Policy Forum Article

China’s Disinterested Government and the Rule of Law

Joseph Mazur and Anca-Elena Ursu

Abstract

This article seeks to understand how China has managed to achieve such high rates of growth over the past four decades despite the absence of a veritable rule of law. A large body of research suggests that a strong rule of law is a key prerequisite for sustained economic development, but China’s unique political economy which vests limited power in its judiciary seems to defy conventional wisdom on this count. Taking as a starting point Yang Yao’s concept of ‘disinterested government’, that is, a government that eschews differentiated interests within a society in favour of a concerted focus on national development, the authors examine the mechanisms by which Chinese leadership has maintained extraordinary growth without the benefit of the rule of law. Specifically, this article argues that the defining features of a disinterested government fulfil many of the same roles as the rule of law from a developmental perspective.

Key words: rule of law, legal reform, corruption

1. Part I

Since the beginning of Deng Xiaoping’s Reform and Opening policy in the late 1970s, the scale and rapidity of China’s development has astounded observers around the world. Emerging from the violent turmoil of the Cultural Revolution, the nation embarked upon a trajectory of unprecedented growth and increasing prosperity all while managing to maintain relative stability. The first impetus for reform came from the Third Plenum of the Eleventh Central Committee Congress in December 1978, when Deng Xiaoping announced the ‘reform and opening’ to the outside world. As Peking University professor Yang Yao noted, ‘China’s annual average growth rate of 9.7% must necessarily lead a reasonable commentator to the conclusion that China’s development has been an unparalleled story of success’ (Yao 2008). But while the facts of the nation’s economic blossoming speak for themselves, the mechanisms by which it has been achieved continue to puzzle scholars across a range of disciplines. In particular, the absence of a true rule of law in China seems to defy conventional wisdom about the necessary institutional prerequisites for successful economic development. Rule of law is an essential institutional feature for sustained and inclusive economic growth. Academics and experts have acknowledged the key developmental role played by the rule of law, concluding that the lack of transparent law enforcement or an independent judiciary capable of policing government actions often significantly hampers sustainable development.
By building upon Yang Yao’s concept of the ‘disinterested government’, that is, a government that does not have differentiated interests among the various segments of a society and which prioritises national development, the authors hope to show the means by which China has been able to sustain rapid economic growth while foregoing this key institutional feature. In specific, we argue that China’s disinterested government acts as a substitute for the rule of law, affording the country a wide range of developmental benefits while simultaneously avoiding the pitfalls of entrenched special interest groups that frequently undermine both economic development and political stability in other developing countries.

2. Part II

Before proceeding, it is necessary to define what we mean by the term ‘rule of law’. Author Eric W. Orts defines the rule of law as a legal system ‘that exercises some significant institutional power to review and, if necessary, police the actions of the government’ (Orts, 2000). Additionally, in The Origins of Political Order, American political scientist Francis Fukuyama states that ‘rule of law can be said to exist only where the pre-existing body of law is sovereign over legislation, meaning that the individual holding power feels bound by the law’ (Fukuyama 2011). Yet, even in well-established liberal Western societies the definition of rule of law remains an essentially ‘contested concept’, (Orts 2000) ‘deeply ambiguous’ (Radin 1989). Even broader definitions of the term exist include the one put forward by Dencho Georgiev who argues that ‘the objectivity of law, as a requirement of the rule of law, does not have to imply independence from politics generally but only the theoretical and practical possibility of the separate existence of a set of obligatory rules—i.e. law—which is not mere political opinion and which could be applied against political behaviour’ (Georgiev 1993). Despite notionally upholding rule of law as one of its ‘core socialist values’ (fazhi, 法治), China’s elite leadership does not meet even the most expansive definition of the term.

Based on these presuppositions, China cannot be said to have a consolidated rule of law because the authority of the Chinese Communist Party (CCP) is not restrained by any pre-existing body of law. In point of fact, the monolithic governance by the Party and its instrumentalist approach to law are the defining features in China’s legal development (Yu 1989). Since the time of the Cultural Revolution, China has embarked on the path of legal reform triggered by the development of the market economy, the need for a dispute resolution method, the public demand for justice and, the pursuit of uniformity in accordance with international standards (Jiang 2010). Since the outset of his mandate, Xi Jinping has explicitly stated that rule of law and judicial reform were key points on his agenda. Prior to the Xi-era, the political leadership of the PRC stressed the Party’s fundamental role in shaping the legal reform agenda by pursuing socialist democracy. In an address delivered at the Sixteenth Party Congress in 2002, Jiang Zemin remarked that, ‘leadership by the Party is the fundamental guarantee that the people are the masters of the country and that the country is ruled by law. The people being the masters of the country constitutes the essential requirement of socialist democracy. Ruling the country by law is the basic principle the Party pursues while it leads the people in running the country.’ However, the CCP’s stated commitment to strengthening rule of law does not include any genuine concession to constitutionalism or subordination to an independent judiciary. In theory, Article 35 of the Constitution of the People’s Republic of China guarantees Chinese citizens ‘freedom of speech, of the press, of assembly, of association, of procession and of demonstration.’

In practice, of course, these freedoms are not protected by the judiciary, and the CCP does not feel restrained by the Constitution in suppressing these freedoms if it is politically expedient to do so. Nor does the CCP’s supposed enthusiasm for legal reform extend

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as far as the creation of an independent judiciary, one of the cornerstones of Western, liberal rule of law. De jure, Article 126 of the PRC Constitution states that ‘the People’s Courts exercise judicial power independently, in accordance with the provisions of law, and not subject to interference by any administrative organ, public organisation or individual.’ De facto, judicial independence is largely restricted by an extremely high degree of Party oversight (Peerenboom 2002). As a matter of fact, political interference with judicial affairs is commonplace. In other words, no actual higher law exists outside the dictates of the Party leadership.

3. Part III

Generally speaking, the absence of the rule of law within a society is major roadblock to economic development. As Fukuyama observes, ‘the emergence of the modern world, including the emergence of a capitalist economy, was broadly dependent on the prior existence of a rule of law. The absence of a strong rule of law is indeed one of the principle reasons why poor countries can’t achieve higher rates of growth’ (Fukuyama 2011). Practitioners have confirmed the same hypothesis. Economist Alexander Van De Putte and Kairat Kelimbetov, former Governor of the Bank of Kazakhstan, include ineffective governance, lack of accountability, and weak rule of law as the major impediments to reaching sustainable growth (Van de Putte & Kelimbetov 2016). This is true for several reasons. First, in many cases, in a society without a rule of law, unconstrained elites will often try to maximise their own profits by seizing property from other segments of society. This creates a considerable disincentive from both investment and domestic development because investors, entrepreneurs and business people cannot be certain that rapacious officials will not arbitrarily seize their assets. Such rent-seeking behaviour not only deters economic growth, it also has the potential to undermine political stability. In many developing nations without a strong rule of law, the government will fall into the hands of special interest groups or coalitions of powerful elites seeking to defend their privileges by blocking institutional change (Fukuyama 2011). Although systemic corruption is undeniably a pervasive problem in contemporary China, the country has nonetheless achieved consistently spectacular growth with a minimum of political instability without the benefit of a rule of law. A convincing explanation for this phenomenon may lie with the fact that China’s uniquely ‘disinterested’ government fulfils many, though not all, of the functions performed by a rule of law in other societies. In the aftermath of the downfall of communism in Eastern Europe and in the Soviet Union, reform deepened and Deng Xiaoping called for an economy based on a legal system intensely focused on domestic development. This formulation is the result of both economic and political considerations. As Yang Yao points out in The Chinese Growth Miracle, the Party’s prioritisation of all around national development comes with a litany of important advantages. He writes, ‘it is rational for the CCP to adopt growth-enhancing policies because economic growth brings both legitimacy to its rule and tangible material benefits to its core members’ (Yao 2014). In fact, since the time of Deng’s reforms, the role of law has traditionally been that of preserving social order and achieving prefixed market-oriented goals.

China’s top leadership has consistently eschewed simple rent-seeking behaviour in favour of a disciplined commitment to economic development. In addition to orchestrating the nation’s transition from a planned to market economy, government policies have also sought to create a legal framework conducive to growth. In recent decades, China has implemented and enforced a vast number of laws relating to commercial transactions, including laws related to copyright, patents, contract enforcement, insurance, arbitration and securities among many others. The actual legal system of the People’s Republic of China is the result of policy decisions made by the Party and State actors in order to support economic growth,
in the current Chinese legal system is indeed (Pitman 2001). Although this ‘flurry of legislative activity’ remains a work in progress, it has undoubtedly served the country well from a developmental perspective. The assurance that assets within China are relatively secure—a condition which Fukuyama terms ‘good enough’ property rights—has both attracted foreign investment and promoted domestic growth. Thus, by investing its political will in creating prosperity as well as the legal infrastructure to sustain it, the disinterested rule of the Chinese Communist Party has replicated the kind of economic environment that can usually only be achieved through a true rule of law. The ‘rule of law’ that Xi and other elites envision for China, does not refer primarily to a political theory of limited government but to a framework within which the Party can express its authority via China’s purpose-built legal structure. Thus, Zhongnanhai’s instrumentalist approach to legal reform has allowed economic necessity to dictate policy rather than a rule of law in the abstract.

It is important to note, however, that while the Party’s upper echelons have largely shunned rent-seeking in favour of a ‘big picture’ approach to national prosperity, Party officials at lower levels of government are considerably less disinterested. The successes of the Deng-era reforms came at the price of increased graft, and corruption was one the primary grievances of the Tiananmen Square protesters in 1989 (He 2000). Rent-seeking at the provincial and local levels of government remains endemic across China. In 2012, Government professor Minxin Pei estimated that roughly $200 billion of wealth are usurped every year by crooked officials across China (Lim 2012). By and large, the average Chinese citizen is painfully aware of this trend. According to Transparency International’s, 2014 Corruption Perceptions Index, China tied for 83rd place with Liberia, Sri Lanka and Colombia (Transparency International 2014).

Additionally, the competing interests of various levels of government are a central factor in explaining major deviations in policy implementation. In an analysis of Chen and Zhang 2016, it has been found that for maximisation of local fiscal revenues—‘revenue-driven administrators’, ‘local governments tended to implement State policies that would reduce fiscal revenues perfunctorily or even refused to implement them’ (Chen & Zhang 2016). The response of China’s disinterested and development oriented Party leadership has been to increase oversight and accountability to the Politburo, China’s main policymaking committee. At the 18th National Congress in November 2012, President Xi Jinping announced an ambitious anti-graft campaign designed to ensnare both ‘tigers and flies’ (that is large-scale and small-scale offenders). Since that time, more than 200,000 officials have been tried on corruption related charges, and more than 400,000 have been formally disciplined. In addition to fighting corruption as a general concept, Xi’s campaign has also been squarely aimed at powerful rent seeking coalitions and factional special interest groups of the type that often threaten the prosperity and stability of countries without a strong rule of law (Kelih & Wu 2007).

Historically, the Party has also employed other methods of oversight to bring local and provincial officials into line. While state-run media are, of course, barred from reporting on a wide range of sensitive or critical topics, the Party has actually encouraged investigative reporting to expose official malfeasance at the local and provincial levels. In general, the Party leadership has adopted the attitude that such journalism combats wrongdoing without significantly undermining faith in the regime in general (Repnikova 2015). This unofficial mechanism of media oversight, termed yulun jiandu (舆论监督) in Chinese, has played a significant role in recent years in monitoring the behaviour of local officials and venting the considerable frustration of China’s disillusioned masses. The media, in other words, are tools of government accountability, which discourages corruption and other abuses of public office. Thus, although the Chinese Communist Party is not constrained by any outside force, the nation’s paramount leaders

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have taken it upon themselves to review and police all subordinate levels of government in lieu of a true rule of law or independent judiciary.

4. Part IV

The question then remains, what factors keep China’s paramount leaders disinterested and what motivates them to police the behaviour of local officials so vigorously? The answer lies in the deeply-held conviction among Party leadership that political legitimacy is largely dependent upon continued economic prosperity. Indeed, popular disillusionment with the hardships and depredations of the Cultural Revolution and the fear of regime change was one of the major impetuses for Deng’s sweeping economic reforms. Since then, the CCP’s development-oriented economic reforms have been a means for safeguarding national stability and base of popular support. Up until very recently, the sheer speed and magnitude of China’s economic growth has offset most of the negative consequences of widespread corruption, but as growth begins to slow, the rent-seeking behaviour of lower ranking Party officials may pose a serious challenge to the economic and political well-being of the state. In 2000, political scientist Zengke He commented on the link between corruption, prosperity, and government legitimacy, writing ‘If corruption spreads into all institutions and levels of the government, the public’s image of the government will be damaged, leading, in turn, to a loss of public support for authority’ (He 2000). Presciently, he also described the impact of an economic slowdown on the Party’s legitimacy: ‘Should China enter a period of recession…corruption will become a more sensitive and more explosive issue that could threaten political stability’ (He 2000).

China’s economic momentum has waned significantly and is no longer to able boast the double-digit growth rates of previous years. While development remains a priority, Party leaders have begun to shift their focus to more forcefully combat corruption and dismantle rent-seeking factions, a strategy which exemplifies Yang Yao’s definition of a disinterested state. As such, Xi’s anti-corruption campaign might just as easily be understood as a public relations campaign. As foreign policy expert Cheng Li observed, ‘If there were ever any doubts that Xi could restore faith in a party that had lost faith among the Chinese public, many of those doubts have been dispelled by the steady drumbeat of dismissals of high-ranking officials since he took office in late 2012’ (Li & McElveen 2015). Simply stated, in place of legal constraints imposed by a true rule of law, China’s elites are instead constrained by the fear of popular unrest and loss of legitimacy, which in turn promotes disinterested and relatively responsible government as well as Party discipline.

The leadership of the Chinese Communist Party has created a system where self-imposed restrictions from within the Party itself police and moderate the actions of the government apparatus as a whole. The effect of this configuration has been similar in many respects to that of a formal rule of law, but the system remains very far from perfect. In many societies, one of the primary functions of the rule of law is to safeguard human rights from abuse by the state or any of its agents. However, China’s economic coming of age has done little to mitigate its poor human rights record. According to the 2015 Human Rights Watch World Report for China, the Communist Party ‘systematically curbs fundamental rights, including freedom of expression, association, assembly, and religion when their exercise is perceived to threaten one-party rule’ (HRW 2015). Considerations of international outcry and their associated economic costs do figure into the Party’s political calculus (the US-led economic and political sanctions that followed the Tiananmen Square incident serve as a painful lesson to China’s current leaders) but so far, the benefits of repression have largely outweighed the costs. From the perspective of a disinterested, development-oriented state like China, it makes sense to punish dissent wherever it hinders economic growth, undermines state legitimacy, or threatens...
stability. In this sense, the Party’s single-minded focus on development is a double-edged sword where rule of law is concerned. Furthermore, China’s current approach to disinterested government and self-restraint is remarkably fragile. The fight against corruption and rent-seeking requires constant vigilance and positive action on the part of the Party’s upper echelons, and failure to effectively manage oversight to the top would likely lead to both economic hardship and popular discontent. If future generations of Chinese leadership do not continue to shun outright graft in favour of committed developmental policy, the substitute rule of law system developed since the beginning of reform and opening could crumble spectacularly. The fact that former Politburo Standing Committee member Zhou Yongkang and former Chongqing Party Secretary Bo Xilai are both serving life-sentences in prison on corruption charges suggests that the future good behaviour of the country’s paramount leaders cannot be guaranteed. In short, a lapse in Party discipline or a failure to effectively review government conduct could have disastrous consequences for the existing status quo.

5. Conclusion

In conclusion, China remains highly unique among the world’s developing countries. So far, it has managed a historic economic rise in addition to maintaining national stability all without the benefit of a rule of law. Instead, a carefully calculated developmental policy consisting of bottom-up accountability, a relentless focus on economic progress, and remarkable levels of forbearance at the highest levels of government has allowed China to defy the pitfalls that usually plague unconstrained, authoritarian governments. But while the Chinese pattern of government restraint may continue to promote growth and public contentment, it is, at best, only a partial substitute for a true rule of law. The fragility of the current system lies in the fact that it relies on positive action by Party leadership to sustain itself rather than on independent institutions and that it ultimately is subject to the whims of China’s paramount elite.

References

Chen J, Zhang Q (2016) Fluctuating Policy Implementation and Problems in Grassroots Governance. The Journal of Chinese Sociology 3, 1–19.
Fukuyama F (2011) The Origins of Political Order: From Prehuman times to the French Revolution. Farrar, Straus and Giroux, New York.
Georgiev D (1993) Politics or Rule of Law: Deconstruction and Legitimacy in International Law. European Journal of International Law 4.
He Z (2000) Corruption and Anti-Corruption in Reform China. Communist and Post-Communist Studies 33, 260.
Jiang H (2010) Judicial Reform. In: Cai D (ed) China’s Journey toward the Rule of Law: Legal Reform 1978 – 2008, Brill.
Keliher M, Wu H (2007) How to Discipline 90 Million People. In: The Atlantic. Atlantic Media Company, Boston.
Li C, McElveen R (2015) Debunking Misconceptions About Xi Jinping’s Anti-Corruption Campaign. China-US Focus, viewed March 2017 <http://www.chinausfocus.com/political-social-development/debunking-misconceptions-about-xi-jinpings-anti-corruption-campaign/>.
Lim L (2012) A Portrait Of Chinese Corruption, In Rosy Pink [Online] NPR, viewed March 2017 <http://www.npr.org/2012/06/29/155773618/a-portrait-of-chinese-corruption-in-rosy-pink/>.
Orts EW (2000) The Rule of Law in China. Vanderbilt Journal of Transnational Law 33, 12.
Peerenboom R (2002) China’s Long March Toward the Rule of Law. Cambridge University Press, Cambridge.
Pitman BP (2001) The Chinese Legal System: Globalization and Local Legal culture. Routledge, Abingdon.
Radin MJ (1989) Reconsidering the Rule of Law. Boston University Law Review 69, 3.
Repnikova M (2015) *Media Oversight in Non-Democratic Regimes: The Perspectives of Officials and Journalists in China*. University of Pennsylvania.

Transparency International (2014) *Corruption Perceptions Index 2014: Results*. Transparency International, viewed March 2017 <https://www.transparency.org/cpi2014/results>.

Human Rights Watch (2015) *World Report 2015*. Human Rights Watch, viewed March 2017 <https://www.hrw.org/world-report/2015>.

Yao Y (2008) *The Disinterested Government: An Interpretation of China’s Economic Success in the Reform Era*, Research Paper 2009/032. UNU-WIDER.

Yao Y (2014) *The Chinese Growth Miracle*. In: Aghion P, Durlauf SN (eds) *Handbook of Economic Growth*, 2, 1–1070. Elsevier. (Online).

Yu X (1989) *Legal Pragmatism in the People’s Republic of China*. *Journal of Chinese Law* 3, 39–40.

Zou K (2001) *China’s Constitutional Changes and Deng Xiaoping’s Legacy*. In: Wong J, Zheng Y (eds) *The Nanxun Legacy and China’s Development in the Post-Deng Era*, 294. Singapore University Press, Singapore.

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