

Legal Reform in China: Institutions, Culture, and Selective Adaptation

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STANLEY B. LUBMAN, *Bird in a Cage—Legal Reform in China after Mao*. Stanford, Calif.: Stanford University Press, 1999.

RANDALL P. PEERENBOOM, *China's Long March toward Rule of Law*. New York: Cambridge University Press, 2002.

China's law reform program began in late 1978, at the Third Plenum of the Eleventh Central Committee of the Communist Party of China (Zhongguo gongchandang). The plenum reflected a tentative policy consensus about the need to reform the state-planned economy and build a legal system that would support economic growth and restore for the regime the monopoly on legitimate coercion that had been lost during the Cultural Revolution. Initial efforts included legislative drafting in areas of crime and public security, contracts, taxation, and foreign business. Law schools that had been closed since the late 1950s were reopened, and legal specialists who had been disgraced during the Cultural Revolution were invited to resume their academic and professional activities. While it is tempting to view the past 25 years as an uninterrupted process of policy consensus on legal and economic reform, in fact the post-Mao period was marked by contention and disagreement. The political crisis surrounding the Tiananmen massacre of 1989 raised the prospect that both legal and economic reform would be halted, although Deng Xiaoping's courageous Southern Tour (*nanxun*) in 1992 helped secure the momentum for stronger links between legal and economic reform (Wong and Zheng 2001). The subsequent acceleration

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of market-oriented economic policies supported expanded efforts at law building in areas of property (including intellectual property and securities), corporations, trade and investment, and administrative procedure.

The role of law in China today remains conflicted. On one hand, the Chinese government and society at large have accorded significant importance to the role of law in socioeconomic relations. Well over 200 pieces of legislation have been enacted at the national level alone since 1979 (Law Society of China 2000a, 59), not to mention administrative regulations and provincial and municipal enactments. Judicial caseloads are averaging nearly 5 million per year nationwide (Law Society of China 2000b, 1209; 2000c, 1209), while the number of additional disputes resolved through mediation and arbitration is burgeoning. Bookstores in Beijing, Shanghai, and other major cities are well stocked with books on law, and crowded with prospective purchasers. Law faculties are filled to capacity with many of China's best students, driven by the prospect of lucrative employment to study a field that for all intents and purposes did not exist 25 years ago. Law firms have multiplied—more than 5,000 have been established since 1990, bringing the total to more than 9,000 (Law Society of China 2000d, 1226). And through it all, the government delivers a steady litany of legislation, administrative regulations, and policy pronouncements extolling the importance of the rule of socialist law.

But herein lies the rub—as fealty to socialism unavoidably qualifies and in the view of many diminishes the capacity for law to serve as an independent source of restraint on government behavior. Problems with law enforcement in practice are evident in abundance. Issues of corruption (Lin 1997); piracy of intellectual property (General Accounting Office 2002a); indeterminate contract and property rights (Organization for Economic Cooperation and Development 2002); inconsistent enforcement of administrative regulations (China Law Committee 2002); and ongoing repression of *Falun gong* adherents (Perry 2001), independent labor unions (Human Rights Watch 2001; Independent Unions 2001), AIDS activists (Human Rights in China 2002), and others whose views are deemed heretical by the ruling party, suggest significant obstacles to establishing a functional system of legal rule. These and many other contradictions are the source of ongoing debate among scholars, policymakers, jurists, and other observers, with little prospect of resolution. Two useful perspectives on this debate are offered in Stanley Lubman's *Bird in a Cage: Legal Reform in China after Mao*, and Randall Peerenboom's *China's Long March toward the Rule of Law*. As the metaphors in their titles suggest, these two books offer contrasting interpretations of the historical record of China's law reform effort.

Stanley Lubman has been advising international companies and governments on law in the People's Republic of China (PRC) for more than 25 and remains an intellectual leader among specialists on Chinese law. Lubman's book draws usefully on his significant academic and professional

experience with the post-Mao legal reform process. Drawing on a metaphor associated with economic planner Chen Yun about the limited freedom of market activity within the confines of China's socialist system, Lubman portrays the systemic and ideological limitations of Communist Party rule as a cage confining the bird of Chinese legal reform.

Lubman examines law in the PRC as a way to broaden understanding of China more generally. Examining institutions for settling disputes, Lubman reviews processes of mediation, arbitration, and court litigation as they have developed over 20 years of economic and political reform. He also looks at the potential role that judicial and administrative institutions might play in asserting legal restraint on administrative officials. While Lubman's focus is on "China's attempts to build legality within its own borders," he notes as well the considerable international implications of China's law reform effort. While he credits China with significant achievements in legislation and institution building, Lubman concludes that China has not succeeded in building a legal system. The absence of a unifying concept of law and the considerable fragmentation of legal and political authority, which are both compounded by problems of ideology and corruption, work to inhibit the emergence of a rule of law system that can impose on state and society alike predictable and enforceable standards for socioeconomic and political behavior.

Randall Peerenboom is one of an emerging cohort of younger specialists writing about the legal system of post-Mao China. Peerenboom discusses the rule of law from the perspective of a philosophical pragmatism that balances thick and thin theories on the rule of law. Recognizing that concepts of law are unavoidably contentious and embedded in local cultural context, Peerenboom suggests that, despite the many problems and contradictions inherent in development of law in China during the post-Mao period, this process can indeed be described as moving toward a rule of law system. While Peerenboom acknowledges numerous obstacles, including the dilemma of party rule; the institutional frailty of legal institutions; and the obstacles of path dependency, he suggests nonetheless that China's economic reforms make some form of rule of law inevitable. Peerenboom views the development of China's legal system as an historical process of socioeconomic change that makes unavoidable the gradual progression toward a system which, while not necessarily matching the models of Europe or North America, nonetheless qualifies as a rule of law system.

Peerenboom's conclusions about the potential for the emergence of the rule of law in China draw on his assessment of the interplay between law and economic development. While perhaps not to the extent suggested by conventional liberal theorists, Peerenboom asserts that law has played a central role in Chinese economic development and will continue to do so. He suggests that law may play a yet greater role in supporting political

reform, particularly as the economy develops and Chinese people seek expanded legal rights. Peerenboom sees changing attitudes among China's population, driven in part by economic growth and in part by increased exposure to international ideas, as demanding increased reliance on law and legal procedures in the exercise of governance. Peerenboom's is a hopeful projection, that changing attitudes among the Chinese people will constrain the state to rely increasingly on law and legal procedure.

Lubman and Peerenboom offer contrasting perspectives on the role of law in China today. Lubman suggests that Communist Party dominance constrains the role of law to such an extent that China cannot be said to have a legal system. Peerenboom suggests that the economic reforms undertaken since the later 1970s, coupled with changing popular expectations, will require the party to rely increasingly on law and thus lay the foundation for a recognizable rule of law system. Using these different perspectives as a starting point, this essay offers a few thoughts on how China's law reform program might be examined in light of questions about institutional capacity and legal culture, and suggests that performance of the Chinese legal regime in areas of economic regulation and dispute resolution might be understood by reference to a dynamic of selective adaptation.

I. FRAMEWORK AND METHOD: CHINESE LAW IN COMPARATIVE PERSPECTIVE

Although few legal scholars debate the importance or utility of studying law in different societies, the field of comparative law remains conflicted as to identity and purpose. Classical approaches to comparing the content and origins of statutes, administrative edicts and other texts have long given way to studies of institutional performance and social behavior and inquiries about norms and ideology (Ewald 1995; Frankenberg 1985; Sacco 1991). Often this is done in collaboration with other disciplines. Political scientists have worked to bring to the study of comparative law critical questions about political movements, ideological change, and regime dynamics (Lev 1998). Anthropologists have offered important insights into issues of power, social norms, and behavior (Greetz 1983; Nader 1969; Starr and Collier 1989). Economists have examined the interplay between institutional change and economic performance (Mattei 1997; North 1990). Scholars focusing on law and development have examined the important role that law and legal institutions play in socio-economic and political change (Jayasuriya 1999; Pistor and Wellons 1999).

Drawing to varying degrees on each of these discourses, Lubman and Peerenboom both remind us of the relationships between law and underlying social norms and practices. They are not alone. Informed by scholarly

debates over the relative importance of formal law in Chinese tradition (Buhmann 2001; Heuser 1999; Scogin 1994), contemporary research on socioeconomic contextualization of law and legal behavior in China raises important questions about issues of identity and content. Statutory studies and discourses on legal theory (Chen 2000; Keith 1994; as well as Peerenboom's book) illuminate much about doctrinal features of Chinese legal reform. Analysis of the bureaucratic politics of law making (O'Brien 1990; Tanner 1998) and of the policy conflicts attendant to legal reform generally (Potter 2003a) help explain the ways in which particular interests are expressed through law. Yet for all of the attention paid to the content of Chinese law, the meaning of law still depends on conditions and outcomes of performance in practice. Questions concerning enforcement of legal obligations raised during China's access to the World Trade Organization (WTO) (WTO 2001) underscore uncertainties about practical performance of Chinese law. Survey interviews suggest that formal law and legal institutions are of limited relevance to ordinary people in China (Michelson 2003). Analysis of the interplay between formal law and informal relational institutions in adjusting socioeconomic and political relations suggest that legal reform remains conditional on local culture (Potter 2002). Research on lawyers and courts (Alford 2002; Clarke 1995) reveals a variety of practice norms embedded in the performance of legal institutions. Research on social attitudes about law and legal institutions (Zhu 2000) helps shed light on local perspectives about law and legal authority.

Having accepted the utility of studying Chinese law, not only for its own sake but for the sake of developing further understanding of other elements of Chinese life and to build understanding about dynamics of law and society generally, scholars face a sobering array of conceptual and methodological questions. Peerenboom cautions against methodological parochialism. Drawing on his background in Chinese philosophy and history, Peerenboom emphasizes the diversity of viewpoints that characterizes rule of law discourse in China and cautions against application of unidimensional standards unconnected to Chinese tradition and contemporary reality. Lubman's reference to the familiar paradox "eye at the telescope or face in the mirror" evokes the classic dilemma of the comparativist who must decide whether the phenomena seen in other societies and systems are merely reflections of the familiar or are instead new phenomena unrelated to the experience of the observer (e.g., Hicks 1991; Derrida 1992, 20–22). The truth of course lies somewhere in between, but both extremes offer cautionary wisdom. In intellectual property (IP) law, for example, the familiarity that foreign observers might find in the texts of legislation and administrative regulations is more than matched by inconsistencies in performance that would seem most unfamiliar (Oksenberg, Potter, and Abnett 1996). International IP lawyers will find quite familiar Chinese law provisions extending protection to inventions and copyrighted works

(Patent Law, art. 2; Copyright Law, art. 2); procedural provisions on preliminary injunctions in IP enforcement (Patent Law, art. 60; Copyright Law, arts. 48–49; Trademark Law, art. 39); and the registration process for patents and trademarks (Patent Law, art. 26; Trademark Law, arts. 9–10). On the other hand, repeated evidence of failures of the statutory and regulatory regime to protect intellectual property in practice suggests that the text of law carries limited weight. Neither assumptions about the effective authority of legal texts nor conclusions about the uncertainty of legal practice tell the whole story of China's intellectual property reforms. Examining both textual authority and the realities of performance is essential to full understanding. So it is with assessments of Chinese law generally.

Unfortunately, comprehensive approaches to examining Chinese legal reforms are often thwarted by the distorted expectations of foreign observers. Despite 25 years of ever-increasing interaction between China and the outside world, foreign assessments of the Chinese reform project still reflect extremes of optimism and cynicism. Optimistic depictions of the successes of China's legal system suggest:

The government has also voiced its commitment to strengthening the rule of law and to throwing off the remnants of the old-style "rule by man." In all, major reform of all aspects of Chinese governance has been set in motion, at least with the potential to alter the relationship between the state and its citizens. (United Nations Development Program 2002)

These may give comfort to investors and development program officers, even as they dismay lawyers and legal academics in China and abroad who hope for more substantial system performance. No less incomplete is the view of hard-bitten pessimists who see failure around every corner in the Chinese legal reform process:

[China's] disregard for the rule of law hinders proper compliance with WTO commitments. . . . The current legal structure is plagued by Party intervention, glaring corruption, and arbitrariness. . . . the Chinese legal system is characterized by the rule *by* law, where the state employs law as a vehicle to exercise power when convenient or necessary for its own ends. (United States–China Security Review Commission 2002).

Scholars attempting to navigate between what Lubman calls the Scylla of moral absolutism and the Charybdis of cultural relativism thus face a daunting task. To the extent that the Chinese legal system involves a complex interaction of norms, process, and performance, I have found it helpful to examine issues of institutional capacity and legal culture as ways to place China's legal reforms in perspective.

A. Institutional Capacity

Studying Chinese law challenges assumptions and expectations about institutional behavior. European and North American perspectives often assume the centrality of institutions in economic and political performance. The China record, however, suggests otherwise. Observers of China's evolving property law regime, for example, have pointed out the enduring mystery of how China has managed to achieve impressive rates of economic growth over more than two decades without an institutionalized system of property rights (Oi and Walder 1999). Other scholars ask similar questions about the stability of the political and socioeconomic systems (Chang 2001; Shambaugh 1998). At the end of the day we may be forced to recognize that institutions (particularly legal institutions) play a substantively different role in China than in the European and North American experiences. Although the interplay of institutions and economic performance remains central to the success of China's reform agenda (Whiting 2001), the party's domination of the regulatory process, and the separation of formal political authority from practical economic power challenge the ability of institutions to manage the socioeconomic and political consequences of legal change. Whether, as Lubman suggests, the law in China remains confined within the cage of party hegemony or, as Peerenboom argues, China's legal system satisfies at least the thin theory of rule of law, questions about institutional capacity remain key elements of the analysis.

Institutional capacity refers to the ability of institutions to perform their assigned tasks. Institutional capacity has been examined from relational perspectives that focus on issues of responsibility between organizations and their constituencies; efficiency in performance and the use of resources; and accountability to varying sources of authority (Savitch 1998). Functional perspectives have also been applied to the question of institutional capacity, in such areas as access to information; effectiveness and methods of communication; organizational symmetry; and ability to enforce rules and directives (Blomquist and Ostrom 1999). However useful these approaches may be in the abstract, actual institutional performance remains contingent on domestic political and socioeconomic conditions (Healey 1998; Martin and Simmons 1998). In the case of China, local conditions of rapid socioeconomic and political transformation pose particular challenges for institutional capacity. During the post-Mao period, as a component of a new approach to building regime legitimacy, the government offered what amounted to a trade-off of greater autonomy in local socioeconomic relations for political loyalty. Individuals and groups were granted limited socioeconomic freedoms, in exchange for continued political subservience. With official acceptance of the decline of class struggle, the regime turned its attention away from managing social behavior and more toward supporting economic growth. The gradual loosening of social and economic

restraints presented the regime with new challenges of maintaining political control while still presenting a broad image of tolerance aimed at building legitimacy. Under such circumstances, regulatory institutions must operate in an environment of changing contexts and priorities. No longer is the government focused on directing economic behavior to meet the imperatives of state planning and managing social relations to satisfy the requirements of revolutionary transformation, but instead aims to facilitate broader socioeconomic autonomy that is still subject to political oversight. Yet the policy consensus over this transformation remains weak, and hence institutional capacity may depend on more fundamental conditions of identity and perspective (Betancourt 1997; Desveaux 1995; Zweig 2000). Accordingly, institutional capacity in China may usefully be examined by reference to issues of institutional purpose, location, orientation, and cohesion.

Institutional purpose concerns the way in which the goals of institutions reflect material and ideological contexts, the availability and nature of financial, human and other resources, and the various limitations that attend institutional performance. Institutional purpose plays a significant role in determining the capacity of institutions to respond to socioeconomic change. In an environment of formalism that conflates policy ideals with the interpretation and enforcement of law (Potter 1999), China's legal institutions function largely according to policy priorities imposed upon them by the party regime. Just as China's political reform has been driven by policy goals of social stability and the need to preserve the Communist Party's monopoly on power, so too has legal reform been driven largely by policy imperatives centered on economic growth aimed at building party legitimacy. The "relative autonomy" ascribed to legal institutions in the European and North American traditions (Balbus 1977) may be even more limited in the case of legal reform in China. Thus, the capacity of China's legal institutions reflects the extent of commonality of purpose between legal norms and processes and the policy imperatives of the Chinese government. Problems arise when policy is unclear or in conflict with requirements for the rule of law. As indicated by the near paralysis that grips institutional decision making in anticipation of major party congresses—the recent Sixteenth CPC National Congress is but one example (Nathan and Gilley 2002)—contention on any of the myriad questions that inform purpose and policy may delay communication of policy mandates and impede the response of legal institutions to carry them out. More seriously, where the requirements of regime policies subvert the requirements of legal rule, as in instances of rights of criminal defendants or labor relations, for example (Potter 2001, ch. 5), the capacity of legal institutions suffers.

Institutional capacity also depends on issues of *geographical location*, particularly the question of balancing central authority with decentralization of social and economic development initiatives (Wunsch 1999). China

has a long tradition of tension between local and central authorities and among the regions. Yet, under the Deng Xiaoping government, social and economic development depended to a significant degree on local initiative (Goodman and Segal 1994; Goodman 1997; White 1998). Agricultural reforms in Sichuan and Anhui, for example, paved the way for national policies of household farming (Fewsmith 1994, 20–21). In Guangdong and Fujian, local initiative ensured permanence for the Special Economic Zones and for expanded foreign trade links (Kleinberg 1990). The practical divisions of power and authority between local and central government departments permit an interplay of power and politics between the central and subnational governments that echoes practices of federalism (Davis 1999; Chen, Hillman, and Gu 2000; Dougherty and McGuckin 2002; Dougherty, McGuckin, and Radzin 2002). Yet the PRC constitution provides that China is a unitary rather than a federal state which, while nominally encouraging local initiative still subjects local authorities to unified leadership of the central government (art. 3). And while scholarly discourses have come increasingly to accept the application of federalist principles to China's circumstances (Huang 2001; Song 2000), often this discussion has been marginalized beyond the boundaries of established policy discourse (Yan 1996, 1998). In the process of bargaining that accompanies the allocation of resources and the distribution of costs and benefits of policy initiative (Shirk 1993), formalistic requirements of submission to the unified state limit the flexibility of local officials. Rigid adherence to contested ideals of unitary authority also limits the ability of legal institutions at both local and national levels to exercise even limited autonomy in support of predictability and stability in socioeconomic and political relations. As a result institutional capacity of the legal system more broadly suffers.

Institutional capacity also depends on *institutional orientation*. Orientation refers to the priorities and habitual practices that inform institutional performance. For legal institutions in China, orientation involves particularly the tension between formal and informal modes of operation. Much has been written on the role of informal networks as vehicles for socioeconomic regulation (Gold, Guthrie, and Wank 2002). *Guanxi* in China is often seen as operating in juxtaposition to the role of law and legal institutions (Arias 1998; Hui and Graen 1997), reflecting perceptions about the weakness of institutions for managing social, economic and political relations and allocating resources (Xin and Pearce 1996). Thus, *guanxi* may serve as a substitute for the norms and processes associated with formal institutions, allowing more flexible responses to increasingly complex social, economic and political relations. The resiliency of informal relational networks has called attention to the potential re-emergence of civil society dynamics in China (*Modern China* 1993). However, the potential role of informal institutions is challenged by the regime's continued insistence on

maintaining formal organizational systems to defend ideological orthodoxy and enforce political loyalty (Cheek and Saich 1997). The tension between the regime's statist ethic of formal institutionalism and the pervasive local informal arrangements that it strives to control tends to divert resources from institutional performance and undermines institutional capacity.

Finally, institutional capacity depends on issues of *institutional coherence*, involving the willingness of individuals within institutions to comply with edicts from organizational and extraorganizational leaders and to enforce institutional goals. Compliance concerns the recognition and enforcement of norms (Etzioni 1961, 1969). Conflicts arise when the norms of particular organizations differ from those of the individuals within these organizations—such as where norms of public policy that drive organizational priorities require subordination of parochial interests of individual officials within the organization. In China, anticorruption campaigns are in essence attempts to promote bureaucratic reform by disciplining and subordinating individual norms of officials to organizational norms of institutions (Red Capitalist 2002; Kwong 1997; McGregor 2002; O'Donnell 2001; Pomfret 2002a, 2002b; Xiao 1998). Rule of law systems to combat corruption have been uneven (Zou 2000), and the party's disciplinary system has been of uncertain effect in deterring violations of organizational norms, particularly in legal institutions (China: Supreme Court 1998; Continuing Reform in PRC Courts 2000). While the decision of the Sixteenth Party Congress to invite capitalists into the party (Kahn 2002; Full Text of Resolution n.d.) may strengthen corruption control through the party discipline system, problems of cohesion are likely to continue to challenge institutional capacity for some time to come.

Both Lubman's analysis of the obstacles to building a legal system in China and Peerenboom's survey of the successes in striving toward rule of law may usefully be viewed in terms of institutional capacity. The policy orientation of the legal regime raises questions about institutional purpose. Issues of central-local jurisdictional relations evoke questions about institutional location. The performance of legal organs reflects factors of institutional orientation. And the problems of corruption are tied to matters of institutional cohesion. The future of China's legal reform project will depend on effective measures to address these issues of institutional capacity.

B. Legal Culture

China's legal reform effort also depends to a significant extent on dynamics of legal culture, which both Lubman and Peerenboom suggest is key to understanding legal behavior in China. Legal culture may be defined by reference to discourses of sociology and political science, in terms of customs, values, and opinions, and ways of thought and behavior (Friedman 1975, 15;

Ehrmann 1976; Glendon 1985; Varga 1992). My own perspective is to focus on legal culture as a basis for understanding the relationship between imported and local norms (Potter 2003b). Thus, legal culture analysis permits appreciation of the tensions between the globalized systems of liberal legal norms from which many of China's legal reform efforts are drawn and deeply embedded systems of local norms and values. For the reception (Unger 1975) of imported legal norms by individual specialists and by groups in China depends in large part on the extent to which they resonate with existing values.

China's law reform project represents in significant part an effort to borrow liberal principles on accountability of government. Proceeding from tenets about human equality and natural law, the liberal tradition of political ideology asserts that government should be an agency of popular will (Heller 1988; Cotterell 1989; Lindblom 1975, 126–30; Kymlicka 1991). Such agency requires accountability, from political leaders through democratic elections and from administrative agencies acting within the limits of lawfully delegated authority. *Responsible agency* is thus a typology by which regulators and their political superiors are accountable to the subjects of regulation and as a result are expected to exercise regulatory authority broadly in accordance with norms of transparency and the rule of law (Potter 2003b). Thus, the accountability of political and administrative agents may be described in terms of their responsibility to society. Norms of responsible agency constitute a belief system driven by changing historical conditions of socioeconomic and political relations in Europe and North America. The general pattern of dissemination of these norms from developed to developing economies reflects imbalances in political and economic power that characterize the current dynamic of globalization. Thus, the capacity of the liberal industrial economies to promote their preferred regulatory norms as an essential element of globalization derives as much from political and economic power as from the inherent wisdom of the ideas themselves (Wagner 1988).

In China, the effects of globalized regulatory norms are confronted by powerful forces of Chinese local culture. The resiliency of local norms despite new institutional arrangements is a salient factor of political culture of modernizing societies (McAuley 1985, 31), and is no less evident in the area of Chinese legal culture. Local norms in China derive from traditional values contextualized by diversity in local socioeconomic and political conditions, which include factors such as status, gender, age, education, employment, (Tang and Parish 2000; Perry and Selden 2000). Although indigenous legal norms may emerge and become stable and influential through a process of formalization of customary values (Bohannon 1965; Berman 1983, 79; Diamond 1973), when local traditional norms are ineffective to manage the totality of changing social and economic conditions, new norms may emerge as an alternative (Geertz 1964, 64).

Acceptance of imported norms may then become possible to the extent that these respond (either in perception or reality) to local conditions more effectively than traditional norms. In an important sense, this is what happened with the introduction of Marxism to China (Friedman 1974; Meisner 1967), and continues with China's increased participation in the world political economy.

Lubman and Peerenboom both suggest that the economic reform process has created opportunities for increased reliance on law in management of the economy and society. Increased complexity in socioeconomic and political relations may require norms of formality and objectivity to replace informal and subjective relational norms associated with tradition (Eisenstadt and Roniger 1984; Merton 1965). This may create increased demands for the institutional and procedural rigor that legal reform promises. Chinese scholars have noted the importance of local conditions and the imperative of respecting, through law, local values of morality and civility (Qiao 1990; Zheng and Zhou 1996). Indeed, it is perceived changes in local conditions driven by the transition to a market economy that are seen to justify enforcement and equality of rights (*Zhongguo shehui fazhan* 1994). Legal reform was seen early on in the reform process as inseparable from the political system (Dao 1987) and as a political consequence of changing socioeconomic conditions (Li 1988). Recognizing the limits imposed by China's public law tradition on the use of law to support economic growth, Chinese scholars have called for a new approach that might reconcile private and public law paradigms (Wang Chenguang and Liu Wen 1993). While it is the party-state that determines China's progress toward socialism (Zhao 1987), recognition of such progress is nonetheless seen to require that the discretionary political power of the party-state should operate through more formal processes associated with law (Yu 1994).

Even where imported law norms are responsive to local needs, however, reception by Chinese legal actors may still depend on the extent to which these accommodate rather than displace the legacy of local norms. Local norms informing China's official regulatory culture may be described in terms of *patrimonial sovereignty* (Potter 2003b). Drawing on traditional norms of Confucianism combined with ideals of revolutionary transformation drawn from Marxism-Leninism and Maoism, regulatory culture in China tends to emphasize governance by a political authority that remains largely immune to challenge (Lieberthal 1995; Lieberthal and Oksenberg 1988; State Council Information Office 2001; deBary and Tu 1998). During the first 30 years of the PRC, law and regulation served primarily as instruments for enforcing policies of the party-state. Norms and processes for accountability were dismissed as bourgeois artifacts deemed inappropriate to China's revolutionary conditions. By the turn of the twenty-first century, even after 20 years of legal reform, the supremacy for the party-state remains a salient feature in the regulatory process (Potter 1999).

Whether the policy aim is military restrengthening, economic growth, or social welfare, accountability is determined nearly exclusively by party and governmental leaders rather than through popular participation. The patrimonialism of Confucianized Marxism-Leninism Mao Zedong Thought combines with the sovereignty of party-state supremacy to establish a powerful modality of governance in the PRC. Patrimonial sovereignty is thus a typology by which regulators are accountable only to their bureaucratic and political superiors, and as a result have few obligations to heed the subjects of rule in the process or substance of regulation. Under the dynamic of patrimonial sovereignty, political leaders and administrative agencies have responsibility *for* society but are not responsible to it.

In this regard it is useful to recall that the liberal notion of restraining state power conflicts strongly with the views of many in the post-Mao period (and earlier) that a strong state is essential to China's development (Lieberthal 1995; Eisenstadt 1968). Chinese legal scholars and officials today remain apprehensive about the applicability of Western legal norms to China (Gong 1995). Official statements about the proper role of law in contemporary China suggest that Chinese legal culture draws on a reservoir of Chinese tradition derived from Confucianism and its assumptions about authority and hierarchy in social organization (Kent 1993; Christensen 1992). The importance of Confucianism as a basis for a collectivist legal order is the focus of many officially sanctioned studies of Chinese legal culture (Chinese Society for the Study of Confucianism and Legal Culture). While Confucianism and the collectivist norms it has engendered have been severely criticized by many contemporary Chinese thinkers as overly authoritarian and repressive (Yang 1992; Wang Ruoshui 1986; Kent 1993), they remain powerful restraints on the penetration of foreign legal norms associated with liberalism.

While they reach different conclusions as to its significance for the legal system, Lubman and Peerenboom each acknowledge the importance of legal culture in the content and operation of Chinese legal reform. Reflecting as it does embedded values about socioeconomic and political relationships, legal culture constitutes the cognitive environment in which local and imported law norms intersect. Responsible agency and patrimonial sovereignty represent competing visions of legal culture that inform China's efforts to build a rule of law system.

Lubman and Peerenboom point to the importance of structures, processes, participants, and attitudes in China's legal reforms. I would suggest this encourages examination of institutional capacity and legal culture. Institutional capacity allows factors of purpose, location, orientation and cohesion to inform our understanding and expectations about the organizational component of China's legal reforms, while legal culture reflects the belief systems of the individuals and groups whose behavior contributes to the performance of legal institutions. To the extent that the

effectiveness of China's legal reforms depends on the performance of institutions and the attitudes of actors, the interplay of institutional capacity and legal culture provides essential context for understanding performance of the legal system as a whole. This of course invites yet further inquiry into the ways that legal reform reflects and also influences China's domestic socioeconomic and political conditions, in the context of China's increased interaction with the international political economy. The latter element is particularly important in light of China's conscious effort to borrow from abroad principles of legal reform.

II. SELECTIVE ADAPTATION: LIMITS TO INTERNATIONALIZATION OF CHINA'S LEGAL REFORMS

The institutional and cultural contexts for legal reform reveal tensions between the Chinese government's effort to borrow legal forms from abroad (primarily Europe and North America) and the need to protect local policy imperatives. The process of borrowing involves a dynamic of selective adaptation by which nonlocal institutional practices and organizational forms are mediated by local norms (Potter 2001; cf. Kennedy 1994). Selective adaptation is made possible by ways in which governments, elites, and other interpretive communities express their own normative preferences in the course of interpretation and application of practice rules (Fish 1980). Whether in response to IMF funding requirements (Lane and Phillips 2002), U.S. nuclear security mandates (Eberstadt 2002), or UN human rights requirements (Kent 1999), states and societies of the Asia-Pacific engage in selective adaptation as a coping strategy for balancing local needs with requirements of compliance with practice rules imposed from outside, by interpreting these nonlocal rules in terms of local norms.

Selective adaptation depends on a number of factors, including perception, complementarity, and legitimacy. *Perception* influences understanding about foreign and local norms and practices (Unger 1975; Etzioni 2000). Perceptions about purpose, content and effect of foreign and local institutional arrangements affect the processes and results of selective adaptation. For example, local government efforts to comply with international trade rules on transparency or human rights rules on gender equality while still pursuing local policy priorities may hinge on the content and accuracy of perceptions about treaty norms and practices and their relationship to local systems. The interpretation and application of nonlocal rules in light of local norms thus depends on perceptions about both. Originally a principle of nuclear physics, *complementarity* describes a circumstance by which apparently contradictory phenomena can be combined in ways that preserve essential characteristics of each component and yet allow for them to

operate together in a mutually reinforcing and effective manner (Bohr 1963; Rhodes 1986. 13 et seq.; Seliktar 1986). Complementarity may allow adjustment of norms and practices of particular cultural communities to satisfy expectations imposed from outside, while still protecting local needs. For example, local compliance with international trade rules on state subsidies or international human rights rules on working conditions may depend on complementarity in procedure, as the formality of imported practice rules is reconciled with the flexibility of local performance standards (Kennedy 1976; Potter 2002). Thus, complementarity affects the potential for nonlocal rules and local norms to be mutually sustaining. *Legitimacy* concerns the extent to which members of local communities support the purposes and consequences of selective adaptation (Weber 1978; Wilson 1992; Rose 2000; Scharpf 2000). Whereas the forms and requirements of legitimacy may vary, the effectiveness of selectively adapted legal forms and practices depends to an important degree on local acceptance. Legitimacy may derive from ideology or from local socioeconomic or political interest. Nationalism, for example, has been identified as a key ideological element that lends legitimacy and effectiveness to capitalist economic growth. (Greenfeld 2001), and is no less relevant to the Chinese regime's efforts to build support for its policies of market transition. On the other hand, the interests of local economic actors may challenge government efforts to regulate production costs according to international anti-dumping rules or to conform consumer protection rules to international standards. While the requirements of legitimacy may vary with time, space and context, the effectiveness of selectively adapted regulatory forms depends to an important degree on legitimacy of the content and process of selection.

Selective adaptation offers insights into the process by which China has attempted to join on its own terms the international political economy. While unable for political and economic reasons to reject openly the norms, institutions, and processes of globalization, many Chinese government leaders and policymakers remain apprehensive about the socioeconomic costs of close interconnection with the global market (Heer 2000; Lung 1999). Yet China's relative size and importance allow it to limit the imposition of foreign regulatory norms. Selective adaptation helps explain how compliance with international norms remains contextualized to domestic conditions and local imperatives. Faced with challenges to comply with human rights and international trade agreements, for example, the Chinese government often rejoins that it has adopted foreign (mostly Western) rule of law principles (State Council Information Office 2000; WTO 2001). China's compliance with WTO requirements is often interpreted locally as consistent with underlying policy imperatives (Kong 2001). When China's performance of international treaty requirements is not as expected by foreign observers, selective adaptation suggests that this

involves more than simply issues of political will, but rather results from a process by which foreign norms are mediated to China's local conditions in light of institutional capacity and legal culture. Selective adaptation also assists us to understand the origins and implications of local interpretation of imported legal norms, thus illuminating distinctions between local contextualization of familiar institutional arrangements, and truly innovative local approaches that depart from the confines of imported legal forms. Examples of economic regulation and dispute resolution discussed by both Lubman and Peerenboom are particular instructive examples of the dilemmas of legal reform and the possibilities of selective adaptation.

A. Economic Regulation and the Challenge to Party Hegemony

Economic regulation is perforce a creature of government institutions, requiring some degree of rules and process. During the Maoist period, law was an administrative tool, consigned largely to the state's exercise of political power and policy authority. Mao's comments at Beidaihe in August 1958 blended law and administration together so closely that they were nearly indistinguishable (Mao 1989, 423–24). For example, in both the early 1950s and the early 1960s, the regime used contract regulations to implement economic policy priorities (Potter 1992). The theme of law as an instrument of party policy remained powerful during the post-Mao period, particular in the area of economic regulation (Potter 2003a). While this policy orientation and the politicization that accompanied it often led to flexibility—even arbitrariness—in the application of law, efforts to codify rules in the post-Mao period often led to increased rigidity in administration divorced from substantive views of justice (Potter 1994). Juxtaposed to the informality that resulted from and also supported continuing political intrusion, formalism in the legal system entrenched party authority while lending the appearance of legality to the process of administration. The success of this effort is evident in the area of the criminal law and criminal procedure law where, despite the fanfare (Chen and Prefontaine 1998), halting efforts at reform have done little to protect individual rights in the face of the power of the party-state.

As Lubman and Peerenboom suggest, the economic reform process in the post-Mao era has created a new policy impetus for legal reform. And economic change has the potential to challenge both the informal and the formal dimensions of state regulation (Keith and Lin 2001). Economic opportunity challenges the indeterminism of informal governance, driving economic actors to seek more predictability through reliance on formalized processes for managing transactions, and also to seek more formal limits on arbitrary state power. Economic change also challenges the inflexibility of the formal, since market forces are often not as predictable as the former

state planners would prefer, and the commercial interests of market actors are unlikely to be satisfied by bureaucratic reliance on regulatory litanies that are unresponsive to the practical realities of economic behavior. Much of the story of legal reform in the post-Mao period has involved a process by which legal and administrative organizations attempted to manage the interplay of formal and predictable with informal and flexible regulation, in an effort to be more responsive to the needs of economic reform. For example, regulations issued in late 1987 governing approvals, licensing, and management autonomy in foreign investment projects were part of a broad effort to encourage foreign investment (State Council 1986). Similarly, regulations on managerial autonomy for Chinese domestic businesses sought to reduce interference by party cadres in business decision making (State Administration for Industry and Commerce 1988). Basing its claim to legitimacy heavily on economic growth and improved living standards, the regime appeared willing to try many different models to insure continued economic growth as a basis for protecting popular satisfaction. Ranging from contract law to foreign investment and taxation to securities market regulation, Chinese legal reforms saw significant achievements in legislation and rule making aimed at support the regime's economic reforms.

However, while the government has described its economic reforms in market terms, the transition to a market economy may well require a different combination of predictability and flexibility than what is suggested in China's economic law doctrines. While legislative and regulatory initiatives throughout the 1990s specified the continued prominence of state supervision to protect public interest (Potter 2001), the predictability of market regulation might require broader autonomy for economic and social actors through restraint on state intrusion (Pistor and Wellons 1999). And while regulatory agencies often appear focused on rigid application of regulatory rent seeking aimed in theory at funding workers rights and social welfare (General Accounting Office 2002b), market regulation may require more flexible approaches to implementation of social policy imperatives (Pharr and Putnam 2000). Whether in the midst of these changing requirements for effective regulation of China's market transition, party power and state authority can be maintained remains an open question. For economic change has created alternative centers of power, as political patronage is replaced by economic advantage, and the legitimacy structure of the regime is transformed from one of socialist transformation and class struggle to one of economic reform and socialist legalism (Heuser 1999). This in turn has challenged the supremacy of patrimonial sovereignty as the basis for the exercise of power and driven more demands for responsible agency on part of the government. Compliance must now be induced rather than compelled, as the task of building a normative consensus draws the government into a more open process of recognizing and balancing conflicting interests (Tanner 1998; O'Brien 1990).

The challenge for the party-state has become one of maintaining hegemony over the discourse of legal reform. Challenges to state power in the areas of administrative law (Buhmann 2001), commercial and civil law (Keith and Lin 2001), and environmental law (Alford and Shen 1997), for example, are supported by the expanding influence of a technical cohort of legal specialists over whom the regime exercises little moral authority. Party control over interpretation of legal texts is potentially problematic since this represents an area of specialized knowledge in which the party and state formerly had little interest or understanding. And once policies are publicly articulated in law, the regime loses important degrees of control over the content and interpretation of these new norms. Instead, hegemony is protected by preserving the party's authority over personnel. When Peng Zhen opined in 1979 that the party should not intervene in individual court cases (Peng 1979), this was not intended to suggest that party was disinterested but rather that party control over the legal system could be exercised more easily through its discipline and personnel management systems. These indeed have proved effective through the late 1990s, as judicial committees in courts throughout China continued to be chaired by party Secretaries whose indirect control has probably been more effective than any efforts at direct control might have been.

While the regime has attempted to maintain hegemony over legal reform through control over personnel, important questions arise about maintaining orthodoxy among the legal specialists upon whom the legal reform effort depends. In the early days of legal reform, most legal specialists were selected for their mastery of the English language that was necessary for them to read foreign law sources. However, as the legal reform process progressed, increased reliance on substantive legal expertise provided opportunities for legal professionals, emerging new elites whose privilege was based on their specialized ability to interpret the policy expressions of law and regulation. Thus, to borrow from Weberian economic sociology, legal professionals in China may be seen as "world makers" who interpret socioeconomic and political life according to a particularistic set of norms and values that, by virtue of their training, only they fully understand (Turner and Factor 1994, 23, 137–43). While this may be common to all specialized occupations (Weber 1947, 250–54; Bendix 1977, 85–87), it takes on particular importance in the case of China's legal reform efforts, where the discourse of legal norms and values is privileged through political and economic processes. The emergence of a community of legal specialists, whose particularized expertise supports powerful dynamics of group identity, poses significant challenges for the regime's control over the content and direction of legal reform.

Thus, the role of law in economic regulation suggests a range of dilemmas for the regime. The transition from political transformation to economic growth as policy priorities, the changing possibilities for state

intrusion driven by the needs of market regulation, and the increased reliance on a cohort of legal specialists whose expertise depends less and less on party ideology or imprimatur, all suggest challenges for political authority of the party-state even as they are required for regime legitimacy. The regime's responses illustrate elements of selective adaptation. In areas of contract and property law, for example, while liberal models of economic regulation are adapted to China's economic legislation, important caveats are preserved that attempt to reify the centrality of socialist economic order and public morality (Contract Law art. 7; Liang 2000, 95). Following accession to the WTO, the Chinese government declined to offer further concessions in area of market access, on grounds that it had already complied with WTO commitments (Dreyer 2002). In the context of economic regulation, these efforts reflect perceptions about the extent to which private law disregards public goods (*contra* Coase 1988), about the effectiveness of public pronouncements about preserving the socialist character of China's system, and about the extent to which China's market access regime satisfies international requirements. Selective adaptation of liberal market models to China's economic regulatory system also reveals issues of complementarity. For example, regulatory regimes governing information disclosure in securities issues (Company Law art. 84; Securities Law art. 45) borrow heavily from U.S. regulatory models but depend on an interlocking array of norms and institutions governing accounting, corporate governance, and administrative procedure. Many of these are mutually inconsistent and others have yet to be fully established (Cai 1999; Shao 2001). Legitimacy questions also arise, as local economic actors challenge the purpose and effect of local regulatory regimes on issues such as intellectual property protection, as instruments of foreign oppression (Oksenberg, Potter, and Abnett 1996). These elements of selective adaptation involve a wealth of additional detail on general questions such as the interplay of rules and norms and more specific issues concerning the identity and behavior of interpretive agents engaged in perception; the structural and performance dimensions of complementarity; and the implications of legitimacy for content and process of legislation and regulation. Research in these areas can illuminate further the ways that China's economic regulatory reforms apply international legal forms to local conditions, without necessarily accepting accompanying legal norms.

B. Dispute Resolution

Whereas economic regulation embodies the intersection of administrative authority and economic behavior, dispute resolution reveals much about the interaction of institutional processes and social norms (Abel 1973). Here again the tensions between informal and formal processes are evident. The near-legendary reputation of China as a society in which

informal mediation had emerged as a preferred alternative to formalized litigation reflects further the interplay between institutions and social expectations. Lubman's seminal article on mediation in China appeared in 1967 as one of the first studies to cast doubt on the virtues of mediation in the Maoist era (Lubman 1967). Responding to work by Jerome Cohen (1966), Lubman suggested that party policies had added a new political dimension to traditional dispute resolution systems and raised questions about fairness and popular confidence in outcomes. The gradual emergence of arbitration processes and ultimately the renewal of interest in court litigation in the early 1990s reflected a lack of public confidence in the informalities of mediation and a renewed willingness to try out more formalized processes offered by civil litigation and arbitration (Lourie 1995; Zhang 1994).

The interplay between formal and informal norms and processes for resolving disputes is not unique to China. Indeed ADR approaches in North America have been influenced by the Chinese experience (Bailey 1993), as questions about access to justice (Sarat 1998), and dissatisfaction with the delays, expenses, and formalism of the judicial system have contributed to increases in mediation and arbitration (Nader 1988), even as concerns emerge over abuses of power in informal mediation settings (e.g., family dissolution and sexual harassment cases) (Grillo 1991; Rifkin 1984; Rowe 1990). In China during the Maoist period, the command economy and the authoritarian political system meant that choices about dispute resolution alternatives were not made by disputants but rather by government cadres. Hence the underlying resentment and distrust that Lubman identified in the early 1960s (linked in large part to increased cynicism over party policies that had led first to the Great Leap Forward and then to the disastrous famine that followed) reflected dissatisfaction with institutional arrangements that conflicted with local legal culture. Often this disjunction was due to the inability of local political cadres to respond to popular concerns and expectations. Reliance on informal processes continued during the post-Mao period. In part this reflected the preferences of local communities (Zhu 2000). Equally or more important, however, informal dispute resolution afforded local cadres significant opportunities for political intervention, patronage, and rent seeking. Only very recently has there emerged a pattern of reliance of more formal processes, either rule-based mediation or arbitration.

Issues of relative autonomy and the tensions between institutional capacity and local legal culture affected the development of dispute resolution during the post-Mao era and continue to do so today. Recent reforms in the structure and performance of dispute resolution institutions in China have seen a move away from mediation and an increase in arbitration as a compromise approach that allows for a modicum of informality, buttressed by some degree of procedural protection. The potential for increased reliance

on court adjudication is also evident, as the number of court cases filed each year continues to rise. While relative preferences for informal or formal dispute resolution processes reflect elements of legal culture, institutional capacity remains a critical variable. Recent indicators of renewed attention to mediation processes as ways of relieving pressure on the courts suggest that institutional capacity remains an essential factor in the development of dispute resolution processes in China. Recent efforts to reorganize the civil chambers of the people's courts as courts of general jurisdiction also reflect concerns over institutional capacity, as the virtues of specialized chambers with possibly more expert judges are balanced against the need for efficiency and the speedy clearing of court dockets.

China's project of building a dispute resolution system that responds to the needs of economic reform and also to public expectations reveals factors of selective adaptation. For example, in response to calls for institutional reform, as expressed most recently by WTO requirements about transparency and the rule of law (WTO 2001), the Chinese government has attempted to transform China's dispute resolution system. Efforts to strengthen the ability of the court system to provide prompt review and correction of administrative action and to increase enforcement of foreign arbitral awards, may well be aimed at accommodating international legal forms, but their satisfaction of accompanying legal norms remains uncertain. Factors of perception are evident in the characterization of different foreign and domestic dispute resolution models (Tang 2000b). Issues of complementarity are evident in the increased prominence given to case law in law school curricula and in court argument (An 1999a, 1999b, 1999c). While many of the organizational features of China's legal system are drawn from the civil continental model, only a few law students and judges go to Europe for training. Most go to England and North America (primarily the United States) and upon returning to China bring ideas and proposals for change based on their common law experience and training. This suggests interesting possibilities for furthering the convergence of common and civil law approaches that is already evident elsewhere but also raises important questions about complementarity in the ways that selective adaptation contributes to system development. As well, dispute resolution reforms also illustrate the effects of legitimacy, as system changes attempt to respond to disputants' needs (Tang 2000a). As courts and arbitration institutions are driven by considerations of financial gain and political prestige to compete for ever-larger shares of China's dispute resolution market, the possibility arises of increased responsiveness to the needs of disputants for greater rigor and predictability of process and practice. As with the case of economic regulation, selective adaptation helps explain the possibilities for legal reform in the dispute resolution area.

In examining the role of legal reform in economic regulation and dispute resolution in China, Lubman and Peerenboom call our attention to

the opportunities and limitations of varying institutional arrangements. Economic regulation aimed at supporting market transition may indeed support expansion of improved legal institutions and processes, although this also raises significant challenges for regime legitimacy. Changing approaches to mediation, arbitration, and adjudication reflect intersections between legal institutional change and the needs of socioeconomic relations. The expansive studies by Lubman and Peerenboom challenge students of Chinese law to consider the possibilities for future developments. Ideas about selective adaptation and its attendant features of perception, complementarity, and legitimacy may further understanding of the challenges that institutional capacity and legal culture pose for legal reform. Ultimately, the regime may be unable to control the content and direction of legal norms for economic regulation and dispute resolution, but selective adaptation suggests how it might try.

III. SUMMARY

The Chinese legal system is a work in progress. Each of the books under review credits achievements of the legal reform program and points to the limits of legal reform. Both also caution against expansive expectations about conformity between China's evolving legal system and the models from Europe and North America upon which it purports to be based. Each author's discussion of the structures and performance of Chinese law calls for continued attention to issues of institutional capacity and legal culture in our efforts to understand the features and dynamics of Chinese law. As the examples of economic regulation and dispute resolution suggest, legal change will continue to reflect a myriad of policy and performance tensions. Lubman and Peerenboom both remind students of Chinese law not to confuse what appear to be familiar institutional forms in the operation of the Chinese legal regime with the acceptance of related international norms. As we struggle to understand the conflicted interplay between imported legal forms and local legal norms, ideas about selective adaptation and attendant features of perception, complementarity, and legitimacy offer potentially useful perspectives from whence to proceed.

To return to the avian context of Lubman's title, bird keepers in Beijing often can be seen to release their charges to fly over the alleyways (*hutong*), sometimes attaching to the birds' tails traditional whistles that emit mysterious harmonies evoking traditional Chinese poetry (Wang Shixiang 1989). While apparently free, each bird remains closely disciplined within the flock. This combination of autonomy and control that joins contemporary appearance with traditional meaning may well be what China's legal reformers intend for the socialist rule of law, by

selectively adapting international legal norms to local conditions. If so, the performance of China's emerging legal system will continue to challenge the expectations and experience of the liberal models upon which it appears to draw. Faced with the same historical record, Lubman and Peerenboom reach different conclusions about the future prospects for Chinese law. Peerenboom suggests that material and ideological pressures will gradually induce the bird keepers to grant more freedom, while Lubman's appreciation of the contexts for legal reform cautions us to accept that, even uncaged, the birds of Beijing may never be completely free. Both perspectives provide invaluable contributions to understanding the present role and future prospects for law in China.

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