

CHINA AS A LAW-RULED STATE: FROM TOP-DOWN RHETORIC TO BOTTOM-UP EXPECTATIONS

 What is the role of law in maintaining spaces of order in modern Chinese society? In 1996, Jiang Zemin adopted a new official policy of ruling the country in accordance with law, and establishing a socialist law-ruled state (*yifa zhiguo, jianshe shuhui zhuyi fazhiguo*), a policy that is now incorporated into the PRC Constitution. Such law-lauding ideology and rhetoric has been increasingly evident in China since the end of the Cultural Revolution, and in conjunction with decades of rapid and prolific legal institution-building, has provided rich fodder for ample scholarship and discourse on the trajectory of China's legal system, and the nature of rule and order in modern Chinese society.

The main empirical issues addressed in this field include the retreat of the Party-state; the evolution of the legislature, judiciary, legal profession and administrative law regimes; and the nexus

between rule of law and economic development, democracy and human rights. The 'law and order' meta-narrative is visibly played out in Party discourse, Five Year Plans, Constitutional evolution and the astounding pace of development of the formal legal system. The thickest descriptions and predictions of the story are those that also take into account trends and trajectories in popular and Party legal consciousness and ideology.¹

The basic distinction made in studies of the role of law in maintaining order is between rule by, and 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.*²

In China, the distinction has proved difficult to make empirically (which is nicely reflected in the lack of a linguistic distinction, both concepts generally translated as *fazhi*, literally 'law-ruled'). While generally scholars are in agreement that the direction of legal reform over the last three decades has been away from rule by man and towards rule by law, the extent to which rule of law is emerging empirically, and its optimal nature and role in the Chinese context, are matters of much debate in the literature.

The focus of most studies of Chinese law and order has been fixed on the most visible manifestation of the working out of that nexus, namely institution-building, rhetoric and policy at the central/top level of the Party-state. The rule of law question has been asked through

the lenses of globalisation, modernisation, and economic development. Opinions diverge in the literature on whether and to what extent the Chinese polity possess a notion of law that is consistent with that required by rule of law. Alford, for example, argues that 'the principal state architects of China's post-Cultural Revolution law reform project have a genuine ambivalence toward their undertaking'.³ Dowdle, on the other hand, argues that any such ambivalence 'manifests itself in practice, not conception. Normatively, the Chinese, including the leadership, are overwhelmingly consistent in proclaiming the supremacy of law over other forms of political authority and over private interests'.⁴

However, the 'top-down' approach, predicated on these meta-narratives, and focusing on official, state-endorsed conceptions of law and order, must be supplemented by increased attention to the experiences and expectations relating to law and order (which I will broadly term 'legal ideology') of citizens in society. Traditional and historical cultural factors, in which Chinese conceptions of law and order are grounded, have been discussed in depth in the literature,⁵ but tend, like the rule of law debate generally, to be examined at the level of the elite polity. If, as Peerenboom argues, rule of law is a function of both institution-building and legal culture, the question must be asked: to what extent is central law-lauding rhetoric penetrating **local** spheres in which 'law' (*fa*) is traditionally regarded as an inferior means of social ordering than 'reason' (*li*)? To what extent are Beijing's winds of change, including the state's 'verbal homage to the sanctity of law',⁶ penetrating the local sphere and popular ideology?

A useful case through which to examine the local state-society interface is that of grassroots, citizen-led NGOs. China's NGO sector has been steadily growing in size, visibility and power since 1978, accompanied by a dramatic increase of state



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oversight and ostensible regulation of the sector. Through the promulgation, beginning in 1989 with the regulations on 'Social Organisations' (*shehui tuanti*), of a number of new laws relating to charities and NGOs, the Chinese government has evinced its concern with maintaining tight control over the newly emerging state-society relationship. While NGOs are increasingly seen as indispensable to economic and social development, they are also seen as potentially threatening for the civic organisation and agendas they represent.⁷ Accordingly, although laws provide a pathway to recognition and legal status for NGOs, in practice such registration is difficult to obtain. For example, a recent study by Ashley and He of Beijing NGOs found that registration status is in practice 'limited to [government-organised NGOs] and similar organisations with continued close government ties'.⁸ It remains the case that most NGOs in China today are not registered with the Ministry of Civil Affairs (at the end of 2008 there were approximately 415 000 registered NGOs in China, of an estimated two to eight million in total).⁹

Existing 'civil society' literature tends to focus on registered NGOs at the state-dominated end of a spectrum of autonomy, simplistically assuming that '[unregistered] grassroots NGOs ... do not encounter too much interference from the government', and are not directly controlled in any way by the government in the absence of registration,¹⁰ there being a supervision gap which allows for greater NGO freedom. However evidence from the author's research on charitable organisations run by the underground Catholic church of Henan province suggests that, on the contrary, at the local interface between state and society, oversight and control are at times also very much evident, but in much more veiled, and less formal/policy-centric ways than we see centrally.

At this local interface between state and society, ordinary citizens and government officials bring their own traditions, histories and expectations about law to their engagement with the legal system and the officials who represent it. In the case of the underground Catholic church and its unregistered/quasi-legal charities, most players demonstrate deftness at functioning in the absence of legally defined relationships, and negotiating paternalistic/disciplinarian-type interactions with local officials. In fact, the local picture painted therein is one in which law is not supreme, either in practice or rhetorically, and many features

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of even a thin conception of rule of law are missing. The 'real' rules of engagement between grassroots charities and the state are more to do with attaining legitimacy, garnering supportive connections, and 'giving face' to local government by treading politically-contentious lines (such as evangelism and drawing attention to gaps in government provision of welfare) carefully.

Above all, the dominant expectation regarding law at this local level is not that law will be impartially, consistently and unambiguously defined and applied, but rather than flexible norms will govern individualised, paternalistic relations with the state. This is not widely regarded as problematic, or in fact widely regarded at all, due to a lack of esteem for the notions of 'law' and 'legality' as intrinsically/

ideologically valuable. It may be surprising, from a Western law-centric perspective, that the picture that emerges from this particular (non) legal ideology is not one of 'lawless chaos'.¹¹ Instead, the local snapshot is one imbued with themes of paternalism, game-playing, give-and-take, suspicion and subordination. Above all, it is one of order – not, admittedly, a type of order associated with rule of law and its threshold requirements such as predictability and certainty, but order nonetheless.

Chinese and foreign scholars alike have put forward a vast array of opinions and descriptions, from conservative to liberal, on how the macro legal culture of China continues to be shaped by the winds of change blowing from Beijing and (purportedly) throughout China. But further empirical studies and examination of the law-order nexus locally is required to better understand the extent to which such winds have penetrated notions and ideas about law and order in Chinese culture and society. By moving in this way from the macro to the micro, texture and distinction is added to our understanding of the ideologies and traditions in which 'law and order' concepts in China continue to be grounded today, and a contribution will also, reflexively, be made to the bigger picture themes of rule of law and legal consciousness.

Notes:

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1. See, for example, Randall Peerenboom, *China's Long March Toward Rule of Law* (CUP, New York 2002) especially Chapters 2–3; Geor Hintzen, 'The Place of Law in the PRC's Culture' (1999) 11 *Cultural Dynamics* 167; Zhiping Liang, 'Tradition and Change: Law and Order in a Pluralist Landscape' (1999) 11 *Cultural Dynamics* 215; Karen Turner, 'The Criminal Body and the Body Politic: Punishments in Early China' (1999) 11 *Cultural Dynamics* 237; Thomas Stephens, *Order and Discipline in China: The Shanghai Mixed Court 1911–27* (Asian Law Series, University of Washington Press, Seattle 1992).
2. Peerenboom (2002) 8.
3. William Alford, 'A Second Great Wall? China's Post-Cultural Revolution Project of Legal Construction' (1999) 11 *Cultural Dynamics* 193, 198.
4. Michael Dowdle, 'Heretical Laments: China and the Fallacies of 'Rule of Law'' (1999) 11 *Cultural Dynamics* 287, 301.
5. The most seminal works include Peerenboom (2002) and the 1999 special edition of *Cultural Dynamics*, with contributions from (inter alia) Alford, Hintzen, Turner, Dowdle, Defoort and Peerenboom, and Liang.
6. Peerenboom (2002) 217.
7. Qiusha Ma, 'The Governance of NGOs in China since 1989: How Much Autonomy?' (2002) 31 *Nonprofit and Voluntary Sector Quarterly* 305, 311.
8. Jillian Ashley and Pengyu He, 'Opening One Eye and Closing the Other: The Legal and Regulatory Environment for "Grassroots" NGOs in China Today' (2008) 26 *Boston University International Law Journal* 29, 55.
9. China NPO Website <<http://www.chinanpo.gov.cn/web/listTitle.do?dictionid=2201>> accessed 30 November 2009;
10. Tony Saich, *Governance and Politics of China* (Palgrave MacMillan, Hampshire 2004) 232.
11. Compare with Hintzen (1999) 169, arguing that the picture that emerges on examining the social realities behind 'China's vociferous legal aspirations' is 'one of lawless chaos, where status, connections and money set the 'real' rules'.