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China on the Horizon: Exploring Current Legal Issues, 28 J. Marshall L. Rev. 639 (1995)

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BOOK REVIEW

CHINA'S INTERNAL DEBATE

PRESTON M. TORBERT*

CHINA'S STRUGGLE FOR THE RULE OF LAW.

By *Ronald C. Keith*. ** St. Martin's Press, 1994.

The rule of law in China has long been of interest to students of law, Chinese history, and politics. Increasingly, it is also of interest to foreign corporations trading or investing in China. A recent *Wall Street Journal* editorial commenting on the United States' threat to impose sanctions on Chinese exports because of China's failure to enforce intellectual property rights, stated that this "pragmatic approach may, in the end, prove the better way to teach China to respect the rule of law. American companies that worry about missing the boat in China should keep in mind that there won't be much of a boat to miss until China gets serious about legal rights."¹ Accordingly, Ronald Keith's recent book regarding China's efforts to move towards a rule of law should find a broad audience.

The author's perspective on the rule of law in China is refreshing and well-argued. Although Ronald Keith is a Professor of Political Science, the scope of his book goes beyond political science to employ comparative legal theory, Chinese history, and Chinese legal tradition to analyze the rule of law in China. Individual chapters treat a wide range of issues related to this broad topic, such as human rights, civil law and civil society, ownership rights, criminal law, and the future of Hong Kong. While he is not unaware of the Western legal tradition's underlying concepts of the rule of law and human rights, he places his primary emphasis on the internal debate within China on the problem of the rule of law and related issues.

Analyzing this internal debate, Professor Keith concludes that "substantive progress" has occurred even within the limitations and self-contradictions of contemporary Chinese political

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1. *Review & Outlook: Mickey Mouse at War*, WALL ST. J., Feb. 6, 1995, at A12.

leadership.² He apparently disagrees with the views of another student of China's legal system, Professor James Feinermann of Georgetown University Law Center, who believes that the rule of law is not really viable in China until the Party's all-inclusive leadership is dismantled. Professor Keith seems to reject both the "iron law of Leninist monocacy" which discounts any suggestion of East-West post-industrial convergence and the assumption of the immutability of the Leninist state and its inability to achieve the attributes of modernization.³ Individual readers will have to judge for themselves whether the changes which Professor Keith describes are "substantive progress" towards the rule of law or whether they are insignificant exceptions to a system characterized by the dictatorship of the Communist Party.

Professor Keith's description of the changes in China's legal philosophy and legal system over the last fifteen years provides a picture of developments not well-known outside of China. He notes at a number of points the irony that, although there has been great Western interest in the legal protection of human rights in China, Western scholarly coverage of the internal Chinese debate on the position of law in Chinese society and politics has been very modest. This book will help to redress, to a certain degree, this imbalance between the interest of Western observers in the rule of law in China and the energy they have spent in trying to understand China's concrete efforts to move towards it. The book also provides interested foreign observers with a good introduction to the ongoing discussion within China as to the contradictions between Communist Party rule and the rule of law in a number of different areas.

In describing China's legal and political reforms over the last fifteen years, Professor Keith makes a number of points that are essential to understanding China's struggle for the rule of law. Although his conclusions on some of these points may be overly optimistic, his arguments are important. Certain points which Professor Keith makes are outlined below.

First, China's struggle for the rule of law had primarily domestic origins. As a reaction to the Cultural Revolution, the Communist Party determined to create a "rule of law state" as early as December, 1978. It was not the Chinese people or the intellectuals that initiated the internal debate regarding the rule of law; it was the Party which wanted to use the law in a new institutional strategy of checks and balances to prevent arbitrary government based upon extremist class politics. In this context, Professor Keith sees the trial of the Gang of Four of late 1980 and early

2. RONALD C. KEITH, *CHINA'S STRUGGLE FOR THE RULE OF LAW* (1994).

3. *Id.* at 211-12.

1981 not just as a show trial, but as politically significant in its recognition of the need to deal with factional criminal behavior "according to law."⁴

Second, in the debate concerning the rule of law in China, the position of the traditional Legalist school of "rule *by* law" as opposed to "rule *of* law" has been explicitly rejected. Although there are conservative elements in the Party which view law as an instrument of the Party and the government, in Professor Keith's view, the Party leadership has formally endorsed the rule of law as opposed to rule by law.

Third, while the Chinese adoption of the concept of "rule of law" corresponds to that of Western tradition in many respects, there are two specific aspects of it which, according to Professor Keith, differ in China. The current Chinese view of "rule of law" does not include the separation of powers. In China, an alternate theory, that of "the unity of legislature and administration," prevails.⁵ In this system, there is supposedly both a functional differentiation among the legislative, administrative and judicial powers and a cooperative unity ensuring the dominance of legislative power over administrative and judicial powers. Further, the Chinese rule of law includes a different conception of judicial independence. In China, it refers to the elimination of the Party's political influence in actual judicial decisions rather than in general policy direction of the judicial system.

Fourth, although for many years, China had rejected the concept of human rights, it reversed its position in 1990 and accepted the term, but expanded it to include not only civil and political rights, but also economic, social, and cultural rights, such as the right to independence, subsistence, and development.

Fifth, the crushing of the student demonstrations at Tiananmen was a setback to the rule of law in China, but was not sufficient to seriously undermine the legal reforms of the 1980s or close off the debate on the rule of law. In Professor Keith's view, "in the Western media, the Tiananmen event achieved the distorted proportions of an all encompassing historiographical interpretation which obscures substantive legal reform and the real underlying dimensions of change within contemporary Chinese society and politics."⁶

Sixth, in China's efforts to define and protect ownership rights, it has proceeded more cautiously than Russia has and has gradually recognized newly emerging interests. This effort has pushed up against the limits of traditional ideology, but has not mounted a final frontal challenge to the existing political order.

4. *Id.* at 12.

5. *Id.* at 83.

6. *Id.* at 87.

This, in Professor Keith's opinion, is part of a "credible ongoing attempt" to create the rule of law.⁷

Seventh, in the 1980s, China's leadership pressed ahead with fast-track legislation that was ahead of society's legal consciousness. Deng Xiaoping settled all debate on this issue with his practical admonition that "law is better than no law, faster [law making] is better than slower [law making]."⁸ This is one example of the pragmatic view of law that reflects not only the view of Mr. Deng, but of many others, not just Party conservatives. Professor Keith does not address the implications of this view of law. Another scholar has stated that "If China expects to develop a lasting legal order, it must abandon pragmatism as it exists today The continued pursuit of a purely pragmatic approach may have appeal in the short run . . . but in the long run, it will undercut the goal of building a stable legal order."⁹

One area in which Professor Keith finds it more difficult to adopt an optimistic or positive stance is in the area of criminal law. He notes that the Western human rights offensive has often focused on China's death penalty, political crime, administrative detention, and the explicitly circumstantial application of criminal law punishment in the violation of the rights of the individual citizen. While Professor Keith examines this focus in regard to the crime of counter-revolution and serious economic crimes, his main points are that counter-revolution has declined as an important aspect of criminal law and that the nature of crime has changed under China's economic reforms. He concludes that, while one cannot discount the growing significance of Western influence on Chinese legislation, "there is obviously a Chinese dimension to the Chinese effort to ensure social control in this difficult period of societal transformation. The focus on assuaging public indignation is an ongoing cultural factor . . . and it is difficult at this stage to gauge accurately the extent to which this perspective ranges beyond the law-and-order mind set of the political leadership to find sympathetic support throughout changing contemporary society."¹⁰

Although Professor Keith is generally favorable in his description and conclusions regarding China's struggle for the rule of law, he does recognize some specific limitations. The law, for example, is not applied to China's leaders. To illustrate this he describes an incident in 1991 in which the failure of Deng Xiaoping's limousine to grant the right of way to an ambulance

7. *Id.* at 141.

8. *Id.* at 20.

9. Yu Xingzhong, *Legal Pragmatism in the People's Republic of China*, J. CHINESE L., Summer 1989, at 50.

10. KEITH, *supra* note 2, at 180.

led to an accident. Subsequently, the ambulance driver, not Deng's driver, was punished. Other examples of more interest to the foreign legal and business community, but not covered in this book, would be the application of the law to the "princelings," relatives of Deng and other senior leaders who occupy important positions in key units in China, or to political succession. Professor Keith believes that China's leadership has abandoned the concept that the Communist Party's policy is the "soul of law" (i.e., its policy takes precedence over law), but some might view the failure to apply the law to China's leaders as an indication that this concept has not been abandoned.

Professor Keith's book is a broad-ranging and helpful introduction to the issue of the rule of law in contemporary China. It provides a good overview of this topic in a number of different respects. Lawyers and business executives engaged in trade and investment in China will find it useful, but will not find any substantive discussion of the rule of law as it applies to the experience of foreign companies in China in joint ventures or other projects. Nevertheless, the principles that can be discerned from China's experience in the areas covered by Professor Keith's book will be instructive. As Keith states, "Ultimately, the interests of the foreign investor . . . are entwined in the overall project to create what one observer so awkwardly described as an 'economic rule of law system engineering.'"¹¹

11. *Id.* at 142.

