

CHINA'S LONG MARCH TOWARD RULE OF LAW

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China has enjoyed considerable economic growth in recent years in spite of an immature, albeit rapidly developing, legal system; a system whose nature, evolution, and path of development have been little explored and poorly understood by scholars. Drawing on his legal and business experience in China as well as his academic background in the field, Randall Peerenboom provides a detailed analysis of China's legal reforms, adopting an institutional approach that considers the possibilities for, and obstacles to, reform resulting from the current state of development of Chinese institutions. Questioning the applicability of Western theoretical conceptions of rule of law, Peerenboom develops a new theoretical framework. He argues that China is in transition from rule *by* law to a version of rule *of* law, though most likely not a liberal democratic version as found in certain economically advanced countries in the West. Maintaining that law plays a key role in China's economic growth and is likely to play an even greater role in the future, Peerenboom assesses reform proposals and makes his own recommendations.

In addition to students and scholars of Chinese law, political science, sociology, and economics, this book will interest business professionals, policy advisors, and governmental and nongovernmental agencies, as well as comparative legal scholars and philosophers.

RANDALL PEERENBOOM is a member of the faculty of UCLA School of Law, where he teaches courses on Chinese law and international human rights. His publications include *Lawyers in China: Obstacles to Independence and the Defense of Rights* (1993) and *Law and Morality in Ancient China: the Silk Manuscripts of Huang-Lao* (1993).

For Lo, Shirley, and Rayne

PREFACE

Imagine it's 1978, and you are Deng Xiaoping. Mao Zedong has just died two years earlier. The Cultural Revolution is still fresh in everyone's minds. The economy is in shambles. The legal system has been destroyed. The Ministry of Justice was shut down, along with the Procuracy. Only a handful of law schools are open, though there are few professors around to teach, and no students. No one wants to study law. There are only 2000 lawyers, many of them trained before 1949. You have just ascended to power. What would you do?

Now imagine it's 2003, and you are the successor to Jiang Zemin. Twenty-some years of reforms have resulted in a proliferation of new laws, so many that China's lawyers, now well over 150,000 in number, have begun to specialize. The Ministry of Justice has been reestablished, as has the Procuracy. There are numerous law schools, churning out tens of thousands of lawyers every year – law now being considered a hot, and lucrative, area. For several years, the Chinese Communist Party (CCP) has endorsed the establishment of a socialist rule-of-law state in which the government must act in accordance with law, and the new policy was expressly incorporated via amendment into the Constitution in 1999. Recent years have seen the passage of a Judges Law, Lawyers Law, Procuracy Law, and Police Law, all aimed at raising the level of professionalism of the various branches of the justice system. In addition, the Criminal Law and Criminal Procedure Law have been amended to bring them more into line with international standards. Administrative law reforms have provided citizens with the right to sue the government, and they are increasingly taking advantage of it.

Nevertheless, foreign investors complain bitterly about the lack of rule of law; human rights activists denounce the repeated persecution of political dissidents; citizens continue to complain about judges on the take, notwithstanding the ongoing campaign to root out judicial

corruption. Critics note that despite the rapid development of a legal aid system in recent years, indigent defendants often cannot secure the service of a lawyer. In their haste to attract investment, local governments regularly flout national laws and policies, approving projects without authority, and offering tax breaks despite Beijing's repeated warnings not to. What do you do?

China's commitment to a law-based order has deepened in the past two decades since the end of the Cultural Revolution, the death of Mao, and the launching of China's reform and opening policies. At the same time, it is widely acknowledged both at home and abroad that China has encountered numerous problems in the realization of rule of law. What accounts for China's woes? Are the problems ideological? China remains a nondemocratic socialist state dominated to a large, albeit diminishing, extent by the CCP. Historically, socialist legal theory has conceived of law in instrumental terms, as a tool of the "Party-state". Is, then, socialist rule of law an oxymoron? Setting aside the role of the CCP for a moment, does the fault lie with China's constitutional structure, with the lack of the kind of separation of powers found in some Western liberal democracies? Does China lack the proper mechanisms for checking and balancing the CCP and the administrative branch? Or is the problem more at the level of doctrine: does China lack important laws or are there major shortcomings in the laws that do exist? Are there other historically contingent factors, such as China's traditions and culture, the current level of institutional development of the major organs of state power and the legal profession, or the impact of the transition from central planning to a more market-based economy? Are all of the above factors, and if so, what are the implications for reform?

This book examines legal reforms and the efforts to establish rule of law in China. There are a number of possible approaches one could take to such a project. One approach would be to begin with certain predetermined theories and assumptions about rule of law, the necessary institutions for its implementation, and the historically proven path of other countries that have realized rule of law, and then use China to test these predetermined theories and assumptions. One could therefore use China to test Weber's theory of the relation between capitalism, rational bureaucracy, and rule of law; North's theory of the importance of clear property rights for economic growth; modernization theory or some

other variant of an evolutionary theory that predicts that legal reforms will produce not only economic development but that legal and economic reforms will lead to political reforms and in particular the establishment of liberal democracy; globalization theories that predict that the rise of global markets will result in the convergence of legal systems toward rule of law and political systems toward pluralist democracies; or cultural theories that claim rule of law is the product of Western enlightenment traditions at odds with China's legal traditions and thus simply not possible, or at least less likely, in China, or alternatively, that predict that any rule of law in China will be rule of law with Chinese characteristics.

Such an approach has obvious advantages. China is an important test case for general theories. It is an authoritarian socialist state rather than a democracy. It is an Asian country rather than a Western one. It is a large, politically significant, developing state rather than a small, politically weak developing state. Certainly the failure of China to develop as a theory would predict would be worthy of attention. Even if the idiosyncratic features of China would ultimately allow one to save the theory by dismissing China as an exception to the general rule, China's failure to conform to the theory would deserve at minimum a rather long footnote.

There are, however, certain costs associated with this approach. Relying in a comparative law context on predetermined theories drawn from the experiences of very different countries is dangerous. All too often, if one approaches the target country with too many expectations of how a legal system is supposed to function, what the role of law should be or where legal reforms will lead, one will end up seeing oneself in the mirror – as Stanley Lubman accurately noted in his highly regarded 1999 study of post-Mao legal reforms, *Bird in a Cage*. As a result, one will miss what is important within the Chinese legal system, and in the process miss opportunities for exploring different roles that law might play given China's particular context and potentially novel institutional arrangements or practices for achieving them.

My approach was somewhat different. I did not expressly start with the objective of testing China against any particular theory. Rather, in 1996 Carine Defoort of Katholiek Universiteit Leuven, Belgium asked me if I wanted to coedit a special volume of *Cultural Dynamics* on the concept and implementation of order in China. After I happily agreed,

we narrowed the topic down to “law and order in China.” At the time, I had been practicing law in China for several years. I was struck by the manifestly greater reliance on law to govern China than at any time in the past, and the increased role of law in commercial transactions and even daily life. No longer was it the case that China had so few laws that a reasonably diligent lawyer could master them in a fortnight. The regulatory regime was increasingly complicated and sophisticated, with many laws being modeled on laws from Western countries. There were also significant changes in noncommercial areas such as criminal and administrative law. Even more strikingly, the theoretical underpinnings of law appeared to be changing, as China moved away from a purely instrumental conception of law toward a conception of rule of law where law was meant to bind both government officials and citizens alike.

Clearly, law’s role in the Chinese polity was changing, in keeping with the dramatic changes in Chinese society, particularly since 1992. Not surprisingly given the rapid pace of change, much of what I read about the legal system was out of date. What I read was often not correct as a matter of law; more importantly, most of the available accounts of the legal system failed to adequately reflect the changes in the actual role of law in Chinese society. Alarming, the dramatic theoretical shift toward rule of law and its potential political significance attracted little notice in the Western press and academic literature. When the higher profile of rule of law was mentioned, it was generally dismissed as mere rhetoric. With some notable exceptions, the Western press continued to focus on human rights violations; meanwhile legal scholars and other academics, again with some notable exceptions, emphasized the many deficiencies of the legal system, and the very different social, cultural, political, and economic contexts in which law operated. Undeniably, the legal system suffers from a number of shortcomings, and no one would mistake China for Kansas. Nevertheless, the existing accounts seemed unduly dismissive of the remarkable progress that had been achieved in the relatively short period of twenty-odd years.

I wanted to begin therefore with a thick description (in the Geertzian sense) of what was actually happening on the ground. Accordingly, I began to jot down things that struck me as unusual, either because they represented a significant change from the way law functioned in the Imperial or Mao period, or because they were at odds with at least my initial conception of a law-based order.

A pattern soon emerged. Many of the problems that I identified were “technical” in nature. They fell easily into categories typically cited as part of a “thin” or procedural rule of law, discussed more fully in the following chapters. For instance, whereas a thin rule of law requires procedural rules for law-making and laws must be made by an entity with the authority to make laws in accordance with such rules to be valid, China’s legislative system was in disarray. A wide variety of entities had vaguely defined powers to issue various types of legislation whose legal effect was often unclear at best. Similarly, whereas a thin rule of law requires publicly promulgated laws, knowable in advance, that are generally prospective rather than retroactive, relatively clear, consistent, and stable, laws in China were often vague, inconsistent internally and with other laws, and subject to rapid change. To further complicate matters, there was often a wide gap between laws on the books and actual practice. Even when laws were implemented, there were often questions as to the fairness of the way in which they were implemented.

Having taken note of the problems, the next task was to explain them, and to explore their causes. As we shall see, the story that emerges is a complicated one in that there are often multiple, overlapping causes for the dysfunctional features of the PRC legal system. Moreover, in explaining the obstacles to realization of even a thin rule of law in China, it quickly became apparent that I would have to address issues that exceed the boundaries of a thin theory of rule of law – including the social, cultural, political, and economic contexts in which the legal system is embedded.

Put differently, thick description by itself is insufficient. In the end, one cannot avoid confronting the kinds of theoretical issues mentioned previously, such as the relationship between rule of law and economic development; the legal system’s role in enforcing property rights in order to ensure economic growth; the relationship between rule of law and democracy and human rights; and the influence of Chinese culture and traditions on the legal system. Yet in theorizing about the role and rule of law in China, we need to avoid simply imposing concepts and categories developed in light of the experiences of other countries. We cannot assume that what works for economically advanced, Western liberal democracies will necessarily work for China. In theorizing about the future of legal reforms in China and the form of rule of law most likely to take hold and flourish in China’s different soil, we need to bear in

mind the differences in political and economic institutions, differences in the level of development, and differences in cultural practices and values. We need to keep our minds open to the possibility that China may develop an alternative to liberal democratic rule of law – a form of rule of law with Chinese characteristics, as it were.

At the same time, we need to avoid the opposite mistake – that is, treating China as so different from other states that none of the same rules and assumptions apply. As a result of economic reforms, China increasingly has a market-oriented economy. As a result of legal reforms, China has passed many laws and established institutions similar to those in other countries. As result of its policy of opening to the outside world, China's citizens now enjoy a wide variety of cultural products enjoyed by others around the world. In other words, rule of law with Chinese characteristics is still rule of law.

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for the mistakes herein, or necessarily shares my views. In many cases, several rounds of edifying conversation were most helpful in clarifying our positions and bringing the differences in our views into sharper relief, without resulting in either side being persuaded by the other's arguments. Yet the process was invariably both immensely enjoyable and intellectually stimulating, at least for me.

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This book draws in places on previously published works, including *Lawyers in China: Obstacles to Independence and the Defense of Rights* (Lawyers' Committee on Human Rights, 1998); "Globalization, Path Dependency and the Limits of Law: Administrative Law Reform and Rule of Law in the People's Republic of China" (*Berkeley Journal of International Law*, 2001); "Human Rights and Asian Values: the Limits of Universalism," *China Review International* (2000); "The Limits of Irony: Rorty and the China Challenge," *Philosophy East & West* 50: 56–89 (2000); "Ruling the Country in Accordance with Law: Reflections on the Rule and Role of Law in China," *Cultural Dynamics* 11: 315–51 (1999). My thanks to the publishers for permission to quote from these works.

ABBREVIATIONS

ALL	Administrative Litigation Law
ARL	Administrative Reconsideration Law
ARR	Administrative Reconsideration Regulations
ASL	Administrative Supervision Law
BERI	Business Environmental Risk Intelligence
BGB	Bürgerliches Gesetzbuch (German Civil Code)
BPC	Basic People's Courts
CASS	Chinese Academy of Social Sciences
CCP	Chinese Communist Party
CCTV	China Central Television
CIETAC	Chinese International Economic and Trade Arbitration Commission
CIM	contract-intensive money
CRIT(s)	Critical Legal Studies Scholar(s)
CSRC	China Securities Regulatory Commission
DPP	Democratic Progressive Party
FBIS	Foreign Broadcast Information Service
FDI	foreign direct investment
FIE	foreign-invested enterprise(s)
GATT	General Agreement on Tariffs and Trade?
GDP	gross domestic product
HPC	High People's Court
ICCPR	International Covenant on Civil and Political Rights
ICRG	International Country Risk Guide
IPC	Intermediate People's Court
IMF	International Monetary Fund
JV(s)	joint venture(s)
MFN	Most Favored Nation
MOFTEC	Ministry of Foreign Trade and Economic Co-operation

MOJ	Ministry of Justice
NGO(s)	nongovernmental organization(s)
NPC	National People's Congress
NPCSC	National People's Congress Standing Committee
NSC	National Seed Group Corporation
OECD	Organization for Economic Co-operation and Development
PLC	Political–Legal Committee
PRC	People's Republic of China
SAFE	State Administration of Foreign Exchange
SAIC	State Administration of Industry and Commerce
SOE(s)	state-owned enterprise(s)
SPC	Supreme People's Court
SPP	Supreme People's Procuratorate
TLSS	township legal services stations
TVE(s)	township and village enterprise(s)
UCLA	University of California at Los Angeles
UDHR	Universal Declaration of Human Rights
UN	United Nations
USTR	United States Trade Representative
VAT	value-added tax
WFOE(s)	wholly foreign-owned enterprise(s)
WTO	World Trade Organization

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Introduction

The hallmarks of modernity are a market economy, democracy, human rights, and rule of law. Not surprisingly, China first began to grapple with the need to reform the legal system in earnest during the Qing dynasty as part of its attempt to come to grips with modernity. Although those early reforms could not gain a foothold in the chaotic civil war conditions of the Republican era, and law subsequently took a back seat to politics during much of the Mao period, legal reforms and rule of law again became a hot issue when China emerged from the Cultural Revolution in the late 1970s and Deng Xiaoping announced his ambitious platform to modernize China. Twenty years of economic and legal reforms have only served to raise the temperature.

Nowadays, it is virtually impossible to open any Chinese newspaper without seeing reference to rule of law. Signs painted on buildings in the countryside proclaim the need to act in accordance with law. Flyers posted in cities urge passersby to steadfastly uphold the law. Scholars have produced literally hundreds of books and articles on the topic in the last ten years. And in 1999, the Constitution was amended to expressly provide for the establishment of a socialist rule-of-law state.

On the other hand, the initial reaction of many members of the general public to any attempt to link rule of law to China is one of shock and amusement. The less informed genuinely if bemusedly still question whether China even has laws. Lamenting the absence of rule of law, foreign investors and human rights activists keep up a steady drum beat calling for its realization. Meanwhile, skeptical legal scholars and longtime China observers query whether China actually is, or should be, moving toward rule of law. Some critics dismiss legal reforms as part of a sinister plot to hoodwink foreigners into investing in China or a jaded attempt by senior leaders to gain legitimacy abroad while actually just strengthening the legal system to forge a better tool of repression.