



Introduction

Debating the Consensuses

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China's rapid growth gave birth to the notion of "Beijing Consensus" to conceptualize China's seemingly unorthodox approach to development. The Beijing Consensus has generated much discussion in academia and public forums for some time and was advanced by many as a worthy rival to the neoliberal "Washington Consensus." Despite the overwhelming interest in this notion, scant legal literature exists on how the Beijing Consensus affects the relationship between law and economic development – and even less literature provides a comprehensive review of its constituent components. Yet, it is the right time for legal scholars to investigate the debate about the two Consensuses and, more importantly, for China to reflect on the understanding of her own success. Summer 2015 witnessed the largest stock market collapse since China began reforming its economy in 1979. The market lost one-third of its value in just two weeks and triggered global panic. I recalled that a colleague once confident of China's economic prospects, then deeply frustrated, said, "The Chinese model is gone!" The contributors of this book go further, in fact a lot further, by contemplating whether the Chinese Model was ever born in the first place.

The vacuum of literature was the impetus for this book, a project that aims not only to provide a theoretical account of the Beijing Consensus but, more importantly, also to discuss the Beijing Consensus in respect of specific areas of law. This book does not focus on public law such as human rights, democracy, and constitutionalism – subject matter which has already received much treatment by modern China law studies scholars. Instead, this book focuses on areas of law that have received less attention, but yet, by general consensus, are vital for economic development. Areas such as tax, property, and corporate law are key areas of concern for orthodox law and development theory, including the Washington Consensus. As such, we think these areas deserve their due treatment as the

fundamental concern of any law and development scholar interested in the Beijing Consensus is to know what are the institutional configurations of the various subsectors of China's legal system that have contributed to one of the greatest economic transitions in human history. Briefly, we ask, what exactly does the Beijing Consensus (if it truly exists) look like in the context of property, tax, corporate law, and other specific areas of law?

The book is organized in three parts. Part I contains three chapters and provides various accounts of the "Chinese Model" from a comparative perspective. To begin, **Michael W. Dowdle** and **Mariana Mota Prado** examine three models of development that claim to be derived from China's experience: Joshua Ramo's "Beijing Consensus," Randall Peerenboom's "East Asian Model," and Dani Rodrik's "New Development Economics." They conduct an intense debate about each of these models and focus on what China's development might have to tell us about the processes and strategies of law and development more generally. **Jedidiah Kroncke** further deconstructs the Beijing Consensus from a Brazilian perspective, another developing country with unique experiences of its own. The increasing Sino-Brazilian discourse provides an excellent context for investigating how China's developmental experience is interpreted outside of China, and Brazil serves as a direct example of whether other developing countries are benefiting from the supposed Chinese Model, specifically in the context of labor law. **Tan Cheng-Han** concludes Part I and deconstructs the Beijing Consensus in reverse from the perspective of a developed country that also saw rapid economic growth through state capitalism – Singapore. Tan notes that while China has been looking anew for developmental inspiration from Singapore, China does not seem to have understood the overarching structure of Singapore's state capitalism very well. Nevertheless, Singapore may still offer China several crucial lessons.

Part II furthers this discussion by examining the Beijing Consensus in the context of specific areas of law. These areas were specially chosen because they are the building blocks of the rival Washington Consensus. Part II begins with **Wei Cui**'s discussion of the rule of law in the context of China's once applauded decentralized model, or "Federalism, Chinese-style." Cui's discussion focuses on how this model has impacted the quality of legislation, law enforcement, and the overall governance through legal institutions in China. **Frank K. Upham** examines Chinese property law and reflects on the applicability of conventional

property theories, which are based on private ownership and the role of property institutions, in the Chinese context. **Weitseng Chen** then scrutinizes China's strategic policy to internationalize renminbi (RMB) and examines whether this potential game changer in the global financial world as well as China's domestic banking system exemplifies any component of the Beijing Consensus. **Ji Li** examines whether a coherent model can be drawn from China's tax reforms, which commentators generally view as a success. **Yingmao Tang** then turns to securities regulation. He examines the developmental trajectory of China's capital markets and demonstrates how various obstacles and the solution to these obstacles, rather than a specific regulatory ideology, have shaped the regulatory model and market practices to date.

While Part II delivers a generally skeptical view about the existence of the Beijing Consensus, Part III explores whether any alternative theory or approach is capable of capturing China's experiences and focuses particularly on China's pragmatic approach toward capacity building. **Benjamin L. Liebman** examines the capacity building of China's judiciary and concludes, "China's own experience suggests that the best model for legal reform may be no model at all." **Hualing Fu** looks at the recent historical development of China's anticorruption campaigns, in particular examining the bifurcation of the anticorruption enforcement system, which consists on one hand of party disciplinary measures and on the other of legal mechanisms. The choice between the two reflects how law enforcement can be molded by capacity considerations. Finally, **Curtis J. Milhaupt** proposes that "corporate capitalism" (as adapted by the party-state) can be used as a framework to conceptualize China's state-directed economy – the major source of financing for China's capacity-building projects.

When examining the Beijing Consensus as a general model, ensuring that discussions are not excessively contextualized is a major challenge, as it may fragment the theoretical dialogue this book aims to initiate. To address this concern, all contributors have agreed to a common analytical framework, although some leeway may be required to best fit how each contributor addresses his or her topic: (1) Given that the Beijing Consensus was derived from China, how distinctive is the developmental trajectory of China's legal system as compared to other legal systems? (2) What accounts for China's deviation from conventional models and is such deviation explainable by existing literature? (3) How are we to better conceptualize China's experiences? Through the lens of the Beijing

Consensus, or is there any other alternative? Can China's experiences be theorized as a specific Chinese Model, and if such a model exists, is this model replicable in other developing countries?

Here, I attempt to provide readers a general response to the three questions by selecting and combining parts of each contributor's work, albeit risking an oversimplification or an incomplete representation of their work.

I Given That the Beijing Consensus Was Derived from China, How Distinctive Is the Developmental Trajectory of China's Legal System as Compared to Other Legal Systems?

Michael Dowdle and Mariana Prado start by pointing out that the factors behind China's economic success are not unprecedented. They argue that the Beijing Consensus, initially coined by Joshua Ramo, would probably be more accurately described as the "Taipei Consensus," and the term "Beijing Consensus" was able to generate global interest because it was marketed as the anti-Washington Consensus. Nonetheless, China's gradual and experimental approach toward her growth provides good lessons for the developing world. In this sense, the Beijing Consensus probably serves as a model in a procedural rather than a substantive sense. That said, whether one can construct a developmental model based merely on gradualism and experimentalism remains debatable in that both theories concern the means rather than the ends (i.e., a set of substantive policy guidelines). As Dowdle argues, experimentalism should not obscure normative issues, which are currently the most pressing for developing countries.

Resonating with Dowdle and Prado, Jedidiah Kroncke proposes the idea that the Beijing Consensus is an "anti-model" through the developmental experiences of Brazil, one of the strongest and most recent rhetorical repudiators of the Washington Consensus. Brazil demonstrates a general rejection of the very notion of the coordinated global advocacy of a universal set of policy prescriptions. Still, the Brazilian experience does little to solidify the workability of the Beijing Consensus because both left- and right-wing politicians use such anti-model narratives to their own favor, and this adds little value to substantive policy contemplation. Furthermore, labor law, as a core aspect of any model of political economy, is routinely neglected when emulation of China is advanced. Nonetheless, while the examination of the Beijing Consensus on prescriptive terms may fail owing to its anti-model nature, it has the potential to

enrich development debates when it provokes thought beyond ideological contrasts and steers debates into concrete studies of individual policies similar to the efforts demonstrated in this book. In fact, this parallels the advances made in understanding Western economic history that have emerged out of critiques of the Washington Consensus. After all, the Beijing Consensus as “an anti-model can liberate nations from old global dogmas but then leave them to become mired anew in their own insular partisan ideologies. It could inhibit experimentation as much as it may liberate domestic policies debates from errant external influence.”

Moving the examination of the Beijing Consensus into specific areas of law, a generally skeptical view about the distinctiveness of a Chinese Model was expressed by contributors as well. With respect to property rights, for instance, Frank Upham suggests that the developmental trajectory of the property rights regime in China is in line with many other developing countries. When the property regimes in such countries, as in China, were initiated, informal institutions and political commitment mattered more for economic growth than formal, well-defined property rights. Also, it seems highly unlikely that China would have grown faster if property rights were enforced. Nonetheless, China’s experiences do point out some loopholes of orthodox property theory, which emphasizes the importance of fully defined property rights and independent courts. In other words, economic development is not conditioned upon well-defined property rights and the courts’ willingness to enforce these rights;¹ to the contrary, such enforcement may harm economic take-off. Therefore, Chinese growth undermines, as Upham suggests, the conventional wisdom that dictates attention to creating or reforming legal systems of developing nations according to the templates derived from Western models.

China’s experiences may not be unique, but unlike its much smaller predecessors, China is too big to be ignored. This brings us to another oft-mentioned feature of China’s model – size, which has not been carefully examined by existing literature. Does a country’s size matter to law and development and, if so, to what extent, and how? Weitseng Chen examines how this distinctive characteristic – an extraordinarily large-scale market – plays out for China in its quest to internationalize the RMB

¹ Upham also points out that Harold Demsetz and Douglass North defined “institutions” to include both formal and informal rules and organizations. Unfortunately, this broad definition of “institution” has not survived the transition from theory to practice. It is in this narrower sense of “institution” that China’s experience presents a challenge.

and whether it unveils any meaningful dimension of the Beijing Consensus. Interestingly, Chen's scrutiny demonstrates that the substance of the RMB internationalization scheme is almost identical to the orthodox policies prescribed by the Washington Consensus. In terms of implementation, while China's large size does provide immense advantages, it also poses similarly great challenges to the internationalization scheme, as any overhaul of China's fragmented and heterogeneous banking and financial systems must be on a wide scale. Such an overhaul, however, would be hindered by coordination difficulties, high monitoring costs, and interlocked systemic risk. Nevertheless, the size of a country does not support any form of Beijing Consensus because it affects the ability to implement statewide currency policies in other countries too, as demonstrated by Chen's case studies of Taiwan and Singapore. In other words, the size of a developing country is not integral to any averred Chinese Model; size has been shown to force China as well as other countries down a path of dependence.

II What Accounts for China's Deviation from Conventional Models, and Is Such Deviation Explainable by Existing Literature?

Chen's claim that China has led itself down a path of dependence leads us to the second question: can China's deviance from Western development theories be explained by existing literature? Wei Cui answers this question squarely, attributing China's deviance to its decentralized governance regime, which, in turn, affected China's legal system. China practices legislative centralization and administrative decentralization, where legislation is promulgated by central bodies but its implementation is left to local bodies. This awkward mix, however, has negatively affected the quality of promulgated legislation. The central bodies lack information feedback from local bodies and, therefore, pass legislation without a full understanding of how a specific law will be practiced. At the same time, local bodies, which are cut off from the legislative process, implement and enforce these laws with their own purposive interpretations. This mismatch explains to a large extent the irregularities observed within China's legal system. Thus, the larger the hierarchical gap between the legislative process and the enforcement of legislation, the worse the consequences will be upon the legal system of that country.²

² Yet, according to Cui, reforms to reduce the gap have principally been neglected or faced opposition in China.

With respect to securities regulation in China, which in many ways contradicts the principles advocated by Western regulatory models, Yingmao Tang suggests that the China Securities Regulatory Commission's (CSRC) dual role of administrator and regulator, and its non-market-oriented, paternalist mind-set, gave rise to the current configurations seen within China's securities markets and capital market practices. Unlike its US counterpart, the SEC, the CSRC does not play the role of a mere regulator; it also bears extra obligations to carry out economic policies as an administrative body, guides Chinese firms as an incubator, and stabilizes the capital markets and financial system as if it were a central bank. As such, the policies prescribed by the Washington Consensus are unlikely to fit China's reality anytime soon, albeit some current measures adopted and proposed reforms that are in line with those advocated by Western models, such as a disclosure-based regulatory regime.

In the area of tax administration, Ji Li provides a historical account of how Chinese officials implemented tax policies, demonstrating the central government's strategic attitude in the face of opposition and potential political backlash. Interestingly, however, what this incremental strategy represents is a set of tax policies very similar to the conventional paradigm proposed under the Washington Consensus. Li's analysis reveals the highly path-dependent process by which China developed a high level of technocratic competency within its tax bureaucracy, a partial side effect of intra-administrative competition that is often lacking in other countries.

Hualing Fu points to China's pragmatism by virtue of the ways in which China carries out its high-profile anticorruption campaigns. In the face of weak judicial mechanisms plagued by insufficient personnel and lack of independence from local politics, the central government has had to resort to party disciplinary mechanisms, which lack transparency and feature controversial extra-legal or extra-extra legal measures. However, this may be transitional. Despite episodic drawbacks, Fu notes that the overall trend of the development of China's legal system seems clear – "the sphere of law had been expanding, reaching out to and occupying more fields; and formal rules are occupying more commanding heights in governance in relation to extralegal rules and practices."

In short, while contributors posit that China's legal experiences do not fully support the Beijing Consensus's elevation as a rival developmental model to conventional paradigms, they demonstrate the importance of China's pragmatism in policy implementation. The trajectory of law and policy evolution in China is not esoterically peculiar but is readily explainable.

III How Are We to Better Conceptualize China's Experiences? By the Beijing Consensus, or Is There Any Other Alternative? Can China's Experiences Be Theorized as the Chinese Model, and If Such a Model Exists, Is This Model Replicable in Other Developing Countries?

How are we then to reconceptualize the Chinese experience without resorting to the notion of the Beijing Consensus? Curtis Milhaupt's examination of China's corporate capitalism shows that this is a matter of national capacity building. Like all other successful economies, he argues, the corporate form has proven to be extraordinarily useful in providing the Chinese party-state with a scalable, adaptable, and relatively anonymous vehicle for economic activity as well as with a template for structuring the state sector and for scaling it to globally important proportions. Similar to other species of corporate capitalism, the basic corporate attributes in China are affected by and adapted to local conditions. While Japanese corporate organizational structure overwhelmingly places the interests of employees over those of shareholders, Chinese managers extend the Leninist approach to state organizations.³ In other words, corporate capitalism can be shareholder-centric, board-centric, employee-centric, state-centric, or, in the case of China, party-centric. On one hand, the CCP replaces conventional risk sharing and monitoring functions with party-state monitoring; on the other, the party system provides high-powered incentives to managers, for whom success in business often brings success in other realms of state management.

Is this Party-State Inc., as a strategy of capacity building, efficient in economic terms? Although the objective of his essay is not to debate the model's efficiency, welfare effects, or sustainability, Milhaupt nonetheless suggests that the distinctive features of China's approach are not beneficial to corporate performance; yet there are also good reasons to think Party-State Inc. is an enduring rather than transitional phenomenon. His observation resonates with a prevailing view shared by commentators of different disciplines – the process of China's capacity building is fast and powerful but also wasteful and takes place at the expense of the development of other social and economic sectors.

Benjamin Liebman and Hualing Fu also evaluate China's judicial developments from the lens of capacity building instead of any distinctive

³ In this regard, Milhaupt suggests that China's large SOEs could be understood better as Party-linked companies than through the conventional lens of state-owned versus privately owned dichotomy.

model. Liebman suggests that Chinese courts are not converging toward the American model but rather have evolved in many ways that resemble courts in other authoritarian systems. Nevertheless, aspects of China's system appear unique, including the strong influence of populism on the Chinese legal system. The best indicator of courts' capacity and the roles courts play in China come through examination of everyday cases – not from examination of the ability of courts to restrain other party-state actors. Fu also suggests that the CCP has to rely on extra-legal party mechanisms for curbing rampant corruption as legal mechanisms still lack the capacity to forcefully deal with corruption, which has reached a level where the party's legitimacy has been seriously threatened. In the future, how these bifurcated systems converge serves as an indicator of the capacity of the Chinese judiciary.

Furthermore, several contributors emphasize the role of the state in national capacity building. Ji Li argues that, although the Washington Consensus almost mirrors Chinese tax policies, the implementation of Washington Consensus-like policies still is given a Chinese touch because their implementation is highly dependent on certain structural factors rather unique to China. In the context of tax reforms, the central government appeared to be able to mitigate disputes and trade short-term interests, favored by vested power-holders, for long-term redistribution of the country's revenue. Weitseng Chen also contends that China's internationalization of the RMB is a set of liberalization experiments designed and led by the state. Similarly, Frank Upham suggests that an ambiguous property regime allows the state to aggregate and reallocate property rights, which is necessary and vital for China's growth at the initial stage. Resonating with this view, Curtis Milhaupt contends that the weak institutional environments in developing economies often render autonomy from governmental authority – usually associated with private property ownership – illusory; instead, governments retain fairly extensive control over all firms, whether state or privately owned. All in all, China demonstrates a gradualist, state-led implementation process that was left out by, and probably contradicted, the Washington Consensus, which had suggested that market forces rather than the state play a leading role in the implementation of its prescribed policies.

Regardless of the skepticism about the Beijing Consensus, our discussions eventually lead to another interesting question: is China's model replicable in other developing countries? Some contributors address this question by asking whether it is worth replicating in the first place. Michael Dowdle casts doubts on this possibility by arguing that what China has

done has mainly been to remove some of the more catastrophic policies implemented during its prereform years. As a result, what remains missing in China today is a highly sophisticated regulatory system to support a sustainable modern economy that requires efficient monitoring, crisis management, and wealth redistribution. Together with Dowdle, Jedidiah Kroncke questions the way in which China's "success" is measured, suggesting that the measurement of "success" should not be focused on GDP growth only but on more comprehensive benchmarks such as the Human Development Index. In the area of tax reform, Ji Li argues that China has not achieved comparatively exceptional levels of performance; empirical studies suggest that China's efforts in tax policy and implementation are merely passable.

Others respond to the question of replicability in a more direct way. Curtis Milhaupt suggests that China's model is neither completely distinctive nor deserving of the label of "model," despite the useful lessons it contains. Ji Li also points out that replicating China's model of tax reform requires at least a central government with relatively low discount rate and a tax agency of adequate bureaucratic capacity, neither of which may be available in many developing countries. As Benjamin Liebman further concludes, "the question is not whether China has created a model that may be relevant for other developing legal systems; the central question is whether the Chinese model can work in China."⁴

In fact, for informed observers, it should not be too difficult to sense the anxiety of the Chinese leaders as to how the Chinese Model can continue to work for China. As such, recent cohorts of Chinese leaders and policy makers have been looking to Singapore for inspiration. As Weitseng Chen points out, some of the recent changes that China made to its regulatory regime for the purposes of RMB internationalization were inspired by Singapore. Singapore has demonstrated that state-owned enterprises can be extremely efficient, that regular elections can be carried out, that governance can be world-class, and that the government receives high approval ratings, all despite being an authoritarian state for decades. Responding to China's search for an alternative developmental paradigm in the likes of Singapore, Tan Cheng-Han offers a historical

⁴ Liebman suggests, however, that China's judicial developments have the greatest potential to contribute to current discourse on authoritarian judicial systems since literature has long noted such possibility of significant development of courts in authoritarian systems. Thus far, however, China and elsewhere have overlooked this perspective in favor of the ideas laid down by US-led jurisprudence.