

Rule of Law History and Development in China: in Comparison of Australia

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Abstract

The article discusses the rule of law development and application in China compared with Australia. In August 2021, the Chinese Central Government issued the *Implementation Outline for the Construction of a Government Under the Rule of Law (2021-2025)*, which indicated the general plan to improve rule of law for the next five years. In the past few years, the Chinese government has made great efforts to promote the rule of law theory. China enforced judicial reform, which improves the judicial independence and professional ability of legal practitioners. Chinese rule of law formation has been influenced by western countries due to previous foreign legal aid and Australian judicial practice has also been influenced by Chinese theory. In Australia, people are encouraged to solve civil disputes via mediation and other alternative dispute resolution (ADR) methods, which may be influenced by Chinese theory of “Fengqiao Experience”. It is important to continue increasing rule of law in China, but it is improper to transplant the Australian theory to China directly due to the different legal culture and history between two countries. Generally, more efforts need to be made for strengthening rule of law in China.

Keywords: rule of law, Chinese Civil Code, judicial reform, transplant law, Fengqiao Experience

1. Introduction

Rule of law principle is a common aspiration which has been proclaimed by both national governments and international organisations as a precondition of forming an acceptable modern governance.¹ Chinese government has substantially become more law-oriented over the past several years.² In November 2020, the Central Committee of the Communist Party of China publicly stated that the "people-centred" rule of law is the core essential of the Chinese rule of law,³ which means that the fundamental purpose is to protect the rights and interests of the people. Additionally, *Chinese Civil Code* was issued in China on 1 January 2021, which is a mark of a more comprehensive application of rule of law theory. Many efforts were made by Chinese government to improve the rule of law level in China through judicial reform and the achieved positive outcomes. On 11 August 2021, the Chinese Central Government issued the *Implementation Outline for the Construction of a Government Under the Rule of Law (2021-2025)* (Outline), which emphasized the importance of establishing a government under the rule of law.⁴ This outline indicated the general direction of establishing the government governed by the law and analysed the methods from ten aspects.⁵

Chinese rule of law theory has been affected by the western theory due to the foreign legal aid provided by Western countries since western countries have provided legal aid and stimulated better practice of implementing the rule of law in China under the requirement of economic globalization.⁶ In the history of developing Chinese rule of law theory, the Chinese government has learned from the rule of law theory of western countries such as Australia. Conversely, Chinese theory has affected some western countries. China provided many legal aids to developing countries during the construction of the "Belt and Road Initiative", which has influenced the rule of law theory development in western countries, including Australia, to some extent.⁷ Additionally, Australian legislations encourage the

¹ Kirby, M. (2010). The rule of law beyond the law of rules. *Australian Bar Review*, 33(3), 195.

² Zhang, T. & Ginsburg, T. (2019). China's Turn Toward Law. *Virginia Journal of International Law*, 59(2), 313.

³ 17 November 2020. An important speech at the Central Conference on rule by Law Comprehensive Application. http://www.gov.cn/xinwen/2020-11/17/content_5562085.htm

⁴ Implementation Outline for the Construction of a Government Under the Rule of Law (2021-2015), Chinese Central Government, 2021.

⁵ Implementation Outline for the Construction of a Government Under the Rule of Law (2021-2015), Chinese Central Government, 2021.

⁶ Pils, E. (2018). In whose service? The transnational legal profession's interaction with China and the threat to lawyer's autonomy and professional integrity, *Fordham International Law Journal*, 41(5), 1264.

⁷ Seppanen, S. (2018) Chinese Legal Development Assistance: Which Rule of Law? Whose Pragmatism? *Vanderbilt Journal of Transnational Law*, 51(1), 102.

development of judicial mediation to some extent, which absorbs some experience from Chinese “Fengqiao Experience” of mediation. Both the *Australian NSW Uniform Civil Procedure Rules 2005*⁸ and the *Civil Procedure Law in NSW of Australia* emphasize the principle of “Just, Quick and Cheap” for solving civil disputes, which is the overriding purpose of the Civil Procedure Act.⁹ Furthermore, the *Civil Dispute Resolution Act 2011* in Australia (Cth) encourages people to solve civil disputes via a non-litigation method before commencing a formal suit, which requires that disputants take genuine steps to resolve disputes before commencing formal legal proceedings.¹⁰ This legislation stimulates mediation to some extent in Australia. China promotes the “Fengqiao Experience” emphasizing solving problems by people themselves, which reflects the historical trend of China's social structure change from the grassroots micro level and is in line with this trend.¹¹ China develops the most advanced mediation system all over the world, Australian government learn from China in the mediation aspect.¹² Therefore, there exists a mutual influence of rule of law theory between China and Australia. Although the rule of law theory was developed in Australia for a long time, the Australian government and judges did not strictly follow the rule of law theory under some circumstances. This might be due to the morality of law theory of Lon Fuller (Fuller) as well as some historical elements and practical impediments. Although borrowing foreign legal theory can be regarded as a method to improve one’s legal system, it is improper to transplant Australia’s legal theory of rule of law to China directly without considering the differences in legal culture and history. Chinese traditional culture of Confucianism is totally different from Australian one, which has a long-term influence on the formation of Chinese rule of law principle. Therefore, Chinese rule of law development requires to consider its special culture and social elements.

This article would introduce the rule of law development in China and the traditional culture influence of Confucianism in rule of law. It would also discuss the efforts of Chinese government in improving rule of law in China. Through comparing with Australian rule of law, it is found that there is mutual influence between two counties. More efforts are required to improve rule of law in China; however, it is important for China considering cultural and social difference when transplanting a western theory. It is important to develop rule of law theory based on Chinese national conditions.

2. Rule of Law Development History in China

In the past, some western authors and commentators thought that since the mid-2000s, China has been retreating from legal reform back to authoritarianism, which regarded China as

⁸ Uniform Civil Procedure Rules §2.1 (NSW 2005).

⁹ Civil Procedure Act §56.1 (NSW 2005).

¹⁰ Civil Dispute Resolution Act §4.1A (Cth 2011).

¹¹ Hu, C. (2018) The Maple Bridge Experience is a 55-year evolution: The historical logic behind it, *Governance Studies*, 34, 19.

¹² Thirgood, R. (1999). Dispute resolution Chinese style – the influences, *Australian Dispute Resolution Journal*, 10(4), 266, 270.

“turned against Law.”¹³ However, this opinion is outdated. The Chinese government made great efforts to improve the rule of law and stimulated legal reform in the past several years, and China has become much more law-oriented than before.¹⁴

2.1 Traditional Theories Influencing Rule of Law Development in China

From Legalism and Confucianism to Marxism and Socialism, historical continuity in China emphasizes the instrumental role of Chinese legislation.

2.1.1 Confucius Legalist State in Imperial China

In imperial China (1600 BC to AD 1911), Legalism and Confucianism were the two main traditional Chinese philosophies which influenced traditional Chinese law.¹⁵ Legalism indicates that good ruling should rely on punitive rules institutionalised by rulers, which emphasizes punitive functions of law, which regards human as essentially evil and selfish.¹⁶ Legalism regards the law as an instrument, and judges were seen as the agents of emperors, which is consistent with rule by law theory rather than rule of law.¹⁷ In contrast, Confucianism does not absolutely follow laws but emphasizes self-cultivation.¹⁸ These two philosophies have never been mutually exclusive but were combined by traditional Chinese rulers.¹⁹ Then, in imperial China, Confucian-Legalist theory prevailed, where it relied on practical legalist measures for ruling and Confucian morality for legitimacy.²⁰ Confucian morality built its root in one institution named Mandate of Heaven, where rulers are thought to have a divine right to rule as long as the rulers look after the welfare of people.²¹ The bad

¹³ Minzner, C. (2011). China's Turn Against Law, *The American Journal of Comparative Law*, 59(4), 936. <https://doi.org/10.5131/AJCL.2011.0006>

¹⁴ Zhang, T., & Ginsburg, T. (2019). China's Turn Toward Law. *Virginia Journal of International Law*, 59(2), 316.

¹⁵ Wu, Q. (2017). How has China formed its conception of the rule of law? A contextual analysis of legal instrumentalism in ROC and PRC law-making. *International Journal of Law in Context*, 13(3), 286.

¹⁶ Eric W. O. (2001). The rule of law in China, *Vanderbilt Journal of Transnational Law*, 34(1), 52.

¹⁷ Eric W. O. (2001). The rule of law in China, *Vanderbilt Journal of Transnational Law*, 34(1), 54.

¹⁸ Wu, Q. (2017). How has China formed its conception of the rule of law? A contextual analysis of legal instrumentalism in ROC and PRC law-making. *International Journal of Law in Context*, 13(3), 286.

¹⁹ Xiao, G. (2005). *History of Chinese Political Thoughts*. China: New Star Press. p. 49.

²⁰ Zhao, D. (2015). *The Confucian-legalist state: A New Theory of Chinese History*. Oxford University Press. p. 294.

²¹ Wu, Q. (2017). How has China formed its conception of the rule of law? A contextual analysis of legal instrumentalism in ROC and PRC law-making. *International Journal of Law in Context*, 13(3), 286.

behaviours of rulers would risk them being overthrown and punished by Heaven.²² In general, Confucian morality built upon the Mandate of Heaven became the cornerstone for state legitimacy throughout the whole imperial China.²³

During the period of 2,000 years, Confucianism shaped the social and moral attitudes of Chinese people, which profoundly affected Chinese legal culture and imposed a long-term influence on the rule of law theory in China. Confucian attitudes towards law revolved around two central concepts – li and fa. Li is the ethical rule, which is a set of normative values aimed at ensuring correct behaviours to achieve harmony within the social order, while Fa can be broadly translated as positive, state-sanctioned law, which can be regarded similar to western legislation.²⁴ According to Confucianism, the aim of all human relations is the preservation of harmony; therefore, fa was regarded as a regrettable necessity since it forces people to correct behaviours via threats of sanctions rather than moral education. These culture and attitude are still influencing Chinese people today.²⁵

2.1.2 Influence of Legal Theory in the Republic of China and Marxism Theory

The legal system in the Republic of China (Zhong Hua Min Guo) modernised China, which had a task of saving China from the threat of foreign invasion and domestic turmoil.²⁶ During that period, the Three Principles of the People (San Min Zhu Yi) was advocated by Sun Zhongshan served as the basis to provide legitimacy.²⁷ At that time, Sun did not apply the western legal theory due to different customs and human sentiments, and Sun applied the Three Principles of People to build legal systems by returning to ancient notions of Chinese morality.²⁸ Therefore, ancient Chinese morality and a Confucian ethical system were advocated during the Republic of China.

The People's Republic of China (PRC) adapts socialist legal theory, which has experienced continuous ideological reinventions with the purpose of strengthening ideological legitimacy consistent with fast economic development in China.²⁹ Marxism was regarded as the original

²² Chesterman, S. (2008). An International Rule of Law? *American Journal of Comparative Law*, 56(2), 361.

²³ Zhao, D. (2015). *The Confucian-legalist state: A New Theory of Chinese History*. Oxford University Press. p. 79.

²⁴ Thirgood, R. (1999). Dispute resolution Chinese style – the influences, *Australian Dispute Resolution Journal*, 10(4), 268.

²⁵ Thirgood, R. (1999). Dispute resolution Chinese style – the influences, *Australian Dispute Resolution Journal*, 10(4), 268.

²⁶ Huang, G., & Wu, J. (1937). *History of Establishment of Chinese Constitution*. p. 909.

²⁷ <https://baike.baidu.com/item/%E4%B8%89%E6%B0%91%E4%B8%BB%E4%B9%89/300174> (accessed on 24 August 2023).

²⁸ Steiger, G. (1937). *The Political Doctrines of Sun Yat-sen; An Exposition of the San Min Chu I*. Baltimore: The Johns Hopkins Press. p.79. Paul Myron Anthony Linebarger. *American Political Science Review*, 31(3), 539-540.

²⁹ Wu, Q. (2017). How has China formed its conception of the rule of law? A contextual

and most authoritative source for the conception of law in China.³⁰ Marx recognized the law in its positive form; however, he focused on understanding its role in society instead of the law itself.³¹ Marxism regards the law as the reflection of the will of the ruling class and is an instrument used by the ruling class.³² Therefore, according to Marx, the sociological understanding of the law should focus on the instrumentality role of law in social evolution.³³ This has influenced the current rule of law theory in China, which is more likely to be regarded as rule by law.

2.2 The Procedure for Forming the Current Rule of Law Theory in China

As discussed before, in imperial China, the combination of Confucianism-Legalism based on the Mandate of Heaven influenced the conception of law and legal theory at that time, which also affected the formation of the rule of law theory in the premodern society of China.

Legal reform in China started in the early twentieth century in the Qing Dynasty. (1644-1911).³⁴ During the period of premodern China, legal translation played an indispensable role in legal reforms, started in the late Qing Dynasty, continuously, which focused on the instrumentality of laws throughout Chinese traditional philosophies.³⁵ However, the Qing Dynasty did not translate the western legal theory directly without considering Chinese national conditions. The legal-reform commission in Qing Dynasty carefully examined different foreign models, and the Qing government finally applied the Japan model in consideration of the similarity of political ideology, culture and history in two countries.³⁶ Then, the Republic of China continued the legal reforms and refused to westernize Chinese laws and enacted a new legal system which took into account Chinese

analysis of legal instrumentalism in ROC and PRC law-making. *International Journal of Law in Context*, 13(3), 288.

³⁰ Zhang, M. (2010). The socialist Legal System With Chinese Characteristics: China's Disclosure for the Rule of Law and a Bitter Experience, *Temple International & Comparative Law Journal*, 24, 1.

³¹ Barron, A., Collins, H., Jackson, E., Nicola, L., & 6 more. (2002). *Introduction to Jurisprudence and Legal Theories: Commentary and Materials*. OUP Oxford. p. 240.

³² Marx, H. K., & Engels, F. (1848). *The Communist Manifesto*. Retrieved from <https://marxists.wikis.cc/chinese/marx/01.htm#4>

³³ Collins, H. (1982). *Marxism and Law*. Oxford University Press. p. 2-14.

³⁴ Chen, J. (2008). *Chinese Law: Context and Transformation*. (Revised and expanded ed.) Leiden: Martinus Nijhoff. p.23.

³⁵ Wu, Q. (2017). How has China formed its conception of the rule of law? A contextual analysis of legal instrumentalism in ROC and PRC law-making. *International Journal of Law in Context*, 13(3), 283.

³⁶ Wu, Q. (2017). How has China formed its conception of the rule of law? A contextual analysis of legal instrumentalism in ROC and PRC law-making. *International Journal of Law in Context*, 13(3), 283-284.

customs.³⁷

In the history, Chinese legal system was also referred to as the Union of Soviet Socialist Republics' socialist legal system for developing Chinese legal theory. Although China applied a socialist legal system and the law should be subordinated to political flexibility, legal rule is more obviously instrumental compared with the Union of Soviet Socialist Republics.³⁸

The turn toward market socialism was advocated by Deng Xiaoping in the late 1970s, which showed that "rule of law" has gradually been emphasized by Chinese government.³⁹ In 1978, Deng Xiaoping declared that democracy must be institutionalized and written into law, which aims to support market-oriented reforms.⁴⁰ In 2001, the Chinese government reinvigorated market-oriented progress due to the stimulation of China's membership in the WTO since as a member, China has an international legal obligation to ensure regulatory and legal consistency with WTO-plus commitments and WTO agreements.⁴¹ The Chinese government supports transnational governance standards agreed upon within bilateral and multilateral frameworks of the WTO.⁴²

More recently, China has become increasingly assertive in its legal practice under the economic globalisation trend. In 2013, with the proposal of the "Belt and Road Initiative", the Chinese government advocated for legislative reforms in many developing countries and provided legal aid to them, which aimed to protect Chinese investments abroad.⁴³ Additionally, the Chinese government provided capacity-building programs for lawyers from developing countries.⁴⁴ Generally, these economic and commercial considerations stimulate

³⁷ Hsia, C., Chow, L. E. J., Chang, Y., & F, P. (1930). *The Civil Code of Republic of China*. Shanghai: Kelly & Walsh. p.xxi.

³⁸ Wu, Q. (2017). How has China formed its conception of the rule of law? A contextual analysis of legal instrumentalism in ROC and PRC law-making. *International Journal of Law in Context*, 13(3), 284.

³⁹ <http://www.npc.gov.cn/npc/c30834/201901/1572ef68df5343abb969ca8afca182b4.shtml> (accessed on 24 August) On the Third Plenary Session of the 11th CPC Central Committee held at the end of 1978, China prioritized the improvement of the legal system. Comrade Deng Xiaoping reviewed history and profoundly pointed out: "The most important thing is a question of law."

⁴⁰ Peerenboom, R. (2003). *From Leninist Discipline to Socialist Legalism: Peng Zhen on Law and Political Authority in the PRC*. Stanford: Stanford University Press. p.107. Potter, P. (2004) *The China Quarterly*, 177, 223-225

⁴¹ Qin, Y. J. (2003). WTO-Plus Obligations and Their Implications for the WTO legal system: An appraisal of the China Accession Protocol, *Journal of World Trade*, 37(3), 483.

⁴² Vision and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road. (2014). *Strategic Studies*, 34/35, 205-223. Retrieved from <https://www.jstor.org/stable/48527488> (Accessed 23 August 2023).

⁴³ Seppanen, S. (2018). Chinese Legal Development Assistance: Which Rule of Law? Whose Pragmatism? *Vanderbilt Journal of Transnational Law*, 51(1), 119.

⁴⁴ Seppanen, S. (2018). Chinese Legal Development Assistance: Which Rule of Law? Whose Pragmatism? *Vanderbilt Journal of Transnational Law*, 51(1), 102.

the rule of law theory and legal reform in China.

3. Efforts Made by the Chinese Government to Improve the Rule of Law in China

In the past several years, the Chinese government has made various efforts to make China more law-oriented by issuing the Civil Code 2021 and relevant policies, amending the constitution, empowering courts and stimulating legal professionalism. Over the past thirty years, China has engaged in the most rapid development of the legal system in the history of the world.⁴⁵

3.1 Issuing the Chinese Civil Code

Chinese Civil Code was issued in 2021, which promoted the rule of law theory application in China. In November 2020, the Central Committee of the Communist Party of China publicly stated that the Chinese rule of law is focusing on “people”, whose fundamental purpose is to protect the rights and interests of people. The establishment of the *Chinese Civil Code* is consistent with the Chinese rule of law focusing on protecting people’s benefits. The issuance procedure and contents of the *Chinese Civil Code* both indicated the promotion of rule of law in China. The draft *Chinese Civil Code* was issued online for public review for more than one year and was passed by the National People’s Representative Meeting, which indicated that the issuance procedure was recognized by the public. Additionally, the *Chinese Civil Code* expanded the protection scope in the previous General Principles part of Chinese Civil Law and strengthened the protection of persons’ interests in the fields of property rights, contract rights, personality rights and marriage rights.⁴⁶ Before issuing the *Chinese Civil Code*, China adapted the *Civil General Principle* and various private laws, and there were controversies between those rules. The issuance of the comprehensive *Chinese Civil Code* solved these controversy problems and advanced the rule of law in China.

3.2 Improving Rule of Law in the Government System by Issuing Outline 2021

On 11 August 2021, the Chinese Central Government issued the *Outline for 2021 to 2025* (the Outline), which aimed to promote the rule of law application in all local governments in China. According to the Outline, the Chinese government administration system under the rule of law should be much more improved by 2025.⁴⁷ Additionally, the administrative powers of the Chinese government would be more explicit under the law, and government implementation efficiency should be improved increasingly by 2025, which could lay the foundation for building a comprehensive rule-of-law society in China by 2035.⁴⁸ The Outline

⁴⁵ Liebman, L. B. (2009). Assessing China’s Legal Reform, *Columbia Journal of Asian Law*, 23(1), 18. <https://doi.org/10.7916/cjal.v23i1.3284>

⁴⁶ Chinese Civil Code (2021).

⁴⁷ Implementation Outline for the Construction of a Government Under the Rule of Law (2021-2015), 2021.

⁴⁸ Implementation Outline for the Construction of a Government Under the Rule of Law (2021-2015), 2021.

also indicated that the Chinese government should improve the rule-of-law implementation system, improve an administrative system according to laws, and establish relevant systems to promote the rule of law in all levels of government in China. The Outline specifically emphasized the limitation of governance powers and mentioned the power of judicial supervision in limiting government powers.⁴⁹ Although this cannot represent an absolute separation of power, limiting government powers by judicial monitoring is more consistent with the rule of law theory.

Although the Outline is only a general outline without clarifying specific actions, it suggested a general direction of building a rule of law society and the government attitude of promoting rule of law theory in China. The establishment of the rule of law society in China requires the cooperation and collaboration of governments at all levels.

3.3 2018 Constitutional Amendment

Legalism, defined as a willingness to both operate in accordance with the written law and to strengthen institutions charged with its enforcement, was more powerfully expressed in the 2018 Constitution Amendment. According to the Constitutional Amendment, the Chinese government would legitimize the capacity of law rather than circumvent it.⁵⁰ The developments in the Constitution have shaped Chinese politics and policymaking since 1976⁵¹, which indicates the end of China's post-Mao 'reform era'.⁵² Recently, legal institutions have assumed a more central and significant position and would continue to gain a stature moving forward.⁵³ There will be an era where the law plays a greater socio-political role in a consolidated authoritarian regime, and courts become substantially significant in authoritarian regimes.⁵⁴ The significance of the law has been indicated in the 2018 Constitution Amendment.

3.4 Empowering the Courts

To improve the rule of law, it is necessary to increase the independent power of judges and stimulate the enforcement of judgments. Chinese government enforced judicial reform to empower the courts and made efforts to increase the independence of judicial power through

⁴⁹ Implementation Outline for the Construction of a Government Under the Rule of Law (2021-2015), 2021.

⁵⁰ Zhang, T. & Ginsburg, T. (2019). China's Turn Toward Law. *Virginia Journal of International Law*, 59(2), 316.

⁵¹ Perry, J.E., & Heilmann, S. (2011). *Mao's Invisible Hand: The Political Foundations of Adaptive Governance in China*. (Harvard Contemporary China Series 17) p.124.

⁵² Minzner, C. (2011). China's Turn Against Law, *The American Journal of Comparative Law*, 59 (4). 936. <https://doi.org/10.5131/AJCL.2011.0006>

⁵³ Zhang, T., & Ginsburg, T. (2019). China's Turn Toward Law. *Virginia Journal of International Law*, 59(2), 316.

⁵⁴ Solomon, H. P. (2010). Authoritarian Legality and Informal Practices: Judges, Lawyers and the Strata in Russia and China. *Communist and Post-Communist Studies*, 43(4), 351. <https://doi.org/10.1016/j.postcomstud.2010.10.006>

several methods.

3.4.1 Financial Independence of Judicial Institutions

Judicial institutions' financial independence from local governments has increased. In the past, it was criticized that Chinese judiciary lacks independence and political irrelevance, however this view is outdated since the Chinese government has substantially expanded its institutional capacity and political independence since 2012.⁵⁵ Before 2012, the political and institutional gains made by the judiciary were at the expense of other government entities. However, since 2013, the Chinese government has enforced some measures designed to significantly reduce its influence in judicial institutions by removing all judicial budgetary decisions to the provincial level or above⁵⁶, which was intended to push judicial financial independence. At least, the provincial and local courts remain financially dependent on the provincial governments, and Chinese central government can control the provincial government significantly, which could prevent provincial governments from interfering with lower courts. In China, the central leadership is arguably most distant and detached from the operation of courts. By this way, Chinese central government can support legal independence and professionalism, so courts can enjoy higher judicial independence since they can obtain sufficient financial security and regulatory protection.⁵⁷

In 2015, Chinese government and the State Council jointly issued a set of regulations aimed at reducing political interference with judicial activities, and all courts must compile the records of any undue political interference and submit these records to relevant institutions for review.⁵⁸ As discussed above, in Australia, the High Court owns a self-administration system that is not interfered with by government executive institutions.⁵⁹ Additionally, the self-governance system of Australian courts upholds judicial independence, which enables judges free from executive interference over significant matters.⁶⁰ Therefore, strengthening judicial independence by decreasing political interference can help to promote rule of law

⁵⁵ Zhang, T., & Ginsburg, T. (2019). China's Turn Toward Law. *Virginia Journal of International Law*, 59(2), 328.

⁵⁶ Central Comprehensively Deepening Reforms Commission, Decision by the Central Party Leadership on Comprehensively Deepening Several Reform Areas. (November 15, 2013).

⁵⁷ Zhang, T., & Ginsburg, T. (2019). China's Turn Toward Law. *Virginia Journal of International Law*, 59(2), 340-343.

⁵⁸ Central Party Leadership Admin. Office & St. Council Admin. Office, Regulations on Documenting, Reporting and Sanctioning Interference with Judicial Activity by Government Officials. (March 20, 2015).

⁵⁹ Stewart, P., & Stuhmcke, A. (2020). Open Justice, Efficient Justice and the Rule of Law: The Increasing Invisibility of Special Leave to Appeal Applications in the High Court of Australia. *Federal Law Review*, 48(2), 190. <https://doi.org/10.1177/0067205X20906031>

⁶⁰ Beaumont, J. B. (1999). The Self-Administering Court: From Principles to Pragmatism, *Journal of Judicial Administration*, 9, 61.

application.

Due to more judicial independence, there is an expanded jurisdiction over administrative disputes and government observers even claimed that they were now the primary source of administrative cases.⁶¹

3.4.2 Strengthen the Implementation of the Judicial Decisions

It is significant to increase the level of implementation of the judgments and judicial orders, which authorizes more powers to the judges. In 2014, Chinese government issued *the Outline of the Plan for the Establishment of the Social Credit System (2014-2020)* to bolster the judiciary enforcement powers in civil dispute cases by establishing the Social Credit System.⁶² This social credit system allows the judiciary to outsource some enforcement of decisions to other public institutions and entities such as public transportation and banks.⁶³ People who do not comply with judgements may be denied financial credit, prohibited from engaging in some businesses, taking airplanes or buying luxuries.⁶⁴ The Social Credit System can improve public compliance with court orders and judgments, which can stimulate the enforcement of judicial decisions and strengthen the powers of judges.

3.4.3 Improving Legal Professionalism

It is necessary to emphasize that judicial reform must promote both judicial independence and professionalism together. In fact, the Chinese government has also made many efforts to stimulate judicial professionalism. Numerous legal reforms were implemented to enhance the capacity of judges to adjudicate professionally and enforce the judicial decisions effectively. The Chinese Highest Court (Supreme People's Court) issued the *Guiding Opinions on Strengthening and Improving Judges' Evaluation Work*, which required to establish a scientific and rational evaluation system for judges to guide, standardize, and encourage judges to perform trial duties fairly and efficiently in accordance with law, and advance the professionalization judges.⁶⁵ Furthermore, the 'life responsibility' policy for judges has been implemented in China. In 2015, Supreme People's Court issued *Opinions on Improving the Judicial Responsibility System of the People's Courts*, which required judges be responsible

⁶¹ Zhang, T., & Ginsburg, T. (2019). China's Turn Toward Law. *Virginia Journal of International Law*, 59(2), 346.

⁶² Outline of the Plan for the Establishment of the Social Credit System (2014-2020). No. Guo Fa (2014) 21.

⁶³ Outline of the Plan for the Establishment of the Social Credit System (2014-2020). No. Guo Fa (2014) 21.

⁶⁴ We can find these examples in the revisions of the Civil Litigation Law in 2012 which shows that people who do not carry out the judgements or orders would be barred from doing some activities. Also, there is a blacklist of people who did not comply with the judicial decisions.

⁶⁵ Guiding Opinions on Strengthening and Improving Judges' Evaluation Work. No. Fa (2021) 255.

for their handled cases for the rest of judicial careers.⁶⁶ This can force judges to improve their judicial capacity and follow legislations more strictly.⁶⁷

In addition, circuit courts were created and exercised review powers over categories of provincial-level cases.⁶⁸ The decisions of circuit courts carry the same legal authority as the Supreme People's Court, and their decisions would bind on all these cases, which can enhance the Supreme People's Court's ability to monitor and control the provincial and local courts, and promote the consistency of applying legislations in China.⁶⁹ To use law more consistently and facilitate the enforcement of law, in 2010, a guiding case system was established, which issues the batches of guiding cases on a regular basis, and the lower courts should follow these guiding cases.⁷⁰ Except for the above, another legal reform is issuing a policy of making all judgments from different levels of courts available online.⁷¹ This system would make judgements more transplant, which can help to stimulate the consistent usage of law and facilitate the public to monitor law enforcement and force legal practitioners to improve judicial capacity and professional ability.

Finally, the judicial reform aims to reward high performers with higher salaries and greater responsibility while retaining others in less prestigious positions. The raising prestige of judges would attract more qualified and professional people into the judiciary, which can improve the overall adjudicatory capacity and legal expertise of law practitioners.⁷²

4. Rule of Law Application in Australia

4.1 Definition of Rule of Law in Australia

Western rule of law theory prevails in Australia, and it has taken a long time to form this theory.⁷³ There has been a long-term debate with respect to the meaning of rule of law, and

⁶⁶ Opinions on Improving the Judicial Responsibility System of the People's Courts. No. Fa Fa (2015) 13.

⁶⁷ Kwai, H. Ng. (2019). Is China a "Rule-by-Law" Regime?, *Buffalo Law Review*, 67(3), 814.

⁶⁸ Supreme People's Court. (2016). Decision of the Supreme People's Court on Amending the Provisions of the Supreme People's Court on Several Issues Concerning the Trial of Cases by Circuit Courts. No. Fa Shi (2016) 30.

⁶⁹ Zhang, T., & Ginsburg, T. (2019). China's Turn Toward Law. *Virginia Journal of International Law*, 59(2), 336.

⁷⁰ Provisions of the Supreme People's Procuratorate on Case Guidance Work. 2019.

⁷¹ Provisions of the Supreme People's Court on the Publication of Judgment Documents by People's Courts on the Internet. 2014.

⁷² Zhang, T., & Ginsburg, T. (2019). China's Turn Toward Law. *Virginia Journal of International Law*, 59(2), 334.

⁷³ Chen, H. Y. A. (2016) China's Long March towards Rule of Law or China's Turn against Law, *The Chinese Journal of Comparative Law*, 4(1), 9. <https://doi.org/10.1093/cjcl/cxw003>

finally, the modern Australian rule of law conception is credited to the English Constitutional law professor A.V. Dicey.⁷⁴ According to Dicey, the rule of law contains three elements: the absolute supremacy of law, the notion of equality before law, and the rights of courts to define and enforce what the law is.⁷⁵ Dicey noted that the supremacy of the rule of law has three characteristics. Firstly, no individuals should be punished except for the breach of law established in the ordinary legal manner before courts. Secondly, legal equality requires that not only no person is above laws, but also all people must be subject to ordinary legislation and amenable to the jurisdiction of ordinary tribunals. Thirdly, the right of personal liberty should be determined before courts, which is a constitutional principle.⁷⁶ Many scholars, including Baron Tom Bingham, Bottomley, Bronitt and Fuller, have debated the conception of the rule of law.⁷⁷ Nevertheless, the rule of law theory proposed by A.V. Dicey has imposed a profound influence in Australia.

According to A.V. Dicey, the principle of rule of law is opposed to arbitrary power,⁷⁸ which plays a crucial role in protecting rights of the public. Also, the application of the rule of law theory provides a comparatively transparent processes and fair place to resolve legal disputes. Laws and fair legal process are crucial for the public, especially for vulnerable people such as the unpopular minorities.⁷⁹ Furthermore, it affords a peaceful mechanism to set rules in the society otherwise people may use the alternatives such as the power of money, influence or guns to illegal solve problems.⁸⁰

4.2 Rule of Law Application in Australia

4.2.1 Origin of Rule of Law in Australia

In Australia, although the rule of law principle has not been spelled out in express terms in the Australian Commonwealth Constitution, it has been upheld in many judicial cases for safeguarding basic legal rights. The rule of law principle is the overarching principle in the Australian democratic system of government, although the conception or definition may be varied by some scholars, the rule of law principle is an implied part of the Australian

⁷⁴ Bingham, T. (2010). *The Rule of Law*. Penguin UK. p.3.

⁷⁵ Dicey, A. V. (1968). *An Introduction to the Study of the Law of the Constitution*. (10th ed). London: Palgrave Macmillan. p. 139. <https://doi.org/10.1007/978-1-349-17968-8>

⁷⁶ Dicey, A. V. (1968). *An Introduction to the Study of the Law of the Constitution*. (10th ed). London: Palgrave Macmillan. p. 110, 114, 115. <https://doi.org/10.1007/978-1-349-17968-8>

⁷⁷ Forsyth, A. (2018). 'Restoring the Rule of Law' through Commercial (Dis)incentives: The Code for the Tendering and Performance of Building Work, *Sydney Law Review*, 40, 95.

⁷⁸ Dicey, A. V. (1968). *An Introduction to the Study of the Law of the Constitution*. (10th ed). London: Palgrave Macmillan. p. 139. <https://doi.org/10.1007/978-1-349-17968-8>

⁷⁹ Bingham, L. (2009). Dignity, Fairness and Good Government: The Role of a Human Rights Act. *Alternative Law Journal*, 34(2), 77. <https://doi.org/10.1177/1037969X0903400201>

⁸⁰ Kirby, M. (2010). The rule of law beyond the law of rules. *Australian Bar Review*, 33 (3), 200.

Commonwealth Constitution.⁸¹ In Australia, the rule of law principle is derived from common law, statutes or can be inferred from the structure or purpose of the Constitution.⁸² The rule of law in Australia means that all persons are equally subject to legislation,⁸³ which is consistent with the opinion of A.C. Dicey.

4.2.2 Following the Rule of Law Principle in a Judicial System

The prevailing application of rule of law in Australian courts is obvious. In Australia, all courts must be subject to both the formality and aspiration of the rule of law.⁸⁴ The principle of open justice, which is the core principle of Australian common law,⁸⁵ renders judges the authority subject to the rule of law principle.⁸⁶ In Australia, the High Court judges are accountable for their decisions in both the public court proceedings and by the *High Court Rules 2004* of Australia, which requires the publication of written reasons for judgment.⁸⁷ The Australian High Court believes that the open court rule is fundamental⁸⁸ with limited exceptions, including administrative justice, interest in justice⁸⁹ and statutory requirements⁹⁰. Open court justice can give access to the public to monitor the enforcement of laws, which can stimulate Australian judges to strictly follow law.

4.2.3 Promotes the Rule of Law by Increasing Judicial Independence

Except for the above open court rule, Australian internal court administration is also exposed to public scrutiny. Section 47 of the *High Court of Australia Act 1979* requires the Court to produce an Annual Report that recognizes the significance of the public availability of

⁸¹ *South Australia v Totani*, 242 CLR 1, 35 [42] (2010) (Australia Commonwealth Law Reports CLR).

⁸² Kirby, M. (2010). The rule of law beyond the law of rules. *Australian Bar Review*, 33 (3), 202.

⁸³ Walker, G. Q. (1988). *The Rule of Law: Foundation of Constitutional Democracy*. (Melbourne University Press) p. 6,7.

⁸⁴ Stewart, P., & Stuhmcke, A. (2020). Open Justice, Efficient Justice and the Rule of Law: The Increasing Invisibility of Special Leave to Appeal Applications in the High Court of Australia. *Federal Law Review*, 48(2), 189. <https://doi.org/10.1177/0067205X20906031>

⁸⁵ *Hogan v Hinch*, 243 CLR 506 [21] (2011).

⁸⁶ Stewart, P., & Stuhmcke, A. (2020). Open Justice, Efficient Justice and the Rule of Law: The Increasing Invisibility of Special Leave to Appeal Applications in the High Court of Australia. *Federal Law Review*, 48(2), 189. <https://doi.org/10.1177/0067205X20906031>

⁸⁷ High Court Rules § 6.03 (Australia Cth 2004).

⁸⁸ *Russell v Russell; Farrelly v Farrelly*, 134 CLR 495, 520 (1976).

⁸⁹ Stewart, P., & Stuhmcke, A. (2020). Open Justice, Efficient Justice and the Rule of Law: The Increasing Invisibility of Special Leave to Appeal Applications in the High Court of Australia. *Federal Law Review*, 48(2), 190. <https://doi.org/10.1177/0067205X20906031>

⁹⁰ *Rinehart v Welker*, 93 311 (NSWLR, 2011).

accurate information about the practice and procedures of court administration.⁹¹ In Australia, the High Court self-administration system was also created within the rule of law theory, which is not interfered with by government executive institutions.⁹² Additionally, the self-governance system of Australian courts upholds judicial independence, which prevents judges from executive interference over significant matters such as the allocation of caseloads and the development of court policies or procedures.⁹³ Additionally, Australian Common Law emphasizes the independence and impartiality of the Federal Court judges in hearing disputes between citizens and the government, which insists that the federal courts must be impartial and independent from government executive institutions.⁹⁴

Generally, Australian judicial independence has been increased through improving the self-administration system of courts⁹⁵, increasing public scrutiny⁹⁶ and reducing executive interference with significant judicial matters.⁹⁷ Judicial independence allows judges to make decisions based only on legislation without considering executive influence, which promotes the rule of law application in Australia.

In Australia, the rule of law has prevailed for a long time and influences the social management system and problem-solving methods, as well as the thinking models of Australian people. However, under some circumstances, the rule of law principle was not applied strictly. The article will discuss certain potential reasons for the violation of strict rule of law in Australia under some circumstances.

4.3 Why Failure of the Rule of Law Under Some Circumstances in Australia

4.3.1 Based on Fuller's Morality of Law Theory

It is possible to apply Fuller's Morality of Law Theory in explaining the failure of rule of law in some circumstances. There was a debate in the building industry regulation in Australia over the last 30 years about whether the rule of law principle requiring legislation must be observed strictly and absolutely.⁹⁸ In the Australian construction field, in 2017, the new

⁹¹ High Court of Australia. (1998). High Court of Australia Annual Report 1997–1998, p.7.

⁹² Stewart, P., & Stuhmcke, A. (2020). Open Justice, Efficient Justice and the Rule of Law: The Increasing Invisibility of Special Leave to Appeal Applications in the High Court of Australia. *Federal Law Review*, 48(2), 190. <https://doi.org/10.1177/0067205X20906031>

⁹³ Beaumont, J. B. (1999). The Self-Administering Court: From Principles to Pragmatism, *Journal of Judicial Administration*, 9, 61.

⁹⁴ *Grollo v Palmer*, 184 CLR 348, 380 (1995).

⁹⁵ High Court of Australia, High Court of Australia Annual Report 1997–1998, 13 November 1998, at 7.

⁹⁶ Stewart, P., & Stuhmcke, A. (2020). Open Justice, Efficient Justice and the Rule of Law: The Increasing Invisibility of Special Leave to Appeal Applications in the High Court of Australia. *Federal Law Review*, 48(2), 190. <https://doi.org/10.1177/0067205X20906031>

⁹⁷ Beaumont, J. B. (1999). The Self-Administering Court: From Principles to Pragmatism, *Journal of Judicial Administration*, 9, 61.

⁹⁸ Forsyth, A. (2018). 'Restoring the Rule of Law' through Commercial (Dis)incentives: The

Secretary of the Australian Council of Trade Unions ('ACTU'), Sally McManus said that she believed that in the rule of law theory, the law should be fair and right. However, when a law was unjust, she did not believe we should follow it.⁹⁹ Although her opinion was debatable, it is still necessary to use Fuller's morality of law theory to explain why the rule of law cannot be applied under some circumstances in Australia.

It is necessary to briefly introduce the Fuller's theory about the morality of law. According to Fuller, the rule of law principle is not applicable in some circumstances since it is significant to explore the nature of legislation before obeying it. Fuller thought that morality and legality of law cannot be departed and therefore immoral law should not be obeyed by us.¹⁰⁰ Referring to the opinions of Fuller, a law has two moralities, including external and internal morality.¹⁰¹ External morality means that a law must gain the fidelity of communities by its moral quality, which is substantive content of rules. On the other hand, the internal morality is that a law is a purposive human activity, so procedures and enactments of law must be recognizable.¹⁰² The principal of rationality should be regarded as congruence in a law.¹⁰³

A law is immoral if it lacks generality and the public does not know whether it is law or not.¹⁰⁴ Additionally, we should not obey a law that fails to publicise itself or gives unlimited discretion to legal practitioners.¹⁰⁵ Law would also be immoral if it makes incomprehensible or contradictory rules which force conducts beyond affected persons' power, frequently change, undermine orientation of subjects, or lack consistency between announced rules and actual administration.¹⁰⁶ If a legislation contains one of above features, it is immoral, and we

Code for the Tendering and Performance of Building Work, *Sydney Law Review*, 40, 97.

⁹⁹ Leigh Sales, New ACTU Boss Says It's Ok for Workers to break 'unjust law', ABC News (March 15, 2017, 7, 59 PM), <https://www.abc.net.au/7.30/new-actu-boss-says-its-ok-for-workers-to-break/8357830>.

¹⁰⁰ Eleftheriadis, P. (2014). Legality and Reciprocity: A Discussion of Lon Fuller's The Morality of Law, *Jerusalem Review of Legal Studies*, 10(1), 1. <https://doi.org/10.1093/jrls/jlu002>

¹⁰¹ Fuller, L. L. (1969). *The Morality of Law*. (Revised Edition). Yale University Press.

¹⁰² Moka-Mubelo, W. (2017). In: Reconciling Law and Morality in Human Rights Discourse. *Philosophy and Politics - Critical Explorations*, 3, 51-88. https://doi.org/10.1007/978-3-319-49496-8_3

¹⁰³ Brownsword, R. (1994). Two Concepts of Good Faith, *Journal of Contract Law*, 7(3), 202.

¹⁰⁴ Fuller, L. L. (1969). *The Morality of Law*. (Revised Edition). Yale University Press. <https://plato.stanford.edu/entries/rule-of-law/> (access on 24 August 2023)

¹⁰⁵ Fuller, L. L. (1969). *The Morality of Law*. (Revised Edition). Yale University Press. <https://plato.stanford.edu/entries/rule-of-law/> (access on 24 August)

¹⁰⁶ Raz, J. (1979). *The authority of law: Essays on law and morality*. (online edn). Oxford: Oxford Academic. p. 232-249. <https://doi.org/10.1093/acprof:oso/9780198253457.003.0012>.

should not obey it according to the Fuller's rule of law theory. In practice, the failure to apply the rule of law principle could be explained with Fuller's theory in some cases.

To pursue the substantial outcome of cases, Australian judges may violate the rule of law under some circumstances. The Australian legal system is overly concerned about procedures and insufficiently attentive to the substantial aspects, such as fair outcomes, achievements of improved relations between parties and desirable social objectives.¹⁰⁷ A defect of rule of law is that the principle mainly depends upon the wisdom and justice of law being enforced. However, legislation cannot cover all these matters. In Australia, certain laws including statutes and judge-made laws may be unjust, out-of-date, or contrary to universal human rights.¹⁰⁸ Therefore, to achieve substantial fairness or the ultimate purposes of legal systems, judges would not absolutely rely on these legislations. This can be explained with Fuller's theory of the external morality of law, which requires people to consider the substance of legislation and outcomes of applying laws.

Another reason for avoiding the rule of law theory is that there are spaces in which the law does not run, and judicial orders are silent or completely ineffective. In Australia, if there are no relevant regulations or precedents, the rule of law normally should not be obeyed since, under these circumstances, judges and executives were given too much discretion without any limitations by the law. This is also consistent with Fuller's theory that the law should not be obeyed if it grants uncontrolled discretionary power to legal practitioners.

4.3.2 Historical Reasons

History and prevailing legal theory have imposed much influence on the rule of law principle in Australia. Racial and ethnic identity led to serious challenges to the rule of law in the Australian history.¹⁰⁹ Although it has been little taught in the literature courses,¹¹⁰ it could give rise to ethnic, religious or racial hatred.¹¹¹ Additionally, throughout history, many Australian laws were transplanted from England without considering local conditions and national characteristics.¹¹² People did not obey these laws due to undesirable results brought by these wrongly transplanted laws. This can also be explained with the Fuller's opinion that people should consider the outcomes of applying laws due to the external morality of law.

4.3.3 Practical Implications

More importantly, there are various practical impediments that demonstrate that the rule of

¹⁰⁷ Kirby, M. (2010). The rule of law beyond the law of rules. *Australian Bar Review*, 33(3), 204.

¹⁰⁸ Kirby, M. (2010). The rule of law beyond the law of rules. *Australian Bar Review*, 33(3), 204.

¹⁰⁹ James, S. (2008). Bicentenary of the coup of 1808, *Australian Bar Review*, 30, 140.

¹¹⁰ *Toy v Musgrove*, 14, 349 (VLR.1888).

¹¹¹ Ridley, G. J. (1982). *The Statesman and the Fanatic: Thomas Wolsey and Thomas More*. Constable. p. 79.

¹¹² Atkinson, A. (1997). *The Europeans in Australia*. UNSW Press. p.7.

law principle is only a theoretical construct rather than a practical reality in some cases. Although practical factors' influence cannot be explained by the Fuller's morality of law theory or historical reasons, it plays a role in barring strict implementation of the rule of law theory in Australia.

Firstly, correct access to legal rights is based on people's background and experience rather than the legislation. Since a law requires statutory interpretation, judges must use their own knowledge during the process of applying law in practice. Secondly, the impecuniosity of potential litigants frequently prevents people from obtaining basic legal advice or pursuing legal rights effectively in courts¹¹³ Public litigation funding is normally not available or sufficient in Australia¹¹⁴ since the application requirements are very strict even though they were the very persons in need of legal assistance.¹¹⁵ Therefore, limitation on the access to courts can be regarded as an obstacle to pursuing the absolute rule of law in Australia.

Additionally, in Australia, the large number of appeals, including civil cases and criminal cases against criminal convictions and sentences, undoubtedly produce the risk of overlooking errors and therefore courts making final decisions cannot be expected to repair certain errors.¹¹⁶ The advent of highly complex, scientific evidence has presented serious challenges to noninstitutional litigants. Individual inexperienced lawyers may cause the courts of criminal appeals to be generally reluctant to review the decisions and submissions of these lawyers.¹¹⁷ Additionally, in civil courts, ADR is spreading, which almost becomes a prerequisite to litigation. While this can bring some benefits, it sometimes does deprive parties of a chance to pursue an absolutely just outcome, which has effectively substituted forces of the rule of law to some extent.¹¹⁸

Finally, in some instances, the government wishes to achieve certain objectives and therefore ignores the rule of law principle. For example, in Australia, general criminal prosecutorial discretions are generally left untouched by courts even though prosecute decisions may effectively determine case outcomes.¹¹⁹ Although prosecution has legal obligations to disclose

¹¹³ Kirby, M. (2010). The rule of law beyond the law of rules. *Australian Bar Review*, 33(3), 207.

¹¹⁴ *Campbell's Cash & Carry Pty Ltd v Fostif Pty Ltd*, 229 CLR 386 (2006).

¹¹⁵ *APLA Ltd v Legal Services Commissioner (NSW)*, 224 CLR 322 (2005).

¹¹⁶ Kirby, M. (2010). The rule of law beyond the law of rules. *Australian Bar Review*, 33(3), 208.

¹¹⁷ *Nudd v R*, 225 CLR 161 (2006).

¹¹⁸ Kirby, M. (2010). The rule of law beyond the law of rules. *Australian Bar Review*, 33(3), 207.

¹¹⁹ Gray, S., & Royan, N. (2009). The Blogger Prince and the Cultured Mongolian — Sedition Prosecutions in the Modern Malaysian State. *Media and Arts Law Review*, 14(4), 463.

all information, in practice, public officials do not disclose reasons for certain decisions.¹²⁰ This may limit the application of rule of law since prosecution would not demonstrate real reasons for the allegedly oppressive use of officials power, which limits the power of judicial review under the rule of law theory.

However, despite the failure of rule of law application under some circumstances, generally in Australia, there still is the supremacy of rule of law, which is the result of its legal philosophy, in particular the impacts of natural law and divine law which emphasize the importance of good quality and morality of law.¹²¹

5. Make Comparisons Between Rule of Law in China and Australia

As discussed above, the different legal cultures between China and Australia affected the formation of rule of law theory. Although, according to Marxism, western countries also apply “morality” to justify political and legal rules,¹²² the western rule of law principle is totally distinctive from the Chinese one. This article will indicate the differences in rule of law implementation in China and Australia. The distinctions are reflected in dispute resolution methods. On the one hand, this distinction is due to the different legal cultures. On the other hand, it is the difference in social management systems which affects the implementation of rule of law theory in China and Australia.

5.1 Different Methods of Problem Solving

The initial difference is distinct methods or principles in solving disputes. Chinese government expressed strong interest in promoting mediation and alternative disputes resolution taken by people themselves.¹²³ China promotes the “Fengqiao Experience” which emphasizes problems solving by mediation and similar methods. Zhejiang Province New Era “Fengqiao Experience” Research Institute indicates that “Fengqiao Experience” is a people-centred experience of grassroots social governance model, emphasizing the integration of autonomy, rule of law and rule by ethics, and its basic approach is to mobilize and rely on the public to resolve contradictions among people.¹²⁴ The report of the 20th National Congress of the Communist Party of China pointed out “adhere to and develop the ‘Fengqiao Experience’ in the new era at the grassroots level of society, improve the mechanism for correctly handling contradictions among the people, strengthen and improve the work of people's letters and visits, smooth and standardize the channels for the expression

¹²⁰ Public Service Board (NSW) v Osmond, 159 CLR 656 (1986).

¹²¹ Zhao, S. (2006). *Debating Political Reform in China: Rule of Law vs. Democratization*. Routledge. P. x, 123.

¹²² Andrews, N. (1998). Confucius and the Regulation of Electronic Securities in the People's Republic of China. *Australian Journal of Corporate Law*, 9(3), 7.

¹²³ Liebman, L. B. (2014). Legal Reform: China's Law-Stability Paradox. *Daedalus*, 143(2), 96. https://doi.org/10.1162/DAED_a_00275

¹²⁴ Jin, B. (2022). The “Fengqiao Experience” in the new era is an important magic weapon to prevent and resolve the risk of contradictions. http://www.gmw.cn/xueshu/2022-11/03/content_36135121.htm (Access on 13 May 2023).

of appeals. It is necessary to coordinate interests, protect of rights, improve the grassroots governance platform supported by grid management, refined services, and informatization, improve the governance system of urban and rural communities, and promptly resolve conflicts and disputes at the grassroots level.”¹²⁵The "Fengqiao Experience" is an original governance experience rooted in socialist culture with Chinese characteristics under the leadership of the Communist Party of China, with distinctive Chinese practice characteristics.¹²⁶As a characteristic of China's grassroots social governance, the "Fengqiao Experience" not only fits with the essential attributes of municipal governance in the three dimensions of history, function and practice, but also plays a positive demonstration and leading role in the development of dispute resolution mechanisms in China.¹²⁷Influencing by Chinese traditional culture, in general, Chinese people regard moral education as more important than formal lawsuits in solving disputes. It is affected by a wider movement in Chinese intellectual life where being Chinese is defined as being Confucian.¹²⁸In China, Confucians argue against the excessive use of legal coercion and stress the merits of government through moral education, which is consistent with Li, who could be flexibly interpreted to meet the exigencies of any particular situation.¹²⁹This opinion has a prolonged influence, and in current China, court action is still being regarded as a very last resort.¹³⁰Many pragmatic Chinese think that even if they win lawsuits, they would lose money¹³¹, and efficiency is worse than mediation. Therefore, the ideals of conciliation, negotiation, mediation and arbitration still play a significant role, solving disputes via moral education and persuasion rather than formal lawsuits. Due to Confucian influence, the government is supposed to promote moral education as a primary means of social control and to rely on penal law only as the last resort.¹³² Therefore, many Chinese people do not regard litigation

¹²⁵ 2022 The report of 20th National Congress of the Communist Party of China.

¹²⁶ Zhao, Q., & Jia, c. (2022). Research on the value of rule of law and its innovative development path of "Fengqiao Experience" in the new era. *Journal of Beijing Normal University (Social Science)*, 2, 113.

¹²⁷ Yao, H. (2023). Judicial practice and innovation path of "Fengqiao Experience" in municipal governance in the new era. *Chinese Journal of Applied Law*, 2, 127.

¹²⁸ Kam, L. (1986). *Inheriting Tradition: Interpretations of the Classical Philosophers in Communist China, 1949–1966*. New York: Oxford University Press. p. 191.

¹²⁹ Bodde, D., & Morris, C. (1967). *Law in Imperial China: Exemplified by 190 Ch'ing Dynasty Cases (Translated from the Hsing-an hui-lan), With Historical, Social, and Juridical Commentaries*. Cambridge, MA and London, England: Harvard University Press. p.21. <https://doi.org/10.4159/harvard.9780674733213>

¹³⁰ Thirgood, R. (1999). Dispute resolution Chinese style – the influences, *Australian Dispute Resolution Journal*, 10(4), 270.

¹³¹ Utter, F. R. (1987). Dispute Resolution in China. *Washington law review*, 62(3), 385.

¹³² Feng, Y. (2010). LEGAL CULTURE IN CHINA: A COMPARISON TO WESTERN LAW, *REVUE JURIDIQUE POLYNESIENNE*, 16, 121.

as the most significant method to solve disputes, which affects the popularization of rule of law theory in China to some extent.

However, in Australia, according to the opinion of Aristotle, lawsuit is the most important and fair way to solve disputes under the influence of rule of law principle. As a process to settle disputes, lawsuit has special merits since law is an impartial rule that informed people of their rights or duties in a certain situation.¹³³ Although, referring to Marxism, western countries' governments also use morality to justify political and legal rules,¹³⁴ lawsuits still prevail, and pursuing legal fairness is regarded as the main purpose. Therefore, formal litigations play a more significant role in Australia than in China.

5.2 Different Society Governance System

Except for the above different legal cultures, the difference in the implementation of rule of law theory between China and Australia is also due to the different social management systems.

In Australia, the principle of the separation of power is crucial since it plays a significant role in limiting power of governments and protecting the fairness of judgement by ensuring the independence of judicial power. However, in ancient and current China, there is no clear separation of power for the following two reasons. On the one hand, moral condemnation is a basic method to educate the public and control the whole society, and the main purpose of Confucianism is to reach a world without litigations. On the other hand, the highest ideal for Chinese Confucius was to reach harmony between different persons via moral education and persuasion, rather than lawsuits.¹³⁵ Ancient Chinese people were persuaded to follow the orders of emperors to achieve a harmonious society. Therefore, even in Ancient China, supreme legislative, judicial, and executive powers were vested in emperors, and people were reluctant to challenge emperors' authority since they were supposed not to damage the harmonious relations with others. Therefore, in the history, Chinese social management system was not as advanced as that in Australia, and people did not pay attention to the separation of power in imperial China. This imposed profound influence on current legal theories of China, so there is still no very clear distinction between judicial power and executive power currently. However, as discussed before, the Outline emphasised the limitation of government power and the power of judicial supervision, which is more consistent with western rule of law theory to some extent.¹³⁶

Modern western rule of law theory has taken time-several centuries to form in European

¹³³ Feng, Y. (2010). LEGAL CULTURE IN CHINA: A COMPARISON TO WESTERN LAW, *REVUE JURIDIQUE POLYNESIENNE*, 16, 120.

¹³⁴ Andrews, N. (1998). Confucius and the Regulation of Electronic Securities in the People's Republic of China. *Australian Journal of Corporate Law*, 9(3), 7.

¹³⁵ Feng, Y. (2010). LEGAL CULTURE IN CHINA: A COMPARISON TO WESTERN LAW, *REVUE JURIDIQUE POLYNESIENNE*, 16, 119.

¹³⁶ Implementation Outline for the Construction of a Government Under the Rule of Law (2021-2015), 2021.

countries, and western governments are aware of many problems of the legal system and have taken steps to address them.¹³⁷ Therefore, due to the different legal cultures and social management systems between China and Australia, it is difficult to implement the rule of law theory in China strictly within such a short time. As discussed above, in 2015, China issued a set of regulations aimed at reducing political interference with judicial activities at all levels,¹³⁸ which plays a positive role in increasing judicial independence and promoting the rule of law development in China.

6. Legal Theory Transplantation

6.1 *The Mutual Influence of Legal Theory Between China and Australia*

The establishment of the Chinese legal system has been affected by the legal theory of western countries, including Australia, to a great extent due to foreign legal aid. In the past, western countries, including Australia and the US, have provided legal aid to China and have engaged in efforts to promote the implementation the rule of law in China. This foreign aid is commercially motivated since China is one of the largest investors in the world; therefore, it is necessary to promote the rule of law in China.¹³⁹ On the other hand, the western law theory has been affected by China to some extent. Currently, China has provided legal reform advice and capacity-building programs for lawyers in developing countries, which is a part of China's foreign policy project 'Belt and Road Initiative.'¹⁴⁰ Chinese legal development assistance also influences policymaking in Australia since China and Australia are in the competition of both economic development projects and legal development assistance.¹⁴¹ Therefore, there exists the mutual influence of legal theory development between China and Australia.

Both Chinese and Australian legal systems have special advantages, and it is worth learning from each other. Australian society is moving towards a more flexible dispute resolution system, and China is seeking a more legalised and predictable system of law. China has the

¹³⁷ Chen, H. Y. A. (2016) China's Long March towards Rule of Law or China's Turn against Law, *The Chinese Journal of Comparative Law*, 4(1), 9. <https://doi.org/10.1093/cjcl/cxw003>

¹³⁸ Central Party Leadership Admin. Office & St. Council Admin. Office, Regulations on Documenting, Reporting and Sanctioning Interference with Judicial Activity by Government Officials, (March 20, 2015).

¹³⁹ Pils, E. (2018). In whose service? The transnational legal profession's interaction with China and the threat to lawyer's autonomy and professional integrity, *Fordham International Law Journal*, 41(5), 1264-1266.

¹⁴⁰ Chinese government established the "Belt and Road" Lawyers Alliance: Accelerate the establishment of foreign-related legal service mechanisms to escort the construction of the "Belt and Road". https://www.thepaper.cn/newsDetail_forward_13917084 (accessed on 25 August 2023).

¹⁴¹ Seppanen, S. (2018) Chinese Legal Development Assistance: Which Rule of Law? Whose Pragmatism? *Vanderbilt Journal of Transnational Law*, 51(1), 104.

largest and one of the best-established mediation systems in the world, and Australia has gradually learned some lessons from the Chinese mediation system, but successful mediation in Australia is still subject to western standards of fairness.¹⁴² Both the *Civil Procedure Law of NSW State Australia*¹⁴³ and the *NSW Uniform Civil Procedure Rules 2005*¹⁴⁴ emphasize the principle of “Just, Quick and Cheap” for solving civil disputes, which stimulates mediation to some extent. Additionally, according to the *Legal Profession Uniform Law Australian Solicitors’ Conduct Rules 2015*, lawyers have the duty to notify clients of the alternatives for solving civil disputes, including mediation.¹⁴⁵ Additionally, in Australia, non-court procedures are encouraged by the *Civil Dispute Resolution Act 2011 (Cth)*,¹⁴⁶ which requires that the disputants take genuine steps to resolve disputes before commencing proceedings. Therefore, Australian legislation stimulates citizens to solve civil disputes through non-litigation methods such as mediation. Furthermore, the Victorian Law Reform Commission reports that the settlement rate for ADR is often very high, usually between 50% and 85%, and mediation is the most commonly used type of ADR.¹⁴⁷ In general, influenced by traditional culture, China takes the “Fengqiang Experience” idea and has the most advanced mediation system, and the Australian government would like to learn from China in the legal mediation aspect. These results indicate the existence of the mutual influence of the legal system between China and Australia.

6.2 Considering Cultural Difference in Transplanting Rule of Law Theory

Referring to above mutual influence between China and Australia, it is reasonable to consider borrowing legal theory from each other to improve judicial systems. For instance, as discussed above, during the period of premodern China, legal borrowing played an indispensable role in the process of legal reform.¹⁴⁸ However, it is necessary to consider the profound influence of legal culture and national conditions when transplanting foreign theories since transplantation does not take place in a legal culture vacuum. Based on the theory of path dependence, it is required to consider the legal culture when transplanting legal theories.¹⁴⁹ Legal culture is a flexible characteristic that indicates stable patterns of legal

¹⁴² Thirgood, R. (1999). Dispute resolution Chinese style – the influences, *Australian Dispute Resolution Journal*, 10 (4), 266, 270, 273.

¹⁴³ Civil Procedure Act § 56.1 (NSW 2005).

¹⁴⁴ Uniform Civil Procedure Rules § 2.1 (NSW 2005).

¹⁴⁵ Legal Profession Uniform Law Australian Solicitors’ Conduct Rules § 7.2 (NSW 2015).

¹⁴⁶ Civil Dispute Resolution Act § 4.1A (Australia Cth 2011).

¹⁴⁷ Victorian Law Reform Commission, *Improving Alternative Dispute Resolution*, Chapter 4 Civil Justice Review: Report. 209, 213 (2008).

¹⁴⁸ Wu, Q. (2017). How has China formed its conception of the rule of law? A contextual analysis of legal instrumentalism in ROC and PRC law-making. *International Journal of Law in Context*, 13(3), 283.

¹⁴⁹ Path dependence is based on the straightforward assumption that “history matters.” It attempts to explain exactly how history matters through studies of how constraints on normal

behaviours and oriented attitudes among the public.¹⁵⁰ Legal culture plays a significant role in legal transplantation since legal culture is a system-specific manner where legal institutions, practices and values are integrated into the function of a legal system.¹⁵¹ Transplanting legal theories with the consideration of legal culture would benefit economics, political science and historical sociology.¹⁵² Considering legal culture is also required for economic development since certain things done by the people must have durable consequences,¹⁵³ including significant economic outcomes.

It is important to consider legal culture when transplanting rule of law theory. It is important to understand legal historical context, which is crucial since it is impossible to explain the observations without the knowledge of legal culture and history.¹⁵⁴ Past events would influence future events; therefore, it is significant to understand historical reasons triggering those creative sequences.¹⁵⁵ Additionally, legal culture should be considered when transplanting the rule of law legal theory due to political interests. It is necessary to consider the continuity and change of time when transplanting the rule of law theory from other countries, otherwise it will be very difficult to abolish previous behavioural and institutional patterns since transplanted rule or legal theory would be added to existing institutions.¹⁵⁶ However, considering legal culture when transplanting legal theory may trigger incremental evolution,¹⁵⁷ which can use historical forces to constrain laws similar to constraining past law.¹⁵⁸

6.3 Considering Consequences of Transplanting the Rule of Law Theory

The idiosyncratic legal governance model of China cannot be easily exported to Australia due

behaviour appear and of the form that those constraints take. Greener, Ian. "path dependence". Encyclopedia Britannica, 9 Jan. 2019. <https://www.britannica.com/topic/path-dependence> (accessed 25 August 2023).

¹⁵⁰ Nelken, D. (2004). Using the Concept of Legal Culture, *Australian journal of legal philosophy*, 29, 1.

¹⁵¹ Husa, J. (2015). A New Introduction to Comparative Law. *Hart Publishing*. p. 3-4.

¹⁵² Husa, J. (2018). Developing Legal System, Legal Transplants, and Path Dependence: Reflections on the Rule of law. *The Chinese Journal of Comparative Law*, 6(2), 131.

¹⁵³ Liebowitz, S. J., & Margolis, S. E. (1995). Path Dependence, Lock-in and History, *Journal of law, economics, & organization*, 11(1), 222.

¹⁵⁴ Husa, J. (2018). Developing Legal System, Legal Transplants, and Path Dependence: Reflections on the Rule of law. *The Chinese Journal of Comparative Law*, 6(2), 131.

¹⁵⁵ Mahoney, J. (2000). Path Dependence in Historical Sociology, *Theory & Society*, 29(4), 528.

¹⁵⁶ Husa, J. (2018). Developing Legal System, Legal Transplants, and Path Dependence: Reflections on the Rule of law. *The Chinese Journal of Comparative Law*, 6(2), 137.

¹⁵⁷ Boas, T. C. (2007). Conceptualizing Continuity and Change: The Composite-Standard Model of Path dependence, *Journal of theoretical politics*, 19(1), 52.

¹⁵⁸ Page, S. (2006). Path Dependence. *Quarterly Journal of Political Science*, 1(1), 88.

to the distinctive social management methods.¹⁵⁹ We should carefully consider the consequences of transplanting the rule of law theory from Australia to China due to totally different legal cultures. What follows transplantation is an evolutionary legal dynamic, and it is very hard to predict results since this is not only transplanting from one organization to another, but it would work as a fundamental irritation which may trigger a whole series of unexpected outcomes.¹⁶⁰ So, it is not proper to copy all legal ideas and theories from other countries. As discussed above, if the rule of law-focused reform intends to become successful, it is necessary to consider these legal culturally adaptive behaviours.¹⁶¹

It is hard for the Chinese legal system to absorb an Australian legal theory due to Chinese special legal tradition and the characteristics of Chinese rule of law. The co-existence of formal legality and informal morality methods for solving disputes show the difference from Australia. Due to traditional Chinese Confucianism, mediation and morality were emphasized, and the law was only regarded as an instrument of state control.¹⁶² The influence of Confucianism is profound, which formed the rule by law theory in China. The separation between morality and legality has established an institutional pattern, which is an outcome of historical developments in early China.¹⁶³ This legal theory has lasted over a millennium¹⁶⁴ and has profoundly influenced the present Chinese legal theory. Currently, Chinese legalism can be interpreted in a way that highlights internal moral dimensions.¹⁶⁵ For example, a high mediation rate of 67.3%¹⁶⁶ is an aspect reflected in the influence of legal culture, which is totally different from Australia. Therefore, to avoid the unexpected outcomes of the transplantation of law, it is inappropriate to transplant the rule of law theory

¹⁵⁹ Seppanen, S. (2018) Chinese Legal Development Assistance: Which Rule of Law? Whose Pragmatism? *Vanderbilt Journal of Transnational Law*, 51(1), 101.

¹⁶⁰ Husa, J. (2018). Developing Legal System, Legal Transplants, and Path Dependence: Reflections on the Rule of law. *The Chinese Journal of Comparative Law*, 6(2), 134.

¹⁶¹ Prado, M. & Trebilcock, M.J. (2009). Path Dependence, Development, and the Dynamics of Institution Reform, *The University of Toronto law journal*, 59(3), 358-64.

¹⁶² Haley, J. O. (2016). Law's Political Foundations: Rivers, Rifles, Rice and Religion. *Edward Elgar Publishing*. p. 90-92.

¹⁶³ Husa, J. (2018). Developing Legal System, Legal Transplants, and Path Dependence: Reflections on the Rule of law. *The Chinese Journal of Comparative Law*, 6(2), 141.

¹⁶⁴ Window, H. (2006). A short history of law, norms, and social control in Imperial China. *Asian-Pacific Law & Policy Journal*, 7, 299.

¹⁶⁵ Winston, K. (2005). The Internal Morality of Chinese Legalism, *Singapore journal of legal studies*, 313.

¹⁶⁶ From January 2020 to mid-August 2022, the people's courts appointed a total of 767,000 pre-litigation mediation disputes online by "head-to-head" units, with a mediation success rate of 67.3%.

<https://news.cctv.com/2022/08/24/ARTIZ7LLoXRuCJkckdYBDx2x220824.shtml> (accessed on 25 August 2023).

from Australia to China directly due to the totally different cultures between China and Australia.¹⁶⁷

7. Conclusions

Implementing the rule of law theory can bring economic and social interests. The legal reform of promoting the rule of law in China has become a major driving force to promote economic growth in China.¹⁶⁸ In the past several decades, China has made great progress in promoting the rule of law theory, such as the issuance of the *Chinese Civil Code*. China also made efforts to promote the rule of law, such as issuing the Outlines for the next five years and propelling legal reforms. It took a long time for Australia to find the correct conception of the rule of law and apply it in practice.¹⁶⁹ China initially created its own “people-centred” rule of law. More efforts and time would be needed for China to form its own rule of law theory, which is more suitable for China’s national conditions. Chinese rule of law development is commercially motivated due to the aspiration of joining the WTO and the implementation of the Chinese foreign policy of the “Belt and Road Initiative”.¹⁷⁰ The economic benefits of legality include the conditions of commercialization and high demographic mobility. The economic benefits of legalism include the stronger enforcement of contracts, more predictable economic behaviours of private individuals and public governments, and access to institutional information, which lowers transaction and information costs during economic activities and facilitates the allocation of resources. Referring to the social benefits, the implementation of the rule of law theory can increase the willingness of private parties to pursue judicial solutions to local disputes, which can provide the government with more information and therefore the government can manage private social, economic and political behaviours.¹⁷¹ Therefore, it is necessary to encourage the rule of law implementation in China, which can stimulate long-term and stable social and economic development. To improve Chinese rule of law application, some scholars consider transplanting the rule of law theory from western countries such as Australia to improve the Chinese legal system. However, it is required to consider the profound influence of legal culture when transplanting foreign theory. There exist great differences in legal cultures between China and Australia. Confucianism’s theory of educating via morality education and

¹⁶⁷ Eric W. O. (2001). The rule of law in China, *Vanderbilt Journal of Transnational Law*, 34(1), 106.

¹⁶⁸ Eric W. O., (2001). The rule of law in China, *Vanderbilt Journal of Transnational Law*, 34(1), 99.

¹⁶⁹ Chen, H. Y. A. (2016) China’s Long March towards Rule of Law or China’s Turn against Law, *The Chinese Journal of Comparative Law*, 4(1), 9. <https://doi.org/10.1093/cjcl/cxw003>

¹⁷⁰ Qin, Y. J. (2003). WTO-Plus Obligations and Their Implications for the WTO legal system: An appraisal of the China Accession Protocol. *Journal of World Trade*, 37(3), 483. Seppanen, S. (2018) Chinese Legal Development Assistance: Which Rule of Law? Whose Pragmatism? *Vanderbilt Journal of Transnational Law*, 51(1), 102.

¹⁷¹ Zhang, T., & Ginsburg, T. (2019). China’s Turn Toward Law. *Virginia Journal of International Law*, 59(2), 372-374.

resolving problems through mediation has lasted over a millennium¹⁷² and deeply influenced the present Chinese legal theory. The transplantation of legal theories can bring numerous unexpected problems, and it is impossible to predict all results. Therefore, it is improper to transplant the Australian rule of law theory to China directly without any modifications.

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¹⁷² Window, H. (2006). A short history of law, norms, and social control in Imperial China. *Asian-Pacific Law & Policy Journal*, 7, 299.

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