

much more than a process of decolonization. It experiences a total revolution in which norms of justice are overthrown, along with political institutions. Given the revolution in the idea of property in particular, one would suspect that little progress could be made in convincing much of the population of the justice of the postrevolutionary order. This, I suspect, put enormous stress on the claim of legitimacy, which borrowed from all the traditional sources: not just charisma, but defense against the threat of enemies foreign and domestic, as well as the awe and love that can emerge from the spectacle of violence.

If we look to contemporary China, things seem quite different again. We find now exactly the struggle between legitimacy and justice that has long defined the legal imagination in the West. A shorthand way of expressing the dilemma of the party today is that its claim to legitimacy is no longer supported by love and awe, even as the content of the law is becoming more just. The larger lesson that Ocko and Gilmartin suggest is that the effort to realize just norms may not be enough to save a regime.

Ocko and Gilmartin rightly point out that political authority is always hostage, to some extent, to community conceptions of justice. In both China and India, the state's conception of justice cannot move too far away from the society's expectations of justice. The same, however, is true of a conception of legitimacy—a point well illustrated in the comparison of the two nations. The authors are surely right to observe that both state and society are reciprocally influencing each other, and the best we can do is to trace the particular ways in which the contestation of power both reflects and influences broader conceptions of law's rule. This is not just a story of concepts, but of institutions, and actors. All are shaping the political imagination.

Rule of Law in China and India: A Historical-Cultural Approach

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The basic account of the legal systems in Qing China and colonial India, and the differences between them, in Professors Jonathan Ocko and David Gilmartin's insightful, nuanced, and thought-provoking article seems sound. I will therefore focus my comments on certain methodological or meta-rule of law issues, first locating their contribution within the broader literature on the rule of law.

THE RULE OF LAW IN HISTORICAL CONTEXT: THE POLITICAL SALIENCE OF THE RULE OF LAW TODAY

Although discussions of the rule of law can be traced back to Aristotle, Hammurabi, and Han Fei Zi, the current worldwide fascination with the rule of law is

the by-product of the failure of the 1980s development model based on neoliberal economic policies and structural adjustment policies to deliver the goods and the problems that third-wave democracies have had in consolidating democracies and protecting rights. The former failure called attention to the fact that there was more to markets and sustained economic growth than economic policies and commercial laws: “Institutions” also mattered. This “discovery” led the major international donor agencies to promote the “rule of law” and good governance.

For various reasons, including limited mandates that prevented the World Bank, International Monetary Fund, and other international financial institutions from intervening in the domestic affairs of sovereign states, the promotion of the rule of law and good governance was initially conceived of, or at least portrayed as, more of a technocratic project than a political one. Numerous technical assistance projects were undertaken, most of them aimed at exporting the legal institutions, rules, and practices of economically advanced Euro-America to developing countries.

The reform agenda was then further expanded to include more explicitly political ends in light of the less than stunning results of these technical assistance projects, many of which focused on the judiciary; the negative impact of structural adjustment policies on the least advantaged members of society; and the dismal results in many third-wave democracies, which failed to deliver economic growth and improve people’s living standards, with some states reverting to authoritarianism and many others struggling along as unconsolidated illiberal democracies. As a result, promotion of the rule of law came to be seen as necessary not only for sustained growth but for liberal democracy, human rights, poverty reduction, and a host of other normative ends. Moreover, the rule of law came to be seen as an end in itself, as constitutive of freedom and the robust conception of development based on the “capabilities” approach advanced most notably by Amartya Sen.

The salience of the rule of law in contemporary political and developmental discourse soon produced a huge literature. Legal scholars, often drawing on historical studies and the previous works of legal philosophers, sought to clarify the conception of the rule of law. What does the rule of law mean? What does it consist of? What are the key elements? What goals or ends does the rule of law serve? Legal scholars, social scientists, political scientists, and practitioners in the “rule of law industry” have sought to determine what institutions are necessary for the implementation of the rule of law. They also examined the theoretical and empirical relationship between law and economic growth, democracy, law and order/crime, the ever-expanding range of human rights (civil and political rights, social and economic rights, labor rights, environmental rights, gender rights, cultural rights, etc.), other indicators of human well-being (literacy, longevity, child mortality), social justice issues (poverty reduction, income equality, gender equality, access to justice, legal empowerment), war (*jus ad bellum*), the ways wars are fought (*jus in bello*), transitional justice, and state building.

In their erudite and wide-ranging essay, the historians Ocko and Gilmartin adopt a different approach: “the cultural study of law” championed by Yale law professor Paul Kahn. Kahn’s approach has a historical or vertical dimension—the genealogy of law, legal concepts, rules, and practices across time—and a horizontal dimension—the architecture of the contemporary legal system and the relationship between institutions, rules, practices, and the broader networks of beliefs that animate contemporary society in any given country or jurisdiction.

This approach to law and legal development highlights the different historical trajectories of legal systems. For instance, Kahn emphasizes in his retelling of the intellectual history of Euro-America that the rule of law emerged out of the transformation from a religious to a secular understanding of political order, and from a monarchical to a popular understanding of sovereignty. Other societies will have different traditions that will affect present understandings of the rule of law, as Ocko and Gilmartin show for China and India.

IMPLICATIONS FOR THE RULE OF LAW IN CHINA AND INDIA TODAY AND FOR GLOBAL RULE OF LAW PROMOTION

Ocko and Gilmartin offer three main arguments in support of their choice to adopt a historical-cultural approach. Taking them in reverse order, they suggest that the significance of the rule of law in the modern world is best understood if we move beyond the particular historical framework of Euro-America. Understanding the history of legal system development outside the context of Euro-America is, of course, one of the traditional subjects of comparative law. That said, much comparative law has focused on differences between legal systems in Europe and America. Moreover, attempts to classify the world’s legal systems have often led to some dubious generalizations, and at times supported Western arrogance, colonialism, and hegemony.

Ocko and Gilmartin therefore are to be applauded for contributing to the study of law in non-Western contexts. Nevertheless, we might ask, what are the advantages and disadvantages of analyzing Qing and British colonial rule through the lens of the now-dominant discourse of the rule of law? One of the criticisms of contemporary rule of law promotion is that it is neo-imperialistic. It assumes a particular role for the legal system in the economy (neoliberalism, although arguably today a “chastened neoliberalism”) or a particular political system (democracy) or particular interpretation of human rights (liberal).¹ In short, rule of law promotion is based on a particular substantive or thick conception of the rule of law—liberal democratic rule of law. This has been exacerbated by the expansion of the rule of law agenda to include all good things,

¹David Kennedy, “Political Choices and Development Common Sense,” in *The New Law and Economic Development: A Critical Appraisal*, ed. David Trubek and Álvaro Santos (Cambridge: Cambridge University Press, 2006), 103–31.

including ideals not even fully realized in upper income Euro-America, and the tendency to confuse description with prescription. Thus, developing countries are encouraged to adopt the same rules, institutions, and practices as found in Euro-America, notwithstanding wide diversity and inconsistencies in rules, institutions, and practices in Euro-America. A close study of the historical development of law and of the contemporary legal systems in India and China reveals different thick or substantive conceptions of the rule of law, including competing conceptions within each country.²

Yet no matter how sensitive one is to context, and how desirous to avoid historical anachronism or a linear account of historical evolution in which all countries are converging on what for the moment are deemed “international best practices,” any discussion of the rule of law imposes certain constraints. Interestingly, Ocko and Gilmartin do not attempt to define the concept.

Many would question however whether the Qing legal system could be described in terms of the “rule of law”—or any reasonable interpretation of it. Arguably the sine qua non of the rule of law is that law imposes meaningful restraints on the state and state actors—or the ruler, in the case of Qing China. Ocko and Gilmartin argue that in Qing China, sovereignty, state legitimacy, and the right to rule rested on following substantive (mainly Confucian) moral principles thought to reflect the cosmic order, which were then codified in laws. As such, law could be used against the state and the ruler. However, the ruler remained the final authority in the interpretation of the cosmic order and hence of laws. There were few institutional checks on the power of ruler. This does not mean that the ruler was free to change laws willy-nilly or abuse his power. Doing so would have negative political consequences, including the loss of support and legitimacy, and even cosmic consequences, such as natural disasters. These moral principles combined with pragmatic political calculations lent support to procedural fairness and the practices of treating like cases alike, ensuring that only guilty people were convicted and confirming that the punishment fit the crime—subject to being overridden by concerns for political stability and perceived threats to the authority of the ruler. Nevertheless, given the lack of formal legal, especially institutional, restraints on the ruler, the Qing legal system is arguably more accurately described in terms of rule by law than of rule of law.

Whether British colonial rule deserves the much-prized honorific label “rule of law” is also debatable. On the positive side, the principle of legality, requiring that there be a legal basis for state actions and that state actors act according to law, was more well established than in the Qing system. Yet there was a heavily instrumental aspect to the colonial legal system, which, needless to say, was

²See also Randall Peerenboom, *China's Long March toward Rule of Law* (Cambridge: Cambridge University Press, 2002); and Upendra Baxi, “Rule of Law in India: Theory and Practice,” in *Asian Discourses of Rule of Law*, ed. Randall Peerenboom (New York: Routledge, 2004), 342–45.

nondemocratic and fell far short of extending to Indian subjects the full range of rights that many contemporary commentators see as central to the liberal democratic conception of the rule of law.

To put the point differently, Ocko and Gilmartin could arguably have told the same story without reference to the rule of law. Granted, they draw on the distinction between the rule of law and the rule of man, but they do not discuss in detail how those terms were understood within the particular historical context. Rather, the tension between the rule of law and the rule of man is treated as a universal problem, a fundamental and inescapable paradox.

As Kahn emphasized, law is one way of understanding, constructing, or giving meaning to sociopolitical events and ideas such as sovereignty and legitimacy. Law is, to be sure, a powerful discourse that can often exclude or obscure other interpretations or forms of meaning. This is particularly true in contemporary Euro-America, where there is a high, and increasing, degree of “judicialization” and “juridification”—that is, an expanded role for courts in resolving social, economic and political issues, and an expansion of legal discourse and modes of analysis into other spheres.³ One reason for the failure of some projects to promote the “rule of law” is that they attempt to assign a similar role to law as found in Euro-America to other societies, thus ignoring, seeking to colonize, or displacing other ways of understanding the world, other cognitive and normative systems, and other ways of dealing with similar issues.

Ocko and Gilmartin also offer a different rationale for their approach that more directly relates to rule of law, and is responsive to these concerns. They suggest that “the history of the ‘rule of law’ only makes sense if it is embedded in larger histories of state power and sovereignty. To imagine that the ‘rule of law’ can be established by simply building legal institutions makes little sense.” There are actually two claims being made here, and they deserve separate treatment.

It is true that we cannot understand the present without some understanding of the past. But we also need to avoid thinking that China’s (or India’s, or any country’s) future is somehow determined by the past, and to examine closely what effects, if any, the past exerts on the present and future. As the authors note, between the Qing and the contemporary reform era was a 100-year period of massive turmoil that resulted in many changes to the legal system and the way law, sovereignty, and legitimacy were conceived.

Sovereignty, legitimacy, and the rule of law are no longer based on appeals to the cosmic order or Confucian principles. The turn to the rule of law in the post-Mao reform era was largely based on the assumption that the rule of law was necessary for sustained economic growth. Today, state legitimacy is mainly based on performance and nationalism. It depends on the Chinese Communist

³For law as the bridge to other modes of discourse or fields, including politics and economics, see Jürgen Habermas, *Between Facts and Norms*, trans. William Rehg (Cambridge, Mass.: MIT Press, 1998).

Party's ability to ensure growth, lift people out of poverty, and raise living standards, and to facilitate the transformation of China from the poor man of Asia to a world power. Sovereignty remains a key concern, particularly in light of China's treatment by foreign powers in the past. But sovereignty also remains important because China has insisted on pursuing its own model of development. This model of development is similar to that followed by other successful East Asian states, albeit adapted for the realities of the twenty-first century, including a more expansive and invasive international trade regime and a more powerful democracy and human rights movement, both of which limit sovereignty and provide alternative sources for challenging the legitimacy of the state. Thus, China has postponed democratization until a higher level of economic and institutional development is attained, as was also true for Taiwan and South Korea. It has also resisted the advice to rapidly privatize the state-owned sector, deregulate, and open the domestic economy to foreign competition as part of a big bang strategy, in favor of a more gradual approach to reforms and opening. And it has sought to develop its own variant of socialist rule of law compatible with its current form of government and contingent circumstances, including existing cultural norms and level of institutional development, rather than attempting to import wholesale the liberal democratic form of rule of law found in Euro-America—or at least found in self-congratulatory civic textbooks in Euro-America.⁴

There are still some similarities between the Qing and contemporary China (although whether current beliefs, rules, practices, and institutions are attributable to Qing beliefs, rules, practices, or institutions is debatable). For instance, there continues to be an emphasis on substantive justice, at times to the detriment of procedural justice and judicial efficiency. Many citizens refuse to accept the limits of the rule of law and the legal system. They are not satisfied to have had “their day in court.” They continue to pursue lost cases through multiple levels of appeals, through repeated petitioning of government officials, and through public protests, many of which are turning violent. As in the past, when people sought an audience with the emperor, citizens today continue to beseech central leaders, at times impeding daily administration. Granted, many citizens are denied their day in court, or are unable to obtain a fair hearing, for a variety of reasons, including that procedural and evidentiary rules are still being developed, some judges are corrupt or subject to political interference, and the judiciary lacks the capacity, and the state the resources, for judges to provide an adequate remedy in many socioeconomic cases.

More fundamentally, there are still questions about the commitment to the core principle of legality: Are state actors, and in particular party leaders, willing to be bound by law? There is still a need to separate more clearly the

⁴Randall Peerenboom, *China Modernizes: Threat to the West or Model for the Rest?* (New York: Oxford University Press, 2007).

party and the government and to further develop institutional checks and balances on political power. And there is still a need to develop a popular and institutional legal culture that more fully respects the underlying rule of law principles of a government of laws, the supremacy of law, and equality of all before the law.

Finally, as Ocko and Gilmartin suggest, adopting the historical-cultural approach helps explain both the failures and successes of technical assistance projects that seek to transplant laws, institutions, and practices to developing countries. Of course, this rationale brings us back to instrumental approaches to the study of law that seek to explain either the relationship between various factors and the rule of law (treated as the dependent variable), or the relationship between the rule of law (treated as an independent variable) and development, democracy, poverty reduction, human rights, or whatever other normative end the investigator chooses to treat as the dependent variable.

In either case, culture, history, and path dependencies become part of a much larger story. The development of the rule of law in any given country, its nature, and the extent of its realization depend on many things, including levels of wealth; the political system; the nature and strength of civil society; the complexity and comprehensiveness of reforms, which make it necessary to sequence reforms and to coordinate across disciplines and vertical lines of authority among state organs; the lack of state capacity to coordinate reforms and insufficient understanding of how best to sequence reforms; opposition by interest groups, including judges, prosecutors, or ministry of justice officials that would lose power as a result of particular legal reforms; as well as cultural and historical factors. While large empirical studies have shed some light on these issues, they must be complemented by the kind of in-depth, historically informed, context-specific country studies so ably provided here by Professors Ocko and Gilmartin.

Not Just a Concept: Institutions and the “Rule of Law”

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Jonathan Ocko and David Gilmartin take two steps forward and one step back in “State, Sovereignty, and the People: A Comparison of the ‘Rule of Law’ in China and India.” The first positive step is the authors’ insistence on broadening the study of the “rule of law” to include the analysis of cases outside the “history of Western Europe and Euro-America.” As the authors point out, the “rule of law” has picked up a set of associations from its study within an Anglo-American legal tradition that are not always applicable to or illuminating in other historical contexts. The article expands the comparative framework over a broad period and in two large and complex political formations, nineteenth- and twentieth-century China and India. The second important step forward, less explicitly stated in the article, lies in the authors’ joining with other scholars in connecting

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