



## **The U.S. Impact on China's Legal System during the Reform Era**

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### **Abstract**

An enormous amount of Chinese borrowing from the United States in legislation during the post-Mao era has been noted by mainland China scholars. Their studies indicate roughly about 60-70 per cent of China's transplantation of laws is related to the United States. In comparative terms, China has borrowed more from the United States than from any other countries in legislation in the last three decades. This situation contradicts the CCP communist ideology, the Chinese statist cultural tradition, and is a departure from previous Chinese law transplantation experiences in the last century. The Chinese fondness of the U.S. laws appears to be rooted in complex political, social, economic and global situation, not an enlightenment of the elites.

**Keywords:** *Chinese constitutionalism, Chinese intellectuals, political reform, U.S. constitution, U.S. impact on China, political discourse, law transplantation*

**JEL Classification:** *K10, K30, K40, K49*





## 1. Introduction

An enormous amount of Chinese borrowing from the United States in legislation during the post-Mao era has been noted by scholars in mainland China. Studies conducted by scholars in mainland China indicate that about 60-70 per cent of China's transplantation of laws is related to the United States. In comparative terms, China has borrowed more from the United States than from any other countries in legislation in the last three decades, according to these studies.<sup>1</sup>

This has raised some serious questions in law transplantation from ideological, cultural and historical perspectives. Ideologically, China is supposed to be on the opposite end to the United States and closer to welfare states that are known for their social democratic practices such as France and the Scandinavian countries. China may have a better chance to borrow from these Western European countries that lean more towards equality than liberty. Culturally, between the two major legal systems, i.e., the European continental system and the Anglo-American system, China may have a better chance to borrow from the former which is more "statist" than the latter that is noted for its emphasis on individuals. After all, China has had a statist tradition dating back for more than two thousand years. Historically, China had not been noted for its borrowing from the United States in terms of law transplantation until recent decades. Instead, countries like Japan, Germany, and the former Soviet Union had had more impact on China in terms of law transplantation in the twentieth century before the post-Mao period. Why has China been so fond of the United States in law transplantation in the last three decades, as demonstrated in the studies of mainland Chinese scholars?

This article studies the U.S. impact on China's legal system during the reform era, with a focus on legislation, through the writings and studies of some mainland China's leading scholars. Qualitative and quantitative studies show that mainland Chinese scholars felt the strong impact of the United States on China's legal system during the time period. It looks like that China's massive borrowing from the United States in its legal system was a result of complex political, economic, historical, and global situations, not a sudden enlightenment by the



elites.

Methodologically, this study is largely qualitative, although some data have been collected. It is almost impossible to measure exactly to what extent that China has borrowed laws from the United States, because many U.S. laws are similar to that of some other countries and some laws have multiple origins. Therefore, the data cited in this study are used suggestively.

In addition, this study used lots of studies from scholars in mainland China. The use of social science research results from mainland China scholars is new. In fact, scientific research by mainland Chinese scholars in general, until recently, was not taken seriously in the West. For instance, the Royal Society used the number of times a research paper is cited in the scientific literature as a proxy for quality. It found that as late as the end of the 20th century, China's citation share in scientific literature was almost nothing. But in 2008, it rose to 4 per cent of the world's total. In terms of quantity, it was even more impressive: China now produces the second largest number of scientific papers, next only to the United States.<sup>2</sup>

The Chinese social science situation was less developed than natural sciences. Before the reform era, social research was not even considered to be "scientific". In the last more than three decades, China has made progress in social research. According to the figure by UNESCO, China's investment in social science research had an average annual growth of 15-20 per cent from 2003 through 2010.<sup>3</sup> Chinese social science research has reached the mainstream Western scholarship as well. Examples include: *Chinese Journal of International Politics* is edited by Tsinghua University but published by Cambridge University Press; *Journal of Modern Chinese History* and *International Critical Thought*, both edited by the Chinese Academy of Social Sciences, are now published by Taylor & Francis.

This study is as much an empirical study as a discourse analysis of the Chinese legislative reforms during the time period. It is important to know how the scholarly circles in China feel about the impact of other countries, especially the United States, on China's legal reforms. In other words, the subject dimension of the issue is no less important than the



object dimension. These Chinese top scholars have no incentive to exaggerate about the role played by the United States in China's legislation, because the regime constantly warns about the Westernization of China.

I start with a historical review of the Western influence on the Chinese legislative reforms in the last century, focusing on the question: Why, until three decades ago, the United States did not have major impact on China's lawmaking, unlike countries such as Japan, Germany, and the former Soviet Union? This is followed by an analysis of the U.S. impact on China's legislative reforms during the reform era. Then, I will look at the U.S. impact on several key issues in legal borrowing, such as federalism, judicial review, and human rights. Finally, I analyse the social context in which China learned from the United States in legislative reforms in the last three decade, trying to answer the question: Why has the United States impacted on China's lawmaking with such a force during the reform era?

## 2. U.S. Impact before the Post-Mao Reform

One of the earliest studies that introduced the U.S. political system into China was by Liang Ting (1796-1861) who wrote the book *On the United States* (合省国说) in 1844. In the book, Liang introduced the American republican system, the election system, constitutionalism, and separation of power. Xu Jiyu (1795-1873) introduced the republican system, rule of law, and the election system of the United States in the book *Yinghuan kaolüe* (瀛寰考略) in 1848. In *Fazheng Zazhi* (法政杂志) magazine published in August 1911, such ideas as republicanism, democracy, rule of law, and separation of power noted in American politics were introduced also.

Among those early studies that introduced the Western political system into China, the most well-known was by Wei Yuan (1794-1857) who wrote *Hai Guo Tu Zhi* (海国图志). In the book, Wei described the American political system as noted for "rule of law" instead of "rule of man". Wei also introduced the concept of federalism and the idea that man is born with human rights. Everybody is equal before the law.<sup>4</sup>



China's first transplantation of Western laws was made by Emperor Guang Xu (1871-1908) during the 103-day Reform in 1898, although they were in the name of imperial orders. The Late Qing constitutional reform was influenced heavily by the Japanese Meiji Constitution of 1889. In the words of Shen Jiaben (1840-1913), the chief architect of the Late Qing legal reform, Japan was the best model for China to emulate.<sup>5</sup> But the Japanese legal system was modeled after Otto von Bismarck's legal system of Prussia, which was noted for its favour of a highly centralized bureaucracy. This suited the needs of Japan's – and China's – for national mobilization in the late 19th century. This was also due to the success of the Meiji Restoration which inspired the Chinese scholars and government officials. Japan's geographic and cultural closeness to China was another factor for the Chinese fondness of Japan in law transplantation. Incidentally, Chinese Marxism also came first from Japan.<sup>6</sup> Furthermore, the large number of Chinese students who went to Japan to study was also important in the Chinese learning from Japan. Japan at that time attracted the largest number of Chinese students, because of the convenience of geographic closeness and cultural similarity. The Qing Dynasty collapsed in 1911, thus ending the 10-year constitutional reform. Most of the new laws had yet been put into practice.

The constitutional framework during the Republican era, i.e., Complete Book of Six Codes, was a combination of American tradition and the European continental tradition. Many regular laws were modeled after that of Germany. For instance, 60-70 per cent of civil laws were borrowed from the German constitution.<sup>7</sup> For criminal laws and criminal litigation laws, China also borrowed a lot from the continental model, instead of the Anglo-American one.<sup>8</sup> This is the continuation of the Late Qing constitutional reform, because the Japanese constitutional model was also borrowed from Germany. As the Chinese became more familiar with the West, they felt more comfortable to borrow directly from Western countries, not through a medium, such as Japan. In addition, the ending of Taishou Democracy (1912-1925) in Japan and the subsequent Japanese adopting militarism made many Chinese intellectuals disappointed with Japan.



Apparently, in the early stage of the Chinese legal transplantation, the United States did not exert as much impact on China as some other Western countries. In the late 19th century and early 20th century, China, like Japan, needed mass mobilization for modernization and national defense which called for a concentration of power in the central government, not the American-style federalism. In addition, the United States did not become the global dominant power until after World War II, thus had less influence in the world in a general sense. The U.S. presidential system did not take the monarchy into consideration. But countries like Japan and China in the late 19th century and the early 20th century needed to worry about their emperors.

In 1949, the Chinese Communist Party (CCP) abolished the use of the Republican constitution, the Complete Book of Six Codes. They first drafted the Common Outline and then the 1954 constitution which was modeled after the 1936 Soviet constitution. In drafting the 1954 constitution, Mao Zedong required all high ranking cadres to read the 1924 and 1936 Soviet constitutions.<sup>9</sup> The major historical event that compelled the Chinese to lean towards the Soviet model was the Cold War, especially the Korean War (1950-1953). China's foreign policy at that time was "leaning towards one side". The Soviet mode also suited the CCP need for one-party domination.

With the split of the CCP and the Communist Party of the Soviet Union (CPSU) in 1956, the Soviet constitutional model was gradually abandoned. China abolished the lawyers' system as well as the Ministry of Justice in 1959. The situation became more extreme during the Cultural Revolution from 1966 through 1976 when only one law was passed.<sup>10</sup>

### **3. U.S. Impact during the Reform Era**

The Cultural Revolution ended with the passing of Mao in 1976. After two years of transition, new policies were set with the ascendance of Deng Xiaoping in 1978. The new slogan was "reform and open up". Opening up to the outside world did not refer to foreign trade and other economic matters only, but also to domestic politics, including the



constitutional system. In his report to National People's Congress (NPC) in 1982, "On the Bill to Amend PRC Constitution", Peng Zhen, then Chairman of NPC Standing Committee, said that the 1982 constitution should "pay sufficient attention to not only the rich experience of China's socialist development, but also the experience of foreign countries". In 1994, Qiao Shi, then Chairman of the NPC Standing Committee remarked, "Legislation must be based on China's actual situation. But we also need to learn from foreign countries. We can borrow anything foreign if it is good and suits the need of China's situation. Some of their laws can be transplanted to China directly."<sup>11</sup> Chinese scholars echoed this by saying that the country must import laws, because China did not have the time to develop its own legal system.<sup>12</sup>

Some scholars believe that China's law making drew upon multiple sources. For instance, Li Lin believed that China's legal system during the reform era has two sources: Former Soviet Union, but with Chinese characteristics; Western legal system, but with socialist characteristics.<sup>13</sup> The post-Mao leadership initially intended to return to the spirit of the 1954 constitution modeled after the 1936 Soviet one.<sup>14</sup> This is consistent with the major theory which emerged after the Cultural Revolution, i.e., "primary stage of socialism". In drafting the 1982 constitutions, the drafting committee consulted the constitutions of 35 countries in the world.<sup>15</sup>

However, the U.S. impact can be detected from the 1982 constitution and the U.S. influence on Chinese legislative reforms gained momentum towards the end of the last century. The American constitutional system does have some characteristics that the United States is known for, although it may not be able to claim exclusive rights for it. Some Chinese scholars have noted this when tracing the origins of China's constitutional changes. For instance, about 130 scholars from 50 universities and research institutions in China gathered in Wuhan in September 2008 to discuss the impact of the United States and Great Britain on China's legal system. Most of the paper presenters seemed to believe that the Anglo-American system's impact on China in terms of law transplantation was "overwhelming".<sup>16</sup>



Chinese law scholar He Qinhua divided the post-Mao era into two periods: The first half of the reform era was influenced more by the first stage of the American legal system before the beginning of the 20th century which was characterized by the spirit of liberalism. During the second half of the reform era, China was influenced more by the second stage of the American legal system, that is, after the beginning of the 20th century, more of welfare. This switch was against the background that from 1998 through 2007, government's revenue increased by 5.7 times, while that of people in cities and town increased by 1.4 times and that of the peasants increased by 1.2 times. Government possessed 76 per cent of the wealth, while the people had less than 25 per cent wealth. China's Gini was 4.7. Twenty per cent of the poorest had 4.7 per cent of wealth, while the 20 per cent richest had 50 per cent of the wealth.<sup>17</sup> For the reform era on the whole, according to He, China was influenced overwhelmingly by the Anglo-American model, especially the United States.<sup>18</sup>

Some Chinese scholars elevated the American experience to the level of universal values. They believed Thomas Jefferson and other Founding Fathers in 1776 for the first time were able to put those abstract ideas by the Enlightenment Thinkers into concrete politics in the Declaration of Independence.<sup>19</sup> Some scholars believe that China can learn from George Washington's constitutional thought, which include "checks and balances", "rights of the citizens", and "cultivating a constitutional culture".<sup>20</sup> For Chinese scholar Qian Fuchen, as far as theory of modern constitutionalism goes, constitution has four components: "sovereignty lying with the people", "human rights", "separation of powers and checks and balances", and "rule of law". For Qian, the constitutional system of the United States and Great Britain is the model.<sup>21</sup>

The widespread influence of the West, especially the United States, on Chinese legislative reform, has also been noted by Western scholarship. Randall Peerenboom noted that after the 1990s Western exports of legal system gained momentum because of the collapse of USSR.<sup>22</sup> He also believed that some of China's administrative laws were modeled on comparative laws in the United States.<sup>23</sup> Andrew Peng noted



“the wide acceptance of the liberal constitutional paradigm among Chinese intellectuals” during the time period.<sup>24</sup> Pittman Porter observed “most of the legal forms, structure and terminology currently used in China derive from concepts of European and North American liberalism.”<sup>25</sup>

Jiang Shigong divides the development of constitutional thought in China in the past three decades into two phases. The first, from the early 1980s through the end of the 20th century, was what he called “an ideological stage” during which general Marxist concepts were used to discuss the basic concepts of constitutions to understand China’s own constitution. In the second phase, since the wave of “constitutional adjudication” that began in 2001, people have tried to understand China’s constitution from a judicial perspective. Influenced by this wave, they have started to Americanize their understanding of China’s constitution and to criticize it according to the principles and rules of the American constitution. Thus, research on the American constitution has become the mainstream in the field of constitutional studies.<sup>26</sup>

Although it is hard to measure exactly the impact of the United States upon China’s constitutional change, some rough statistical analysis is possible. The study can be conducted against the background of the impressive growth of China’s legislation in general during the time period: From 1978 to 2011, China made 236 laws, 690 administrative regulations, and 8,600 local regulations.<sup>27</sup> This is against the poor legislation record of the pre-1978 period: from 1949 through 1978, 134 laws were made. A total of 111 of them had been invalid, or 81 per cent. Only 23 laws were still valid.<sup>28</sup>

Studies concerning China’s borrowing from other countries in legislation in the last decade include those by Shen Zongling, a law professor from Peking University, Zhu Jingwen, a law professor from Renmin University, and Li Lin, Director of the Law Institute, Chinese Academy of Social Sciences, China’s main think tank. The study by He Qinhua, a law professor from China Eastern University of Politics and Law, on Anglo-American legal systems’ impact on China is also important.



In Shen's study, he listed 26 cases where foreign laws were borrowed in China's legislation. Among these 26 cases, 11 of them were named, while the rest were labeled as "foreign countries". Among the 11 identified cases, 8 of them are about the United States, or 73 per cent.<sup>29</sup> In Zhu's study, he listed 16 cases where foreign laws were borrowed in China's legislation. Seven of them were identified. The rest was labeled "foreign countries". Four were from the United States, or 57 per cent.<sup>30</sup> In Li Lin's study, 22 cases were listed where China borrowed from foreign countries in terms of legislation. Among the 22 cases, 17 cases were from the United States,<sup>31</sup> or 77 per cent.

If we average the numbers of the three studies, China has borrowed from the United States 69 per cent of the time in law transplantation. Although this is only a rough estimate, given the small sample size, one can get a glimpse of the overall picture of the impact that the United States exerted on China's legislation. Compared with other Western countries, it looks like that the United States has played the most important role in shaping China's legislation in the last three decade. Actually, this is the first time in history that the United States has played such a significant role in influencing China's legislation.<sup>32</sup> It should also be noted, although at the early stage of the reform, China's leaders and intellectuals had intended to go back to the policies of China before 1956 or in constitutional matters going back to the 1954 constitution which was modeled after the 1937 Soviet constitution, the Soviet-Russia experience played very little role in China's legislation in the last three decades. Based on these studies, China borrowed from Soviet-Russian legislation only 9 per cent of the time when it borrowed from foreign countries in legislation.

Among these scholars, Zhu and Shen believe that the 1982 constitution and its amendments borrowed from the United States in "rule of law", "human rights", "protection of private properties", and "federalism", although these characteristics are not uniquely American. Li Lin's study focuses on China's borrowing in non-constitutional legislation.



#### **4. Key Issues: Federalism, Judicial Review and Human Rights**

At the centre of constitutionalism is the restraint of government's power as well as the protection of the individuals' rights, which were reflected in such issues as federalism, judicial review and human rights. The United States has impacted on the Chinese legal system in these areas in the last three decades. Shen Zongling noted that the 1982 constitution borrowed from the U.S. federal system in giving more power to the local authorities.<sup>33</sup> Although it is not the only country in the world that has a federal system, e.g., Switzerland and Germany also have federal system, the United States is the most famous for this. Some Chinese scholars believe that in order to build constitutional governance like that of the United States, China must decentralize its power structure.<sup>34</sup> At the beginning of the reform, Chinese scholar Zhang Youyun criticized the 1975 constitution that did not give enough rights to the autonomous regions.<sup>35</sup>

Unlike the late 19th century and early 20th century when China needed centralization of power for modernization and national defense, the post-Mao period was noted for a gradual decentralization of power which was a response to the over-concentration of power in the national government in the late stage of the Cultural Revolution. Since 1978, power has drifted from the party to government institutions and from the central to locals.<sup>36</sup> Naturally, Chinese leaders and intellectuals were attracted to U.S. federalism.

Judicial review is almost uniquely American. Although countries like Great Britain and Japan have nominal judicial review system as well, they seldom use it. Some Chinese government officials and scholars have tried to adopt some kind of judicial review in China, although the process was not smooth. Generally speaking, the Supreme People's Court has tried to avoid making judgment regarding the constitutional matters. However, the Supreme People's Court for the first time made an interpretation of the constitution regarding the Qi Yuling vs Chen Xiaoyi etc. Case in August 13, 2001.

The plaintiff Qi Yuling filed a lawsuit at the Intermediate People's Court in Zaozhuang, Shandong Province, against defendants Chen Xiaoyi, etc, over a dispute about infringement of the right to her name



and the right to education. Qi Yuling was accepted by Jining Business School as a new student in 1990 through an examination. Because of the fraudulent act by the defendants, Chen Xiaoqi was able to get into Jining Business School using the plaintiff's name. The plaintiff felt that this violated her right to her own name and her right to education. As a result, Qi requested that such infringement be stopped and that she be paid 160,000 yuan for economic losses. The Supreme People's Court intervened to address this case based on the constitution. Some regarded this case as the equivalent of *Marbury v. Madison* in the U.S. constitution. Huang Songyou, Vice-President of the Supreme People's Court, praised this as a major step in having the judiciary to play a role in interpreting the constitution. However, in 2008, the judicial decision was revoked by the Supreme People's Court.<sup>37</sup>

Another example of the Chinese testing on judicial review was the Sun Zhigang case in 2003. Sun was beaten to death by retention quarters personnel. Three scholars, who got doctoral degrees in law, appealed to court by citing constitutional reasons, suggesting to set up an independent agency to watch whether citizens' constitutional right was violated. The case was dealt with quickly and heavily through administrative means, not judicial review. Although the attempt to set up some kind of judicial review failed, the term "judicial review" has become a part of the daily discourse of the Chinese people because of media exposure.

The two cases were a reflection of the general situation regarding judicial review in China. Although both cases failed to endorse judicial review, it reflects the desire of some Chinese government officials as well as scholars to adopt some kind of judicial review and they were very aware of the United States' connection. So far, China's constitutionalism has been in the form of making constitution, carrying out the constitution, and amending the constitution, not in the form of the judiciary judging certain laws unconstitutional. Under the current constitutional framework, the NPC has the power to decide whether certain laws are constitutional or not. The NPC is above the State Council and the judiciary, according to the 1982 constitution.<sup>38</sup>



“Human rights” is certainly not uniquely American. But again, the United States is the most well-known for it. In the words of Louis Henkin, Americans tend to believe that human rights represent something that is uniquely emphasized by Americans.<sup>39</sup> Naturally, some Chinese scholars attributed China’s change in the constitution system regarding protecting human rights to the influence of the United States.

The Chinese experience with human rights has been a path of zigzags. Individual rights until 20th century were unique to the West. But China’s 1954 constitution included bill of rights.<sup>40</sup> For some scholars, the fact that the issue of human rights was written into the constitution in 2004 was one of the two most significant changes in China’s constitutional reform at the beginning of the new century. The other was the issue of rule of law which was written into the constitution in 1999.<sup>41</sup> The issue of human rights received lots of attention from Chinese scholars. For instance, in 2007, key journals of law in China published 159 articles on constitutionalism. Among them, 66 were about human rights, or 41 per cent.<sup>42</sup>

In the previous constitutions, the section of “protecting citizens’ rights” comes after section of “the structure of the government”. The 1982 constitution reversed the order to emphasize human rights. He Qinhua believed that the 2004 amendment to protect individual rights was influenced by the United States.<sup>43</sup>

Many legal devices have been adopted to safeguard the rights of the individual and these devices, such as jury, hearings, contracts laws, labour laws, protection of private properties etc., often bear the in-prints of the United States. In the view of Shen Zongling, the Chinese got inspiration from the 1791 U.S. constitution, which stipulates that the suspect has the right for attorney. To ensure that the defendant received a fair trial, China borrowed from the U.S. regarding the jury system. Although such countries as Great Britain, Germany, and France also use the jury system, they don’t use it as regularly as the United States. But China uses jury system only in big cases. This is largely because it is hard to find jurors who have legal knowledge.<sup>44</sup> In the 1997 amendment, China adopted the principle that one is innocent until proven guilty.



Hearings represent another effective tool to safeguard the rights of the individuals. It was believed that the hearing system in the United States is more effective than the counterpart in China. The testimonies of the United States are more outreaching, more open, and more just than the discussions of the Chinese system. The antagonistic cross-examination in the U.S. hearing system can reveal the nature of the issues under debate more clearly.<sup>45</sup> Following the example of the U.S. legal system, the new Chinese law stipulates that before ordering for penalty regarding licenses and fines, the administrative units are obligated to inform the parties involved that they are entitled for hearings and testimony. The parties involved will not pay for the hearing costs of the administrative units.<sup>46</sup> China's first hearing after the Mao era was in 1997, when Administrative Penalty Law was passed by NPC. In addition to public hearings, such mechanisms as letters from the people have received increasing attention by authorities.<sup>47</sup>

China adopted the 1999 constitutional amendment to protect private properties. It was because the Chinese government was under tremendous pressure from the new bourgeois class that either consume what they have earned in an extravagant ways, or move the money overseas. The 2004 constitutional amendment was to protect private properties in a more systematical way.<sup>48</sup> To make the protection of private properties more effective, a series of laws have been adopted, such as contract laws, tax laws and labour laws. All these laws have imprints from the United States. Chinese law scholar Li Lin believed that laws on contracts were borrowed from the United States too, covering issues such as the principle of choice, charity donations, contracts of lending, contracts in tourism, etc.<sup>49</sup> Shen Zongling believed that laws regarding taxes and labour were also borrowed from the United States and other Western countries.<sup>50</sup> The areas covered include investigation regarding taxpayers' bank accounts, enforcement of taxpayers' invasion of taxes, or debts to other parties, etc.<sup>51</sup>

The legislation regarding custody of kids by divorced parents was also borrowed from the United States. The parent who does not have custody has the right to come to see the kids. But if such parent's behaviour will harm the kids, then the court can order the practice to be





stopped.<sup>52</sup>

## **5. Conclusion: Why Has the United States Impacted on China's Legal System during the Reform Era?**

If, as we stated at the beginning of the essay, the United States' large impact on China's constitutional system does not seem to be consistent with China's communist ideology, the Chinese statist cultural tradition, and the historical experiences before the reform, why has it happened during the reform era?

It seems that CCP's highly pragmatic attitudes towards constitutional matters played an important role. Even before the founding of the People's Republic of China, the CCP supported Zhang Junmai who drafted the 1946 Republican Constitution which was very close to the system of the United States. It was noteworthy that the CCP did not support the other two options available at that time, that is, the Soviet model and the Sun Yat-sen model, which were supposed to be ideologically closer to that of the CCP than the American model.<sup>53</sup> The situation has become even more so now: the Chinese Communist Party is communist just in name. Ken Lieberthal remarked recently, "If the Chinese Communist Party is called what it really is, it would be called Chinese Capitalist Bureaucratic Party."<sup>54</sup>

Another factor is that many policies and laws made during the post-Mao era were largely the result of historical contingencies as a reaction to the disastrous Cultural Revolution. Many of the social welfare values of European social democracy did not fit the post-Mao political culture which leaned more towards liberty than equality, especially during the first half of the reform period.

Furthermore, modern society was increasingly controlled by technology in the later part of the twentieth century. The bureaucracies of different societies perform similar functions. Therefore, in the West, "convergence theory" was developed to explain the situation. For instance, issues such as food safety and environment have little ideological components and it was relatively easier for the Chinese to learn from Western countries. The United States after World War II,





especially after the collapse of the former Soviet Union, has become the world's dominant power. It was natural for a developing country such as China to learn from the United States in governance. The interconnectedness of the two economies also makes it easier for the Chinese to look to the United States for standard.

Compared with political system, legal system's ideological orientation is less obvious. Thus, it was relatively easier for the Chinese to borrow laws from the West, especially from the United States, under the current situation. Although the term "Chinese model" has been used with increasing frequency in the last decade, which symbolizes that people want to become distant from the Western model, the Western Liberal Model is prevalent. In the words of Pan Wei, a Peking University political scientist who is critical of the American system, "Legal studies is the hardest hit area in the sense that it was influenced by the West the most."<sup>55</sup>

Indeed, the Chinese legislative reforms during the time period are for real, not documents that have meaning on paper only, although changes on paper are also significant. As of 2002, China's legal system ranked in the 51st percentile on the World Bank's rule of law index, having risen from the 32nd percentile in 1996 when the World Bank started to monitor.<sup>56</sup> For 2010, it was 44.5 percentile. Asia in general is 50.8 percentile in 2010. It goes back and forth. "Despite many problems, China outperforms the average country in its income class on most major indicators of human rights and well-being, with the exception of civil and political rights."<sup>57</sup> Plaintiff prevails in whole or in part in some 40 per cent of the administrative litigation cases, a rate three times higher than in the United States.<sup>58</sup>

Lynn White also pointed out, if constitutionalism means to contain state power, then the current Chinese system has that element too. For instance, although it is not written into the constitution, no Chinese top leader such as the President can serve more than two terms. White also points out that China is not the only country that has an imperfect legal system. Some of the American laws were made purposely vague also.<sup>59</sup>

"Rule of law" has increasingly replaced governmental policies in the last 30 years. For instance, from 1980 to 1992, NPC made 110 laws,



or each year about 8 laws. From 1993 to 1997, 8th NPC made 78 laws, or 15.6 a year. The 9th NPC, from 1998 to 2002, made 72 laws, or 14.4 a year.<sup>60</sup> "In today's China, law matters more than it ever has."<sup>61</sup>

Furthermore, Chinese political culture has changed a lot in the last three decade because of globalization. The Chinese newspaper *Global Times* reported on March 12, 2012 that 63 per cent of those polled either favoured or did not oppose Western democracy. Half of those polled believe that China was on the verge of revolution. About 93 per cent of city dwellers hope that constitutional amendment be made to protect private properties.<sup>62</sup>

Another on-line survey shows: for the Chinese public, the most admired leaders are, in order, Zhou Enlai (36.13 per cent); George Washington (35.64 per cent); Hu Yaobang (34.68 per cent); Deng Xiaoping (30.79 per cent). The most favoured political system are those of, in order, the United States (71.98 per cent); Sweden (32.38 per cent); Great Britain (30.76 per cent); Germany (28.81 per cent); Singapore (27.51 per cent). Over half of the respondents did not approve of China's political system.<sup>63</sup>

In spite of the progress, both in paper and in actions, serious problems still exist. Paradox in social reality exists in the constitutional system. The Chinese public in general still has little confidence in the country's legal system. According to a survey in 2004, only about 20.1 per cent of those polled said that they would resort to the country's legal system when their legal rights were violated. About 21.5 per cent said that they would try to settle the disputes through informal channels.<sup>64</sup>

For some Chinese scholars, "since 1978, legal reforms have remained institutional, not cultural ... Institutionalized legal reform is "decoration". In reality, it is still rule of man, not rule of law. The root of the problem that laws cannot be properly executed is cultural."<sup>65</sup> Western scholars shared this view: "In the case of China, however, the effects of globalized legal norms are confronted by powerful forces of local culture."<sup>66</sup> Although Western influence on China's legislation was essential, its operations still reflect the influences of local legal culture. "Chinese legal institutions have been mediated by local legal culture."<sup>67</sup>



The Chinese government's highly instrumentalist attitudes towards the country's legislative reforms have resulted in theoretical difficulties in China's legal system.<sup>68</sup> For instance, the relations between NPC and its standing committee are unclear. Standing Committee was given the power to interpret the constitution, but it is unclear whether the NPC has the power to do it. In addition, the relations between the State Council and NPC are unclear. On the one hand, the constitution allows the State Council to issue regulations based on the constitution; on the other hand, it also says that the State Council is under the direct leadership of the NPC which issues laws.<sup>69</sup>

## Notes

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