

BOOK REVIEW

China's Journey Toward the Rule of Law: Legal Reform, 1978-2008 BY CAI DINGJIAN AND WANG CHENGUANG, eds. [Leiden: Koninklijke Brill NV, 2010. xxiv + 560 pp. Hardcover: €182.00, US\$236.00]

Rule of law seems to be experiencing a bit of a dark period in China right now. Corruption is endemic; popular protests against unlawful government actions seem to be at an all-time high; and at the same time, and somewhat paradoxically, the party-state has become increasingly aggressive in suppressing people who are seeking to use law rather than violence to express grievances and felt injustices against public officials. Universities have even been told that academics should not talk about the constitution and constitutionalism.

The present climate has caused many observers and scholars of Chinese law to argue that China is now “retreating” from rule of law—that it is moving backwards toward a not too distant past when law was seen as the enemy of party-led progress. And certainly, there is evidence to support this view. Between 1990 and around 2005, China experienced a legal renaissance of sorts. Constitutional-legal institutions were able to assert true authority. Public interests and public impact litigation and legal advocacy were encouraged and even celebrated. Lawyers were able to use the law, and the courts, to at least try to advance claims of injustice, and while they often failed, they did not need to fear political retribution.

But in such times as these, it is useful to remember that the long-term and the short-term operate according to different logics. Long-term trajectories are often punctuated by short-term disruptions. Europe retreated from political liberalism during most of the 1930s, but by the 1950s, European liberalism was nevertheless back in full flower, and has been ever since.

I have always suspected that Chinese scholars tend to take a longer view when looking at rule of law development in China. Why this is the case, I won't speculate. But when Chinese legal scholars look at the development of some area of law, or of the Chinese legal system *en toto*, they seem much more likely to locate ‘developments’, not simply within five-year or ten-year trajectories, but over a generation or two. And particularly during times of seemingly countercyclical devolution, it can be useful to be reminded of the deeper trajectories of the *longue durée*.

Along these lines, *China's Journey Toward the Rule of Law*, edited by Cai Dingjian and Wang Chenguang, represents a distinct and important addition to the English-language literature on rule of law in China. Over the past three decades or so, there have appeared a great many English-language books and academic articles looking

at rule of law in China, in many different aspects. But the overwhelming majority of these are written by scholars working out of the Anglo-American legal academic community, or otherwise have been written primarily for persons working out of that community. As such, they are informed by the concerns and interests of that community. By contrast, *China's Journey Toward the Rule of Law* is written by Chinese legal scholars, and it does not seem particularly oriented towards a distinctly Anglo-American academic readership. Citations and references are almost exclusively to Chinese texts and Chinese writers. Moreover, to this reviewer, who has spent some twenty years reading the legal scholarship written by Chinese for Chinese, the style and manner of discussion/presentation is also distinctly 'Chinese' in aesthetic and analytic character. This is not to imply that the contributions to this volume are not quite critical. The contributors are quite aware that China continues to face many obstacles in its on-going pursuit of rule of law, and they devote significant attention to problems of enforcement, corruption, and political and cultural resistance.

The volume examines China's engagement with rule of law sectorally. It includes chapters on the constitution, administrative law, criminal justice, the judiciary, legal education and the legal profession, public interest litigation, market regulation, foreign investment protection, intellectual property and environmental protection. Chapters tend to focus on doctrinal developments, before discussing obstacles to better implementation or further developments. Invariably, the starting point for these chapters' investigations is not 2005 or 2000. It is—as the volume's title suggests—1978, the transition from the Cultural Revolution to "Reform and Opening Up".

And in doing so, they do remind us how China's engagement with rule of law does indeed look different from the perspective of the *longue durée*. Legal systems are grown, not constructed. They are the accretional product of the complex and often spontaneous emergence of myriads of everyday institutions and practices. And it is in the complexity of the sum total of these institutions and practices, in their mutual embeddedness and interdependence, that the true resilience of a legal system lies. Viewing these developments over the longer term, these chapters remind us that China's legal system is the product of thirty years of development that has been as much (if not more) organic than strategic. They show that this trajectory does indeed appear to be driven by its own distinct and complex logic, one that operates largely outside the party-state's recent emphasis on policy-based rather than law-based governance. This is not to imply that today's short-term retreat is not without important consequences, or that it is not something we should be concerned about. But it is a retreat that operates within a larger developmental trajectory that we should not completely lose sight of.

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Very soon after this volume was published, its lead editor, Cai Dingjian, passed away from stomach cancer. Cai was one of China's first real scholars of China's constitutional law (as opposed to simple constitutionalism) as it was re-emerging following the trauma of the Cultural Revolution. He probably was more influential in the development of that law *qua* law than any other scholar. This was not accidental. Cai was deeply committed to the emergence of a constitutional law in China. He

was both brilliant and unassuming, discovering a living constitutional law where few else could see it.

Cai never claimed or demanded credit for his immense accomplishment in this regard. It is therefore easy to overlook what a monumental accomplishment his was. Over a century later, we still revere A.V. Dicey for his discovery of a constitutional law in England. Cai Dingjian's contributions to China's constitutionalism are every bit of equal accomplishment. He is of equal stature, and his accomplishments deserve to be held in the same awe.

It is because of his efforts, I believe, that constitutional discourse and constitutional scholarship will survive the party's recent political assault. His was and is precisely the power of the *longue durée*—a power that brute efforts at momentary political oppression cannot reach.

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