

The Peter A. Allard School of Law

Allard Research Commons

Faculty Publications

Faculty Publications

2014

The Legal Maladies of 'Federalism, Chinese-Style'

Wei Cui

Allard School of Law at the University of British Columbia, cui@allard.ubc.ca

Follow this and additional works at: https://commons.allard.ubc.ca/fac_pubs



Part of the [Rule of Law Commons](#)

Citation Details

Wei Cui, "The Legal Maladies of 'Federalism, Chinese-Style'" in Weitseng Chen, *The Beijing Consensus? How China Has Changed the Western Ideas of Law and Economic Development and Global Legal Practices* (Cambridge, Cambridge University Press: [forthcoming in 2017]).

This Working Paper is brought to you for free and open access by the Faculty Publications at Allard Research Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Allard Research Commons. For more information, please contact petrovic@allard.ubc.ca, elim.wong@ubc.ca.

The Legal Maladies of “Federalism, Chinese-Style”

Wei Cui

A condensed version of the following essay will appear as a chapter in Weitseng Chen (ed.) *The Beijing Consensus? How China Has Changed the Western Ideas of Law and Economic Development and Global Legal Practices* (Cambridge University Press, forthcoming 2016)

I. Introduction

According to those who purport the existence of a “Beijing Consensus”, a key element of the Chinese model of economic development is China’s authoritarian government’s willingness to experiment with policy choices.¹ The literature on Chinese political economy has in turn analyzed policy experimentation chiefly in terms of the interactions between the national government and subnational political actors. For example, Yingyi Qian, Barry Weingast, and their fellow authors advanced the well-known hypothesis of “market preserving federalism”, attributing China’s economic growth before the early 1990s to both the (supposed) ability and strong fiscal incentives on the part of subnational governments to implement pro-growth policies.² Zhang Jun, Zhou Li-An, and their collaborators have also developed an impressive body of research demonstrating how the centralized personnel and appointment system within the CCP and decentralized policy implementation jointly created conditions for a unique form of political “yardstick competition”, and how the strong political incentives generated by such competition may have contributed to economic growth.³ Other prominent social scientists have

1. John Williamson, “Is the ‘Beijing Consensus’ Now Dominant?” *Asia Policy* 13, (2012): 1-16; cited in Edmund Malesky and Jonathan London, “The Political Economy of Development in China and Vietnam,” *Annual Review of Political Science* 17, (2014): 395–419. Also, see Dowdle and Prado, Ch. 1, pp. [17-23], for a discussion of policy experimentalism as part of the New Development Economies model and as the main feature of Beijing Consensus; and Chen, Ch. [] , pp. [21-26] for examples of policy experimentation in China involving the foreign exchange and banking markets. [editor to update]

2. Gabriella Montinola, Yingyi Qian, and Barry R. Weingast, “Federalism, Chinese Style: The Political Basis for Economic Success,” *World Politics* 48, no. 1, (2006): 50-81; Hehui Jin, Yingyi Qian, and Barry R. Weingast, “Regional Decentralization and Fiscal Incentives: Federalism, Chinese Style,” *Journal of Public Economics* 89, (2005): 1719-42. For a forceful critique of this hypothesis, see Hongbin Cai and Daniel Treisman, “Did Government Decentralization Cause China’s Economic Miracle?” *World Politics* 58, (2006): 505–35.

3. See the essays collected in Jun Zhang and Li-An Zhou, *Weizengzhang erjingzheng: zhongguo zengzhangde zhengzhijingjixue* (Growth from Below: The Political Economy of China’s Economic Growth) (Shanghai: Gezhi Publishing, 2008); Li-An Zhou, *Zhuanxing zhongde difang zhengfu: guanyuanjili yu zhili* (Local Governments in Transition: Official Incentives and Governance) (Shanghai: Gezhi Publishing, 2008); and Hongbin

offered critiques or modifications of such theories,⁴ but all appear to agree that analyzing the dialectic between central control and subnational experimentation is key to the investigation of China's political economy. The literature continues to develop in both empirical richness and theoretical sophistication.⁵

However, in the study of Chinese law (whether pursued inside or outside China), the theme of federalism—or “central-local relations”—has so far played entirely a background role. Central-local relations may enter generic descriptions of the Chinese political system in which the country's legal institutions are situated, but they are never the focus of theoretical, empirical, or even doctrinal legal analysis. Instead, aside from investigations of particular substantive areas of law, descriptions of the Chinese legal systems have privileged judicial institutions, the general discourse about the rule of law, and their relations to authoritarianism as themes for inquiry. In a way, this is not unlike the study of legal systems elsewhere: the social scientific literatures on federalism and on the rule of law, while each vast in themselves, rarely overlap. But since analyzing center-local relations has been one of the vital sources of insight into Chinese authoritarianism, the insulation of legal studies from the study of “federalism, Chinese style” means that legal scholars' understanding of authoritarianism also remains generic and a-theoretical.

In this chapter, I summarize and further develop arguments that I have made elsewhere, to the effect that the allocation of power and responsibilities among different tiers of government has indeed had major influences on the development of the rule of law in China. Specifically, the impact can be divided into two kinds. First, the extraordinary centralization of legislative power in China—which is no doubt a reflection of the extraordinary degree of centralized control within the CCP—has resulted in a radical

Li and Li-An Zhou, “Political Turnover and Economic Performance: The Incentive Role of Personnel Control in China,” *Journal of Public Economics* 89, (2005): 1743-62.

4. See Chenggang Xu, “The Fundamental Institutions of China's Reforms and Development,” *Journal of Economic Literature* 49, no. 4, (2011): 1076–1151; Cai, “Did Government Decentralization Cause China's Economic Miracle?”; Victor Shih, Charles Adolph, and Mingxin Liu, “Explaining the Advancement of Central Committee Members in China,” *American Political Science Review* 106, (2012): 166–8; Victor Shih, *Factions and Finance in China: Elite Conflict and Inflation* (New York: Cambridge University Press, 2008). While Shih is skeptical of the political yardstick competition theory, his description of factions within the CCP crucially includes the category of “generalist” politicians, whose rotations through subnational political positions are determinative of their factional affiliations and policy outlook.

5. For a recent survey, see Malesky, “The Political Economy of Development in China and Vietnam.”

short supply of legal rules in virtually all areas of governance. Second, the extraordinary *decentralization* of the delivery of government services and policy implementation has directly reduced compliance with and enforcement of the laws, and indirectly undermined the development of legal institutions and the legal profession. Moreover, the adverse consequences of radical legislative centralization and radical administrative decentralization interact with one another: legislative centralization is especially inefficient, *conditional upon* administrative decentralization; administrative decentralization is especially pernicious, *conditional upon* legislative centralization. Overall, I argue, these twin arrangements have had a systematic negative impact on the Chinese legal system, and may have held back the development of the rule of law to a greater degree than even China's authoritarian government itself would like. Moreover, I believe that this negative impact could be of the first order: for what little we know empirically, the pervasive effect of these twin arrangements—which characterize virtually all aspects of Chinese governance—could exceed, in its magnitude, the effect of features of the few institutions that legal scholars have tended to study, such as the degree of independence of the judiciary.

The chapter proceeds as follows. Part I presents evidence that legislation is unusually centralized in China by commonly accepted standards, notwithstanding the prevalent assumption among the Chinese legal studies community that law *should be* centralized. It then argues that centralization has inefficiently suppressed the supply of legal rules. Part II then shows that the performance of day-to-day government functions is unusually decentralized in China, again, by commonly accepted standards, and highlights several ways in which this decentralization adversely impacts compliance and enforcement. Part III discusses the ways in which studying legislative centralization and administrative decentralization brings to focus a wide range of empirical phenomena in Chinese law, as well as recent policy developments that legal scholars have erroneously ignored. Finally, Part IV concludes by briefly discussing the theoretical significance of my proposal to connect the topics of federalism and the rule of law.

II. Excessive Centralization in Lawmaking

A most fundamental feature of China's current legal and political system is a high degree of legislative centralization. The feature has two basic manifestations. First, within the central-provincial

relationship, the central government possesses much greater legislative power. This is illustrated by the reservation of legislative power to the central government for several broad categories of policy in the Law on Legislation.⁶ More importantly, this characterizes the disparate laws and regulations operative in a wide array of policy areas.⁷ Second, relatively few sub-provincial governments have legislative power. Until 2015, only 49 quasi-provincial and prefecture-level jurisdictions can enact local statutes and regulations in comparison to the 333 prefecture-level, 2,856 county-level and 40,906 township-level jurisdictions across China.⁸ According to the Law on Legislation, local statutes (*difang FAGUI*) and government regulations (*difang zhengfu guizhang*) are the only forms of local rules that have a formal legal effect and which apply generally.⁹ Therefore, congressional bodies and executive offices in most municipal governments, and all county and lower-level governments, do not have lawmaking power. People's congresses at most sub-provincial jurisdictions are thus not "legislatures" but mere electoral and quasi-governing bodies, despite the constitution's recognition of them as "seats of state power".¹⁰

Surprisingly, such a core feature of Chinese legal institutions has received little analysis in either legal or social science scholarship. There remains a tendency among scholars studying Chinese law to believe that China's high degree of legislative centralization follows from China being a unitary and not a federalist country. But this belief is mistaken. Even in a unitary state with a single sovereign, legislative power can be delegated, whether constitutionally, systematically, or through specific legislation with respect to specific spheres or matters, to lower levels of governments. A unitary state simply means that such delegation may be withdrawn unilaterally by the sovereign, and not that the delegation cannot be made. Municipal, county and other local governments in other unitary states (e.g. the U.K., Spain, Italy,

6. Legislation Law of the People's Republic of China (Order of the President No. 31), a 8 (2000).

7. For current arrangements of legislative centralization in tax policymaking, for instance, see Wei Cui, "Fiscal Federalism in Chinese Taxation," *World Tax Journal* 3, (2011): 455-80.

8. These are located in 27 provincial capitals, 4 cities that host special economic zones, and 18 "relatively large cities" specially designated by the State Council.

9. Legislation Law of the People's Republic of China (Order of the President No. 31), c 4 (2000).

10. The Constitution of the People's Republic of China, c 1, a 2 (2004).

etc.) routinely exercise delegated legislative power. Even in federalist countries, local governments similarly do not have inherent legislative power but instead exercise powers delegated to them by state or provincial sovereigns. Thus the limited range of government bodies that can make rules with binding legal effect in China has no foundation in any general legal doctrine and few analogues in international practice. Moreover, regional governments in many other unitary states enjoy greater legislative power than provincial governments in China.

There are two ways of answering the question, “How unusual is China’s degree of legislative centralization?” The first is to follow the normal practice of comparative legal studies, and use the advanced legal systems of very few developed countries as the frame of reference. If comparisons are made this way, China would clearly look like an outlier. It is difficult to name any well-known legal system where the lowest two or three tiers of subnational government categorically lack lawmaking power (whether inherent or delegated), the way Chinese townships, counties, and most prefectural-level governments do. For example, the U.S., Canada, Australia, and all European countries have property taxes, and most property tax rates are set by the lowest tiers of government (and the setting of property tax rates clearly is legally binding). This is a binary feature: either a lower-tier government has *some* lawmaking power, or it does not have *any*. If one looks instead to the scope of legislative discretion that sub-national government in developed countries possess, it will be even clearer that substantial autonomy among sub-national governments is the norm. For example, out of 16 developed countries surveyed by Ebel and Taliencio, subnational governments in 12 countries had some legislative control over more than 50% of tax revenue.¹¹

A second, more rigorous approach to evaluating how unusual China is in its legislative centralization is to compare representative countries from both the groups of developed and developing economies. Gadenne and Singhal recently presented data that suggests that developing countries generally are more centralized than developed countries, as measured by the proportion of subnational government

11. Robert Ebel and Robert Taliencio, “Subnational Tax Policy and Administration in Developing Economies,” *Tax Notes International* 37, (2005): 925.

budget to overall government budget (expenditure responsibility) and the proportion of subnational tax revenue to overall tax revenue (tax assignment).¹² Ebel and Taliercio, using more refined measures of fiscal autonomy than the IMF data relied on by Gadenne and Singhal, show that subnational governments in East Asian developing economies display a special lack of fiscal autonomy. In each of China, Cambodia, and Vietnam, revenue over which subnational governments have some legislative control represents less than 5% of subnational tax revenue.¹³ These studies suggest that China might be less of an outlier when compared to other developing countries. This perspective, however, complements the one obtained from the first approach and gives even greater urgency to studying Chinese centralization. Chinese-style legislative centralization is unusual relative to the legal systems normally used as reference frames by westerners—and by most legal scholars in China—and studying this unusual feature may shed some light on developing countries in general. These perspectives, however, are virtually unheard of in current literature.

My further contention is that China's extreme legislative centralization is worth studying because it has had a systematic negative impact on the rule of law. However, a quite opposite perception is prevalent in China (and not uncommon among western scholars who study China): Local governments are perceived to be more likely to run afoul of legal rules than the central government, and centralization is an instinctive response to local government behavior that deviates from the law. In short, law is often conflated with central control. However, this view is too unreflective. To put it in a somewhat tautological fashion: if local governments were to be able to make their own legal rules, they would be much less likely to violate legal rules. Deviations from the law by local governments may be the inevitable consequences of legislative centralization. In that case, it would be ironic to think of that these deviations can be cured or prevented by legislative centralization.

12. Lucie Gadenne and Monica Singhal, "Decentralization in Developing Economies," *Annual Review of Economics* 6, (2014): 581–604. They argue that this is the case even if developing countries from the 21st century are compared with developed countries in the late 19th century.

13. Such percentage is also relatively low in Thailand (10.9%) and Indonesia (15%), compared to 84% in Spain and 96% in Denmark (both of which have unitary political systems). Ebel, "Subnational Tax Policy and Administration in Developing Economies," 926.

A more substantive formulation is this. To adopt national policy in the form of national law to be applied for all of China requires gathering an enormous amount of information about social preferences and social and economic circumstances across the country and aggregating such information and preferences. This is sometimes impossible to do: there may simply be no policy that would work across the country. Moreover, in many other circumstances it is difficult to achieve (whether through authoritarian or democratic politics).¹⁴ Knowing the high likelihood of adopting inadequate or wrong rules, national lawmakers would naturally be hesitant to make rules. To use common Chinese bureaucratic parlance, they are more likely to wait—sometimes for decades—for circumstances of enacting legislation to become “mature” (“*chengshu*”). Thus giving the central government a monopoly on lawmaking increases the likelihood that rules will turn out to be inadequate for local circumstances, or that no rule will be promulgated. Both these eventualities, however, increase the likelihood of local governments straying from centrally-made law, or making policies outside all legislative frameworks, to fill the gaps left by the central government.

Like the central government, provincial governments may also suffer similar disadvantages with respect to policy issues specific to sub-provincial jurisdictions. A general formulation of the problem would be as follows. The range of government entities authorized to make law has been highly restricted (as a means to exert political control). However, the information disadvantage, as well as incentive deficit, suffered by these entities results in an under-supply of adequate legal rules. Facing this problem, local governments that are outside the range of authorized lawmakers, in order to carry out their governance functions, adopt their own rules that are not supported by the legislative, interpretive, and administrative apparatus that formal legal rules command.

To support these claims, one needs to first show that legal rules are in short supply in China, and second that such short supply is significantly (though by no means exclusively) caused by legislative centralization. As to the first point, I believe that most Chinese legal professionals would agree with it at

14. For a discussion of this in the environmental protection and land management context, see Benjamin Van Rooij, *Regulating Land and Pollution in China: Lawmaking, Compliance, and Enforcement; Theory and Cases* (Leiden: Leiden University Press, 2006), Part I. [page no.]

least at an anecdotal level: the shortage of legal rules in China is quite severe, particularly given both the size of the government and the level of development of the economy.¹⁵ It is widely agreed that statutes adopted by the national legislature tend to contain merely principled statements and too few detailed rules, along with an abundance of rules that delegate further rulemaking to the executive branch. It is also generally known that the State Council leaves a vast amount of policy questions unanswered in the administrative regulations and decisions it issues, and makes generous delegations to national ministries. To assess the quantity and quality of the diverse bodies of regulations, rules, and policy guidance issued by national agencies requires substantial professional expertise, but I believe that most lawyers in their respective fields would agree that existing law and policy guidance contain large gaps, and such gaps tend to remain unfilled for long periods of time (often decades). The examples are innumerable.¹⁶

Nevertheless, how can one make such impressionistic evidence more systematic? One possibility is to systematically identify instances of rules adopted by local government agencies that could easily have general application, but to which correspond gaps in national rules. There are certainly many examples of such local rules, especially those that would promote local economic growth, tax collection, and other items central to the government agenda. Under the Company Law, for instance, whether in-kind (i.e. non-cash) contributions of capital were permitted was unclear before the 2005 revision of the Company Law, and how to deal with such contributions remained vague at the national level after 2005. Against this backdrop, various local governments adopted explicit rules to facilitate the formation of businesses. Under the laws governing personal income tax, how income from investment partnerships should be treated was unclear at the national level, but various local governments adopted explicit local

15. For quite some time, and perhaps even today, a contrary claim can be heard among scholars of Chinese law, to the effect that China does not have a shortage of law: rather the law is simply not implemented. I believe this claim is merely rhetorical. Logically, the fact that law is unimplemented or not complied with does not contradict the view that there is a shortage of law for those who are willing to comply with the law. Moreover, that many legal rules are not implemented may suggest that they are poorly-designed rules. In short, non-compliance with existing law is consistent with the shortage of supply of law. Practically, I find the claim a bit perverse, and reflective of the disengagement of legal scholarship from the practice of law.

16. For instance, after 20 years of the adoption of the Company Law, corporate mergers and divisions still lack basic definitions.. In the area of corporate and personal income taxes, basic income tax concepts such as what constitutes individual residence in China, what is employment income, what determines ownership, etc, remain crudely defined after 30 years of income tax collection.

rules in order to encourage the growth of private equity. Various local tax bureaus also have explicit rules to distinguish taxable fringe benefits (e.g. work uniforms that can also be worn on personal occasions) from non-taxable work supplies, an important problem in tax compliance facing many businesses. The notable features of all these cases are: (1) there has been no delegation of rulemaking authority from the central government to the local governments and administrative agencies; and (2) the local governments nonetheless adopted explicit rules to fill in obvious gaps in national rules, naturally, out of the need for regulation and administration.

Such local policy interpretations sometimes shade into problematic lawmaking—the adoption of rules that are contrary to, or at least unauthorized under, national rules. They are typically looked at askance by legal scholars.¹⁷ But insofar as the rules adopted do not substantially involve local circumstances (e.g. there is nothing local about the question of whether work uniforms are taxable fringe benefits), they could be seen as meeting generic demands for legal rules that the central government has failed to supply. However, centralization means that even such local rules are in fact rarer than they should be, since local governments, supposedly acting as mere agents of the central government in the implementation of policy, have not been delegated any rulemaking authority. Their ability to meet demands for legal rules is already being strongly suppressed.

In a recent paper, Cui and Wang provide a more direct illustration of the failure of centralized rulemaking, by studying how Chinese provincial governments set local tax rates pursuant to nationally-delegated powers.¹⁸ In particular, we examine two episodes of tax-rate-setting for the vehicle and vessel tax (VVT) in 2007 and 2011, respectively. We exploit the fact that revenue from the VVT, like the revenue of numerous other small, local taxes, has been assigned in all provinces to sub-provincial governments, who are also responsible for VVT collection. As a result, provincial rate-setting constitutes an instance of legislative centralization, even though it occurs at the sub-national level: the range of

17. See, e.g. Donald C. Clarke, “How Do We Know When an Enterprise Exists? Unanswerable Questions and Legal Polycentricity in China,” *Columbia Journal of Asian Law* 19, (2005): 50.

18. Wei Cui and Zhiyuan Wang, “The Inefficiencies of Legislative Centralization: Evidence from Chinese Provincial Tax Rate Setting,” *China: An International Journal* (forthcoming). [to update]

decision-makers has been restricted, and information and incentives relevant to the decisions likely lie at lower levels of government. In delegating VVT rate-setting power to provinces, the national government signaled that it lacked information to set rates for different parts of the country. Legislative decentralization, therefore, ought to improve efficiency. We show, however, that provincial governments did not in fact incorporate provincial information in the choices of tax rates; instead they copied one another. Because the political motives for tax mimicry found in other jurisdictions, such as yardstick competition due to local elections, expenditure competition, or tax competition, are not present in the setting of VVT rates, it is highly plausible that provincial governments acted out of indifference as well as a lack of information. Thus the central and provincial governments collectively failed to adopt appropriate legislation. The detriments of centralization, interestingly, are observed at the provincial level.¹⁹

The kind of empirical test offered in Cui and Wang is also useful for establishing the specific causal origin of the shortage of legal rules in centralization. In most countries, legal rules may be felt by the private sector to be in short supply. Law is a public good that is costly to produce, and even putting aside fundamental challenges of social choice and of politics, it may not be socially optimal to have legal rules resulting in precise determinations for each and every circumstance that transpires.²⁰ In common law countries and countries with vibrant civil societies, courts and professional associations may fill in some of the legal gaps left by legislators and administrative agencies. In other countries lacking similar mechanisms, the shortage of legal rules may be a more severe problem. Finally, countries like contemporary China have young legal systems, which imply less time to accumulate and revise legal rules. Given these general factors, it may seem difficult to claim an *additional* explanation (such as artificial restrictions on who can make law) is required to explain the shortage of law. But the study

19. Cui's and Wang's study directly supports the argument made by Gadenne and Singhal, that "the involvement of central governments in determining state and local taxes often limits the fiscal capacity of subnational governments... Imposing centrally determined taxes also severely undermines the potential efficiency benefit of these taxes: Taxes are less likely to reflect better local information and less likely to approximate user fees." Gadenne, "Decentralization in Developing Economies," 594.

20. See Louis Kaplow, "General Characteristics of Rules," in *Production of Legal Rules*, ed. Francesco Parisi, vol. 7 of *Encyclopedia of Law and Economics*, ed. Gerrit De Geest (Cheltenham, UK: Edward Elgar, 2012).

offered in Cui and Wang shows that such a claim can be substantiated.

What is even more plausible and common-sensical is that legislative centralization is problematic *in combination with* administrative decentralization. As Part 2 will discuss, a primary manifestation of administrative decentralization in China is the poor staffing of the central government bureaucracy. When national ministries are woefully under-staffed, how could they possibly supply enough legal rules? In addition to resource constraints, the lack of experience directly administering the law (a task relegated to local civil servants of much lower ranks) may also undermine the ability of central bureaucrats to draft appropriate legal rules. Such limitations of resource and experience may apply to provincial bureaucrats as well. Nonetheless, it is likely that China's high degree of legislative centralization is inefficient not only conditional upon radical administrative decentralization, but even in the absence of such decentralization.

Ironically, one challenge for the proposal to study the consequences of Chinese legislative centralization empirically is, that the inefficiencies of centralization in many areas of government activity may seem a priori to most students of federalism, such that it may not appear worthwhile to provide empirical evidence for it. However, neglecting the significance of legislative centralization in China is such an entrenched habit that perhaps only extensive documentation of centralization's negative impact can change the current discourse. Part 3 will discuss additional phenomena in Chinese law that may be explained by excessive legislative centralization.

III. Excessive Administrative Decentralization²¹

Although administrative decentralization in China is discussed more often than legislative centralization, several crucial refinements of the meaning of decentralization are necessary for one to evaluate its impact on the rule of law.²² I define "administrative decentralization" as comprising two components. First, there is a single bureaucratic hierarchy, and decentralization means that government

21. This section draws on Wei Cui, "Administrative Decentralization and Tax Compliance: A Transactional Cost Perspective," *University of Toronto Law Journal* (forthcoming).

²² Also see Dowdle and Prado, Chapter 1, pp. [] for a discussion of decentralization as part of the New Development Economies model. [editor to update]

functions vis-à-vis citizens are performed at the lowest levels of the hierarchy. By contrast, higher levels of the bureaucracy do not directly exercise government power with respect to citizens, but instead issue commands to bureaucratic subordinates. Second, the lower the bureaucratic rank, the more geographically dispersed are the units within that rank, and the smaller is their geographical reach. Decentralization thus implies that the scope of functions of a particular, citizen-facing government unit is usually delineated by reference to the finer geographic divisions of government.²³ What is unusual about China is first, how deep (i.e. multilayered) the bureaucratic hierarchy is, and second, how resolutely the tasks of government administration are placed at the bottom ranks of the hierarchy.

The most direct way (especially for comparative purposes) to present Chinese administrative decentralization is to consider the vertical distribution of government personnel. Information on such distribution is surprisingly scant. Yuen Yuen Ang has offered a few data points regarding the Chinese civil service as a whole, based on pre-1998 information.²⁴ She shows that while the net size of public employment in China in 1997 was one-third below the then global mean (3.1% of total population as compared to 4.7%), China's local (provincial level and below) public employment size per capita of 2.5% was among the highest in the world, more than twice the global average of 1.1%. It follows "that China's public employment is heavily concentrated among local governments compared to other countries."²⁵ In fact, China's national- and provincial-level civil service has probably become even thinner (relative to the total size of public employment) since the late 1990s, after several rounds of government downsizing. China's current Minister of Finance Lou Jiwei, for example, estimated that the central government staff

23. These two components resemble what Professor Zhou Li-An calls "xingzheng fabao" (administrative outsourcing) and "shudi guanli" (territorial management) in his book, which argues that the pair of arrangements characterizes the environment for political yardstick competition in China. The difference between my and Professor Zhou's characterizations of decentralization is discussed below. Zhou, *Weizengzhang erjingzheng: zhongguo zengzhangde zhengzhijingjixue* [Growth from Below: The Political Economy of China's Economic Growth].

24. Yuen Yuen Ang, "Counting Cadres: A Comparative View of the Size of China's Public Employment," *The China Quarterly* 211, (2012): 676-96.

25. She then draws the correct conclusion "that given the complexity of policy-making in such a populous country, China's central government employment may be too small." *Ibid.*, 691.

comprised only 7% of the total civil service in 2006.²⁶ On the basis of this estimate, Lou states that China has the “smallest central government in the world”.

China’s tax bureaucracy, which employs more than 10% of the total population of civil servants, offers a vivid illustration. The national State Administration of Taxation deploys just over 0.1% of total workforce in tax administration. As can be expected, the agency undertakes very little direct administrative responsibility vis-à-vis taxpayers. According to a recent OECD study,²⁷ which covered 35 OECD countries and 17 non-OECD countries/regions, in 2011 China had by far the smallest percentage of tax administration staff working at headquarters (i.e. national offices) among the 52 countries surveyed. Further, if provincial tax bureaus are counted as a form of regional offices, China’s percentage of tax administrators working at either national or regional offices is also the lowest among all countries surveyed.

Data compiled by the State Administration of Taxation (SAT) allow us to obtain an even finer-grained view of the “bottom-heaviness” of Chinese governance. In 2003, provincial-level employees accounted for only 5% of the staff in the State Tax Bureau system. In contrast, prefectural level employees accounted for 16%, while those at the county level or below represented an overwhelming 79.5%. A similar distribution can be found for the Local Tax Bureau system. If we were to visualize Chinese tax administration in a pyramidal figure, divided into 5 tiers (corresponding to the national, provincial, prefectural, county, and sub-county levels), the proportions of each tier from the national to the sub-country level would have the ratios of 0.1:4.9:15:40:40.

There are other measures of administrative decentralization than personnel distribution—such as the actual allocation of administrative powers—which I do not elaborate here. The type of

26. See Jiwei Lou, “Xuanze gaigede youxiancixu [Choosing the Optimal Sequence of Reforms],” *21st Century Business Herald*, August 6, 2006. Lou’s estimate of the proportion of centrally-employed civil servants is much smaller than Ang’s for the 1990s (20%, Ang, “Counting Cadres”, 693). Lou has since then revised the estimate down even further for comparative purposes, to 4%. See Jiwei Lou, “Yangdi guanxi zaichonggou [Restructuring Central and Local Relations Once Again],” *Caijing Magazine*, April 2, 2012.

27. OECD, *Tax Administration 2013: Comparative Information on OECD and Other Advanced and Emerging Economies* (Paris: OECD Publishing, 2013), 83.

decentralization that characterizes Chinese tax administration is in fact shared by a majority of the Chinese administrative state. In most areas of governance—be it business registration, public health and food safety, environmental protection,²⁸ policing, education, labor and social security, land management, and cultural and media regulation—the Chinese state is decentralized, i.e. bottom-heavy in a geographically dispersed hierarchy.²⁹ The few less decentralized spheres of regulation, e.g. banking and securities regulation, customs, etc. constitute exceptions to a general rule. Another notable exception is the judiciary: the lowest courts sit at the county level—already above many government units—and the intermediate courts and provincial courts actually try cases, instead of simply supervising lower courts.

Suppose it is accepted that China's degree of administrative decentralization makes it an international outlier. What does this have to do with the rule of law? The answer is: quite a lot. To begin, consider what impact decentralization has on the county- or lower-level civil servants as enforcers of the law. The positions they occupy resemble those of legal professionals, yet they are seriously disadvantaged as professionals. For one, their geographic jurisdiction is limited, and this gives them relatively little incentive to specialize within their fields of work. Any type of transaction or situation to which specialized law applies is less likely to occur in a small jurisdiction compared to a big one. Moreover, because they are situated at such low rungs of the bureaucratic hierarchy, the career incentives for developing professionalism are also limited—the chances of rising to higher positions are minimal. These disadvantages can be crippling, even if the civil servants begin with high levels of education.

Consider further the incentives of regulated subjects (e.g. taxpayers) vis-à-vis these low-level law enforcers. Although China's civil service, relative to international standards, is not bloated in per capita terms, assigning most civil servants to limited geographical jurisdictions does give regulated subjects

28. For a discussion of decentralization in environmental protection agencies, see Van Rooij, *Regulating Land and Pollution*, 267-71.

29. This general pattern has also been implicitly acknowledged by recent social scientific scholarship of China. Both the theories of market preserving federalism and political competition for growth (see notes 2 and 3 above) assume that at fairly low levels of the state, local politicians still command a wide range of regulatory tools. This is the same as saying that in a wide range of regulatory areas, administrative decisions are made at very low-levels of the bureaucratic hierarchy.

readier and cheaper access to law enforcers. Most importantly, regulated subjects will face two, potentially very different, sources of law. One is law as it is generally publicized by the government and interpreted by the legal profession. The other is whatever rules the low-level civil servant will most likely enforce. Because of the civil servants' professional disadvantages, the rules low-level civil servants are likely to enforce may frequently deviate from the law as publicized. Yet since it is the rules that are likely to be enforced that matter most of the time—in the system of administrative decentralization, higher level bureaucrats rarely interact with citizens directly—most regulated subjects may have incentives to learn these rules only. For this reason, publicized law may often fail to regulate behavior.

Add to all this the fact that legislation is extremely centralized in China: because the law enforcers are so removed from the rule-makers—even though they are most likely all employed by the same bureaucracy—communication and coordination can be very costly. It is hard for the rule-makers to know how legal rules are enforced, and it is hard for the enforcers to know why the publicized rules are adopted.

Is it possible to empirically verify—more than just anecdotally—the negative consequences that administrative decentralization brings as I have predicted? Such systematic verification has yet been offered, but I have argued that in the context of tax administration these predictions fit well with two easily observable phenomena. One is the under-utilization of courts: taxpayers sue tax agencies very infrequently. This would be the natural outcome if most taxpayers either do not comply with the tax law, or they comply only with the law dictated by low-level enforcement officers but not with the requirements of formally publicized law (possibly due to a lack of awareness). The other is the under-development of the tax profession: there is no room for legal professionals if all that matters is the propensities for law enforcement by individual, low-level civil servants.

The potential causal connection between administrative decentralization and the failure of enforcement and compliance implies that the conditions for the rule of law may often be violated in China well before disputes arise and reach courts, such that the presence or absence of an independent judiciary may be of secondary significance for important regulatory areas. Moreover, excessive administrative

decentralization may have held back the rule of law in ways that are contrary to the preference of China's authoritarian government itself.

The foregoing characterization of administrative decentralization and its consequences differ from standard political economy accounts in several ways. First, the political economy literature, not surprisingly, focuses on local political leaders who are comprehensively evaluated by the results of governing a particular territorial jurisdiction. They are “generalists” held accountable to fundamental outcomes such as economic growth. Very little has been said about the behavior and incentives of bureaucrats in local regulatory agencies—within, so to speak, the more “Weberian” aspect of the Chinese state. Second, theorists have tended to draw a major distinction between whether a particular local government agency is “vertically” supervised by a superior agency within the same sphere of regulation or “horizontally” controlled by a local chief executive office.³⁰ The focus of this chapter, however, has been on consequences of decentralization that emerges regardless of whether an agency is controlled vertically (by a superior line agency) or horizontally (by the local head of the executive branch). What matters is the rank within a single bureaucratic hierarchy: the steeper the hierarchy and the lower is the rank of the actual administrators, the more decentralized is the system. Third, discussions of decentralization have tended to adopt a principal-agent framework where the fundamental problem is formulated in terms of monitoring in the presence of divergent preferences. The analysis above, however, presents the problem in terms of transaction costs—the costs of communicating and learning about the law. Finally, the political economy literature is generally vague about the scope and meaning of decentralization. Many portray provincial-level decision-making as decentralized. However, as the foregoing analysis has shown, the phenomenon of decentralization can only be appreciated when one focuses on the county or even lower levels of government.

IV. Seeing “Federalism, Chinese-Style” in Chinese Law

The anomalous combination of legislative centralization and administrative decentralization—

30. Zhou, *Zhuanxing zhongde difang zhengfu: guanyuanjili yu zhili* [Local Governments in Transition: Official Incentives and Governance], 139-45.

each arguably excessive in its own, and each made worse in its impact by the other—may be labeled “federalism, Chinese style” in the realm of law. A wide range of phenomena in the Chinese legal system can be traced at least partly to this combination. Remarkably, however, very few scholars of Chinese law (again, whether inside or outside China) have even recognized that such phenomena require explanations, let alone that such phenomena are explainable in terms of Chinese-style federalism. This section highlights some of the phenomena and their significance.

Part I has already highlighted the sparseness in content of national statutes and regulations. This feature, particularly within the more exalted categories of Chinese law, is especially remarkable given the insular nature of China’s lawmaking process. Like parliamentary systems elsewhere, the Chinese executive branch gets to write the law, often with little input or public discussion.³¹ The drafters of statutes, formal regulations, and informal administrative guidance, are likely to be all the same bureaucrats. In this type of setting, where there are few veto players in the legislative process, it is common in other countries to see a great amount of detailed rules in statutes, reflecting the bureaucratic expertise of the executive branch. Yet the insular policymaking process in China does not have such effect. This phenomenon, which is of great interest to lawyers, clearly calls for an explanation.

The perspective outlined in Parts I and II provides one such explanation. To begin, the tiny size of the central government bureaucracy—the result of administrative decentralization—means that central ministries often lack staff resources for policy research and legislation. Yet at the same time, the ministries essentially monopolize lawmaking. Central ministerial employees often have little experience actually administering the law. They also lack contact with the low-level government employees who do have such experience. They are thus often poorly positioned to furnish drafting detail: they lack the channels of information both *ex ante* and *ex post* to be confident that any detailed provision drafted are appropriate. The safer approach for employees at the central ministries (and their bosses) is to make only

31. In other words, the phenomenon of *bumen lifa* (administrative agencies write the law) is by no means unique to China. For similar phenomena in the U.K. and in Canada, see James Alt, Ian Preston, and Luke Sibieta, “The Political Economy of Tax Policy,” in *Dimension of Tax Design*, ed. Institute of Fiscal Studies (Oxford: Oxford University Press, 2010); Brian Arnold, and Heather Kerr, “The Canadian Tax Policy Process”, in *Tax Policy in Canada*, eds. Heather Kerr et al (Toronto: Canadian Tax Foundation, 2012).

statements of principle in statutes and formal regulations, even though few would veto more detailed proposed statutory or regulatory language.³²

In fact, the small pool of manpower and the lack of information on the part of central ministries explain many features of the legislative and agency rule making processes in China when viewed up close.³³ For example, the paucity of formal ministerial regulations and the overwhelmingly prevalent practice of issuing informal circulars³⁴ are not due to any onerous procedural requirements (such as notice and comment) imposed on formal regulation. Instead, they are arguably the result mainly of staffing constraints and an unwillingness of the central ministries to commit to legal positions. To use another example, it is a surprise for many to learn of the unfading popularity of comparative studies among legislators in China despite the size of China's population and economy as well as regional variations (there are no dearth of examples in China.). Yet Chinese lawmakers are perennially interested in the laws of other countries, including even countries that are much smaller, countries that have different circumstances, and countries that do not have advanced legal system. Yet, this interest is unlikely to be a reflection of some irrational belief in the effectiveness of legal transplants. The more plausible explanation is that this interest stems from the sheer lack of information about what is actually happening in China. This lack of information, on the part of the central government, is in no small part attributable to the combination of legislative centralization and administrative decentralization.

The central government's lack of information can also be seen in its frequent inability to commit even to rules and policies enshrined in statutes. As a number of commentators have pointed out, it is not

32. For a narrative example, see Wei Cui, "Dui qiye chongzu shui wu guize qicaoguo chengde fansi (Reflections on the Making of the Income Tax Rules for Enterprise Reorganizations)," in *Tax Law and Case Review: Volume 1*, ed. Xiong Wei (Beijing: Law Press, 2010). Income tax rules for corporate reorganizations were developed during the 1990s through informal administrative guidance, and remained virtually unchanged between 2000 and 2007. In 2007 these rules were included in the State Council's draft administrative regulation for implementing the new Enterprise Income Tax Law, but were deleted last minute because they were perceived to be too complex by lawyers in the State Council's Legislative Affairs Office. Furthermore, none of the few SAT staff members who understood the rules happened to be available to explain them to the State Council's lawyers.

³³. These processes have not been closely documented in Chinese legal studies. Some scholars in China participate in them but generally choose not to write about them while the few accounts presented by scholars outside China tend to be sparse.

³⁴. For examples in Chinese taxation, see Wei Cui, "What is the 'Law' in Chinese Tax Administration?" *Asia Pacific Law Review* 19, no. 1 (2011): 75-94.

just the lower-level governments that nonchalantly issue ultra vires rules and policies that conflict with applicable law of higher status. Central ministries also do so with alarming frequency. Nicolas Howson has asked how the Chinese Securities Regulatory Commission, with a most elite legal staff, could issue informal circulars on insider trading that flatly contradict the Securities Law.³⁵ Yet such instances of ultra vires rule making can be found in China wherever one looks,³⁶ and they are especially notable for the following reasons. First, the notion that statutes and regulations tend to reflect the preferences of lawmakers in the parliament or State Council while agency guidance tends to reflect the distinct preferences of a different group of bureaucrats is incorrect. As noted above, the distinction between legislation and rulemaking in China is weak. Ultra vires rule making often reflects not the actions of errant agents but changes of mind of principals. Second, such changes of mind often occur not as a result of any change in the circumstances surrounding policy. Nor are most of the ultra vires rules promulgated by subordinate ideologically or politically compelling. Their rationales are miscellaneous and banal. The suggestion here is that their banality may also have a banal explanation. After having monopolized lawmaking, the central government constantly struggles to deliver legal rules.

In terms of phenomena observed in respect of the enforcement end of the legal system, although the analysis summarized in Section 2 implies many predictions, one of the most critical is that the legal profession tends to be excluded from ordinary law enforcement in many regulatory areas. As a result, legal professionals tend not to observe how law enforcement activities are carried out, and their impressions of law enforcement are likely to be patchy. This does not mean that relevant phenomena cannot be identified or lack legal significance. One example is as follows. It has been observed in some policy areas that Chinese regulatory agencies impose low sanctions on non-compliant subjects. The fines levied on violators of environmental laws seem systematically lie at the lower end of the permitted range

³⁵. Nicolas Howson, "Enforcement without Foundation? Insider Trading and China's Administrative Law Crisis," *American Journal of Comparative Law* 60, no. 4 (2012): 955-1002. For other examples of ultra vires rulemaking in Chinese securities law, see Tang, Chapter [], pages [9-15].

³⁶. See, for example, Cui, "What is the 'Law' in Chinese Tax Administration?".

even though this arguably makes for ineffective enforcement.³⁷ This is probably true in the tax area as well. Decentralization can offer an explanation for this clearly important aspect of China's legal system. Where regulated subjects have frequent contact with regulators, including consulting the latter on the consequences of their actions, it is easier for violators to argue that they have had the explicit or tacit approval of regulators. Such frequent contact may be what makes it difficult to impose high fines.

Finally, it is important to point to a range of policy initiatives that China has undertaken precisely to mitigate the anomaly of pairing radical legislative centralization with radical administrative decentralization. In light of the arguments made in Parts I and II, the larger the hierarchical gap between legislation and enforcement, the worse the consequences of the mismatch will be. Either legislative decentralization or the centralization of enforcement can reduce the gap and bring improvements to the Chinese legal system. Yet initiatives along either of these two lines have principally been neglected or even faced opposition within Chinese legal academic circles. A most vivid illustration comes from a recently proposed and imminent change to China's Law on Legislation. The Law on Legislation has frequently been referred to as a quasi-constitutional statute, and foundational to the Chinese legal system. Its revision, therefore, would appear to be anything but esoteric. In an amendment proposed in August 2014 and expected to be adopted in 2015, any Chinese city that contains districts will be permitted, subject to the approval of provincial legislatures, to adopt local statutes and regulations for municipal affairs such as urban construction, maintenance of urban order and environmental regulation. This would increase the number of cities with the power to promulgate rules with formal legal effect from 49 to 282.³⁸ For those who recognize the inefficiencies of legislative centralization, this is an important and positive development. Arguably, as well, this amendment is an attempt to pluck one of the low-hanging fruits (and the most obvious of them all) so that the legislative system can be improved. However, the development

³⁷. Van Rooij, *Regulating Land and Pollution*, 288-9; Benjamin Van Rooij, "The People's Regulation, Citizens and Implementation of Law in China," *Columbia Journal of Asian Law* 25 (2012), 10-12.

³⁸. See Baocheng Chen, "Lifafa shoucixiuding, 233 shi jianghuo defang lifaquan," [First Revision of the Law on Legislation, 233 Cities Will Gain Legislative Right], *Caixin*, August 26, 2014; Bo Peng and Xiaoyue Zhang, "Defang lifa: Jiyu haishi tiaozhan" [Local Legislation: Opportunity or Challenge], *People's Daily*, October 22, 2014, 17; Wenceng Li and Lei Chen, "Zhangchunsheng yanzhongde lifafa xiugai" [Zhang Chunsheng's View of the Revision of the Law on Legislation], *Legal Weekly/Legal Daily*, December 3, 2014.

caught Chinese legal scholars entirely by surprise. It is difficult to find any scholarly writing that advocated or anticipated this reform. Moreover, the response from academic circles (both inside and outside of China) to this large and imminent change has also been near to non-existent. Other than vague comments about how the quality of local lawmaking needs to be supervised, legal academics have had nothing to say.³⁹

Yet another fundamental change to the Chinese polity under discussion—is the centralization of the delivery of government services in select areas of government policy. Discussion of this change is now underway, though such a change is less likely to be adopted than the proposed changes to the Law on Legislation. The centralization of the delivery of governmental services is, however, different from the concept of centralization as it has traditionally been understood in China. Centralization, to the Chinese government, has traditionally been a matter of increasing central control and monitoring at the expense of control by subnational governments. A number of regulatory and other governmental agencies – such as the state tax bureau system, customs, banking, securities, and insurance regulation, coal safety, and statistics among others – are “vertically” controlled by the central government in terms of budgetary needs, staffing needs, and appointment of personnel. A few other regulatory areas adopt “vertical control” by provincial governments (including mainly the local tax bureau system, business registration, quality supervision, inspection and quarantine and food and drugs administration). Proponents of judicial reform in recent years have also advocated for vertical control of basic and intermediate courts either by provincial high courts or the Supreme People’s Court. Most of the discourse in favor of centralization in this traditional sense, however, assumes that (1) where central and local government preferences diverge, the central government’s preference should prevail; and (2) that the problem with decentralization is mainly one of inadequate monitoring in the principal-agent framework. The first assumption, which is normative, may be justified in certain contexts but is highly inaccurate when generalized. The second assumption, which is positive, suffers from the same problem. The analysis in Part II, for example,

³⁹. See Li, “Zhangchunsheng yanzhongde lifafa xiugai” [Zhang Chunsheng’s View of the Revision of the Law on Legislation].

defines decentralization in terms of an excessively steep hierarchy (with government services delivered at the bottom), plus the limited geographical reach of each citizen-facing agency. It predicts negative consequences for the rule of law from these two features. Neither, however, is necessarily altered by increased vertical monitoring.

What would truly be a fundamental and novel change to the Chinese administration is the centralization of the actual delivery of government services. In other words, the central and the provincial governments would actually become citizen-facing in a number of policy areas. This is not just a matter of delegating authority on paper. It requires a dramatic increase in manpower at the national and provincial levels of the administrative state.⁴⁰ In public finance terms, this means that instead of increasing sub-national shares of tax revenue, the share of direct expenditures made by lower levels of governments should be reduced. Higher (i.e. national and provincial) levels of government should make less transfer payments while expanding their own operations and implementing government programs directly. Few proponents of centralization in China have envisioned centralization in these terms. Indeed, the proposal to increase in manpower at the national and provincial levels would be unprecedented in Chinese history.

V. Implications for Two Existing Literatures

The account given in this chapter of “federalism, Chinese style” from the perspective of the law has substantial implications for the literature on Chinese political economy. The factual patterns I highlight—radical forms of legislative centralization and administrative decentralization—have largely been neglected in this literature but they are not inconsistent with the factual patterns that political economists generally agree on. Instead, they are simply more careful descriptions of certain aspects of the latter patterns. For example, the central government’s monopoly of legislative power (and the discourse conflating law with centralized law used to support such monopoly) is simply another

⁴⁰. See Lou, “Xuanze gaigede youxiancixu” [Choosing the Optimal Sequence of Reforms]; Lou, “Yangdi guanxi zaichonggou” [Restructuring Central and Local Relations Once Again].

manifestation of the centralization of political power within the CCP.⁴¹ Likewise, the performance of government functions principally at the county- and lower-levels of government simply depicts Chinese decentralization through a magnifying lens. However, to these more carefully identified institutional details, I attribute a set of causal consequences that have not been previously conceived.

It has been the norm to portray explanations of Chinese economic growth, in terms of central-local relations, as either repudiations or innovative supplementations of orthodox institutional economics. The logic of the political economists' arguments typically goes: China does not have an independent judiciary or legal regimes for securing property rights or guaranteeing the enforcement of contracts, then, why did China's economy grow so rapidly for such a long period of time? Chinese-style federalist arrangements (as theorized in different ways) are then offered as substitutes for the missing legal institutions. Implicitly, this line of thinking assumes that similar institutions do not exist in other countries that are comparable to China (e.g. Eastern European countries) and that China is unique in her political configuration.

The account given in this chapter suggests that some features that are indeed unique about Chinese intergovernmental relations in fact *undermine* the operation of legal institutions. If we posit that a relatively clear set of legal rules for governments and private actors to follow is conducive to economic growth, then, Chinese-style legislative centralization is anti-growth. If government actors deem it desirable that the policies they have chosen be reasonably and reliably implemented through compliance with legal rules, then, Chinese-style administrative decentralization prevents this from happening. Thus, it seems that Chinese-style federalism not only operates *in the absence of legal institutions* but also *inhibits the potential contribution of legal institutions*. China doesn't just happen to have the intergovernmental relations it has, plus the absence of rule of law: the absence of the rule of law is attributable in no small part to the present state of intergovernmental relations.

⁴¹. For a discussion of how the discourse equating law and centralized law developed in the tax policy area in the 1980s, see Wei Cui, "The Origin of the High Centralization of Tax Legislative Power," *Peking University Law Journal* 24 (2012): 763. For how Chinese authoritarianism is more radically centralized even than its counterpart in Vietnam, see Edmund Malesky, Regina Abrami, and Yu Zheng, "Accountability and Inequality in Single-Party Regimes: A Comparative Analysis of Vietnam and China," *Comparative Politics* 43 (2011): 401–21.

The foregoing further implies that if law does not matter for economic growth, it must fail to matter not only because property rights, contractual enforcement and independent judiciaries do not matter, but also because having rules for coordination and achieving compliance with government policies do not matter. Yet this conclusion—that coordination and policy implementation do not matter—is hard to make sense of. Suppose we accept that Chinese sub-national government officials are highly incentivized to promote economic growth. Putting aside the controversies surrounding this claim aside, how did sub-national government officials achieve economic growth if the system for transmitting and enforcing legal rules is constantly eroded? Without being able to envision such mechanisms, it seems that one would have to claim that whatever economic growth was achieved was achieved regardless of (much) government policy. The opposite would seem more plausible: if Chinese intergovernmental relations had a less inhibitive effect on the development of the rule of law, enormous productive potential would have been unleashed.

The perspective of law, therefore, casts doubt on the explanatory power of federalism, Chinese-style for economic growth.

The account of this chapter also has fundamental implications for the literature on the development of the rule of law in China. Notably, current literature on the rule of law is founded on two assumptions. First, it is assumed that the term “rule of law” stands for a set of legal institutions that are prominent in the legal systems of developed countries, including especially a competent and independent judiciary. Although there has been a lively debate on whether developments in the Chinese legal system should be measured by a thick or thin conception of the rule of law,⁴² it is still common for legal scholars and commentators to associate the rule of law with particular legal institutions and to either blame the failure of the rule of law on the features of these institutions or to pin hopes for a wider conception of the rule of law on changes to these institutions. These instinctive causal inferences are neither willful (they are positions to fall back on when no better understanding is available) nor unique to Chinese legal

⁴². See, for example, Randall Peerenboom, *China's Long March toward Rule of Law* (Cambridge: Cambridge University Press, 2002).

studies,⁴³ yet over time they increasingly stretch credulity. For example, is there any evidence that the manpower and budgetary changes proposed in 2013 for the judiciary will have a decisive impact on the Chinese legal system? The details of such arrangements are rarely regarded as central to the functioning of judiciaries elsewhere.⁴⁴ Similarly, those who believe that the rule of law means the judiciary's ability to constrain government advocate for purportedly "idealistic" pro-plaintiff provisions (such as less stringent standing requirements and the possibility of anticipatory adjudication) in the revision of the Administrative Litigation Law, when such provisions are hardly regarded as necessary or even desirable in developed legal systems.⁴⁵

A second assumption in the existing literature is that the CCP's preferences determine the development of the rule of law. It is almost uniformly accepted that the Chinese government embraces an instrumentalist conception of law; the Chinese government only promotes the rule of law when and only when it is in the CCP's own interest. Thus China has witnessed some progress towards the rule of law because that is in the CCP's interest; but there hasn't been greater progress, because that would have threatened to undermine the CCP's self-interest. The flaws of this kind of narrative as a social scientific explanation are patent.

The connection drawn in this chapter between intergovernmental relations and the rule of law in China departs from both of the above assumptions. First, a wide range of institutions, social practices and individual behavior determine whether there is a legal order or not. Conversely, the absence of legal order often has nothing to do with courts. For example, if regulators and regulated subjects achieve mutually acceptable outcomes extra-legally (e.g. sufficient revenue is collected regardless of what the tax law says),

⁴³. Hadfield and Weingast argue that "the great majority of academic and policy work takes the concept for granted, generally equating it with the institutions and practices in those (relatively few) parts of the world where the rule of law has been largely achieved." Gillian K. Hadfield and Barry R. Weingast, "Microfoundations of the Rules of Law," *Annual Review of Political Science* 17 (2014): 21-42. See also Liebman, Chapter [], pages [5-7], for a discussion as to the difficulties in defining a Chinese model of the rule of law.

⁴⁴. Increasing vertical control and providing better professional incentives to government employees are hardly new initiatives even in China.

⁴⁵. See William Landes and Richard Posner, "The Economics of Anticipatory Adjudication," *Journal of Legal Studies* 23, (1994): 683-720.

neither party will litigate.⁴⁶ It will then be wrong to blame low litigation volumes on the lack of judicial independence. Moreover, if potential plaintiffs refuse to litigate, the rule of law cannot be enhanced by empowering the judiciary to monitor administrative agencies.⁴⁷ Indeed, whether legal order is maintained or not often does not even depend on the government alone. If a regulated subject decides not to hire a lawyer or otherwise learn the law, but instead puts in an inquiry with a low-level government employee, it is he (the citizen and not the government employee) who initiates the informal transaction. Finally, whether an adequate supply of legal rules is available may depend not on the relation between the legislative and executive branches (an institutional configuration frequently emphasized by rule of law advocates) but on the relationship between higher and lower tiers of government.

Second, this chapter has also shown that the extent of rule of law may not be determined by the preferences of the (single) ruling political party. Even if radical legislative centralization is seen as the preference of the Chinese authoritarian government—with the caveat that it also appears to be the preference of the dominant majority of Chinese law scholars however otherwise liberal-minded—radical administrative decentralization is much more likely to be exogenous to such preferences. Chinese politicians are products of such a system, not the other way around. To put it very directly, drastically expanding the size of the civil service at the national and provincial levels would be unprecedented in China's history. Yet the failure to do so is precisely what makes China's governmental structure internationally unique. Although such expansion may be very effective for improving the rule of law in China, it is unclear whether even the most ardent government proponent of the rule of law would be an instant advocate for such civil service reform.

VI. Conclusion

I believe that my arguments are novel, even contrarian, in a number of important ways. From a normative and legal perspective, they are unorthodox both doctrinally and in their policy implications. As

⁴⁶ See also Tang, Chapter [], page [16], for a discussion of extra-legal developments in the Chinese securities market; and Fu, Chapter [], pages [10-14], for a discussion of extra-legal developments in China's anti-corruption regime.

⁴⁷ Likewise, if statutes and formal regulations are most often vague and lacking in details, most judges will have no choice or incentive but to defer to agency interpretations.

Part I discussed, the error that most scholars of Chinese law, as well as much social scientific scholarship that passively accepts the Chinese legal discourse, fall prey to is conflating law and centralized law.⁴⁸ Under the prevailing conception, “law” is what the central government announces, whereas “real practice”—enforcement or non-enforcement, compliance or non-compliance—is what happens “locally”. Whereas the distinction between law on paper and law in practice holds everywhere in the world, this distinction is often aligned with the “central/local” divide in China. This conflation has even led some to postulate a conflict between decentralized experimentation and the rule of law. The perspective advanced in this chapter, however, suggests that this mode of discourse originates in an unreflective acceptance of a political ideology that promotes excessive centralization. Breaking free of the shackles of this confounding discourse is necessary just to get the descriptions of many phenomena in Chinese law right. The discourse has also blinded most legal scholars to vital legal developments and reforms actually taking place in China, such as the grant of greater legislative power to sub-provincial governments, and the centralization of the delivery of certain government services.

From a social scientific perspective, the arguments of this chapter offer fresh empirical as well as theoretical insights. Recognizing what an outlier China is (relative to the legal systems with which China is normally compared) in terms of legislative centralization and administrative decentralization should prompt a range of empirical reclassifications. Provincial policy-making, for example, should often be seen as centralized, not decentralized, policy-making. This chapter also opens avenues for new historical inquiries, e.g. into how the anomalous pairing of radical legislative centralization and radical administrative decentralization came about. More importantly, in terms of theorizing about legal systems, the connections I draw between federalism and the rule of law is based on the demand for and supply of legal rules and the relevant actors’ ability and incentives to acquire knowledge of legal rules. In analyzing how the rule of law has developed in China, I do not place specific institutions, such as courts or property right regimes, on a pedestal. While the study of Chinese law—and the study of legal systems in developing or transitional economies more generally—have traditionally dwelled upon these institutions,

⁴⁸ In contrast, Upham notes that ultra vires rules are not “law” but “order”, see Chapter [], pages [11-12].

it has been suggested recently that this approach is mistaken. Instead, legal theorists are now calling for explorations of the micro-foundations of the rule of law.⁴⁹ The arguments in this chapter can be seen as answering that call.

⁴⁹. Hadfield, “Microfoundations of the Rules of Law,” 22.