LEGAL AND ECONOMIC DEVELOPMENT WITH SUI GENERIS CHINESE CHARACTERISTICS: A SYSTEMS THEORIST'S PERSPECTIVE

Dr. Xiao Li*

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INTRODUCTION

The astonishing and persisting economic growth without a sound rule of law scheme in China has long been observed as an intriguing but troublesome mismatch.¹ The myth can largely be attributed to the inapplicability in China of the deterministic causal relationship between economic development and the rule of law, a conviction generally held by scholars of law and economics.² The premise of such a line of reasoning is

¹Assistant Professor, City University of Hong Kong. My special thanks go to the editors of the Brooklyn Journal of International Law for their insightful and professional edits. All errors are my own.

²Apart from economists, quite a large number of legal scholars have devoted their research to this issue. Representative works include RANDALL PEERENBOOM, CHINA’S LONG MARCH TOWARD RULE OF LAW (2002); JUDICIAL INDEPENDENCE IN CHINA: LESSONS FOR GLOBAL RULE OF LAW PROMOTION 86 (Randal Peerenboom ed., 2010); RANDALL PEERENBOOM, CHINA MODERNIZES: THREATS TO THE WEST OR MODEL FOR THE REST? 34 (2007); Donald C. Clarke, Legislating for a Market Economy in China, in CHINA’S LEGAL SYSTEM: NEW DEVELOPMENTS, NEW CHALLENGES 13, 14 (Donald C. Clarke ed., 2008); ULRIC KILLION, MODERN CHINESE RULES OF ORDER: PARADOX OF LAW AND ECONOMICS 189 (2007); STANLEY LUBMAN, BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO 102 (2002); Yongqin Wang, Understanding Economic Development and Institutional Change: East Asian Development Model Reconsidered with Implications for China, 16 J. CHINESE POL. SCI. 47, 48 (2011).

²This understanding first starts from the differentiation between common law regimes and civil law regimes. According to the Legal Origin theory, common law regimes tend to have better performance in capital markets and economic development in general. For a brief but apt summary, see John Ohnesorge, China’s Economic Transition and the New Legal Origins Literature, 14 CHINA ÉCON. REV. 485, 487 (2003). For legal origin theory, see Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, The Economic Consequences of Legal Origins, 46 J. ÉCON. LITERATURE 285, 298 (2008). According
the existence of a simplistic, linear causal relationship between a country’s institutional framework and its observed economic performance.\(^3\) In essence, the separation of power among the legislature, the judiciary, and the executive administration sets up a sound framework in which the necessary, if not sufficient, conditions for healthy economic development are said to be in place.\(^4\) Economic development without such a framework is seemingly in conflict with this traditional wisdom.

Along with such a line of reasoning, development must occur through a dramatic shift, as happened when the Soviet Union and its former satellites abandoned communism, and replaced it with the democratic legal framework of the dominant Western

to La Porta et al., “legal origins—broadly interpreted as highly persistent systems of social control of economic life—have significant consequences for the legal and regulatory framework of the society, as well as for economic outcomes.” Id. at 326.

3. For a critical review of the Legal Origin theory, see Ruth Aguilera & Cynthia Williams, “Law and Finance”: Inaccurate, Incomplete, and Important, 6 BYU L. REV. 1413 (2009), and the three fallacies—“the extrapolation fallacy” (by extending a conclusion at micro-levels to complex systems), “the transmission problem” (the unclear consequential link between legal origin, company law, and stock markets), and “the exogeneity paradox” (the assumption that legal institution can be separated)—identified by Professor Katharina Pistor. See Katharina Pistor, Rethinking the “Law and Finance” Paradigm, 6 BYU L. REV. 1647, 1648–62 (2009).

4. This can largely be attributed to the then widely promoted Washington Consensus, which was coined by John Williamson and targeted reform policies for Latin America. Among the ten original themes, the final theme is “The legal system should provide secure property rights without excessive costs and make these available to the informal sector.” As stated by Williamson: “Shortly after I had written my 1989 paper, I began to get interested in the transition from communism to a market economy that was then in its early stages. It soon became clear that institutional issues were, or at least should be, at the heart of the transition, and that one of the most critical actions was defining property rights.” See John Williamson, Senior Fellow, Inst. for Int’l Econ., The Washington Consensus as Policy Prescription for Development, A Lecture in the Series “Practitioners of Development” 11 (Jan. 13, 2004). Criticism against the Washington Consensus has long been in existence. See David Rodrik, Goodbye Washington Consensus, Hello Washington Confusion? A Review of the World Bank’s Economic Growth in the 1990s: Learning from a Decade of Reform, 44 J. ECON. LIT. 973, 973–74 (2006); Charles Gore, The Rise and Fall of the Washington Consensus as a Paradigm for Developing Countries, 28 WORLD DEV. 789 (2000).
This process of transformation was conducted at a huge cost and the long-term implications are still too early to tell. In stark contrast to the aforementioned transformation, China follows an alternative “evolutionary” approach, which is “piecemeal, partial, incremental, [and] often experimental.” While the efficacy of the Chinese approach has been made manifest in Chinese economic development over the past thirty years, its incongruence with the generally accepted theory of law and economics scholars presents some interesting areas for analysis.

To understand this phenomenon, legal scholars have been approaching it from a combination of backgrounds in sociology, economics, and political science. Among those approaches, recent developments in Systems Theory, the Complexity Theory, the Institutional Theory, and the Behavioral Economics are worth noting. These theories provide a framework for analyzing the complex interactions between the economic, social, and political factors that shape the development of market economies.


6. The bleak picture can be observed in Theodore Gerber & Michael Hout, More Shock than Therapy: Market Transition, Employment, and Income in Russia, 1991–1995, 104 AMER. J. SOC. 1, 3–6 (1998). But see generally Vladimir Popov, Shock Therapy Versus Gradualism Reconsidered: Lessons from Transition Economies after 15 Years 1 (Ctr. for Econ. & Fin. Res. at New Econ. Sch., Working Paper No. 68, 2006). The author first separated the transformation period into two stages: the transformational recession, and the recovery and the process of economic growth. Several factors contributed to the former recession, which include the distortions in industrial structure, trade patterns accumulated during the period of central planning, and the collapse of state institutions during transition period. As the ill-effects of the former factors gradually disappeared in the recovery stage, the positive effects of the ongoing liberalization on economic growth became apparent. Still, the author admonished that “institutional capacity and reasonable macroeconomic policy” are prerequisites for successful economic growth.


8. See Niklas Luhmann, A SOCIOLOGICAL THEORY OF LAW (Martin Albrow ed., Elizabeth King & Martin Albrow trans., 1985); Gunther Teubner, LAW AS
ry,9 and the Complex Adaptive System (CAS) theory10 are of special relevance. The adaptation of the Systems Theory from biology to social science has long been credited to Niklas Luhmann, who developed two key concepts—operational closure and structural coupling—to understanding the autopoietic development of a social system.11 For a systems theorist, a system is embedded within an environment composed of other systems.12 Due to the internal operational closure and the struc-


10. JOHN H. MILLER & SCOTT E. PAGE, COMPLEX ADAPTIVE SYSTEMS: AN INTRODUCTION TO COMPUTATIONAL MODELS OF SOCIAL LIFE (2007); YIN SHAN & ANG YANG, APPLICATIONS OF COMPLEX ADAPTIVE SYSTEMS (2008). The general thesis is that social systems can be deemed CASs.

11. See the following discussion in Part I.

12. According to Luhmann, society as a system is subdivided into subsystems by a principle of functional differentiation:

One can describe a society as functionally differentiated as soon as it develops its main subsystems with a view towards specific problems which then will have to be resolved within the frame of every corresponding functional system. This implies to renounce to a fixed hierarchy among functions... Instead of such a hierarchy... one should establish the rule according to which every system takes its own function to take precedence over others and then conceives of others functional systems—and in fact of society as a whole—as its environment.

tural coupling with the external environment, a system must be studied within a network of systems. An inference can accordingly be drawn that co-evolution of a system and its environment is an inherent feature of the Systems Theory.

Alternatively, the Complexity Theory and the CAS theory supplement our understanding of the autopoiesis of systems by exploring the complexity of the co-evolution process. For Holland, CASs are “systems that involve many components that adapt or learn as they interact.” In a similar vein, Ruhl deems a CAS something “comprised of a macroscopic, heterogeneous set of autonomous agents interacting and adapting in response to one another and to external environment inputs.” It thus follows that social systems, including the legal system, the

Croatia, Sept. 14–18, 2009), available at http://www.u-picardie.fr/~LaboERSI/travaux/fichiers/T595.pdf (quoting and translating from Niklas Luhmann, Politique et Complexité 43–44 (1990), translated from Soziologische Aufklärung 4: Beiträge zur funktionalen Differenzierung der Gesellschaft (1987)). For Seidl, “[f]unctional systems constitute environment for each other.” This is because each system has its own language of a set of binary code and reproduces by self-reference. And “[t]he different systems are merely structurally coupled to each other, i.e. their structures are adjusted to each other in such a way as to allow them to react to their respective operations.” See David Seidl, Luhmann’s Theory of Autopoietic Social Systems 14 (Ludwig-Maximilians-Universität München Munich Sch. of Mgmt., Working Paper No. 2004-2, 2004). For the purpose of this article, the political system, legal system, and economic system are subsystems of the social system. Each of the three constitutes the part of the environment of some other subsystem of the social system. To facilitate discussion in this article, we assume that the social system constitutes the political system, the legal system, and the economic system only.

13. See generally Seidl, supra note 12.


15. J.B. Ruhl, Law’s Complexity: A Primer, 24 Ga. St. U. L. Rev. 885, 887 (2008). For Rihani, Complex Adaptive Systems share the following traits: “They have active internal elements that furnish sufficient local variety to enable the system to survive as it adapts to unforeseen circumstances. The systems’ elements are lightly but not sparsely connected. The elements interact locally according to simple rules to provide the energy needed to maintain stable global patterns, as opposed to rigid order or chaos. Variations in prevailing conditions result in many minor changes and a few large mutations, but it is not possible to predict the outcome in advance.” See Samir Rihani, Complex Systems Theory and Development Practice Understanding Non-Linear Realities, 80 (2002).

that a system is capable of stabilizing itself. Such dynamic equilibriums of CASs are the result of continuing feedback or learning processes between agents within a system, and between a system and its environment. In turn, the sustainable

18. The development path of complex systems is captured by attractors, “the closed set of states a system repeatedly traverses when at equilibrium.” See Cliff Hooker, Introduction to Philosophy of Complex Systems, in PHILOSOPHY OF COMPLEX SYSTEMS, supra note 16, at 3, 24. Three types attractors have been identified: (1) point attractors—equilibrium points where the system will tend to and then stop; (2) cyclical attractors—as what the pendulum does between two points; and (3) strange chaotic attractors in non-linear complex systems—the development path always distinct from the past path, an unpredictable evolutionary process that is decided by initial conditions. The strange chaotic attractors are thus relevant to the current study. For organized complex systems, there are a large number of attractors, which are similar but not identical. Rihan, supra note 15, at 8, 78–80. However, the difference between attractors is within specific limits.

In general, a disturbance to a system at equilibrium will lead the system into one of three situations: (1) stay put within the current attractor basin; (2) be pushed to another attractor basin but of the same fitness landscape; or (3) transform to another attractor basin of a new fitness landscape. Though internal variations happen all the time, the system remains stable in the sense that it does not escape the attraction of existing attractors of the existing fitness landscape, or the picture of the whole system cannot easily change into another global pattern attracted by another set of attractors. If the latter happens, the structure of the system changes. Thus, it is the existence of these attractors that explains the emergence of order in seemingly chaotic systems. See Hooker, supra, at 23–25.


Still, it must be mentioned that some minor variation may initiate a catastrophe through which the current equilibrium state of the system will shift into a totally different state with a new set of attractors. The intriguing issue is we cannot know beforehand which variation at what time will lead to the catastrophe. Accordingly, catastrophes are generally not welcomed in our discussion.

19. In Luhman’s words, this is a recursive reference process, including both the internal self-reference and the external structural coupling between the system and its environment. Specifically, “[c]ommunication comes about
growth of a system is decided not only by the quality of the system on its own but also, more importantly, by the compatibility of the system with those other systems that make up its environment. The importance of such an understanding is at least twofold. First, the co-evolution between and among systems seriously constrains the application of the traditional wisdom that operates under the presumption that there is a simplistic, linear one-way causal relationship to be identified. Second, the role of a regulator in CASs is better deemed an adaptive manager who is good at understanding and responding to the dynamic and continuing learning process of the elements within systems.20

The application of such theories to China demands an understanding of the sui generis Chinese characteristics: Confucianism, Chinese Communist Party (“CCP” or the “Party”) control, and strong, centralized government control, which reveal a distinctive configuration of the autopoiesis of Chinese systems. In contrast to the rather strong operational closure of the legal system in Western countries, the Chinese legal system has a relatively weak internal operational closure and a strong, but nearly one-way, structural coupling in which it is subjugated to both the economic system (at least during the fast growth period) and the political system.21 With such a configuration of autopoiesis, the Chinese legal system has been adapting on dual track schemes and via experiments, yielding meaningful experiences that can be put to use on a wider scope. Additionally, the adaptive efficiency of China’s system requires strong compatibility among different systems. Indeed, both the dominant CCP control and strong central government control have largely been employed to support economic growth. Specifically, deregula-

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20. Even though Ruhl is describing the recent development in American court management, the quotation is applicable to the trial-and-error style adaptive walk. See J.B. Ruhl & Robert L. Fischman, Adaptive Management in the Courts, 95 Minn. L. Rev. 424, 428 (2010).

21. See infra Part II.
tion to local governments, which provides opportunities to apply trial-and-error techniques, is put to effective use by strong central and CCP control in coupling or learning between patches of the system. Effective and efficient learning processes may accordingly have been achieved for the whole system. Retrospectively, the government has largely realized its role as an adaptive manager of CASs.

The structure of the Article is as follows. Part I will give a brief introduction to the systems theories. Next, Part II will describe sui generis Chinese Characteristics. This background information will then be used to apply the Systems Theory to the adaptation of Chinese legal systems in Part III, and show in Part IV how the compatibility among different systems has contributed to persistent economic growth in China over the past thirty years.

I. THEORETICAL BACKGROUND

A. The Systems Theory

By adapting the autopoiesis of organizations in biology, Niklas Luhmann develops the Systems Theory for social science. For biologists, autopoiesis implicates both self-reference and self-reproduction of elements of biological organizations. Self-reference refers to a development process relying on the interactions among and between internal constituent elements of an organization; self-reproduction is a concomitant result of

22. “Patch” has a special meaning in Complexity Theory. The idea is attributed to Stuart Kauffman, who created this concept in his book. STUART KAUFFMAN, AT HOME IN THE UNIVERSE 252–57 (2000). Patches are decision-making units of a complex adaptive system, which do not overlap but are coupled with each other. In China, the provinces can appropriately be deemed patches, which is similar to the well-known models of “competitive federalism.” For an application of the patching theory to decision making, see David Post & David Johnson, “Chaos Prevailing on Every Continent”: Towards a New Theory of Decentralized Decision-Making in Complex Systems, 73 CHI.-KENT L. REV. 1055 (1998).

23. See supra note 5.

this self-referential process. Viewed from this feature alone, organizations are autopoietic in that they are operationally closed.

In social science, Luhmann defines a system through the process of delineating a system from its environment, which is comprised of a number of other systems. Within a system, a program using a language of a binary code dictates the operation of the elements of the system. Interactions between a system and its external environment are achieved by structural coupling, meaning the communication of information or learning in social science. Given that a system is embedded within its environment, structural coupling provides important information conduits between a system and its environment.

It shall be noted that both internal and external pressures may initiate a coupling process. For instance, abrupt envi-

25. For Luhmann, "[s]ocial systems can only reproduce themselves by (always self-referential) communication." See Niklas Luhmann, The Unity of the Legal System, in AUTOPOIETIC LAW: A NEW APPROACH TO LAW AND SOCIETY 16 (Gunther Teubner ed., 1987). Also, for Luksha, “By all means, self-reproduction must be self-referential, because it (a) requires system to operate on itself, (b) requires a system to maintain a representation (or some kind of description) of itself.” Pavel Luksha, Society as a Self-Reproducing System, 2 J. SOCIOCYBERNETICS 13, 15 (2001).

26. See the translation by Julien Broquet, supra note 12. The delineation of a social system and its environment hinges upon the operational closure of the system in which the binary code is employed. Accordingly, a social system cannot communicate with its environment but can only be structurally adjusted through structural coupling with the other subsystems in the environment.

27. The binary code can be understood in positive and negative terms. For instance, in law the binary code is legal or illegal; in politics, power or not in power; and in economics, possession or non-possession, or payment or non-payment.

28. Luhmann differentiates a social system from the other living systems by emphasizing communication, which is a synthesis of selection of information, and utterance. See Niklas Luhmann, Social Systems 142 (Timothy Lenoir & Hans Ulrich Gumbrecht eds., John Bednarz, Jr. & Dirk Baecker trans., 1995). In essence, “the autopoiesis of social systems, i.e. the reproduction of communications through communications.” Seidl, supra note 12, at 9. See also Gunther Teubner, The Two Faces of Janus: Rethinking Legal Pluralism, 13 CARDOZO L. REV. 1443 (1992).

29. Humberto R. Maturana & Francisco J. Varela, The Tree of Knowledge: The Biological Roots of Human Understanding 74
Environmental changes may demand changes within a system,\textsuperscript{30} or the intensive conflicts within a system may change the environment within which the system is embedded.\textsuperscript{31} Hence, a system both influences and is influenced by its environment. What is emphasized by systems theorists, however, is that external information must be digested by the internal elements to achieve autonomous self-reproduction.\textsuperscript{32} Thus, even though systems theorists juxtapose structural coupling with operational closure, the former serves the latter and the importance of structural coupling may easily be downplayed.

The Systems Theory approach departs from the focus of the traditional wisdom on the simplistic, linear causal relationship to a network study by considering any given system merely as a part of some greater network. Also, taking into account coevolution requires a continuing reflexive regulatory approach, according to which the regulator must be proactively responsive to the information communicated in the co-evolution process. In other words, too much inflexibility will lead to a rigid regulatory framework that is unsuitable to the dynamic co-evolution process.


31. For instance, how decision making in one nation leads to changes to the world system, as shown by the ramifications of the case of William Marbury v. James Madison, 5 U.S. 137 (1803), in the US.

32. In contrast with the biological reproduction of individuals, Luhmann argues that a social system reproduces itself by self-reference, but emphasizes the role of communication: “Social systems use communication as their particular mode of autopoietic reproduction. Their elements are communications which are recursively produced and reproduced by a network of communications and which cannot exist outside such a network.” Niklas Luhmann, The Autopoiesis of Social Systems, in Sociocybernetic Paradoxes Observation, Control and Evolution of Self-Steering Systems 172, 174 (Felix Geyer & Johannnes van der Zouwen eds., 1986).
B. The CAS Theory

1. Complexity

While the Systems Theory identifies two key qualities of a social system—operational closure within the system and structural coupling between the system and the other systems in the environment—the recent development of the CAS Theory helps us better understand the complexity of the co-evolution between a system and its environment.33 The study on the complexity of a system starts from the observation of chaos at the detailed levels of a system.34 For activities of systems at detailed levels, simple deterministic biology, physics, and chemistry rules play their due roles.35 However, once such rules repeat numerous times, tiny differences in the initial situation

33. Note that Professor Eve Mitleton-Kelly termed social systems as Complex Evolutionary Systems. See Eve Mitleton-Kelly, Ten Principles of Complexity and Enabling Infrastructures, in COMPLEX SYSTEMS AND EVOLUTIONARY PERSPECTIVES ON ORGANIZATIONS: THE APPLICATION OF COMPLEXITY THEORY TO ORGANIZATIONS (Eve Mitleton-Kelly ed., 2003). Mitleton-Kelly argues that:

Although we make a conceptual distinction between a ‘system’ and its ‘environment’ it is important to note that there is no dichotomy or hard boundary between the two . . . in the sense that a system is separate from and always adapts to a changing environment. The notion to be explored is rather that of a system closely linked with all other related systems within an ecosystem . . . . Within such a context change needs to be seen in terms of co-evolution with all other related systems, rather than as adaptation to a separate and distinct environment.

Id. at 29–30.

Still, it must be noted that complex theory itself is full of complexity. Despite the exponential development for the past thirty years or so, Hooker observes that “there is no unified science of complex systems . . . the empirical domain of complex systems is itself complex—at this time irreducibly complex!” Hooker, supra note 18, at 3–90, 5.


35. See Robert Bishop, supra note 34.
will be amplified and lead to huge differences in the end results.\footnote{36} Likewise, a minute disturbance to the normal development process may also lead to unexpected results.\footnote{37} The randomness of the end results is called chaos, which is sensitive to the initial conditions of a system.\footnote{38}

The above line of reasoning may also be applied to social science studies, as evidenced by the ability of human beings to learn from the past in planning for the future. Indeed, the autopoiesis of a social system is achieved through such a continuous ongoing information communication process, in which agents “recursively use the results of previous steps and anticipate future ones.”\footnote{39} As amplification of tiny differences of the initial states during the development process is normal, the application of the traditional linear thinking in social science may accordingly be constrained.

However, chaos does not provide the whole picture of the co-evolution of a system and its environment. Complexity theorists also note that the emergence of qualities unforeseen at the level of individual elements of a system come into existence as the chaos develops.\footnote{40} The unanticipated quality may well appear in an orderly way, or, to use the language of complexity theorists, an order may emerge at the global level despite chaotic localities.\footnote{41} For instance, synchronization has been widely observed in both nature and in human society.\footnote{42} Alternatively,}

\footnote{36. This is not to say that the difference cannot be suppressed, for amplification can be either positive or negative. See Hooker, supra note 18, at 24.}

\footnote{37. See Rihani, supra note 15, at 80.}

\footnote{38. Id.}


\footnote{40. Rihani, supra note 15, at 7. For a brief history of emergence and its implication on social science studies, see Peter A. Corning, The Re-emergence of Emergence, and the Causal Role of Synergy in Emergent Evolution, 185 SYNTHÈSE 295 (2012).}

\footnote{41. Rihani, supra note 15, at 7.}

\footnote{42. See text accompanying note 17 supra. For example, some orderly quality has already been observed in swarms of fireflies, which will flash in the same place at the same time and with the same frequency. For a recent introduction to the application of sync, see Johan Suykens & Grigory Osipov, Introduction to Focus Issue: Synchronization in Complex Networks, 18 Chaos, 037101-1, at -1 to -4 (2008).}
the development process of a system may also be discontinuous and subject to critical situations, where a minimal perturbation of the situation may give rise to an abrupt catastrophe to the whole system. Thus, the unpredictable complexity of a dynamic system can be seen as a result of chaos and of how systems and environments are affected by such chaos.

Throughout the ever-changing development process of a system, intermediary states between total chaos and complete order are the norm. In fact, a system is at the edge of chaos most of the time. This may not necessarily be inimical for the development of a system. A system at equilibrium does not have sufficient energy to engender changes in response to alterations in its environment and may thus degrade into death. Nor is it desirable that a system is in total chaos, as these scenarios are typically characterized by a failure to function as an organized system as a result of a proliferation of uncertainty. An appropriate combination of chaos, emergence, and catastrophe thus helps the system keep an adaptable healthy status. On this, Rihani states:

Too few states produce unvarying order and too many create chaos: both are dead ends. Poised between the two regimes, Complexity is the zone where self-organization allows new stable patterns to emerge and evolve without compromising the survival of the entire system. In all cases the system must

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44. This idea is widely attributed to Chris Langton, Computation at the Edge of Chaos: Phase Transitions and Emergent Computation, 42 PHYSICA D 12 (1990). See also Ruhl, supra note 18, at 1418.

45. See Langton, supra note 44; Ruhl, supra note 18, at 1418.

46. See Rihani, supra note 15, at 80.

47. Fryer contends that the most productive state is at the edge of chaos, where maximum variety and creativity provides possibilities of behavior. See Peter Fryer, A Brief Description of Complex Adaptive Systems and Complexity Theory, http://www.trojanmice.com/articles/complexadaptesystems.htm (last visited Aug. 24, 2013).
have some variety to give it flexibility to withstand unexpected shocks, but limits on variety are also necessary to avoid chaos.\footnote{RHANI, supra note 15, at 80.}

In sum, chaos cannot be avoided. Instead, it is internalized into the dynamic governance scheme of a system. The unanticipated emergence of quality at the level of a system implies that a whole system cannot be intuitively understood simply through the identification of individual elements. Accordingly, it is inadvisable to make \textit{ex ante} projections of the development of a whole system on the basis of our knowledge of individual elements or any subsystem only. Instead, the non-linear interaction characteristic of co-evolution should be introduced to liberate us from the established constraints of traditional wisdom.

2. Adaptability

The second characteristic of a social system is its adaptability. In order to describe the adaptation at detailed levels, Stuart Kauffman introduced the concept of fitness landscapes, which consist of all possible survival strategies (trajectories) of agents within a system.\footnote{STUART A. KAUFFMAN, THE ORIGINS OF ORDER: SELF-ORGANIZATION AND SELECTION IN EVOLUTION (1993).} Normally, the fitness landscape of an agent is full of peaks, valleys, and planes, indicating that the development path of the agent is not always a simple upward slope to the maximum of the system.\footnote{The concept was first employed to understand the dynamics of evolutionary optimization. A brief introduction on the concept of the fitness landscape can be seen in Peter Stadler, \textit{Fitness Landscapes, in BIOLOGICAL EVOLUTION AND STATISTICAL PHYSICS} 187 (Michael Lässig & Angelo Valleriani eds., 2002). For the application of the concept to legal studies, see Ruhl, \textit{supra} note 18.} However, because no agent has a “God’s eye view of its entire fitness landscape,”\footnote{For a brief review of the history of how social scientists accept Darwinian evolutionary theory, see Ruhl, \textit{supra} note 18, at 1450.} an agent spends most of his time searching for the local extremum, which may not necessarily be the global maximum.\footnote{A local extremum is the best situation of a subsystem whereas a global maximum may be understood as the best situation of the social system as a whole.}
given that the coevolution between a system and the environment the system is embedded in, the fitness landscape is said to have a fluid nature.\textsuperscript{53} In turn, a search for a nearby peak may itself be time consuming and risky, as moving out of the current niche may court further unexpected risks; for instance, falling into a low-point or simply running on vast plateaus, both of which are worse than the option to remain at its current level. In other words, neither is it effortless for an agent to climb up to a local extremum, nor is it an easy decision for an agent to move out of the niche and search for a higher peak once he stays on a local peak.\textsuperscript{54}

One inference from the above understanding is that if it is unknown when and where we can find the global peak, more meaningful trials by agents shall be promoted to achieve the more efficient and effective adaptation of the system as a whole. Given that the sensitivity to the initial situation largely limits the efficacy of a learning process from a foreign environment, it is advisable to promote the learning process between agents with similar, if not identical, initial situations.

Such understanding can conveniently be observed in how the trial-and-error approach to introducing new policies has been gradually institutionalized in China. For instance, private initiatives to get rid of poverty initially succeeded in rural China.\textsuperscript{55} Cosseted by the local and central governments, the initial successful efforts largely invigorated similar experimentation across the whole country.\textsuperscript{56} In consequence, Township and Village Enterprises (“TVEs”) in rural China contributed to economic growth, a result that Deng Xiaoping and his cohorts had not foreseen.\textsuperscript{57} Once the benefits of these local experiments

\textsuperscript{53} See Rihani, supra note 15, at 82.
\textsuperscript{54} See Ruhl, supra note 18, at 1456–57.
\textsuperscript{56} See id. at 15–17.
\textsuperscript{57} In a meeting with the guests from Yugoslavia on June 12, 1987, Deng said: “The greatest achievement that was totally unexpected is that rural enterprises [both TVEs and private enterprises] have developed.” Yingyi Qian, The Process of China’s Market Transition, 1978–1998: The Evolutionary, Historical, and Comparative Perspectives, in CHINA’S DEEP REFORM: DOMESTIC POLITICS IN TRANSITION 229, 237 (Lowell Dittmer & Guoli Liu eds., 2006); see
were realized, the Chinese central government introduced new policies by promoting the successful experiences within larger areas.58

On the whole, CAS theorists observe that the adaptation path of a system is set by attractors, which refer to “the closed set of states a system repeatedly traverses at equilibrium,”59 and attractor basins, which refer to “the wider set of states [a system] can pass through while still returning to its attractor.”60 Each system may have different states of equilibrium but each state of equilibrium has its own idiosyncratic combination of attractors and attractor basins.61 The change of a system from one equilibrium state to another is not easy, as the existence of such attractors and attractor basins makes it hard for the system to escape the attraction of existing attractors.62 Indeed, even though internal variations happen all the time, a system remains stable in the sense that the whole system cannot easily shift into another global pattern attracted by another set of attractors or attractor basins.63

Due to the existence of attractors and attractor basins, a CAS is resilient in the sense that a system has the ability to absorb disturbances and reorganize so as to stay in the same basin of attraction.64 Resilient CASs have adaptive capacities, a concept

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also Ying Fan, N. Chen & D.A. Kirby, Chinese Peasant Entrepreneurs: An Examination of Township and Village Enterprises in Rural China, 34 J. SMALL BUS. MGMT. 72 (1996). As Deng admitted, the result “just came out of nowhere.” MICHAEL ELLMAN, SOCIALIST PLANNING 72 (Phyllis Dean et al. eds., 2d ed. 1989).

59. See supra text accompanying note 18.
60. See Hooker, supra note 18, at 24. Hooker employs an example of a ball rolling in a basin. The point at the bottom where the ball may stop is a point attractor. If the ball keeps running around the basin wall without falling into a point at the bottom, then there is a cyclic attractor. A strange chaotic attractor exists in a non-linear complex system; the famous one is Lorenz’s butterfly effect.
61. Indeed, “the attractor landscape is the system’s dynamical signature.” See Hooker, supra note 18, at 24.
62. See supra text accompanying note 18.
63. Id.
64. See generally Brian Walker, C.S. Holling, Stephen R. Carpenter & Ann Kinzig, Resilience, Adaptability and Transformability in Social-Ecological...
which refers to the ability of a system to “sense threats to system equilibrium and respond by changing resilience strategies without changing fundamental attributes of the system.” In comparison with the traditional wisdom that law provides certainty, conceptualizing a legal system as a CAS emphasizes how to improve a legal system’s ability to adapt to the ever-changing external environment.

Since different systems have different resilience and adaptive capacities, adaptability will vary from system to system. The less adaptable or the stickier a system is, the longer period of time it requires to adapt to a new environment. Among the three systems (legal, political, and economic) being discussed in this Article, the stickiest system is the political system due to the fact that China is still a party state. Conversely, the economic system is the least sticky system.

The implication of such a realization is two-fold. First, the varying adaptability between systems with different degrees of stickiness may contribute to undesirable catastrophes and to the collapse of the whole system. Thus, the sticky political

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66. Id. at 1387–91.
67. Gerard Roland, Understanding Institutional Change: Fast-Moving and Slow-Moving Institutions, 38 STUD. COMP. INT'L DEV. 109 (2004). For Roland, the cultural system is the stickiest one, and the legal system and the political system follow in sequence. But since China is a party state, the political system is stickier than the legal system.
68. See Xueyi Lu, Peilin Li & Guangjin Chen (陆学艺，李培林，陈光金 主编), 2013 NIAN ZHONGGUO SHEHUI XINGSHI FENXI YU YUCE SHEHUI WENXIAN CHUBAN SHE (2013 年中国社会形势分析与预测，社会科学文献出版社) [2013 CHINA SOCIETAL ANALYSIS AND FORECAST] (2012). According to their report, despite the achievement until the Eighteenth National Congress of the CCP, [At this decisive stage, China needs to further adjust the economic structure, boost domestic consumption, find solutions to growing income inequality, and prevent the rebound of widening income gap. On the other hand, government also needs to pay more attention to adjust the deficiency of the current employment structure, mitigate the tension of labor relationship, and rely on innovative strategies to cope}
system may have to be adaptable to the new environment so that sustainable economic growth can be achieved. Second, the time lag may provide opportunities to develop different systems in sequence.\textsuperscript{70} A government may take advantage of the time lag to devote its efforts in developing its economy while passively carrying out reforms of the stickier political system so long as the delay in reform does not degrade the environment. However, the government must take advantage of the time lag tactically, without allowing the political system to drag the greater environment into catastrophe.\textsuperscript{71}

\textbf{C. Institutional Compatibility}

In essence, both the Systems Theory and the CAS Theory assume an adaptable coevolution between a system and its environment. As shown, the Systems Theory emphasizes operational closure with structural coupling supplementing information from the outside, while the Complexity Theory focuses on the details of adaptation between a system and its environment.\textsuperscript{72}

\begin{itemize}
\item with emerging characteristics of mass disturbance. Furthermore, it is essential for the government to resolve the resistance during the process of social system reform, strengthen the cooperative mechanism for social management, and change the traditional ideology of maintaining social order with rigid measures.
\end{itemize}

\textit{Id.} (as translated by author).

\textsuperscript{70} Camilo Olaya, System Dynamics Philosophical Background and Underpinnings, in 1 COMPLEX SYSTEMS IN FINANCE AND ECONOMETRICS 812, 813 (Robert Meyers ed., 2011 ed. 2010).


\textsuperscript{72} International Society for the Systems Sciences (“ISSS”) defines a system as “a family of relationships between its members acting as a whole.” Matthew Shapiro et al., The Primer Toolbox, ISSS.ORG (last visited Aug. 25, 2013), www.issss.org/primer/toolbox.htm. Professor Forrester pointed out, “The con-
The research derived from the foregoing theories thus deviates from the traditional wisdom that focuses on decision making by rational individuals to a new perspective on a network study that considers any given system as a part of some bigger network. A change to any part of the network will thus effect the situation of other aspects of the network and engender unexpected implications on the situation of the whole network. On this point, the argument of Professor Ruhl is pertinent:

The fact of coevolution in dynamical systems is the ultimate demise of reductionism. No one component can be extracted from the system, studied in isolation of the system, altered to fit whatever ideal is in operation for the system, and then inserted back into the system with the expectation that we can predict the subsequent behavior of either the component or the system. The alterations of the one component’s schema and structure will reverberate through the system, causing other components to alter their schema and structures, with who knows what as the end result.\(^{73}\)

Such understandings may press us for alternative ways to achieve the ultimate objective of the CAS study, which is to determine how to achieve the sustainable growth of the whole system.\(^{74}\) Due to the coevolution among systems that constitute an environment, the adaptive capacity of the environment as a whole depends on the compatibility among systems with different adaptive capacities. The objective of how to achieve the sustainable growth of the whole system is then transformed into how to achieve institutional adaptability by building up compatibility of the systems. Different from the prior thinking, efforts shall not be devoted only to improving the resilience and

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73. See Ruhl, supra note 18, at 1471 n.245.
74. See Ruhl, supra note 18.
adaptive capacity of any independent component system. Rather, compatibility among systems is also, if not more, important to achieve the sustainable growth of the whole system. Given that every CAS is always at the edge of chaos, a dynamic compatibility between systems within an environment is accordingly required.

A relevant study here is the research of Davis on the relationship between institutional flexibility and economic growth. Davis argues that institutional arrangements must be flexible to accommodate “continual institutional learning and adaptation.” Davis first differentiates between institutional quality and institutional flexibility, which refers to the ability of creating new institutional arrangements according to environmental development. Davis found that improvement in institutional quality may have “an immediate but temporary” positive impact on economic growth whereas improvement in institutional flexibility will lead to “a gradual but persistent” economic growth. Thus, in comparison with institutional quality, institutional flexibility is more meaningful for sustainable economic growth. Good economic institutions, according to Davis, may be sufficient to maintain the economy at a given level but do not necessarily create high or even positive growth rates of economy. In addition, Davis observes that “countries with high quality but inflexible institutions will be rich and stagnant, while countries with low quality but flexible institutions will be poor and dynamic.”

For Davis, an emphasis on institutional quality indicates a static view of the institutional environment, which is in conflict with the ever-changing reality of the world. In comparison, the focus on institutional flexibility shall in turn attract aca-

76. Id. at 318.
77. Id.
78. Id. (discussing the positive effects of institutional flexibility on the economies of Europe and the United States and the negative effects arising from the lack of institutional flexibility).
79. Id. at 307.
80. Id.
81. Id. at 306.
demic attention to the “flexible institutional matrix that will adjust in the context of evolving technological and demographic changes.” Institutional arrangements of a society shall accordingly be established with an objective to achieve adaptive efficiency—“the ability of [a society] to adjust flexibly in the face of shock and evolve institutions that effectively deal with altered reality.” This emphasis on dynamic institutional flexibility thus corresponds to the systems theorists’ focus on the coevolution among and between systems.

II. THE SUI GENERIS CHINESE CHARACTERISTICS

Chinese social systems have long been labeled with Chinese characteristics, a clear indicator of autopoiesis of the Systems Theory. According to Professor Zhang, Chinese characteristics refer to two points: Chinese in terms of culture and Socialist in terms of legal and political systems. In essence, these can be characterized as both Confucian culture and the dominance of the Chinese Communist Party. However, to explore the relationship between law and economic development, a third characteristic was also identified; i.e., the unique central-local relationship. Each trait will be discussed in sequence.

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82. *Id.*

83. Douglass North, *Understanding the Process of Economic Change* 13 (Mercatus Ctr. of George Mason Univ., Forum Series on the Role of Insts. in Promoting Econ. Growth, June 24, 2003), available at http://pdf.usaid.gov/pdf_docs/Pnacx402.pdf. But notice North then deemed China an intriguing exception, for China “does not have the rule of law, it has a political dictatorship; it does not have secure property rights—all of which have under girded the development of the United States and the [W]estern world.” *Id.* at 21.


85. I interpret Professor Zhang’s assertion that China is socialist in terms of legal and political systems to mean that the political system, which entails the legal system, is dominated by the CCP. Furthermore, the way that the legal regime interacts with economic policy is defined by a unique relationship between local and central government.
A. Confucianism

The first Chinese characteristic is Confucianism. According to Confucianism, moral virtues are better governance guidelines than laws. The contrasting philosophy in China is Legalism, according to which formal rules shall be set up beforehand and strictly enforced afterwards. Under the guidelines of Legalism, rulers are merely professionals who enforce predetermined laws. Predictability and uniformity are thus commended merits of Legalism. However, Legalism’s rigidity attracts vehement criticisms from Confucians, who hold that predetermined rules are doomed to be incomprehensive and unable to deal with the varieties of social life. Moreover, laws require

88. This is the criticism by Han against Confucianism. For Confucianists,

If you try to guide the common people with coercive regulations and keep them in line with punishments, the common people will become evasive and will have no sense of shame. If, however, you guide them with virtue and keep them in line by means of ritual, the people will have a sense of shame and will rectify themselves.

in Analects 2.3; but Han says:

When a sage governs a state, he does not wait for people to be good in deference to him. Instead, he creates a situation in which people find it impossible to do wrong. If you wait for people to be good in deference to you, you will find that there are no more than ten good people within the borders of your state. But if you create a situation in which people find it impossible to do wrong, the entire state can be brought into compliance. In governing, one must use what works in most cases and abandon what works in only a few cases. Therefore, the sage does not work on his virtue, he works on his laws.

Quoted in Eric Hutton, Han Feizi’s Criticism of Confucianism and Its Implications for Virtue Ethics, 5 J. Moral Phil. 423, 428 (2008).
89. ‘Li’ is a concept with a wide range of meaning, which may include: 1) the narrowest—ritual or rites; (2) the broader—proper conduct; (3) all the institutions and relationships. Thus, Bodde argues that “li, in short, constitute both the concrete institutions and the accepted modes of behavior in a civilized state.” And “fa is a model or standard imposed from above (the heaven), to
human beings to set up and enforce them, such that the ideal sought by legalists may be distorted by the people who construct the system. The conquest of Confucianism over Legalism dates back to the Han Dynasty and shows that governance by laws has historically been downplayed by governance by virtues in China.

What is embedded in Confucianism is the impetus to coordinate the interrelationship between individuals. For Professor Lin, such understanding can be readily identified in one key element of Confucianism represented by the Chinese character “仁.” The word itself is defined as “a good interpersonal relationship that is universally valid between two random persons.” In the words of systems theorists, such an objective can be interpreted as an attempt to constrain chaos to a reasonable extent so as to avoid catastrophes. Thus, Confucianism promotes a shift in focus from rational independent individuals to the interrelationship between individuals, an approach which is inherently in compliance with the Systems Theory approach.

The application of Confucianism in practice is guanxi, a widely recognized norm of conduct, which is pervasive in social

which the people must conform.” See Bodde, quoted in Funk, supra note 87, nn.15–16.

Laws are created for specific purposes and serve the governor who uses them to control. In contrast, li, in compliance with human nature and cosmic order, are characterized by universal validity. Thus, “a government based on li functions harmoniously because the li, being unwritten, can be flexibly interpreted to meet the exigencies of any particular situation. A government based on law creates contention because its people, knowing in advance what the written law is, can find means to circumvent it, and will rest their sophistical arguments on the letter rather than the spirit of the law.” See Funk, supra note 87, at 2–3 n.4.

90. Id. at 2–3 n.4. Bodde summarized that “laws are no better than the men who create and execute them.” See note 7 of n.4.

91. In the Han Dynasty, only Confucianism was revered whereas all the other schools were dismissed. See Sor-hoon Tan, The Dao of Politics: Li (Rituals/Rites) and Laws as Pragmatic Tools of Government, 61 Phil. E. & W. 468, 469–71 (2011).


93. Id.

94. Id. at 367 (citations omitted).
and economic life. Economically, guanxi helps to reduce transaction costs in repeated games. The implications of guanxi in economic activities shall not be deemphasized as transactions are more often made in China on the basis of guanxi affiliations than on arm’s length principles. Considering the high frequency of transactions in a fast growing economy, the binding effect of such relational contracts is evident once disputes arise; whereby contractual parties may first seek compensation through long-term contractual relationships set up on guanxi to redress losses incurred at an earlier time.

Within such a context of extensive self-enforcing, interlinked relational contracts, the function of the rule of law may in practice be circumscribed given the preference of agents to seek recourse through such norms as guanxi. The subconscious preference to avoid being present at courts may also be partly explained by the widely welcomed and long-established tradition of mediation as an important alternative dispute resolution method in China. Moreover, the inefficient and non-independent judiciary system may also lead disputants to the recourse on non-judiciary solutions.

In effect, the emphasis of guanxi throughout the history of China promotes a value-based and norm-driven governance.

95. Meling Wong, Guanxi Management as Complex Adaptive Systems: A Case Study of Taiwanese ODI in China, 91 J. BUS. ETHICS 419, 419–21 (2010). Wong argues that guanxi is bound to the five fundamental relationships, i.e., wulune—emperor-subject, father-son, husband-wife, elder-younger siblings, and friend-friend. In other words, Wong thinks that all guanxi can be interpreted in wulune.


97. Wong, supra note 95, at 421.

98. This is because initial loss may well be recovered and surpassed by the benefits to be acquired in future contracts.


100. This refers to alternative dispute resolution and political solutions such as xinfang (letters and visits), or even protests before the government office building. For letters and visits, see Carl Minzner, Xinfang: An Alternative to Formal Chinese Legal Institutions, 42 STAN. J. INT’L L. 103 (2006).
structure. It should also be noted that the strong sinicization that stubbornly persisted throughout the history of mainland China may, to this day, effectively shield China from external efforts for a change to Western culture. In fact, despite the “onslaught of new legal and commercial regimes,” guanxi practices have even been flourishing in business transactions. Hence, the long-established informal norms of guanxi continue to have an important role in social activities in China. Nevertheless, these important informal norms shall not be employed to minimize the role of law, but rather to seek the right combination between the soft norm and the hard law.

B. The Dominance of the CCP

The second characteristic is the dominance of the CCP control, which can be reflected in both the omnipresence of the CCP and the hierarchical Nomenklatura personnel management system.

1. The Omnipresence of the CCP

The structure of the Chinese political system is better described as a hierarchical structure with the leading CCP on the top and several democratic parties playing consultative roles and showing full support for the leadership of the CCP.

102. See generally HENRY KISSINGER, ON CHINA (2011).
105. Official introduction to the political system of China:

China’s political system is a system of multi-party cooperation and political consultation under the leadership of the Communist Party of China (CPC). The system was established and developed jointly by the CPC and other democratic parties in their longtime commitments to China’s revolution, its construction and reforms. The system has become a basic political system in contemporary China.
Within such a political governance structure, the omnipresence of the CCP is apparent in a number of ways. First, the CCP is the most populous party with more than 82.6 million party members at the end of 2011. CCP members occupy the majority of the National People’s Congress (“NPC”) at different levels. Though most non-party members may select to be representatives of the Chinese People Political Consultation Conference (“CPPCC”), their roles are subject to the leadership of the CCP. Also notable is the recently promoted...
“Three-Represents,” meaning that the CCP represents (1) society’s most advanced productive forces; (2) advanced culture; and (3) the needs and interests of the greatest majority of the Chinese population. This shows that the Party has become more inclusive and expansive than ever in attracting elites with different backgrounds across different classes of society. Second, the CCP’s presence is felt in social life through the CCP Constitution, which dictates the establishment of branches of the Party wherever there are three party members in any organization, be it a joint venture, a law firm, a private company, or institutions in the judicial system. Third, there is a hierarchical structured Political-Legal Committee under the CCP Committees at different levels. The members of such com-

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111. See Constitution of Communist Party of China, supra note 109, art. 29. Primary Party organizations are formed in enterprises, rural areas, government organs, schools, research institutes, communities, social organizations, companies of the People’s Liberation Army, and other basic units where there are at least three full Party members.

112. See SUSAN V. LAWRENCE & MICHAEL F. MARTIN, CONG. RESEARCH SERV., R41007, UNDERSTANDING CHINA’S POLITICAL SYSTEM (2012), available at
mittees are heads of judiciary organs at different levels, and
because judiciaries are supervised by and are responsible for
NPC at different levels, the influence of the CCP may in fact
undermine the independence of the judicial system.113

Given the omnipresence of the Party, economic agents in
China proactively follow an “if you can’t beat them, join them”
approach by seeking opportunities to be elected or attracted as a
representative either of the People’s Congress at different levels
or of the CPPCC.114 This is a mutually beneficial process. For
economic agents, joining in the club with elites who hold strong
powers in accumulating and distributing resources provides
them with a better chance to take advantage of more insider
information.115 Thus, the Party can conveniently achieve the

http://china.usc.edu/App_Images/crs-2012-understanding-china-political-syst
em.pdf.

113. See Fu Hualing, Autonomy, Courts and the Politico-Legal Order in
Contemporary China, in THE ROUTLEDGE HANDBOOK OF CHINESE CRIMINOLOGY
76–88 (Liqun Cao, Ivan Y. Sun, & Bill Hebenton eds., 2013).

114. Currently there is no specific law on CPPCC. However, the preamble to
the Constitution of the PRC (XIANFA, 宪法) states:

The Chinese People’s Political Consultative Conference, a broadly
based representative organization of the united front which has
played a significant historical role, will play a still more important
role in the country’s political and social life, in promoting friendship
with other countries and in the struggle for socialist modernization
and for the reunification and unity of the country.

XIANFA, pmbl. (1982) (China). The members of the CPPCC are selected rep-
resentatives of different walks of life and with social influence. For a brief
summary of the system, see People’s Political Consultative Conference of the
PRC, UNIV. OF MINN. HUMAN RIGHTS LIBRARY, available at

115. Empirical evidence shows that political connections bring additional
benefits to entrepreneurs. Wu et al. found that private firms with politically
connected managers perform better and receive more tax benefits from local
governments than those without such managers. In addition, politically con-
nect ed managers are more likely to be assigned to underperforming local State
Owned Enterprises. See Wenfeng Wu, Chongfeng Wu, Chunyang Zhou & Jun
Wu, Political Connections, Tax Benefits and Firm Performance: Evidence from
China, 31 J. ACCT. & PUB. POL’Y 277 (2012); Hong Bo, Political Appointments of
Managers in China (Univ. of London Working Paper, 2009), available at
political objective of diversified representation of the people and can concurrently enhance its control of the Party.\footnote{116}

Alternatively, the omnipresence of the Party transforms potential political conflicts between the different parties into those between different factions within the Party.\footnote{117} It is thus reasonable to worry that the intensive conflicts within the Party may lead to its collapse. However, the fact is that short of a hegemonic faction, a rational choice for factions is to cooperate with each other for common benefits. Furthermore, internal improvement and alternation of party leaders help the CCP to avoid the closed style of government observed in Muslim countries and sidestep the potential pitfalls of democracies where the opposing parties do not contribute to meaningful debates, but merely debate to oppose.\footnote{118} Last but not least, the collective leadership also forestalls the one-man leadership of the past by promoting “considerable bargaining and maneuvering for factional advantage.”\footnote{119} In other words, neither the similarity among different factions within the Party is strong enough to lead the system into a dying equilibrium, nor is the difference between factions strong enough to lead the system into total chaos.\footnote{120} Instead, efficiency and rationality in decision making may still be enhanced under the one party control system by

\footnote{116. This is further enhanced in the recent Opinions issued by the CCP Central. \textit{See Zhonggong Zhongyang Guanyu Jiaqiang Xinxingshi Xia Dangwai Daibiao Renshi Duiwu Jianshe de Yijian (中共关于加强新形势下党外代表人士队伍建设的意见) [Opinion of the CCP Central Committee regarding the Further Strengthening the Construction of Non-CCP Personnel under the New Situation in 2012]; Zhonggong Zhongyang Guanyu Jinyibu Jiaqian Dangguan Rencai Gongzuo de Yijian (中共中央关于进一步加强党管人才工作的意见) [Opinion of the CCP Central Committee regarding the Further Strengthening the Work of Control of Talents by the CCP], available at http://cpc.people.com.cn/BJG5/n/2012/0926/c64387-19120321.html.}


\footnote{118. \textit{Id.}}

\footnote{119. \textit{Lawrence & Martin, supra note 112.}}

\footnote{120. This is not to say that internal democracy has already achieved its desired efficacy. For instance, self-monitoring has been far from satisfactory, which in turn seriously undermines the efficacy of the internal democracy.}
both expanding the wide coverage of party members and promoting internal democracy within the Party.\textsuperscript{121}

2. The Nomenklatura System

The dominance of the CCP is further enhanced by the institutionalized Nomenklatura system. Transplanted from the former Soviet Union, the Nomenklatura system refers to the institutional arrangements on personnel management through which the Party has the power to decide the list of potential candidates for key positions, both in the government and the party’s own hierarchy, as well as to nominate qualified personnel.\textsuperscript{122} Since 1980, the system has been extended to party committees at lower levels.\textsuperscript{123}

The Nomenklatura system covers a wide range of personnel—from political positions to positions in judiciary organs, academic institutions, and enterprises.\textsuperscript{124} For instance, judges in the judiciary system and directors of state-owned enterprises (“SOEs”) are all covered by the Nomenklatura scheme.\textsuperscript{125} On the one hand, they are party members and regulated by the Nomenklatura scheme.\textsuperscript{126} On the other hand, they must per-

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\textsuperscript{121} See Zheng, supra note 117.
\textsuperscript{123} Central Committee Organization Department, “Notice on the Repromulgation of the Job Title List of Cadres Managed by the Party Central Committee, 1980,” in which the Party committees at lower levels were also required to do the same. See Burns, supra note 122, at 37.
\textsuperscript{124} For a list of the job titles covered, see Burns, supra note 122 at 42–45. A relevant concept is BianZhi, which is usually translated as “establishment.” The two concepts are different. BianZhi clarifies what departments and positions are included in an administrative setup whereas the Nomenklatura system tells which job titles are under the party control. See Kjeld Broedsgaard, Cadre and Personnel Management in the CPC, 10 China: Int’l J. 69, 76 (2012).
\textsuperscript{125} For the list of job titles covered by the Nomenklature System, see Burns, supra note 122 at 42–45.
\textsuperscript{126} See Burns, supra note 122; see also Hon S. Chan, Cadre Personnel Management in China: The Nomenklatura System, 1990–1998, 2004 China Q. 703 (2004). The so-called cadres must be “both red and professional,” or both politically adamant and technically professional (you hong you zhuan, 又红又专). See Fengcheng Yang (杨凤城), Guanyu “You Hong You Zhuan” Wenti de Lishi Pingjia (关于“又红又专”问题的历史评价) [A Historical Review of the
\end{footnotesize}
form their specific professional functions either in courts or in the SOEs.127 In turn, the promotion of such personnel is made on the basis of both their professional performance and their contribution to the Party.128 Thus, by integrating the Party’s policies into the performance evaluation criteria of people under the scheme, the Nomenklatura scheme can effectively enhance the control of the Party on both the economic and legal system.

The extensiveness and effectiveness of the Party control through the Nomenklatura scheme can easily be identified in the following diagram:129

Source: Kjeld Brødsgaard, Cadre and Personnel Management in the CPC (2012).

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127. See generally Chan, supra note 126.
129. See Brødsgaard, supra note 124, at 75.
As shown, non-party leaders cannot be found in ranks higher than the Bureau Level. It is fair to say that the Nomenklatura system today helps the Party achieve a highly controlled personnel administration system with an extensive coverage, the role of which cannot be minimized due to “its importance for the Party patronage and social stability.”\textsuperscript{130} A combined reading of the omnipresence of the Party and the Nomenklatura system tells us that a unified central leadership with a level-by-level hierarchical structure has been institutionalized not only within the Party but also in the wider administrative system of government.\textsuperscript{131}

3. Adaptation of the Party

The omnipresence of the Party and the strong personnel control under the Nomenklatura system not only helps to establish and uphold the leading position of the political system among the three systems of China, but also fosters a very strong operational closure of the CCP-dominated political system. Internally, the structural coupling of the political system with the other two systems shows a one-way radiation. As shown in the Constitution, the single-party controlled political system demands both a national economy dominated by state-owned economy and a legal system serving the policies and interests of the Party.\textsuperscript{132} Conversely, the influence of the economic and legal systems on the reform of the political system is limited.\textsuperscript{133}

Externally, the structural coupling of the Chinese political system with the political system of other countries is rather

\textsuperscript{130} Despite a short break during the Cultural Revolution period, the scheme has long been in existence. During the period of the Cultural Revolution, the intensive conflict within the party incapacitated the functioning of the system. John P. Burns, “Downsizing” the Chinese State: Government Retrenchment in the 1990s, 175 CHINA Q. 775, 802 (2003).


\textsuperscript{132} See XIANFA, pmbl., arts. 1, 5, 6 (1982) (China).

weak and again manifests itself in a one-way mode by radiating outward.\footnote{This is in the sense that the structure of the Chinese political system is stubbornly resistant to external pressures. The Chairman of the National People’s Congress Standing Committee, Bangguo Wu, stated that China will not follow the Western path and would prefer a “no political change” policy. See Zheng Yongnian, \textit{Where Does the Chinese Communist Party Go from Here?: Challenges and Opportunities}, 10 \textit{China: Int’l J.} 84, 85 (2012). Professor Zheng argues that the CCP is rather open internally but closed externally. The internal openness is achieved by intra-party democracy.} In fact, the experience of the former Soviet Union during the transition at the end of the 1980s taught China a lesson on how not to act—the Soviet Union’s abrupt and simple change of its system without a complementary socio-political environment resulted in a bitter experience.\footnote{See generally Popov, supra note 6.}

It is true that the development of the legal and economic systems may impose more intensive pressure on substantive reform of the political system.\footnote{As quoted by LI, a survey of 80,000 people conducted by the Organization Department of the CCP in 2008 showed that one third of the Chinese populace was not happy with the way the CCP leaders were selected or the performance of the CCP leaders. See Cheng Li, \textit{Intra-Party Democracy in China: Should We Take It Seriously?}, \textit{China Leadership Monitor}, Fall 2009, available at http://media.hoover.org/sites/default/files/documents/CLM30CL.pdf.} Still, the amount of delay needed to effect changes may also save enough time for the Party to reform from within. In fact, the Party has been undergoing adaptable reform.\footnote{For that, Nathan’s summarization is apt: [Four aspects of the CCP regime’s institutionalization: 1) the increasingly norm-bound nature of its succession politics; 2) the increase in meritocratic as opposed to factional considerations in the promotion of political elites; 3) the differentiation and functional specialization of institutions within the regime; and 4) the establishment of institutions for political participation and appeal that strengthen the CCP’s legitimacy among the public at large. See Andrew Nathan, \textit{Authoritarian Resilience}, 14 \textit{J. Democracy} 6, 6–7 (2003).} For instance, inner-party democracy has been promoted ever since Mao’s era and deemed the “lifeblood of the Party.”\footnote{The phrase was introduced on the 16th Party Congress in 2002. For a critical review of the Inner-Party Democracy, see Joseph Fewsmith, \textit{Inner-Party Democracy: Development and Limitations}, \textit{China Leadership Monitor}.} By introducing such measures as multi-candidate
elections, decision making by votes, and institutionalized management of the cadres, it is expected to achieve a more transparent Party life.\textsuperscript{139} In addition, the collective leadership invigorates dynamic factional politics, with the result that internal democracy may lead to greater institutionalization of the inner-party democracy, thus further enhancing the Party’s control.\textsuperscript{140} As one professor observed, “China has not moved away from socialism, but has rather kept the socialist brand and applied it in a more expansive way.”\textsuperscript{141}

The end result of such a nearly single-direction structural coupling may well be a stultified political system, which may further hinder or destroy the progress made in the economic system and the legal system. For instance, even though political and social reform had already begun since the 16th CCP Congress in 2002, the reform is to a large extent aimed at supplementing or complementing the results achieved by economic reform and perfecting the environment for economic reform.\textsuperscript{142} However, as Premier Wen once warned: “Without the success of political structural reform, it is impossible for us to fully insti-

\footnotesize{\textsuperscript{139} See generally Zheng, supra note 134.}
\footnotesize{\textsuperscript{140} See Li, supra note 136, at 7–8.}
\footnotesize{\textsuperscript{141} See Zhang, supra note 84, at 53.}
\footnotesize{\textsuperscript{142} This is still the case after the promulgation of the Resolution on Several Key Issues in Comprehensively Deepening the Reform on the third Plenum of the Eighteenth CCP Committee. See Zhuoyuan Zhang, The Key to Comprehensively Deepen the Reform is the Reform of Economic System, CHINA SOC. SCI. TODAY, Nov. 27, 2013, available at http://www.csstoday.net/xueshuzixun/guoneixinwen/86239.html. Even though a radical political reform was not possible, as what happened in the former Soviet Union, the reform in political system has been introduced at times when the political system severely constrains the development of economy.}
tute economic structural reform.” Viewed from this perspective, the adaptation of the political system is relatively passive rather than proactive.

C. The Symbiosis of Strong Central Control and Gradual Deregulation

Strong central control is the third sui generis Chinese characteristic to address. At the time when the country was founded, the objective to develop heavy industry, the necessity to guarantee agricultural provisions and supplies, and the requirement to supply public goods all made centralization both economically and politically indispensable. However, the heavy workload at the central government and the unnecessary complications arising from the information asymmetry under the command economy led to decentralization in 1957. However, serious


146. See Justin Yifu Lin, Ran Tao & Mingxing Liu, Decentralization, Deregulation and China’s Growth in Transition, in LAW AND ECONOMICS WITH CHINESE CHARACTERISTICS: INSTITUTIONS FOR PROMOTING DEVELOPMENT IN THE TWENTY-FIRST CENTURY 467, 468–71 (David Kennedy & Joseph E. Stiglitz eds., 2013). The Third Plenary Session of the 8th Congress of the Communist Party of China serves as an indicator of the first wave of decentralization by delegation of more power from the central to the local governments. Specific measures included the delegation of nearly all SOEs to local governments; planning on a regional basis was given preference over central planning on a
coordination failures called for centralization again only two years later.\textsuperscript{147} The ensuing economic stagnation reignited efforts to decentralize in the 1970s and, in turn, the investment boom arising from discretions at local levels resulted in another round of centralization.\textsuperscript{148}

As before, the re-centralized governance structure was again identified as one of the main obstacles to economic development at the beginning of reform.\textsuperscript{149} Deregulation had since been promoted to liberate productivity.\textsuperscript{150} As one main technique to deregulation, fiscal reform carried out in 1980 required local governments to seek the fiscal balance on their own.\textsuperscript{151} Local governments then began to do their utmost to promote economic development, resulting in self-contained and sufficiently diversified provincial economies, which indicate that intensive competition among different provinces may persist.\textsuperscript{152}

By invigorating local economies through inter-provincial competition, deregulation has contributed to astonishing eco-

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\textsuperscript{147} Id.

\textsuperscript{148} Id. This is the so-called second wave of decentralization, the indicator of which is the 3rd Plenary Session of the 11th CPC Congress in December 1978. Several features were similar to those of the first wave of decentralization.


\textsuperscript{150} Id.

\textsuperscript{151} See Shen et al., supra note 145. This is the “fiscal contracting system” between 1980 and 1985, through which revenue and expenditure were divided between the central and local governments and each local government was given responsibility for balancing its own budget. Taxes were accordingly categorized into the central government revenue, and revenues were shared according to a prefixed proportion between the central and the local governments. In 1985, the measure of profit remittance to the government by SOEs was replaced by that of income taxation.

\textsuperscript{152} Shen Liren (沈立人), Dai Yuanchen (戴园晨), Woguo Zhuhou Jingji de Xingcheng ji Qi Biduan he Genyuan (我国“诸侯经济”的形成及其弊端和根源) [Formation, Defect and Origin of “the Economy Divided by Dukes or Princes under Emperor” in China], 3 ECON. RES. J. 12 (1990); Alwyn Young, The Razor’s Edge: Distortions and Incremental Reform in the People’s Republic of China, 115 Q.J. ECON. 1081, 1105 (2000).
onomic growth. However, the imbalance between the central and local governments imposed a serious threat on the authority of the central government, and centralization was re-ordered in 1994. Indeed, the whole picture is better understood as “cycles of centralization and deregulation,” throughout which the central government has been holding the ultimate say on the timing and extent of deregulation. Thus, even though deregulation to local governments can be seen as a main feature of recent administrative reform, local discretion has always been subject to review from the strong center.

Considering the discretion enjoyed by local governments, the power of the central government is of special importance in China. First, strong central control provides an effective mechanism for structural coupling between local governments, which enjoy discretion that provides many opportunities for experimentation. This strong central control can limit the effects of experiments within the constraints established by the central government, enabling successful experiences to be extended to a wider scope, with negative effects arising from unsuccessful experiments accordingly limited to experiment points. Second, the central control aids in fighting against unpredictable crises, a feature that is especially important given the fitness landscape of a fast growing economy. For instance,

153. See Lin et al., supra note 146, at 484–86.
154. Shen et al., supra note 145, at 8–11.
157. See Sebastian Heilmann, Maximum Tinkering under Uncertainty: Unorthodox Lessons from China, 35 MOD. CHINA 450, 457 (2009). But see Cai & Treisman, supra note 156. According to Cai and Treisman, it is the competition at the center among factions with different ideological predispositions and local connections rather than the competition among locals that explains the economic growth. This view however does not change the argument that it is the trials at the local level that provide the dynamic to adapt to a point of efficiency.
the CCP Politburo met in October 2008, immediately after the collapse of Lehman Brothers, and released its economic stimulus package worth 4 trillion RMB in November 2008. An effective control from the central government thus secures the effective intervention required for speedy effective solutions. Third, a strong central government is essential for achieving the objective of fast growth per se, in terms of accumulating and distributing resources in a weak market economy while securing a stable environment for the adaptation of the whole system. For instance, the highly centralized planned economy helped China at the foundation of the country build its heavy industry, guarantee supply and procurement of grain, and provide public goods. Similarly, it is also the strong central control that transferred the wealth accumulated from the TVEs to avoid widespread unemployment for numerous employees of the SOEs, thus saving time for the ensuing reforms. Likewise, a strong central control is also necessary for securing a stable environment, in which the country can initiate and continue its economic reforms. Thus, the strong central control in combination with the gradual deregulation to local governments provides a suitable strategy to achieve the adaptive efficiency of the whole system.


160. See Lin et al., supra note 145.


III. IMPLICATIONS ON THE ADAPTATION OF THE LEGAL SYSTEM

A. Adaptation of the Legal System

1. Adaptation with the Dominant Political system

In stark contrast to the checks and balances scheme in the West, analyzing China’s one-party political system is integral to understanding Chinese legal development. Since the immediate and overarching political system overshadows the legal and economic development, the structural coupling between the political system and the legal system is almost always one way. In fact, the paramount dominance of the Party in the judiciary system can be observed in terms of finance, personnel, and operation.163 For instance, local governments finance local courts, and most members of the Adjudicative Committee in each court, a Committee which is in charge of influential cases, are CCP members.164 In combination with long-established social guanxi, the intrusion of politics seriously undermines the independence of the court system.165

Alternatively, the lack of confidence in the judiciary system drives disputants directly to the government for a solution. As the populace inherently thinks the government is the ultimate settler of disputes, the populace may intentionally sidestep the legal system.166 This is especially true when cases deal with

166. The letter and visit is one field example. For a critical view of the letter and visit in China, see Minzner, supra note 100, at 105; see also Carl Minzner, China’s Turn Against Law, 59 AM. J. COMP. L. 935, 938 (2011).
sensitive sociopolitical and socioeconomic issues. Additionally, the Party’s policies may easily be integrated into laws and regulations wherever ambiguous existing laws and regulations leave opportunities for the Party to intervene. In combination with these elements, the Nomenklatura scheme and the increasingly expansive party membership enhance the enforceability in social life of Party policies, which may in fact function as a “living constitution.” Just as one scholar properly argues, the Chinese legal system can only be appropriately understood with its indispensable political element.

Thus, in comparison with the rather autonomous nature of legal systems in Western society, the operational closure of the legal system within China may have to be constrained, if not handicapped, by its nearly one-way structural coupling with the leading political system.

Besides, the dominance of the political system in China also implies a delicate adaptation of the legal system. The recently promoted Three-Supremes—meaning “the supremacy of the Party, the supremacy of popular interests, and the supremacy of the Constitution and law”—within the judiciary system can be cited as a revealing example here. As an echo to the Three-Represents and the pursuit to establish a harmonious state, the president of the Supreme People’s Court proffered the Three Supremes. On the one hand, the three-supremacy

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167. Fu and Peerenboom tried to tell the difference between political cases (“directly challenging the authority of the ruling regime”), politically sensitive cases (“affect[ing] socio-political stability, economic growth, international recognition or reputation or the broad public interest”) and labor cases (using collective and different dispute resolution procedures). Fu Yulin & Randall Peerenboom, A New Analytical Framework for Understanding and Promoting Judicial Independence in China, in JUDICIAL INDEPENDENCE IN CHINA: LESSONS FOR GLOBAL RULE OF LAW PROMOTION 95–133 (Randall Peerenboom ed., 2010).

168. Id. at 96–97.

169. Id.


172. The phrase derived its origin from a speech by the then President Jintao Hu at a National Conference on Political-Legal Work convened by the CCP’s central Political-Legal Committee. President Hu said: “In their work, the grand judges and grand procurators shall always regard as supreme the par-
merely describes the established dominance of the political system among the three systems, as the supremacy of the Party has always been placed in the front. But on the other hand, the three-supremacy reveals how the Chinese judiciary system responds delicately to the current environment with a strong Party control and strong economic performance. Indeed, the inclusion of the supremacy of the Constitution and law can only be deemed politically expedient within an environment with stringent political constraints. At the very least, the supremacy of laws has successfully been maintained and, more importantly, juxtaposed with the other two supremacies, thereby securing a niche for the legal system in the Party state.

The dominant political system may also contribute to special features in the lawmaking process. It is observed that legal development in China has more often than not been the product of CCP administrative policies. Laws are introduced only when opportunities mature, such that it is usually the case that “economic necessity drove policy reform,” leading legislation to legitimize successful experiences and to further supplement the institutional predilection for the economic development. For instance, foreign trade had been promoted in practice ever since the open door policy was introduced, whereas the Foreign Trade Law was only promulgated a decade later in 1994.

This approach, whereby policy leads legislation, is also apparent in the evolution of laws on SOEs. SOEs, originally known as State Run Enterprises (“SREs”), had long been deemed gov-

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174. Id.
ernment organs rather than independent legal persons.\textsuperscript{176} In order to reform those inefficient SREs, the state introduced a series of administrative policies to enhance the autonomy of the SREs, policies which consummated in the Decision of the Central Committee of the Chinese Communist Party on Several Issues Concerning the Reform of the Economic System in 1984.\textsuperscript{177} Even though productivity had generally improved among SREs, state subsidies still supported many inefficient SREs.\textsuperscript{178} It is thus no wonder that the Enterprise Bankruptcy Law ("EBL") mainly targeting SREs was not introduced until 1986, two years after the policy was first explored in a northeastern city.\textsuperscript{179}

\begin{flushright}

177. See Yueh, \textit{supra} note 173, at 102–03.

178. Yiping Huang, Wing Thye Woo & Ron Duncan, \textit{Understanding the Decline of China’s State Sector}, 9 MOST: ECON. J. ON E. EUR. & THE SOVIET UNION 1, 5 (1999). Huang et al. observed that the initial efforts to promote autonomy of and introduce more initiatives of managers were largely ineffective by measuring the size of total factor productivity ("TFP") growth. In fact, the total losses of industrial SOEs rose from 4.2 billion yuan in 1978 to 34.9 billion yuan in 1990 and 72.7 billion yuan in 1996; an astonishing annual growth rate of 17 percent between 1978 and 1996. It is widely estimated that, in the 1990s, about one third of SOEs made explicit losses and another one-third made implicit losses.

(citation omitted) \textit{id.} at 5. Huang et al observed that “Direct subsidy to loss-making SOEs rose from 18.2 billion yuan (1.2 per cent of GNP) in 1988 to 84.4 billion yuan (2.4 percent of GNP).” \textit{id.}

179. This refers to the nationally well-known bankruptcy of Shenyang Anti-Explosion Equipment Factory in 1984. Article 1 of the law tells the importance of the law to the SRE reform:

\begin{quote}
This Law is devised to meet the need for development of the socialist planned commodity economy and economic system reform, to promote the operation of all-people owned enterprises, to strengthen the economic responsibility system and democratic administration of all-people-owned enterprises, to improve management, to enhance economic efficiency, and to protect the legal rights and interests of creditors and debtors.
\end{quote}

For the law and brief comment, see Douglas G. Boshkoff & Yongxin Song, \textit{China’s New Bankruptcy Law: A Translation and Brief Introduction}, 61 AM. BANKR. L.J. 359, 359–62 (1987); see also Mark E. Monfort, \textit{Reform of the
The Contract Responsibility System, a supplementary measure to promote productivity, through which managers reached a contract with the state, was first experimented and then promoted nationwide by the enactment of the Provisional Regulations on Contracting Management System in SOEs in 1988.\textsuperscript{180} The importance of all such efforts was to cultivate a common understanding that SOEs are separate legal persons with their own autonomy.\textsuperscript{181} With such efforts, the opportunity to introduce a law on SREs became mature. The Law on Industrial Enterprises Owned by the Whole People (“LIEOWP”) was then passed in 1988 despite the fact that SOEs, as the main organization form, had been in existence ever since the foundation of the country.\textsuperscript{182}

With experience accumulated in the development of the private economy and related foreign investment, the Company Law of 1993 further facilitated the corporatization of SOEs, through which most small and medium sized SOEs had been privatized.\textsuperscript{183} By the time the SOE reform had gone through the phase of “Grasp the Big and Let the Small Go,” inefficient small and


\textsuperscript{180} By such a system, the CEO or leader of the SO, who was the legal representative of the SOEs, signed contracts with the government, the basic principle of which were stipulated in section 5 of the Provisional Regulation, i.e., to “lock the minimum amount of profit for the SOEs to pay to the State,” and entitle SOEs “to keep the remaining profit, but remain liable for paying the fixed amount to the State even if [the] SOEs have not made satisfactory profit.” For a more detailed discussion, see Cindy Schipani & Junhai Liu, \textit{Corporate Governance in China: Then and Now}, 2002 COLUM. BUS. L. REV. 1, 8–11 (2002).

\textsuperscript{181} See Yueh, supra note 173, at 102–03.

\textsuperscript{182} Section Two of the Law on Industrial Enterprises Owned by the Whole People reads: “The property of the enterprise shall be owned by the whole people (equivalent to the notation of ‘State’), and shall be operated and managed by the enterprise with the authorization of the State in line with the principle of the separation of ownership and managerial authority.” Zhonghua Remin Gonheguo Quanmin Suoyou Zhi Gongye Qiye Fa (中华人民共和国全民所有制工业企业法) [Law on Industrial Enterprises Owned by the Whole People] (promulgated by the Standing Comm. Nat’l People’s Cong., April 13, 1988, effective Aug. 1, 1988), ch. II, art. 2.

\textsuperscript{183} While Western scholars usually employ the word privatization, corporatization is used in China.
medium sized SOEs had already failed at the efficient use of assets and labor.184 As a result, the narrow application of the EBL of 1986 became increasingly outdated.185 The Bankruptcy Law was then revamped in 2006, reflecting not only the change of the attitude of the government towards the SOE reform but also the requirements of a developing private economy and more intensive foreign related investment.186

The above examples show that policies, compared with laws, are good at applying the experimental approach and facilitating the learning process. However, a side effect of this first approach to administrative policy is that laws necessary for a free market economy may not be introduced easily. For instance, a well-defined property law has long been claimed as a precondition to economic development, yet the introduction of the Property Law was not possible until 2007, almost thirty years after the open door policy was introduced in 1978, due to the ideological constraints on the protection of private properties.187 Also, as a key law in setting up a free market, the Anti-Trust

184. The policy was introduced in 1997 at the 15th Communist Party Congress, Naughton summarized succinctly: “In ‘letting the small go,’ policy-makers were giving local governments much greater authority to restructure their own firms and, in particular, to privatize or close down some of them . . . [L]ocal government-run factories were not only much smaller than those of the central government, but also much more exposed to competitive pressures and consequently much less profitable. In fact, in the mid-1990s all of the state-owned small and medium enterprises put together were losing money.” BARRY NAUGHTON, THE CHINESE ECONOMY: TRANSITIONS AND GROWTH 301–02 (2007). For empirical evidence of the policy, see Samuel Ho, Paul Bowles, & Xiaoyuan Dong, “Letting Go of the Small”: An Analysis of the Privatisation of Rural Enterprises in Jiangsu and Shandong, 39 J. DEV.STUD. 1 (2003).

185. As the economy was still strictly a command economy from the central government and state-owned enterprises were the main organization form, the law emphasizes the goal of imposing responsibilities on persons responsible for business failure rather than the equitable and efficient distribution of assets. See Boshkoff & Song, supra note 179, at 361.

186. See Yueh, supra note 173, at 119–20. This also refers to the bankruptcy of Shenyang Anti-Explosive Equipment Factory in 1984.

Law ("ATL")\textsuperscript{188} was only introduced fourteen years after the introduction of the Unfair Competition Law. It is not to say that anti-trust issues had not been in existence when China first introduced the Unfair Competition Law, but instead that strong political resistance from the vested interest groups successfully postponed the introduction of the ATL, which aimed to achieve the anti-administrative monopoly among SOEs.\textsuperscript{189} Consequently, despite the prioritization of economic goals, an inactive political system is still able to postpone the introduction of laws necessary for a free market economy.

Nevertheless, as the market economy develops further, intrusions of the political system into the functioning of the legal system, and the negative effects associated with such activity, may well be retreating. Indeed, when Peerenboom studied the implications of the strong role of the Party on the development of Chinese administrative law before China was admitted to the WTO, he observed that "[r]ather, the Party’s main relevance to administrative law lies in its ability to promote or obstruct further political and legal reforms that would strengthen the legal system, but could also lead to the demise of the Party or to a drastic reduction in its power."\textsuperscript{190}

After the accession of China to the WTO, structural coupling with the international world further improved the development of the Chinese legal system.\textsuperscript{191} In order to perform its obliga-


\textsuperscript{189} While the local protectionism was not successfully curbed in the former UCL, the ATL, with a special target at anticompetitive (local) government actions, is at least on paper a powerful dose on (administrative) monopoly to secure a competitive socialist market economy on a historically state-controlled market. See Salil K. Mehra & Meng Yanbei, Against Antitrust Functionalism: Reconsidering China’s Antimonopoly Law, 49 Va. J. Int’l L. 379 (2009).


tions as a member of the WTO, both substantive and procedural administrative laws have already gone through a series of revisions. More importantly, the conception of due process and rule of law has increasingly been accepted in the administrative system. In addition, the development of specialized markets, such as product factor markets, especially the financial markets, may dictate a stronger role of law due to stronger coupling of the national economy with the established institutional environment of the West. For instance, to comply with the WTO rules, China set up the China Banking Regulatory Commission,


194. A unique character accompanying the astonishing economic growth is the rather pessimistic development in the financial market. The economic development in China can mainly be attributed to the development of (international) trade. But the incompatible development in financial markets, especially the development of the securities market, may again remind us of the legal origin theories proffered by Rafael La Porta et al. See supra note 2. See also Thorsten Beck, Asli Demirguc-Kunt & Ross Levine, Law and Finance: Why Does Legal Origin Matter?, 31 J. COMP. ECON. 653 (2003). Beck et al. summarized that the current theories on why legal origin matters for financial development can be categorized into two groups, i.e., the political channel (starting by looking at the relationship between investors and the state and then at the implications on the development of property rights and financial markets), and the adaptability channel (the ability of the legal system to adapt to the increasing demands of financial development). According to Beck et al., the adaptability of a legal system to the evolving economic conditions matters more for the development of the financial market. See id. at 654–55.
the China Security Regulatory Commission, and the China Insurance Regulatory Commission, providing an institutional base for financial market reform in China, and by issuing detailed regulations, these regulatory authorities are better prepared for the reform of the Chinese capital market.195

2. Adaptation on the Dual Track

For the past thirty years, one apparent characteristic of the development of the Chinese legal system was the existence of dual track systems, which made possible a trial-and-error approach. One example of the dual track exists in substantive laws regulating economic activities involving foreign parties and those for domestic participants. For instance, Economic Contract Law 1981 and Foreign Parties Related Economic Contract Law 1985 were only unified into the Unified Contract Law in 1999.196 Also, the Joint Venture Law (“JVL”) introduced the company as an organizational form for the purpose of attracting foreign investment in 1979, whereas Chinese Company Law (“CCL”) was only introduced in 1993.197 Detailed rules on the establishment and annual reviews of companies with foreign investment were also introduced so that the JVL could be under scrutiny.198 The dual track in law conveniently drew a line be-

195. For example, the newly introduced Qualified Foreign Institutional Investors (“QFII”) regulations not only permit foreign investors to invest in Chinese securities markets but also help to improve the corporate governance of listed companies. See Weihua Wu, Are Qualified Foreign Institutional Investors Real Investors or Speculators: Evidence from China (May 10, 2011) (unpublished article) (on file with author), available at http://ssrn.com/abstract=2056056.


198. See Zhonghua Renmin Gongheguo Zhongwai Hezi Jingying Qiye Fa Shishi Tiaoli (中华人民共和国中外合资经营企业法实施条例) [Regulations for
tween laws for domestic agents and those for overseas investors, and the experiences accumulated from foreign companies were later successfully transplanted to the CCL 1993. Even though revisions of the CCL were made in 2005, special regulations on Joint Ventures as stipulated in the JVL still enjoy priority whenever there is a conflict between the JVL and the CCL 2005.

Likewise, a similar dual track scheme can be found in arbitration regarding commercial disputes. In the past, the China International Economic and Trade Arbitration Commission and China Maritime Arbitration Commission were devised to deal with arbitration for disputes involving foreign parties, whereas the Economic Contracts Arbitration Commission with its domestic divisions controlled the domestic arbitration. Considering the deficient court system, arbitration has long been preferred as an alternative to court proceedings. Such delineation...
tion between related domestic and foreign arbitration secures a niche for arbitration of international disputes, while at the same time requiring the maintenance of a separate domestic arbitration practice. Learning between tracks thus helps to improve domestic arbitration practices, and arbitration centers in China are now all allowed to docket international cases.\textsuperscript{203}

Apart from the above foreign-domestic double track, China’s dual track also exists in laws regulating the state owned sector and those on the private sector. It must be realized that the existence of a private economy was not recognized in law until 1988, almost ten years after the economic reform.\textsuperscript{204} The delineation was employed not only to explore the viability of the development of a private economic sector, but also to help the then loss-suffering SOEs through a difficult time by transfer-


\textsuperscript{204} The First Amendment to the Constitution of 1982 was made in the first Plenary Session of the 7th National People’s Congress in 1988. M. Ulric Killion, \textit{China’s Amended Constitution: Quest For Liberty and Independent Judicial Review}, 4 WASH. U. GLOB. STUD. REV. 43, 45 (2005). A new paragraph was attached to Article 11, which reads, “The State permits the private sector of the economy to exist and develop within the limits prescribed by law. The private sector of the economy is a complement to the socialist public economy. The State protects the lawful rights and interests of the private sector of the economy, and exercises guidance, supervision and control over the private sector of the economy.” XIANFA art. 11, §1 (1988).
ring profits from the private sector and providing job opportunities for a large number of displaced employees of the SOEs at the beginning of the reform. As large-scale unemployment was successfully avoided, both the macroeconomic goals and social stability had been maintained, a key element that contributed to the efficacy of the gradual approach in China.

In sum, the merit of the dual track system is that the co-existence of both the old and the new makes possible a guided structural coupling, which can easily be set up between systems under the two tracks. Such an approach not only helps to locate the merits of systems under each track but also facilitates the digestion of those merits between tracks, benefiting the search for an appropriate growth trajectory for the whole system. What cannot be downplayed in such a dual track system is the importance of the adaptive manager role of the government or regulatory authority, which acts as a valve switcher for the structural coupling and as the environment stabilizer so that the intended learning and digesting can become reality.

3. Adaptation in Fast Transition

Laws in a fast growing economy are usually introduced as political expediencies. One revealing example will be helpful here. For instance, prioritized economic goals of local governments led to serious concerns of weak protection for employees, and in order to address these concerns and pacify large-scale social unrest, the new Labor Contract Law ("LCL") was introduced at the beginning of 2008. Nevertheless, ever since the LCL was introduced...

205. See Gang, supra note 161, at 115.
206. See Yueh, supra note 173, at 10.
207. Before the introduction of Labour Contract Law in 2008, the Labour Law 1994 was the main reference. However, underpayment, or no payment of employees, or the fraudulent and manipulative conduct of employers was the norm. See Anita Chan, Labor Standards and Human Rights: The Case of Chinese Workers under Market Socialism, 20 HUM. RTS. Q. 886, 891–93 (1998). The introduction of the LCL 2008 seriously constrains illegal acts such as non-payment of wages in the private sector, especially for migrant workers, which was increasingly acute and courted criticism from different sectors of the society. See Sean Cooney, Making Chinese Labour Law Work: The Prospects for Regulatory Innovation in the People’s Republic of China, 30 FORDHAM INT’L L.J. 1050, 1053–54 (2006). For a general but percipient review...
in consultation stages, employers have complained about the “overprotection” of employees.\textsuperscript{208} The increasing cost for labor protection has since been a serious concern for Small- and Medium-sized Enterprises (“SMEs”), which contribute the most to the employment agenda of the country but are the most hard-pressed to afford due protection to their employees.\textsuperscript{209}

Indeed, creative reactions from the employers had immediate effects on employees.\textsuperscript{210} Immediately before the law came into effect, employees were laid off across the country or were fired and re-employed through employment agencies at lower wages.\textsuperscript{211} Alternatively, employers may choose to relocate to other...
Due to the increased labor costs associated with the LCL and the intense competition for limited employment opportunities, employees may have no choice but to accept lesser contractual terms, which defeats a major intended protection under the LCL. Even worse, the law was promulgated just one year before the onset of the world financial crisis, such that SME employers that have long functioned in labor intensive export processing industries were further aggravated as a downturn in international markets is reorienting those SME exporters to seek an increasing share of the domestic market.

At the same time, employees are increasingly conscious of their legal rights. Empirical data show that labor disputes...
have increasingly been brought to courts and arbitration tribunals, and that the number of cases with a plaintiff involving more than ten employees has also been on the upward trend ever since the promulgation of the LCL. Employees may intentionally postpone signing the legally required employment contracts by dragging the negotiation process until the one-year period terminates. Employees may also collectively threaten


217. Article 82 of the LCL reads:

If an employer fails to conclude a written labor contract with an employee after the lapse of more than one month but less than one year as of the day when it started using him, it shall pay to the worker his monthly wages at double amount.

If an employer fails, in violation of this Law, to conclude with an employee a labor contract without fixed term, it shall pay to the employee his monthly wage at double amount, starting from the date on which a labor contract without fixed term should have been concluded.


While it is true that it is usually employers that intentionally drag along the negotiation process and lead to the break-up of the negotiation process, employees may also intentionally take advantage of the law to compromise the interests of employers, especially SMEs. See Liang Da (梁达), Jinfang Guyi bu Qian Laodong Hetong de Shuangbei Gongzi Zhuanjia (谨防故意不签劳动合同的"双倍工资专家") [Attention Shall Be Paid to “Double-Wage Specialists” Employees Who Intentionally Declined to Sign the Employment Contracts], 152 YIAN SHUOFA (《以案说法》) [LAW & CASES] 40 (2010). Xu Chen & Fei Liu (陈旭与刘菲), Laodong Zhe Daode Fengxian yu Shuang Bai Gongzi Zhipei Zeren Paichu (劳动者道德风险与双倍工资支配责任排除) [Moral Risks of Workers and the Avoidance of Duty to Pay Double-Wage], 24 PEOPLE’S JUDICATURE (CASES) (《案例研究》) 75 (2010). There is no clear stipulation on such issues in LCL. See Yefang Qian & Hongxia Zheng, Shall Double-Wage Compensation Be Applied
to bring their disputes to arbitration tribunals if there is no increase in wages, signaling social unrest and incremental pressure from local governments on the employer.\textsuperscript{218}

As a result, local governments have been struggling to strike the right balance between the implementation of the labor law and the strong initiative to pursue economic growth within a stable social environment.\textsuperscript{219} Such a goal is not uncommon to a fast growing economy, which is keen on further economic growth whereas the success of growth can lead to hindrances in the form of an increase in the importance of social concerns.\textsuperscript{220} A decision, however, has to be made before potentially negative effects develop into catastrophes and shift the whole system to a different fitness landscape with unimaginable uncertainties. Indeed, the current alternative to China’s growth is decelerated economic development with increasingly serious consideration of social concerns.\textsuperscript{221} Hence, even though economic growth is still of importance in the current development agenda, the newly introduced draft of the ECL apparently disregards the

\textsuperscript{218} This may first initiate media attention and then pressure on governments. See Yin Lily Zheng, \textit{supra} note 211, at 614.

\textsuperscript{219} See Cooney, \textit{supra} note 207, at 1066.

\textsuperscript{220} See generally Garcia, \textit{supra} note 209.

negative concerns for economic growth and prioritizes the social concern of employees.222

B. The Relevance of Rule of Law

One evident observation to be made is that the Western idea of employing rule of law as a governance tool to constrain the supremacy of the government has long been a foreign concept to Chinese culture. According to Professor Orth, rule of law as a second feature was initially introduced to counterbalance the supremacy of the central government, which historically was the chief feature of political institutions of England.223 With separation of powers in place in the political system, rule of law is effectively employed in the West to place limitations on the different branches of government.

However, the absence of the separation of powers in the political system of China does not provide a suitable context for transplanting Western-style rule of law.224 As described earlier, the dominance of Confucianism over Legalism since the Han dynasty indicates that rule by man historically dominated over rule by law in China.225 While a strengthening of the rule of law system was advocated for upon the death of Mao Zedong, it was introduced with a strong communist ideological objective to


223. At least at that time, the concept was not common to Western legal philosophy. See John Orth, Exporting the Rule of Law, 24 N.C.J. INT’L L. & COM. REG. 71 (1998).

224. This is also the reason why Professor Randall Peerenboom proffered the division of the thick and the thin rule of law. See PEERENBOOM, CHINA’S LONG MARCH TOWARD RULE OF LAW, supra note 1, at 3-6.

225. See Tan supra note 91.
serve party control. Moreover, this system was dismantled almost completely during the Cultural Revolution, and immediately after the collapse of the Gang of Four, when rule by law was introduced to legitimatize the new leadership, maintain the social order, and enhance the control of the Party. The western conception of rule of law is thus merely an academic topic with no practical observance in China.

Besides, China remains cautious in pursuing the complete acceptance of Western-style rule of law after experiences accrued with foreign jurisdictions as a product of structural coupling. For instance, the experiences of geographically and culturally proximate Asian countries indicate that a dual track system with the coexistence of both a well-developed commercial law system and stringent constraints on civil and political rights is a much more achievable objective for developing China. Additionally, China continues to work on building its sui generis legal system within a socialist framework. Thus, it is not unfair to say that skepticism of rule of law informs Chinese culture.

In sum, the configuration of the operational closure and the structural coupling of the Chinese legal system present a different picture from that of the West. For one thing, the operational closure of the Chinese legal system is enhanced by its

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228. See Fu & Peerenboom, supra note 167, at 110.
229. Bangguo Wu, the top legislator of China, in his work report of the Standing Committee of the National People’s Congress delivered at the second plenary meeting of the first session of the 12th NPC at the Great Hall of the People in Beijing, capital of China, announced that “We will comprehensively advance law-based governance of the country, and enhance the important role that the rule of law plays in national governance and social management.” China’s Top Legislator Vows to Push ‘Rule of Law,’ Keep Power in Check, Xinhua News Agency (Mar. 8, 2013), available at http://english.people.com.cn/90785/8159917.html.
long-established Confucian culture and the modern socialist ideology. For another, given the strong outward radiating effect of the Chinese political system, the independence of the Chinese legal system cannot be achieved alone. While the further development of the economic system does require a favorable co-evolution of the legal system, such positive effects are still within the ambit of the socialist political system. Given that “changes in formal law matter where prevailing cultural norms say that formal law matters,” a foolhardy transplantation of new laws or the audacious unconditional acceptance of rule of law without consideration of the underlying legal tradition and the institutional arrangements may just do a disservice.

IV. COMPATIBLE SYSTEMS TO ACHIEVE SUSTAINABLE GROWTH

A. The Role of Law

For the purposes of economic development, laws function as both positive and negative constraints. As positive constraints, laws and regulations facilitate economic development by introducing favorable laws and regulations, by providing suitable dispute resolution, and by training more legal professionals. For example, at the very beginning of Chinese economic reform, the focus of legal reform was on the laws of attracting foreign investment, which provide more certainty than those on other domestic legal relationships. In addition, the Constitution was amended in 1988 to accommodate new economic development, such as when changes to Article 10 relaxed a long restricted land policy and spurred foreign investment activities in China by permitting that “the land-use right may be assigned in accordance with the provisions of the law.”

mentary in comparison with Western law, these efforts, in combination with the political environment, served the purpose of economic development effectively.

Alternatively, laws and regulations may restrict economic growth. For instance, the introduction of Law on Environment Protection\(^{235}\) and the mandatory disclosure requirement of environmental issues for publicly listed companies\(^{236}\) not only reflect the incremental serious concern for environmental issues but also function as negative constraints on the single-minded pursuance of economic growth without due consideration of environmental responsibility. In combination with tax preferential treatments, the introduction of such laws may significantly direct fresh investment to cleaner industries.\(^{237}\)


\(^{237}\) Tax preferential treatments can be located in Art. 36. Press Release, Ministry of Fin. of the People’s Republic of China, Notice on Preferential Treatments for Software Enterprises, by the Ministry of Finance and the Na-
Laws also play an important role in curbing the race to the bottom arising from deregulation. Unregulated competition among local governments in searching for global maximums may not be suitable for a fast growing economy. This is not only due to the complexity of a natural evolution process but also because of the spillover of costs across local boundaries. For instance, short-sighted focus on local economies after the decentralization in 1988 only led local governments to fragment the national market into closed, stagnant patches. The Unfair Competition Law was introduced in 1993 with a specific purpose of curbing the then notorious regionalism within the country.

B. The Supplementary Nomenklatura System

The political system and the legal system may supplement each other in function. For instance, Hoff and Stiglitz argued that the lack of a serious political demand for the rule of law contributes to the postponed establishment of rule of law in post-communist societies. According to this thesis, resource

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238. Shen et al., supra note 145, at 31.
239. Article 30 of the Anti-Unfair Competition Law (1993) states that

If the government or its departments violate Article 7 of this Law to force the others to purchase the commodities from the pointed manager, limit the others make a fair competition, or limit commodities to transfer between regions, the senior government shall order to correct these mistakes; If the fact is serious, the same level government organ or the senior government organ shall administratively punish the person who bear the direct responsibility.

240. Karla Hoff & Joseph Stiglitz, After the Big Bang? Obstacles to the Emergence of the Rule of Law in Post-Communist Societies, 94 AM. ECON. REV. 753 (2004). The power to control can be both positive and negative. Positive in the sense of wealth accumulation and negative in the sense of stripping the accumulated assets of others.
controllers make both economic and political choices to safeguard their own earned interests. By using their political power to strip the assets of others, resource controllers can achieve resource accumulation similar to that which would be possible by making positive economic decisions under a sound system of rule of law. The political institution favorable to those vested interest groups may thus resist the introduction of rule of law into the country.

The implication of this understanding is that a strong political institution at least supplements, if not replaces, the rule of law in accumulating and distributing resources. The applicability of such a thesis can similarly be observed in China, where the Nomenklatura scheme has long been employed in practice as a tool to redress the deficiency of both the legal system and the political system. For instance, when Clark and others studied the weak role of formal legal institutions in China, especially a weak scheme on property rights, they found the importance of non-legal institutions to be strong. In order to attract investment and retain investors, local governments compete in providing preferential arrangements. In fact, due to the authority given to judges, and the extent of their discretion in ruling, the enforcement of court decisions in a socialist poli-

241. Id.
242. Id.
244. Apart from Professor Clarke, discussed below, other scholars also identify the important role of the Nomenklatura scheme in achieving political stability and economic growth. See Hon, supra note 126.
245. Clarke, et al., supra note 203. But notice that Clarke et al. also point out the stronger than expected role of law in transactions: “in the area of transactions of goods and services, we present new data that show that the legal system is more important than might be assumed, given the enormous emphasis that personal and social relationships have played in the literature discussing markets in China.” Id. at 376.
246. For instance, more preferential tax treatment may be offered by the local governments to attract foreign investment.
247. The triple discretion in courts identified by Professor Woo is just one example of how the legal system coevolves with its environment. The first discretion is discretion on facts, discretion which is conducive to locate substantive solutions to conflicts between parties. Discretion on facts however is
ical legal system is “neither a neutral, technical issue, nor an automatic consequence of law,” and both under- and over-enforcement is possible according to the policy demands.\(^{248}\)

In other words, the deficiency of the judiciary system may largely be supplemented by the existing Nomenklatura scheme.

In parallel, when Wang and others compared the regional variations of Foreign Direct Investment (“FDI”) within China, they found that good economic fundamentals, or “factors contributing to a higher rate of return on investment,” may play a more important role in attracting new investment.\(^ {249}\) They also found that government officials with long-term career visions and concern of self-reputation also help to attract FDI in a weak legal system.\(^ {250}\) In fact, a political and administrative environment favorable to overseas investors is seen as especially desirable when it is accompanied by a weak legal system.\(^ {251}\)

Similarly, Professor Zheng also observed that “[a]t the practical level, the protection of capital and property rights at various levels in the Chinese government surpassed the rule of law.”\(^ {252}\)

The efficacy of employing the existing Nomenklatura scheme as a way to achieve the intended reform objectives shall not be underestimated. Once the economic performance of the area administered by the local officials was included among the criteria of performance evaluation, thereby making a difference to

\(^{248}\) See Castellucci, \textit{supra} note 163, at 59.


\(^{250}\) \textit{Id.} at 21.

\(^{251}\) \textit{Id.} at 17–22.

\(^{252}\) See Zheng, \textit{supra} note 144, at 6.
the career path of local officials, the lack of rule of law may provide chances for both over- and under-protection in comparison with the protection provided in formal law. In fact, the initial single-minded pursuit of economic prosperity may lead the government to intentionally support formal enforcement via arbitration or to threaten potential government sanctions. Clarke and others argue that the “political structure itself has served as an alternative to the formal legal system in providing a reasonable degree of security to certain non-state investors at the local level.”

Later, when the early fervor for economic growth cooled down to include more social concerns, the Nomenklatura system was again employed to achieve the intended reform objective. For instance, even though environmental protection law has long been introduced, its enforcement is still far from satisfactory. Personal interests, either in terms of finance, political promotion, or even bribery, all lead to its ineffective enforcement at local levels. Nevertheless, when environmental protection is included among the political performance assessment formula, serious consideration of environmental issues by local governments may become a reality.

Hence, within an institutional environment with a leading political system dominated by a single party, the Nomenklatura scheme supported by the Party has been effectively employed to

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254. Clarke et al., supra note 203, at 400.
supplement the deficient legal system for the purpose of economic development. If it is true, according to the theory of Hoff and Stiglitz, that the political elites in developing countries, in comparison with their counterparts in developed countries, have more institutional specific investment and benefit more from the established institution, it will be hard for developing countries to establish a new institution so as to counteract those vested interests. A more feasible choice is to take advantage of the existing institutional arrangements. Such a realization also suggests that the role of the legal system in a country prioritizing economic development is linked more to the flexibility of the legal system to adapt to the local institution than to the attributes of the legal system per se. In other words, the compatibility of the function of the different systems within an institutional environment may be more important than the quality of any individual system.

C. The Importance of the Strong Central Control

The coexistence of a strong central control and the well-established Nomenklatura system facilitates an efficient learning process for the whole system. For one thing, deregulation to local governments provides bountiful opportunities for maximum regulation “tinkering” at local levels whereas the strong central control intentionally encourages or cossets such creativity. For instance, the three main experiments at local levels that contributed to past economic success, i.e., the house-hold responsibility system from Fengyang in 1978, the Special Economic Zone in Guangdong and other coastal areas, and the SOE reforms in Sichuan and Hunan, all secured vigorous support from the central government in their initial stages.

For another, the hierarchical structure under strong central control provides an adaptable institutional framework for the

258. Gilson & Milhaupt, supra note 253, at 238.
261. See Cai & Treisman, supra note 156, at 514–19.
experiences accumulated within experimental localities to be transmitted to other regions upon success. Given the detrimental implications brought by the unregulated free competition between provinces, structural coupling between local governments is thus of special importance to achieve sustainable economic growth. In practice, effective structural coupling can be achieved in several ways. First, by introducing administrative measures or issuing party orders, the results of local experiments can be shared across the nation. Second, coupling can be enhanced by personnel movement of government officials between municipalities. Former experience accumulated by government officials either at other provinces or at the central government may also be employed across boundaries. Third, by intentionally introducing laws, limitations on inter-provincial structural coupling may at least be constrained.

The ultimate effect is that local diversity may calculatedly be promoted, but within the constraints or the grid established by the central government. Viewed from that perspective, policymakers at higher levels may accordingly function as gatekeepers and advocates for useful, locally generated innovations. Thus, the combination of inter-provincial competition and strong central control provides an appropriate institution for China to achieve the adaptive efficiency of the whole system.

263. Id.
264. This is can be attributed to the Nomenklatura system, through which the central government may dispatch and move personnel according to the plan of the national economy as a whole. For the role of Nomenklatura system in Chinese economic development, see Hongbin Li & Li-an Zhou, Political Turnover and Economic Performance: The Incentive Role of Personnel Control in China, 89 J. PUB. ECON. 1743 (2004).
266. See Heilmann, supra note 157, at 457.
For this, Professor Heilmann’s remark is pertinent: “It is precisely the dialectical interplay between dispersed local initiative and central policy making—maximum tinkering under the shadow of hierarchy—that has made China’s economic governance so adaptive and innovative from 1978 to 2008.”

In consequence, distortions from a free market economy may be partially redressed by a strong political (administrative) system in practice. Such understanding indicates that a totally “laissez-faire” market economy in combination with a well-established rule of law may not be compatible with the socialist economy in China. In fact, structural coupling with the economic systems in other countries also shows that the role of government intervention is necessary. The intermittent financial and/or economic crises at least provide evidence that a free market economy pursued in the West is not without its detriments. To the Chinese government, the invisible market hand must be balanced with the indispensable visible hand of the government. The fate of a national economy is thus dependent not on whether the invisible hand of the market is strong enough to function freely but on how the two hands in cooperation can achieve the objective.

In essence, the key issue here is that the decision-making process is no longer an ex ante “process of setting rigid standards based on comprehensive rational planning,” but an ongoing process of “experimentation using continuous monitoring, as-

267. Id. at 458.
269. See Gilson & Milhaupt, supra note 253.
sessment, and recalibration.” Viewed from this perspective, the central government or the party plays an important role of manager in guiding the adaptive walk.

D. Dynamic Compatibility to Achieve Sustainable Growth

A review of economic growth in China shows that the Chinese government intentionally takes advantage of existing conditions for the purpose of achieving institutional flexibility. The deficient legal system had partially been redressed by the political and administrative system. As stated earlier in this article, the “meta-rights—access or rights to property rights” under the unique Chinese political and administrative system clearly counterbalanced the lack of protection for property rights under the property law. In other words, a deficient legal system, an indicator of low institutional quality, does not necessarily indicate a lack of institutional flexibility for the whole system. For instance, the continuing local experiments were only possible without legal constraints. At the beginning of reform, policy experimentation at local levels could be carried out as long as a report was approved by the central government that the intended experiments were in compliance with the spirit of the central policy. Thus, the deficient legal institution may have enhanced institutional flexibility by promoting competition among local governments, a key contributor to the economic growth in China.

The legal system is just one important component of the meta governance, the aim of which is to achieve the sustainable growth of whole system. The past experience of China at least

271. Even though Ruhl is describing the recent development in American court management, the quotation is applicable to the trial-and-error style adaptive walk. See Ruhl, supra note 20, at 428.
272. This thus corresponds to the argument of de Soto, who argues that what matters in the economic development of the United States is not “property rights per se but meta-rights—access or rights to property rights.” Davis, supra note 75, at 308.
273. Hao Wu & Tianli Wen, supra note 217, at 37.
274. Id.
275. See Jianxing Yu & Ziyiing He, The Tension Between Governance and State-Building, 16 J. CHINESE POL. SCI.1 (2011). The current focus on governance study shows that both the anarchy of exchange as in the market mechanism and the hierarchical administrative structure as in a firm or a
showed that the compatibility among systems were more important than the quality of any one within the environment. Still, the compatibility itself is due to the co-evolution of subsystems within the system and that of the systems constituting the environment of the system. For instance, as the Chinese market becomes more integrated with the rest of the world, we observe incremental pressures on China to adapt its administrative system to international practices, as evidenced by China’s need to reform, if not reshuffle, its administrative system of government in order to meet the requirements for accession to the WTO. 276 As the domestic economy further develops, the State Council even claimed at the end of 2012 that the government shall withdraw itself from matters in which either citizens or the market are capable of self-regulating, and prohibit pre-imposed administrative review for items which can be reviewed ex post or through other administrative measures. 277 While it is still a slogan at this stage, the pronouncement of such principles indicates that the government has been managing to adapt the system to the development of the market economy.

state may overshadow the importance of governance, a concept which should jump out of the traditional constraints of both the free market and the hierarchical style. Rather, governance emphasizes self-organization, a horizontal network and partnership, and “refers to mechanisms and strategies of co-ordination in the face of complex reciprocal interdependence among operationally autonomous actors, organizations, and functional systems.” Id. at 3. Moreover, the current governance study “indicates that a one-track approach favoring one over the other is inadequate to guide or explain the practice of governance today.” Id. But the authors leave open the question of how China can transition from an authoritarian government to the governance they define in the article.


However, one set configuration of compatible subsystems is only suitable for a given fitness growth mode, which is captured by one set of attractors and attractor basins. Once a new growth mode is introduced, the whole system will escape from the capture of the existing attractors and attractor basins and a new configuration suitable for the new growth mode will be required. Recent evidence shows that China is moving on a new growth mode, according to which a moderate growth rate will be pursued with a focus on developing a consumption-led growth mode and improving social welfare.278 Such a shift indicates that the initial compatibility among and between the political (administrative) system, the economic system, and the legal system, which are suitable to single-minded economic growth, may need to be changed. In consequence, as the market economy further develops, the legal system may become more autonomous and the configuration of the autopoiesis of the legal system may change accordingly. Still, it is noteworthy that no less emphasis should be imposed on comprehensive reform—a mindset suitable to achieve the adaptive efficiency of the whole system.279

CONCLUSION

The pursuance of a comprehensive reform package per se reveals that the Chinese government has long been following a systems view of the reform process. The above discussion reveals that it is the compatibility among the systems and the supplementary roles played by the other systems that partly redress the deficiency of the Chinese legal system and may accordingly provide a better explanation for the persisting economic development in China. This is not a single-direction simplistic linear determination but a networked non-linear co-evolution with a strong sensitivity to the initial conditions of the systems in concern. The current economic success within the existing environment may thus persist, rather than collapse, on the condition that adaptable coevolution among the sub-systems can be successfully achieved. In other words, the compatibility of a system with the other systems in its environment may be

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279. See Hao Wu & Tianli Wen, supra note 217, at 44.
more important than the quality of any individual system in concern.

Alternatively, Chinese development is not a result of a well-designed plan but an adaptive management process—a continuing recursive process of learning from field experience and using that information to guide further development. Due to the fast speed of transition, unexpected effects are the norm but are overseen by China’s strong central control. On the whole, the Chinese government largely functions as an effective adaptive manager.

It is worth noting that the evolution of the market economy in the West is a natural evolutionary development process whereas the development of the market economy in China is an artificial short cut. If the gradual adaptation process is long enough to accommodate the Western-style evolution process, a more pro-Western style rule of law could be expected. However, the fact remains that a span of thirty years may be too short a period to achieve that purpose. Conversely, the recent successful economic experience of China may reinforce the development path of those sticky elements of the existing institution. If, however, the sticky political system becomes more incompatible with the other systems, the widely commended economic feat will soon yield unexpected catastrophes, a result the government will try its best to avoid.