

Why is the Rule of Law in China Unsuccessful?

Danielle Rauli

“Our public security system is the product of a dictatorship,’ Mr. Qin wrote his family when he was on death row. ‘Police use dictatorial measures on anyone who resists them. Ordinary people have no way to defend themselves. Instead of rule of law, we have chaos.’”

—Qin Yanhong Chinese citizen wrongly convicted of murder,
as written in a letter home, quoted in Kahn, 2005a

Introduction: The Rule of Law: What Is It and Why Is It Important in China?

In its most rudimentary definition, the rule of law refers to a system in which “law is able to impose meaningful restraints on the state and individual members of the ruling elite” (Peerenboom, 2002, p. 2). Two existing theories divide the concept of rule of law: thin and thick. “Thin” rule of law implies formal aspects, or any features that a legal system must possess in order to function effectively as a system of laws (Peerenboom, 2006). On the other hand, “thick” rule of law incorporates similar ideas with an emphasis on morality, such as forms of government or conceptions of human rights.

Insights

It is widely debated as to whether China's governmental system incorporates any strong rule of law, thick or thin. Many scholars define China as a "rule by law" nation; that is, the government is above the law. This is directly the opposite of a "rule of law" state, in which no one is above the law. It is even asserted that China's Communist Party (CCP) uses weak attempts toward establishing rule of law as a "mask for oppression and injustice" (Peerenboom, 2002, p. 2). And even those who believe China does maintain a rule of law often weigh the CCP against Western liberal democratic standards, concluding that the CCP's legal system is a thin, weak establishment of rule of law at best. Given this, many critics are also skeptical of the CCP's capacity to establish a strong rule of law. In this paper I will argue that although the rule of law is presently fragile in China, there is a current trend toward strengthening legal traditions in the nation. With the implementation of comprehensive reforms, China has the potential to move toward the more thorough legal traditions of its western trading partners.

Certainly for any nation, the ability to maintain and enforce the rule of law and the coinciding principles can be problematic; however, in China it has been especially difficult. This is largely due to the Chinese political structure and history, as well as the Chinese notion of

Why Is the Rule of Law in China Unsuccessful?

“zhengfa xitong (政法系统)” which “deliberately combines the political and legal worlds” (Keith and Lin, 2003, pg. 623). This zheng-fa system often places emphasis on the position of the people’s leader, and as a result has led to the notion that “policy, as interpreted by the Party leader, was more important than, and could even substitute for, the comprehensive stipulation of law” (Keith and Lin, 2003, pp. 623-624). While this ideology seemed feasible leading up to and during the Mao era, in the face of current globalization and international attention, the zheng-fa “excuse” for a limited rule of law is no longer suitable.

Due to globalization, an ever-expanding market-based economy and the international spotlight that comes with hosting the 2008 Olympics, the emphasis on China’s rule of law system has never been so strong. While it is safe to say that China has recently improved its rule of law system, when weighed against western liberal democratic standards, it is simply not up to par. Western nations, most notably the United States, are continuously pressuring China to reform its system as it becomes a larger player in the world market as well as in international negotiations. China also wishes to mold a legal system that boosts the CCP’s legitimacy in the eyes of its citizens and the rest

of the world, without the cost of compromising its socialist structure. However, before either the West or China can begin negotiations on China's rule of law system, it is necessary to understand *why* the rule of law is limited in China. Why is the rule of law in China so unsuccessful, and what policy changes are needed to ensure a more sound legal system?

Why Is the Rule of Law in China So Weak?

The reasons for a weak rule of law in China can be broken down into four subcategories: the judicial system, the legal profession, and the legislative system, as well as general Chinese culture and attitudes toward the rule of law.

The Judicial System

A weak rule of law in China almost goes hand-in-hand with the Chinese judicial system. The lack of judicial independence from the CCP continues to be a crippling factor for rule of law reform. The court system is almost entirely controlled by the CCP and local governments, and judges are appointed solely by the party and local governments. According to the Carnegie Endowment Fund for International Peace, "because Chinese courts are really a part of state bureaucracy, they typically lack the political authority to enforce decisions" (Pei, 2005, p. 8). Judicial corruption also plays a key

Why Is the Rule of Law in China Unsuccessful?

factor in undermining the authority of the courts. Judges, who are appointed by party members and rarely have extensive knowledge of the legal system, often take bribes in exchange for a favorable outcome in a case. As stated by Chinese government scholar Jamie Horsely in “Rule of Law in China: Incremental Progress,” “Until recently, judges were drawn from the ranks of the retired military. Appointments were based more on political correctness than on relevant experience or legal knowledge”(Horsley, 2008, p. 102).. Even though the system has somewhat improved in the last decade, she reports that only 40 percent of judges today hold a university degree. Another factor which poses a great challenge to legitimacy of the courts is criminal lawsuits. This is evident in China’s statistics regarding the death penalty. According to Amnesty International, in 2008 China performed 72% of the world’s executions, and imposed 79% of the world’s death sentences – more than all other countries combined (Amnesty International, 2009). In the *New York Times* article, “Deep Flaws, Little Justice in China’s Court System”, Joseph Kahn asserts that the police and courts “rely mainly on pre-trial confessions and perfunctory court proceedings to resolve criminal cases rather than extensive legal review” (Kahn, 2005a). This often leads to wrongful accusations and uninformed court decisions that could result in sentences ranging from many years

Insights

to life in prison -- for some, even death. In such a system where no respect for the court process is evident, it is easy for the courts to appear as nothing more than a formality.

The Legal Profession

The Congressional-Executive Commission on China (CECC), created by the U.S. Congress to monitor governance issues in China, estimates there is roughly one lawyer for every ten thousand individuals in China, as compared to a ratio of one to 550 in the United States (Nanlan, 2005). According to the U.S. State Department, the number of government lawyers providing legal aid remains inadequate to meet demand. Those that do provide legal aid are often corrupt, unqualified and inexperienced. This is because, like the judiciary, lawyers are dependent upon the government. In addition, it is common that a party cannot afford a lawyer, due to the limited legal aid system. Lack of experience on the part of the lawyers is also a continuing problem. In a case study of 130 civil disputes brought to trial, it was found that 27% of the lawyers remained silent, 43% made brief comments, and only 4% made actual references to procedural or substantive law (Peerenboom, 2002). This is due to a number of factors. For instance, until 2001, PRC lawyers were not required to have a law degree or any other type of college degree to sit for a bar

80

Why Is the Rule of Law in China Unsuccessful?

examination. As a result, in the mid-1990's, almost a third of China's lawyers had no formal education beyond high school. Many lawyers also prefer to rely on social connections rather than legal analysis to achieve case goals. They oftentimes engage in unfair competition in order to attract clients, including royalties, kickbacks, payment of introduction fees, and clientele practices called "guanxi". Guanxi refers to the system of social networks in which protection of friends, family and co-workers is put above the law. As a result of this corruption network, lawyers tend to take on pro-bono cases for relatives and close friends, and scam other clients to make a profit.

The Legislative System

Lawyers in China are often deemed unknowledgeable of the law; however, the "law" in China is almost impossible to comprehend. China's legislative system is notoriously complex and ineffective, only exacerbating the problem of its weak rule of law. According to Chinese media statistics, 1,932 government officials were convicted for corruption in 2005, including six at the minister level (Shirk, 2007, p. 32). A major contributor to the pervasiveness of corruption and such a disabling legal system is the poor quality of legislation. Peerenboom addressed this issue in a chapter titled "The Legislative System: Battling Chaos." According to Peerenboom, not only is

Insights

“power dispersed, but the lines of authority for law-making are not clear. In many instances, it is difficult if not impossible to state whether an entity was acting within its authority” (Peerenboom, 2002, p. 256). Compounding the problem is the poor quality of legislation, including poor drafting of laws due to the lack of experience on behalf of drafters, which results in poor (if any) implementation. Perhaps the legislative system’s most pervasive contribution to a weak rule of law is the sheer inaccessibility of citizens to the laws. Publications remain a large problem. Many regulations are still unpublished, and those that are published are incomprehensible to party officials let alone the public. And finally, the legislative system is hampered by the relatively low esteem of the Chinese constitution. According to Peerenboom, the constitution is not “treated as the supreme law, nor is it enforced” (Peerenboom, 2006, p. 109). With an increasingly dense constitution and lack of transparency and knowledge when dealing with legislation, it is not difficult to understand why China’s legislative system contributes to a sub-par rule of law system.

Cultural Barriers

Lack of legal knowledge, the judiciary and the complex legislative system are accountable for an insufficient rule of law in China; however, these institutional shortcomings pale in comparison to

Why Is the Rule of Law in China Unsuccessful?

the cultural barriers that are rooted deeply in society. As discussed in an editorial in the New York Times, one author wrote,

“Your hopes that China might change by absorbing “the rule of law” seem to assume that the country’s authoritarian rulers are a major obstacle to the spread of law. In fact, popular attitudes are even more of a barrier” (Link, 2007).

It is true that China’s cultural habits and social traditions present a major obstacle to improving the rule of law in China. Traditionally and historically, China has lacked a “rule of law culture” (Peerenboom, 2006), and establishing effective rule of law in the country is not something that is held in high esteem. Instead, many use social connections to get around the law, feeling that bribery and kickbacks are more effective means of obtaining what they want. As stated in the chapter “The Virus of Corruption” in *China: Adapting the Past, Confronting the Future*, corruption has “always been a way of life in China” (Bouye, Denton, and Dickson, 2002, p.301) The authors proceed to state that “The exchanging of gifts and lavish meals is an established part of business ritual. Chinese journalists think nothing of accepting gifts from interviewees” (Bouye, Denton, and Dickson, 2002, p.301). Aside from having no tradition of rule of law, the CCP also rejects the kind of liberal democratic government typically associated with the rule of law. Therefore, in order to enact rule of law

reform, Beijing's government must find a way to institute widespread respect for constitutional law without compromising its own power and legitimacy.

Evidence for a Strengthening Rule of Law in China

While the rule of law in China has a long way to go before establishing even a thin rule of law system, the CCP has recognized the need for reform to handle a growing market economy and to boost their domestic legitimacy. Understanding the need to present China as a modernizing culture that has leverage on the political and economic level, the CCP has begun to implement improvements in the system that substantially aid the progress of reform.

One of the most important aspects of an improving system is the reform of the legal profession. Law school curricula and teaching methods are becoming more and more diverse, including the “introduction in 2000 of clinical legal education that combines teaching with hands-on practical experience representing real clients” (Pei, 2005, p.8). The CCP has also begun to consult legal scholars in the new and improved process of policy-making. Chinese lawyers are also beginning to engage more directly in politics. Now, over 400 lawyers serve as local people's congress deputies at all levels, and almost 2 percent of registered Chinese lawyers serve on political

Why Is the Rule of Law in China Unsuccessful?

consultative congresses (Kahn, 2005b). Corresponding with the increase in people seeking legal counsel is the increase of cases in the courts, which reflects a growing confidence in the judicial system. Perhaps the most interesting element of the new legal reform is the type of case now being pursued by China's lawyers. Public interest cases that deal directly with specific social problems are garnering public attention, because lawyers are drawn to these issues through the media. Some lawyers even take on "politically sensitive cases involving criminal defendants, activists, and religious worshippers" (Yang, 2007, p. 153). However, doing so often puts Chinese lawyers in direct conflict with local governments, and sometimes, can even cause a suspension from practice. Although governmental restraints on the legal profession are still pervasive, the legal system is certainly moving in a positive direction of reform.

China has also recently experienced some progress in improving administrative law. This is largely through the National People's Congress, an institution that claims to "exercise the power of the people on the state level" (Shirk, 2007, p. 171). However, recent attempts have begun to make the NPC more transparent and responsive to the needs of the people. NPC deputies undergo various training programs and legal experts are being recruited to serve. By

Insights

increasing public participation and the number of hearings, the CCP hopes to improve the credibility of the NPC and become more in tune with social issues that continually resurface. This is also reflected in the expanding village election system. The village elections as well as the NPC deputy elections are “becoming incrementally more competitive” (Bouye, Denton, and Dickson, 2002, p. 302), and some deputies are seeking to more effectively carry out their constitutional duty to supervise the government. Although the reforms to the NPC and the expanding village election system indicate promising attempts at institutional reforms by the CCP, there is still a long way to go. The fate of China’s experiment in legislative reform may hinge on whether Beijing will commit itself to extending the process to all levels of government.

Policy Recommendations

With the goal of establishing more transparency in mind, there are many methods by which the CCP can reform the legislature, the courts, and even the general public’s way of thinking, to alter the rule of law in favor of a transparent, more cohesive system. The first and foremost fundamental step in strengthening China’s rule of law is establishing transparency. The government ought to “give the Chinese citizens the legal right to access information and the means to enforce

Why Is the Rule of Law in China Unsuccessful?

law through the courts” (Peerenboom, 2002, p. 256). Without making the legislative bodies and court system more transparent, the Chinese government runs the risk of deepening its poor rule of law system.

Secondly, the CCP must recognize the need for more institutional reforms in the courts, as well as a more independent court system. Since the judiciary is, essentially, the backbone of enforcing this rule of law system, it is imperative that the CCP mend the current judiciary situation. At a minimum level, the CCP could change the way courts are funded and the way judges are appointed, by shifting the responsibility from local governments to a more centralized system. Also, the CCP could reduce its role in judicial appointments, perhaps by allowing the National People’s Congress control over who is selected. In addition, “increased professional training to enhance competence” (Peerenboom, 2002, p. 258) is essential to structural court reform. Without the authority to enforce the laws and court decisions, the legitimacy of the judiciary is greatly weakened in the eyes of Chinese citizens, thereby rendering it ineffective. Also, the pervasive issue of widespread court corruption needs to be promptly addressed. Perhaps a suggestion to help reduce court corruption could be to raise judges’ salaries, thereby reducing the incentive to use bribery and clientelism as a means of collecting money. Another

Insights

means of increasing the legitimacy of the courts is to increase the social status of judges in general. As it is now, being a member of the judiciary is not necessarily a respected profession in China. However, perhaps if the wage and social status of judicial members were raised, it would attract more qualified candidates to fill the position.

Much like the judiciary, the legal profession is not well-respected in China, and proves to be another example of a system needing substantial reform. As the judiciary system lacks qualified judges, the legal system is also full of unqualified lawyers. In order to obtain more qualified lawyers, the CCP needs to ensure that the process of becoming a lawyer is more rigorous. While there have been significant attempts in recent years to raise standards through more testing, legal training is necessary in conjunction with testing. In addition, legal aid needs to be more readily available, so as to increase the number of cases that are handled each year. This reform deals specifically with the CCP's Ministry of Justice (MOJ). Since 2005, the MOJ has sponsored more than 3,000 legal clinics, increasing the number of clients from 700,000 to 1.6 million (Johnson, 2003).. However, legal aid still does not reach all sectors of society. While it is offered to residents of highly impoverished areas, the regulations on who receives the aid are strict and often complex. To better reform the

88

Why Is the Rule of Law in China Unsuccessful?

legal system, the CCP needs to make legal aid an essential part of legal culture, widening its availability to more sectors of society and classes of people, both urban and rural. Lastly, lawyers need to be recognized as a force for social change. China's lawyers usually "shy away from politically sensitive cases to avoid jeopardizing their lucrative commercial practices" (Johnson, 2003) simply because they believe that their role in such cases will have no bearing on the end result.

While I am not suggesting that lawyers begin to take on highly politically-sensitive cases, I am suggesting that attorneys ought to take more risks to increase their credibility and to make themselves a force for social change. Perhaps lawyers could take on more cases of underrepresented areas, or they could simply take on less monetarily-rewarding cases. By restoring faith in the legal system through the eyes of Chinese citizens, lawyers can encourage strong and positive social change from the bottom up. There is evidence of an increasing role for lawyers in repressive regimes, such as in Taiwan and South Africa, where the legal profession managed to be at the forefront of reforms. This could also be true for China.

Strengthening the role of the National People's Congress is a legislative law reform that could open the door for stronger rule of law. Perhaps even a radical suggestion would be to increase electoral

Insights

freedom by permitting direct elections for delegates above the village level (on a county or township level) or to decrease the Party's role in selecting the members of the NPC. The size of the NPC also needs to be reduced. At present, the 3,000 member NPC is so large that it functions largely ineffectively. Also, the NPC only meets once a year. Decreasing the size of the NPC and increasing the number of meeting times could result in a higher-quality legislative review system.

Institutional reforms and changes to organic laws are crucially important to establish a more transparent and effective of rule of law in China; however, the ability of these changes to take effect lies in the roots of society. It is imperative that laws and institutions “nurture a society that is guided by legal rules and that appreciates its rights and responsibilities under the law” (Keith and Lin, 2003). This type of society calls for a major transformation of the Chinese attitude towards the rule of law in general, a task that will certainly prove difficult. However, there are ways in which the government can boost the reputation and legitimacy of the rule of law. One effective means could be through the use of media and social organizations that promote “legal education campaigns,” as well as using the media to restore faith in the judiciary and legal systems. Moreover, the CCP ought to encourage a free press to back their reform stance. Journalists

Why Is the Rule of Law in China Unsuccessful?

should have a good knowledge of the law in order to help raise legal consciousness and to offer informed reports on legal issues. Also, the CCP could bring about minor education reforms that include simple law-related curricula in China's primary and secondary schools. This could help young children internalize the increasing importance of their nation's legal code. In order to cut corruption, police should also be thoroughly trained and knowledgeable with respect to the law, and local government officials need to strongly discourage the use of bribery, kickbacks and clientele practices.

Conclusion

The reason for China's recent turn toward reforming the rule of law, according to Randall Peerenboom, has "been the belief that legal reforms are necessary for economic development" (Peerenboom, 2002, p. 258). In emphasizing the importance of law to economic development, Chinese legal scholars align themselves with Western economists who argue that rule of law is conducive to economic growth. As a 1999 World Bank report states, "countries with stable government, predictable methods of changing laws and a strong judiciary saw higher investment and growth than countries lacking these institutions" (World Bank, 1999, p. 23) Given that China is moving more and more toward a market economy and becoming a

Insights

major player in the international market, the likelihood that President Hu Jintao will continue on the path of reform is strong. In his meeting with the Political Bureau, Hu Jintao stressed the importance of the rule of law by concluding that “The Party should consistently reform and improve its governance and serve the people, while demonstrating, developing and maintaining its vanguard character” (“President Hu Jintao Stresses Rule of Law in Government,” 2006). He went on to state that the Party came to realize the importance of the rule of law by deepening its knowledge of its own administration and summarizing its long-term practice and experience.

Adding to the economic pressure on the CCP to reform the rule of law, there is also acute pressure from international governments to reform the law in light of the 2008 Beijing Olympics. Organizations such as Human Rights Watch and Freedom House actively monitor Beijing’s stance on the rule of law by tracking the numbers of human rights violations. Persuasion from foreign governments as well as a strong desire for China to increase its international leverage are other reasons why China’s rule of law will continue down the road of development.

In conclusion, I agree with Randall Peerenboom’s concluding argument in *China’s Long March Toward Rule of Law*. He states that

Why Is the Rule of Law in China Unsuccessful?

“China’s rule of law is likely to proceed. Despite occasional setbacks, China’s legal system will continue to converge toward rule of law. The regime will rely on incremental changes, and reformers will be driven primarily for domestic factors and considerations in determining the pace and content of reforms” (Peerenboom, 2002, p. 258). In retrospect, China’s legal system as it exists today has come a long way since Mao and the early post-Mao eras. The government in Beijing is now more flexible, especially in regard to market politics and economics, than it has ever been. It has proved it has the ability to adapt without losing control or detracting from its legitimacy. Although human rights abuses and corruption are still prevalent in Chinese society, the numbers for each are lower than in past years, especially with a recent addition by the CCP to the Constitution that “the state respects and safeguards human rights” (“Chinese expert hails inclusion of human rights in constitution”, 2004). While this is essentially meaningless without the backbone of the judiciary and legal system to enforce the amendment, it proves that China is on the right track and will continue to be for years to come.

In my opinion, the major obstacle to such reforms is not financial or even technical, but is related to the Chinese mindset. Rule of law reform will not “easily take root in systems rife with corruption

Insights

and cynicism” (Carothers, 1998), p. 19. It will only succeed if Chinese citizens have faith in the system. While it is the government’s job to build the skeleton of a more thorough rule of law system, it is the people’s responsibility to give it flesh, to swing the system into motion. Lawyers, judges, everyday citizens, and even children can all serve as the force of social change, from the bottom up. The Chinese people equal the change that must happen in China’s rule of law future.

Why Is the Rule of Law in China Unsuccessful?

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Insights

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Why Is the Rule of Law in China Unsuccessful?

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