

Chinese Legal Culture During the Reform Era

Shiping Hua, The University of Louisville¹

Legal systems in different countries reflect local characteristics. Former U.S. President and scholar Woodrow Wilson remarked that the same laws can hardly be applied to all nations, because every nation has its unique laws which were developed along with its national characteristics.² But the Chinese case is probably more unique than many other countries in the world. In the observation of Pitman A Potter, modern liberal legal norms constitute a belief system driven by historical conditions of socio-economic and political relations in Europe and North America. This is essentially one-way direction by which these norms are disseminated around the world and it reflects the imbalances in political and economic power between developed and developing economies that characterize the current dynamic of globalization. "In the case of China, however, the effects of globalized legal norms are confronted by powerful forces of local culture."³

Sure enough, in the last 60 years, China's legal system has evolved along a path which differs not only from the model of the former Soviet Union, but also that of Western countries. Before the start of the reform in 1978, China had not developed a comprehensive legal system, unlike the former Soviet Union and other Eastern European communist countries. Instead, China did not emphasize rule of law at all. In the post-Mao legislative reforms, China has not totally copied its legal system along the line of Western countries, but instead, has developed along an unique path.

This essay argues that Chinese legal culture in pre-modern times still impacts the legal culture now. The separation between moral issues and legal issues is not clear. The legal system is viewed not as a channel to adjust human relations, but as a tool for penalty. The separation between administration and the legal system is not clear. China's legal system is still viewed as a tool to carry out the policies of the Chinese Communist Party. The format of this essay follows the following questions: What are some of the major changes that have taken place in China's legislative system? What are the challenges that China faces in furthering the reform? What are some of the origins of the current problems in the country's legislative system?

After the establishment of the state socialist system in mid 1950s, China had relied mainly on party leadership and campaigns such as the Great Leap Forward in 1958 for governance, not the legal system.⁴ Lawyers were abolished in 1959. Then, it was the disastrous Cultural Revolution from 1966 through 1976 during which the weak legal system was suspended altogether. Actually, one of the first victims of the Cultural Revolution, Beijing Mayor Peng Zhen, fell from power precisely because he advocated the idea that everybody is equal before the law. The Maoist logic for being against the rule of law is that this concept was not useful for equality.⁵

Tremendous social changes have taken place in China in the last three decades, not only in economics, but also in politics, because the two cannot be separated in any rigid way. Unlike the economic changes, however, these political changes are less visible. The most profound political changes have often occurred at the margin of the country's political power. In terms of institutions, it is the legislature, not the party, where more reforms have taken place; in terms of the hierarchical structure of power, more political changes have taken place at the lower level, such as villages, towns, districts (divisions within cities), and counties instead of the central government; in terms of geographic locations, more political changes have taken place outside of the nation's major centers of Beijing and Shanghai, in places like Guangdong or Fujian. This situation reflects the regime's general policy orientation in the last three decades: The consideration for stability overrides all other considerations.

As a response to the Mao era, one of the first moves taken by the post-Mao regime was to restore the country's legal system. Top leaders of the National People's Congress (NPC), such as Peng Zhen, Qiao Shi and Li Peng all emphasized rule of law.⁶ The emphasis on rule of law was not only a natural response to the lawless Cultural Revolution, it also served the vested interest of some important leaders of the post-Mao regime. Many leaders within the NPC system are senior leaders and the emphasis on legislation strengthened their own political power.⁷ In addition, unlike other possible areas of political reform breakthroughs, such as elections, especially at the top level, rule of law does not pose a direct challenge to the leadership of the party. Furthermore, the post-Mao reform called for trading with other countries and the emphasis of rule of law will encourage foreigners to invest in China. Currently, about 70% of China's GDP is related to foreign trade.

Against this background, from 1979, immediately after the start of the reform to the beginning of 2009, NPC and its Standing Committee made 229 laws. In accordance with the laws at the national level, the State Council made about 600 regulations and policies and the local People's Congresses made over 7,000 local regulations during the period.⁸ Many people in the West know that China has experienced double digit growth in economics in the last three decades. Few of them know that China has had double digit growth in legislation as well.⁹

The direction to which legislative reform moved was from emphasizing economics only, to comprehensively covering such areas as culture, medicine, environment, etc.. This tendency reflected the fact that at the beginning of the reform, the government emphasized almost exclusively on economic development. As the reforms deepened, they gradually spread into other areas. The legislative reforms also experienced the process from emphasizing legislation at the central government level to the levels of province, municipalities, and autonomous regions. This reflects the gradual decentralization of power of the country during the reform period. In addition, the legislative reforms have processed from mostly emphasizing social control, to rights protection of the individuals. This shows that the Chinese society has become more pluralistic and individual rights have become increasingly respected. Furthermore, the

law making process has also become more and more open. China has increasingly paid attention to not only make laws, but also abolishing laws simultaneously.

Some scholars attributed these changes to the political changes taken place in the last three decades in general. According to one such interpretation, the political trend of China since 1978 has been moving towards more liberalization and real progress has been made. First, Chinese politics no longer relies solely on the policies by the party, but increasingly relies on rule of law. Second, Chinese politics no longer follows the logic of orthodox Marxism, that is, class struggle is the key in understanding human society. Instead, people have started to realize that politics is a matter of interest adjustment among different people. These two points are very similar to that of Western society. These scholars also believe that theory building in legislation has become more sophisticated.¹⁰

During the reforms, China's legislation has borrowed a lot from foreign countries, especially from the United States. This is especially true in such value-neutral areas as food safety and water pollution. For instance, out of 22 major laws that it adopted from 1982 to 2000, China borrowed from the United States in 17 of them.¹¹ A Western author observed, "most of the legal forms, structure and terminology currently used in China derive from concepts of European and North American liberalism."¹²

Open door legislation started in the mid 1990s and in 2008, the government made it a principle by saying that generally all bills proposed by NPC will be made public. Such mechanisms as letters from the people and public hearings have received increasing attention by authorities.¹³ In addition to choice, openness is another hallmark of western legal culture.¹⁴

However, the move towards liberalization in legislation was not linear. In response to the 1989 Tiananmen Spring, legislation moved backwards towards the pre-reform period in that laws were considered related to "class," that is, the dominant capitalist uses laws to oppress the working class. By the mid-1990s, however, things started to relax in the sense that the discourse of legal reform recognized changing socio-economic conditions and posited a civil legal culture that suggested limits to intrusion by the state.¹⁵ This trend continued until the end of the 1990s. Nevertheless, in 2000, the Legislation Law of the PRC, enacted at the 3rd session of the 9th National People's Congress drew back significantly from the principles of democracy and openness.¹⁶

The Chinese borrowing from western countries is not total copying. Although Western influence on China's legislation was essential, its operations still reflect the influences of local legal culture.¹⁷ The development of the Chinese legal system during the reform era "has reflected a process of selective adaptation, by which borrowed foreign norms about law and legal institutions have been mediated by local legal culture."¹⁸

Because of this situation, some Chinese scholars were pessimistic about the country's legal reforms. Chinese scholar He Qinhua lamented, "since 1978, legal reforms have remained institutional, not cultural... Institutionalized legal reform is 'decoration,' In

reality, it is still rule of man, not rule of law. Many Chinese laws are too general to follow... The root of the problem that laws cannot be properly executed is cultural.”¹⁹

China is indeed still struggling with some serious difficulties in legislative reforms. These difficulties largely fall into three categories: (1) Institutionally, the relationship between the state and legislature is not clear. (2) Culturally, both the elites and the masses don't expect much from the legal system. (3) Operationally, some legislative bodies, especially at the local levels, perform poorly because of technical difficulties.

The legal system and administration are not separated but under the united leadership of the party. Actually, one of the major theoretical debates regarding China's legal reform during the post-Mao era was: “Who is bigger, the law or the party?” The official explanation is: The party leads the people to make laws and then the party will abide by these laws. But in practice, the answer was not that easy. The relations between the Party and Congress were not clear at the very top.²⁰ There is always a party secretary who is in charge of “politics and legal matters,” (zheng fa shuji). Even China's higher education reflects this. The Chinese University of Political Science and Law, (Zhongguo zhengfa daxue) focuses on both political science and legal studies, implying that these two cannot be separated. Sometimes, the language of law is made vague on purpose so that people can get away with it.²¹ In terms of the selection of deputies, nominations of the candidates are still largely controlled by the party. In a sense, the voters have some influence in rejecting some of the candidates whose nominations are either made directly or influenced by the party. The voters still don't have much influence in putting their own candidates into office. This situation is worse at the national level.

The membership of the legislatures is sometimes made up by semi-retired government officials, those from the eight “democratic parties,” i.e., those small parties established in the past as allies of the CCP against the KMT that pledge to be under the leadership of the Communist Party, and those who represent China fifty-five minority nationalities. Most of the deputies are not professional politicians. Some famous athletes and movie actors also find themselves sitting at the NPC meetings as deputies. The only professional politicians are those state functionaries who have to fulfill their duties in the government/party bureaucracy. Therefore, most of the deputies either don't understand their duties as deputies, or don't have the time to fulfill these duties.

In terms of political culture, the people don't expect much from laws. According to a survey conducted in 2004, only 20.1% of those polled said that they would resort to legal system when their legal rights were violated. About 21.5% chose to resolve the problem through informal channels.²² This is similar to the situation of Japan where people tend to settle their disputes outside of the court system. There are seven engineers for each lawyer in Japan; while there are seven lawyers for each engineer in the United States.

Some legislators tend to view their function more as a matter of back patting the party, rather than checks and balances. In terms of the relationship between the legislature and the masses, the legislators tend to view themselves as the link and bridge between the

party and the masses. They transmit the government policies to the people and transmit the opinions of the masses to the government.²³ In terms of their work style, these legislators care more about following procedures so that they won't be criticized by their colleagues and the voters, rather than policy substance. Major differences are usually ironed out in close door sessions before the publicized plenary sessions. This kind of attitude is partly rooted in the Chinese tradition in the sense that the Chinese hate open conflicts. Like Japan, East Asians tend to white-wash everything. Open conflicts tend to be viewed as doing more harm than good.

In terms of the performance of the local legislatures, the local legislatures are in session in very short intervals, convening once a year, lasting only three days. In some places, it lasts only one day, or even half a day. With such a short duration, it is impossible for the local legislatures to do substantial legislation, or any other governance work of importance. Therefore, local legislatures' main function is to organize the current meeting and to prepare for the next year's meeting.

The availability of the deputies is another problem. Many of them, especially at the local levels, have full time responsibilities in other government bureaucracies. They simply cannot be at the annual meeting for long. Therefore, the plenary session is largely a performance. When the local legislature is not in session, the chairman and vice chairman exercise power. But because local legislature is collective leadership in the sense of one person one vote, it is hard for the chairman and vice chairman to exercise power.

With the increasingly important role they play, the local legislators have to spend more time making laws and regulations and consequently the issue of longer congressional sessions has been raised. A recent suggestion from the local legislature in Qinghai Province suggests that standing committees should be established at the level of township as well, in addition to those at the levels above township. Staffing was not a problem in the past, because the legislature just rubber stamped the decisions made by the party. Now, the local legislators have to make some real decisions and the specialists in various areas are needed.

Many of the problems embodied in the legislative system as was discussed previously have origins in two areas: (1) China's cultural tradition and (2) the party's instrumentalist approach towards the legislative reforms.

As we have seen, the leaders as well as the masses don't view laws as the ultimate judge to settle human conflicts and the legal system and administration are not separated. Law making in China has a long history with the first law being made in 536 BCE.²⁴ Some scholars believe that after writing was invented, laws were among the first things to be written down.²⁵ But laws have not been in the dominant position in the country's political arena. In the *Book of Documents (Shu Jing)*, one of the earliest classic documents before Confucius, laws were not comprehensive and they were not considered to be important.²⁶ Among the three pillars of the Chinese political system, *Way*, or *Tao* is the most important; second is rites, because the ancient Chinese were very formal, especially the

aristocrats. The least important were laws, because laws were often little more than the whims of the emperors.²⁷ Confucius also believes that the son can cover up for the father and the father can cover up for the son for their possible crimes or misdemeanors.²⁸ Corruption was therefore built into the political system.

Unlike the situation in modern democracy, laws were used neither to control the behavior of the ruler nor to protect the interest of the people. In the words of Confucius, “punishment should not go to the high ranking officials, and rites should not go to the common people,” (*xing bu shang dafu, li bu xia shu ren*). Actually, nobody raised the point how to prevent the abuse of power in pre-modern times. Certainly there was no separation of power.²⁹ The concept of *Tian ren he yi*, that is, heaven and man are inter-related, makes the distinction of man, the universe, and society unclear. This is why the human right concept, which was considered to be an inalienated part of the individual rights in modern society, is not strong in traditional China.³⁰ Besides the fact that there was no separation of power between the legal system and the administration, Chinese laws in pre-modern times were also noted for its harshness for the offenders.³¹

Since Han, the concept of “shame” has become important in regulating human behavior.³² This has made some scholars in modern times describe the Chinese culture as a “shame culture,” in contrast to the western society which was described as a “guilt culture.”³³ Nowadays, the Chinese government has inherited this tradition, by launching the so-called, “Eight Glories, Eight Shames,” (*ba rong, ba chi*) campaign, and Jiang Zemin’s slogan “to rule the country through morality” (*yi de zhi guo*). .

Another difficulty for China’s modernization of legislation is that when, in the 1970s, the Chinese started to pay attention to rule of law, in the West there had emerged a counter trend, “Critical Legal Studies,” which went against the legalism. This certainly complicated China’s move towards the liberalization of the country’s legislative system. But this self reflection by the western legal scholars and practitioners is consistent with Confucian tradition. “The basic idea is that, no matter how precise legal standards seem to be, they can never control the effective discretion of the judge (or other decider) to reach the result that he desires. Therefore, the judge is responsible for the result and cannot take refuge in the notion that his discretion was removed by an applicable pre-existing legal standard. This emphasizes, therefore, the importance of men rather than laws.”³⁴

According to this interpretation, laws cannot execute or interpret themselves. People are the ones that play those functions. What is really needed is well-trained, honest, able men, conscientiously obeying the laws, and imbued with the spirit of democracy, to serve as administrators and on the bench. This viewpoint is similar to some Confucian ideas. In the Analects, “The Master said ‘Let there be Men, and Government will flourish. But without the right men, government decays. Therefore, the success of government lies in getting proper men. If you lead the people correctly, who will dare not to be correct? Hence the institutions of a ruler are rooted in his own character and conduct.’”³⁵

Chinese government in the last three decades has adopted laws based on pragmatic considerations: stability and economic development.³⁶ The government emphasized that continuity was important. In 1980, Peng Zhen said that those laws and regulations made before the reform were still valid. Of course, some of the laws became invalid because of time, not because of politics, such as the land reform laws.³⁷ This has resulted in the situation where the post-Mao legislation still has traces of the Soviet experience.³⁸ Chinese legal scholars put this situation in a positive way. According to Li Lin, China's legal system has two sources: Former USSR, but with Chinese characteristics; Western legal system, but with socialist characteristics.³⁹

The obsession with stability has sometimes made the Chinese regime look short of respect of laws. For instance, China from time to time launches the so-called "severe punishment" (yan da) campaigns during which criminal activities such as prostitutions will be dealt with, not necessarily strictly within the legal framework, but "more swiftly, more heavily than usual" (*cong kuai, cong zhong*). In the beginning, most of the laws were made to keep the economy going. Although economic legislation is still very important, the government has gradually increased the making of new laws in other areas, such as environment, medical, etc..

The government's instrumentalist approach towards legislation has also resulted in the fact that theory building in legislation is weak. Currently, the philosophical basis of legislation is still based on class domination which differs little from the pre-reform period. This philosophical basis provides insufficient guideline to legislation at present times. Therefore, theory building in legislation needs to be strengthened. For instance, in spite of the enormous change, the official discourse about laws is still Marxist. Yuan Dayi wrote, "laws are reflections of the will of the dominant class in society."⁴⁰ Law is defined as representing the will of the state which is dominated by the dominating class.⁴¹ Nowadays, the income gap between the rich and poor in China is larger than that of the United States. People can very easily use the official discourse to denounce the current Chinese party state by saying that the laws are used by the vested interest class to oppress the poor the majority of which are the working class.⁴²

¹ . An earlier draft was presented at the Beijing Forum, November 5, 2010.

² . Wilson's book, *The State*, was published in 1889. See Joseph D. Lowe, *The Traditional Chinese Legal Thought*, Berkeley, California, Library of Congress Catalog Card Number: 84-80994, 1984, p. 63.

³ . Pitman B. Potter *The Chinese Legal System: Globalization and Local Legal Culture* (London and New York: Routledge, 2001), pp. 5-6.

⁴ . Ji Weidong, "zhongguo fanwenhua de shuibian yu neizai maodun," (The Change in Chinese Legal Culture and the Contradictions within), *Bijiao Fa Yanju*, 1987, No. 4. pp. 1-11.

⁵ . For instance, the U.S. legal system is very developed. Yet, its income gap between the rich and poor is large.

⁶ . Potter, pp. 17-18.

- ⁷ . Murray Scot Tanner, *The Politics of Lawmaking in Post-Mao China*, (Oxford: Oxford University Press, 1999), p. 38.
- ⁸ . Feng Wei, “Woguo 30 nian lifa gongzuo de huigu yu fansi,” (Reflecting on China’s Legislation in the Last 30 Years), *Shandong Shehui Kexue*, 2009, No. 2. pp. 37-40.
- ⁹ . This is an observation by Li Junru, former Vice President of Central Party School. Li Junru, “Zhongguo tizhi gaige zou shi,” (The Trend of China’s Structural Reform), Renmin University of China, Beijing, June 12, 2006.
- ¹⁰ . Feng Wei., pp. 37-40. As will be seen in the following, I don’t agree with this observation.
- ¹¹ . Li Lin, “30 Years of Reform and Opening and the Development of Chinese Legislation,” *Journal of Beijing Union University (Humanities and Social Sciences)* Feb. 2009, Vol. 7 No. 1 Summer No. 23
- ¹² . Potter, p. 14.
- ¹³ . Li Lin, “30 Years of Reform and Opening and the Development of Chinese Legislation,” *Journal of Beijing Union University (Humanities and Social Sciences)* Feb. 2009, Vol. 7 No. 1 Summer No. 23
- ¹⁴ Lawrence M. Friedman, *The Republic of Choice: Law, Authority, and Culture* (Cambridge: Harvard University Press, 1990), P. 19.
- ¹⁵ . Potter, p. 7.
- ¹⁶ . Potter, pp. 19.
- ¹⁷ . Potter, p. 14.
- ¹⁸ . Potter, p. 2.
- ¹⁹ . He Qinhu, *Zhongxi Falu Wenhua Tonglun (On Legal Cultures of China and the West)* 1993, p. 9-10
- ²⁰ . Murray Scot Tanner, *The Politics of Lawmaking in Post-Mao China*, (Oxford: Oxford University Press, 1999), p. 32-33.
- ²¹ . Potter, p. 11.
- ²² . Gao Yi, *Xinjiang Sheke Luntan*, 2006 (5)
- ²³ . Kevin O’Brien *Reform Without Liberalization: China's National People's Congress and the Politics of Institutional Change* (Cambridge, 1990).
- ²⁴ . Joseph D. Lowe, *The Traditional Chinese Legal Thought*, Berkeley, California, Library of Congress Catalog Card Number: 84-80994, 1984, p. 28.
- ²⁵ . Wejen Chang, *Traditional Chinese Legal Thought, Lecture Notes*, Harvard Law School, 1992, p. 14.
- ²⁶ . Wejen Chang, p. 11. Also, Duan Qiuguan, *Chuantong falu guannian zai xianshi cunzai he yingxiang*, *Falu Kexue*, 1989, Vol. 25, No. 4, page 5.
- ²⁷ . Wejen Chang, p. 17.
- ²⁸ . Fan Zhenyuan, *Qiantan zhongguo falu de lunlixing tedian (On the Ethical Aspects of Chinese Traditional Law)* in *Falu yu jingji*, 2009, March, No. 179, pp. 13-16.
- ²⁹ . Wejen Chang, pp. 325-7.
- ³⁰ . Ji Weidong, “zhongguo fanwenhua de shuibian yu neizai maodun,” (The Change in Chinese Legal Culture and the Contradictions within), *Bijiao Fa Yanju*, 1987, No. 4. Pp. 1-11.
- ³¹ . Joseph D. Lowe, *The Traditional Chinese Legal Thought*, Berkeley, California, Library of Congress Catalog Card Number: 84-80994, 1984, p. 67.

³² . Ji Weidong, Pp. 1-11.

³³ . Wenshan Jia, *The Remaking of the Chinese Character and Identity in the 21st Century: The Chinese Face Practices* , Praeger, 2001.

³⁴ Richard A. Falk, “The Relations of Law to Culture, Power, and Justice,” *Ethics*, Vol. 72, No. 1 (Oct., 1961), pp. 12-27

³⁵ Falk, pp. 12-27

³⁶ . Li Lin, “30 Years of Reform and Opening and the Development of Chinese Legislation,” *Journal of Beijing Union University (Humanities and Social Sciences)* Feb. 2009, Vol. 7 No. 1 Summer No. 23.

³⁷ . Li Lin.

³⁸ . Potter, P. 4.

³⁹ . Li Lin, “30 Years of Reform and Opening and the Development of Chinese Legislation,” *Journal of Beijing Union University (Humanities and Social Sciences)* Feb. 2009, Vol. 7 No. 1 Summer No. 23,

⁴⁰ . Yuan Dayi, “The Reform and Improvement of China’s Legislative Structure, “*“Zhongguo lifa tizhi de gaige he wanshan,”* unpublished, read at the workshop on legislative reforms organized by Central Party School-University of Louisville, summer, 2009.

⁴¹ . Yuan Dayi, *Zhongguo Lifa Tizhi de gaige he wanshan (Reform and Improvement of China’s Legislative System)*, Beijing Municipality Party School, unpublished paper read at the workshop organized by Central Party School and the University of Louisville, summer, 2009.

⁴² . “Marxist legal theory argues that law always operates as a technique of class domination by which, in capitalist society, the bourgeoisie preserves its advantageous position. Law functions as part of the ideological superstructure of the capitalist system. Part of the role is to disguise this fact and appeal to standards of general welfare and justice. The lower classes, easily manipulated by moral abstractions, internalize the myth that the legal system preserves a just social order. Hence, its members are alienated from an awareness of their own interests. Self-alienation is attributed to the lower classes, which explains their willing subservience to the established social order, a large part of which is formalized in the legal system. Carrying Marxist thought further, it is only when a society is established in which there are no class differences, and so no possibility for economic exploitation, that political power will be used for the general welfare.” Richard A. Falk, “The Relations of Law to Culture, Power, and Justice,” *Ethics*, Vol. 72, No. 1 (Oct., 1961), pp. 12-27