

Pitman B Potter, *China's Legal System* (Polity Press, 2013)

Professor Potter is an influential international authority on the Chinese legal system. His latest book on China's legal system raises an all too familiar question that has confounded the Western community of China law scholars and practitioners: Is China making progress towards the rule of law formation under the Party's continuing control of the legal system?

The introduction contrasts Stanley Lubman's reservedly pessimistic position on the system's critical lack of objectivity and autonomy with Randall Peerenboom's nuanced optimism that a 'thin rule of law' is possible.¹ Potter's standpoint is also qualified and complex. He states that law in the People's Republic of China today must still be regarded 'primarily as an instrument of rule for the Communist Party of China'.² Potter places the issue of 'instrumentalism' within a wide-ranging multidimensional approach to Chinese law and politics and considers prospective rule of law formation in light of the law's response to what should be regarded as the overlapping domestic concerns of political stability, economic prosperity, social development and international engagement. Potter asks the reader to consider carefully the underlying elements of ideology, policy and interest that inform China's conflicted political-legal context. Even while Party instrumentalism continues to inform the legal system, it has had to adapt to the transition from state planning and the command economy to the 'socialist market' that now includes facilitating the

protection of private civil relationships of contract and property, supporting economic development, safeguarding of social interests and human rights, supporting further engagement with international institutions, and international trade and investment relations.³

The first chapter highlights China's recent legal history. The Chinese Communist Party (CCP) struggled against 'feudal society', but, revolutionary ideology notwithstanding, New China's legal system absorbed elements of tradition including hierarchical Confucian 'relational justice' and overly flexible 'catch-all statutes' which encouraged officials to use their own moral discretion rather than technical and legal expertise.⁴ Mao was both a revolutionary who used class struggle to bombard the established social order and a closet Confucian at least in his antipathy towards law. Mao believed that the 'majority of people' would have to be ruled, not by law, but by relying on the cultivation of '[good] habits'.⁵

1 Pitman B Potter, *China's Legal System* (Polity Press, 2013) 1, citing Stanley B Lubman, *Bird in a Cage: Legal Reform in China After Mao* (Stanford University Press, 1999); Randall Peerenboom, *China's Long March Toward Rule of Law* (Cambridge University Press, 2002).

2 Potter, above n 1, 2.

3 Ibid.

4 Ibid 8.

5 Ibid 22, quoting 'Talks of the Beidaihe Conference (Draft Manuscript), August 17–30, 1958' in Roderick MacFarquhar, Timothy Cheek and Eugene Wu (eds), *The Secret Speeches of Chairman Mao: From the Hundred Flowers to the Great Leap Forward* (Council on East Asian Studies, Harvard University, 1989) 423–4.

Potter notes the CCP preference for officials as ‘ideologically reliable amateurs’⁶ and interprets class labelling in the Mao era as a contemporary variation of ‘relational justice’.⁷ Indeed, it is more than coincidence that since the death of Deng Xiaoping, Jiang Zemin, Hu Jintao and Xi Jinping have all emphasised cadre emulation of the classic ‘honest official’ as the answer to corruption in preference to rule of law independence which would underwrite the supremacy of law as against Party authority and privilege.⁸

The main issue informing pre-reform CCP legal history was the tension between state-building requiring more formal governance, based on law, and the persisting mass-line populism of the CCP as it struggled to consolidate the new State against the possibility of counterrevolution. With Deng’s post-1978 reforms, however, the law had to deal with a new set of unfamiliar problems as the economy and, for that matter, society, moved further and further away from state planning towards the market.⁹ This new socio-economic dimension was further developed as China engaged with the dynamics of globalisation.

The second chapter on political stability asks what happened to the original Party pattern of Mao’s instrumentalism in light of the Party’s ideological shift from political consolidation to economic prosperity and the subsequent development of new problems of proliferating inequality and polarisation under the ‘socialist market’. The Party accepted the necessity of institutionalisation and formalisation process so as to generate stability in the context of profound socio-economic change; however, changing Party instrumentalism still pressed on the legal system even in the context of deepening market reform. This instrumentalism is extensively correlated with the abuse of the criminal justice system for overt ideological purposes.

There are so many outstanding matters of interpretation that no one book is going to resolve. Deng, for example, explicitly addressed the question as to why it was necessary to move from the ‘Party taking the place of law’ to ‘the Party playing the leading role according to law’.¹⁰ Apparently ‘feudal autocracy’ had persisted after 1949 and it became especially glaring in the inordinate special privilege and special authority of the ‘Gang of Four’.¹¹ The initial thrust of legal reform was not so much the result of adaptation to international norms as a domestic political recognition that law could be used to constrain special privilege and authority to sustain the equal rights of citizens who had been bullied and persecuted in the Cultural Revolution. On this basis Deng concluded that the Party must not intervene in everything and that the masses must ‘acquire a sense of the rule of

6 Potter, above n 1, 25.

7 Ibid 8.

8 Ronald C Keith, Zhiqiu Lin and Shumei Hou, *China’s Supreme Court* (Routledge, 2014) 185–6.

9 Ronald C Keith and Zhiqiu Lin, *Law and Justice in China’s New Marketplace* (Palgrave MacMillan, 2001) 15–18.

10 According to the view of judge and legal scholar, Zhang Wenxian. See Keith, Lin and Hou, above n 8, 4–5.

11 Ibid 185.

law'.¹² Chapter 2 refers to the opening of 'new avenues' of public participation, but ruefully concludes that 'the purpose of stability remains to protect the power and privileges of the ruling Party/State'.¹³ For Deng the question of privilege was a question both for political leadership and the masses. In dealing with privilege it was necessary to stress the law rather than the spirit of the leader. Ideally, at least, the Party would take responsibility for the law's direction, but would undertake to 'act according to law'.¹⁴ The masses were to be encouraged to understand and use the law, as opposed to the sweeping anarchy that fostered legal nihilism in the Cultural Revolution.

A discussion of political stability might also cover local arguments over the contemporary prospect for constitutionalism. Party conservatives have recently sought to bury this term as it is seen as an unpredictable threat to Party control. Indeed the term had already inspired internal debate about judicial review of legislation and the existing structure of the Party-controlled Adjudication Committees. Thus far in China 'judicial independence' has specifically referred to 'trial independence'. However, to ensure the rights of citizens, Chinese organization prescribes a 'separation of responsibilities, mutual restriction and mutual coordination' within the justice system. This system was destroyed in the Cultural Revolution. It was reinstated after the Cultural Revolution only to be challenged more recently in the Bo Xilai Chongqing crackdown on 'black societies' that facilitated the 'joint handling of cases'.¹⁵ The Bo Xilai Affair was a watershed event that set back lawyer reform and created debate about the domestic understanding of 'acting according to law'.¹⁶ Bo had dropped proper procedural sequence and checks and balances. Public security, procuratorates and courts were pushed together in a fast-tracked rough justice that wilfully defied the conventional 'separation of functions'.¹⁷ The full impact of the Bo Xilai Affair awaits further research.

Chapter 3 narrates the changing content of instrumentalism as the Party shifted from 'class struggle as the key link' to the post-Cultural Revolutionary emphasis on economic prosperity. Ideologically, the Party moved from consolidating the 'relations of production' within socialism to a 'primary stage of socialism' wherein instrumentalism focused the modernisation of the 'productive forces'.¹⁸ This ideological change in Party instrumentalism raises the question as to how to deal with instrumentalism. Are all instrumentalisms essentially the same? Randall Peerenboom has offered the following point: 'Of course, law is used

12 See *ibid.*

13 Potter, above n 1, 88.

14 Keith, Lin and Hou, above n 8, 185.

15 For further discussion of 'joint handling' and 'proposing before entry [to the court]' as it relates to the 'Three Supremes', 'the separation of functions' and the 'rule of law', see *ibid* 196–8.

16 *Ibid.*

17 Potter discusses how the 'specialization of functions' formalised 'the separate roles of judicial institutions' so as to foster 'greater professionalism': Potter, above n 1, 78.

18 *Ibid* 92–3. The phrase 'the primary stage of socialism' appears in «中华人民共和国物权法» [Property Rights Law of the People's Republic of China] (People's Republic of China) National People's Congress, Order No 62, 16 March 2007, art 3.

instrumentally in every legal system. Thus, a distinction must be made between pernicious instrumentalism and acceptable instrumentalism'.¹⁹

Potter reports on the ideological emphasis on the 'productive forces' in the cause of development.²⁰ He provides a thought-provoking discussion of the spread of 'corporatism' and 'clientelism'.²¹ The controlling nature of economic law to consolidate the purposes of the State is contrasted with the 'facilitative' nature of the civil law, highlighting subject equality and the support of 'relatively autonomous social and economic interactions'.²² This tension between state-led protection of the public interest and recognition of new property relations is then traced in the building of contract and property law regimes supporting China's development. This tension is exemplified in the difficulties of according equal protection under the law to public and private property and in tax law provisions which attempt to protect taxpayer's rights and interests while emphasising State responsibility for the promotion of social and economic development.

Knowing what we now know about the proliferation of contradictions within Chinese society during the reform era, there is perhaps an unsatisfying and grim irony in the Gang of Four's Cultural Revolutionary warning against 'capitalist restoration', as explained in Deng's 'theory of productive forces'.²³ More recently, both Hu Jintao and Xi Jinping have attacked past 'GDP'ism' at the expense of the needs of the people, and apparently the exclusive reference to the GDP no longer supports cadre promotion.²⁴ Chapter 4 packages a number of initiatives together, but expresses reservations about the centre's reduced capacity to respond to issues of social justice. Moreover, while exponential legal development had to respond to the changing content of Party control, structural inertia often challenged practical enforcement of new law.

The chapter reviews the contradictions that informed the Deng and Jiang Zemin leaderships. Growth apparently became a destructive fetish. Ideological cautions against growing social injustice, polarisation and inequality failed to influence State budgetary priorities. As discussed, social development has long been an important CCP concern; however, Hu Jintao and Xi Jinping are credited with rebalancing the priorities of economic growth and social development. This chapter covers a lot of new legal ground relating to labour relations, healthcare,

19 Peerenboom, above n 1, 23 n 23.

20 Potter, above n 1, 90.

21 Ibid 90–1.

22 Ibid 93 (citations omitted).

23 This theory allegedly focused exclusively on material incentives and technological improvement as the basis for national economic development, and at the deliberate expense of the class struggle needed to avert 'capitalist restoration'. For an analysis, see Ronald C Keith, *China from the Inside Out: Fitting the People's Republic into the World* (Pluto Press, 2009) 94–5. Potter discusses Jiang Zemin's policy that focused on 'productive forces' as the basis for 'socialist modernization', a phrase which appears in the Constitution adopted in 1982: Potter, above n 1, 51–2, citing «中华人民共和国宪法» [Constitution of the People's Republic of China] Preamble.

24 Potter refers to how Hu Jintao's emphasis on 'harmonious society' returned to a focus on social development: Potter, above n 1, 129. See also 'Shed GDP Obsession, Return to Marxism, Xi Jinping Tells CPC Cadres', *The Economic Times* (online), 30 June 2013 <http://articles.economictimes.indiatimes.com/2013-06-30/news/40286860_1_president-xi-jinping-gdp-numbers-cpc>.

education rights, women's rights, the national minorities, the media, the environment and a particularly interesting discussion of corporate responsibility touching on the competitive interplay of jural and societal factors in rule of law formation.

This chapter's chronological narrative does not always smooth out the inconsistencies of political reality. Even before Deng's death in 1997 there was a strong push for the protection of the 'rights and interests' of the disadvantaged sectors in Chinese society.²⁵ Under Dengist reform, the law began to feature 'human rights' protection as distinct from past emphasis on the suppression of the class enemy. New laws, for example, emphasised compulsory education (1986), air pollution and treatment (1987), protection of the environment (1989), the handicapped (1990), minors (1991), women (1992), trade unions (1992), labour (1995) and the elderly (1996).²⁶

Despite the good intentions of reform legislation, as time progressed it was clear that the State in its focus on economic growth had reduced its policy, and particularly its budgetary, commitment to overcoming social inequality and injustice. Moreover, no matter how progressive the legislation, its elaboration in follow-up regulation could not bring about adequate enforcement in a transition to the market that involved the cutting of State budgets. After Deng's death a new wave of legislation, legislative revision and judicial interpretation addressed society's problems. Professor Potter's coverage provides an excellent account of the subsequent extension and revision of legislation, but he advises that major national legislation on social security still 'remains a work in progress'.²⁷

Chapter 5 traces Chinese interaction with international law and organisation over the years. Indeed, Chinese irritation with 'bourgeois international law' was explicit at the height of the Cold War and during the Cultural Revolution.²⁸ China's modest experience with trade and international treaty relations is duly noted in Potter's analysis, but one might also note that in the Cold War years, when China was denied its seats at the UN, it still worked to achieve UN membership and supported the UN Charter. Significantly, China rejected Sukarno's proposal for an alternative UN.

The suggestion that 1989 'created a significant rift in China's relations with the world'²⁹ possibly detracts attention from what was essentially China's successful diplomatic handling of Western backlash and Chinese persistence with the open door strategy.³⁰ As the analysis itself notes, extraordinary expansion of trade and Chinese human rights diplomacy occurred after Tiananmen.

Chapter 5's carefully calibrated analysis of Party control in relation to China's expanding international engagement features several contradictory developments.

25 Keith and Lin, above n 9, 53–7.

26 See generally Potter, above n 1, ch 4.

27 Ibid 138.

28 Ibid 169–70.

29 Ibid 171.

30 See Keith, above n 23, 44–5.

On the one hand, with WTO induction, China moved ‘rapidly to open markets and improve market-based governance of trade and investment relations’.³¹ Indeed, the production of related legislation was truly impressive. On the other hand, even with the dismantling of the command economy, the State persistently exercised ‘guidance’ over the national economy. The open door did not swing open. It was opened deliberately, a few inches at a time, such that foreign investors had to contend with the State interest in the priorities of national economic development and social justice. Such State concern does not necessarily constitute what Peerenboom referred to as ‘pernicious instrumentalism’,³² but there is still the question as to the effect of Party control on rule of law formation.

The analysis views the 2004 State constitutional amendment to ‘respect[] and protect[] human rights’³³ in light of ‘policy imperatives of economic development and the preservation of Party supremacy’.³⁴ Chinese ‘orthodoxy’ is explained with reference to China’s preference for the positive law of the State: ‘Under PRC orthodoxy, rights are not inherent to the human condition, but rather are specific benefits conferred and enforced at the discretion of the Party/State’.³⁵ White Paper reasoning and the statements of Chinese Human Rights Centres interject that China had moved away from the positive law theory and practice when it dropped exclusive reference to ‘citizen’s rights’ and accepted the applicability of ‘human rights’ categories as relevant to Chinese ‘rule of law’ performance.³⁶ Furthermore, it is arguable whether Chinese positioning exclusively emphasises rights to subsistence and development, as a zero-sum calculation that negates all civil and political rights. For example, death penalty reform (rather than abolition) is largely based on modest legislative reform that seeks to raise the procedural requirements in death penalty cases and to confine capital punishment to crimes of violence. This trend has enjoyed widespread support among China’s jurists.

What is the author’s answer to the question raised at the beginning of his book? The author concludes that the ‘policy priorities of the Party/State will likely continue to be the foundation for the PRC’s socialist legal system for some time to come’.³⁷ Indeed the Party’s demise has been prematurely predicted for many years. Directing our attention to ‘cat theory’ and the rise of ‘capitalism with Chinese characteristics’³⁸ cannot definitively answer the question: What is the quality of Chinese rule of law formation in the changing context of continuing Party control? This debate is not likely to be resolved for some time to come. Notwithstanding the constant Party refrain that it wants the legal system to put people first, the author has a final word of advice for the contemporary jurist in China:

31 Potter, above n 1, 172.

32 Peerenboom, above n 1, 23 n 23.

33 Potter, above n 1, 186.

34 Ibid.

35 Ibid 187.

36 For the essential background to this policy shift, see Keith, above n 23, 68–70.

37 Potter, above n 1, 212

38 For analysis of such related ‘leftist’ metaphor criticizing Deng, see Keith, above n 23, 93–4.

The future of China's legal system depends on whether those involved in drafting, enactment, interpretation and implementation of law in the PRC will be able to draw upon the changing dynamics of legal form and apparatus to express ideals and practices of law which transcend limitations of Party/State rule to build a legal system that genuinely and effectively responds to the needs and aspirations of China's people.³⁹

There is so much fast-paced, multifaceted reform in China that occurs in a very conflicted context. Changing reality simply defies protestations of harmony; however, the law's development and enforcement is essential to dealing with disharmony. Equally perplexing is the obvious expression of continuity in the context of deep and profound change. It is hard to find in any one place a comprehensive and incisive explanation of contemporary legal trends. Potter's analysis on the law's response to continuity and change builds on many years of deep research and insightful publication. The author is very informed and equally at home as he works across the several departments of law. Professor Potter has also taken the lead in the study of 'selective adaptation' in Chinese legal reform whereby international and local norms are deliberately accommodated in Chinese legal activity. The book includes a crisp, but lucid, comprehensive analytical synthesis that cuts across a range of issues in legal reform, connecting legal history and culture, political stability, economic prosperity, social development and international engagement. The resulting interdisciplinary synthesis is not only rare, but incisive. This book should be on the shelves of all legal scholars and practitioners who are serious about engaging with China.

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39 Potter, above n 1, 208.