



**How History Shapes the
March Towards Rule of Law-
Lessons from India and China**

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Abstract

It is no secret that a nation state's domestic legal system, its functioning and continued reformation is essential to maintain the 'rule of law'. While the notion of this 'rule of law' differs from state to state based on the extent of enshrined constitutional guarantees, independence of the judiciary and various other socio-cultural factors, China and India present two very contrasting examples.

This paper will delve into exploring the origin and nature of the differences that these two states exhibit in their understanding of 'rule of law'. After delineating these schisms, the authors analyze the myriad forms in which these base differences have manifested themselves in China's and India's approach to international legal order governed by public international law.

Keywords: *India, China, Rule of Law, Rule by Law, Confucius, Public International Law*

Introduction

A comparative study of India and China, in any field, always makes up for an interesting exercise as it compels the researcher to look at the history, culture and societies of these two great ancient civilizations in the quest for answers. In this paper, we attempt to scrutinise the legal systems of the two nations to understand the origin and nature of the differences in their understanding of the notion of 'rule of law'. We do this by looking at the ancient philosophies that guided the state and society of these two nations and how they shaped their ideas of equality, justice, legitimacy and harmony. Subsequently, we trace the evolution of the constitutional framework that developed in China and India under the influence of relatively recent historical events - the rule of Qing dynasty in China and India's colonisation by the British. In the next part, we look at the role played by China and India in the progressive development of the labyrinth of public international law and their participation in international dispute resolution mechanisms. We do this to test our hypothesis - whether there is a link between a nation's subjective understanding of the rule of law and its international character. In other words, we hypothesize that the crystallisation of the notion of 'rule of law' in the polity of both nations is influenced by historical and socio-cultural factors which have a direct bearing on the nation's attitude towards public international law and its engagement with multilateral institutions.

Rule of Law and Its Progressive Development

'Rule of Law' in simple terms means that the law of the land, which is publicly and democratically promulgated, reigns supreme. As a principle of governance, rule of law is an arrangement in which every individual, institutions (both public and

private) and State itself is accountable to laws which are enforced equally and adjudicated in a fair and independent way (Gauba 2009). Rule of law also connotes that the state derives its power from the body of laws generally known as the constitution. The same constitution puts limits on the arbitrary use of the power of the state and upholds the equality before law for all. Scholars like Kahn have also persuasively argued that the rule of law is not merely a determinant of the rules of adjudication between the state and society but an idea that encapsulates the construction of modern sovereignty (Kahn 2000).

There does exist 'thin and thick' interpretations of the concept of rule of law. The thin interpretation takes into account the formal, instrumental or administrative aspect of the rule of law. It stresses on the basic features which any legal system must possess in order to stay operational without taking into account the fact that the given legal system is the outcome of a democratic or non-democratic social process (Peerenboom 2002).

On the other hand, the substantive conception (thick interpretation) incorporates all the basic ideas of the thin theory but adds an overarching element of political ethics to which the existing legal system must conform to. Law under this is not just instrumental but flows down from some basic universal values. Liberal democratic version under the thick interpretation emphasises capitalism, an open multi-party democratic system and a liberal interpretation, prioritizing the political and civil sides over socio-cultural and economic rights part of the human rights theory. Whereas state-socialist version emphasizes on the state-controlled economy with a single party system which may be internally democratic in its setup and stresses on the stability, subsistence and collective rights over the individual rights. Regardless of the divergence in the interpretation of the concept of rule of law, all theories agree on the fundamental idea that law must levy some kind of rational limits to the power of those ruling and also obligates creation of a governing system which minimizes prejudices and arbitrariness. In addition, it should be understood that, in practice, there will exist dissimilarities in the nature of the 'rule of law' regimes due to social-political and historical context in which their political and legal system has developed. These determinants could be both domestic/internal and external in their character.

Philosophical Underpinnings of 'Rule of Law'

The core of modern Chinese law is based on traditional Chinese approaches and socialist legal policies. Political authority in China, in ancient times, has been based on the concept of 'Mandate of Heaven' (*tiānmìng*) (Szcsepanski 2011). The theory has its root in the way Zhou dynasty (1046-256 BCE) legitimized their rule. According to this idea, there could only be one legitimate ruler of China at a time, and this ruler reigned as the 'Son of Heaven' with the approval of the gods. Unlike the western divine-right theory, if a king ruled unfairly, he could lose this approval, which would result in his downfall. Overthrow, natural disasters, and famines were taken as a sign that the king had lost the Mandate of Heaven. Thus, the nature of law in China has traditionally been positive, ruler-made law which seeks to advance the interests of the state by enforcing Confucian values. While the sovereignty of the state rested on the Mandate of Heaven, the role of law was to act as the pivot of that sovereignty. This system was largely dependent on the morality of the ruler who would hold the levers of reward and punishment to gently balance the harmony prevailing in society (Ocko 2009). The bulk of the Qing Code was devoted towards the regulation of 'government officials' by maintaining discipline among

them, as opposed to prescribing a code of conduct for the people to follow (Jones 1994).

Similarly, in the Indian context, as held by thinkers like Kautilya in his seminal work *Arthashastra*, though the ruler was the representative of God on earth, his authority was not completely arbitrary. The king had to follow the '*Raj Dharma*' which was an ethical code of conduct for the rulers (Kautilya 2000). The contemporary legal and administrative system of any nation has direct and indirect links to the traditions through impacts and influences of the historical norms. In the Chinese legal tradition, the word for law in classical mandarin was *Fǎ* which means fair, straight or just. It also carries the sense of a 'standard or a model' (Liang 1989). Derk Bodde and Clarence Morris held that the concept of *fǎ* had an association with *Yi* which means 'social righteousness' (Bodde 1973).

Confucianism, which has been a predominant tradition in China, advocated a rule by moral persuasion in accordance with the concept of *Lǐ* i.e. imperatives of conduct which help preserve social order (Chan 1963). *Lǐ* was to be enforced by society instead of state or courts. Coded law was intended to supplement *Lǐ* and not to replace it. Confucianism held that state should lead with virtue and thus create a sense of shame which will prevent undesirable conduct.

In imperial China, Qin dynasty (221-207 BCE) was the first to establish a centralized legalist government (Loewe 2006). It entailed strict adherence to the legal code, brutal silencing of political opposition and absolute power to the ruler. Scholar-officials (analogous to modern-day bureaucrats), skilled in calligraphy and Confucian philosophy, were appointed to look after the daily affairs of governance. This system continued as recently as 1912 when the Xinhai Revolution ended the rule of Qing dynasty. Historian Wing-Tsit Chan has concluded that it was because of this practice of appointing and reliance on intellectual elites and civil-servants which has given China a tremendous handicap in their transition from government by men to government by law (Moore 1967). Quite in contrast to India, wherein pre-colonial era appointments to bureaucracy were seldom based on open exams and were mostly nepotistic in nature. But in post-colonial times, the bureaucracy has been the upholder of the rule of law in India albeit with frequent nudges and reprimands from the judiciary.

Constitutional History and Evolution of 'Rule of Law' in China

After the Xinhai Revolution, that ended the dynastic rule (Xing 2016), a series of constitutional documents mostly authored by 'Kuomintang' (*Guómíndǎng*) were used to govern the newly established 'Republic of China' after 1912. Most of these reflected the 'Three Principles of the People' (*Sān Mǐn Zhǔyì*) given by Sun Yat-sen who was one of the leading faces of the Xinhai revolution (Cohen 1978). The three principles - *Minzu*, *Minquan* and *Minsheng* are loosely translated as democracy, nationalism and welfare. These principles envisage a form of democratic-socialism and the constitution enacted in 1946, with amendments, is still a part of the organic law in Taiwan.

The failure of the Chinese leadership to extract a fair deal for China in the Treaty of Versailles at the Paris Peace Conference (Albrecht-Carrié 1973) in 1919 led to the 'May Fourth Movement' which later took the form of the 'New Culture Movement' (Masayuki 2007). These events, coupled with withering domestic conditions which sprung from failure of republic government of 1912, fostered

disillusionment towards traditional Chinese culture and anti-western ideas, thus pushing China into the line of ideas inspired by the Russian revolution.

Common Program of People's Republic of China (1949-1954)

After the Chinese Civil War of 1949 and the emergence of the Communist Party, a Chinese People's Political Consultative Conference was organized to form a common program of "new democracy" to replace the Kuomintang inspired republic system. The Common Program worked as an interim constitution for the next five years. It specified the structure, name and symbol of the new state. It also elected the leaders of the new central government with Mao Zedong as the chairman and thus, People's Republic of China (PRC) came in to being on 1st October 1949. For the next five years, the central government worked under the common program with a degree of inclusiveness and democracy which was arguably was not to be seen again even to the present day. It had provisions guaranteeing the protection of private property and even for assisting private enterprise (CPPCC 1949). Moreover, the central government elected in 1949 under the provisions of Common Program had a considerable number of representatives from parties other than the Communist Party.

The 1954 Constitution

The exercise for drafting a new constitution started in 1952 and a drafting committee was appointed in 1953 under the leadership of Mao Zedong. Coming into force in 1954 (Houn 1955), it was the first socialist constitution of China. During the Maoist period (1949 - 1978), the government had a hostile attitude towards a formalized legal system, because Mao and the Chinese Communist Party (CCP) saw the law as creating constraints upon their power. The legal system was attacked as a counter-revolutionary institution and the concept of law itself was not accepted. Courts were closed, law schools were shut down and lawyers were forced to change professions or be sent to the countryside (Wang 2013). Such extreme measures were possible as the Communist Party dominated the drafting committee and the whole process. The system of governance envisaged in the constitution composed of six structures. The legislature i.e. the National People's Congress (NPC) was the highest organ. The President and the State Council formed the executive and there was provision for sub-national governments in the form of People's Congresses. The autonomous ethnic regions were allowed to decide their own form of government according to the wishes of the majority in such areas. Lastly, the judicial system was envisaged as the hierarchy of courts headed by the Supreme People's Court (SPC). In addition, there was a provision for Supreme People's Procuratorate which was mandated to investigate the crimes by the government (Cohen 1978). Relatively a comprehensive set of human rights were guaranteed but were qualified with the duties like paying taxes, national service and abidance by law.

However, the government based on this constitution was short-lived due to the anti-rightist purge movement and the 'Cultural Revolution' that took over China. Whatever protections that were guaranteed in the constitution, practically ceased. Most of the governmental bodies completely stopped working and the people's government at various levels were replaced by revolutionary committees. There was a complete constitutional break down and no formal rule of law was in place. Even though there was an attempt to import a socialist legal system based on the Soviet Union yet from the start of the anti-rightist movement in 1957- 59 to the end of the Cultural Revolution, PRC lacked most of the features of what could be called a formal legal system or a rule of law of any kind.

The 1975 Constitution

After the cultural revolution, Mao and his supporters sought to formalize their control over power and state through the promulgation of a new constitution. Resultantly, the Chairman of the Communist Party became the only power centre. Replacement of the local people's government by revolutionary committees was formalised. Constitutional protections, rights and freedoms were considerably curtailed.

With the advent of the Communist Party to power, the law took the form of general principles and shifting policies rather than a detailed and constant body of rules. Thus, the 'law' in early communist China avoided technical language, strict legal procedures and even courts. This was to encourage greater popular appreciation of the legal system. During Mao's rule, the law was heavily based on party policies. Under him, China attempted to establish a system of polity based on the socialist law which was more or less a direct import from the system of law in socialist Soviet Russia. It was based on a civil law system as seen through the Marxist-Leninist ideological framework. Lenin, following Marx in his conception of law and state, considered them as an instrument of oppression and thus postulated the establishment of popular, informal tribunals to administer revolutionary justice (O'Brien 2014).

Mao himself held that the revolution was continuous and opposed any legal system based on the western conception of 'rule of law' which emphasized stability as it would act as a constraint. In addition, as the state in communist China was, theoretically, the prime propounder of continued disruptive revolution, any legal system based on the universal and almost permanent normative legal values would restrict the revolutionary communist state and thus prove to be a hindrance to the revolution itself. As of 1977, China had no codes of law at all and was governed by decrees, bureaucratic regulations and personal orders of various officials which were often kept secret (Lieberthal 1995). The number of lawyers practising in China fell from 60,000 to 2,800 between 1949 to 1957 and even the Ministry of Justice was closed down in 1959 (Zimmerman 2005).

The 1978 Constitution

After the death of Mao, another short-lived constitution was promulgated. The new constitution maintained the ideological undertones of the 1975 constitution but the need for socialist democracy was emphasized and the system of government under the 1954 constitution was largely restored (Cohen 1978).

The 1982 Constitution

With the rise of Deng Xiaoping as the new paramount leader of China, reform-oriented leaders came to form the top echelon of the government and a new constitution with a political reformation agenda was brought into force. A relatively more objective review of the Communist Party policies was undertaken thus resulting in a governmental structure which was comparatively more decentralised. Fundamental rights and duties were greatly expanded and the constitution itself was subsequently amended many times in pursuance of economic and political reforms.

The enactment of the Administrative Procedure Law of the People's Republic of China was a major development in 1990 as it made administrative organs of the state subject to private suits for infringement of rights, with the exception of

matters relating to national defence and foreign affairs (Subba 2014). The next significant change came in 1999 when Article 5 of the Constitution was amended to include the phrase that “the People’s Republic of China practices ruling the country in accordance with the law and building a socialist country of law” (Zhu 2010). It is from this moment that the Chinese state carved a niche for itself by translating the popular notion of ‘rule of law’ (*yīfǎ zhìguó*) to ‘rule according to law’. This interpretation indicated a shift in the Party’s approach from a revolutionary stance to that focused on improving governance.

18th CPC Central Committee Fourth Plenum, 2014

Chaired by General Secretary Xi Jinping, this was the first time a CPC plenary session had placed rule of law at the centerstage. The meeting also reviewed the CPC’s ‘mass line’ campaign to boost ties between officials and the public. This followed Xi’s explanation of the earlier CPC ‘*Decision on Major Questions about Deepening Reform*’ (2013) where it was made clear that ideological unity will continue to be forged around Deng Xiaoping’s ‘two-hands’ formula - a market-based economy and uncompromising political control (Garrick 2016). This explanation emphasised that the rule of law should be advanced under the CPC leadership, in line with socialism with Chinese characteristics.

The 4th Plenary Session of the 18th Central Committee of the CCP, held in October 2014, can be considered as a crucial inflexion point in China’s march towards rule of law. The Committee adopted the 2014 ‘*Decision Concerning Certain Major Issues in Comprehensively Moving Forward Ruling the Country According to Law*’ and a series of reforms were initiated within China. The primary intention was to curb local protectionism i.e. the influence exercised by local officials on courts and to cut down on corruption. These reforms materialised in the form of setting up of ‘circuit tribunals’, as regional benches of the SPC, which are empowered to straddle provincial boundaries and assume jurisdiction over disputes spanning over multiple provinces. This branching out of the SPC into multiple circuit tribunals was a long-pending reform and was first mooted in the 1996 SPC Report on local protectionism in China. Decisions by circuit courts are final and binding and carry the same weight as a ruling by the SPC. The deliberate choice of calling them ‘tribunals’, and not ‘courts’, characterises their functionality i.e. of not acting as independent courts but as internal departments of the SPC (Wang 2019).

Constitutional History and the Evolution of ‘Rule of Law’ in India

India too has a rich legal tradition stemming from the *Vedas*, *Dharmshastras* and *Dandshastras* in addition to the Kautaliya’s *Arthashastra* in the ancient and early medieval period to times of Muslim rulers during Sultanate and Mughal period wherein law was loosely based on Islamic Sharia law (Schimmel 1980) and the Central Asian code of law like *Yassa* which was de facto law of the Mongolian empire (Lamb 2018).

The Indian understanding of the law and the present legal system has its roots in the British jurisprudence wherein the concept of ‘Rule of Law’ was explicitly defined by Dicey in his work ‘*The Law of the Constitution*’ (Dicey 1885). The rule of law in British India served as a dominant tool of state legitimation as it sought to closely entwine state power with rationality and morality (Hussain 2003). This was achieved by following a paradigm wherein the cultural and societal realm was differentiated from the procedural realm. The British accommodated the vagaries of caste and class distinctions prevailing in the Indian society by treating custom as

a source of substantive law and, at the same time, showing a firm commitment to procedural justice (Holmes 2003). This is evidenced by the enactment of the Code of Civil Procedure of 1858, the Criminal Procedure Code of 1882 and the Indian Evidence Act of 1872. In sharp contrast with China, where such a distinction did not exist as the law embodied a universal morality in both procedure and substance (Ocko 2009), the British were able to balance the needs of a culturally particularistic society with its own mandate of universalisation of procedures as a rational, rule-bound state.

The British's ability to establish an elaborate legal framework to govern its colony led to the birth of the modern legal profession in India. As lawyers, these educated Indians charted a new path for engaging with the British and paved way for India's independence. Nearly half of the 184 lawyers who played a role in the freedom struggle went on to occupy important positions in free India (Bhasin 1985).

Therefore, since independence and subsequent promulgation of the Constitution of India in 1950, the Indian legal system has been striving to implement an ideal definition of the rule of law as practically possible (Basu 2001). The Preamble to the constitution itself, in addition to laying emphasis on justice, liberty and equality, proclaims that the constitution derives its power from the will of the people of India and all the organs of the state derive their authority from the constitution.

In India, constitutional law reigns supreme and the entire executive, legislative and judicial systems originate and derive their structure from the constitution itself. The constitution itself provides for separation of power and a system of checks and balances for all the three organs of the state (Basu 2001). Moreover, the Indian constitution guarantees that no legislative, executive and even judicial action could be in contravention to the fundamental rights, the protections and remedies for which are imparted to an individual by the constitution itself. Article 32 of the Indian constitution, referred to as its 'heart and soul', gives every Indian the right to seek constitutional remedies, in the form of writs, directly from the apex court i.e. the Supreme Court of India (Singhvi 2009). The judicial innovations like the 'Basic Structure Doctrine'¹ have further strengthened the protection from the arbitrary legislative actions of the state and have secured the mandate of just laws in the country (Krishnaswamy 2010). The advent of 'Public Interest Litigations' (Bhagwati 1984) in the 1980s, wherein public-spirited individuals or groups (like NGOs) can seek the intervention of the apex court on any issues of public importance, has immensely contributed towards expanding the scope of fundamental rights enshrined in the constitution. For instance, sexual harassment at workplace², population control³, environmental pollution⁴, reservations for historically disadvantaged groups⁵ et al. are some of the areas where the apex court has intervened to plug legislative gaps.

However, it cannot be denied that there do exist implementational obstacles and India too has to go a long way in order to harmonize the rule of law. Huge delays in dispensation of justice by courts, on account of high pendency of cases (Dhavan 2015), and access to free legal aid (Galanter 2003) remain crucial challenges. Yet,

¹ Kesavananda Bharati Sripadagalvaru and Ors. v. State of Kerala and Anr., (1973) 4 SCC 225

² Vishaka and Others vs State of Rajasthan and Others, (1997) 6 SCC 241

³ Javed vs State of Haryana, (2003) 8 SCC 369

⁴ M.C. Mehta vs Union of India & Ors., (1987) 4 SCC 463

⁵ Indra Sawhney vs Union of India, (1992) Supp 3 SCC 217

the root foundations of the Indian legal system are comparatively much stronger and firmly based in the ideal conception of the rule of law - legally, politically, socially and ethically.

Navigating the Spectrum From 'Rule By Law' to 'Rule Of Law'

While both India and China were affected by the British in the heydays of colonialism, the turn of events influenced their conceptions of the rule of law very differently. India, as a British colony, was forced to co-opt the common law system which remains a lasting legacy of its colonisation till date. On the other hand, China's defeat in the Opium War at the hands of the British in 1842 led to it being put under the jurisdiction of 'unequal treaties' (Zimmerman 2005). Not just the British (Treaty of Nanjing in 1842), but the United States, France (Treaty of Whampoa in 1844), Russia (Treaty of Aigun in 1858) and Japan (Treaty of Shimonoseki in 1895) also benefitted from these unequal treaties that were imposed on China. This period is firmly embedded in the psyche of Chinese people as its 'Century of Humiliation' (1839 to 1949) and it is the birth of the CCP which ended this period of misery with the communist revolution (Kaufman 2010). This narrative explains why the Chinese government today prefers that legal development and reform must come from within China. Consequently, since both India and China learned different lessons from western imperialism, this schism manifested itself in two prominent yet contrasting ways. Firstly, as earlier stated, the development of the legal profession was seriously impeded in China while India witnessed the emergence of a legal intelligentsia which assumed a leadership role in the freedom struggle. Secondly, India embedded judicial independence in its constitution while China continues to believe in a further centralising the party's powers over the judiciary. Both the factors have a major bearing on the march towards rule of law as the bar (lawyers) and the bench (judges) form the edifice of any legal system.

Establishment of Judicial Framework

Since Mao, i.e. after the cultural revolution, China started rebuilding its legal system and institutions. Ministry of Justice, basic laws and law schools were re-established. While this can be taken as evidence that some kind of transformation towards the rule of law is going on in China yet the reach of law and the protections guaranteed therein are still limited. The actual role of the party is on one side not reflected in the constitution and on the other side, many a time at odds with it. The '*nomenklatura system*', wherein the party has the power to appoint or veto the appointment of the members of the People's Congresses and courts, clearly undermines the constitutional authority, independence and legitimacy of the legislature and judiciary and thus, is a flagrant violation of the fundamentals of rule of law (Burns 2017). Further, the Chinese government has over time continued to put incremental limits to the civil liberties of the dissidents, both civil and political (Peerenboom 2002).

Under China's court system, the Supreme People's Court (SPC) is the apex court and tops the hierarchy composed of provincial, municipal and county courts (Zimmerman 2005). However, SPC's decisions are not binding on the lower court (Lubman 1999). In its fourth five-year plan (2014-2018), the SPC has endeavoured to establish a quasi-precedent system through identification of 'guiding cases' (Wang 2019).

In sharp contrast with India, the judgments of constitutional courts i.e. the

Supreme Court of India (SCI) and also that of the High Courts in each province, serve as a binding precedent on courts lower to them in the hierarchy (Krishnaswamy 2010). This system essentially makes the interpretation of a law given by SCI the 'law of the land'. Indian judicial system has been bolstered by the degree of deference that the Indian executive has shown towards the courts, such as, in the *Berubari case* where the SCI ruled on sovereign matters (Singh 2015).

In China, the judges are appointed by the standing committee of the respective People's Congress and by the National People's Congress, in case of the SPC (Zhang 2016). While judges are also appointed by the executive in the United States, the process involves detailed scrutiny of the nominee by the US Senate (Slinger 1989). No such checks and balances exist in China and judges' appointments are purely political in nature, thus severely compromising the independence of the judiciary. However, through the introduction of the 'Law on Judges' in 1995, the required academic qualifications for judicial appointments were made stringent, which included the condition to qualify the National Judicial Examination. These reforms have augmented the professionalism of Chinese judiciary (Wang 2019) but has neither secured its independence nor fostered its depoliticisation.

On the other hand, India is the only country in the world where judges of constitutional courts are appointed by the President on the binding recommendation of a collegium of senior-most judges with the executive playing a largely insignificant role (Mehta 2007). This system has ensured that the independence of the judiciary, which is part of the basic structure of the constitution⁶, remains protected.

Under the Chinese constitution, the People's Congresses and the procuratorate wield power to supervise the functioning of judges and the courts. They can even call for reconsideration of cases. On the contrary, the judgments of courts in India are enforceable as law and the constitutional courts can even punish the non-conformer in contempt of judgement/order (Nair 2004). Notwithstanding the delays and costs associated with prolonged litigation, this robust structural foundation of the judiciary under the Indian constitution makes its courts command the respect of the common people and also go a long way in instilling faith in the judiciary.

The promulgation of successive constitutions, in concurrence with the nature of authority at the helm, China's journey from a relatively open system of laws in 1954, through the 1975 constitution which was heavily influenced by cultural revolution, to the post-Mao 1982 constitution, it could be argued that it is gradually treading towards 'rule of law'. But at the same time, there are clear indications that the legal system at its core remains more of a 'rule by law'. The constitution in its present form does incorporate various protections and remedies but the legal system at its core conception has retained a functionalist approach (Ruhlig 2018). The Chinese law is still based more on the instrumental conception of law whereby law is seen as a tool to be used by the state as it sees fit and somewhere still, the communist party remains above the law (Galanter 2003). This is evident from the fact that despite opening up a litigation process of trials and citizens petitions, coupled with a centralised system for personnel and resource management, the 2014 CPC Decision explicitly rejects the notion of judicial independence and interprets *yīfǎ zhìguó* as 'rule according to law', which is yet another pitstop in this spectrum. The firm grip of the CCP over the SPC and the circuit tribunals affirms the description of Chinese judiciary as a 'bird in the cage' (Lubman 1999). Hence,

⁶ Supreme Court Advocates on Record Association. vs Union of India, (2016) 5 SCC 1

China is still traversing on the path to ‘rule of law’ as many aspects of its present system are still at odds with the idea.

Further, it may also be argued that China’s march towards ‘rule of law’ is not characterised by a firm belief in its utility but is rather an incidental consequence of globalisation wherein China is compelled to set up a domestic legal system which is known for its efficiency and legal certainty. The most relevant evidence of this belief is the ‘social credit system’ in China which is being developed to standardize the assessment of individuals and businesses (Ma 2018). The social credit system can also be seen to have its roots in the traditional Confucian understanding of law as *Li*, which emphasizes on right conduct, which is being induced through social and moral pressure. Having low social credit, apart from all the penal implications and curbing of the freedoms, would also have a defamatory effect on the social reputation of the individual or the businesses and thus, nudge them towards the conduct considered desirable by the state. It is being imposed in a centralized manner and will make China’s legal system even more divorced from the ideals of rule of law as the Chinese state continues to avoid having crucial debates on issues like individual privacy and mass surveillance (Chorzempa 2018). And when such developments are seen in the backdrop of the fact that, in 2018, the constitution was again amended to remove the term limits of the President and the Vice-President, the supremacy of the party over the state is seemingly undeniable. These developments have made the system centralized, authoritative and repugnant to the idea of rule of law, both, in theory and in practice (Gan 2018).

Role in Developing International Law and Dispute Resolution Bodies

As we have seen earlier, the Cultural Revolution was a major hindrance in the development of the tradition of the rule of law in China. At the same time, it strangled the legal profession, organic growth of legal jurisprudence and severely compromised the independence of the judiciary (Tsou 1999). This period is also characterised by China’s isolationism from at the global high table as it remained absent from the United Nations from 1949 to 1971. However, things started changing rapidly since Deng Xiaoping liberalised the Chinese economy in 1978 (Cohen 1978). Economic liberalisation pushed China towards greater integration with the international legal order which is now a member of over 130 international organisations (Jia 2013). China has increasingly ramped up its participation in global rule-making as its economy has grown (Brandt 2008).

On the other hand, India took a leadership role in bringing together most of the developing and under-developed nations under the umbrella of the Non-Aligned Movement (Miskovic 2014) immediately after it achieved independence. The Indian Constitution directs the state to foster respect for international law and treaty obligations while also encouraging settlement of international disputes by arbitration.⁷ Its mature tradition of rule of law allowed it to have well-qualified legal professionals who played a key role in negotiating legally-binding treaties and amending India’s domestic laws to comply with them. For instance, while India ratified the International Covenant on Civil and Political Rights (ICCPR) in 1979, China only signed it in 1998 and is yet to ratify it.⁸

One domain of international law where China has displayed renewed vigour is the World Trade Organisation (WTO). It joined WTO in 2001⁹ and since then, it has

⁷ Article 51, Constitution of India, 1950

⁸ OHCHR Dashboard, <http://indicators.ohchr.org> (accessed on 12 September 2019)

⁹ ‘WTO | Accessions: China.’ World Trade Organization - Global Trade,

gradually increased its participation in rule-making at the WTO and is also increasingly using the Dispute Settlement Body (DSB) to protect its trade interests (Brandt 2008). While only joining the WTO framework in 2001, China has already been a party in 237 cases before DSB as compared to India's participation in 216 (despite being a member since WTO's inception).¹⁰ But India's track record at the WTO is stellar in the sense that it has contributed immensely in the development of WTO's jurisprudence. For instance, India emerged as a leading member in the Doha Round negotiations while China, despite being one of the largest trading nations in the world, has deliberately shunned this responsibility (Qin 2008). India has also been extremely vigilant in safeguarding the principle of non-discrimination, even to the extent, that India objected to some of the discriminatory terms in China's instrument of accession to the WTO! On the other hand, China has chosen to compromise on several occasions in order to prevent a formal dispute being launched by another country (Ji 2010) China's propensity of avoiding litigation and its preference for settling the matter through bilateral discussions and compromise is yet again visible here.

Interestingly, China has also never been involved in any case at the International Court of Justice (ICJ), neither as the complainant nor as a respondent. This again is in stark contrast with India's record - it has been a party to 6 cases at the ICJ which the first one being the landmark case of the annexation of Goa from the Portuguese in 1955¹¹ and the latest one in 2017 against Pakistan for seeking consular access to its citizen.¹²

None of these stats should be interpreted to conclude that India has a tendency to have more disputes with other countries and China is more harmonious. Rather, these figures are a consequence of India's ability to make sophisticated legal and policy arguments at international forums owing to its long tradition of embracing the rule of law. China, which is still in an early stage of its transition from rule by law towards rule of law, is learning the tricks of the trade. Since WTO is the only forum where it has managed to create sufficient expertise, the respective numbers clearly indicate and verify this trend.

On the issue of climate change, India and China have shown increasing convergence of interests and have set a good precedent of joining their forces to challenge the developed nations' attempts to dilute the principle of 'common but differentiated responsibilities' (Gupta 2016). Both India and China are large, populous nations but still at varying stages of development. Therefore, they face common challenges of air pollution, land degradation, lowering of crop productivity due to rising temperatures, fast melting glaciers affecting the flow of their perennial rivers et al. However, this cooperation is not just a consequence of overlapping interests but also direct evidence of greater complexity of environmental laws that both the countries have enacted over the past few decades to tackle these common challenges (Boer 1998). Just like India and China have seen more unanimity in their positions in the domain of international trade law, similar convergence is now being witnessed in environmental law (Araral 2016). As both countries legislate on certain areas of law, it builds domestic expertise in its legal community and widens the jurisprudence in that domain. This allows both countries to develop a nuanced

https://www.wto.org/english/thewto_e/acc_e/a1_chine_e.htm (accessed 12 September 2019)

¹⁰ Statistics available at: https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm (accessed on 25 September 2019)

¹¹ Right of Passage over Indian Territory, Portugal v. India, Judgment, 1957 I.C.J. 125 (Nov. 26)

¹² Jadhav Case, India v. Pakistan, [2017] ICJ GL No 168

understanding of each other's legal positions on the matter and opens up further scope for cooperation.

Lastly, it must also be pointed out that claims of sovereignty are taken very seriously by the Chinese government (so too by every other nation as well), as evidenced by its unilateral activities in the South China Sea and its point-blank refusal to participate in any dispute resolution mechanism to break the deadlock (Mincai 2014). China's claim over the Nine-Dash Line raises many complicated questions of international law and needs trained legal minds to resolve the issue. Philippines tried to do the same by initiating arbitration proceedings against China at the Permanent Court of Arbitration (PCA) under the provision of the United Nations Convention for the Law of the Sea (UNCLOS) but China completely rejected the proceedings as illegal and inconsequential. China's disregard for the PCA, in this case, is again in sharp contrast with the pliant acceptance by India of PCA's award in a similar maritime delimitation dispute in the Bay of Bengal which went in favour of Bangladesh (Bateman 2014). This example again underscores the point that a mature tradition of adherence to the rule of law in India allows it respect and further strengthen international courts while China still finds it difficult to overcome its pessimism regarding them.

Comparing this state behaviour with China's newfound comfort in using the services of the DSB at the WTO may lead one to conclude that while realpolitik and assertion of state power do explain China's conduct with respect to the South China Sea arbitration, a developed domestic legal framework can nudge a state towards reposing greater faith in international courts and tribunals.

Conclusion

This paper began by exploring the various strands of the notion of 'rule of law' in China and India by studying the philosophical foundations of these two great civilisations. Very few countries in the world today can proudly associate themselves with deeply thought-provoking ideas as individuals like Confucius and Chanakya penned down centuries ago. The reflections of these ideas can be seen, even today, in the societies of both countries as they were patronised by successive dynasties and rulers over the course of time, thus, firmly embedding them in our collective psyches and cultures. Therefore, studying these ideas today is as relevant as it was before. As shown in our analysis, in the case of China, harmony and order within the society was the desirable state of affairs while India was wedded to the ideas of justice and *dharma*.

While ancient civilizational philosophies tend to get entrenched in people's subconscious, it is the turn of recent events that has the strongest bearing on how they choose to act today. Therefore, the rule of Qing dynasty in China and the colonial rule of the British in India make for an apt comparison. We see that the Qing rulers continued the Confucian tradition in China even as they pioneered the enactment a legal code for the first time in China's history. On the other hand, the Indians were subjected to a completely alien system of common law by the British which created plenty of friction between the colonisers and the colonised in the 18th century. However, over the course of 200 years, India not only internalised the western notion of rule of law in its polity but also managed to keep its own customary laws and practices intact by separating procedural justice from substantive one. Even during British rule, practising law was the most remunerative profession in India and successful lawyers earned far more than their British

counterparts. This class of Indian lawyers, which included India's first Prime Minister, first President and Mahatma Gandhi, were able to elicit respect from both Indians and the British owing to their fluent command over the British law and language. This explains the disproportionate influence that lawyers wielded over the Independence movement and also their subsequent role in nation-building. The limited interaction of China with the British and other imperial powers, however, had the opposite effect on it. It closed itself down from foreign influences and actively avoided the amalgamation of western ideas in its political system, as well as, its society.

In the third phase of our analysis, we looked at how an independent and democratic India treated the legacy that the British had left behind. A comprehensive constitution-drafting exercise ensured that India soaked in the most progressive ideas prevalent at that time, be it from the US Constitution, from the Irish or from the Japanese. At the same time, Communist China reposed faith in its own civilizational philosophy and only chose to mix them with the Marxist idea of a socialist state. While the results of these two differing concoctions are there for the world to see and analyse, the limited mandate of this paper was to understand how these developments shaped the understanding of the rule of law in these two countries. We conclude that Indians, after being well acquainted with the inquisitorial system of adjudication in British courts, developed a metaphorical thick skin and created a legal ecosystem of qualified professionals which allows it to leverage international law to protect its interests.

China, on the other hand, took a completely divergent path. It failed to build consensus around one constitution, depending entirely on the rule of man as opposed to the rule of law. This hampered the progressive development of the tradition of rule of law within China and consequently, it is difficult to imagine China having a flourishing legal profession in the near future as we do in India. The judiciary continues to be an extension of the CCP and domestic jurisprudence is developing in only a few domains like contract, business and trade laws. Lack of enforceable rights in the Chinese constitution further compounded this problem and large-scale pendency of cases, as opposed to in India, is not a problem that China faces today.

Extending this logic to the realm of international affairs is certainly a risky affair but nevertheless, we have tried to show some interesting co-relations. China today has a great number of business and trade lawyers as the demand for them was created in the market since China's accession to the WTO. The ease of cooperation between India and China at climate change summits also underscores this co-relation between the presence of domestic jurisprudence in an area with the greater acceptance of global rules in that very domain. These could be important lessons for all constitutional democracies, which believe in the traditional notion of rule of law while dealing with an increasingly assertive party-state like China, even as the latter transitions from rule by man towards the rule of law.

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