‘THE SONG REMAINS THE SAME’ – THE STATUS OF THE RULE OF LAW IN CHINA AT THE 5TH YEAR ANNIVERSARY OF WTO MEMBERSHIP

PATRICIA BLAZEY* AND PAUL GOVIND**

I INTRODUCTION

The 11 December 2006 will officially mark five years since China entered the WTO. It is particularly significant because five years marks the end of China’s ‘transition period’ as it has integrated itself into global markets. Despite the end of this period a number of obligations remain that China needs to fulfill. At the time of writing specific topics included fully opening the banking sector to foreign interests, ‘national treatment’ in relation to issues such as income tax for corporations and, importantly for current purposes, the ‘rule of law’.¹ This latter theme is the focus of this paper and whilst the topics regarding banking and taxation will be analyzed, it is argued that many of the common problems that effect the operation of these areas such as the issue of licenses and impartial transparent decision making are actually problems associated with the absence of the rule of law.

It is important to understand from the outset that whilst China has reached the end of the transition phase, involvement in the WTO is still in its infancy. Membership in the WTO is not an end in itself – just like globalization, it is a process. Globalization encompasses international cooperation and sharing of ideas on economic, political and cultural matters.² These areas are interdependent to a degree but particular forces and trends will impact in each area differently. For example, an external measure such as the WTO Protocol will certainly impact upon economic

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* SRN (University College Hospital London) BA LLB (Macq) LLM (Syd). Head of Department of Business Law and Senior Lecturer, Macquarie University, Sydney.
** BA LLB (Hons) (Macq), Visiting Fellow, Department of Business Law, Macquarie University.

¹ For the purposes of this paper the authors employ the following definition of the rule of law. F A Hayek: ‘the law...means that government in all its actions is bound by rules fixed and announced beforehand – rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one’s individual affairs on the basis of this knowledge’.

matters more directly than cultural matters. Its main focus, that is the liberalization of trade, is concerned with the economic matters whilst impact on culture is indirect. Obviously political acquiescence from the Chinese government has been important but the WTO regulations do not explicitly demand changes with respect to the Government’s apparatus or political philosophy. The regulations concerning laws contained in the WTO Protocol extend only as far as it seeks to ensure that the law does not fundamentally undermine principles of free trade.

An effective legal system must take into account the contours and contexts of economics, politics and culture. Of further relevance, the rule of law must ideally transcend economics, politics and culture and serve as a force that can simultaneously represent and also bind the competing interests and duties of actors in these areas. This helps highlight a crucial theme of this paper – was it unrealistic to assume that the regulations contained in the WTO Protocol could introduce modern legal (and political) ideas such as the rule of law into China? Perhaps – the ease with which this link is made should highlight questions of its durability. The underlying reason is that such analysis underestimated the political and cultural (and by implication social) forces entrenched in China. In this paper we broadly argue that through the medium of legal education and training there are attempts to create a culture of law in China that is receptive to the benefits offered by a legal system based on the rule of law.

The first section of this paper examines the limitations of the WTO/rule of law relationship. It was believed that with transparency would follow accountability, or China would face the consequences for arbitrary and inconsistent application of its laws. This led many to believe that participation in the WTO would result in the rule of law prevailing in China.

Subsequently the paper suggests that a preferable strategy begins with comparing the progress of economics-law-politics. We review some of the topical issues that remain on China’s WTO ‘to do list’ as it approaches the end of the five year transition. The regulation and administration of some sectors suggest that the Chinese government will apply relevant laws to suit their needs.

The next section of the paper observes that the greatest problem facing the entrenchment of rule of law in China is the arbitrary nature of government bodies. Corruption remains rife in the context of government and bureaucratic sectors. Local governments continually hamper attempts to establish consistent application of laws throughout the country. The problems are deep seated and the creation of a ‘legal culture’ can only take place in the context of Chinese culture itself.

Finally the paper will argue that the key to overcoming both these problems might lay with legal education. Education of the legal sector and of the population generally will assist in the creation of a legal culture. The purpose of economic liberalization is to benefit the consumer. Their rights can only be adequately
II A NEW ERA – BUT IN WHAT ARENA?

In 2001, observers had high hopes for the prospects of legal modernity in China. In September of that year the WTO successfully concluded the negotiations that allowed China’s entry. Of particular interest to lawyers was the requirement that China enacts and operate laws which protect and uphold the principles of free trade. The WTO press release stated, ‘China has agreed to … offer a more predictable environment for trade and foreign investment in accordance with WTO rules’. This commitment with its focus on ‘predictability’ seemed to suggest that membership of the international body would compel China to bring its legal system into the modern world and in line with ideas of the rule of law. This idea was further underlined by the commitment that, ‘the WTO Agreement will be implemented in China in an effective and uniform manner by revising its existing domestic laws and enacting new legislation fully in compliance with the WTO Agreement’ (emphasis added).

The reference to ‘domestic laws’ appeared to be a clincher – the external document of the WTO regulations would initiate internal change. The question is ‘what kind of change would it encourage and to what degree’?

The legal reforms listed in WTO regulations extend only so far as they protect the principles of free trade. This is fair enough too. The mandate of the WTO is to advocate a rules-based system for the purpose of underpinning global cooperation. Its guiding principal is economic prosperity. Whilst it may encourage ‘openness’ social interests such as democracy and equality before the law remain side effects. It would be incorrect to assume that prior to their entry into the WTO the Chinese Government was unfamiliar with the practices associated with multilateral trading. The ascension negotiations which lasted fifteen years offered an adequate insight. The upshot is that the Central Government in China is acutely aware of the impact compliance with WTO regulations brings and as a result will seek to manage this impact where it threatens ‘the nation’s security’. An interesting example is the Central Government’s approach to opening up the banking sector. China’s banking sector remains one of the stand out issues requiring resolution before the end of the transition period on 11 December 2006. The major problem is that according to WTO regulations (‘national treatment’), foreign invested banks should be able to provide local currency services to any Chinese client throughout China and currently Chinese laws do not allow this. Some Central Government officials

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remain opposed to the idea of full market access for foreign banks and will try and manipulate laws to achieve this end. These sentiments were epitomized by the Vice Chair of the China Banking Regulatory Commission Tang Shuangning who stated, ‘We must set limits because we don’t want foreign banks to gain control.’ In addition to the problems regarding transparency of legal decisions this illustrates the limitations of imposing an external legal idea upon internal political structures ill equipped to utilize modern legal concepts such as the rule of law.

III EXTERNAL INFLUENCE UPON INTERNAL VALUES

Michael Dowdle observes that the donation of ideas can facilitate development. However in so far as these ideas represent a change toward the rule of law, China has been more circumspect in their absorption of foreign legal ideas then it might first seem.

It is necessary from the outset to understand the different ways in which foreign legal ideas are absorbed. The two major methods are:

1. Passive response to international legal norms and
2. The active adoption of international legal norms.

The Chinese government is content to allow a situation where the legal norms of an international organization such as the WTO can be seen to act as a guide for domestic legal modifications but will not allow a similar situation to develop with regard to the laws of foreign domestic states.

This stance also restricts the infiltration of international legal norms to areas where the party is prepared to allow a dilution of state authority. It is particularly prevalent in the area of economic reform where bodies such as the WTO are active. This trend is further underlined by the concentration of lawyers in particular areas where the state is prepared to, or wishes to, relinquish a level of control. It further serves to

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8 Ibid 2.
11 The protocol contained in the agreement between the WTO and China, under Article (A) (2) states: ‘China shall apply and administer in a uniform, impartial and reasonable manner all its laws, regulations and other measures of the central government as well as local regulations, rules and other measures issued or applied at the sub-national level (collectively referred to as ‘laws, regulations and other measures’) pertaining to or affecting trade in goods, services, trade related aspects of intellectual property rights (TRIPS) or the control of foreign exchange.’ See also, ibid 502.
highlight the limitations of WTO membership in terms of change in the Chinese legal landscape particularly concerning the introduction of the rule of law.

Despite the increase in the number of lawyers in China several internal institutional problems remain. Statistics indicate that the number of lawyers is heavily concentrated in the economic area. The increasing growth of foreign commercial law firms in China is similarly limited to the economic area and overseas training of Chinese lawyers is mainly concerned with these areas. Whilst the influence of WTO ascension is certainly felt in these areas the same cannot be said about administrative law – arguably the most relevant area of law when trying to establish a system which respects the rule of law. The inability to challenge decisions of state authorities is a severe blow to accountability and consistency. The number of lawyers active in administrative law areas remains low and the party indirectly discourages participation in the area.

There are a variety of factors that contribute to the discouragement of lawyers practicing in the area. Lawyers are still reluctant to take administrative litigation cases because of the impact upon state bodies. With little semblance of judicial independence administrative law cases are largely avoided with most being ‘solved’ be the applicant dropping the action. The 2006 Congressional Report observes that the Chinese government has restricted rights and efforts to challenge government decisions. As a result administrative challenges to government actions have not increased since 1998 – and in fact declined between 2003 to 2005.

Despite its high profile status as a harbinger of change, the WTO ascension protocol remains an external source of legal reform. Internal problems lie at the heart of the rule of law challenge in China. The small measure of success that the WTO rules have had upon China’s laws is offset by the fact that application of the laws is still dependent upon administrative bodies.

IV CURRENT STATE OF PLAY OF WTO REGULATIONS IN CHINA

It is widely agreed that since China has entered the WTO transparency is at an all time high. We must remember though that historically China has been a particularly closed and insular society and that more changes are required until we see the kind of accountability that we are accustomed to in the West. The last five years have witnessed some notable positive developments in the legal sector. For example economic liberalization has helped erode the power base of many inefficient but

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12 Congressional Report on China, 2006
15 Ibid 131-132.
influential government agencies and state owned enterprises. It has helped remove the links of such enterprises to bureaucrats and the inevitable abuse of their positions. Whether it was the effect of competition or not some government bodies have become more transparent and offer the public the opportunity to comment on draft law and regulations.

However some problems remain concerning legal issues and the WTO principle of ‘national treatment’. As the examples below demonstrate the legal problems stem from the lack of any application of the rule of law. This is different from a situation where regulatory authorities can manipulate laws to achieve some ulterior purpose. Such a situation is not an example of the manipulation of the rule of law but rather underlines the absence of the rule of law entirely. The rule of law does not exist where relevant decisions show partiality or are arbitrary. This is important to understand because decisions by government agencies can sometimes seem to benefit domestic interests at the expense of foreigners and vice versa. There is very little relevance in terms of a consistent agenda and it only serves to further underlie the complete arbitrary nature of some decisions and lack of rule of law. Member companies of the US-China Business Council ranked issues associated with applications for business licenses and other government approval as the primary concern regarding trade in China. In many cases administrative problems have limited the expansion of international and foreign businesses. The USCBC explains that the China Insurance Regulatory Commission (CIRC) reviews applications by foreign insurers to open multiple new branches consecutively whilst considering applications by domestic companies concurrently. The process is very lengthy and as a result only one foreign insurer application per year can be processed.

Discriminatory laws and policies have also been the source of debate. A major worry is the regulations placed upon foreign firms that seek to acquire Chinese companies. In August 2006, the Ministry of Commerce released new regulations applying to certain mergers and acquisitions. Acquisitions by foreign companies of popular Chinese companies must be submitted for government approval before being given the green light. The regulations on these acquisitions give the government authority to veto transactions under the inherently vague heading of ‘national security’. Similar concerns have been voiced with regard to the status of the banking sector. Current Chinese laws restrict foreign ownership of domestic

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18 Ibid 1.
20 Ibid 5.
21 Ibid 6.
22 Ibid 6-7.
banks to 25% whilst no such restrictions are placed upon domestic investors. The reforms to laws in the banking sector are the biggest item remaining on the five year/end of transition agenda. The problems encountered in regulating the banking sector demonstrate further the political barriers that the rule of law must overcome. Michael Overmyer observes that, ‘poor intra-government communication and minimal transparency has sometimes led to slow issuance of legal and regulatory changes, thereby delaying the implementation of important WTO commitments’ (emphasis added). There are some positive signals in the area of banking. The activities of foreign banks are regulated through the state council issued *PRC Regulations on the Administration of Foreign Capital Financial Institutions* (February 2002) and *China Banking Regulatory Commission’s Implementation Rules* (September 2004). These regulations allow approval of foreign banks to deal in local currency with Chinese citizens – what is required now is the actual approval by the Banking Regulatory Commission. However the banking sector is also subject to the vague notion of ‘national security’. Despite this idea being enshrined in Chinese legal instruments its application threatens the idea of rule of law. Such a broad term as ‘national interest’ can allow arbitrary and outlandish concerns to be brought into the decision making process. This is especially important given the poor track record of government agencies and the transparency of decisions. The broad range of factors that could be brought under ‘national interest’ could be influenced by regional concerns and the competition between government agencies. This does not help foster an environment where consistency and predictability – a key WTO requirement – of decisions is assured. Some foreign banks have reported that China’s regulators take a strategic approach to granting applications. For example affluent coastal cities are protected from competition whilst investment is funneled into less developed regions.

**V Teaching an Old Dog New Tricks?**

The status of administrative law in China is greatly undermined. The domestic delineation of power to local branches has allowed corruption within the ranks of government officials to grow unabated. In this section we review the current status of the legal system and the institutional impediments that thwart administrative remedies and the rule of law.

We believe the policies utilized by the Central Government are unhelpful as they merely serve to attenuate the administrative law process thereby further undermining its effectiveness. A strong example is the use of the citizen petition

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23  Overmyer, above n 7, 1.
24  Overmyer, above n 7, 2.
25  Overmyer, above n 7, 2.
26  Overmyer, above n 7, 2.
27  Administrative law remains the most important area where judicial independence is thwarted. This is particularly the case where administrative agencies are themselves defendants. Q Zhang, ‘The Peoples’ Court in Transition: The prospects of the Chinese judicial reform’ (2003) 12 Journal of Contemporary China 82.
system known as xinfang. Xinfang is used by citizens as a way of communicating their grievances about government policies or the actions of government officials. The petitions are to be addressed to the administrative authority responsible. The policy of the Central Government is to keep these petitions as far away as possible and has set a goal to reduce number of petitions in 2006.\(^{28}\) The central government has ordered nationwide adoption of ‘responsibility systems’ that discipline local officials who fail to prevent mass petitions from either occurring or reaching the central government.\(^{29}\)

Sylvia Ostry also believes the lack of transparency in Chinese administrative law is a chief obstacle to WTO implementation.\(^{30}\) Ostry blames the local use of normative documents, the absence of a centre point for regulation and coordination of laws and regulation, and the overall lack of autonomous legal authority as contributing to the problem of local protectionism.\(^{31}\) Furthermore, Chinese bureaucrats have little understanding of the legal process. As a result their enforcement of trade related laws and regulations are discretionary and riddled with inconsistency. An example is the way that the same law or regulation has a different interpretation depending on the region.\(^{32}\) Administrators even intervene in the judicial decision-making process to expand local or private interest.\(^{33}\) It is not rare to see a local government or a local agency often becomes a party to the contract and its decision to either approve certain investment projects or to endorse a company’s entry into an agreement appears arbitrary from an outsider’s perspective.\(^{34}\)

The benefits that WTO membership brings to China are not debated here. However, the application and operation of liberalized markets and foreign investment rules within the Chinese context remain important. The introduction of rules such as those contained in the WTO Protocol cannot exist in a vacuum. Like all legal systems developments of legal norms are dependent upon a given context. In the socio political landscape of China the impact of free trade and foreign investment has not created the transparency or objectivity in decision making that was hoped for. This failure is particularly acute in local or regional politics. Ironically, rather than helping to drive regional China into modernity the commercial benefits of foreign investment have indirectly assisted in consolidating the power bases of local agency bureaucrats.

China’s decentralized political apparatus has traditionally proved to be a stumbling block to top down reforms. The intense rivalry between government agencies has

\(^{28}\) Congressional-Executive Commission on China, above n 14, 140.
\(^{29}\) Congressional Executive Commission on China, above n 14, 140.
\(^{31}\) Ibid 425.
\(^{33}\) Ibid 448.
\(^{34}\) Ibid 448.
accelerated with the advent of WTO membership and foreign investment. A key factor was the decision by the central government to transfer approval of foreign investment to local branches and agencies. The behavior of some local branches is entirely arbitrary and occasionally contrary to Central Government guidelines. In the past the local branches were fiercely protective of local industry, such as in 1994 when the Central Government sought to consolidate the auto industry into six national companies. Local investment can help secure the economic and power bases of regional bureaucrats – often through non legal arrangements. The political game has been played by these rules in China for a long time and foreign investment offers a new means to consolidate regional power.

Despite the encouraging commitments made to WTO regulations at the top level of government, the lower levels are seemingly frozen in a cultural past that can potentially disrupt the downward flow of new ideas. The structure of local or regional bureaucracies has been likened to modern feudalism. In order to attract foreign investment local bureaucracies will compete with each other and ‘subsidize developed countries and their companies. These policies, often used at the local level to attract foreign investment, include preferential treatment on taxes and land-use fees’. There are two major consequences of this course of action that bear upon the prospects of establishing a rule of law. The local populations suffer because of the preferential treatment and as a result sentiment that local bureaucrats are concerned with swelling their own pockets rather than protecting the interests of local people increases; the decision making process is entirely arbitrary and lacks any sense of transparency or consistency. Both of these problems underline a lack of a suitable structure for the implementation of a consistent legal system and the population’s growing disillusionment with law as a bulwark on the arbitrary exercise of power.

As China approaches the end of the five-year transition there is the potential that this abuse of liberalized trade by local bureaucrats might continue for some time. As part of its commitment China must grant ‘national treatment’ to foreign companies – this includes taxing them at the same rate as domestic rivals. Since China’s entry into the WTO in 2001 the central government has opened markets whilst concurrently reforming the two tier income tax system which discriminates between local and foreign corporations. Even though the five year transition period will end on the 11th December this year, there has been no change to the income tax laws. Despite anticipation that the Standing Committee of the National People’s Congress convened to discuss such legislation in October 2006, no such proposals

36 Yong, above n 17, 3.
38 Yong, above n 17, 4.
were tabled.\textsuperscript{39} The result is that official debate on the reforms will be postponed until 2008. Whilst foreign corporations are paying less tax than domestic counterparts it means foreign investment will continue at an accelerated rate. This means that local or regional bureaucracies will grant further preferential treatment to ensure the investment is made in their direction. Local officials have further cause for concern in that the removal of tax preferences may see foreign investors look for other regions in China and in some cases other countries where they can invest.\textsuperscript{40}

In many cases the interests of local governments and agencies and domestic companies are one in the same. The corporate tax system has motivated both government and business to set up fake companies overseas which then invest in China thereby escaping the higher domestic tax rate.\textsuperscript{41} In 2005, the Ministry of Commerce conceded that one third of supposed foreign investment in China was in fact made by overseas shadow companies held by domestic Chinese companies or local governments.\textsuperscript{42}

\textbf{VI \textit{THE CULTURAL ‘GAP’}}

Chinese cultural traits have served to further insulate the population from the effect of legal instruments. The value that the Chinese population attaches to law ‘stems from its cultural integration’ and the failure to appreciate this ‘has amounted to a systematic impoverishment of its capacities and of its relevance to the community as a whole’.\textsuperscript{43}

As mentioned earlier, international legal norms might be absorbed by a country but they essentially remain external legal sources. The extent to which they are applicable to a given domestic legal system varies – Michael Dowdle observes that, ‘legal effectiveness depends crucially upon local culture and dynamics that exist within the law’.\textsuperscript{44} An example of this problem is the association of the rule of law with the idea of modernity. Modernity in turn is tied to the idea of capitalism. The emerging era of capitalism in China has not followed the same path as nations in the Western world which was closely aligned with liberal democratic principles.

The influence of Confucianism on Chinese society and the law is fundamental in understanding China’s slow progress toward rule of law. Historically, Confucianism, with its focus on ethics and moral virtue took precedence over the law. It was the role of rulers and officials to educate subjects upon moral and acceptable behavior. Law would only come into play as a last resort in cases where

\begin{itemize}
  \item \textsuperscript{39} Wong, above n 35, 2.
  \item \textsuperscript{40} Wong, above n 35, 3.
  \item \textsuperscript{41} Wong, above n 35, 3.
  \item \textsuperscript{42} Wong, above n 35, 3.
  \item \textsuperscript{44} Dowdle, above n 9, 66.
\end{itemize}
the social order was upset and which was conceived as a disruption of the moral, natural, and cosmic order, which is seen as a continuing sequence.

Over arching preferential treatment is termed Guanxi. Guanxi is a term that describes the base force that holds the personalised networks of influence together. Preferential treatment results from a feudal tradition of granting privileges to some and not to others. Chinese culture traditionally places great importance on values such as loyalty, mutual trust and fulfillment of personal obligations which are emphasized in the context of relationships. Personal networks based on traditional values are exploited in this way to overcome institutional barriers and at the same time, used to circumvent the principles of impartial treatment embodied in legal codes. Guanxi is ‘living law’ for it deals with connections developed by people as they live and work within their communities and will continue to influence the implementation of law until such time that norms embodied in the formal law of the state override it. Guanxi in practice can be seen to be an obstacle affecting the due legal process, but its existence is perpetuated because of an unspoken mutual understanding between government officials, private entities and citizens. This tacit understanding occurs despite the fact that it appears to contravene formal laws.

The population regards the cultural relationships as an impassable barrier to solving problems such as corruption. This has instilled a ‘fatalistic’ attitude within the population that law cannot help to solve any of their problems. This negative perception of the law must be remedied if the population is going to participate in the legal system and enforce their rights in relation to the state. This preoccupation with trade issues has overlooked the other significant player – consumers. The relevant consumer protection legislation was enacted in 1993 and has not since been revised. This means that it does not take into account many changes necessary upon entry into the WTO. As Mary Ip points out, a review of the current consumer legislation is vital. However, of perhaps greater importance, there is the need to design and set up an effective enforcement system that is governed by the rule of law.

VII THE HOPE FOR EDUCATION

Legal education is the key to building effective, indigenous legal norms in China. Whilst education will often be inspired by foreign ideas the crucial difference when compared to the absorption of WTO concepts is that education at the grass root

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45 K Lieberthal and M Oksenberg, Bureaucratic Politics and Chinese Energy Development (1986) 139. The magnitude of the problem, particularly in the countryside, cannot be understated. For example, according to a recent survey conducted by the Shanxi Public Security Bureau, 80% of police recruits in Shanxi Province in recent years have been unqualified ordinary workers who acquired positions through nepotism or the ‘back door’. Such officers were recruited through ‘memos’ issued by senior police officers or influential cadres.

46 The view that ‘if enough people do something, it becomes accepted as the norm’.

47 M Ip, ‘Chinese Consumers and the WTO’ (paper was presented at the 3rd Asian Law Institute Conference in Shanghai 2006) 719.
level can be better adapted to Chinese conditions. In terms of administrative law and the rule of law the importance of education is related to what Randal Peerenboom has termed, ‘convergence’, that is the influence of foreign ideas must be shaped in a Chinese context.48

Legal education in China has principally suffered due to government control of universities. Traditionally law schools were established under the administration of government departments. In fact the Ministry of Justice trained over half of the legal specialists in law schools under its administration.49 This administration has generally been poor and inefficient which has meant that resources have not been adequately or evenly distributed.

Bjorn Ahl goes further stating, ‘Insufficient judicial education of judges, public prosecutors and lawyers is considered as a more serious problem on the way to establish the rule of law in China than the lack of independent courts and judges.’50 Most judges in China still do not have a law degree. There is a serious lack of judges with tertiary qualifications and the administration of the law is undertaken by only51 approximately 3000 judges. With China’s entry into the WTO this poses serious problems for compliance with legal requirements. Further reflecting the resource limitations on the judiciary, in the past highly qualified judges had concentrated on criminal laws to the detriment of economic matters including enforcement.

Historically, this has meant education; training and experience of judges have in the past been quite inadequate. Indeed, in the past judges were not trained in any meaningful manner and were simply plucked from say, the army and commissioned as judges. In 1985, only 9.5% had received post-secondary education. The figure was raised to 30% in 198952, 34% in 1990,53 49.2% in 199154 and 56.15% in 1992.55 Great attention has been paid to raising their qualifications. By the end of 1992, 66.59% had qualifications equivalent to tertiary level56 and by 1995 that will be 80%.57

51 CCTV, Channel 9, News, 26 December 2000, where it was reported that less than 3,000 judges in China were qualified to practice on China’s admission to W.T.O. The remainder would be required to take further education and training.
52 Law Year Book of China (1990) 133-4.
53 Law Year Book of China (1991) 104.
54 Law Year Book of China (1992) 122.
55 Law Year Book of China (1993) 93.
56 Ibid.
Ahl observes the role judicial examination fulfills in maintaining the rule of law. He underlines the importance of the examination by saying that the judicial examination is an instrument to control society by selecting people who prove to be qualified for the legal profession.

A substantive look at the contents of the exam itself reveals that the subject matter is directed at producing well-rounded legal professionals. The effect of China’s entry into the WTO and growing involvement in the international arena generally has influenced the exam so that questions about internal economic relations and law, constitutes 9% of the exam. It underlines the main objective of law in China – to protect economic growth.

It appears that the best way forward for Chinese legal education is to adopt overseas models for teaching. Both traditional and more modern intellectual forces have insulated the population from effective use of law. Phan has observed that Confucianism and communism in particular have overwhelmed legal culture. However through programs such as critical legal education that is being undertaken in Chinese law schools such as Wuhan, representative actions are being filed against the state on behalf of citizens. Through this process people are taught of their legal rights and the accountability of state administration to the rule of law.

The process has been beset by a number of difficulties, many of which relate to cultural reservations people hold towards the law generally. This policy is highlighted in the Wuhan school’s philosophy which aims to teach students, often from affluent backgrounds, that law is a society wide phenomenon and certain sectors will be affected differently. A report on the Wuhan school detailed that some students were dismayed by people’s frustration that the law did not appear to cater directly to their concerns. The solution, whilst it might appear idealistic, is certainly a helpful approach in the context of building a legal culture that upholds the rule of law. Students and legal representatives are encouraged to view their struggles as structural rather than individual, that is look at the benefits of orchestrating larger social change through legal action.

This philosophy has had an obvious effect on the type of legal actions that the Wuhan clinic chooses to target. Actions are brought against state authorities through administrative law that serve to highlight the progress made in establishing rule of law. These are the types of areas and decisions that can have broader social implications. Such litigation has proven very difficult at times. Chinese legal clinics such as Wuhan have suffered from a lack of support inside and outside the institution.

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58 Ibid 261-262.
59 Ibid 262.
60 Phan, above n 13, 123.
61 Phan, above n 13, 138.
62 Phan, above n 13, 139.
63 Phan, above n 13, 137.
These problems are understood by the directors of the Wuhan institute. In order to compensate for the limitations which effect legal suits, political action is often employed.\textsuperscript{64} In a country such as China where the political and legal institutions are seemingly inseparable at times this dual approach makes perfect sense. It does not represent a capitulation or loss of faith in the legal process or rule of law – rather demonstrates that there are forces within China that are looking to hold the government accountable for their failure to provide and preserve a legal system that is accessible, objective and upholds the rule of law.

\textbf{VIII CONCLUSION}

Throughout this paper the terms ‘eastern’ and ‘western’ have been used to describe alternative Chinese and Western approaches to law. Ultimately however, both approaches espouse a richness and independence born of a unique social narrative and differing experiences which strive to realise that essential manifestation known as ‘justice’.

The failure of legal reform to keep up with economic reform in China can not definitively be aligned with one particular reason or explanation. Rather, it is within the ongoing inter-relations of economic, social, ideological and philosophical factors that a Chinese rule of law is slowly developing. In attempting to conceptualise the shape and character of a Chinese rule of law, this paper has had to explore some of the underpinning assumptions and political beliefs ensconced within western law.

Without limiting the discussion to a jurisprudential banter, this paper has also tried to imagine how capitalism, with its origins in western legal tradition and institutions, will influence and impact the development of Chinese law in the 21\textsuperscript{st} century. In doing so, the cause and effect mentality of law leading to economic prosperity, or vice versa, has slowly dissolved into a tentative understanding that legal reform and economic reform go hand in hand. To realise one without the other is to engender an unbalanced path towards development.

In balancing the path towards the economic promised land, the Chinese experience echoes one of the foundational tenants of Confucian thought - harmony. Although China is on the road to rapid change and industrialisation, the harmonious road must still be travelled. Such harmony, it has been argued, can be realised in the reform of the judicial branch of Chinese government which can stand as a bulwark of reason and stability in the eye of a storm of change.

A granted concession of the authors is the lack of engagement with the political implications of judicial reform. The constitutional implications of judicial independence are far reaching and tremendously interesting, but unfortunately beyond the scope of this paper. It is only hoped that what has been discussed within

\textsuperscript{64} Dowdle, above n 9, 62.
the limits of this article can form the basis of further analysis and research in this constantly changing field.

Above all it must be remembered, as engrossing and enthralling the study of China is to the western scholar, it must not be abstracted beyond the realisation that what we are dealing with are the real lives, real futures and real aspirations of a significant slice of humanity.