The Chinese Legal System

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Introduction

Any account of the legal system of the People's Republic of China must be prefaced by a warning of the need to distinguish between the formal system and what actually happens. Such a gap is of course present in some degree in all countries, but in many areas it is particularly broad in China. Thus, while it may often be possible to provide a reasonably complete account of Chinese law as it applies to a certain issue, that will not be the same as a reasonably complete account of how a certain issue is in fact treated in China.

The Chinese legal system is in form much closer to the legal systems of continental Europe than to the common law, but also contains substantial elements borrowed from the Soviet Union and inherited from traditional Chinese law. These elements, and the thinking behind them, are a major cause of the gap between form and reality, and between how participants talk about the system and how they act within it.

Traditional Chinese Law

Unlike the legal systems of continental Europe, Chinese law does not trace its roots to the private-law system of Rome or to any religious basis. Instead, traditional Chinese law centered on state concerns and dealt with private matters incidentally. While medieval European monarchs held themselves forth as providers of justice and sought legitimacy on those grounds, the Kangxi Emperor (r. 1662-1722) worried that

[l]awsuits would tend to increase to a frightful amount, if people were not afraid of the tribunals, and if they felt confident of always finding in them ready and perfect justice. . . . I desire, therefore, that those who have recourse to the tribunals should be treated without any pity, and in such a manner that they shall be disgusted with law, and tremble to appear before a magistrate.

While Imperial China with its advanced bureaucracy produced a great deal of documents of a rule-like character, it had very few officials with the specialized function of interpreting and applying those rules, and their role was limited to the review of cases where a non-state actor was involved as a defendant. No institution existed that could apply law against the state, and original jurisdiction over cases involving individuals was with the local magistrate, an official whose responsibilities covered all aspects of government (and not simply legal matters) within his territorial jurisdiction.

In summary, the legacy of traditional Chinese law inherited by modern China is substantially different in many of its most basic principles from European legal systems. Law has no connection with religion; there is no special, differentiated institution ("court") before which disputing parties advance legal claims; and the legal system functions to serve state interests, not to protect individual rights or to resolve disputes among individuals (although it can sometimes be used to serve that purpose).

Modern China

In 1911, Imperial China came to an end with the overthrow of the Qing (Ch'ing) dynasty. After almost four decades of intermittent civil war and invasion, the People's Republic of China (PRC) was established in 1949 under the rule of the Communist Party of China. The legal history of the PRC begins with the abolition in 1949 of all the laws of the predecessor state, the Republic of China. This left a substantial legal vacuum that ultimately had to be filled by whatever authoritative materials decisionmakers had at hand, including Party newspaper editorials, policy documents, and leaders' speeches. At the same time, there was for many years little need for a formal legal system in many areas of national life, since the economy was largely subject to state planning and conflicts could thus be resolved without reference to legal rights and duties.

Recurring political turmoil prevented any substantial development of the legal system for the first three decades of the PRC, but with the start of the post-Mao era of economic reform in 1979, a number of changes began to occur. Significant amounts of legislation were issued and the institutions of the legal system -- in particular, courts, judges, and lawyers -- received more attention from the state. Indeed, the ideal of "rule according to law" was recently written into the national constitution, although the practical effect of adding these words is small.

The PRC is in form a unitary state; all power flows from the central government, whose seat is in Beijing. Local governments have only such power as the central government chooses to delegate to them. Naturally, it cannot avoid such delegation, and in many cases is unable to supervise effectively the exercise of local government power, leading to substantial de facto autonomy for local governments in some areas of activity.

As it rejects the notion of vertical separation of powers, the PRC also rejects the notion of horizontal separation of powers between different branches of government (for example, the traditional troika of legislative, executive, and judicial branches). A necessary separation of functions is acknowledged, but constitutionally speaking the National People's Congress (in form, a legislature) sits at the apex of China's political power structure. In reality, that position is occupied by the Standing Committee of the Politburo of the Chinese Communist Party, but both form and reality share the rejection of multiple power centers.

Because the form of centralism, whether vertical or horizontal, does not match the reality of the need for delegation, the Chinese legal system does not deal well with the problem of defining the limits of the rule-making authority of subordinate bodies. To be sure, there are laws prescribing legislative hierarchies, but there are few institutional ways of making these rules meaningful.

As noted above, at the apex of China's formal constitutional structure of political power is the National People's Congress (NPC), which has the authority to issue laws binding over all of China, and which also appoints the Premier (the head of the State Council, which might loosely be described as China's cabinet or executive branch) and the Presidents of the Supreme People's Court and the Supreme People's Procuracy (the prosecutorial agency). NPC delegates are not directly elected; they are chosen by the people's congresses below them, at the provincial level. Similarly, provincial people's congress delegates are chosen by people's congresses below them. Only the people's congresses at the lowest level have directly-elected delegates.

The day-to-day work of government is carried out by the State Council under the Premier. The State Council is divided into various functional ministries and commissions. This bifurcation between a people's congress on the one hand and a day-to-day government on the other hand is replicated several layers down into local government. In each case, the government organization is responsible not to government organization the next level up, but rather to the people's congress at the same level. Again, this is the formal structure. In practice, the Communist Party organization at any given level of government has a monopoly on political power. This monopoly, of course, does not mean absolute power to do whatever the Party organization wishes. There are always constraints on capacity, whether economic, political, or social.

There are four levels of courts in China: the Supreme People's Court at the center, the Higher Level People's Courts at the provincial level, and the Intermediate Level and Basic Level People's Courts further down at the local level. Each level of court is essentially responsible to local political power at the same level, a responsibility that is reinforced by local control over court finances. The Supreme People's Procuracy (also known as the procuratorate) has a similar structure. While efforts are being made to upgrade the quality of the judiciary, China's courts at present are marked by the low educational level of their judges and their low status in the hierarchy of power. Unlike in many countries with a continental system, a judgeship in China is not a fully professionalized, civil service position.

All of the above organizations, at various levels, are capable of issuing documents and rules purporting to be binding on various parties to varying degrees. (Even the Supreme People's Court, despite the system's self-image as one in which courts merely apply law and do not make it, regularly issues long documents, unconnected with any particular case, in which it spells out detailed legal rules.) Needless to say, such documents may frequently conflict, but there appears to be no institution with the will and the capacity to resolve such conflicts authoritatively.

The top-down view of law as an instrument of government, with citizens seen as the objects of legal regulation, remains influential in China today. Courts by and large do not welcome litigation, and often try to discourage it. The concept of the private attorney-general, in which the state seeks to enlist private citizen plaintiffs in pursuit of its goals, is (with the interesting exception of defective consumer products) by and large anathema. Far more than in many other systems, the Chinese legal system is willing to forgo the enforcement of rights when other pressing values seem to be at stake, to the point where it might be more accurate to say that the system recognizes interests more than rights.