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LAW AND THE MARKET ECONOMY IN CHINA

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Law and the Market Economy in China

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ASHGATE

Published by
Ashgate Publishing Limited
Wey Court East
Union Road
Farnham
Surrey GU9 7PT
England

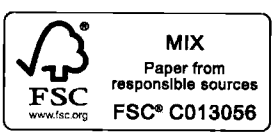
Ashgate Publishing Company
Suite 420
101 Cherry Street
Burlington
VT 05401-4405
USA

www.ashgate.com

British Library Cataloguing in Publication Data
Law and the market economy in China. – (The library of essays on Chinese law)
1. Commercial law–China.
I. Series II. Keller, Perry.
346.5'107–dc22

Library of Congress Control Number: 2011925051

ISBN 9780754628613



Printed and bound in Great Britain by
TJ International Ltd, Padstow, Cornwall.

Acknowledgements

The editor and publishers wish to thank the following for permission to use copyright material.

American Bar Association for the essays: Bruce M. Owen, Su Sun and Wentong Zheng (2008), 'China's Competition Policy Reforms: The Anti-Monopoly Law and Beyond', *Antitrust Law Journal*, **75**, pp. 231–65; Xueguo Wen (2008), 'Market Dominance by China's Public Utility Enterprises', *Antitrust Law Journal*, **75**, pp. 151–71.

American Journal of Comparative Law for the essay: Xin He (2009), 'Enforcing Commercial Judgments in the Pearl River Delta of China', *American Journal of Comparative Law*, **57**, pp. 419–55.

Cambridge University Press for the essays: James V. Feinerman (2007), 'New Hope for Corporate Governance in China?, *China Quarterly*, **191**, pp. 590–612. Copyright © 2007 The China Quarterly; Julia Ya Qin (2007), 'Trade, Investment and Beyond: The Impact of WTO Accession on China's Legal System', *China Quarterly*, **191**, pp. 720–41. Copyright © 2007 The China Quarterly.

Columbia Journal of Asian Law for the essay: Donald C. Clarke (2005), 'How Do We Know When an Enterprise Exists? Unanswerable Questions and Legal Polycentricity in China', *Columbia Journal of Asian Law*, **19**, pp. 50–71.

Fordham International Law Journal for the essay: Donald P. Harris (2008), 'The Honeymoon is Over: The U.S.-China WTO Intellectual Property Complaint', *Fordham International Law Journal*, **32**, pp. 96–187.

John Wiley and Sons for the essay: Sida Liu (2008), 'Globalization as Boundary-Blurring: International and Local Law Firms in China's Corporate Law Market', *Law and Society Review*, **42**, pp. 771–804. Copyright © 2008 Law and Society Association.

Oxford University Press for the essays: Guanghua Yu and Hao Zhang (2008), 'Adaptive Efficiency and Financial Development in China: The Role of Contracts and Contractual Enforcement', *Journal of International Economic Law*, **11**, pp. 459–94. Copyright © 2008 Oxford University Press; Daniel C. Crosby (2008), 'Banking on China's WTO Commitments: "Same Bed, Different Dreams" in China's Financial Services Sector', *Journal of International Economic Law*, **11**, pp. 75–105. Copyright © 2008 Oxford University Press; Ping Wang (2009), 'China's Accession to the WTO Government Procurement Agreement—Challenges and the Way Forward', *Journal of International Economic Law*, **12**, pp. 663–706. Copyright © 2009 Oxford University Press.

Virginia Journal of International Law Association for the essay: Salil K. Mehra and Meng Yanbei (2008), 'Against Antitrust Functionalism: Reconsidering China's Antimonopoly Law', *Virginia Journal of International Law*, **49**, pp. 379–430.

Yuhong Zhao (2007), 'Trade and Environment: Challenges after China's WTO Accession', *Columbia Journal of Environmental Law*, **32**, pp. 41–97. Copyright © 2007 Yuhong Zhao.

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Series Preface

In 1978, the Chinese Communist Party embarked on a programme of economic reform that would eventually transform not only China's economy but that of the world. As part of this massive effort to wrench China out of poverty by liberalizing its planned economy and opening the country to foreign trade and investment, the Party also began to construct a national legal system. Building on the remains of the socialist legal institutions and laws swept away in the Cultural Revolution as well as the Party-state's own well developed administrative methods, the Chinese government began to introduce the laws and regulations deemed necessary to its goals of economic reform and social stability.

More than thirty years on, China's legal system boasts not only a constitution and a solid array of primary legislation, but also a dense cascade of national and regional regulatory instruments. The central government has gradually enacted legislation in all major fields of law, including critically important laws on property rights, contracts and tort liability. It has also adopted broad amendments and issued detailed interpretations for many of these laws as circumstances and policies have changed through an unprecedented economic and social transformation. These measures include recurring efforts to reform the textual language and application of the Criminal Law and the Criminal Procedure Law, which have often been the subject of domestic and foreign criticism. The Communist Party has also countenanced the creation of legal rights that individuals may exercise against state authorities to claim redress for wrongful acts by state personnel as well as legal duties requiring state authorities to redress or compensate such acts. In addition, the legal reform project has fostered the rapid growth of legislative, judicial, regulatory and other legal institutions. These not only include a national court system, but also a burgeoning legal profession, which has gradually found a role in complex commercial transactions, disputes and other civil matters. In several decades, China has thus accomplished, in terms of formal laws and institutions, what western states took centuries to achieve; albeit accomplished on the back of a resilient system of public administration directed by a ruling party well experienced in the exercise of power.

The renovation of China's legal system has however also needed to accommodate the Communist Party's monopoly over political power, control of the use of coercive force and management of economic and social relationships. Despite a loosening of its grip on personal life in recent years, the Party still reaches into almost every organized group or activity in China. It is consequently a system of government that is innately incompatible with a liberal democratic conception of the rule of law. Indeed, the more pressing question is whether government under the Chinese Communist Party is compatible with any concept of the rule of law. The most blatant incompatibilities include, for example, the use of special detention procedures and facilities for Party members suspected of wrong doing that are entirely outside the state's rules concerning criminal justice or administrative sanction. More generally, the Party's discretionary use of power and preference for secrecy is reflected in the tendencies of Chinese law towards vague statutory language and weak procedural rights.

Many of the problems China faces in improving its legal system are universal. Indeed, resistance to the constraints of legal rights and duties, whether through ignorance, corruption or the arbitrary exercise of power, is commonplace even in countries where the rule of law ideal is revered. China's geographic size and enormous population, coupled with a dramatic rate of economic and social change, has moreover vastly complicated its efforts to address these problems. Yet the Party's tenacious grip on every important source of authority presents a formidable challenge to the rule of law ideal, raising doubts about the foundations and durability of the Chinese legal reform project.

Since 1978, the rule of law has provided one of the principal measures of progress in the construction of a new legal system. Party leaders, from Deng Xiaoping to Hu Jintao, have committed the Party to ruling the country according to law, deliberately if ambiguously raising rule of law expectations. Observers outside China, including western governments and key international organizations such as the World Bank, have also argued that economic development requires competitive markets, effective public and private institutions and good governance, solidly underpinned by adherence to the rule of law.

Plainly, an effective and durable rule of law in China must be well grounded in its history and current conditions. It is therefore important to see beyond the Party's Leninist structure and methods and accept that it is also following a model of centralized administration that has sustained Chinese states and societies through several millennium of economic and political dominance in East Asia. That tradition is thus inevitably a key factor in the development of rule of law institutions in contemporary China. From a pluralist view, the rule of law concept is simply a universal tool box that should be unpacked and applied in ways appropriate to each locality. At a minimum, it arguably requires no more than the equal application of the law to all members of society, including those who wield the power of the state. A thin version of this kind rejects the idea that the rule of law is necessarily rooted in the intellectual achievements of the Enlightenment or bound to core liberal democratic values and principles. Conversely, from the liberal democratic perspective, any thin version of the rule of law is either a way station on the road to those values and principles or a failure of the rule of law, which effectively excludes the possibility of a genuine rule of law under the Chinese Communist Party. The probability that the achievement of a state and society wedded to the rule of law will mean the demise of one party rule has moreover not been lost on the Party leadership or its opponents.

The construction of a comprehensive legal system is therefore fraught with risks for the Party. When the Communist Party established the People's Republic of China in 1949, it declared a radical break with the past, completely abolishing the western inspired laws enacted by the Nationalist Party during the Republic. In the Anti-Rightist Campaign of 1957, the Party crushed the remnants of the legal establishment who had dared to raise rule of law objections to its methods of government. Nonetheless, while it has made determined efforts to ensure that the law does not become a vehicle for serious challenges to its authority, the Party has frequently adopted legal constructs imported from the west to achieve its economic and social purposes. It has simply found it near impossible to escape the west's hold on the defining institutions of the modern state. Nor has it been able to escape the influence of legal reforms initiated in the late Qing and brought to fruition under the Nationalist government, which most importantly include the embrace of German civil law. As many in the Party no doubt appreciate, foreign sourced legal rules are often associated with liberal democratic principles

of law and government, including external transparency and public accountability. Whether those associations should be stamped out or merely pruned is a critical question for legal reform in China. In principle they are not altogether unacceptable to the Chinese government, which has committed itself to greater transparency and accountability in limited spheres. Yet the Party also remains acutely conscious of the threat that external scrutiny and accountability poses to its rule.

Outside China, the aspirations of western governments, commercial corporations and NGOs have also played a part in this transfer of legal concepts and rules. These law building initiatives in China, often highly publicised, should be seen in the broader context of long running efforts to entrench liberal economic and political values into a nascent, if fragmented, global public order. China's post 1979 reforms, moreover, coincided with a strong shift towards market based or neo-classical economic policy in the United States and elsewhere. The application of this policy to investment and trade relations, often referred to as the 'Washington Consensus', provided a powerful external policy guide on the steps needed for China to achieve prosperity. And while that policy prescription demanded the liberalization of markets, it also carried the implicit assumption that economic liberalization would lead to pluralist politics. The World Bank and other international development bodies have since tempered their advocacy of market based solutions with an emphasis on institution building, constitutionalism and good governance. If anything, however, this has tended to make the underlying liberal democratic aspirations of these development programmes more explicit.

In the western euphoria sparked by the dismantling of the Berlin Wall and the collapse of the Soviet Union, it appeared to many that China's transformation into the world's most populous democracy as well as market economy was only a question of time. For advocates of that final revolution, the Chinese government needed to be encouraged to leave behind its instrumentalist preference for 'rule by law' and move towards the rule of law ideal: the thicker the better. In economic terms, this would help to create the certainty and predictability deemed to be essential for the growth of profitable trade and investment. In political terms, it would help to establish a public space in which a pluralist civil society could begin to flourish and foster democratic institutions. Yet, the relative decline in the global authority of the western democratic model over the past decade and China's rise as an economic and political power has thrown that assumed trajectory into serious doubt.

In these changed circumstances, China now presents itself as a credible alternative to the western democratic model, marrying state capitalism to permanent one party government, underpinned by continuing economic growth, stable public order and effective public administration. The western model is however well entrenched in the world's major multilateral institutions. China's expanding involvement in international organizations and agreements has thus brought its domestic policies and laws into greater contact with international legal principles infused, or at least, coloured by liberal democratic values. On this front, the Chinese government's determined reliance on principles of state sovereignty has softened enough to permit selective multilateralism. In the field of United Nations human rights law, China has moved awkwardly around the thorny challenge of civil and political rights, leaving the International Covenant on Civil and Political Rights signed but unratified. At the same time, it has accepted other human rights treaty obligations that sit more easily with its long established position that international rights must be fulfilled in context and therefore, in China, economic and social development take priority. Most notably, the Chinese government

has become a state party to the International Covenant on Economic, Social and Cultural Rights. While these UN treaties often contain periodic review mechanisms that provide an opening for external scrutiny and comment on domestic law and public administration, China has developed a robust response to attempted naming and shaming in these fora.

In comparison, China's accession to the World Trade Organization in 2001 has had a deeper impact on its legal system and regulatory regimes. Participation in the WTO is not limited to democracies and its trade obligations have no direct bearing on the nature of domestic political order. Nonetheless, WTO disciplines and supplementary rules contain elements that resonate with a liberal democratic vision of the state. The fundamental principle of non-discrimination, in law or practice, demands an equality of treatment for foreign goods and services that carries difficult implications for states like China that use privileged national firms to achieve social and political as well as economic policy goals. China's Protocol of Accession moreover contains 'WTO plus' obligations not shared by existing member states that, among other things, extend the non-discrimination principle to politically sensitive sectors, including audio-visual media goods and their distribution services. The WTO's transparency rules for domestic measures affecting trade in goods and services as well as its obligations to ensure that measures affecting trade in services are administered reasonably, objectively and impartially have also put pressure on legal and regulatory systems in all member states. But this pressure is often most strongly felt in states like China, where there is a strong tradition of administrative secrecy and close ties between government and industry.

Regardless of these external obligations, there are also compelling domestic reasons for the Communist Party to advance not only the rhetoric of the rule of law, but also specific legal reforms that move towards that ideal. For central government authorities, the exercise of legal rights and duties, in particular law based remedies for wrong doing, can potentially improve the performance of local governments, which have historically sought to avoid Beijing's administrative reach. More broadly, these rights and remedies enhance the legitimacy of the Chinese state, which has energetically publicised the importance of legal reform.

The creation of a relatively comprehensive legal system has nevertheless left intact other elements of Chinese public administration that are incompatible with liberal democratic rule of law expectations. Most significantly, these include responsibility systems that require officials throughout the bureaucracies of the Party-state to meet economic growth and social stability targets that are often difficult to achieve without disregarding relevant legal rights and responsibilities. Consequently, while China has adopted many laws and regulations that outwardly conform to international standards, those legal reforms have not radically transformed the Party's methods of government. On the other hand, this recurring disconnection between national legislation and the practice of government is hardly unique to China. Many states have adopted the constitutional institutions of the dominant world model without closely linking them to domestic practice.

In China, however, the government has been increasingly forthright in its rejection of the notion that fundamental rights protecting the autonomy and equality of the person should be enforceable through independent judicial procedures. The Chinese model asserts instead that the exercise of legal rights is broadly and intentionally subordinate to political authority. Yet even if the legitimacy of that model is accepted outside China, including its rejection of key liberal democratic values, the door is not closed to scrutiny of its claims or comment on its weaknesses. If that external review cannot be grounded in a shared commitment to individual

liberty, it can at least be grounded in the universal respect for human dignity pledged by all UN member states.

On that basis, where then are the institutional foundations for the effective protection of the individual in China from the abusive exercise of state and market power? A thick version of the rule of law may not be essential to that end, but the Chinese model has yet to develop mature institutions that provide reliable remedies to specific acts of wrong doing. The mechanisms to expose and redress major failures in public policy are even less apparent. This notably includes, both as a matter of specific acts and of national policy, the injustices of place and status that have divided urban and rural residents throughout the history of the Peoples Republic. In a society increasingly divided between haves and have nots, open debate regarding these public policy choices is sorely needed.

Questions about law in contemporary China therefore sit within a wider debate over the nature and future of public administration under the Communist Party. That debate is, moreover, often sharply divided over the proper relationship between the individual and the Chinese state and the role of fundamental rights in that relationship. Given the intensity of the debate, the assumptions that each scholar brings to the discussion of law in China are always open to question. This is plainly the case for Chinese academic lawyers based in China writing in English for a foreign readership, whose work may be unfairly or fairly taken to reflect official government policy positions. There are undoubtedly powerful pressures in Chinese academic institutions to ensure that critical scholarly assessments do not challenge the legitimacy of the Chinese political order.

Yet while those pressures need to be recognised, the question of perspective is equally important for scholars based outside China. Here, the central issue is whether the author is so wedded to a liberal democratic perspective that any alternative order is per se illegitimate or at best a transitional regime to be assessed according to its progress towards that universal goal. There is moreover the potential failure to appreciate the extraordinary complexity of transplanting laws or regulatory rules from one legal system to another. Those misperceptions begin with an idealised view of how law works in an advanced liberal democratic state and end with a poor understanding of how to develop effective legal rules and remedies within the Chinese state.

The three volumes in this series bring together the work of different scholars containing divergent views on the nature of legal order in China and its further development. They are intended to be read as a whole, as they address similar themes and frequently speak to each other, although in most cases not intentionally. They also examine some of the most interesting and difficult issues in contemporary Chinese law from different perspectives and scholarly traditions. Collectively, they capture an important moment in China's rise as a global power, showing how the Communist Party has sought to use law to foster economic growth and manage social change, while maintaining its monopoly on power.

They also describe a complex and mixed situation. There is considerable evidence that law has become an important factor not only in commercial transactions and disputes but also in other areas, such as the breakdown of marital relations. While often sidelined, the law provides guidelines that help to create greater certainty and predictability in economic and social relations and also enhance the authority of decisions. Despite these demonstrable successes in the legal reform programme, this does not mean that some fields of law in China now operate in a relatively non-political manner. In a country where every organization is

under the direct or indirect supervision of the Party, what is non-political? Undoubtedly, thirty years of legal construction and education have had an impact on Chinese citizens, fostering not only a knowledge of legal rules but also a nascent rights awareness. Yet public expectations about legal rights are still very much grounded in the China's own traditions and practices of state centred public administration and political authority.

The growth of popular rights consciousness has also lead many in the Party to conclude that the benefits of empowerment of the public through the creation of legal rights are outweighed by the threat they pose to Party authority. Recent experience has demonstrated that even ordinary rights of compensation for injury or loss of property can become a tool for organizing collective action. China's contemporary legal system is therefore full of contrasts. The work of legal development continues to advance with improvements to many laws and regulations. This appearance of legal maturity however co-exists with the potentially unlimited exercise of coercive force against citizens.

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Introduction

The essays in this volume concern different aspects of China's changing market-based economy. They address commercial contract enforcement, corporate structures, competition law and selected issues related to Chinese membership of the World Trade Organization (WTO). Over the last two decades, the rapid integration of China's economy into the global marketplace has raised difficult expectations regarding non-discriminatory and transparent treatment of domestic and foreign commercial competitors. The Chinese government has made significant efforts to raise standards of governance in public administration and also to improve corporate governance and the market efficiency of the economy.

Yet, as these essays show, the central government has struggled to create corporate entities that are responsive to domestic and foreign shareholder interests, but are still amenable to direct and indirect Party-state guidance, which remains a core element of the Chinese economic model. This is especially true of the many state-owned enterprises that permit minority, non-state equity investment but are also important vehicles for the achievement of government economic and social goals. Legal developments in the economic sector have inevitably reflected those complex and sometimes conflicting policy objectives. The import of foreign legal and regulatory rules has moreover brought about recurring mismatches between rules developed under more open market conditions and China's state-directed, more restricted economy. In this regard, the development of competition law in China, through the Anti-Monopoly Law and other national legislation, has been contentious and conflict prone. The Chinese government's flexibility in combining market- and state-based economic methods has also figured prominently in its trade relations. WTO trade rules have become a major testing ground for differences over the legitimate role for the state in a market economy and, in particular, when China's state-owned enterprises should properly be treated as entities of the state.

In Chapter 1, Yu Guanghua and Zhang Hao discuss the growth of formal and informal financial contracts under the influence of China's economic reform policies. Their study, drawing on field research in Wenzhou, a port city on the south coast of Zhejiang province, concerns the development of both informal and formal contractual arrangements providing finance for local commercial transactions or undertakings. Many of these contractual arrangements occur in Wenzhou's informal financial market, which exists alongside the loan channels provided by banks and other sources of finance. Agreements made in this market are therefore not officially approved and are unenforceable in the courts. Yu and Zhang compare these informal finance agreements with the growing use of formal financial instruments in Wenzhou, including in particular bills of exchange, letters of credit and secured debt.

The key element in their study, however, is the concept of adaptive efficiency, which the authors take from the field of law and economics and apply to developing market conditions in China. Adaptive efficiency refers to the constraints and opportunities affecting the willingness and ability of individuals and groups to 'acquire knowledge and learning, to induce

innovation, to undertake risk and creative activity of all sorts, as well as to resolve problems and bottlenecks of the society through time' (p. 3). It also contains underlying presumptions against state-oriented decision-making, emphasizing instead 'decentralized decision-making processes that will allow societies to maximize the efforts required to explore alternative ways of solving problems' (p. 3).

The application of this concept in China might therefore appear counter-intuitive, given its reliance on state-owned enterprises and many other forms of state intervention in markets. Yu and Zhang, however, direct their attention to the margins of lawfulness, which have been a distinctive feature of China's economic transformation. In those grey areas, experimentation in new administrative and commercial practices has abounded, fuelling innovation and sometimes bringing about positive changes in national policies and law, as well, inevitably, as corruption, environmental damage and other harms. The authors argue that adaptive efficiency is useful in analysing the extent to which China's reforms create incentives for economic actors to develop different forms of financing that promote an effective market economy. They conclude that adaptive efficiency occurs in China through experimentation with different contractual and other arrangements, both informal and formal, that enhance efficiency by reducing risk and transaction costs. In their view, formal contracts become more important as development advances and economic actors require formal contractual arrangements in more complex, risky transactions with higher technological content.

In Chapter 2, Xin He examines the effectiveness and efficiency of Chinese courts in adjudicating and enforcing commercial judgements. Xin draws on extensive field work in the Pearl River Delta in Guangdong province to argue, contrary to the popular view that Chinese courts are biased and that their decisions are unenforceable, that in this locality enforcement outcomes are reasonable, enforcement processes are relatively efficient and problems of local protectionism are not serious. These positive trends depend, however, on the special economic and administrative advantages of the Pearl River Delta, the hotbed of China's export economy. Those advantages significantly include a diversified local economy, in which private enterprises, individual business operators and limited liability companies have become a larger part of the economy than in many other localities. Unlike state-owned enterprises and other major companies, these businesses cannot rely as heavily on political influence to protect their interests, resolve disputes and forestall legal claims. Instead, they are more likely to use the courts to resolve disputes and obtain payment, although in common with developed economies elsewhere much depends on the nature of the dispute and the amounts involved.

Xin also found that there is no apparent ideological bias against private businesses when they bring commercial disputes to these courts. Conversely, they are less likely to benefit from local protectionism as the courts have neither the time nor interest in skewing outcomes in their favour as they might well do for major local enterprises or in more significant cases. Government efforts to build judicial professionalism and strengthen enforcement have also helped to undercut local protectionism. The question now is whether these positive developments in commercial practice are being eclipsed by Beijing's more recent emphasis on the political loyalty of judges and the mediated settlement of disputes.

Interestingly, Xin does not believe that this observed efficiency and effectiveness of the courts was a pre-condition for the rapid development of the Pearl River Delta economy.

In fact, the court system was much weaker and less effective in the late 1980s and early 1990s when the local economy took off. Consequently, he argues that 'while the courts in the more developed area have indeed become more effective, this change has occurred largely because the local government, with a more developed local economy, has more income and can consequently give more financial support to the courts' (p. 70). That suggests that local financial resources, both state and private, have been a key precondition for the institutional and professional development of the courts in China.

In Chapter 3, 'How Do We Know When an Enterprise Exists? Unanswerable Questions and Legal Polycentricity in China', Donald Clarke investigates a basic question of Chinese enterprise law. In asking how one can tell whether an enterprise exists, Clarke sets out some of the various circumstances in which Chinese courts or other state authorities will recognize the existence of a business organization distinct from the natural or legal persons that participate in its operations. Surprisingly, many of these forms of limited liability have no basis in Company Law or other national legislation. There is moreover no rule in Chinese law or policy that governs the question of limited liability or otherwise imposes coherence on this assembly of entities.

Rejecting the simple explanation that these are merely the transient products of an immature legal system, Clarke uses the problem of limited liability in Chinese corporate law to make an important observation about the Chinese legal system more generally. He postulates that the very attempt to locate a legal rule that brings consistency to the problem of limited liability involves a misunderstanding of the nature of law in China. Clarke explains that China's legal system is radically polycentric and is therefore neither designed nor able to produce consistent rules. In short, there is no single source of ultimate authority within the apparatus of the Chinese state, despite the formal subordination of its various sources to an apparent single authority. As a result, limited liability exists if a government agency says it exists and can make this claim respected in part or all of the Chinese state system. Indeed, Clarke says that 'to make this claim might be the equivalent of saying that there is no single Chinese legal "system," that there are instead many Chinese legal systems, each with its own jurisdiction, hierarchy of authority, and way of operating' (p. 89). What claims to be a unified system of law is in effect splintered into a hyperarchy, in which too many legal authorities are empowered to make law to the extent of their bureaucratic jurisdiction. Clarke implies that this will continue until a radical change in the nature of the Chinese political system brings about a reorganization of the state.

Taking a more black letter law approach, in Chapter 4 James Feinerman discusses corporate governance and the development of the Chinese market economy. Using OECD standards as a guideline, Feinerman identifies major weaknesses in corporate governance in China. These include the abuse of power by dominant shareholders, the limited duties and supervisory responsibilities of boards of directors and the limited rights of shareholders. These internal governance issues cannot, however, be separated from underlying problems that afflict many Chinese companies, such as overly concentrated ownership, inexperienced commercial courts and a lack of market or cultural constraints on unlawful behaviour. All of these undermine the rule of law standards of clarity, certainty and consistency that Feinerman wholeheartedly endorses.

In Feinerman's view, reform of corporate governance in China is unlikely to change dramatically until there is a genuine effort to address the exercise of state power in the market economy. Company managers, directors and controlling shareholders are all, in different ways, able to rely on the power of the state to frustrate rules that impose obligations on the company and its shareholders. For their part, government policies towards company structures and operation often appear to be heavily influenced by pre-market reform views of the industrial or commercial enterprise as a vehicle to be driven as necessary by management to serve the purposes of the state.

Despite these general observations, Feinerman is chiefly interested in the achievement of better corporate governance through the reform of company law rules, in particular those concerning independent directors and shareholder rights. He therefore discusses the major amendments to the Company Law in 2005 that addressed a range of governance issues, including changes to the rules concerning shareholder meetings as well as the remedies and information rights of minority shareholders. Fiduciary duties of majority shareholders were also strengthened as were the board's duties of loyalty and diligence.

The overarching question that Feinerman points towards is the questionable effectiveness of rules taken from foreign jurisdictions and inserted into a Chinese context. Indeed, there are few fields of law in China where the import of foreign rules has occurred on such a grand scale and their effects have been so markedly different from their original intent. To some extent, this is hardly surprising in a field as complex as company law, which is heavily dependent on well-functioning, supporting institutions. Yet it is also an illustration of the recurring superficiality of legal rules in China and the overwhelming importance of administrative practice.

In an essay on China's competition policy reforms (Chapter 5), Bruce Owen, Sun Su and Zheng Wentong critically analyse the national Anti-Monopoly Law (AML). The National People's Congress adopted this legislation in 2007 after a thirteen-year drafting process, which although unusually long followed the Chinese law-making practice of experimentation through national and regional regulations and other normative instruments. The law is therefore both a consolidation of pre-existing rules on the acquisition and use of market power and a deepening of market reform. It contains provisions common to foreign competition law, such as prohibitions on certain kinds of horizontal agreements between firms and specified abuses of market power, as well as provisions directed at distinctive features of the Chinese economy, such as the dominance of state-owned enterprises and associated administrative monopolies.

Owen, Sun and Zheng broadly assess the reasons for the limited scope of the Anti-Monopoly Law as well as its various weaknesses in implementation, including not least the conflicting aims of China's economic policies. The ostensible aim of the AML is, for example, to encourage competition. Since its adoption the Chinese government has, however, introduced measures strengthening the role of state-owned enterprises in key economic sectors, excluding domestic and foreign competitors. The authors strongly favour market-based economic reform through a more rigorous application of the AML as well as further development of competition law in China. While they accept that state-owned enterprises will remain a major element of the Chinese economy, they also advocate more effective controls on their powers. At a minimum, the AML should be enforced against state-owned enterprises to wean them from the protective environment created by their domestic monopoly status.

Yet, as Owen, Sun and Zheng accept, the Anti-Monopoly Law was never intended as a vehicle for radical economic reform, placing the protection of market stability slightly ahead of its competition objectives. This is apparent in its broad exceptions to anti-competitive agreements and its cautious approach to the treatment of administrative monopolies. These monopolies, which arise out of the power of central and local government authorities to impose restrictive licensing on a wide range of economic activities, are ubiquitous in China. Monopoly positions created by the use of administrative powers are, in principle, subject to specified competition disciplines under the AML, however the remedies are administrative and political rather than legal.

Chapter 6, by Salil Mehra and Meng Yanbei, takes a somewhat different approach to the development of competition law in China. For Mehra and Meng, not only should the Anti-Monopoly Law be understood in its domestic context, but the use of foreign-derived benchmarks for the development of effective competition law should also be applied with great caution. They argue that, taken optimistically, the AML is a simple stage in an ongoing development of Chinese competition law. In particular, they are sceptical of criticisms of the AML that are grounded in 'antitrust functionalism', which expressly or implicitly assumes that anti-trust law in China must look like and work like anti-trust elsewhere. This legislation was intended to address the problem of competition within the constraints of the Chinese economy, including its reliance on administrative methods of enforcement. It also provides a legal and policy framework for the education of Party-state officials on the importance of market competition, which may, for example, help to alleviate local and regional protectionism through changes in bureaucratic behaviour.

The chief difficulty here is whether the Anti-Monopoly Law can operate effectively without the underlying support of an independent and predictable judicial system. For Mehra and Meng, the assumption that competition law requires both an independent judiciary and a cohort of lawyers skilled in that area of practice is in effect to use American anti-trust law as a universal model. They suggest instead that frequent resort to the courts may well be an indication of instability in competition law. China may therefore be establishing a competition law system based on administrative rather than judicial control, which reaches the same end.

Yet Mehra and Meng are not uncritical of the Anti-Monopoly Law and also address several of its problems, including the question of who will regulate anti-competitive behaviour. For example, the current separation of enforcement power into three institutions, the National Development and Reform Commission, the State Administration for Industry and Commerce and the Ministry of Commerce, not only wastes resources, but also creates conflict and friction between different agencies. They suggest that the gradual creation of a unified, independent and integrated enforcement agency could evolve out of the Anti-Monopoly Commission if it were combined with relevant parts of those State Council departments. That step towards the more effective regulation of anti-competitive behaviour would be, as they freely admit, strongly resisted by competing departments.

In Chapter 7, Wen Xueguo critically examines the detrimental effect of public utility enterprises (PUEs) on consumers as well as their competitors in his essay on the market dominance of PUEs in China. Market dominance typically arises through the existence of natural monopolies or government protection from competition. PUEs engage in a variety of harmful practices, which include excessive pricing, compulsory charges, cross-

subsidies, purchasing or selling boycotts, restrictions on access to controlled infrastructure and compulsory or tied transactions. Wen also suggests that the large number of civil cases brought against PUEs indicates an urgent need to remedy their negative effects on competitive markets and consumer interests.

Controlling the market dominance of Chinese public utility enterprises faces several obstacles. According to Wen, one of the most important characteristics of the PUE is its dual role as a commercial operator and an industry administrator, which makes government supervision of abusive conduct an almost impossible task given the potential conflicts of interest. Wen therefore argues that '[t]his conflation of operator and administrator is especially important in the context of Article 51 of the new AML, in which it is the administrator who makes the final determination of a violation of the law that the administrator's own PUE may have actually committed' (pp. 212–13). The law therefore does little to rein in the abuse of privileged market status by PUEs, which are still seen by the government as essential vehicles to achieve economic and other key policy goals rather than burdens on market competition. In Wen's view, PUEs are in fact a major obstruction to further competition reforms and their ownership structures and rules of corporate governance must be reformed. Accordingly, those based on natural monopolies should be placed under the control of independent regulatory authorities and all the others should be forced to operate as commercial businesses subject to a strengthened Anti-Monopoly Law.

Liu Sida's essay, 'Globalization as Boundary-Blurring' (Chapter 8), concerns the development of legal services in China following the quasi-entry of foreign law firms into the domestic legal services market. After the legally doubtful operation of some foreign law offices in China during the 1980s, the government introduced regulations permitting the licensing of foreign law firms to provide 'information concerning the impact of China's legal environment', while prohibiting them from engaging in Chinese legal affairs. As a result, these foreign firms must retain Chinese law firms to provide their clients with the full range of corporate and commercial legal services in China.

Liu examines the complex interface between foreign and domestic legal practices in China, including in particular the adaptation of the structures and practices of global legal services to Chinese circumstances. Liu rejects the argument that these developments in China are best explained by the related concepts of isomorphism and diffusion of global models. Those concepts would suggest that China's elite commercial law firms have mainly sought to emulate the institutional models derived from the major Western states whose legal firms dominate global legal practice. Instead, Liu argues that the absorption of foreign institutional models has in fact involved considerable boundary blurring and hybridization of legal practices. Rather than the diffusion of foreign models into China, a process of hybridization has occurred in which local actors have become structurally global-looking while global actors have acquired local expertise and become more localized, blurring the de facto market boundary between foreign and local law firms. In the terms of neo-institutionalist theory, this is in effect a decoupling of global models and local practices, which in Liu's view reflects the political and cultural sensitivity of law and legal practice to locality. 'This process, if not unexpected, is intriguing to theories on the globalization of law and professions, because it suggests that the cultural substance of law and professionalism is not only decoupled from