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Kevin J. O'Brien

Modern China 2010; 36; 79 originally published online Nov 19, 2009;
DOI: 10.1177/0097700409347972

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36(1) 79-86

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DOI: 10.1177/0097700409347972

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Kevin J. O'Brien¹

Abstract

Common features of the articles by Xueguang Zhou and Jiang Shigong include attention to governance rather than reform or regime change, to informal as well as formal rules, and to practice over texts. The articles differ mainly in their level of abstraction and the reach of their findings. But even here, Zhou's "organizational practices" are essentially micro-level variants of the broader, constitutional principles that Jiang explores. Both authors make a persuasive case that there are abiding rules that pattern behavior between Chinese political elites, though what these rules are, and what distinguishes constitutional principles from other institutions (and temporary political compromises), await further study.

Keywords

implementation, cadre responsibility system, goal displacement, collusion, constitution, people's congress, democratic centralism, Hong Kong Basic Law

The articles featured in this issue focus on the here and now and have refreshingly little to say about reform or systemic change. For Xueguang Zhou and Jiang Shigong, the key question is "How is China governed?" rather than "Is regime change coming?" or "Will China become democratic?" or even "What is the future of political reform?" Both authors examine administrative practices closely and seek to uncover some of the rules of the game that shape Chinese politics. What they find is that much of the action nowadays

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is transpiring inside the state and that governance depends on countless accommodations among the powerful, both at different levels and within each level of the party-state.

In particular, Zhou and Jiang home in on the policy process and the formal and informal rules that structure it. Much like Dicey and Wheare, they consider a political system to be composed not only of laws and regulations but also of conventions, understandings, habits, and practices. At every step, they emphasize how China is governed rather than how top leaders or the constitution say it should be governed. Zhou could be speaking for Jiang when he draws attention to “informal but highly institutionalized practices” that are taken for granted and seen as appropriate and legitimate. Both authors stay close to the ground throughout while plumbing open secrets of Chinese politics and striving to reorient scholarship away from dead ends and unrealistic expectations. They highlight “common knowledge”—the National People’s Congress (NPC) is beholden to the party, the party constitution is more important than the state constitution, local officials often find it necessary to shift funds from one pot to another—and remind researchers that this is where their inquiries should start. The authors differ mainly in their level of abstraction and the reach of their findings. But even here, Zhou’s “organizational practices” are essentially micro-level variants of the broader, constitutional principles that Jiang explores.

The two articles share another trait: they are written as contributions to the disciplines (organizational sociology and constitutional law) as well as to China studies. Important phenomena in China are addressed, but as a case in the sense that social scientists use the term. Zhou and Jiang thus raise crucial questions about the role of area studies at a time when the disciplines command much attention, especially from younger scholars (and their employers).

Zhou and Local Collusion

At the heart of Zhou’s analysis lies a tension between “good” flexible implementation and “bad” goal displacement. Though he sometimes presents local collusion as an “organizational failure” and an example of distortion, evasion, or sabotage, Zhou’s story is better understood as an apparent divergence that is not a divergence. Collusion between local officials and their supervisors is open and institutionalized. Strategic alliance formation is an indispensable response to directives and frequent inspections in a sprawling, centralized polity in which superiors motivate their underlings with high-powered incentives. Delegation, discretion, and flexibility are supported by an “institutional logic” and governance would cease without them.

One implication of this reading of Zhou is that the large literature on weak policy implementation in China is misdirected. Students of Chinese politics often take the center's words too seriously when it announces its intent to implement an impossibly wide range of impossibly ambitious policies, insofar as the system of rule depends on many instructions being ignored (with impunity). It is not that authorities at higher levels cannot measure evasion (O'Brien and Li, 1999); or that they only seek to have priority assignments attended to and do not incentivize local cadres to complete other tasks (Edin, 2003); or that performance measures must be repeatedly fine-tuned to induce subordinates to pursue multiple tasks and reduce moral hazard problems (Whiting, 2004); or that cadre responsibility systems conflict with legal norms that have been propagated since the late 1970s (Minzner, forthcoming). Instead, collusion between officials and their immediate superiors is absolutely necessary to rule. Examples here include transferring money from one budget line to another, gift giving at holiday time, and buying off subordinates or bosses who can block needed projects. "Coping strategies" such as these, and tacit acceptance of local conspiracies and cover-ups, do not subvert the system of rule: they are the system of rule, or at least the grease that makes governance work.

Yet, at the same time, Zhou remains troubled by goal displacement. He suggests a distinction between flexibility by purposive design, flexibility by unintended design, and flexibility by special interests. Whereas flexibility by special interests, which amounts to corruption, is certainly dysfunctional and undesirable, the difference between the other two may not be as great as Zhou implies. In fact, it strains credibility to think that Beijing does not recognize the institutional logic that Zhou has identified, or that it has not long ago learned to live with (and expect) many types of "illicit" policy variation at lower levels. The notion of design and its purposefulness, in other words, should not be reified. Zhou is correct that the three types of flexibility are often mixed together, and it is nearly impossible to encourage only "good" flexibility while eliminating "bad" flexibility.

This has implications for researchers. If, like China's leaders, scholars accepted that policy misimplementation is baked-in and normal, this would reduce a tendency to demonize local cadres (who have taken much criticism over the years) (O'Brien and Li, 2006) and enhance understanding of the pressures they and their superiors face. It would also encourage more attention to unrealistic policy targets and intense, almost irresistible incentives, which virtually guarantee that a gap between official goals and ground-level practices will open up. Though Zhou's unabashedly institutional analysis downplays out-and-out greed and other sources of pervasive corruption, this is compensated for by illuminating an otherwise puzzling outcome: a centralized,

high-capacity regime that often cannot ensure downstream implementation (and sometimes does not try to).

The conclusion that emerges is that it is challenging to be an authoritarian leader in a far-flung, centralized polity like China's, but not as challenging as outside observers have made it seem. Policy formulators know that only some portion of what they instruct subordinates to do will happen, and ratcheting up pressure periodically (e.g., during prostitution clean-ups, anti-piracy campaigns, or food safety sweeps) is designed to limit collusion, not put an end to it. Furthermore, ridding the system of collusion may not be desirable, even if it were possible. A fair number of local conspiracies increase social welfare and are "effective adaptive strategies" that enable grassroots officials "to get the job done."

Jiang and China's Constitution

Jiang's article is first and foremost a critique of formalism. He adeptly draws readers away from the standard question "Is the state constitution 'fake' or 'widely abused'?" to the more pressing issue of what China's constitution is. Although he spends some time parsing texts, and is a mite defensive on topics such as international involvement in the spread of constitutions, he avoids simply echoing the party line or rehearsing tired formalities that everyone knows are untrue. His main interest is practice rather than textual exegesis and his "empirical-historical perspective" reflects a social scientist's hunch that there are foundational principles (institutions, rules, conventions) that pattern political behavior in China at a very deep level. Like Zhou, Jiang's concern is how China is ruled rather than how certain documents claim it is ruled, and his plea to "step down from the clouds of metaphysics and ideology and go deeply into China's political reality, history, and cultural traditions" should be a wake-up call for any legal scholar or political scientist who still conducts research closer to the stratosphere than the ground.

Jiang highlights four aspects of the regime and four sources of China's unwritten constitution. The "living, effective" constitution is composed of the party constitution and certain conventions, doctrines, and statutes. It is exemplified by a set of institutional relationships: that between the party and the NPC, the state chairman and other power holders, the center and local governments, and Beijing and Hong Kong under the Basic Law.

Jiang's account of people's congresses unpacks the "interactive connection between the party and the state" and is instructive. But it is also too dismissive and too gushing. On the one hand, his claim that the NPC deputies are democratically elected sounds like it fell out of a misleading

constitutional law treatise of the sort that Jiang criticizes. His treatment of legitimacy is also problematic. That the party represents workers and peasants and “enjoy[s] the support of the masses” by virtue of its “political ideals, historical mission, and class interests” is unpersuasive and neglects the fact that acquiring and retaining legitimacy are not one-time undertakings, but tender shoots that must be cultivated day after day.¹ Although recent surveys have indeed shown high levels of support for the party (Chen, 2004; Tang, 2005; Kennedy, 2009), the sources of this support are not as distant or unfalsifiable as Jiang suggests.

At the same time, Jiang downplays the potential of people's congresses more than is deserved. Yes, the NPC has appeared sleepy and handcuffed of late, and Jiang is right to dismiss the fictions that the NPC can decide whatever it wants and that the state constitution is more significant than the party constitution. But as two recent books have shown (Cho, 2008; Xia, 2008), much is afoot with local people's congresses (LPCs). While representation has not improved markedly, lawmaking and oversight have been transformed, and LPCs play a growing part in the local policy process. Energetic LPCs are not a “rival show” or Jiang's “rubber stamp,” but partners in governance that offer a venue for interested parties (mostly within the bureaucracy) to hammer out compromises (O'Brien, 2009). Administrative reforms are reshuffling power relations and altering where politics takes place. Ties between party committees and local congresses have become more complex than ones of leaders and led, and either-or choices between cooperation and confrontation, deference and feistiness, are regularly finessed. If Cho (2008) and Xia (2008) are on the mark, LPCs (at least) are not fated to be rubber stamps under China's unwritten constitution. “Multi-party cooperation” offers room to operate, and by focusing on the NPC at a particularly quiet time, Jiang has not fully explored the role that legislatures can play under party leadership.²

The position of state chairman is an unexpected choice as an element of China's constitutional order. But it is an excellent vantage point from which to view the balance that has been reached between personalistic and institutionalized rule. The history of the state chairmanship that Jiang presents is multilayered and fascinating, and one might only point out that it tells a story of fluidity and change as much as of continuity and constraints on behavior. Jiang's account also raises questions about the sources of constitutional change, other than the whims of top leaders, and some will read the many ups and downs of the head of state as proof that political maneuvering counts for all, and China does not have a constitutional order. I think this is mistaken, and if the current arrangements surrounding the state chairmanship persist (as Jiang predicts), Jiang will be proven correct.

Hierarchy and democratic centralism have long been considered essential features of the party-state. Jiang's contribution is to address how a political system with strong local governments retains a highly centralized character. Once again, the authority of party committees at all levels is key, and government organs and people's congresses are distinctly second (and third) fiddles. Power is integrated and flows from the center. Despite "consulting to settle the matter" and periodic efforts to expand local initiative, excessive conflict is avoided because separation of powers and checks and balances are not on the table. For Jiang, party primacy and discipline sit at the heart of China's unwritten constitution, and the possibility that the party could be an extraconstitutional force is effectively precluded. (Some may wonder if there is anything that the party or central authorities could do that is unconstitutional.³) The localities (and the government and people's congresses) have limited autonomy by design, and initiative from below occurs mainly during implementation. Mao may have called for greater local say in his speech "On the Ten Major Relationships," but the structure of power, even after Deng's decentralizing reforms, works against it.

The last feature of the living constitution that Jiang examines is the Hong Kong Basic Law. He conceives of it as a treaty-like agreement between two nations that establishes special rules that apply only in one region. This seems sensible. Constitutions may have inconsistencies, and if they do not, interpretation will soon introduce them. That the governing principles of one region differ from those in the rest of the country is perhaps unconventional, but not unknown in the annals of constitutions that apply differently (or not at all) in colonies or territories. Constitutions can abide discrimination. One set of rules can hold in capitalist Hong Kong and another in postsocialist China. That it is necessary for Hong Kong to have an "executive-led political system" rather than a "legislature-led system" is, however, less obvious. This was a choice made for political, not constitutional, reasons. If there were more "patriots" in Hong Kong, it would not have been "necessary."

Three final points: Jiang's article is reminiscent of earlier Chinese scholarship in one way: late in his article, tucked in the middle of a paragraph, a radical proposal appears. The whole people should be involved in, and agree to, any modification of the party constitution. Equally striking, Jiang's historical sweep leads to more attention to Mao Zedong as a continuing influence in Chinese politics than might have been expected. Particularly, given the massive changes since his death, Mao's imprint on China remains outsized, even in a constitutional-legal realm that he often disparaged. Lastly, Jiang's article, like Zhou's, is a contribution to the study of China's political institutions because he makes a persuasive case that there are long-lasting rules that pattern behavior between elites, though what these rules are, and

what distinguishes constitutional principles from other institutions and temporary political compromises, await further study. We can only hope that Professor Jiang, his students, and other constitutional scholars take this inquiry the next step forward.

Declaration of Conflicting Interests

The author declared no potential conflicts of interests with respect to the authorship and/or publication of this article.

Funding

The author received no financial support for the research and/or authorship of this article.

Notes

1. On political legitimacy in contemporary China, see Schubert and Chen (2007), Schubert (2008), Gilley (2008), and Gilley and Holbig (2009).
2. For a forceful rejection of the view that the NPC is a "rubber stamp," see Tanner (1999). O'Brien (1990) and Dowdle (1997) also find this term unhelpful.
3. Of course, the presence of unfunded mandates and state governments raiding local coffers (as is happening in California in 2009) reminds us that top leaders, be they in unitary or federal states, authoritarian or democratic systems, are often tempted to infringe on local autonomy and prerogatives.

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Biography

Kevin J. O'Brien is Alann P. Bedford Professor of Asian Studies and Professor of Political Science at the University of California, Berkeley. His books include *Popular Protest in China* (2008), *Rightful Resistance in Rural China* (2006) (with Lianjiang Li), *Engaging the Law in China: State, Society, and Possibilities for Justice* (2005) (with Neil J. Diamant and Stanley B. Lubman), and *Reform Without Liberalization: China's National People's Congress and the Politics of Institutional Change* (1990, 2008 paperback).