

Challenges to china's governance



**ASSIGN
BUSTER**

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Understanding China's Governance: Challenges and Prospects

Have legal reforms implemented so far limited the arbitrary use of official power, advanced the independence of the judiciary and promoted the rule of law in China

Introduction

Over the years, changes have constantly been made to the legal system of China. Despite the massive changes in the legal system of China, the modern development of the Chinese legal system had not been started until about 30 years ago. The formation of an entirely new legal system in China is particular special and interesting because China undergoes dramatic sociological, economic and cultural changes along with the legal reform.

In this essay I am going to discuss whether the reform of the legal system has achieved its main goals: to restrict the unauthorized use of official power, to advance the independence of judiciary, and ultimately, the promotion of the rule of law in the country. I will first talk about the background of China's legal system. Then I am going to describe the changes that have been made to China's legal system. Last but not least, I will address and discuss whether the reforms have preceded their main goals.

Background of China's legal system

1. Traditional Chinese Law

This is the starting point of the historic development of the legal system of China. Being practiced and in forced by the Chinese Empire[1], the Traditional Chinese Law mainly dealt with the regulation of the government and the development if natural economy, with no protection of rights involved. The law lasted until the 19th century because it could not cope with the economic development at that period, especially when the western capitalist civilization was influencing China at that period.

2. Acceptance of Foreign Law

This is a reform which was done by the Qing Dynasty in the late 19th century and early 20th century. The reform aimed to meet the requirements of development at the international level and to cope with the national economy. Unfortunately, the resign of the last emperor of China in 1912[2]led China to its long period of civil wars. During this long period, the political system and the legal system of China were both delicate and erratic. China was so unstable at that time that it was impossible for them to establish a legal system.

3. Socialist Legal system

The instability of China's legal and political system maintained for a long period until 1949, when Mao Zedong Proclaimed the People's Republic of China (PRC). A socialist legal system was implemented at that time[3], which was based on 'Maxist Leninist ideas'. Maxist Leninist ideas refer to the conversion of a country to a socialist republic. And this conversion must be led by a group of conductors that are professional revolutionaries[4]. This new legal system has several characteristics including the fact that the

regulation of economy requires little need for the body of law. Nonetheless, this development phase did not last long because of political changes - the Cultural Revolution.

4. " Democratic institutionalization and legalization" in 1978

In 1978, China has started to establish a modern legal system. The Chinese Communist Party (CCP) opened a platform for democratic institutionalization and legalization at the 3rd Plenum of the 11th Central committee[5]. Deng Xiaoping's goal was to seek for continuity and stability of the law and the system. However, because Deng took an experimental approach for this reform, the reform created a lot of error systems and laws.

Major reforms

1. Changes in the law making bodies

There has been an increase of transparency and openness in the law making bodies. Two major law making bodies in China are National People's Congress (NPC) and Local People's Congress (PCs). Both law making bodies have increased their transparency gradually over the years, and they become more open to the public. For instance, they start releasing drafts of laws, and start providing public participation and hearings.

2. 1982 Constitutional Reform[6]

In total the Chinese Constitution had been amended for 4 times. A new version of Constitution was adopted in 1982. One of the major changes is that the party control of China is replaced by party leadership. The new constitution also emphasizes on the sanctity and conformity of the socialist

legal system. This Proclaims that the constitution and the law are above any individual, organization or even political party.

3. Legislative reforms

In addition to the constitutional reforms, there have also been changes in lawmaking over the years. Lawmaking has shifted its focus from enhancing the state's economy to addressing social issues, including the provision of transparency and social fairness. The shift is made because China's leadership understand that except from the delivery of rapid economic growth, assuring fairness and harmony in the society also plays a vital role in order to ensure the legitimacy of China's one-party rule. Thus, more laws on welfare, social security and health insurance etc. are included in more recent NPC legislative plans.

The major reforms include Administrative Litigation Law (1989) which was considered as revolutionary because it was the first time that the citizen were allowed to challenge the government by using the court system; State compensation Law (1994) which allow citizen to sue the government; Administrative reconsideration Law (1999) which allow the request for review for any government action; Administrative Penalties Law (1996) which granted procedural rights for the public and Administrative Licensing Law (2003) which limits corruption[7].

4. Court Reform

There are also reforms of the judiciary system. The Supreme People's Court (SPC) had its first plan for the reform of the judiciary system in the 90s. The aims of the reform were straight forward. They aim to improve the quality of

judges by training; addressing the problem of corruption and so as to enhance the potency of system; and to inspect the judges. The reforms are designed to improve both the professionalism of court system and the competence of judges. In order to achieve the goals, new rules are implemented. For example, all of the new judges have to pass the national unified judicial exam which has a passing rate of less than 10 percent[8]. This ensures the competency of the judges. Moreover, there is an emphasis on legal and logical reasoning in courts. Opinions should also be according to facts. The reform allow public to engage more confidence to the courts and help resisting corruption and interference.

The Rule of Law and Judiciary Independence in China

Rule of Law by definition is the constriction of the arbitrary use of power by laws[9]. In order for the Rule of Law to work, the government must be under the control by law. Also, the law must be enforced by an independent body - the courts. The courts thus act as a mediator between the government and the citizen.

However in my opinion in China's case, due to its one-party control, the communist party controls the government and involves in all of the governmental affairs. This may include the formulation of general policies, judicial affairs and the determination of appointments to official posts. The lack of independence between the government and the party suggests that the rule of law has not been promoted by China's legal reform.

In addition, both the NPC and the PC are basically under the control of CCP, the lack of independence of the NPC and the PC restricts the rule of law by a

lot because the PC and the NPC are the law making bodies in the country. The CCP can get involved in the law making process, so it controls the law that regulates the country. In addition, there are many laws being drafted by local or central government. The laws drafted may provide interests to the region or the department instead of providing general interest for the public.

CCP also indirectly controls the court due to its control over the PCs. For example, the judiciary is not entirely separated from PCs because judges are appointed and remunerated by PCs. This may cause political interference by local parties and ultimately causing local protection. The lack of independence between the court and CCP again shows that the rule of law cannot be applied on China.

Furthermore, the constitutional and legal status of the CCP is still unclear. It is still unclear whether the constitution determines CCP's legitimacy; or the CCP determines the legitimacy of the constitution. It is also unclear that whether the party is above the law.

Moreover, the enforcement of law has been a challenge to the promotion of the rule of law in China. In addition to the independence between the law enforcing body and the government, it is necessary for the law of the country to be legitimate and to be enforceable. Or else, the rule of law will not work. Due to the weak and inferior punishment and penalty for the people who disobeyed court orders, the law becomes hard to be enforced in China.

Rebuttal : Socialist Rule of Law Theory

While all of the information above showed us that the legal reform has not promoted the rule of law in China, some people advocate the “ Socialist Rule of Law Theory”, suggesting that instead of the promotion of rule of law, the legal reforms of China promoted “ Socialist Rule of Law”. They separate the Rule of Law from the Socialist Rule of Law.

The Socialist Rule of Law advocates that in order to achieve a ‘ harmonious society’, the legal system must follow the leadership of the party. According to the vice-president of the SPC, China needs to prevent the “ negative influence of Western rule of law theory” (Cao, 2006)[10]and this is based on two main arguments.

Firstly, they think that the application of the rules should not be rigid. Under the rapid economic and social growth, the law often slows down the progress of development and reforms in China. So they believe that the Western rule of law theory does not work on developing countries like China, or else the development of the state would be really slow. Laws can also be seemed as an obstacle to progress.

Secondly, they think that it is acceptable to breach the constitution if they are favorable for China’s interest or if they are good for the state’s productivity and stability. For instance, private enterprises operated before they were permitted by the constitutional amendment in 1988[11]. This suggests that the constitution could also be an obstacle to development or reform.

Conclusion

China's one party control shows that despite of the legal reform that have been done over the years, the Western style rule of law has not been promoted. This is mainly due to the control of the court, the government and the law making bodies of the country. It is also unclear that whether the constitution is above the CCP or not. The control of the organization above makes CCP above the law and possibly the constitution, which makes the idea of rule of law not applicable on China.

However, some people advocate that the legal reform of China has promoted the " Socialist Rule of law", which states that " in order to achieve a ' harmonious society', the legal system must follow the leadership of the party". It is arguable that whether the Socialist Rule of Law fits China more than the Western style Rule of Law due to its rapidly developing economy and infrastructure.

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