

Discussion at Second U.S.-China Rule of Law Dialogue, June 2, 2011
**“Inclusive Development, Uniformity and the System of Laws in
China”**

by

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Professor Cheng analyzes the foundation and structure of the present configuration of Chinese legal institutions and its desirable future in a very small number of pages--- a brave and suggestive approach. (I am avoiding the term “Chinese legal system” for reasons that will be clear.) She begins by noting NPC Chairman Wu Banguo’s recent statement that China has now created “a socialist system of laws with Chinese characteristics” (hereafter SSLCC).

Professor Cheng points to the need to venture behind this rhetoric, After noting the principal theories that could be used to define the basic concepts of a legal system, seeks to provide a “framework” for analysis that is composed of three major emphases:

- Coherence of the legal system;
- Dominant policies-economic development, then social justice;
- The Chinese “system” and the rule of law.

She emphasizes that “a system of laws is not just a collection of laws (emphasis supplied).” She also says “a system of laws is different from rule of law.” She also says that after the Cultural Revolution, with the onset of economic reform laws were “not thought of as comprising a system...’ , Here she comes close to something that I wrote years ago, when I said that I didn’t think China has a legal *system* at all, because the law-making and law-enforcing agencies of the state did not seem to be based on a foundation that expressed a single coherent philosophy of law.

Professor Cheng notes that throughout Chinese history, law has been used as an instrument of governance rather than defining “civil rights.” In late Qing history law as also came to be regarded as an instrument of development and as well as a ”tool” of governance. The use of the term “tool” is suggestive, because it is consistent with some Western observers who have characterized the Chinese attitude toward law as one that treats it as an instrument of policy. The policy with this it has been most closely associated, of course, is economic development.

Jie Cheng analyzes the changes that have occurred in the policies underlying legal development, in a transition from heavy emphasis on the goal of “efficiency” to one more modulated by concerns for “social justice.” She traces five stages in the recent history of Chinese law since the onset of reform, moving from heavy emphasis on “efficiency” to increasing emphasis on “social fairness.” In the current, fifth, stage, legal responses are being fashioned by the party-state (my term, not hers) to address economic inequality overall, between cities and the countryside, and among regions; in addition, current policy is shifting focus to dealing with concerns of China’s leaders and citizens about the effects of economic development on diminishment of natural resources and damage to the environment. She points to recent emphasis on what she calls social and economic rights, mentioning some examples of laws adopted since 2007, notably the Labor Contract Law, Employment Promotion Law, Social Security Law, People’s Mediation Law, and Law on Mediation and Arbitration of Rural Land Contracting Law. These reflect what she calls the policy of “inclusive development”

Another analytic concern is the coherence and orderliness of the system of laws, to which not much attention was paid until the enactment of the Legislation Law, which classified laws and law-making institutions, as well as procedures and procedures that the Standing Committee of the NPC may use for reviewing regulations that have been adopted either at the central level or by lower levels of government. For some reason, she does not mention the overlapping function of the Legislative Affairs Office of the State Council, which, according to an official website, has similar responsibilities, specified as:

Handling the filing of local regulations and rules as well as ministerial rules, examining whether or not they contravene the constitution, laws and administrative regulations or conflict with each other, and then putting forward corresponding suggestions thereon according to different circumstances. <<http://www.chinalaw.gov.cn/article/english/about/>>

I might note that in discussions that I have had with members of this Office that I have formed the impression that it has not been very active in carrying out the review of local regulations, and would appreciate clarification from other participants in our conference.

The third element of Professor Cheng’s analysis is the extent to which the current system supports the rule of law, in terms of limitations on the power of government. She notes the advances in administrative law, but argues that current

policy now requires that adoption of legislation that supports and strengthens “substantive equality and social justice.” She enumerates current checks on the exercise of law-making power, but she does not focus on how-- and whether—these checks are in practice exercised. Her paper would benefit from added analysis in this regard.

Her last and most pointed argument concerns the weakness of the courts, still subject to the authority of the NPC, which means that “the constraint of legislative power is less rigid that it should be.” Her conclusion is that current policy, favoring the enhancement of social equality and the “social policy of inclusive development” calls for the NPC to enact additional legislation to advance those policies as well as the role of the courts.

Professor Cheng does not mention the decline, in recent years of the power of the courts to adjudicate disputes, as opposed to resolving them by mediation, especially judicial mediation, which, according to current policy is favored over adjudication. Wang Shengjun, president of China’s Supreme People’s Court, recently spoke to a seminar of senior judges several days ago , urging the country’s courts to employ mediation in solving civil disputes even to the point of prioritizing it over the issuance of court rulings. “Mediation is an effective way to handle social conflicts and promote harmony,” Wang told the judges, although he also cautioned them that mediation should be voluntary and not coerced.

http://www.chinadaily.com.cn/xinhua/2011-05-30/content_2765749.html

Professor Carl Minzner has recently discussed the emphasis on mediation as an expression of dissatisfaction with the ability of the courts to settled disputes, and the leadership’s concern with social stability. This concern seems likely to deflect any advance toward increasing the role of the courts. “China’s Turn Against Law,” http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1767455

Relevant here is Professor Donald Clarke’s recent article on his law professor’s blog, http://lawprofessors.typepad.com/china_law_prof_blog/

Clarke distinguishes among 3 common Western views of the Chinese legal system:

- Optimistic—heading toward an idealized Western rule of law system—and currently disappointed;

- Realist- legal system divided between politically sensitive and other matters, in which considerable progress has been made in the non-political (economic) sphere;
- Cynic- denies that there has ever been a real commitment to rule of law

Clarke states that : “Political power was not, is not and will not be constrained by law.”

This is the “statist” model, in which legal rules are designed to create an efficient bureaucracy that serves the purposes of the state. “It can do so in ways that are more or less efficient, and that produce more or less justice for individuals as a byproduct...But it is not developing a system that will restrain government action when it counts.”

My own view is more in line with Clarke’s than those of the optimist, the realist, and the cynic. At the same time, the “statist” or “developmental” view is not static, because as we know, economic development changes the outlooks of citizens and their economic organizations. We have seen, in the 1990s, the growth of Chinese administrative law and the nascent growth of constitutionalism. There doesn’t seem to be the prospect of progress in either sphere for the immediate future, because we don’t know who will be the next leaders, and what the situation of China’s economy will be.

The situation of China is dramatic, because the goal of Chinese economic development has never been clearly defined, because it can’t be. Professor Cheng’s paper will stimulate our current speculations about the future of the rule of law in China, but like many speculations about China, we can only be inconclusive at the moment.