

## Different Operating Systems

In Washington and Beijing, conference-goers speak the global vernacular of governance — English terms such as “rule of law,” “non-governmental organization,” “public participation” — but meanings often differ from person to person. Those who would transplant American law to China must know how to translate between the “operating systems” which give common words local meaning. American lawyers talk about the need to “make law work,” but the translation in China today might be “making the plans work.”

China and American operating systems share dual principles — pragmatism and stability. Americans understand pragmatism; Charles Sanders Peirce and William James coined the term. China (where the saying goes, “Black cat, white cat it makes no difference as long as it catches mice”) has been a champion practitioner of the pragmatic. But concepts of stability differ.

In China, stability means strong central authority, with no separation of powers; China’s law tradition, from ancient legalism to civil and socialist, fits the top-down mold. America’s Founding Fathers, per Federalist Ten, premised stability in free multiplication of factions. The common law tradition, with bottom-up citizen-court lawmaking and enforcement, fits within this premise.

In China, there are now many environmental laws, but government plans provide requirements (targets or *mu biao*) which are given teeth through performance incentives to responsible officials. For example, the key de facto climate change requirement is a plan target, not a law. The energy saving (*jie*

*neng*) target in the Five Year Plan is imposed through agreements (*zeren zhuang*) with provinces and then with the top emitters. The Five Year Plan also targets sulfur dioxide and chemical oxygen demand but myriad local plans target a host of further items, including local nuisances such as restaurant noise.

Plans are legal (i.e., provided for by Constitution) but not law (i.e., as defined in the law on legislation). In comparative function, perhaps, the plan is analogous to American laws enforceable only by the government on itself, as for instance where there is no practical citizen standing. Indeed, since China’s heavy industrial pollution is still often from state enterprises, enforcement may be largely by government and against government — with attendant tensions where stability is pegged to growth of gross domestic product.

The law-plan distinction goes to the heart of environmental agency authority. In the United States, once Congress makes a law, the Environmental Protection Agency (per *Chevron*) is deferred to for meaning. In China, plan targets are set by the key authority at each level of government; environmental agencies, which must abide by the targets, advise but do not set them. (In the United States, government lawyers are omnipresent; in China today, environmental agencies have few lawyers to compare plans with law).

But similarities between operating systems exist. In both countries, key requirements are set at the

center, with enforcement through agreements with local governments. In both countries civil service workforces are supplemented by large non civil service staff (*shi ye danwei* in China, contractors in the United States.) In both countries interlocal competition drives environmental protection. In the United States, however, and consistent with the common-law, bottom-up operating system, the government paid workforce is supplemented by citizen oversight, with citizen suit and information laws to give bite.

In sum, the translation between law and plan is a key to making China’s environmental law work — and at least two approaches present themselves.

First, from the top, plans and laws may be systematically reviewed and linked — as the new water law does. Second, from the bottom, and drawing on the rootedness of the plan in the government’s own targets and the force of intergovernmental competition, citizens might, drawing on the tools of information-based environmental regulation in America, shine comprehensive light on targets and their implementation. Drawing on the logic of information-based regulation, and China’s new open information law, plan targets might be given further basis and bite and perhaps even promote a race to the top.

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