

## 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.”<sup>1</sup> Worse yet, some condemn it as a mask for oppression and injustice.<sup>2</sup>

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.<sup>3</sup> 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.<sup>4</sup>

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.”<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup>

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.<sup>8</sup>

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;<sup>9</sup> 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.<sup>10</sup>

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.<sup>11</sup> 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.<sup>12</sup>

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.<sup>13</sup> 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.<sup>14</sup> 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.”<sup>15</sup>

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.<sup>16</sup>

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.<sup>17</sup>

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.<sup>18</sup>

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.<sup>19</sup> In addition, local stations have been quick to respond to the interest in law by providing a variety of law-related programs.<sup>20</sup> 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.<sup>21</sup>

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.<sup>22</sup>

### 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.<sup>23</sup>

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.<sup>24</sup> 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.<sup>25</sup> 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.<sup>26</sup> 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.<sup>27</sup> 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.<sup>28</sup>

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.<sup>29</sup> 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.<sup>30</sup> 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.<sup>31</sup> 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