Rule of Law in India and China- A Comparative Study

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I. Introduction

Broadly speaking, there are two conceptions of the term ‘rule of law’, i.e., one where the partisans believe that the power of the State should never be exercised against the citizens except in accordance with the rules with set out in a publicly available rule-book. The State as well as the individual citizens are supposed to adhere to these rules until they are changed following another rule-oriented process. The other view ensues where it is believed that citizens have moral and political rights and duties available to them to be exercised against each other or against the case, as the case maybe, by leveraging enforcement through the courts or other adjudicatory bodies. Albert Venn Dicey, a venerated English legal scholar, tried to explain the rule of law in terms of supremacy of regular law over arbitrary power and equal subjugation of all classes to ordinary laws. There are several aspects attributed to the concept of rule of law, some treated as sine qua non while others an essential ingredient in this complex mix. To reconcile these views plainly we can establish in the very least the following common ground- that there should be law (implying that the actions of the State are not dictated by the thesis of arbitrariness); and such law should be guided by the ideals of rights and duties of the citizenry, equality (which is the anti-thesis of arbitrariness) and should be enforceable in the courts.

1 Ronald Dworkin, A Matter of Principle, 12 (Harvard University Press, Cambridge, 1985). Dworkin called the first model to be the “rule-book” conception and the second model to be the “rights” conception.
3 To give an analogy, to describe rule of law is classical case of ascertaining the description of an elephant based on the testimony of six blind men. Each one would touch a different part of the elephant (only one part each such as the tusk or tail) and paint a holistic picture that the elephant is a pipe or a rope and so on. What rule of law entails would vary from country to country depending on the historical, social, demographic perspectives of different regions. However, what we can agree to is that there are some things which are deemed as universally good and some which are deemed as universally condemnable. The goal of rule of law is to minimize the effect of the bad or the condemnable and establish the reign of what can be termed as universally good. In this manner its ultimate objective can be compared to Bentham’s theory of hedonism, through the means of limiting the power of the government over the governed. The author wishes to acknowledge that this idea is the outcome of the discussion with Dr. Vandana Mahalwar, on the concept of Rule of Law, held on Sept 9th 2016.
4 Example – Independence of judiciary.
5 Example – Supremacy of the Constitution.
This paper will attempt to discuss some of the aspects (separation of powers, independence of judiciary, judicial review et al.) of the metaphoric elephant called rule of law and endeavor to compare the existence, situation and status of rule of law in India and China.

II. Meaning of Rule of Law – The Basic Idea

F.A. Hayek has provided one of the clearest and most powerful formulations of the ideal of the rule of law:

Stripped of all technicalities this 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.\(^8\)

The Rule of Law, in plain terms means literally what it says, i.e., the rule of the law. However, there has to be distinction made here between rule of law and rule of good law.\(^9\) In a non-democratic system, with flagrant violation of human rights, poverty, racial segregation, gender inequalities, it is possible that rule of law exists while on the other hand, in a democratic system with respect for human rights, equality etc. it is equally possible that there is no conformity of rule of law. Therefore, to the least, the rule of law should unequivocally mean to be rule of good law. For this discussion we will consider rule of law to be rule of good law, and proceed with this premise.

Rule of law implies that no one is above the law meaning thereby that the government actions should be governed by the law established and that all governmental actions should be accountable to pre-determined standards applied by an independent body such as courts. Such predetermined standards are contained in constitutions, statutes, precedents, administrative regulations, common law and principles of natural justice such as equity, justice and good conscience. These are the standards that are called ‘law’.\(^10\) At the same time it is important to note that certain discretionary powers are also required to be exercised by the government to function effectively. The balance between exercise of discretion and arbitrariness can also be quantified as falling in the sphere of rule of law.

The principle is that all persons and authorities within the State, public or private, should be bound by and entitled to the benefit of prospectively promulgated public laws, publicly administered in the courts.\(^11\)

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\(^7\) Supra Note 3.  
III. Separation of Powers

The concept of separation of powers implies that there should not be any “centralized unity of state power”\textsuperscript{12}. The powers of the State should be divided into legislative, executive and the judiciary and each must operate in their sphere of jurisdiction without transgression into the other’s domain. Even before Montesquieu came up with the doctrine of separation of powers, Aristotle, the Greek philosopher, distinguished three elements in a well ordered State, viz, the deliberative, the magisterial and the judicial. The ‘deliberative’ is concerned with all the questions of general interest to the community, the ‘magisterial’ is concerned with questions such as the disposition of offices, the mode of appointment to them etc. The ‘judicial’ was to adjudicate disputes\textsuperscript{13}. The first scientific exposition of the separation of powers applicable in modern times, however, has to be attributed to Montesquieu\textsuperscript{14}.

It is noteworthy that the Constitution of India does not anywhere declare the doctrine of separation of powers. No words have been used to affirm or formulate the doctrine. The articles that relate to the legislative powers, do not mention say that the legislative power will exclusively exercised by the Parliament\textsuperscript{15}. Article 246 (1) does say that "Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I". But the words "exclusive power" in this clause are meant to exclude the state legislatures and are not intended to close the doors against the executive. Likewise the articles relating to judicial power do not say that the judicial power of the Union shall exclusively lie with the Supreme Court of India\textsuperscript{16}. The words “to the exclusion of any other court” in Article 131, are intended to exclude other courts. It does not exhibit the intention of the drafters that there should be any bar on the executive or the legislature to perform any judicial function.

Similarly in Article 53 one can see the words "the executive power of the Union shall be vested in the President and shall be exercised by him either directly or through officers subordinate to him in accordance with this Constitution". But even here, one does not find words like "exclusively". Throughout the reading of the Constitution of India, one would come across provisions where the legislature is performing executive\textsuperscript{17} and judicial functions\textsuperscript{18}, the executive

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  \item \textsuperscript{12} Upendra Baxi, ‘The Rule of Law in India’, 6\textit{SUR - Int'l J. on Hum Rts.} 9 (2007).
  \item \textsuperscript{14} ‘When’, he wrote, ‘in the same person or in the same body of magistrates the legislative and executive power are combined, no liberty is possible, because there is reason to dread that the same King and the same Senate may make tyrannical laws with the view of executing them tyrannically. Neither is there any liberty if the judicial power be not separated from the legislative and the executive. If it were joined to the legislative power, the power of the life and liberty of the citizens would be arbitrary; for the judge would be the lawmaker. If it were joined to the executive power, the judge would have the force of an oppressor.’ \textit{Id.} at 382.
  \item \textsuperscript{15} See: Articles 79 and 245 of the Constitution of India.
  \item \textsuperscript{16} See: Article 131 of the Constitution of India.
  \item \textsuperscript{17} Voting in the election of the President (Article 55), Removal of judges of the Supreme Court and High Court (Article 124 and 217 respectively), etc.
  \item \textsuperscript{18} Impeachment of the President (Article 61), Judicial functions in connections with parliamentary privileges including contempt proceedings (Article 105) etc.
\end{itemize}
performing legislative and judicial functions, and the judiciary performing legislative and executive functions.

Such overlap in the powers and functions of the three organs as well as the conspicuous absence of the words indicating separation of powers compels one to think that the framers of the Constitution of India consciously disapproved of the doctrine of separation of powers or at least its scope in the purest form.

In China, ideally, a few legal theorists contend that the power of constitutional supervision should reside with the Supreme People's Court, and that the Supreme People's Court should concurrently investigate violations of the Constitution. This argument is difficult for most people to accept because there is theoretically no separation of powers in China and the Supreme People's Court is obliged to recognize the superior authority of other organs of state power. As a practical matter, it would be very difficult for the Supreme People's Court to review unconstitutional acts committed by superior organs of state power.

Wang Xi, a professor of history at Indiana University of Pennsylvania, in 1994 and 1995 advocated the adoption in China of a constitutional separation of powers between the center and localities, a separation similar to the constitutional division of powers between the federal government and the states of the United States. Although Wang carefully pointed out the differences between a gradually centralizing American federation and a currently decentralizing China, he saw a virtue in the combined use of exclusive powers and concurrent powers in the United States, which he described as the coexistence of "self-rule" and "joint rule." He urged the Chinese government to borrow the American constitutional mechanism of dividing powers between the center and sub central levels, a move that he distinguished from the informal and flexible process of decentralization already under way in the People’s Republic of China.

It is well established that separation of powers is an essential ingredient for rule of law to perpetuate in a given society. From a perusal of both, the Indian as well as the Chinese Constitutions, it appears that the doctrine of separation of powers is not embodied in either, at least in the purest form. However, it is observed that in India the spirit of

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19 Power of the President to promulgate ordinances (Article 123), Power of the President to make regulations for the peace and good governance of territories (Article 243), etc.
20 Power of the President to grant pardons, suspend, commute or remit sentences (Article 72), President’s power to decide whether a member of Parliament has become subject to any disqualification for membership (Article 103), etc.
21 Making rules for regulating it’s practice and procedure (Article 145).
22 Power to appoint officers and servants of Supreme Court (Article 146).
24 The term constitutional supervision has been deliberately used by the author in place of constitutional review as the author believes that the word supervision indicates a more vertical relationship than review which connotes a horizontal, equal and independent relationship between different bodies. Such a distinction is apt in China as China focuses on democratic centralism with NPC (National People’s Congress) at the helm of all affairs.
26 See Articles 3 and 128 of the Chinese Constitution. Article 3 notes: “...All administrative, judicial and procuratorial organs of the state are created by the people's congresses to which they are responsible and by which they are supervised.”; while Article 128 states “The Supreme People's Court is responsible to the National People's Congress and its Standing Committee. Local people's courts at various levels are responsible to the organs of the state power which created them.”
separation of powers is still maintained by upholding the independence of judiciary as well as the concept of judicial review. These two will be discussed further as separate heads in this write-up.

IV. Independence of Judiciary

Judicial independence refers to a setting where the judges can perform their functions independent of the influence or control of the legislature, the executive or any other extraneous factors. Independence of judiciary is essential to maintain the democratic set-up in a country, where verdicts can be given by the judges without fear or favor. Independence of judiciary is a direct corollary concept of separation of powers.

The independence of judiciary is a gradual and continuous process. It may not be possible to lay down all the conditions required to provide an independent judiciary in the constitution or any statute. Such conditions will have to be checked and revised from time to time28.

The Indian Constitution clearly directs the State to “separate the judiciary from the executive in the public services of the State”29. The Indian judiciary has a pyramidal structure with the lower courts at the bottom, the High Courts in the middle and the Supreme Court at the top. The lower courts may be dependent on the states for funding and administrative purposes, but generally they are under the supervision of the High Courts30. The High Courts are primarily under the regulatory power of the Union except for some cases like appointments and finances31. The Supreme Court functions totally under the regulative power of the Union32.

A plethora of steps have been taken by the drafter of the Indian Constitution to make sure that the judiciary functions as independently as possible33. Independence of judiciary has been held to be a part of the basic structure of the Indian

29 Article 50 of the Indian Constitution.
30 Article 233-35.
31 Article 229.
32 Article 124.
33 Firstly, the judges of the Supreme Court and the High Courts have to take an oath before entering office that they will faithfully perform their duties without fear, favor, affection, ill-will, and defend the constitution of India and the laws. Recognition of the doctrine of constitutional sovereignty is implicit in this oath. Secondly, the process of appointment of judges also ensures the independence of judiciary in India. The judges of the Supreme Court and the High Courts are appointed by the President. The constitution of India has made it obligatory on the President to make the appointments in consultation with the highest judicial authorities. He of course takes advice of the Cabinet. The constitution also prescribes necessary qualifications for such appointments. The constitution tries to make the appointments unbiased by political considerations. Thirdly, the Constitution provides for the security of tenure of Judges. The judges of the Supreme Court and the High Court’s serve “during good behavior” and not during the pleasure of the President, as is the case with other high Government officials. They cannot be arbitrarily removed by the President. They may be removed from office only through impeachment. A Judge can be removed on the ground of proved misbehavior or incapacity on a report by both Houses of Parliament supported by a special majority. Fourthly, their salaries and allowances are charged upon the Consolidated Fund of India. Further, the salaries and allowances of Judges of Supreme court and High courts cannot be reduced during their tenure, except during a financial emergency under Article 360 of the constitution. Fifthly, the activities of the Judges cannot be discussed by the executive or the legislature, except in case of removal of them. Sixth, the retirement age is 65 years for Supreme court judges and 62 years for High court judges. Such long tenure enable the judges to function impartially and independently. Seventh, a retired Supreme court judge cannot practice in legal practice in any court in India. However, a retired High court judge can practice law in a state other than the state in which he served as a High Court judge. These restrictions ensure that a retired judge is not able to influence the decision of the courts.
Constitution and therefore even constitutional amendment that try to directly or indirectly take it way can be invalidated by the Supreme Court of India\textsuperscript{34}.

The Chinese Constitution contains an explicit article declaring independence of judiciary\textsuperscript{35}. However, on a closer perusal, it becomes clear that this appears to be an artificial creation. This is primarily because Article 129 of the Chinese Constitution lays down that the Supreme People’s Court is responsible to the National People’s Congress and its Standing Committee\textsuperscript{36}, while local people’s courts at various municipal levels are responsible to the organs of the state power that created them. Thus we see that there is a clear eclipse on judicial independence due to overarching authority of NPC and its Standing Committee (i.e., the legislature and the executive). In order to establish a body that is independent of the Standing Committee, a Constitutional revision would be required, and Cai Dingjian contends that even if such a provision is made, it would still be extremely difficult to exercise effectively any constitutional supervision circumventing the authority of the Standing Committee\textsuperscript{37}. This dilution of independence of judiciary is very apparent on the reading of the Chinese Constitution. Cai further states that there are a few theorists who believe that the authority to interpret the constitution should vest in the Supreme People’s Court, however, he contends that this is not practically possible because the Supreme People’s Court has to recognize the superior authority of other organs of state power. It would be extremely challenging for the Supreme People’s Court to review unconstitutional acts committed by superior organs of state power\textsuperscript{38}.

Chinese courts are embedded in – and constrained by – various party and government organizations. The external environment is comprised of the party committee, the political and legal committee, the government, the local congress, the intermediate court, and the procuratorate. Basic People’s Courts are theoretically at the same rank as the county government since they all are elected by the county People’s Congress, however, in reality because of the Court’s fiscal dependence on the government, they are considered as a functional department of the government\textsuperscript{39}. Some Chinese commentators have challenged the role of supervision of individual cases, exercised by the People’s Congress saying that it is conducive to foster independence of judiciary and that adjudication of cases requires legal expertise which the People’s Congress clearly lacks. On the other hand the supporters of this system say that such supervision (including that of individual cases) reduces the chances of injustice and truly reflects the public demand or in other words, the will of the people. Strictly speaking there is no sound legal basis for a People’s Congress to supervise a court’s handling of individual cases, since the Constitution only provides in general terms that people’s congresses supervise courts’ work and ensure laws are respected and enforced. However, popular support for the

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  \item \textsuperscript{34} SC Advocates on Record Ass’n v. Union of India, AIR 1994 SC 268; SP Gupta v. Union of India, AIR 1982 SC 149.
  \item \textsuperscript{35} Article 126. of the Chinese Constitution says - Judicial independence - The people's courts exercise judicial power independently, in accordance with the provisions of the law, and are not subject to interference by any administrative organ, public organization or individual.
  \item \textsuperscript{36} Article 62 of the Chinese Constitution of the National People's Congress ("NPC") has the power to supervise the enforcement of the Constitution. Article 67 stipulates that the NPC's Standing Committee has the power "to interpret the Constitution and supervise its enforcement. Thus NPC and its Standing Committee share the power to exercise constitutional supervision while the Standing Committee alone exercises the power of constitutional interpretation.
  \item \textsuperscript{37} Supra Note 18 at 230.
  \item \textsuperscript{38} Id at 231.
  \item \textsuperscript{39} Yuhua Wang, Tying the Autocrat’s Hands- The Rise of Rule of Law in China, 76 (Cambridge University Press, New York, 1\textsuperscript{st} edn., 2015).
\end{itemize}
supervision of individual cases came about due to widespread judicial corruption, common complaints of low-quality judges and an increase in the number of cases wrongly handled by the courts\textsuperscript{40}.

Thus we can perceive that both, the Indian Constitution as well as the Chinese Constitution, have made provisions for or at least attempted to secure judicial independence. However, in case of India we saw that independence of judiciary, apart from the Directive principle enshrined under Article 50\textsuperscript{41} and other provisions\textsuperscript{42}, has been laid down as a tenet of the basic structure of the Constitution and hence any amendment to the Constitution of India that compromises the tenet of judicial independence, can be struck down as violative of the Constitution by the Supreme Court of India. The Constitution of China, on the other hand, clearly lays down judicial independence in the form of Article 126, however, itself provides mechanisms to dilute the same, in the form of Articles 62, 67 and 129 by providing the NPC and its Standing Committee as superior to county courts as well as the Supreme People’s Court.

V. Judicial Review and Constitutional Supremacy

Judicial review entails that the judiciary will have the power to strike down a law if it perceives it to be in conflict with the Constitution. It is considered as a device to protect the principle of checks and balance. Traditionally, the apex court of a country has the authority to pronounce the final wording on what the Constitution says or intends to say. In a way it is necessary to ensure that the Constitution is being interpreted in accordance with the changing times as well as the needs of the country, without making an amendment in the text of the Constitution itself. Moreover, as mentioned earlier, the responsibility to maintain the balance of power in a State and making sure that neither the legislature nor the executive exceed their bounds and venture into the tricky territory of arbitrariness is vested in the judiciary. It is also known that in most of the States\textsuperscript{43}, the principle of Constitutional Supremacy is adhered to, meaning thereby that, the Constitution is considered to be the supreme law of the law from which all other laws, rights, duties, powers, privileges or immunities emanate. To preserve this Constitutional Supremacy as well, the concept of judicial review takes on a very important role.

Ronald Dworkin has said - The judges' criterion is the Basic Law and not public opinion or what the majority of the population think - however desirable society's acceptance of the judgments may be. Thus the judges have to 'defy the


\textsuperscript{41} Supra Note 22.

\textsuperscript{42} Supra Note 26.

\textsuperscript{43} Britain would be an example where the there is Parliamentary Supremacy instead of Constitutional Supremacy. This is a salient feature of English Constitutional law. This principle of parliamentary sovereignty means - according to Dicey's definition - that Parliament 'has, under the English constitution, the right to make or unmake any law whatever; and further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament'. He says: 'It is a fundamental principle of English lawyers, that Parliament can do everything but make a woman a man, and man a woman.' See A.V. Dicey, \textit{Introduction to the Study of the Law of the Constitution} (Indianapolis Liberty Fund, 8th edn., 1982).
general will as soon as constitutional guarantees are at stake. Constitutional Supremacy implies that there should be a distinction between Constitution and other laws, the legislators being bound by the constitutional law assuming that there are special procedure for amending the constitution, and an institution which can keep a constitutional check on the legal acts of the governments. Hence it can be said that both, judicial review and supremacy of the constitution are essential, if not sine qua non, to the concept of rule of law.

In India, judicial review is based on the doctrine of ultra vires and dates back to the British rule, therefore the legitimacy or its existence have never been in question. Although article 13(2) of the Indian Constitution says specifically that a law inconsistent with the fundamental rights guaranteed by part III is void, the Indian Supreme Court made it clear in one of the earliest cases that the power of judicial review is inherent in a written constitution and exists independently of article 13(2). In Keshavananda Bharti v. State of Kerela, the Supreme Court of India laid down that the supremacy of the Constitution is one of the basic features of the Constitution. In Indira Nehru Gandhi v. Raj Narain, it was said:

“Neither of the three Constitutionally separate organs of the State can, according to the basic scheme of our Constitution today, leap outside the boundaries of its own constitutionally assigned sphere or orbit of authority into that of the other. This is the natural and logical meaning of the principle of Supremacy of the Constitution.”

This means that the legality of any action of each of the organs of the State or any authority within the State should be capable of being tested in a Court on the anvil of the Constitution.

Chinese constitution is deeply intertwined with the NPC system, judicial review system, which met relatively little opposition in other countries, faced far greater resistance in China. Supreme Court revoked its judicial reply regarding Qi Yuling case. The revocation is widely attributed to the Chinese government’s toughened stance against constitution judicialization.

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45 Ibid.
46 The author gives England as an exception to the requirement of Constitutional Supremacy. It is submitted that in essence the ultimate authority should lie with the people of a State, not the King, the legislator, the executive or even the judge. This ultimate power can be in the form of a Constitutional document or vest with the legislative through the people. In such a scenario the legislative should be removable by due process at the will of the people. In case it lies within the body of the Constitution, the said document should be amendable to accommodate the changing requirements of the people. Rule of (good) law as Raz puts it, is achievable only through volkgeist.
48 (1973) 4 SCC 225.
49 (1976) 2 SCR 347.
51 Qi Yuling v. Chen et al 2001 Supreme People’s Court (SPC). It was a ruling that recognized the constitutional right of a PRC citizen to education, name, identity, and reputation. In a summary announcement in December 2008, the SPC abolished the case.
52 Quanxi Gao, Wei Zhang et al., The Road to Rule of Law in Modern China - Research Series on the Chinese Dream and China's Development Path, 114-115 (Springer, 2015)
We have already seen that Article 62 and 67 of the Chinese Constitution vest the authority to amend, interpret and supervise the Constitution to the NPC and its Standing Committee. However, Articles 32 and 33 give the Supreme People’s Court the authority to adjudicate cases which fall under its original jurisdiction or over cases which it takes over within its jurisdiction by laws or by regulations. The Supreme People’s Court is entitled to interpret laws or regulations in their actual application to particular cases. But does this entail that the SPC has the power of judicial review? The SPC is obliged to report to NPC and its Standing Committee. The question follows that can a body exercise the power of judicial review over an institution to which it answers to under the Constitutional mandate?

Liu Nanping in their article ‘Judicial Review in China: A Comparative Perspective’ has submitted that judicial review in fact exists in China and that since inception there have been no cases where NPC or the Standing Committee have interpreted the Constitution. It is also argued that Constitution as well as other laws are silent on how to supervise and interpret its provisions and that the Standing Committee of NPC has delegated the power to interpret laws or regulations to both, the SPC and Supreme People’s Procuracy. While this may be true but it begs a question that, can an agent with delegated authority (delegate) review the work of its principal (delegator) or can a servant assess or negate the command of its master? Certainly not. In a scenario such as is stipulated in the Chinese Constitution, a true form of judicial review of the legislative acts that may be violation of the Constitution, can never exist, at least as the Constitution stands in its current form. The Preamble of the Constitution of China as well as Article 5 declare the Constitution to be supreme and the fundamental law of the State.

So, much like India, Constitutional Supremacy is a well enshrined principle in the Chinese constitutional jurisprudence.

VI. Prospective, Clear and Stable Laws

The laws should be prospective in nature. The society cannot be guided by retroactive laws and nor can an individual’s actions be penalized as unlawful if the law under which he is prosecuted was not in existence at the time of the action. The laws must not be ambiguous, vague, obscure or imprecise and must be open and clearly publicized. Additionally, the laws must be stable, that is, they must not be changed very often. If the laws are changed too frequently, the people

53 Article 129.
55 See: The Constitution People’s Republic of China. The relevant part reads – “This Constitution, in legal form, affirms the achievements of the struggles of the Chinese people of all nationalities and defines the basic system and basic tasks of the state; it is the fundamental law of the state and has supreme legal authority. The people of all nationalities, all state organs, the armed forces, all political parties and public organizations and all enterprises and institutions in the country must take the Constitution as the basic standard of conduct, and they have the duty to uphold the dignity of the Constitution and ensure its implementation.”
56 Article 5. Constitutional supremacy -The People’s Republic of China practices ruling the country in accordance with the law and building a socialist country of law. The state upholds the uniformity and dignity of the socialist legal system. No laws or administrative or local rules and regulations may contravene the Constitution. All state organs, the armed forces, all political parties and public organizations and all enterprises and institutions must abide by the Constitution and the law. All acts in violation of the Constitution and the law must be investigated. No organization or individual is privileged to be beyond the Constitution or the law.
will not be in a position to determine what the law is at a given point in time and will live in constant fear of possible unintended breach of law by their actions. Stability in laws is essential as people are guided by law in their long term decisions\textsuperscript{57}.

The Constitution of India provides a clear protection from retroactive (ex post facto) laws. It states that no person can be convicted of any offence except for violation of a law in force at the time of commission of the act charged as an offence, nor shall be subjected to greater than that which might have been inflicted under the law in force at the time of commission of the offence\textsuperscript{58}. Thus a person cannot be made to suffer more by an ex post facto law that what he ought to have been under the law he was subject to at the time of the alleged commission of an offence. This protection, however, is not applicable to tax laws\textsuperscript{59}. The Supreme Court of India also explained that a statute cannot be said to be retrospective because a part of the requisites for its actions is drawn from a time antecedent to its passing\textsuperscript{60}. India has over a thousand Central and state legislations that are available in public domain\textsuperscript{61}.

There is no explicit provision in the Chinese Constitution to provide protection against ex post facto laws or prevent retroactive application of new laws. It is, however, understood that though retroactive application of new laws is theoretically prohibited in China, retroactivity is the consequence when cases are reopened at a later time and reviewed pursuant to new policies, albeit not pursuant to new laws. Thus, in 1988, the Supreme People’s Court stated that supervisory review should be most effectively used to reverse the “incorrect” policies\textsuperscript{62}. There was heavy reliance on party politics rather than law during the Mao period and China lacked even the most basic laws such as a comprehensive criminal code, civil law or contract law. However, between 1976-1998 the NPC and its Standing Committee passed more than 337 laws and the local people’s congress and governments passed more than 6000 regulations\textsuperscript{63}. Today China is being governed by more publicly promulgated laws rather than Party policy or internal regulations, as opposed to during the Mao Period\textsuperscript{64}.

Thus we can conclude that this aspect of Rule of Law is well established in India while in China, it is rather rudimentary and China is catching up by enacting more and legislations and by publicly promulgating laws.

VII. Conclusion

\textsuperscript{57} Supra Note 2 on 3-4.
\textsuperscript{58} Article 20(1) of the Indian Constitution.
\textsuperscript{60} Sajjan Singh v. State of Punjab, AIR 1964 SC 464.
\textsuperscript{61} http://indiacode.nic.in/. Also see http://www.lawsofindia.org/index.php.
\textsuperscript{62} Supra Note 20 at 177.
\textsuperscript{63} Only 134 laws were passed between 1949-1978 with only one law passed during the Cultural Revolution 1967-1976. Out of those 134 law 111 were subsequently declared invalid and many remaining ones were amended in the post 1978 reform era. See, Randall Peerenboom, China’s Long March Toward Rule of Law 6 (Cambridge University Press, Cambridge, 1\textsuperscript{st} edn. 2002).
\textsuperscript{64} Id. at 7.
Rule of Law is and has been an elusive concept. Brian Tamanaha has rightly observed that rule of law today stands in the peculiar state of being the preeminent legitimating political ideal in the world, however, there is no consensus on what it actually means. There are several aspects which can be attributed to the term rule of law and a few of them have been discussed in this paper with an aim to make a comparative study between Indian legal system and the Chinese legal system. A distinction has to be drawn between rule of law and rule by law. The former includes the principles and ideals such as judicial review, independence of the judiciary, precise, clear and transparent laws etc., that is, in essence it imposes meaningful restraint on the governing bodies, while the latter simply entails that the society is to governed as per the law of the land, giving no regard to how that law should be, be it a public welfare law or a draconian law, as long as there is a law which can be used by the State as it deems fit. It was in this regard that Joseph Raz elucidated that rule of law should essentially mean rule of good law, otherwise it is just a hollow concept.

From a perusal of several sources of literature, it can be concluded that the ideal of rule of law is far more evolved in the Indian setting that in its Chinese counterpart. The key elements of rule of law such as judicial review and independence of the judiciary which are the primary tools for keeping a check on the excesses of legislative and executive branches are listed as the basic structure of the Indian Constitution which cannot be abrogated even by a constitutional amendment. The concept of supremacy of the constitution is maintained by both India and China and has been kept on an equal footing in both the regimes.

China is making progress by rapidly promulgating new laws but has a lot to make up for. In the current draft of the Chinese Constitution, it is not possible to sustain independence of judiciary as well as effective judicial review due to the fact that SPC has to report to NPC and its Standing Committee. It can argue that since interpretation requires legal expertise most of that could be delegated by the Standing Committee to the SPC, however, this delegation can be revoked by the former whenever it so wishes and cases can be reopened on an individual basis as well. In such a setting the struggle to maintain rule of law is, at most, wishful thinking and it is submitted that to effectively incorporate the ideals of rule of law and provide them immunity from the savagery of legislative or executive whims, the Chinese Constitution needs to be amended. The lines of the doctrine of separation of powers are blurred in both Indian as well as Chinese Constitutions, yet, India has more successfully reached a stage where the Supreme Court of India has positioned itself as the guardian of Rule of Law in India, whereas, the Supreme People’s Court had to strike a fatal blow to the Chinese constitutionalism by abolishing its judgment in the Qi Yuling case.

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