in common? Each case involves an application of the Rule of Law, albeit laws which Americans may find offensive. We might think that cutting off a son’s hands is a little excessive if he gets into an altercation with his father, or that incarcerating a young thief and vandal would be more “humane” than giving him a licking, or that people should have the right to vote whether guaranteed under the law or not, although *The Washington Post* reported that only 36% of those eligible to vote in the U. S. did so last year in the midterm elections. But whether we like these situations or not, the Rule of Law was honored in each instance. And if we are going to have any chance of persuading another country to change its law, we had better acknowledge and respect that country’s Rule of Law, rather than condemn it simply because it is not the same as ours. This approach has been the guiding principle of the International Academy of Trial Lawyers’ China Program since its inception in 1994, when then U. S. ambassador to China, J. Stapleton Roy, asked Raymond Tam, then president of the Academy to help China develop its legal system.

The IATL

The International Academy of Trial Lawyers or IATL was founded in 1954, a little over sixty (60) years ago. Its membership consists of the top 500 trial lawyers in the United States and prominent attorneys from many other countries. Among the Academy's stated purposes are cultivation of the science of jurisprudence, promotion of reforms in the law, and facilitation of the administration of justice. As China was recovering from the nightmare of the Cultural Revolution and turning to the market economy, Ambassador Roy believed it was important for the future of China and the United States that a group of knowledgeable lawyers assist China as it sought to construct a legal system. Ray Tam agreed, and persuaded the Academy to accept the ambassador's challenge. Thus was born The China Program.

The IATL China Program

Each fall, the co-chairs of the Program and their Chinese adviser travel to Beijing to interview approximately twenty-five (25) government lawyers nominated for the program by the People's Republic. These lawyers are among China's best. They come from such agencies at the Legislative Affairs Office of the State Council, the National People's Congress, and the Central Party School, to name a few.

The Program co-chairs and their adviser interview the candidates and select ten (10) to come to San Jose, California, the following spring. In San Jose, the delegates (as they are called) spend a week in an orientation learning the basics of the American legal system. They then fly to various destinations around the United States where each delegate spends two (2) weeks living with an IATL Fellow and the Fellow's family. The delegate goes to work each day with the Fellow and becomes involved in the Fellow's law practice.

In other words, the Chinese lawyer is immersed in the personal and professional life of an American trial lawyer and the lawyer's family, and as a result, gains an understanding of the American legal system and our way of life. This year, delegates will be traveling to hosts in Connecticut, Virginia, Florida, Minnesota, Wisconsin, Nebraska, Texas, Oregon, and Northern and Southern California.

After their two (2) weeks with a Fellow and the Fellow's family, the delegate returns to San Jose to join the other returning delegates who all then travel back to China as a group.

Accomplishments of the IATL China Program

In the 20+ years of The China Program, some two hundred (200) Chinese lawyers have participated in the Program and gone on to make significant contributions to the growth of China's legal system. Minister Song Dahan of the State Council had this to say about The China Program: "The IATL has done a great service for both our nations. The delegates have all benefited from their experiences in The China Program, as evidenced by their multiple promotions in the various departments they serve and the multiple legislative and administrative initiatives that they have led. Most of them have had a direct hand in the drafting and execution of many national legislative enactments and policy stipulations, making significant and far reaching contributions to these enactments. The delegates have also stayed in touch with each other, forming a nucleus of legal professionals committed to the Rule of Law in China. In addition to these achievements, the delegates have also written articles and taught courses based on their experiences in The China Program, making recommendations on how the Rule of Law in China may benefit from the American legal system. These articles and presentations have influenced legal thinking in China."

The guiding principle of the China Program was perhaps best summed up by George Tompkins, a New York Fellow and past-president of the Academy. He said: "The Academy has played a meaningful role in the development of the substantive legal system in China since 1995, with numerous positive results, all attributable to the education of the selected lawyers from China who have participated in the program. We do not tell the Chinese lawyers what to do--we tell them what we do in their selected fields and why--they then adapt our concepts to their system to suit their needs. I can mention, from personal involvement, the development of the regulatory aviation laws of China, the development of the liability laws of China in respect of compensation for victims of aviation and auto accidents, aircraft accident investigations, competition/antitrust laws, laws pertaining to corrupt practices by government officials [Washington and New York State could learn from China], international controls of aircraft emissions, commercial agreements, WTO matters, trademark and copyright protections for USA companies in China, and on and on."

George's words bear repeating: "We do not tell the Chinese lawyers what to do—we tell them what we do in their selected fields and why—they then adapt our concepts to their system to suit their needs." In other words, law with Chinese characteristics. We respect China, its ancient history and marvelous culture, and its legal system. China is committed to the Rule of Law, and we want to do our best as Fellows of the IATL to help China achieve its goals in this regard, whether we agree with particular laws or practices. That's what friends are supposed to do.

The 4th Plenum

I was honored to be elected a Fellow of the International Academy of Trial Lawyers in 2001, almost fifteen (15) years ago. I should say, my wife, Sara Wigh, and I were honored, because one of many wonderful things about the Academy is the important part spouses play in its life and work. At the first meeting which we attended, I volunteered to host a China Program delegate. Sara and I have hosted three (3), and they have become lifelong friends. In 2009, Ray Tam who had chaired the Program with his wife, Audrey, since its inception, invited Sara and me to take over the program and continue his work. We accepted and this is the fifth year we have chaired the China Program. As a result, we travel to China each fall to interview candidates, line up hosts for them, lead the orientation in San Jose in the spring, and make sure everyone gets to and from the host homes, and safely back to China. It is a lot of work, but extremely rewarding.

Last fall was an exciting time in Beijing. The Fourth Plenary Session of the 18th Party Congress took place at the Great Hall of the People. The focus of the 4th Plenum was strengthening the Rule of Law. In addition, China hosted the annual meeting of the Asia-Pacific Economic Cooperation (APEC), which witnessed heads of government from twenty-one (21) Pacific Rim nations converge on China's capital. The sky was blue ("APEC blue" as the people of Beijing put it), thanks to measures the government took to reduce air pollution. People were excited.

Sara and I arrived as the 4th Plenum was concluding and the APEC meetings were about to begin. In addition to interviewing the candidates for The China Program, we talked to many government officials, including ministers from the State Council and the National People's Congress, as well as senior faculty at the Central Party School and judges of various courts. Without exception, everyone was excited about the report of the 4th Plenum and hopeful for the continued growth of Rule of Law in China. A big question however was what part would the Communist Party play in this movement.

Rule of Law Under the Party

The Party had started to emphasize the Rule of Law in the mid-1990s, about the same time the IATL China Program began. In 1999, the constitution of the PRC was amended to state: "The People's Republic of China practices ruling the country in accordance with the law and building a socialist country of law." But the preeminence of the Party was unquestioned. In announcing the work of the 4th Plenum, the CPC stated, "the rule of law should be advanced under the Party's leadership and in line with socialism with Chinese characteristics." And in an article in

the *People's Daily*, it was noted, "that the rule of law should only be advanced by the rule of the Party and there are CPC fundamentals that should not be overridden."

None of this should have come as a surprise, since Article 1 of the Constitution of the People's Republic of China (as amended in March 2004) states: "The People's Republic of China is a socialist state under the people's democratic dictatorship led by the working class and based on the alliance of workers and peasants. The socialist system is the basic system of the People's Republic of China. Disruption of the socialist system by any organization or individual is prohibited."

In other words, China is a "democratic dictatorship" and any "disruption" of its socialist system will not be tolerated. The Chinese constitution contemplates a vigilant Communist Party acting in what it believes are the best interests of the nation, and however foreign that may seem to us in the United States, it is entirely consistent with the Rule of Law in China. The importance of the Party to the legal system of China, and to Chinese society generally, is understandable given the recent history of China—the last several hundred years that is—and the Communist Party's role in saving China from destruction.

A Historical Perspective

The First Opium War commenced in 1839 and lasted until 1842. It was all about the drug trade. The British wanted to sell opium to the Chinese. China's government was opposed to it. In fact, China passed a law banning the importation and sale of opium. Disregarding the Rule of Law, the British navy bombarded China's coastal cities into submission, and in the "peace" that followed, extracted concessions from the Chinese that included a series of treaty ports along the coast from which England and other western nations, including the United States, proceeded to loot China and oppress its people. The Japanese joined in, and by 1921 when the Communist Party was founded, China was a desolate country, suffering from war, poverty, famine and disease. After years of fighting the Japanese, followed by a dreadful civil war, the Party succeeded in freeing China from its oppressors and started up the long road of rejuvenation to take its place today as the world's second largest economy and its status once again as a great nation. On October 1, 1949, Chairman Mao announced the founding of The People's Republic of China and uttered the famous words, "The Chinese people have stood up." Stood up to the invading Japanese, stood up to the meddling Western powers, stood up to the corrupt Kuomintang. China had stood up, and the Party had saved the Chinese nation.

Little wonder then that the Party is so protective of what it has accomplished, and cautious about entrusting it all to an "exceedingly elusive" Rule of Law. There is Rule of Law in China, but

it has been, and always will be, Rule of Law with Chinese characteristics. What does that mean for us as American lawyers? It means we must respect China and its legal system, and we must respect the Communist Party of China. Many terrible things were done in the name of the Party: the Great Leap Forward and the Cultural Revolution, to name a few. That said, the Party deserves our respect for its many positive accomplishments. It has earned that respect.

Common Ground

Those of us who grew up in the Cold War were taught that Communism was a bad thing. Whether it was or was not will be long debated. What cannot be disputed is that the Communist Party in China will also be with us for a long time, and if we are to accomplish anything by way of improving relations between our two countries, we must accept the Party and learn to work with it, not against it. We must not make the mistake of the American missionaries who so long ago believed the Chinese people could be “saved” if only they would abandon their “heathen ways” and become “good Christians.” We must instead accept “Chinese characteristics” and look for common ground. I believe in The China Program, we have found that common ground.

In closing, I urge us all to heed the words of Chairman Mao: “There must not and cannot be any conflict, estrangement or misunderstanding between the Chinese people and America.” Our China Program of the International Academy of Trial Lawyers, and your China Law & Policy Conference of Stanford University, are two important steps to reducing conflict, estrangement and misunderstanding. Let us continue our work together, and again quoting the Chairman, “Serve the People, Heart and Soul.”