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Sisällys

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Legal Formalism, Justice and the Judiciary in China

1 INTRODUCTION

The legal development in China since the economic reform of late 1970s is characterized of a top-down, state-driven and market-oriented approach.[1] Such a course is featured with impressive progress in rule-making. By 2011, more than 250 valid laws had been enacted by the National People's Congress and its Standing Committee, more than 700 administrative regulations promulgated by the State Council, and more than 8400 local regulations issued by competent local people's congresses.[2] Those laws and regulations deal with various essential aspects of the state and society, covering basic civil and criminal system, environmental protection, labour welfare, human rights protection and many others. The economic and social life as well as the operation of state power, to a great extent, has been legalized.

Yet, to many observers, from home and abroad, China's rule of law development remains problematic in several aspects. For example, it is observed that the generality of the enacted rules and ambiguity of the employed language often creates a de facto delegation to the law enforcer with a considerable degree of discretion. Considering the multiple layers of administrative structure in China, this could undermine the legal certainty and lead to uneven enforcement of laws. The administrative dominance in the social life often creates a stronger role for the executive in both the law-making and law-application than that in liberal democracies.

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[1] For an elaboration on the state-driven element of China's rule of law, see *Jiang Lishan*, Legal Modernization: China's Path to Rule of Law (法律现代化—中国法治道路问题研究), Beijing: China Legal Publishing House, 2006, in Chinese; for an exposure of the market-oriented legal development, see *Donald Clarke*, Legislating for a Market Economy in China, China Quarterly (2007), pp. 567–589.

[2] See Information Office of the State Council, White Paper on the Socialism with Chinese Characteristics Legal System, Beijing, October 2011, http://www.scio.gov.cn/zfbps/ndhf/2011/Document/1036756/1036756.htm

For some, the administration of justice by the Chinese judiciary is even more problematic. As an independent and effective judicial system is understood as a hallmark of a functioning rule of law society, measured against which the legal development in China is questionable. The judicial corruption in the Chinese judiciary induces very low trust among the public towards judicial power. In some recent prolific cases reported by the media, the judgments rendered by the judicial bodies sit strongly against the public feelings.

The general dissatisfaction with the judiciary can also be seen from the political life of the State. The Supreme People's Court is obliged to submit its annual work report to the National People's Congress for approval, as is required by the Chinese Constitution. Yet, for more than a decade, the work report by the Supreme People's Court continuously receives a comparatively low rate of affirmative votes, which put direct political pressure on the judiciary. In 2004, the work report by the Supreme People's Court received a historical low rate of approval by 71.89%. Despite the efforts at the Supreme People's Court to improve its popularity among the delegates, the situation has not improved much by now. In 2013, percentage of approval slightly rose to 75.36%, with 2218 votes in favour 605 for opposition, and 120 for abstention. The rate of approval is conspicuously lower than that of the work report by the State Council, which was approved by 95.7% affirmative votes in 2013.[3]

Judicial culture and judicial practice is deeply embedded in historical contingents. The research on judges, courts and judicial culture by Prof. Pia Letto-Vanamo has been extremely valuable and inspiring for a comparative exercise. In this essay I shall take the opportunity to offer some personal reflections on the judiciary and rule of law process in China.

2 THE GROWTH OF MODERN JUDICIARY IN CHINA: AN INSTITUTION BY IMITATION

No institution equivalent to the judiciary in the Western world ever existed in traditional society of China. While most disputes were dealt with through mediation by the gentries and senior members of family or local communi-

[3] The data were collected from various official media reports in China including the People's Daily, Xinhua News Agency and others.

ties, it was for the county magistrate to adjudicate disputes should mediation fail. Adjudicating disputes is but one of many functions performed by the county magistrate. In addition to administration of justice, the duty of the county magistrate includes, among others, tax collection, security maintenance, public welfare, education and promotion of culture, ceremonial observances.[4] In a highly centralized system, the adjudication of disputes had no chance to institutionalize into a separate power out of the reach of the emperor, and indeed, the supreme power of adjudication belonged to the emperor himself.

Constitutional reform started in the early 20th century as an elite response to Western imperialism. The establishment of a separate judicial system, independent from the administrative in China, was part and parcel of this reform. The judicial reform was strongly upheld by some open-minded Chinese intellectuals and officials justified on the following grounds. First of all, it is a necessary response to the extraterritoriality and consular jurisdiction exercised by the western treaty power. The imposition of the extraterritoriality by the colonial powers was justified on the ground that China lacked a modern, human and fair judicial procedures to conduct justice. The legal reform was conducted for the purpose of restoring China's jurisdiction over the foreign subjects as well as the Chinese subjects residing in foreign settlements and concessions. Secondly, more importantly, a separate, independent judiciary was considered essential for the success of the whole constitutional and social reform.[5] The principle of judicial independence and separation of power practiced in the Western Europe and the United States was highly valued. An independent administration of justice was thus designed as an integral part of the new constitutional structure.

In 1906, the legal form finally inaugurated. New laws and new institutions emerged. New type of trial courts and procuratorates independent from the traditional administrative system, organized on the models in the West and

[4] For an authoritative and classic research on this, see *T'ung-tsu Ch'ü*, Local Government in China under Ch'ing, Cambridge, Mass: Harvard University Press, 1962.

[5] The reform aimed for a complete reorganization of the states, and the measures adopted were very comprehensive, far-reaching and radical. Such measures involves, for examples, abolition of the civil servant examination based on Confucian classics, establishment of the modern schools and universities, encourage foreign study, reform of government structure, building modern army and navy force, prohibition of torture in the judicial procedures, promotion of industrial development, fiscal and taxation reform, and others. See *Immanuel C.Y. Hsu*, The Rise of Modern China, Sixth edition. New York: Oxford University Press, 2000, pp. 408–418.

Japan, also began to be instituted, albeit on a trial basis. By the enactment of the Organic Law of Judicial Courts in 1910, new courts were to be instituted at four levels. The exact number of the new courts created by during the Qing dynasty is still unknown. Some estimates that "when the Qing dynasty came to an end in 1912 a total of 345 courts had been established nation-wide, including the supreme court in the capital, high courts (gaodeng shenpan ting) at the provincial level, district courts (difang shenpan ting) in major cities, and courts of first instance (chuji jshenpan ting) in smaller cities, each with their corresponding procuratorates."[6] The main constrains on the development of the modern judiciary was the lack of qualified legal talents and sufficient financial recourses.

The judicial reform continued during the Republican Era. The Beijing government was troubled with warlordism. It possessed only very limited authority and resources. It was reported, by September 1926, China had only 138 modern courts, 58 transitional courts, in contrast to more than 1800 traditional magistrates (who now work with the assistance of trial officers).[7] The circumstance was improved at the effort of the Nationalist Government which took power in 1927 by successful military expeditions. The Nationalist Government launched an ambitious plan to establish modern courts at all levels. By 1937 when the Sino-Japanese war broke out, the Nationalist Government established over 611 trial offices under the county government, which were designed as transitional institutions towards fully independent courts. The implementation of the plan was interrupted by the Japanese invasion. By 1947, there existed 784 local courts, 119 branch courts of higher courts, and 37 higher courts.[8]

The building of a modern court system in China in a nationwide comprehensive manner was only achieved in the People's Republic. The early years of the People's Republic was guided by the ideology of class struggle and saw various political movements and mass mobilizations. The greater need of law came with the economic reform in 1978. The judicial system was established at the nationwide level. By October 2004, there were 3133

[6] *Xu Xiaoqun*, The Fate of Judicial Independence in Republican China, 1912–37, China Quarterly (1997), pp. 1–28, at 3.

[7] Report of the Commission on Extraterritoriality in China, Peking, September 16, 1926. Government Printing office: Washington, 1926, p. 56.

[8] See *Wang Taishen*, the First Contact between China and the Western Type Courts during Late Qing and Republic Era: Focusing on the Court System and its Establishment (清末及民國時代中國與西式法院的初次接觸－以法院制度及其設置為中心), Academia Sinica Law Journal (2007), pp. 105–162.

basic people's courts, 10290 dispatched people's tribunals, 148555 judges working at the basic level.[9] By now, there are 33 higher people's courts and around 400 intermediate people's court. The total number of judges is close to 200 thousand.

Meanwhile, there comes along with increasing use of the court system. In 1978, the people's courts had 440 thousand cases for the first trial. The number grew to over 5 million by 1996.[10] The case load for the court has been continuing to grow. In the year of 2013, over 14.2 million cases were filed to the court system, marking a 7.5% increase over the previous year.[11] The judicial system in China faces a huge amount of workload that puts much pressure on the organization of the judiciary as well as on individual judges.

3 LAW AS FORMALISM

Due to the diverse usages of the term legal formalism in existing scholarships, it is desirable to offer some clarification on the term used in this essay. In the American literature, legal formalism, in contrast to legal realism, is often associated with a mechanical, textual-oriented approach to the application of law by judicial organs.[12] As such, legal formalism is often viewed as a pejorative label. However, since late 1980s another stream of scholarship started to re-assert the significance of law as form and legal formalism to constrain the decision-makers.[13]

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[9] The Report of the Supreme People's Court on Strengthening the Construction of Basic Courts (October 26, 2004), http://www.npc.gov.cn/wxzl/gongbao/2004-12/26/content_5337517.htm.

[10] See *Zhu Jingwen*, Data Analysis of Flow of Litigation into Different Channels in China, Social Sciences in China (2009), Vol. 30, pp. 100–118.

[11] The Work Report of the Supreme People's Court for the Year of 2014, http://lianghui.people.com.cn/2014npc/n/2014/0310/c382480-24592263.html

[12] Legal historians characterize the judicial practice of the period from second half of the 19th century up to 1930s in the United States of America as Formalism Period. See *Charles C. Goetsch*, The Future of Legal Formalism, 24 American Journal of Legal History (1980), p. 221–256, pp. 221–222. For an elaboration on political economy of formalism and its rise in the mid-19th century, see *Morton J. Horwitz*, The Rise of Formalism, 19 American Journal of Legal History (1975), pp. 251–264.

[13] See *Frederick Schauer*, Formalism, 97 Yale Law Journal (1988), pp. 509–547. See an advocacy of legal formalism in the discipline of international law, Martti Koskenniemi, What is International Law For?, in *Malcolm D. Evans* (ed.), International Law, 3rd ed. Oxford: Oxford University Press, 2010, pp. 32–57.

I refer formalism to a set of judicial practice and judicial culture that is based on a positivistic rule-based idea of law. In the Chinese context, I would like to specifically highlight the following aspects of Chinese legal practice by what I mean legal formalism. First of all, the legal formalism implies a positivistic view of the law. Law originates from a sovereign, and as such state law not only distinguishes itself from the morality, usage and social custom, but also prevail over those social norms. In some sense, the rule of law construction in China mean that the legal language becomes the mainstream sources of social order, State law-making is used to reform the Chinese society, to adapt China from a self-closed agrarian economy to market economy, industrialization, and modernization. Second, the settlement of disputes is administrated by judicial institutions through following a set of formal procedures. The whole process operates on the basis of extensive legal documentation. Thirdly, the adjudication is a rule-based decision-making procedure. Individuals are epitomized as placeholders of abstract rights and obligations. Judicial bodies can only adjudicate disputes expressible in legal terms of rights and obligations, namely, mostly material interest of individuals in a capitalist society.

Thus the adjudicative activities by the formal judiciary carry with an inevitable weight. Such a form of law makes it more difficult to access and utilize for a layman. The structure, costume, language, and procedures all demonstrates the high authority of the judges above the litigants. While such a formal culture could be effective to resolve the disputes in the West, it has its problem in the Chinese context. In the Chinese society, to resolve disputes is to dissolve the disputes, to eliminate the disagreement from the very root of the disputes. "Resolving disputes did not simply require knowledge of law; it required having a full understanding of the situation that gave rise to the dispute."[14] It requires that the adjudicating authority speaks of not only rules, but also reasons, virtues and morality. The formalism of law has the collateral effects that law can speak of mainly calculable material interest. Thus law can decide on the material interest between the parties, but hardly appeal to the heart of people. The term justice, be it vague, is however a fundamentally materialized concept in judicial practice.

Notably, a substantial number of Chinese people choose a different Chinese way of justice: petition, an institution which is less formal, more flexible

[14] See *Benjamin Liebman*, A Populist Threat to China's Courts, in Margaret Y. K. Woo and Mary Elizabeth Gallagher (eds.), Chinese Justice: Civil Dispute Resolution in Contemporary China. Cambridge: Cambridge University Press, 2011, pp. 269–313.

and free of charge. The total number of petition in the first 9 month of 2009 was reported to be more than 8.6 million, almost as many as that of the cases filed to the courts. [15] An eminent phenomenon endogenous to the operation of Chinese courts is so called litigation related petition. Litigants who are not satisfied with the judgments by the courts petition to the administrative or legislative bodies for grievance. In such cases the judiciary turns away from its nature of being an institution for dispute settlement, but becomes part of the dispute and even generates new disputes.

One can hardly overlook the political implication of the law as formalism: some empirical studies shows that the petition system is mostly used by those marginalized, impoverished, less educated individuals,[16] while the formal system is more resorted to by individuals with financial means and basic education.[17] The rule of law development thus empowers those who can speak its language and as such has a suppressive effect on those who cannot speak or think in the legal language. In this way rule of law could become a powerful discourse for the political elites to push for social reform and subsume social resistance. Law becomes a male power, a formal institution built upon property, ownership and freedom to contact. Petition represents a female style, a paternalistic institution for those wounded in the rapid modernization, marketization and globalization. The extensive use of petition in the transformative China should not be interpreted as a symptom of the people being backward or pre-modern, but rather an intuitive resistance towards the expansion of a body of aggressive language speaking of modernization and development.

4 THE BANALITY OF LAW

The legal development in China throughout the twentieth century can be understood as being part of the general process of China's struggle for mod-

[15] See *Carl F. Minzner*, Xinfang: An Alternative to Formal Chinese Legal Institutions, Stanford Journal of International Law (2006), Vol. 42, pp. 103–180.

[16] Ibid., p. 159.

[17] For a revealing research on the different use of the arbitration committees and petitions by different employers in labour disputes, see *Isabelle Thireau – Hua Linshan*, The Moral Universe of Aggrieved Chinese Workers: Workers' Appeals to Arbitration Committees and Letters and Visits Offices, China Journal (2003), Vol. 50, p. 84.

ernization.[18] The legal reform is adopted as a locomotive for the China's modernization, which has been exerting a profound impact on the Chinese society.

In traditional China, the Confucian ideal society is a society regulated by Li (礼). Li is sometimes translated as etiquette, rituals, or appropriateness. Li consists of various codes of conducts that are expected to be performed by individuals in different social roles. "Li is profoundly relational, and the fulfilment of personal life is seen as fulfilment of role, be it familial, professional or political."[19] If everyone in the society performs one's role appropriately, the society is in harmony. It is important to note that Li is not something imposed from external by coercion. Rather, by inspiring poetical and beautiful expression of life, Li attracts wholehearted submission. "Li is not passive deference to external patterns. It is a *making* of society that requires the investment of oneself and one's own sense of importance."[20]

The term fa (法), nowadays often translated as law, was closely associated with punishment, criminal law. Fa, in written form, comes from the need of military mobilization during wartime. Each and every dynasty in China has its own imperial code, an elaborated codification of criminal laws. Yet the operation of fa is subject to li. "A government based on virtue can truly win the hearts of men, one based on force can only gain their outward submission. The Li are persuasive and hence the instrument of a virtuous government; law are compulsive and hence the instrument of a tyrannical government."[21]

Under the traditional Chinese society, disputes between individuals are conceived as a disruption to the cosmic order.[22] The occurrence of a dispute is interpreted as moral imperfection of one or both parties, and is also characterized as a failure of education. Thus the settlement of disputes is nothing but a re-assertion of Confucian teachings. The magistrate applies the imperial code to resolve criminal cases and most of the civil disputes. Yet the political and moral authority of the solution imposed derives not only from

[18] On this point, see *Suli Zhu*, Paradoxes of Legal Development in 20th Century China from the Perspective of Modernisation, Hong Kong Law Journal (1998), Vol. 28, pp. 429–439.

[19] *H. Patrick Glenn*, Legal Traditions of the World, 4th ed. Oxford: Oxford University Press, 2010, p. 328.

[20] Ibid., p. 327.

[21] *Derk Bodde – Clarence Morris*, Law in Imperial China: Exemplified by 190 Ch'ing Dynasty Cases with Historical, Social, and Judicial Commentaries. Cambridge: Harvard University Press, 1967, p. 20.

[22] See ibid., p. 43–46.

the imperial code, but in a deeper sense also from the Confucian teachings. This experience is often reinforced by the personal virtues, wisdom and learning of the magistrate. The law as a form is underlined and endorsed by a deeper philosophy, which is capable to transcend law from its purely formal and violent nature.

In addition, the course of dispute settlement is not about defining the rights and obligations of the disputed parties, but about repairing relationships in the fulfillment of rightness and justice. It is not to separate individuals by demarcated sphere of rights,[23] but a re-affirmation of the unity/connectedness/harmony of the people under the Heaven. Exactly for this reason, the adjudication process always has certain degree of a theatric performance towards a broader audience other than the parties to disputes.

The modern judicial system can only deal with the individual (mostly material) disputes. The fading of the background social ideal underneath the judicial procedure leads to the banality of law. Law becomes a banal institution to settle disputes at a formal sense. Law is not an institution to generate or strengthen social solidarity, but to create and consolidates the image that the society is made of disconnected individuals being holders of rights and obligations. Human beings are conceived as rivalling individuals struggling for one's own rights and interests. Individuals are not possible to be conceived as a moral agency towards achieving greater virtue, but a material existence driven by desire (or need, in economics). The positivization of law leads to the death of virtues in the law's empire (if any).

5 AN OUTLOOK ON THE JUDICIARY AND RULE OF LAW IN CHINA

The political principle of separation of power and judicial independence expresses the idea of check and balance of powers, but at the first place also implies that power exercised in those three forms (legislative, executive, and judicial) are legitimately accepted in modern society. The political space in which rule of law can operate to a large extent hinges upon the political legitimacy enjoyed by the judicial bodies in a definite political community.

[23] It is observed that this kind of practice precludes the development of a rights culture. See *Li Qicheng*, A Study on Local Courts at Provincial Capitals and Cities of the *Late Qing* (晚清各级审判厅研究), Beijing: Peking University Press, 2004, p. 19.

Yet, the judiciary in today's China has to create a rule of law space for its own. There is not a rule of law tradition in the sense that the judiciary is able to stand on its own. Thus the judiciary in China has dual tasks, both to administrate and to create the rule of law in China. The administrative dominance in the operation of society is probably endogenous to Eastern Asian countries, like South Korea, Japan, Singapore, China and some others. The strong administration is considered key to the successful economic reform and state modernization. In addition to the paternalistic tradition (a type of historical legitimacy), the administrative power is supported by a kind of performance-based legitimacy. The democratization movement in the East Asian countries, started in 1960s and 1970s, introduced the political legitimacy of vote and participation, legitimacy based on the consent of the ruled. However, the judicial power is yet to establish itself in society. Unfortunately, as a result of being an un-established power, the judiciary aligns itself to, or re-organizes itself in line with other forms of powers. The lack of judicial independence in China is not at all a new observation, but a persistent or indeed parasitic phenomenon in China's legal development throughout the 20th century.

Many outside observers from liberal democracies attribute the problem of the Chinese judiciary to its lack of independence from the Chinese Communist Party or the government. From the perspective of a liberal tradition, the solution for the problems of the Chinese judiciary is to gain more independence from the Party, and in its relation to other state authorities the judiciary should be promoted to a higher political status. What judicial independence means at a theoretical level and how it could be translated into Chinese practice is constantly a tropical issue in Chinese law studies. While some scholars reject the possibility of judicial independence in a single party state, recently more nuanced empirical research shows that the scope of autonomy of the courts in deciding cases is much greater than often presumed and is continuously growing.

The legal development in China deserves being treated seriously. One needs to avoid overly antagonizing the relationship between the court/rule of law and the Chinese Communist Party. As a matter of fact, the Chinese Communist Party is the initiator and by far the firmest supporter to rule of law construction in China. The building of court system and the training of modern judges are all accomplished under the leadership of the Chinese Communist Party. Moreover, with the endorsement of the Party, promoting rule of law and respecting human rights are now incorporated into the

Chinese Constitution which is more than a symbolic action. This is not to say that no tension exists between the Party and the judiciary. While the judiciary is largely a creation by the Party, the professionalism of the judiciary is creating a growing divide between the judiciary and the party, and, from a more problematic aspect, between the judiciary and the general public.

Yet, the real problem for the Chinese judiciary is not about fighting for a higher status in the state structure,[24] but to define a role. It should act carefully to prevent from being trapped in professionalism and populism. Its future lies in whether it could, by transcending its technicality and formalistic culture, be open and inclusive to those who are marginalized and deprived in transformation of China. What the Chinese Judiciary really lacks is a theory, a coherent political theory of social justice.

[24] To many Chinese public the biggest problem of the Chinese judiciary is judicial corruption and judicial unfairness. This implies public support to closer state supervision over the work of the court and more control over the work of the court in order to prevent and combat judicial corruption.