Introduction

After nearly four decades of changes and transformation of its economic, political and social systems, the People’s Republic of China (PRC) now clearly manifests its re-emergence as one of the most influential actors in global governance. Very far from Deng Xiaoping’s ‘low profile’ approach to foreign policy, the PRC appears as an increasingly influential actor in global governance building upon its unique experience of fast, deep and complex transformation.

China’s opening up and reforms policies as initiated by Deng Xiaoping at the end of the 1970s, and pursued by Jiang Zemin, Hu Jintao and Xi Jinping, have contributed to the transformation of one of the most ancient civilizations into a state of diversity and contrasts. Next to its numerous economic successes, most particularly in terms of taking more than half of its own population out of extreme poverty, China’s development model is also working as a huge laboratory with its own successes and challenges. While Xi Jinping has recently called for the ‘rejuvenation of the Chinese nation’ through the accomplishment of the ‘Chinese dream’,¹ China keeps struggling to balance the continuous search to make sense of China’s millennial tradition with the transnational dynamics of globalization in a state governed by a One-Party rule. In that context, many challenges remain ahead, such as political accountability, with the 87 million-strong Chinese Communist Party (CCP) whose factions do not always share the same ideology and interests; rising inequalities between the coast/centre and the more remote areas of the country, between the urban and rural areas, and between the ethnic majority and minorities; the environmental sustainability of China’s economic model; and the increasing dissonance between CCP ideology and the key values the PRC has decided to abide by at the international level and as part of its own domestic legal system.

¹ The concept of the Chinese dream was first introduced by President Xi Jinping in 2012, who currently puts it at the heart of most of his speeches. See Zheng Wang, ‘The Chinese Dream: Concept and Context’ (2014) 19 Chinese Journal of Political Science 1, at 1.
While the prospects for China’s future still remain very uncertain, China will be without contest a major influence in the decades to come. At the international level, China’s opening-up and reform policies have allowed the country to gain great influence through its membership in the main international organizations (i.e. United Nations Security Council, World Trade Organization, International Monetary Fund) and forums (i.e. G-20, BRICS, Shanghai Cooperation Organization), as well as through its growing interdependence with the various regions of the developed and developing world. China has come increasingly to recognize the importance of international organizations and is no longer suspicious about their utility. After having been a rule taker, China increasingly wishes to assume the role of rule shaper and even rule maker. Hence, China has recently launched a series of new global and regional frameworks to promote and defend its foreign policy objectives. These include the launch of the Belt and Road Initiative that should serve as a platform to enhance connectivity with the rest of Asia, Africa and Europe; the establishment of the New Development Bank (or BRICS Development Bank) and the Asian Infrastructure and Investment Bank (AIIB); the BOA Forum for Asia; and the Xiangshan Forum. In the words of Gregory Chin, this growing activism ‘has not been to defeat the original purposes of the global multilateral institutions or to destabilize the international system. It is, however, supporting a shift in the balance of global influence toward multipolarity’. China’s support for multipolarity has been central in China’s foreign policy since the 1990s and presents China as a rising power capable of shaping the United States’ unipolar moment.

It is against this background that this book focuses on one peculiar aspect of China’s governance and participation in global governance, which is the Chinese contribution to the rule of law and the international rule of law.

The rule of law is a principle of governance that defines the status of the law in the governance of a state as well as the relationship the government and its representatives should have vis-à-vis the law. While the rule of law principle finds its origins in European legal traditions (one...
often related to the mainstream traditions of the English Rule of Law, German Rechtsstaat, and French Etat de Droit), it has now become a principle at the very heart of many constitutions all over the world. China is no exception and has notably raised the ‘Socialist Rule of Law with Chinese Characteristics’ as a major rhetorical driver of its economic, political, social and legal reforms. The rule of law acted, in line with this, as the main theme of the Fourth Plenum of the 18th Party Congress in 2014. This annual meeting of the CCP is intended to set the political agenda and its priorities for the years to come. The focus on the rule of law during the Fourth Plenum testifies to the importance accorded to the rule of law in the rhetoric of the CCP. In that context, the rule of law appears as a relevant ‘benchmark’ to assess the evolution of the Chinese legal system.5

At the international level, the rule of law has also increasingly gained an important status across all fields of global governance from international development, international trade to international security. The best testimony to the growing importance awarded to the rule of law and the international rule of law relates to the adoption by the United Nations General Assembly (UNGA) of the 2012 High Level Declaration on the Rule of Law at the National and International Levels.6 Through its membership in the main international organizations, China influences the development of the international rule of law. As a Permanent Member (P5) of the United Nations Security Council (UNSC) and the second largest world economy, China especially impacts the development of the international rule of law in the fields of international security and international trade. It is in this context that this book will focus more particularly on the Chinese perspectives on the international rule of law in the fields of international trade and international security.

This book will address five research questions in particular. First, what is the rule of law and its relationship with the emergence of the international rule of law? This book aims to understand the relationship between the rule of law and the international rule of law. While the rule of law concept was originally developed in the context of domestic legal

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systems, recent attempts have been made to translate the application of the rule of law to the international level. Facing the very different nature of the international order, the study of the international rule of law requires taking into account the specificities of the international legal order, which is a system based on ‘sovereign equality’ but also the ‘practical inequality’ between states.

Second, what are the origins, characteristics and prospects for the ‘Socialist Rule of Law with Chinese Characteristics’? This book aims to provide a thorough introduction to the development and setbacks of the rule of law within China. The rule of law, as being developed (or underdeveloped) within the contemporary Chinese legal system, should indeed be approached as a home-grown concept that finds its roots in China’s legal tradition, legal history and the evolving economic, social and political conditions within China. This book therefore pays a particular attention to the extent to which the recent references made by the Chinese leadership to the rule of law actually translate into an effective reinforcement of the rule of law within China. Beyond the rhetoric on the ‘Socialist Rule of Law with Chinese Characteristics’, this book identifies the characteristics, shortcomings and prospects for the development of the rule of law within China.

Third, what are the Chinese perspectives on the international rule of law in the fields of international trade and international security? This book aims to analyse the origins, characteristics and prospects for China’s contribution to the development of the international rule of law. This book follows, for that purpose, the distinction endorsed by the United Nations (UN) since 2006 between the rule of law at the national and international levels. On the one hand, this book focuses on China’s concern to tackle rule of law shortcomings within states, more particularly in the context of post-conflict situations (rule of law at the national level). On the other hand, it explains the Chinese involvement in the

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enhancement of the rule of law in inter-state relations and the compliance of international organizations with the rule of law (rule of law at the international level). In order to perform this analysis, this book focuses on two case studies: the Chinese contribution to the international rule of law in the activities of the WTO and the UNSC. While China’s WTO membership (2001) was a key turning point in the strengthening of the international trade architecture, China’s P5 status enables it to influence the resolution of the major traditional and non-traditional security challenges. The findings on China’s contribution to the international rule of law in the fields of international trade and international security will enable us to come up with a comprehensive understanding of the specificities of the Chinese approach to the international rule of law.

Fourth, what are the prospects for the emergence of a consensus on the rule of law and the international rule of law given China’s own understanding of the concepts? The purpose of this book is finally to analyse the prospects for the development of an international consensus on the rule of law and the international rule of law, given China’s own understanding of these concepts. In a context where China has become increasingly vocal within the international arena, it remains to be seen to what extent the Chinese understanding of the rule of law and the international rule of law can act as a benchmark for the development of an international consensus. A particular attention will be devoted to the similarities and differences between the Western liberal democracies and Chinese approaches towards the rule of law and the international rule of law. In this respect, the analysis of the prospects and challenges for a dialogue on the rule of law in the context of the EU-China Strategic Partnership will help highlight the potentials and difficulties to engage China in the field of the rule of law.

On the basis of these four questions, this book will test the extent to which the Chinese perspectives and contribution to the international rule of law reflect the Chinese perspectives on the rule of law in its own

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domestic system. On the one hand, it could be argued that China defends a formal (thin) version of the rule of law and the international rule of law. China would defend a minimalist understanding of the rule of law that does not include any element of political morality, at the domestic, national and international levels. The ‘Socialist Rule of Law with Chinese Characteristics’ would be a system on its own which only tallies with a restrictive and selective understanding of the rule of law principle. On the other hand, contrary to the European Union (EU) which emphasizes the intertwinement of the rule of law with human rights and democratic principles, China would defend a view on the international rule of law that is directly linked to a strict protection of national sovereignty.

METHODOLOGY AND CONTRIBUTION TO THE ACADEMIC REFLECTION

Studying the Chinese contribution to the rule of law and the international rule of law constitutes certainly a challenge per se as the two concepts remain debated and sometimes even contested. While some will blame the rule of law for being a very abstract concept without a well-defined substance, others will point out the great difficulty, not to say the naivety, to think that this concept can be translated to the international level. This book appears to be very timely, however. The rule of law and the international rule of law have indeed come up at the forefront of the agenda of international organizations and states that do not especially share the same legal culture. Critical, comparative and interdisciplinary research on what the rule of law and the international rule of law actually mean in different national contexts is therefore of a great significance to identify new avenues for dialogue across legal and political systems. Such a dialogue will furthermore only be possible if one does not overlook the way China defines the rule of law and the international rule of law.

In addition to being timely research, this book fills a significant gap in academic literature. While most of the literature has focused so far on the development of the rule of law within China, very little research has been done on the Chinese contribution to the international rule of law.

11 See for the most comprehensive contributions to this field of research: Randall Peerenboom, China’s Long March Toward Rule of Law (Cambridge University Press, 2002); Suisheng Zhao, Debating Political Reform in China: Rule of Law vs. Democratization (Armonk Sharpe, 2006); Stéphanie Balme and
more particularly, in the fields of international security and international trade. Hence, the added value of this book pertains to the study of the interdependence between the Chinese perspectives on the rule of law and the international rule of law. One of the questions that this book will attempt to answer is whether the evolving perspectives on the rule of law within China inform China’s foreign policies that contribute to the international rule of law.

This book finally endorses a comparative approach, with regular references to the European and global perspectives on the rule of law and the international rule of law. As will be demonstrated, the current emphasis on the rule of law and the international rule of law in the rhetoric and policies of the Party-State sometimes finds an echo in, or contradicts, the renewed emphasis on the rule of law and the international rule of law at the European and global levels.

To reach these purposes, this legal research takes due account of the insights of other disciplines (i.e. legal history, legal theory, international relations and Chinese contemporary studies). Studying Chinese law and the Chinese contribution to the development of the international rule of law indeed requires a deep understanding of the political, social, economic and historical contexts in which they are taking place. Politics, society, economics and history are all closely intertwined dynamics that have an impact on China’s perspectives on the law and the roles it should play in its own internal and external policies.

The sources used in this book are as diverse as the approach tends to suggest. Starting from the analysis of the rule of law as a concept that has

Michael W. Dowdle (eds), Building Constitutionalism in China (Palgrave Macmillan, 2009); Weifang He, In the Name of Justice: Striving for the Rule of Law in China (Brookings Institution Press, 2012); John Garrick and Yan Chang Bennett (eds), China’s Socialist Rule of Law Reforms Under Xi Jinping (Routledge, 2016); Samuli Seppänen, Ideological Conflict and the Rule of Law in Contemporary China (Cambridge University Press, 2016); and Flora Sapio, Susan Trevaskes, Sarah Biddulph and Elisa Nesossi (eds), Justice: The China Experience (Cambridge University Press, 2017).


developed progressively across time and geography, this book will reflect upon legal history and the literature of legal theory to explain the emergence of a multiplicity of discourses on the rule of law. This book will then study national laws and regulations, in particular Chinese laws and regulations, in order to substantiate the formal and substantive components of the rule of law within different contexts. Given the nature of China’s political system, this book will also include an in-depth analysis of the Party-State’s rhetoric and documents in order to account for the prospects and inevitable limitations for the development of the rule of law within China, as well as for China to support the development of the international rule of law. The two case studies will finally require delving into sources of international law and more particularly WTO law and UNGA and UNSC Resolutions. The first case study will mobilize aspects of WTO law that pertain to the accession and activities of China in the WTO. It will also require an analysis of recent trade disputes and their legal implications. The second case study will more particularly focus on UNSC Resolutions that include a strong rule of law dimension, and therefore contribute to the UNSC rule of law activities in global security governance.

SUMMARY OF THE MAIN CHAPTERS

This book is divided into six chapters. The first chapter defines the concept of the rule of law as a regionally/country situated principle. After a detailed analysis of the origins of the rule of law in the European legal traditions (i.e. English Rule of Law, German Rechtsstaat and French Etat de Droit), it analyses the progressive emergence of a consensus on the importance of the rule of law, as best demonstrated by the numerous references to the rule of law within constitutions all over the world. This chapter also addresses the main critiques against the rule of law principle. These critiques pertain to the conceptual weakness of the rule of law as well as the very elusive nature of the consensus around it. The rule of law indeed acquires a very different meaning depending on the political regime and legal tradition concerned. In order to fully grasp this diversity, this chapter will make references to the literature that draws a distinction between formal (‘thin’) and substantive (‘thick’) versions of the rule of law – a distinction that will prove to be very useful in understanding the rule of law as a home-grown concept.

The second chapter focuses on the international rule of law concept per se. In the first part, it explains the theoretical, legal and political challenges to translate the reflection on the rule of law from the national
to the international level. This difficulty relates primarily to the very
different nature of the international legal order when compared with
national legal orders. After a detailed literature review on the inter-
national rule of law, this chapter will focus on the UN initiatives and
highlight the actual scope and inherent limitations of the emerging
consensus on the rule of law and the international rule of law.

The third chapter provides an introduction to the development of the
rule of law within China’s domestic legal order. After a brief introduction
to the history of the Chinese traditional, or pre-modern, legal system and
its main philosophical fundamentals, this chapter focuses on the roles
played by the law in the process of economic and political reforms after
1978. It will be argued that the strengthening of the legal system through
the enactment of numerous new laws, the strengthening of judicial
capacity, as well as the rise in people’s legal awareness, has acted as a
premier driver of the Chinese development model. In the same line, this
chapter also provides a summary of the various sources of inspiration that
gave the contemporary Chinese legal system its own specificities. Despite
the tremendous progress made in the last four decades, the Party-State is
still very far from becoming a fully-fledged rule of law system. In
addition to the recurrent challenges that the Chinese legal system is still
facing today, particular attention will be devoted to the significant
discrepancies that exist when comparing the Party-State’s rhetoric on the
rule of law with some recently adopted policies, including the numerous
crackdowns targeting human rights activists. On the basis of the existing
literature in the field, the chapter concludes that China’s commitment to
the rule of law remains limited in a context where the Chinese legal
system develops at multiple speeds as a function of the CCP’s own
interests.

The fourth chapter focuses on the Chinese contribution to the inter-
national rule of law in the field of international trade. After a thorough
presentation of the implications of China’s accession to the WTO, the
chapter emphasizes the specificities of China’s accession conditions. It
will be argued that China’s accession commitments, as included in
China’s Accession Protocol, were very stringent and still have a strong
hold on China’s actions and leverage within the WTO. The chapter will
then turn to China’s participation in the WTO Dispute Settlement
Mechanism (WTO DSM). After a period of passive learning, China has
arguably become an active litigant which has gained the capacity to use
the WTO DSM as a central avenue to defend its international trade
interests. The analysis of two recent cases, namely China—Raw Mater-
ials and China—Rare Earth, will demonstrate that China’s experience
with the DSM tends to reinforce the international rule of law in the field
of international trade. Nevertheless, the heritage of China’s accession protocol as implemented by the WTO Dispute Settlement Body (WTO DSB) in these two cases might constitute a challenge to some important aspects of the international rule of law, primarily the equality of states before international law.

The fifth chapter concentrates on China’s contribution to the international rule of law in the activities of the UNSC. It starts by explaining the history of China’s participation in the UNSC, as well as the use it has made of its veto right since its recognition as a P5 Member back in 1971. The chapter will more specifically focus on the importance of sovereignty and non-intervention in the rhetoric and practice of China in the UNSC. Afterwards, the chapter will turn to the rule of law dimensions of UNSC activities. It will be argued that the UNSC contributes to the international rule of law through the creation of rule of law missions, its (quasi-) legislative practice, and international adjudicative practice. Whether China contributes or challenges these various dimensions of the UNSC rule of law activities is the next focus of this chapter. It will be argued that despite China’s proved flexibility in some recent international crises (e.g. the Libya crisis), China’s rhetoric and practice still place sovereignty and non-intervention at the heart of China’s foreign policy doctrine and therefore impede the development of some aspects of the international rule of law.

The sixth chapter builds on the conclusions of the two case studies and aims to summarize China’s perspective on the international rule of law. In an attempt to test our two research hypotheses, this chapter questions the relationship between the rule of law and the international rule of law from a Chinese perspective. It will be argued that China’s commitment to the international rule of law tends primarily to support a ‘thin’ version of the international rule of law and may support the development of a new type of ‘thick’ international rule of law based on an emphasis on sovereignty and non-intervention. It will be concluded that the Chinese perspectives on the rule of law at the national and international levels might prove to become increasingly appealing for states who want to depart from the Western values-based international diplomacy. The difficulties the EU encountered in launching a rule of law dialogue with China will here be taken as an emblematic example of the difficulties for external (Western liberal democratic) actors to engage China in the field of the rule of law and the international rule of law.

Chinese perspectives on the international rule of law