Growing up in China and educated in Japan and the USA, Weidong Ji has both witnessed and actively participated in the historical process of legal transformations in contemporary China. Through a series of academic contributions as well as meetings, activities, and memberships with policy-makers and practitioners, the author has spared no effort in applying theoretical scholarship to real, concrete practices. He has made significant contributions to the building of a rule-of-law system in China, with great social influences. This book shares his insights, experiences, and practices related to the institutional undertaking of building the rule of law in China, with English readers. It offers a legal perspective on some of the cutting-edge issues in our society at large (e.g., risk and uncertainty, artificial intelligence, the COVID-19 pandemic, and big data).

Weidong Ji was Dean and KoGuan Chair Professor of Law at Shanghai Jiao Tong University, China, from 2008 to 2018. Since then he has been University Professor of Humanities and Social Sciences, and the president of the China Institute for Socio-Legal Studies. He has published more than 100 academic articles and nearly 20 authored and edited books, including: A Hypermodern Law (Minerva Press, 1999); New Views on Constitutionalism (Peking University Press, 2005); and The Composition of Chinese Judicial System (Yuhikaku Press, 2004). He is also the coeditor-in-chief of the Asian Journal of Law and Society.
Professor Weidong Ji provides us with something as exclusive as a global discourse on current sociolegal questions and problems with insights from the USA, Europe, China, and Japan. By reflecting on Western debates on issues like Critical Legal Studies, contemporary jurisprudence, social transformation, and the forefront of legal research against the backdrop of the rule of law in China, the book is just as rewarding for Chinese as for Western students and scholars. A contrast of modern Western Europe with China can deepen, as Roberto M. Unger has expressed it in the book, “the understanding of complicated relationships of different patterns of social organizations, different types of ideologies and different forms of normative order.”

Håkan Hydén, Fellow of the World Academy of Arts and Sciences, Vice President in the Governing Board of the Research Committee of Sociology of Law, Sweden

China is in the process of redefining its understanding of a democratic rule of law. Since late 2013, she is undergoing a phase of judicial reform, aiming at an increase in efficiency of the judicial process and a reduction of instances of arbitrariness. Weidong Ji provides us with a deeply probing study of this process: empirically informed, intellectually challenging, and conceptually profound. No serious scholar of Chinese law or Chinese policy can afford to ignore these studies. Not only do they show a deep understanding of the current reforms, they put them masterfully into perspective and explain the Chinese understanding of the rule of law in a fascinating and innovative way.

Martin Nettesheim, Professor of Constitutional and European Law, University of Tübingen

Around the world, virtually every nation supports the rule of law in theory. What the rule of law means in practice, however, varies from state to state. In this book, Professor Weidong Ji draws on three decades of work to offer a thoughtful and thought-provoking examination of how the rule of law has been interpreted and applied in China. This is important not only to understand China itself but also to see how law, politics, and economics influence one another more generally.

Simon Chesterman, Dean of Faculty of Law, National University of Singapore
Professor Ji not only tried to learn from Western law and legal institutions but also tried to encourage ‘internal evolution and self-shaping’ of law and legal institutions in changing social conditions of China. As a sociologist of law, the author tended to focus on legal mechanisms and functions, but his works represent more comprehensive attempts to make bridges between Western law and Chinese legal and social contexts, and, as such, should be read by a wide range of people interested in the sociology of law and legal theory beyond China.

Masayuki Murayama, Former President of the Research Committee on Sociology of Law (organizational secretariat in Spain), the International Sociological Association
TOWARD THE RULE OF LAW
IN CHINA

Social Diversification and the Power System

WEIDONG JI

Translated by

XI LIN
CONTENTS

Foreword xi

Dieter Grimm

Acknowledgments xv
Translator’s Note xvii
List of Abbreviations xlvii

Introduction 1

The Structure of the Book 11

1 The Conception of Law in Traditional China 15
1.1 The Legalist Idea of the Law and Instrumental Rationality 15
1.2 A Reciprocity-Based Authority 17
1.3 The Coupling of \( yin \) and \( yang \) in the Social Order 21
1.4 How to Escape the Trap of Legal Equilibrium? 24
1.5 The Law as a Complex System and Its Nonrandomization 26
1.6 The Reversed Schema of Society and the Law 31

2 The Essence of Modern Rule of Law 34
2.1 A Chinese Perspective on the Modern Rule of Law (Rechtsstaat) 34
2.2 Value Plurality and Constitutionalism 37
2.3 Judicial Review and Judicial Independence 41
2.4 Restraining the Government’s Power 47
2.5 The Inner Morality of Law 50
2.6 The Authority of Modern Rule of Law 54

3 The Rule of Law: Contemporary Challenges and Paradigmatic Innovation 64
3.1 Outline of the General Problem 64
3.2 Network Society and the Form of China’s Legal System 67
3.3 A Responsive Legal Mentality in a Risk Society 73
CONTENTS

3.4 Globalization and Supranational Legal Systems 84
3.5 The Perspectives of a Neoproceduralist and Constructivist Jurisprudence 89

4 A Rule-of-Law Democracy (Rechtsdemokratie): Social Diversification and Reconstructing the System of Authority 97
4.1 Several Entry Points for Legal Reform from the Angle of Economic Outlook 97
4.2 "A Triple Review Mechanism" as an Alternative Way of Rule of Law 99
4.3 Main Incentives to Implement This Approach to the Rule of Law 111
4.4 To Examine the Idea of National Supervisory Commission from a Weberian Constitutional Design 120
4.5 Summary 135

5 Judicial Reform in China: The Status Quo and Future Directions 138
5.1 Introduction 138
5.2 Characteristics and Problems of the Existing Judicial System 138
5.3 Recent Examples of Interference in Economic Cases by the Local Party and Government Authorities 143
5.4 Political Restraints, Judicial Review, and the Role of Lawyers 145
5.5 Macroanalysis: The Road Map of Judicial Reform for the Past Fifteen Years 148
5.6 Combining Responsibility with the Trial Procedure: The Case Management System 151
5.7 Media Trial as a New Attempt to Supervise Judicial Discretion 153
5.8 Out of the Vicious Cycle of Discretion Constraints in China 155
5.9 Solving the Dilemma of Discretionary Power in China’s Judiciary through a Just Procedure 163
5.10 Solving the Dilemma of Discretion in China’s Judiciary through Legal Discourse 207
5.11 Judicial Power and Its Transformations in the Age of Artificial Intelligence 234
5.12 Summary 253

6 Reconstructing Legal Ideology 257
6.1 An Intellectual Background of Modernizing State Governance 257
6.2 A Genealogical Analysis of Legal Ideology 262
6.3 A Tripartite Structure of a Republican Conception of State 275
## CONTENTS

6.4 A Reinterpretation of Historical Materialism  281
6.5 A Procedural Arena for Competing Claims  289
6.6 Summary  291

Postscript  303
Appendix 1 Themed Discussions of This Book  351
Appendix 2 An Interpretation of and Reflection on China’s Cultural Traditions  403
Appendix 3 China: The Way to Democracy via Rule of Law  431
References  449
Index  495
FOREWORD

The rule of law is the opposite of arbitrary rule. As such, it is a value in itself, independent of the content of the law. It gives citizens and inhabitants, including economic actors, a basic certainty in their interactions with others and vis-à-vis the government. Without this certainty, it is difficult to imagine that individuals will be able to develop their potential and that the economy will thrive.

This presupposes, however, that the government does not only rule through law but also according to law. The rule of law is not established as long as the government may use its power at will. By adopting the rule of law, the government agrees not only to pursue its ends by using legal means but also to adhere to the legal rules itself. The rule of law is identical with limited government.

Certainty does not mean that the law must always remain the same. As social life is in constant change and modern science and technology constantly create new opportunities but also new risks, it is inevitable that the law, which undertakes to regulate development, changes as well. But the rule of law guarantees that this change occurs itself in a legal way and, at least in principle, for the future and not retroactively.

However, the rule of law remains rudimentary if the government was free to give the law any content it wishes. Rather, legislation ought to be guided and limited by basic principles of justice. Justice is a contested notion, and every society must decide for itself which concept of justice it recognizes. Nevertheless, there is also some universal consensus, for example, on the prohibition of torture and of slavery, on the principles of the Universal Declaration of Rights, and on equal treatment.

Finally, in order to be complete, the rule of law requires that the law be applied by independent judges in cases of doubt or conflict. To be sure, the law is a product of the political process and politics retains the power to change the law. However, upon enactment and for as long as it is in force, the law is disconnected from politics and interpreted and applied according to legal, not political, criteria.
This is the reason behind the principle of judicial independence that judges can determine the meaning of legal provisions by a legal method of interpretation and with legal arguments and apply and enforce it impartially and irrespectively of political or other nonlegal considerations and expectations. The trust of citizens in the law, on which the legitimacy of political rule is based, largely depends on the independence and impartiality of the judiciary.

Moreover, it is not only the behavior of individuals or associations and corporations that is subject to judicial scrutiny. Since the law is binding not only for private but also for public actors, government included, it is a requirement of the rule of law that state acts can be reviewed as to their conformity with the law. Only if this is guaranteed does the rule of law fulfill its promise to stabilize expectations, make state behavior predictable, and create the degree of certainty on which social development depends.

These are cornerstones of the rule of law, but like the principle of the rule of law, they are not self-sufficient but need concretization and specification. This leaves room for more than one form of the rule of law. It is not a one-size-for-all model. The German Rechtsstaat differs from the American rule of law and this again from the French état de droit. The German version, for instance, is more substantive-oriented, the American more procedural-oriented (due process of law).

Predictably, the rule of law will be more successful the more it takes up the traditions of the country in which it applies. Just as there is an American, a French, and a German version of the rule of law, there will be a Chinese version. Here lies the great importance of Professor Ji’s book. In full conscience of the essence of the rule-of-law idea, he develops a concretization that is embedded in Chinese traditions and will thus best suit Chinese society.

Professor Ji connects the rule-of-law requirements with a free market economy as it has been established in China in recent years. He shows on the one hand that a market economy depends on the rule of law for its operations and transactions, but it is, on the other hand, also in need of being so regulated that economic interests can be accommodated with other legitimate interests and that market failure is avoided. The market, that is his message, ought to serve society as a whole, not dominate it or subordinate noneconomic sectors of societal life to economic interests.

The book clearly describes the consequences that this concept of the rule of law has for the political system in China. His book is a plea for more constrained, more decentralized, and more democratically