

CHINA'S LONG MARCH TOWARD RULE OF LAW

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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.

A few minority voices, all but drowned out in the din over the wonders of rule of law, suggest that the economy is doing fine without it, and hence question whether China really needs it. Ironically, although most in China proudly chant the rule-of-law mantra, many Western legal scholars and political scientists dismiss it as a meaningless slogan – “just another one of those self-congratulatory rhetorical devices that grace the public utterances of Anglo-American politicians.”¹ Worse yet, some condemn it as a mask for oppression and injustice.²

Notwithstanding such reservations about its value and the self-proclaimed failure of earlier efforts to transplant Western liberal democracy and rule of law to developing countries in the 1960s and 1970s, multinational agencies continue to pour millions of dollars into legal reform programs in China.³ If anything, Russia’s collapse and the Asian financial crisis have only increased faith in the importance of rule of law and opened the funding floodgates even wider. Bilateral programs also abound. In 1997, for instance, Presidents Clinton and Jiang signed a broad-ranging agreement widely touted as a rule-of-law initiative in the Western press. Not to be outdone, the EU entered into a Legal and Judicial Cooperation Program in 1998.⁴

What is one to make of such wildly divergent perspectives? Is China in the process of establishing rule of law? If so, is that good or bad? What has prevented China from realizing rule of law? Assuming China does implement rule of law, will rule of law in China differ from rule of law in Western liberal democracies? This book attempts to sort through these and related issues, beginning with the basic question of the meaning of rule of law.

What is rule of law?

Rule of law, like other important political concepts such as justice and equality, is an “essentially contested concept.”⁵ Yet the fact that there is room for debate about the proper interpretation of rule of law should not blind us to the broad consensus as to its core meaning and basic elements. At its most basic, rule of law refers to a system in which law is able to impose meaningful restraints on the state and individual members of the ruling elite, as captured in the rhetorically powerful if overly simplistic notions of a government of laws, the supremacy of the law, and equality of all before the law.

Theories of rule of law can be divided into two general types: thin and thick. A thin theory stresses the formal or instrumental aspects of rule of law – those features that any legal system allegedly must possess to function effectively as a system of laws, regardless of whether the legal system is part of a democratic or nondemocratic society, capitalist or socialist, liberal or theocratic.⁶ Although proponents of thin interpretations of rule of law define it in slightly different ways, there is considerable common ground, with many building on or modifying Lon Fuller's influential account that laws be general, public, prospective, clear, consistent, capable of being followed, stable, and enforced.⁷

In contrast to thin versions, thick or substantive conceptions begin with the basic elements of a thin concept of rule of law but then incorporate elements of political morality such as particular economic arrangements (free-market capitalism, central planning, etc.), forms of government (democratic, single party socialism, etc.), or conceptions of human rights (liberal, communitarian, "Asian values," etc.). Thick conceptions of rule of law can be further subdivided according to the particular substantive elements that are favored.

Thus, the Liberal Democratic version of rule of law incorporates free market capitalism (subject to qualifications that would allow various degrees of "legitimate" government regulation of the market), multiparty democracy in which citizens may choose their representatives at all levels of government, and a liberal interpretation of human rights that gives priority to civil and political rights over economic, social, cultural, and collective or group rights.⁸

In contrast, Jiang Zemin and other Statist Socialists endorse a state-centered socialist rule of law defined by, *inter alia*, a socialist form of economy, which in today's China means an increasingly market-based economy but one in which public ownership still plays a somewhat larger role than in other market economies; a nondemocratic system in which the Party plays a leading role; and an interpretation of rights that emphasizes stability, collective rights over individual rights, and subsistence as the basic right rather than civil and political rights.

There is also support for various forms of rule of law that fall between the Statist Socialism type championed by Jiang Zemin and other central leaders and the Liberal Democratic version. For example, there is some support for a democratic but nonliberal (New Confucian) Communitarian variant built on market capitalism, perhaps with a

somewhat greater degree of government intervention than in the liberal version;⁹ some genuine form of multiparty democracy in which citizens choose their representatives at all levels of government; plus an “Asian values” or communitarian interpretation of rights that attaches relatively greater weight to the interests of the majority and collective rights as opposed to the civil and political rights of individuals.¹⁰

Another variant is a Neoauthoritarian or Soft Authoritarian form of rule of law that, like the Communitarian version, rejects a liberal interpretation of rights but, unlike its Communitarian cousin, also rejects democracy. Whereas Communitarians adopt a genuine multiparty democracy in which citizens choose their representatives at all levels of government, Neoauthoritarians permit democracy only at lower levels of government or not at all.¹¹ For instance, Pan Wei, a prominent Beijing University political scientist, has advocated a “consultative rule of law” that eschews democracy in favor of single party rule, albeit with a redefined role for the Party, and more extensive, but still limited, freedoms of speech, press, assembly, and association.¹²

A full elaboration of any of these types requires a more detailed account of the purposes or goals the regime is intended to serve and its institutions, practices, rules, and outcomes in particular cases, as will be provided in Chapter 3. Nevertheless, this preliminary sketch is sufficient to make the following points. First, despite considerable variation, all forms accept the basic benchmark that law must impose meaningful limits on the ruler and all are compatible with a thin rule of law. Put differently, any thick conception of rule of law must meet the more minimal threshold criteria of a thin theory. Predictably, as legal reforms have progressed in China, the legal system has converged in many respects with the legal systems of well-developed countries; and it is likely to continue to converge in the future.

Second, at the same time, there will inevitably be some variations in rule-of-law regimes even with respect to the basic requirements of a thin theory due to the context in which they are embedded. For example, there may be differences in the way disputes are handled, with some systems relying more on the formal legal system to enforce property rights and resolve social conflicts and other systems relying more on informal and nonlegal means of protecting property rights and resolving social conflicts. Similarly, administrative law regimes will differ in the

degree of discretion afforded government officials and the mechanisms for preventing abuse of discretion. Judicial independence will also differ in degree and in the institutional arrangements and practices to achieve it.¹³ And differences in fundamental normative values will lead to divergent rules and outcomes. Hence signs of both divergence from and convergence with the legal systems of well-developed countries are to be expected. Indeed, whether one finds convergence or divergence depends to a large extent on the particular indicators that one chooses, the time frame, and the degree of abstraction or focus. The closer one looks, the more likely one is to find divergence. But that is a natural result of narrowing the focus.

Third, when claiming that China lacks rule of law, many Western commentators mean that China lacks the Liberal Democratic form found primarily in modern Western states with a well-developed market economy. Although some citizens, legal scholars, and political scientists in China or living abroad have advocated a Liberal Democratic rule of law, there is little support for liberal democracy, and hence a Liberal Democratic rule of law, among state leaders, legal scholars, intellectuals, or the general public.¹⁴ Accordingly, if we are to understand the likely path of development of China's system, and the reasons for differences in its institutions, rules, practices, and outcomes, we need to rethink rule of law. We need to theorize rule of law in ways that do not assume a liberal democratic framework, and explore alternative conceptions of rule of law that are consistent with China's own circumstances. While the three alternatives to a Liberal Democratic rule of law each differ in significant ways – particularly with respect to the role of law as a means of strengthening the state versus limiting the state – they nevertheless share many features that set them apart from their liberal democratic counterpart.

Given the many possible conceptions of rule of law, I avoid reference to “the rule of law,” which suggests that there is a single type of rule of law. Alternatively, one could refer to the *concept* of “the rule of law,” for which there are different possible *conceptions*. The thin theory of rule of law would define the core concept of rule of law, with the various thick theories constituting different conceptions. Yet, as I argue in Chapters 3 and 12, from the perspective of philosophical pragmatism, how one defines a term depends on one's purposes and the consequences that attach to defining a term in a particular way. As thick and thin theories

serve different purposes, I do not want to privilege thin theories over thick theories by declaring the thin version to be “the rule of law.”¹⁵

Fourth, assuming, as seems likely, that China will ultimately more fully implement some version of rule of law, the realization of rule of law in any form will require significant changes to the present system.

China’s march toward rule of law

Although it may be too early to declare definitely that China will succeed in fully implementing rule of law, there is considerable direct and indirect evidence that China is in the midst of a transition toward some version of rule of law that measures up favorably to the requirements of a thin theory. As an official matter, both the Party constitution and the 1982 constitution confirm the basic principles of a government of laws, the supremacy of the law, and equality of all before the law. Moreover, in 1996, Jiang Zemin adopted the new *tifa* or official policy formulation of ruling the country in accordance with the law and establishing a socialist rule-of-law state (*yifa zhiguo, jianshe shuhui zhuyi fazhiguo*), which was subsequently incorporated into the Constitution.¹⁶

Were the only evidence for the shift toward rule of law mere words, we would be justifiably dubious. However, China has backed up its rhetoric with actions. Decimated by the Cultural Revolution and decades of neglect and abuse, the legal system had to be rebuilt virtually from scratch. One of the first tasks was to start passing laws. Given the heavy reliance on Party policies rather than law during the Mao period, China lacked even the most basic laws such as a comprehensive criminal code, civil law, or contract law. The response has been a legislative onslaught the pace and breadth of which has been nothing short of stunning. Between 1976 and 1998, the National People’s Congress (NPC) and its Standing Committee (NPCSC) passed more than 337 laws and local people’s congresses and governments issued more than 6,000 regulations. In contrast, only 134 laws were passed between 1949 and 1978, with only one law passed during the Cultural Revolution from 1967 to 1976. Moreover, of the 134 laws passed between 1949 and 1978, 111 were subsequently declared invalid and many of the remaining ones were amended during the post-1978 reform era.¹⁷

Considerable effort and resources have also been spent on institution-building. The Ministry of Justice, dismantled in 1959, was reestablished

in 1979. Law schools were reopened, and a wide variety of legal journals commenced publication. The government has sought to rebuild its legal institutions and promote greater professionalization of judges, procurators, lawyers, and police. The legal profession in particular has made remarkable strides over the last twenty years. While in 1981, there were just 1,465 law offices and a mere 5,500 lawyers, by 1998 there were more than 8,300 law firms and over 110,000 lawyers.¹⁸

Much time and effort have been spent on legal dissemination and consciousness raising. China is now in its fourth five-year plan to publicize laws. Recently, live trials have been broadcast on television. Every day CCTV broadcasts the half-hour program *Today on Law* where experts discuss the ins and outs of interesting cases.¹⁹ In addition, local stations have been quick to respond to the interest in law by providing a variety of law-related programs.²⁰ There is also a radio program to inform people about their rights. Judging from the increase in litigation, the efforts are achieving some success. While litigation was virtually nonexistent in 1979, the total number of cases of first instance reached 3 million by 1992, and 5 million by 1996.²¹

Perhaps the best evidence for the contention that the legal system is moving in the direction of greater compliance with the requirements of rule of law is the increasing importance of law in everyday life. Whereas during the Mao period the country was governed mainly on the basis of Party policy and administrative regulations, often passed internally up and down the administrative hierarchy but not made available to the general public, today the country is increasingly governed on the basis of publicly promulgated laws rather than Party policy or internal regulations (*neibu guiding*). Nowadays, lawyers and consultants who dismiss the law and advise their clients that all is possible with the right connections (*guanxi*) are simply guilty of gross malpractice. Moreover, law is beginning to impose meaningful restraints on the ruling regime (which of course is not to claim that law is the only source of restraints on government actors). For instance, Party interference with specific court decisions is the rare exception rather than the rule. Significantly, a number of administrative laws have been passed establishing legal mechanisms for challenging government officials and holding them accountable. Increasingly, citizens are willing to take on the government through administrative reconsideration and litigation. More important, they are often successful. In fact, the plaintiff prevails in whole or in part

in some 40 percent of the administrative litigation cases, a rate three times higher than in the USA.²²

Rule of law or rule by law?

While there is considerable evidence that China is in the midst of a transformation to some form of rule of law, there is at the same time some evidence to support the view that the legal system remains a type of rule *by* law rather than a form of rule *of* law. Whereas the core of rule of law is the ability of law and legal system to impose meaningful restraints on the state and individual members of the ruling elite, rule by law refers to an instrumental conception of law in which law is merely a tool to be used as the state sees fit.²³

Despite remarkable progress, the reach of the law is still clearly limited. The Party's actual role in governing the country is at odds with or not reflected in the Constitution or other legal documents. In some cases, Party policies continue to trump laws. The nomenklatura system whereby the Party is able to appoint or at least veto the appointment of key members of the people's congresses and courts undermines the legitimacy, independence, and authority of the legislature and judiciary. Senior Party members, moreover, are generally subject to sanctions, if at all, by Party discipline committees rather than the courts, in flagrant violation of the fundamental rule-of-law principle that the law applies equally to rulers and commoners alike. Further, the government continues to limit civil society and political dissidents are denied their rights as provided by law.

Of course, assuming China is in the process of implementing rule of law, one would expect that during the transition period many aspects of the current system would be at odds with rule of law. During this period, some commentators, emphasizing how far China's legal system falls short of the ideal of rule of law and looking back to its rule-by-law past, will insist that China remains fundamentally rule by law. Others, stressing the ruling regime's formal commitment to a system in which law binds the state and state actors and the progress that has been made in promulgating laws and creating institutions to achieve that purpose, may be inclined to describe China's legal system as a fledgling, albeit deeply flawed, form of rule of law.²⁴ Still others, observing that China's legal system differs significantly from the rule-by-law regime of the Mao

era, yet acknowledging that the current system falls far short of the ideal implied by the honorific rule of law, will prefer to describe China's legal system as in transition toward rule of law, as I have here.²⁵ In any event, while some skeptics may question whether China is moving toward rule of law, everyone agrees that there are many significant obstacles to its implementation. Opinions differ, however, as to the relative weight of the various impediments and their underlying causes.

Why has China not implemented rule of law? An institutional approach

One way to study China's legal reforms is to examine in turn particular areas of law: commercial, family, criminal, administrative, environmental, and so on. The advantage of such an approach is that each area is likely to give rise to its own particular set of issues. China's problems in the environmental area, for example, are due in part to a weak central agency and the desire for economic growth.²⁶ The Criminal Procedure Law, recently revised to afford greater protection to the accused, falls prey to the public's demand to strike hard at crime and turf struggles between the procuracy and the judiciary.²⁷ Family laws aimed at curbing domestic violence butt up against longstanding traditions in which wives were subordinate to husbands in the family hierarchy and violence against women was tolerated. The effectiveness of administrative litigation and other means of reining in the bureaucracy is diminished by a low level of legal consciousness among citizens who are unaware of their rights, and the persistent influence of a paternalistic tradition in which the ruled are expected to defer to mother and father officials (*fumu guan*) much as children defer to their parents. Thus, even when citizens do know their rights, they are often reluctant to challenge abusive administrative officials.²⁸

At the same time, there are general systemic and institutional obstacles to enforcement that cut across the various areas, albeit with varying degrees of relevance and importance to any given area. A weak judiciary, for example, undermines effectiveness in all areas. Rather than focusing on particular areas of law, this study is organized by institutions, with reference to various areas of law as needed to illustrate specific issues and problems. The advantages of this approach are twofold. Although in-depth studies of specific areas of law are valuable and needed, such

studies often run the risk of missing the forest for the trees. Understandably, given their focus, the task of drawing connections to other areas of law is frequently slighted. Moreover, as will be shown throughout this work, the major obstacles to rule of law in China are systemic and institutional in nature. Accordingly, to understand any specific area of law requires that one understand the larger institutional context in which it exists.

The role of the Party

The most common explanation for China's troubles places the brunt of the blame on ideology and the attitudes of China's ruling elite, particularly senior Party leaders.²⁹ Analyses of China's failures to realize rule of law thus typically begin, and all too often end, by noting that China remains a single party socialist state. Some critics argue that single party socialism is simply incompatible with rule of law and a limited government because the leading role of the Party cannot be reconciled with the supremacy of the law and a system in which law limits Party power.³⁰ It is standard socialist legal theory dogma that law is a tool of the state and the ruling class. In a Leninist state, the Party is assigned a leading role based on the premise that it knows best what is in the interests of the people. Law then becomes a tool of the Party to be used to serve the interests of the people and to attack the enemy.

Setting aside the theoretical issue of the compatibility of single party socialism and rule of law, cynical realists claim that as a practical matter there is no rule of law in China at least to a considerable extent because senior Party leaders and other interested parties simply do not want it.³¹ After all, rule of law implies some degree of separation between law and politics and the imposition of limits on the Party and government authority. While Party leaders are happy to use law as a tool to ensure more efficient implementation of Party policies, the last thing they want is meaningful restraints on their own power.

In contrast, I suggest that single party socialism in which the Party plays a leading role is in theory compatible with rule of law, albeit not a Liberal Democratic version of rule of law. Party members and government officials are required to comply with the law, and in practice their behavior is increasingly constrained by law, especially when compared to twenty years ago. Although the CCP still often fails to abide by the circumscribed role set forth in the state and Party constitutions, on a

day-to-day level, direct interference by Party organs in administrative rule-making or specific agency decisions is not common. Increasingly, routine acts of governance are handled by the usual government entities with little or no interference from the Party. As the Party's grip over society loosens, opportunities for conflict between Party policy and law become fewer. While it remains to be seen whether the legal system will be able to impose meaningful restraints on the CCP on issues of major importance, there will be fewer and fewer instances where the will of the Party or individual Party members will be able to trump laws.

The Party's main relevance to realization of rule of law lies in its ability to promote or obstruct further political and legal reforms that would strengthen the legal system but could lead to the demise of the Party or a drastic reduction in its power. Reforms such as the establishment of a more independent and authoritative judiciary, the development of a more robust civil society, the creation of an anticorruption commission, and the holding of higher-level elections of people's congress delegates and government officials all require Party approval. Naturally, given their vested interest in retaining power, some senior leaders may be ambivalent at best about some of these reforms and their implications for the Party.

Nevertheless, the extent of Party ambivalence toward legal reforms and rule of law should not be overstated. First, the CCP is not monolithic; there are different factions within the CCP, and individual Party members hold different opinions on issues, though according to PRC legal scholars there is widespread support for some form of rule of law among senior Party leaders as well as rank-and-file members.³² Many of the younger members who joined the CCP have done so not for ideological reasons but rather for the perceived economic benefits and career opportunities. Thus, even though the Party is still a force within the Chinese polity, with the power to influence and in some cases determine the outcome on certain key issues, the increased diversity of views within the Party makes it more difficult for Party leaders to rally the necessary support to block reform proposals. More importantly, the Party is not drawing on a blank slate; its choices are constrained by the pressing need to sustain economic growth and attract foreign investment, international pressure, growing discontent over corruption, and the rising domestic demand for rule of law. Hence the future of rule of law in China depends on more than the preferences of senior leaders.

Accordingly, I place less emphasis on socialist ideology and the intent of the leaders and more emphasis on context and the particular problems that China is confronting in establishing a law-based order. The CCP is only one of the obstacles to realizing a law-based order. Even if China's leaders were wholeheartedly committed to establishing a legal order in which the law imposed meaningful constraints on state actors, it could only be imperfectly realized at this point.

China's legal system is beset by a number of problems. As a result of more than a decade of feverish legislating, the legal framework is by and large in place. Although there are still some gaps in the framework and loopholes in the existing laws, tinkering with doctrine or passing more laws and regulations alone will have little impact. At this point, the biggest obstacles to a law-based system in China are institutional and systemic in nature: a legislative system in disarray; a weak judiciary; poorly trained judges and lawyers; a low level of legal consciousness; a weak administrative law regime; the lack of a robust civil society; the enduring influence of paternalistic traditions and a culture of deference to government authority; rampant corruption; large regional variations; and the fallout from the unfinished transition from a centrally planned economy to a market economy, which has exacerbated central–local tensions and resulted in the fragmentation of authority.³³

The legislative system

The turn away from Party policy to a more law-based order has resulted in a more independent, authoritative, and professional legislature at both the national and local levels. Although delegates from the National People's Congress and local people's congresses are not elected (except at the lowest level) and key appointments are still made in accordance with the nomenklatura system, people's congresses are no longer merely rubber stamps. The institutional capacity of the people's congresses has been enhanced steadily through a variety of measures, including rapid expansion in personnel, the development of subcommittees responsible for specific technical tasks, and efforts to raise the educational level of delegates. The newly minted Legislation Law and other laws have clarified and standardized the law-making process and increased transparency and opportunities for public participation to some degree. Meanwhile, the State Council and local governments have passed a

number of regulations to govern administrative rule-making, and legislators are busy working on a draft of a comprehensive Administrative Procedure Law that promises to render the administrative law-making, interpretation, and implementation processes more transparent, accountable, and accessible to the public.

Notwithstanding such positive developments, the legislative system continues to be a major obstacle to the realization of rule of law. For a variety of reasons, laws are often general and vague. Many laws and regulations are poorly drafted, due partly to the lack of practical experience and the low level of competence of the drafters, especially at the local levels. Laws and regulations are subject to frequent change, frustrating investors who find it difficult to develop long-term strategies. On the other hand, China's legislators simply cannot keep up with the pace of reforms. As a result, many laws are out-of-date, at odds with reality and current practices, and in need of amendment. Perhaps most worrisome, however, is the astoundingly high level of inconsistency between lower-level and higher-level legislation and the lack of effective channels to rectify the problem.

Although a number of solutions have been proposed and a number of steps taken to reduce the level of inconsistency, they are not likely to suffice for reasons explained in Chapter VI. In the end, deeper institutional reforms, including judicial reforms to increase the independence and authority of the courts – in particular giving the courts the power to annul administrative regulations – are likely to be required.

The judiciary

China has taken a number of steps to increase the professionalism and authority of the judiciary. The Judges Law raised the standards for becoming a judge. The National Judges Institute and other institutes run extensive judicial training programs, often funded by foreign agencies and involving foreign experts. Specialized courts have been established to handle intellectual property disputes. Nevertheless, the judiciary remains a weak link in the rule of law chain.

Rule of law requires that laws be enforced fairly and impartially. In China, however, judicial corruption and the longstanding practice of judges meeting *ex parte* with litigants and their lawyers undermine the fairness and impartiality of the process. Moreover, despite the efforts to

raise the level of competence, many judges remain poorly trained and ill-suited for the job. Indeed, there are still many former military officers with little or no formal training in law serving as judges, though many are set to retire in coming years or are being transferred to posts within the court that do not require them to hear cases.

More fundamentally, the courts lack both independence and authority. Under the nomenklatura system, the Party continues to approve the appointment of senior judges. The president of the court, who has considerable power within the court, frequently lacks formal legal training and has been appointed based on political criteria. To be sure, direct Party interference in specific cases is rare for the simple reason that the Party has no interest in the outcome of most cases other than that it be fair. By far the biggest source of outside interference in court decisions is not the Party but local government officials seeking to protect local interests.

The authorities have attempted to overcome the problem of local protectionism by passing regulations, applicable to particular areas of judicial work such as enforcement, that increase the independence of judges by shifting responsibility for certain personnel decisions to higher-level courts. However, such partial reforms are unlikely to succeed in combating rampant local protectionism and are even more unlikely to succeed in addressing the broader issue of the courts' lack of independence and authority. Ultimately, deeper institutional reforms are necessary. However, the authorities have been reluctant to approve any such reforms, no doubt in part out of fear that a more independent court able to decide run-of-the-mill commercial, criminal, and administrative litigation cases fairly and impartially would also be able to decide politically sensitive cases fairly and impartially. As in other areas, such as propaganda and thought control work, the Party's goals are at odds with each other; and the desire for economic growth is forcing senior leaders to choose between goals and accept compromises, often with irreversible results.³⁴

The legal profession

The legal profession has developed rapidly in terms of the numbers of lawyers, their quality and professionalism, and their independence. Today, a growing number of PRC lawyers are able to compete with foreign lawyers for lucrative foreign investment work by taking advantage of their bilingual language skills and knowledge of the local

environment to provide superior advice and more effective service. Nonetheless, there are still many problems that plague the legal profession as a whole. The supply of lawyers falls far short of demand, particularly outside of the major commercial centers. Equally important, many lawyers lack the training and skills to provide the quality legal services sought by businesses engaged in increasingly sophisticated transactions or by defendants seeking to take advantage of China's revised criminal procedure laws. Despite efforts to raise the standards for becoming a lawyer, many attorneys have received no formal legal training and some lack even a college education.

Although lawyers are no longer considered "workers of the state" as in the Mao era, the independence and autonomy of the legal profession remains limited. Lawyers are now subject to the dual oversight of the Ministry of Justice (MOJ) and the bar association. However, the national and local bar associations remain closely affiliated with the MOJ and its local counterparts. The relationship between the legal profession and the state is best characterized as a form of corporatism or clientelism. Lawyers seek to establish a close relationship with the MOJ or its affiliates mainly for commercial reasons: either to gain access to business opportunities or simply to stave off excessively predatory rent-seeking by greedy justice bureau officials. Political considerations are rarely a factor, in part because most lawyers much prefer to concentrate on high-paying commercial work rather than politically sensitive cases.

The legal profession also suffers from rampant professional responsibility violations. Many lawyers survive and in some cases thrive based on their *guanxi* (connections) with judges and government officials rather than their legal skills. Given the current environment in which they must operate, including widespread corruption and a poorly trained judiciary, lawyers often feel they have no choice but to rely on *guanxi* as much as on legal arguments.

All in all, the legal profession is still young and immature, both in terms of the average age of lawyers and the profession itself. The lack of professionalism of lawyers contributes to difficulties in implementing the law and establishing a law-based order. Although in time the legal profession will mature and become more professional, there are still likely to be signs of divergence vis-à-vis legal professions in other countries, particularly in common law countries such as the USA. Given China's more civil law system, lawyers are less likely to emerge as major

catalysts for social change. While lawyers are likely to back further legal reforms and press for the implementation of rule of law, whether they will be ardent champions of democracy and political reforms more generally is doubtful. Like other entrepreneurs who have benefited from economic reforms, lawyers on the whole appear to be politically conservative and risk averse. They do not want to rock the boat and risk instability – and endanger their privileged lifestyles – by hastily moving toward democracy. Most seem content to focus on accumulating wealth and all of the perks that go with being a high-paid lawyer, including for the very elite the latest mobile phone, a new car, a villa in the suburbs, and vacations abroad.

The administrative law regime

Because administrative law plays a key role in limiting the arbitrary acts of government, the centrality of administrative law (administration in accordance with law – *yifa xingzheng*) to rule of law is well accepted both in China and abroad.³⁵ Whereas in the past the purpose of administrative law was considered to be how to facilitate efficient government and ensure that government officials and citizens alike obey central policies, administrative law is now understood to entail a balancing of government efficiency with the need to protect individual rights and interests.³⁶ Moreover, China has established institutions and mechanisms for rein-ing in the bureaucracy similar to those in countries known for rule of law, including legislative oversight committees, supervision committees that are the functional equivalent of ombudsmen, internal administration reconsideration procedures, and judicial review. At the level of legal doctrine, China has passed a number of laws that not only resemble but are modeled on laws from other countries. Even in the area of outcomes there are signs of convergence with the legal systems of Western countries, albeit rather limited convergence.³⁷

Despite convergence with respect to goals, institutions, mechanisms for checking administrative discretion, and legal doctrines, China's administrative law regime produces comparatively suboptimal results because of a variety of context-specific factors. Although some of the troubles are specific to the administrative law system – such as loopholes or shortcomings in particular laws – most of the problems have little to do with the administrative law system as such. Rather, the system

is undermined by deficiencies in the legislative system, a weak judiciary, poorly trained judges and lawyers, and general problems such as a relatively low level of legal consciousness among the citizenry, many of whom are afraid to challenge government officials.

Administrative law reformers therefore face a number of challenges. Having concentrated on legislation and the establishment of a regulatory framework for much of the last twenty years, attention must now turn to opening up the law-making, interpretation and implementation processes to greater public participation, as contemplated in the Administrative Procedure Law currently being drafted. However, a more active role for the general public and private interest groups requires a relaxation of the state's grip over civil society. Thus, administrative reforms will continue the shift of power from the state to society that has occurred in the last twenty years as a result of economic reforms. The ongoing separation of government from enterprises and the change in the role of administrative agencies from both regulators and market players to primarily regulators will further enhance the development of the private sphere. As the economy expands and the administration in its role as regulator is responsible for resolving increasingly technical policy issues, the Party's role in the policy-making process is reduced accordingly, shifting the balance of power from the Party to state organs.

But as administrative agencies have assumed more of the responsibility for setting policies and daily governance, the possibility that they will abuse their power has grown. While China currently relies on a variety of mechanisms to check the administration, all are in need of reform. Even though the importance of judicial review is easily overstated,³⁸ in China's case a stronger judiciary is necessary to combat local protectionism and deal with increasingly recalcitrant local governments.

General obstacles: the path-dependent nature of reforms

In carrying out institutional reforms, China must take into consideration the organizational structure, practices, and culture within the existing institutions and the general context in which the institutions operate. Tradition and culture, corruption, regionalism, the absence of a vigorous civil society, and China's unfinished economic transition are among the most important factors shaping, and in some cases limiting, legal reforms. Simply put, the lack of a culture of legality, a deeply ingrained

tradition in which personal relations tend to supplant generally applicable laws, and a relatively low level of legal consciousness among legal actors and consumers make the establishment of a law-based order difficult. Widespread corruption among government officials distorts the law-making and implementation processes, while corruption within the judiciary tarnishes the image and authority of the legal system and deprives the ruling regime of the potential legitimacy benefits to be derived from its efforts to promote rule of law. Large regional differences complicate the law-making and implementation processes. To take account of regional variations, laws are necessarily broadly drafted and local government and administrative officials are given considerable discretion in interpreting and applying national laws. In the absence of effective mechanisms for checking administrative discretion, however, agencies and local governments pass regulations that serve their own interests but contradict national laws both in spirit and letter. Yet the main reason local governments pass such legislation is to promote economic growth in the region. Facing a reduction in state subsidies, local governments depend on economic growth to generate tax revenues to cover the increased welfare costs that they have been forced to bear as part of economic reforms. Predictably, local protectionism is a serious problem. Local governments erect trade barriers to keep out products from other regions, or, as noted previously, pressure courts to find in favor of local companies.

Reformers are not omnipotent – they must play the hand that is dealt them. As a result, reforms are unavoidably path-dependent to some extent. To illustrate with one of many examples discussed at greater length in the following chapters, proposals that call for the immediate elimination of adjudicative supervision committees, which supervise the decisions of the panel of judges that hear cases, are likely to be rebuffed at this stage given the low level of competence of many judges and serious corruption within the courts. A more feasible approach is to revise the procedures to make the process more transparent and to allow the parties to more effectively challenge supervision committee decisions.

Although the path-dependent nature of reforms sets the outside parameters for what is feasible, it also opens up the possibility that China will develop its own institutions and practices in the process of responding to context-specific problems.³⁹ For instance, China might explore the possibility of controlling administrative discretion and combating corruption through such methods as consultative committees,

anticorruption commissions, and an expanded letters and petition system and hot-line network. The authorities might also consider modifying the cadre evaluation system to include a quantifiable rule of law index in the hope that local government officials would be less likely to pass inconsistent local laws or engage in local protectionism if so doing would jeopardize their chance for career advancement. Conceivably, though improbably, China might even consider a constitutionally separate branch of government similar to the control *yuan* envisioned by Sun Yatsen.⁴⁰ Ultimately, the possibilities for reform are constrained to a considerable extent by the limits of human imagination.

Does China need rule of law? Rule of law and economic development

Advocates of rule of law and neoclassical economists alike have argued that sustainable economic development requires rule of law and in particular clear and enforceable property rights.⁴¹ Yet at first blush China seems to have had tremendous economic growth without either, leaving economists, political scientists, and legal scholars to puzzle over the success of China's economy despite market and legal imperfections.⁴² China's phenomenal growth rate has been attributed to cultural factors,⁴³ a distinct form of "Chinese capitalism,"⁴⁴ a *guanxi*-based rule of relationships,⁴⁵ clientelism⁴⁶, and corporatism.⁴⁷

In contrast, I suggest that law has played a more important role in China's economic growth, and in the growth of those Asian countries that have experienced high growth rates over long periods of time, than is usually assumed; and, more importantly, law is likely to play an even greater role in the future in China. As discussed in Chapter X, multi-country empirical studies that test the relationship between "rule of law" and economic growth support the conclusion that rule of law is necessary for sustainable growth.⁴⁸ While China has been able to take advantage of several distinctive features to achieve rapid growth, in the mid to late 1990s, foreign investment and growth slowed. Although the Asian financial crisis was a major factor, deficiencies in the legal system have also deterred investors and limited economic reforms, including state-owned enterprise reforms.

To be sure, rule of law appeals to different sectors of the economy to varying degrees. Foreign investors, particularly large multinational

companies, arguably need it the most. But the private sector, township–village enterprises, and even state-owned enterprises and farmers could also benefit from rule of law to one degree or another. On the other hand, not all economic actors will benefit from rule of law – in particular, inefficient companies that now thrive due to their clientelist and corporatist ties will be threatened by rule of law.

Nor is rule of law sufficient for economic growth. Many other factors also play a role, and no doubt a more important role, including sound economic policies. Moreover, no system can rely on compulsory enforcement to ensure that economic actors act rationally, obey the law, honor their contracts and pay their debts. Informal dispute resolution mechanisms play a vital role in complementing the formal court system in all countries. Similarly, market mechanisms that impose discipline on companies without having to resort to the courts are also needed. For example, disclosure rules and commercial associations make it costly for parties to breach their contracts, dodge their debts or misuse funds obtained from public offerings.

In the end, economies, like legal systems, differ in significant ways upon closer scrutiny. As China's economic reforms have progressed, there has been considerable convergence with the economies of well-developed countries. At the same time, there has been considerable divergence. But even if there is sufficient variation to describe the economy in terms of a unique form of Chinese capitalism, the notion that the PRC economy will be able to sustain economic growth without further legal reforms that bring the system into greater compliance with the basic requirements of a thin conception of rule of law is doubtful.

Rule of law and political reform: political reform without democracy

Democracy in the sense of genuine, multiparty elections in which citizens elect officials at all levels of government is not a viable option at present. The Party opposes it. There is little support among intellectuals for genuine elections. Nor is there a hankering for democracy on the part of the general populace. Moreover, even if the Party were willing to endorse democracy and the people did want it, China currently lacks the institutions, including rule of law, to make democracy work.