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The Evolution of Law Reform in China: An Uncertain Path

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Preface

This anthology is intended to contribute to understanding contemporary China by using Chinese law as a prism through which to view China itself. In slightly more than three decades, China's economy has become the fastest growing economy in world history. GDP has grown more than 10 per cent yearly[1] and 300 million Chinese have been enabled to rise out of poverty. Reform has generated dramatic socio-economic changes that are still at work and will continue to reshape Chinese society. The task of constructing a legal system has been undertaken amidst these changes, although the pace of legal reform has been slower than the economic reforms.

Chinese law has been marked by tentativeness, experimentation and subservience to the Chinese Communist Party (CCP), which is entwined with, and controls, the nation's institutions of governance. The resulting structure is sometimes referred to in this anthology as 'the Party-state'.[2] The authoritarian CCP has been determined to maintain its grasp on Chinese institutions and Chinese society and it has resisted attitudes, conduct and institutions that it fears might loosen its hold. At the same time, the CCP has had to modify its ideology and some policies. After 30 years of Chinese economic reform, Chinese law, despite gaps and defects, is a force that is slowly and unevenly acting to change the country. The path ahead is uncertain and the eventual results of efforts to promote legal reform cannot be predicted.

The anthology should be informative to readers who are not otherwise familiar with China's institutions of governance. It is also intended to serve as a useful source for more specialized readers interested in analysis of China's legal institutions and the issues surrounding them that intimately affect the governance of the nation. The chapters in the anthology, each one a complete and unedited article or book chapter, illuminate the evolution of Party-state policies toward key institutions. In addition to providing overviews of the history of law reform and policies toward it, the chapters address the courts and their operation in the face of policy changes, the rise of administrative law beginning in the 1990s, the criminal process, the growth of the legal profession, and limits on lawyers' functions. Extra-legal dispute settlement and the system for handling citizens' protests are also presented. In addition to the supremacy of the CCP, readers will note the persistence of a number of other issues common to most or all of the areas surveyed. One is substantive, the critical influence of local government autonomy on the implementation of law and policies emanating from Beijing; another is theoretical, the interaction between legal institutions and legal culture.

The Introduction that follows is addressed to general readers not deeply familiar with the history of China's remarkable economic development since 1979, which has influenced the societal environment and the course of law reform. The three opening sections provide general background to the more specialized Section 4, which contains introductions to each of the chapters that follow and presents issues about each chapter that have been raised by Western and Chinese scholars.

I have received invaluable assistance in preparing this anthology from a number of American scholars including Donald Clarke, Carl Minzner, Benjamin Liebman, Keith Hand, Glenn

Tiffert, Alex Wang and a number of Chinese scholars. Judith Lubman has been, as always, an unfailing source of advice and support.

A personal note: I began studying Chinese law in 1963 with the generous support of the Rockefeller Foundation, the Ford Foundation, and the Columbia Law School. At that time China, inaccessible to Americans, seemed on the other side of the moon. I approached it more closely when I first traveled to Hong Kong with my wife Judith and our two children, then aged two and four, to do research and interview Chinese émigrés for almost two years, but China was still distant. I was able to go China in 1972, months after President Nixon, and have been to China every year since then, combining a career as a scholar and the practice of law, in which I represented foreign clients with interests – or problems – in China.

The experience of assembling this anthology has been a useful way to retrace the course of legal reform that grew up around my ears after I had begun to travel and work in China. Looking back, I have seen how far China has come since my first visit, appreciate how far its governance may have to go to continue to advance legal reform, and realize how difficult the task of understanding and interpreting China will continue to be for Americans and other foreigners as well.

I am grateful to Edward Elgar Publishing for proposing that I edit this volume, and for support and encouragement in the process of preparing it. Chris Berry and Chloe Mitchell have been most helpful throughout.

Berkeley, California 2012

Notes

1. C. Fred Bergsten, Charles Freeman, Nicholas R. Lardy and Derek J. Mitchell, China's Rise: Challenges and Opportunities 106 (2008).
2. A comprehensive review of the Party's grasp over state institutions is Richard McGregor, The Party: The Secret World of China's Communist Rulers (Harper Collins 2010). Its hold over the legal system is pithily summarized at p. 23, quoting what a retired judge was told when he objected to interference by Party officials in his court rulings: 'You call it interference, we call it leadership'.

Introduction

Stanley B. Lubman

This anthology focuses on 'core institutions' of the legal system – sources of law, the Constitution, the courts, administrative law, the criminal process, and the legal profession, as well as extra-judicial dispute resolution and the highly organized system that handles citizen petitions and complaints. Of these, the last two have roots in China's imperial history and exhibit aspects of Chinese law that contribute to the complexity of China's *legal culture*. The term 'legal culture' has been used to mean 'those parts of general culture – customs, opinions, ways of doing and thinking – that bend social forces toward or away from the law and in particular ways'.[1] When any legal system is studied the breadth of the concept of legal culture requires that attitudes toward law and legal institutions throughout state and society, related to both theory and practice, must be taken into account, from the leadership to various sectors and classes, and from top to bottom.

The concept is useful here because it helps to avoid uncritical projections of Western ideals of the rule of law onto a Chinese system that reflects competing influences. These influences, which are addressed from various angles in the chapters in this volume, include the following:

- prevailing institutions, attitudes and practices before the Chinese Communist Party (CCP) established the People's Republic of China in 1949;
- the CCP's hold on Chinese society and institutions and its determination to maintain it, evidenced in repression of dissent, treatment of law as subservient to policy, and politicized control of the courts;
- China's complex and ongoing economic and social transformations, which include attainment of a historic rate of economic growth over 30 years, the rise of a middle class and a reduction in poverty, and also by a huge influx of rural residents to the cities, serious income disparities, the decline of Communist ideology, the emergence of competing values in a moral vacuum, and the heavy influence of the state in some economic sectors, as well as rising rights consciousness;
- the fragmented authoritarianism of the present political system, often shown by local governments' deviation from policies and laws issued from Beijing; and
- the influence and impact of Western institutions, such as demands for greater transparency of government agencies arising out of China's obligations because of its accession to the World Trade Organization (WTO).

A full and exhaustive survey of legal development in any society, especially a non-Western one, is difficult to assemble. In China today, policies, attitudes and practices are in flux and empirical research is currently very hard to undertake. In compiling this anthology, an effort was made to choose the best available scholarship (not all the articles and chapters originally selected could be obtained for publication) with a view to illuminating the operation of legal institutions in society.

This introduction is divided into five sections. Section 1 sketches some important characteristics of traditional Chinese law and culture before and up to the mid twentieth century that continue to be echoed today, sometimes substantially and sometimes only rhetorically. Section 2 then surveys Chinese legal institutions and CCP policy toward law during the 30 years of Communist rule that preceded the onset of economic and legal reform and which have left their imprint on contemporary Chinese law.

Section 3 describes the current environment of Chinese law. It first presents some background on the relationship between law and the economic reforms that made legal reform necessary, and then identifies major problems that are by-products of that reform.

Section 4 is divided into nine subsections. The first presents a number of different perspectives as expressed by Western and Chinese scholars. The eight subsections that follow address the specific clusters of legal institutions that are represented by the articles in the anthology. They note major issues raised by each of the 29 selections that have been included and place them in the context of relevant scholarship and opinion.

Section 5 draws some conclusions on China's uncertain future.

1 Chinese Law Prior to 1949[2]

The principal characteristics of the Chinese legal tradition reflect conceptions of law that radically differ from basic Western approaches. These include the following:

Law was more closely linked to morality than it has been in the West

Law in China reflected an intimate relationship between the state and the dominant philosophy of Confucianism, which emphasized a harmony that extended from heaven to earth and was expressed in a hierarchical order from the emperor to the lowest levels of society. Government aimed at protecting natural harmony by promoting ethical behavior. Government was conducted by men who set high moral examples for their subjects according to the principles of proper behavior in the *li* (*commonly translated as 'propriety'*), which governed conduct in family and society.

The Chinese code addressed administration and certain familial relationships, but not most matters treated as private law concerns in the West

In the words of John Fairbank, a leading historian of China, the code 'was nearly all public law, referring to procedures, marriage, inheritance, and other matters relative to and important in government administration'.[3] Codified law reinforced the hierarchical social order expressed in Confucianism. Proper conduct was dictated by status relationships of which the most important were between emperor and subject, parents and children, and husband and wife.

Absence of rights

Western thought since Hobbes makes the individual the bearer of rights and bases rights on the fundamental dignity and equality of every being. In China, rights and duties were contextual and were often hierarchical, causing rights and duties to flow asymmetrically depending on the relationship of individuals to each other and with an absence of rights against the state; each conflict had to be addressed in terms of the alternative consequences with a

view to finding a basis for cooperation and harmony.[4] Economic transactions arose and were enforced largely within the framework of familial and other custom-governed relationships. The Chinese analogues of Western rights might usefully be considered as *claims that were grounded in relationships*, whether familial, communal or commercial. Most were not defined in objective rules promulgated by the state, and they were not ordinarily vindicated by agencies of the state.

LITIGATION WAS AVOIDED AS MUCH AS POSSIBLE, AND NO LEGAL PROFESSION EXISTED

Formal law was not differentiated from other exercise of state power. Local magistrates at the county level decided criminal matters and non-criminal ones that were brought to them. They were required to discover the truth in the case, and the system emphasized substantive justice, which meant that the outcome of a case had to meet the requirements of both law and Confucian morality.[5] A bureaucracy existed from the provincial level upward to hear appeals, culminating in review by high courts in Beijing. Litigation was time-consuming, degrading and costly. The magistrates, untrained in law, relied on their secretaries, whose powers to control the fate of disputants were feared. In addition, corruption existed throughout the system, especially among the employees of the magistrate's office (*yamen*). Torture could be used to obtain evidence. The widespread belief in the perils of litigation discouraged many people from bringing lawsuits to the magistrate.

In practice, because of the hazards of litigation and widespread fear of involvement with government officials, most civil disputes were settled within the basic nuclei of traditional Chinese society – family, clan, village and guild. As one scholar has described this practice, 'the local group generally required the parties to exhaust their remedies within the group before looking to the magistrate for relief'.[6] This was welcomed and promoted by the state, since the administrative apparatus of the state at the lowest level, the county, was extremely thin; at the end of the Qing dynasty in 1911, the average magistrate governed a population of 250,000 people.

The dominant ethic emphasized mediation within the appropriate group, and in practice ranged from completely private mediation to public adjudication. It was not always smooth or evenhanded, and parties sometimes would agree to a compromise that was unsatisfactory to both. Public opinion was often strong enough to discourage disappointed litigants from carrying the dispute to the magistrate.

At the same time, it is difficult to gauge the extent to which formal litigation was avoided, and some research has suggested that litigation was carried out despite popular reluctance, with formal legal rules supplying 'the frame within which compromise took place'.[7] The long-accepted view that litigation was shunned is contradicted by the burdens that had to be taken on by officials when civil disputes were brought to them. Also, although there was no legal profession in China, there were 'litigation mongers' (*songgun*) and 'litigation brokers' (*songshi*) who assisted litigants in civil disputes. These professions were frequently denounced by officials, and their participation as intermediaries between individuals and the state was actively discouraged.[8] It thus appears that although the notion of rights against the state was lacking and claims against persons were not characterized as rights, the fundamental analogues of rights existed in some depth.

China, 1912–49: Weak Courts and Continued Existence of Compromise-based Institutions

The contrast between Western and Chinese judicial systems was sharpened in the late nineteenth and early twentieth centuries. While Western nation-states became more centralized and their judiciaries grew more powerful, the grasp of imperial rule over the vastness of China declined. The deepening differences between judicial systems were dramatized by the fate of the efforts at law reform during the Republic of China's brief rule.

Pre-Communist Law Reform[9]

Modern law reform began in the late nineteenth century. The Western powers and Japan had imposed extra-territoriality on certain areas of China, foreign ideas strongly challenged traditional ones, and the desire to modernize China was awakened. Law reform became an important concern, motivated strongly by the promises of the Western powers to relinquish their extra-territorial rights and to assist in law reform. Before the end of the Qing Dynasty in 1911, one commission had visited Japan, Europe and the United States to study constitutions and returned in 1906 to recommend that Japan be used as a model. Under the aegis of a Law Codification Commission appointed in 1904 the ancient codes were completely revised and reissued. Drafts of codes of civil law, criminal and civil procedural law, a criminal code and commercial law were completed by 1912. In the criminal code issued in 1910, civil and criminal cases were distinguished from each other for the first time.

After the overthrow of the Qing Dynasty and the establishment of the Republic, the legal reforms begun under the Qing continued. After about 15 years of political instability, the government established by the Kuomintang (KMT) party in 1927 revised some of the codes that had been prepared earlier but only partly promulgated. Western influences had a strong role to play in shaping the new codes, and a Continental-style judicial system was established. As a result, 'Chinese law was transformed and began to be Western law in its form, terminology, and notions'.[10]

Jianfu Chen (LaTrobe University School of Law) distinguishes the modernization of Chinese law that was the objective of the KMT legal reforms from 'Westernization'. According to him, KMT reformers took Chinese traditions into account more than their Qing predecessors had done. However, they also introduced Western concepts like family law and succession, and formally established equality of the sexes for the first time in Chinese history.

The accomplishments of the KMT reformers were not widely put into practice, especially outside the cities. Warlordism, Japanese invasion, and civil war prevented the work of the law reformers from being effectively implemented. As Chen concludes: 'the KMT law and legal institutions were far from reaching the Chinese people and had no substantial effect on the society at large'.[11]

A final thought on pre-1949 law reform is useful to keep in mind. As Chen further notes, the breakdown of traditional institutions initiated by the late Qing and KMT legal reforms did not mean the disappearance of traditional conceptions of law. He emphasizes the continuation of 'the traditional conception of law as an instrument for the authoritarian state', which is 'the link between modern and traditional Chinese law'.[12] Some of the chapters in this anthology will focus directly on the continuing influence of traditional institutions and concepts. Law

reform could not be rapidly accomplished in the late nineteenth and twentieth centuries, and the chapters in this anthology will illustrate why law reform today moves only slowly at best.

2 Chinese Law Under Mao[13]

The Party did not neglect legal forms after its victory in 1949, but it allowed them little substance. In the areas occupied by the CCP before 1949, justice had already become politicized as a tool to reshape society and suppress class enemies. In 1949, soon after Communist victory and the establishment of the People's Republic of China (PRC), the KMT laws were abolished. The task of creating a new legal system was not seriously begun until 1954, but it was ended in the Anti-Rightist movement of 1957. Legal institutions were either largely rendered irrelevant or politicized by the late 1950s, a decade before the Cultural Revolution ultimately swept them aside. This section focuses on the pre-reform criminal process, which has left a heavy imprint on current institutions.

The Criminal Process Under Mao

Before law reform began in 1978, the courts' principal activities centered on the formal criminal process. Today, the criminal process, although it has undergone reform, still displays strong continuity with that of the Maoist period. Because criminal law openly continues to be used to operate as a tool of changing Party policies, its resonance with the period preceding reform is strong and striking.

Before reform, the activities of the courts in the formal criminal process seemed to reflect notions of bureaucracy rather than legality. Although legality has become selectively valued by Chinese leaders, some of the notions of bureaucracy that competed for dominance before the Cultural Revolution continue to influence legal institutions and the policies toward them.

Sanctioning Processes between 1949 and 1966

Before reform, Chinese Communist leadership style emphasized organizing techniques that centered on mobilizational leadership and what CCP terminology called the 'mass line'. This style frequently blurred or obscured the distinction between governmental and nongovernmental organizations and activities, and the CCP used the state apparatus as only one of the available means for transmitting and implementing policy. Law and regulation were required to be flexible and responsive to policy, and law enforcement was required to aim at mobilizing mass support for the Party. In Yenan and other areas occupied and ruled by the CCP before 1949, adjudication had been blended with mobilizational tactics such as mass meetings and rallies.

When the Party came to power in 1949, law was categorized as falling within the sphere of what came to be termed 'political-legal' work and remained linked with the mass line. At the same time, the Party recognized that some orderliness in procedure had to be assured and that methods had to be provided for reviewing cadres' exercise of discretion in applying the flexible policies which, in the absence of law codes, defined prohibited conduct only generally. Conflict between contrasting emphases on the mass line and regularity was to sharpen over the years.

1949–53: 'CAMPAIGNS' AND THE RESTRUCTURING OF SOCIETY

During the first four years of Communist rule the Party applied its revolutionary techniques to restructuring Chinese society. A succession of violent mass movements was launched to redistribute land and shatter the power of rural landholders, eliminate persons labeled as 'counter-revolutionaries', and break the power of the urban bourgeoisie. Legality, of course, was ignored. KMT law codes were abolished and no move was made to adopt new ones; though some penal norms punishing counter-revolutionary activity and corruption were adopted in the course of campaigns, they were broad and imprecise. Regulations establishing formal judicial and procuratorial hierarchies were promulgated, but the courts were used merely to implement specific campaigns and were at times displaced by special tribunals created for campaigns.

Law itself became a target. In 1952 and 1953, a nationwide campaign to 'reform law' purged most of the considerable number of law-trained judges and clerks who had previously worked for the overthrown KMT regime, replacing them with politically reliable cadres. The campaign stressed the role of law as an instrument of class warfare, and criticized the purged judges for their unwillingness to wage such warfare against enemies of the people. Legal procedures were denounced as reactionary.

The use of invidious 'class' distinctions

During the first years of rule, the CCP classified all adults by 'class origin', a designation indicating the economic position of each family and its affiliation with the KMT at the time of Communist victory. In addition to class-designating labels, supplementary classifications stigmatized some persons as identifiable opponents of the regime or as undesirable elements for a variety of reasons.

Creation of police and Party networks of control

During the early years, the Party also created an elaborate apparatus for surveillance, especially in the cities, where neighborhood residents' committees of activists were charged with keeping close watch on fellow residents under supervision by the local police. The police, dominated by the Party, administered serious criminal sanctions, which ranged from confinement in police-run institutions called 'labor reform' camps to the death sentence. Trials were not usually held unless, in conjunction with some campaign, Party officials felt that a public trial would have particular educational importance. The police also administered so-called administrative sanctions for less serious offenses entirely without the courts. These included fines and short periods of confinement in police-run detention centers. A police-administered regime of 'control' was first applied to former landlords and minor counter-revolutionaries not linked with serious crimes, then extended to other persons deemed to deserve punishment and surveillance without prison confinement.

In every economic, educational and government unit, police and Party cadres were charged with handling personnel, security matters and labor discipline. In every urban street, and less effectively in the vast Chinese countryside, the activist-augmented cadre apparatus directly controlled or influenced application of an assortment of informal punishments, such as public criticism of varying intensity in small or large groups.

The courts and the procuracy figured little in actual decision-making and were used chiefly to formalize the most serious punishments in order to propagandize Party policies and educate