

Chinese Law Reform: Its Recent Past and Uncertain Future

Hong Kong, November 11, 2014

Introduction

Background to post-1979 law reform

Just as economic reforms were beginning in 1978-1979 and China's leaders announced that China was going to create a "socialist market economy," a prominent Chinese economist said

"Market economy" should be "a bird in the cage" of the socialist economy.

Today, Chinese law reform reflects a mixed picture: The cage has grown since the onset of reform, but the law is still a bird inside of it.

Before 1979 – law a tool of policy, politicized, and existing institutions (based loosely on a Soviet model) were dismantled during the GPCR. Since 1979, as part of the dramatic economic reforms that began then, great progress in creating law-related institutions -- the courts, the legal profession, legal education, and, of course, an exploding body of laws and lesser norms

—but great limits on the growth of legality persist.

today want to share my current assessment of China's progress and some of the problems that it continues to face.

The limited time we have today requires that I focus on a small group of topics that illustrate fundamental issues—and trends that point to different mutually inconsistent trends in legal reform

I Background: the socio-economic context of legal institutions and their reform

Economic reform:

Accomplishments: not discuss other than to note that the yearly rate of growth of China's GDP has been near to or over 10% for over 30 years, which is unprecedented in world history;

- dismantling rural communes and making villages the owners of collective property and businesses;
- Reviving individual businesses and then PS and LLC ;

State sector of the economy has shrunk –but not eliminated. keeping some of the largest SOEs under state control; State-led capitalism under authoritarian one-party rule

- **Reform has generated sharp regional disparities between the coast and inland regions and a growing wealth gap that has seen the difference between richest and poorest to be one of the greatest in the world. [Latest report: urban rural gap is highest since 1978 urban 17,000 Y, rural 5,000Y]**
- **One American scholar has written that by far the most rapidly growing sector of China has been the private sector, but ‘it remains starved for funds and highly vulnerable to predatory behavior by local officials’.ⁱ He adds that ‘the Chinese leadership does not seem to have a clear direction of how SOEs should be reformed’.ⁱⁱ**
- **The dissolution of the state sector has created widespread unemployment and deprived millions Chinese of the social security and healthcare that they once received from their work units.**
- Endemic corruption throughout the governing apparatus has further exasperated an already anxious population.

Corruption is particularly resented in poor rural areas, where farmers frequently suffer from local bureaucratic harassment and malfeasance, as well as unlawful land takings by local governments. The current anti-corruption campaign has added new uncertainties, notably the attitude of local officials “of doing as little as possible to avoid making mistakes...especially in local government departments.” **Caixin editorial 7.23.2014**

2. Governmental administration: devolution of power to local governments; behavior of local govt officials often departs seriously from central govt laws and policies

3. Slow growth of civil society. Party-state anxious to avoid protest, strictly controls activities of non-profits.

Law reform, 1990s and first half of first decade of 21st century

Change in role of law

1. Importance of legislation as source of rules, rather than declarations of policy

2. Legal institutions and CCP ideology

Ambiguity in Chinese conceptions of the rule of law

Chinese policy has long been President Jiang Zemin's stated "Let China be ruled by law," a phrase that was given extensive publicity throughout China, but neither he nor his successors have challenged the leading role of the Chinese Communist Party (CCP) over Chinese society.

Just as symbolically, in 1999 China's National People's Congress amended the Chinese Constitution to insert "the rule of law" into that document as a leading principle for the first time. It co-exists there, however, with Marxism-Leninism, Mao Zedong Thought and Deng Xiaoping Theory, all doctrines that insist on CCP dominance.

Dilution of ideology

Constitutional amendments in recent years to redefine ideology

- Entrepreneurs allowed to enter the CCP
"builders of the socialist cause" added to "socialist working people"
- **Individuals and private sectors of economy given explicit protection of rights**
- "The state protects the right of citizens to own lawfully earnings, savings, houses and other lawful property."
 - Article 24 One paragraph added to the Constitution: "**The state respects and protects human rights**"

Harmonious society

The Hu Jintao leadership chose “the harmonious society” as the rubric under which to advance its particular social, economic and political vision for China. This is a response to growing disaffection among many Chinese increasingly frustrated by the inequities that I have already summarized. Disparities that gape across regions are the source of potentially destabilizing civil unrest, which may in turn threaten the nation’s continued development and Party control.

The harmonious society doctrine aimed to promote more equitable sharing of the fruits of development: the goals have been adopted by the current leadership

Goals include: providing adequate social services in rural areas, correcting regional development imbalances, addressing labor dislocation, expanding health services and education, and placing greater emphasis on environmental and sustainability concerns. By focusing on these tasks, the Hu leadership hoped to bring about a more prosperous and stable society, and thereby bolster Party legitimacy.

The current leadership exalts the China dream, and has undertaken a massive drive against corruption at both high and low levels.

The influence of systemic factors

- **Disconnect between local govts and central govt policies and control;**
- **Size of country, variation in economic conditions;**
- **Govt policy stress economic growth—conflict with other policies:**

Local officials must suppress discontent, keep mass protests from central govt attention-

This leads, for example,

Σto suppressing protests about violation of environmental regulations

Leads also to suppression of labor protests.Σ Guangzhou govt instructions to ct re labor protest

Growing public resentment, paired with the steady demise of the party’s ideological appeal amid market reforms, has forced the CPC leadership to grapple with a genuine crisis of legitimacy.

INSTITUTIONAL REFORM

Reasons for changes

Formal law not responsive to current conditions, especially in rural China

Political reasons for change of policy—not wish to restrain govt power, especially in the face of social tensions

Law once economic reform began, saw a basic change in the Party-state's approach to law: the CCP now use law to create rules, rather than being enacted to formalize policies that have already been implemented, as was the practice before reform began. BUT --Among continuities with pre-reform practice, there is a continued instrumentalist approach to law, as well as experimentation both at the center and locally.

Popular consciousness of law, strongly stimulated by emphasis laid by the state on the development of law and legal institutions has led to greater use of courts- although rights consciousness is still uneven Other favorable developments are professionalization of judges and procurators and the importance of legal academics in the deepening of legal reforms

Even though dramatic economic progress has been made there has been a lack of 'significant institutional change' in the courts since 2005. Greater institutional reform will have to be made in order to meet the challenges, and was targeted as the theme of the 4th plenum..

COURTS

Civil Litigation

Number of cases has grown in recent years --- corruption?

Mediation

Since 2005 there has been one especially notable trend in the handling of cases by the courts because of the rise of protests: an emphasis on mediation rather than adjudication as the preferred method of handling disputes. SPCT guideline for civil trial work: **conciliation possible, adjudication when necessary, emphasis on solving the case** Judges instructed to emphasize mediation

1. SBL in central Chinese city, 2008: pressure on judges to mediate; quotas and resulting pressures on litigants by judges

2. Launch of model judge campaign in January 2010—model judge was praised for emphasizing the three supremes, preventing petitions about local grievances from being

presented to higher levels, emphasizing mediation, and following the practice of “resolving disputes in any way necessary” rather than just sitting in a court room and disposing cases on “technical legal grounds.”

March 2012: President of the SPC: 400 million civil cases. He stressed that resolving disputes through mediation was now a priority of the Chinese court system and that 67.3 percent of civil cases were either handled by mediation or withdrawn. <http://www.clb.org.hk/en/node/110016>

Criminal process An excellent recently published book, McConville, Criminal Justice in China: An Empirical Enquiry, The authors find that the relationship between prosecutors and judges tends to be so close that there is “little space for lawyers to work within.” More basically, a judge is quoted as saying, “the police, the judge and the prosecutor are in one family.” [

Judges, the authors say, “...are clear as to their allegiance. As they see it, they are simply one component of the criminal justice machine that has been established for the purpose of processing criminal cases...through to conviction and punishment.”

ACQUITTALS CAN AFFECT PERFORMANCE EVALUATION OF JUDGES AS WELL AS LAWYERS 196 : NUMBER OF ACQUITTALS MUST FALL BELOW AN ASSIGNED PCT OF ALLCASES HEARD: WITHDRAWAL PREFERABLE TO NOT GUILTY VERDICT

*****CHOICE; submit to conviction or challenge the system.**

Assert innocence? Little prospect that arguments will prevail

Dossier prepared by police and pros, assisted by judge in presentation and management of cases, Compliance is expected and required .

Judgment consultation with superiors -division chief, sometimes ct pres and PLComm in “important” or “complex” cases, party secretary, party committee

much wider scope of influence than “complex” cases

Conclusion: outcome of cases prosecuted in court is never in doubt; presupposition of guilt, trial in form only.

Progress has been made toward resolution of one notorious problem in Chinese criminal procedure, the use of torture to coerce confessions from suspects The Criminal Procedure Law,

amended in March, 2012 , provides that suspects cannot be forced to incriminate themselves, that forced confessions such as those obtained through torture are illegal, and that evidence, testimony and statements enacted through illegal means such as violence or threats must be excluded. .

LAWYERS--2998 -79,000+ currently 200,000+ as of 2010

1990s and early 2000: *Lawyers' growing professionalism*

The qualifications of lawyers have also improved the percentage of lawyers who have a law degree, whether undergraduate or graduate. As of 2007, increased to 51%.

In the first regulations on lawyers, in 1980, lawyers were defined as “state legal workers” (Article 1). In the 1996 Lawyers’ Law, lawyers came to be defined as “professionals providing legal services to society”. It took over fifteen years to nail down in the legal code the status of lawyers as being outside the state, at least formally. Almost all state-owned law firms have been converted to partnerships. With the development of the All-China Lawyers’ Association, there has been movement towards self-regulation of the legal profession.

The growing profession helps structure transactions and add resources for settling disputes, Beyond this, other observers note the emergence of an ideology of legal service that is committed to the cause of justice for individual clients, particularly in non-criminal areas. Although Chinese lawyers are still led by the semi-official All China Lawyers’ Association and regulated by Ministry of Justice and local Bureaus of Justice, **a sense of professional autonomy is emerging among Chinese lawyers.**

BUT- shortage of lawyers in rural areas; low ethics;

Public interest lawyers

In the meantime, although most Chinese lawyers are not involved with what we call “civil rights” some lawyers have appeared who engage in what is known as ‘rights protection’ (weiquan) or ‘cause lawyering’, Two scholars, Fu and Cullen at HKU Faculty of Law describe three groups of ‘cause lawyers’ who they consider as advancing the rule of law. The three groups are:

1. 'Moderates' aim at 'advancing moderate political objectives', such as maximizing workers' wages, increasing consumer protection and removing discrimination in hiring by public bodies and government departments.
2. 'Critical' lawyers aim at reforming the system 'through legal and political action and advocacy'. Their cases often involve civil society organizations such as churches, peasants' associations, labor unions and social organizations. Typically try to increase their influence by mobilizing resources, as by lobbying senior leaders and trying to mobilize the media to bring about desirable results. They may test the limits of reform, while avoiding radical political activism.
3. 'Radical' lawyers represent the most sensitive cases and identify with political dissidents and their political causes. Local governments often try to deny access to the courts to such lawyers, and their commitment and zeal sometimes harms the interests of their clients

Fu and Cullen state that this group of lawyers 'by and large, accept the legitimacy of the existing political system and seek to protect and improve the rights of citizens within the constitutional constraints and legal framework of the PRC'. They are found most frequently in small firms in big cities; some are academic lawyers, based in law schools. Their most common activity is 'defending the rights of vulnerable groups', and they act mainly out of commitment, often receiving limited fees or none at all.

POLICY CHANGES SINCE 2006: "socialist system of law with Chinese characteristics"

Formal law not responsible to current conditions, especially in rural China

Political reasons for change of policy—leadership not wish to restrain govt power, especially in the face of social tensions

Personnel changes: SPCt from legal reformer to ex-cop

One scholar has stressed 'the need for a balance between respect for the authority of legal institutions and populism'. By '**populism**' he means **public opinion expressed through the media and complaints raised through the 'letters and visits system'**. Pressures on the courts are seen by the populace as effective because judicial decision-making can be influenced by officials who are themselves concerned about public opinion. The use of non-legal channels by citizens seeking redress is especially significant in today's China because of the current underdevelopment of channels for 'citizen input'. Further, the more courts are seen as susceptible to popular pressures, the more they may be subjected to such pressures.

The problem of populist pressures on the courts assumes special significance because of the heavy emphasis that the Party-state places on the responsibility of all the professionals in the

legal system to maintain ‘social stability’. Risks are created, however, by emphasizing results consistent with social stability at the expense of treating litigants fairly.

Another factor important for understanding Chinese legal reform is the wide discretion exercised by courts, which permits Chinese courts to differ from the common Western idea that outcomes reached by the courts should be standardized, so that ‘like cases are treated alike and courts are not swayed by extra-legal factors’. A problem that helps stimulate the exercise of judicial discretion is the vagueness of many Chinese laws and regulations.

In the face of the problems that I have itemized just now, the task of creating a legal system that is dedicated to maintaining the rule of law is unprecedented as well as enormous.

Can populism could be used to strengthen popular confidence in the courts without ‘returning to mass justice?’ This concern is timely, given the Party-state’s push for the desirability of using mediation rather than adjudication to resolve disputes brought to the courts.

Court procedures have been improved, as have the training of judges, their educational levels and the quality of judgments. The autonomy of the courts, however, has not increased. Local Party and government officials continue to intervene in the adjudication of cases and enforcement of judgments, although such attention is normally focused on politically sensitive cases. Weak enforcement continues to be a problem for this and other reasons, such as local protectionism, i.e., favoring a local defendant over a party from outside the jurisdiction.

There is no sign of any intention to transform the role of courts in China’s political structure. The transparency of the courts is limited, they are often inactive in sensitive cases, and China’s interior suffers from a steady loss of judges who would rather serve in the cities. There are pressures from other directions, notably media exposures of injustice, media reinforcement of CCP policy, and an increase in petitions and protests.

Liebman notes some positive trends, such as a focus on efficiency and fairness of courts in adjudicating disputes, but not on shifting the role of courts in the system. He finds that the courts are not significant in settling disputes over public rights, i.e. claims against the state, and are still not effectively adjudicating private rights. They do serve, however, as safety valves for airing a wide range of complaints. They are not agents of change, but by encouraging judicial professionalization the CCP may be fostering greater challenges. He also notes that some judges are consulting other courts of equal rank outside their jurisdictions, using the internet for networking, and engaging in downright innovation – within limits. Liebman’s last point is that the courts’ role is increasingly contested and debate on it has become increasingly open.

Another scholar, writing four years after Liebman, emphasizes notably different trends. Carl Minzner notes that ‘in recent years, Chinese authorities have shifted tone. They are turning away from trials and adjudication according to law ... in order to meet political goals of appeasing popular sentiment and warding off social protest.’¹ He cites statistics that appear to show that the percentage of civil cases resolved through mediation doubled from 31 percent in 2004 to 62 percent in 2009. Even though he suggests that the statistics have been fudged to inflate the totals, he notes that this illustrates the pressures on the courts.

He further finds effort to rebuild extra-judicial ‘people’s mediation committees’ (leftovers from the pre-reform era), and to promote more mediation by judges within their courts. Another use of mediation is ‘big’ or ‘grand’ mediation, led by Party political-legal authorities to resolve complex disputes that could lead to large-scale protests.

The recent developments mentioned have been produced, in Minzner’s view, by nothing less than revision of policies toward reform. He cites reaction to the importation of foreign legal institutions that do not work well in China’s rural areas, the courts’ drift away from populism (reflected in increased professionalization), and the idea that western legal concepts used by Chinese judges could be excuses to avoid or oppose Party leadership. Mediation is a response to concerns about social stability.¹ He notes, too, the use of campaigns celebrating model judges whose dedication to Party doctrines and Confucianism should be emulated.

No one can predict the future of the Chinese courts but there are pertinent questions. What will be the role of the courts in China’s authoritarian Party-state? Liebman asks, in the absence of political reform, can they be fair and even act to inhibit arbitrary acts by officials? Or, if they continue to develop the capacity to handle cases fairly, could that lead to greater tensions with the Party-state? Minzner focuses on the resurgence of pre-reform policy toward the courts. Once again the role and function of legal institutions are themselves the subject of debate.

The future of law reform

There are too many unknowns about the future of the CCP, its relations with Chinese society and about future policies – economic and otherwise – for extended speculation about the likely path and timing of law reform

The crucial issue remains, of whether the Party-state will be willing to strengthen the authority of the courts,

If China’s legal development is to progress appreciably, the leadership must confront

- the need to strengthen the concept of procedural justice; and
- the need for the Party to be bound by the law.

China's legal development can only be gradual, and it must be strengthened not only by more powerful and predictable enforcement of law generally and court decisions specifically, but also by limiting the influence of cultural factors such as guanxi (relations) and corruption. The goal of the rule of law has been formally accepted in Party declarations, but progress toward attaining the rule of law will be as one scholar has put it, "long and winding".

In the face of the problems that I have itemized just now, the task of creating a legal system that is dedicated to maintaining the rule of law is unprecedented as well as enormous

The future of law reform There are too many unknowns about the future of the CCP, its relations with Chinese society and about future policies – economic and otherwise – for extended speculation about the likely path and timing of law reform.

Professor Donald Clarke (G. Wash. School of Law) distinguishes among 3 common Western views of the Chinese legal system:

- Optimistic—heading toward an idealized Western ROL system—**currently disappointed;**
- Realist- legal system divided between politically sensitive and other matters, in which considerable progress has been made in the non-political sphere
- Cynic- denies that there has ever been a real commitment to ROL

Clarke: "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. The prospect of progress in either sphere is currently unclear because we don't know who will be the next leaders, and what the

situation of China's economy will be. The goal of Chinese economic development has never been clearly defined, because it can't be.

Scholarly discussions, Chinese and Western, will continue to stimulate our 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, and on that inconclusive note I will close and await our discussion.

Some thoughts on law reform and foreign investment

Recent signals of note

1. Emphasis on greater legality in land reform.

State Council amendment of Law Administration Law – a step toward legality

SCMP Dec 7;

WSJ Dec 7 Wu Jianrong –mass disturbances

[cautionary note on Wukan]

2. **Problem of audits of RTOs**
RTO-Chinese buy controlling interest in listed US company, and can thereby gain market listing w/p IPO

Considerable fraud- much litigation

[SBL: as expert witness:

Rich Chinese couple's China company bought control of listed US company, thereafter it was found that they had misrepresented their company's business and assets,; they transferred several \$ million to themselves and bought large house in US. Lawsuit brought but could not get necessary documentation; settled

Chinese affiliates of US auditing companies refused to hand over documentation

3. **Generally, there is more open discussion in China about legal reform**
E.g., He Weifang

Recent surveys of foreign companies

AmCham Shanghai 2011

Bureaucracy somewhat hinders 70%

Unclear regulatory environment 70%

lack of gvt transparency 68%

tax administration 68%

difficulty enforcing contract terms 60%

obtaining necessary licenses just under 60%

difficulty in litigation 50%

Corruption somewhat or seriously hinders business 60+%

EU Chamber of Commerce China Position Paper 2012

Clarify key concepts under the AML

Transparency in the enforcement of the AML

Improve arbitration enforcement

Standard of review

Publication of relevant court decisions on enforcement

Continue working toward greater transparency

“mismatch between the WTO transparency requirements and the Chinese legal regime”

Official journal

Predictability—affected by retroactive application of laws and regulations and, occasionally, application of laws still in draft form (is with the implementation rules for AML)

Conclusion:

“China is a difficult place in which to do business, in part, because the country’s legal framework is still in the process of being built. Even if the law is fully developed, the application and enforcement can be uneven, especially outside Shanghai, Beijing and Guangzhou.”

Nearly three quarters of responding companies (71 percent) say the regulatory environment in their industry either has not changed or deteriorated over the past year, imposing compliance costs and adding risks to doing business in China”

