

Intellectual Property Rights in China

Cosponsored by Washington University's
Weidenbaum Center on the Economy, Government, and Public Policy,
Center for New Institutional Social Sciences,
and Institute for Global Legal Studies

May 11-13, 2006

John Haley
Washington University

I am the outsider on this panel. I am not a Chinese law specialist. My primary country of expertise besides United States is Japan. A course I teach on the Civil Law Tradition also includes Europe and Latin America as well as East Asia. Of significant interest are problems that we confront when we look as legal comparativists at Chinese law and particularly when we discuss the problem of the rule of law in China.

This morning, I hope that I will not take my whole portion of time, but rather set out as briefly as possible some propositions and propositions that are largely definitional with perhaps some historical background, which, at least from my point of view, helps put the other papers and discuss into an analytical context. My goal is to channel or to provide parameters for the issues that we are discussing.

My written presentation begins with a sentence that I would like to read. The rule of law assumes a legal system in which conceptions of correlative legal rights and duties are enforced by impartial, politically independent judges through an judicatory process initiated and ultimately controlled by private parties. That is

the core meaning, in my view, of the rule of law as it has developed inside the Western conception of law and legal order. This assumption of the legal system assumes two very distinct notions and practices.

One is fundamental and I believe unique to the legal order that developed in Western Europe, not Eastern Europe, not Europe as a whole, but only in Western Europe. This element of law became a primary component of the West European legal tradition that reached its fullest fulfillment in the Great National Codes of the 19th century beginning with the French Code of two hundred years ago and ending at the end of the century importantly with the German Civil Code. The German Civil Code, it should be noted, came into effect almost simultaneously with the enforcement of the Japanese Civil Code, which was almost immediately, made effective in Taiwan under Japanese control and in 1910 applied to Korea. Thus three distinct territories in East Asia became active participants in the Great National Code project at the end of the 19th century and beginning of the 20th century. These codes were private law codes. They encompassed property, contracts, and torts. These required formal enforcement systems in which the rules and principles of the code could be applied and enforced by impartial, politically independent judges in an adjudicatory process initiated and ultimately controlled by private parties, the core meaning to private law process.

The other conception, also distinctive, is the notion of a “rule of law” that reached fullest expression in the United States. Although its origins may be found in the English legal history, because of parliamentary supremacy it was not until

imposed by European treaty on the United Kingdom in the latter half of the past century, ever a fully developed feature of any of common law system. Nor was it a feature of continental European law until after World War I with the creation of constitutional courts beginning in Austria and Czechoslovakia in 1920. The American conception of the “rule of law” reflects the view that rules and principles of law exist that can and will be enforced against the state through a system of impartially, politically independent judges through an adjudicatory process initiated and ultimately controlled by private parties. The most basic of these rules are constitutional and thus cannot be revised or overridden by the political branches of government. This conception of legal rules applied and enforced against the state. Except where the state is acting as a private party and the private law code would be applicable, this conception of legal rules applied against the state was never applied in other common law systems without written constitutions where the principle of parliamentary supremacy prevailed. Nor was it applied in Western Europe until the constitutional court movement began in 1920. It is now fundamental, however, throughout Europe as European courts impose rules derived from the treaty of Rome against states.

Another conception often included under the rule of law rubric is excluded by the American definition. This is the notion of a legal order in which legal rules do bind and are enforceable against the state but are not enforced through the judiciary process controlled by private parties and an impartial, politically independent judiciary. This conception, introduced in continental Europe, reaches

it's fullest expression in German law. It is the notion of the *Rechtsstaat* or the legality principle. The requirement that state action be subject to legal rules and legality includes the idea of a constitutional order but the rules may be statutory or administrative and they may be enforced against the state through a variety of processes legislative, administrative as well as judicial. So beginning in France and developed in Germany, we have the European creation of a separate system of administrative courts as separate from the regular judiciary. We can call these courts. The Germans do. But the French do not. They do enforce with rights against the state.

The notion of some kind of administrative organ or adjudicatory system that enforce the rules against state actors and agencies, particularly the rules that the state has created by statute or at the highest levels of administrative organs to ensure that agents of the state comply with the rules themselves is not unique to the West. It is as fundamental to the Chinese legal tradition as private law is to the Western legal tradition. Consider a trajectory of political institutional development and in tandem with that trajectory, the development of institutions for law enforcement. In such evolutionary development, the Chinese can be viewed as having evolved the most advanced and enduring public law system or rule by law system as an administrative state a millennium before Europe. By the time the Romans were just beginning to develop classical Roman law in the third century, BCE – but the Chinese had already established a centralized bureaucratic system and the problems that Bob Kapp and Andrew Mertha described yesterday. Their

comments could not have been made five hundred years, six hundred years, or seven hundred years ago because the fundamental problem of the Chinese state was how to ensure that the agents of the state obeyed the law and the problem in China was always and continues to be corruption at the judicatory level, not among the judges but administrative officials.

The apparatus for the enforcement of law in the Chinese legal and political tradition is administrative not judicial. The problem for China, I submit, is the establishment of a law enforcement system that encompasses conceptions of correlated legal rights and duties enforced by an impartial, politically independent judiciary through an adjudicatory process initiated and controlled by private parties. This requires that those who govern China at the highest level, intermediate levels and the lowest levels give up political power to a cadre of professional judges who function both as agents of the state but also as independent state officials. I suggest this is extraordinarily difficult to achieve. It requires China to move backwards on the trajectory of institutional evolution. I know of no political order, no system of law on the globe historically or at present that has ever accomplished that task.