

## SBL TALK AT STANFORD LAW SCHOOL, NOVEMBER 13, 2008

### Introduction

"The Uncertain Future of Legal Reform in China."

how far Chinese law reform has come since 1979, possible further reforms, and obstacles to meaningful reform

### Prologue: Chinese law before 1979

1949-1965:

In form, Soviet model

In theory and fact—politicized; law as an instrument of policy

100 Flowers

GPCr-Cts and law schools closed, 1966-1978

### Since 1979, Accomplishments

1979—economic reform, which has been engine of legal reform. Reform has brought a fundamental new orientation toward governing China, in which formal legislation has become the major framework for the organization and operation of the Chinese government.

### Legalization – Legislative explosion

**To implement economic reforms, since 1979 China has generated an extraordinary volume of legislation.** Illustratively, legislation has been used to frame commercial activity; to express policies of state macroeconomic control and their implementation; to give legal recognition to new rights and interests; and to create a framework for direct foreign investment.

### Deficiencies in the judicial system

**The courts and the bar have been reconstructed.** Formerly scorned as "rightist" institutions at the end of the 1950s and as "bourgeois" during the Cultural Revolution, they have been rebuilt in a four-level hierarchy. Courts are increasingly being used as the forums in which rights created by legislation are asserted by citizens against each other and, to some extent, against state agencies. The bar, too, has been established; there are probably now over 150,000 lawyers. Although most of the 8,000 law firms are state-run, the number of "cooperative" firms is growing.

The operation of the courts is seriously deficient.

- **The judiciary is inadequately professionalized:** Only about half of all judges have a complete three-year legal education; many judges had previously served in the army or in other jobs that did not qualify them for their current tasks. Since 1999, Judges must take bar exam-quality relatively better, increasing, especially in higher courts.

- **Corruption is widespread.**

- **Moreover, the extensive decentralization of power that has taken place since 1979 has led to the phenomenon that Chinese call “local protectionism.”**

Because local judges are appointed and the courts are financed by local governments, when deciding disputes the courts often favor local enterprises on which the local governments depend for their revenues. In addition, the courts are frequently criticized for their unwillingness to enforce judgments rendered by courts elsewhere in China against local defendants.

- **Σ Zidell; BP**
- increasing complaints to Letters and Visits Bureaus
- Wang Chenguang, Fu Hualing on the courts in the countryside

**Reforms include:**

**Emphasis on raising quality and professionalization**

**Exploration of use of precedent**

**Reform of death penalty procedure-now SpCt must review all , not just one appeal to next level**

**Civil Procedure Law revised in some respects**

**Grounds for retrial expanded**

**New measures to strengthen enforcement**

**Note: current social and economic context-china in flux**

- continuing privatization of economy-but continued uncertainty about future of large SOEs and lack of social safety net
- decentralization of administration

- growing complexity of nonstate economy
- mobility: breakdown of communal, workplace ties
- Growing socio economic inequality disparities : socio-economic; rural-urban; coastal-inland

## **II breakdown and flux in values**

### ***Corruption***

- Pervasive
- Increasingly complex: Multiple chains
- More higher level officials punished
- Judicial corruption growing

### **rising crime**

### **eroding CCP legitimacy**

### **Chinese leadership paranoia about political opposition [FLG], mistrust of civil society**

*Countryside-* relationship between peasants and authorities is unstable

### **conclusion: economic progress, but threat to social stability**

## **III Institutions**

### **The persistence of pre-reform institutions of the Party-state; ineffective implementation**

In some areas, the authoritarianism of the Party-state continues. Chinese criminal law and criminal procedure remain heavily dominated by the police and by Party influence over individual cases; recurrent “campaigns” to punish crime distort the operation of the criminal process. Police still have the power to send alleged offenders against certain laws to “labor reeducation” camps for as long as three years. Both within and outside the criminal area, much legislation has only been hesitantly and incompletely implemented.

## Legislation and legal interpretations

### IV Policies – conflicting trends

#### Ambiguity in Chinese conceptions of the rule of law

Chinese policy toward the rule of law reflects an ambivalence that is sharply illustrated by President Jiang Zemin's statement in February, 1996, when he stated "Let China be ruled by law," a phrase that was given extensive publicity throughout China. Unfortunately, that was not the entire sentence: In the next phrase, Jiang exhorted all to "maintain the long-term stability of the nation," that is, preserve 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

The building of a "socialist harmonious society" is the rubric under which the Hu Jintao leadership has chosen to advance its particular social, economic and political vision for China. Observers have suggested that, to a large degree, the drive to build a harmonious society is a response to growing disaffection among Chinese people increasingly frustrated by the inequities that have arisen with rapid GDP growth. The ruling Communist Party of China (CPC) has identified the disparities that gape across region and class as the source of potentially destabilizing civil unrest, which may in turn threaten the nation's continued development and Party control. The harmonious society doctrine aims to diffuse any volatile trends by way of "people-centered reform," whereby the fruits of development are more equitably shared. Goals of the new platform 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 hopes to bring about a more prosperous and stable society, and thereby bolster Party legitimacy.

Several troublesome consequences of China's development and modernization have worked to deepen tensions in society. The growth policies espoused by previous leaders Deng Xiaoping and Jiang Zemin heavily favored coastal areas such as the Yangtze and Pearl River Delta regions. Their philosophy was to spur growth by "allowing some to get rich first," on the assumption that prosperity would eventually expand to reach all levels of society. These policies have allowed for soaring growth and great improvements in living standards along China's urban coast, but the rural and hinterland areas have foundered by comparison. Accompanying regional disparities and the growing wealth gap has been the dissolution of the state sector and the social security it once guaranteed millions of Chinese. 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. 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. The Hu Jintao leadership has formulated the harmonious society platform in order to address these problems.

Part of Hu Jintao and Premier Wen Jiabao's shared vision for a harmonious society is a significant re-centralization of government power. Over the past several years, observers have noted that central government agencies have become more assertive, while at the same time provincial and local governments have grown increasingly dependant on the center for funding. The Hu leadership has also installed centralized macroeconomic control mechanisms aimed at more equitably redistributing the profits of China's development. Other measures have been taken to monitor and restrict local government behavior so as to curb the cronyism thought typical of the more freewheeling days under Jiang Zemin. As part of this effort, the central government has targeted the discretionary power of low-level officials, who are perceived as responsible for the rampant petty corruption that has so vexed the masses. By systematically reclaiming control over the purse strings at various administrative levels, the central government is reasserting its power in a bid to rectify operations in the party-state's lower echelons.

### *Harmonious Society and Rule of Law<sup>1</sup>*

A harmonious society was conceived as a society "should feature democracy, *the rule of law*, equity, justice, sincerity, amity and vitality. Such a society will give full scope to people's talent and creativity, enable all the people to share the social wealth brought by reform and development, and forge an ever closer relationship between the people and government".<sup>2</sup> Rule of law has been emphasized as an important aspect of harmonious society.

*The fundamental duties of the people's courts are to solve social conflicts, maintain social stability, guarantee economic development, promote social harmony, and realize fairness and equity. The people's courts are not only a building force of harmonious society but also a protection force of harmonious society, and shoulder a significant historical mission during the course of constructing a socialist harmonious society.*

• *Several Opinions of the Supreme People's Court on Further Displaying the Positive Roles of Litigation Mediation in the Building of a Socialist Harmonious Society* (No.10 [2007] of the Supreme People's Court), March 6th, 2007. The following is an excerpt of this document:

*Litigation mediation is an important part of China's litigation system, an important way for the people's courts to exercise their trial power and an importance composition of harmonious jurisdiction. It is a way for settling disputes, which is rooted in China's historic and cultural tradition and has been proved as effective over a long period of judicial practice. It not only conforms to the current value and litigation awareness of the general public, but also embodies the Chinese nation's longing for harmonious natural order and social order. In recent years, the people's courts have improved their trial work to a large extent, accumulated precious experiences during the process, and established the principle of "conciliating when possible, judging when necessary, combining*

<sup>1</sup> "What is a harmonious society?", [http://news.xinhuanet.com/english/2005-03/21/content\\_5278045.htm](http://news.xinhuanet.com/english/2005-03/21/content_5278045.htm).

<sup>2</sup> The Sixth Plenary Session of the 16th CPC Central Committee, *Decision on Some Important Issues about Constructing a Socialist Harmonious Society*, 2005.

*conciliation with judgment and solving the dispute once the case is concluded” as the guideline for civil trial work. The people’s courts at various levels shall take “solving the dispute once the case is concluded” as the goal of trial work, correctly understand the status and roles of litigation mediation in their trial work and make great efforts to put litigation mediation work forward.*

*Harmonious Litigation.* On January 5, 2007, on the Seventh National Conference on Civil Trial Work, SPC President Xiao Yang gave a speech titled “Construct a Fair, Efficient and Authoritative Civil Trial System, Providing Strong Judicial Protection for the Construction of Socialist Harmonious Society”, in which he coined a concept called “harmonious litigation” or “judicial harmony”. Xiao Yang pointed out, “in the world, there are two modes of civil trial: inquisitorial and adversarial. Too much emphasis on inquisitorial mode will put extraordinary burden on the judges and will impair the image of neutrality of the courts; while too much emphasis on adversarial mode will let to delay and unnecessary costs and even substantive injustice. Under the strategic goal of establishing harmonious society in China, civil litigation shall march towards a harmonious mode. Forcefully initiating harmonious justice will undoubtedly become the important characteristics of civil trial in the new era.”<sup>3</sup>

### **Constitutional amendments in recent years**

#### Entrepreneurs to enter the CCP

“builders of the socialist cause” added to “socialist working people”

Article 21 Paragraph 2, Article 11 of the Constitution: "The state protects the lawful rights and interests of the individual and private sectors of the economy, and exercises guidance, supervision and control over the individual and private sectors of the economy." shall be modified as "The state protects the lawful rights and interests of the non-public sectors of the economy, including individual and private sectors of the economy. The state encourages, supports and guides the development of the non-public sectors of the economy, and exercises supervision and control over the non-public sectors according to law."

Article 22 Article 13 of the Constitution: "**The state protects the right of citizens to own lawfully earnings, savings, houses and other lawful property.**" and "The state protects by law the right of citizens to inherit private property" shall be modified as "The lawful private property of citizens may not be encroached upon." and "The state protects by law the right of citizens to own private property and the right to inherit private property." and "The state may, for the public interest, expropriate or take over private property of citizens for public use, and pay compensation in accordance with the law."

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<sup>3</sup> “SPC Initiate Harmonious Litigation”, available at [www.univs.cn/univs/hfut/renren/article\\_show.php?article\\_id=118846](http://www.univs.cn/univs/hfut/renren/article_show.php?article_id=118846).

Article 24 One paragraph shall be added to Article 33 of the Constitution as paragraph 3, that is "**The state respects and protects human rights.**" And paragraph 3 shall be changed into paragraph 4 accordingly.

**Ask:** Could this lead to greater legal protection of property interests? Raise here the complicated question of China's future political evolution if economy continues to grow:

Western European history and the rise of the middle class

Will China follow the same path?

Middle classes tried to cooperate with kings before they began to demand special privileges

Chinese entrepreneurs linked closely with local governments- corporatist development, unlike civil society in the west.

### **Recent Chinese commitments to deepen the rule of law**

China's accession to the WTO has brought China's leaders to realize the need to deepen of law reform with regard to trade-related and certain other laws. They seem willing, too, to engage in wider legal reform, but some obstacles will impede the further strengthening of institutions. Officials—in BJ

- need for greater regularity and legality recognized- a motive for WTO accession
- administrative law reform, since 1990s, and ongoing:

### **Uniformity of compliance with WTO obligations**

***Chinese commitments in the Protocol of Accession include an undertaking to "ensure" that local government regulations would conform to China's WTO obligations.***

Some impetus will be given to uniform administration by implementation of the Chinese undertaking to "establish a mechanism under which individuals and enterprises can bring to the attention of the national authorities cases of non-uniform application of the trade regime," (Protocol of Accession, Art. 2 (A) 4) but it may be difficult to bring about effective national action to modify or annul local deviations from WTO standards. Nationwide uniformity may be a distant goal, and

### **Transparency**

**The Chinese government has undertaken not to enforce unpublished laws, formerly common.**

***It has also promised that "China shall make available...upon request, all laws, regulations and other measures pertaining to or affecting***

***trade...before such measures are implemented or enforced.” (Protocol of Accession 2 (C)1)***

Attempts are under way to put greater order into the system, and the formulation of legislation is being transformed from the passive translation of policy into a specialized professional activity.

**Compliance with this undertaking quoted above also would import a high degree of transparency into law-making and rule-making processes that have been impenetrable to outside gaze for decades.**

**China has never required a consultation phase in these processes, and is just beginning to experiment in this area.**

**reports of foreign businesses: some agencies giving notice, but not enough time to comment.**

**Σ Slowly increasing experimentation with public participation**

The Legislation Law adopted in 1999 provides generally for legislative bodies and administrative agencies that are drafting legislation or rules to engage in consultations with concerned citizens or organizations. Similarly, the State Council has recently adopted regulations on the drafting process of its rules that provide for “in-depth, on-the-spot investigations and studies of the main issues in the draft regulations;” when “the vital interests of citizens, corporations, or other organizations” are involved, hearings “may” be held. A similar provision is included in regulations on the drafting of rules by State Council agencies.

**Σ Open government regulations, Oct 2008; Σ Hunan**

These provisions reflect the Chinese leadership’s willingness to begin to consider ways of channeling inputs from Chinese society. Preliminary reports suggest, however, that some experimental hearings have involved only carefully chosen participants.

Considerable time will have to elapse for experimentation with these new procedures to unfold -- and for officials to change their mentalities so that that they will accept comment on proposed rules from outside the drafting bodies.

The requirement of “uniform, impartial and reasonable” administration of law

## **Problems**

Courts



1. legislative background
  - p. 49: ROL in Constitution, private property in Const., HR protection
  - Legislation Law
  - Judges law (amended 01)
  - Supervision Law
  - Property law
  - Labor contract law
2. localization of cts
3. admin style—rejection of separation of powers
4. CCP leadership
5. corruption
6. reform plans
  - first (1999-2003) “fairness” emphasized
  - improvement of quality of judges
  - transparency
  - second: (2004-2008)
  - crim law –death penalty
  - civil cases-evidence, pretrial
  - uniform application of law; precedent
  - enforcement of judgments
  - judicial quality
  - funding
7. civil cases-slight decrease since 1999
8. educational level of judges rose-but much through informal training
9. professional qualification level rose, as did training at institutes
10. law clerks
11. reform of people’s assessor system
  - note 80% of cases in which assessors participated settled by mediation
12. civil procedure—retrial procedure modified
13. enforcement procedure
14. adjudication committee reform
15. case guidance system
16. litigation costs reform

### **Restricted reform?**

ROL- generally accepted by most Chinese scholars  
 Judicial independence never accepted as official goal  
 Priorities are economic development, solve social problems while retaining public confidence in party-state, solve political problems step by step while guarding against major political events that might affect economic development

**But what is future role of courts? Cf Shen Kui and Liebman in CQ 2007 Cf Peerenboom, Are China’s Legal Reforms Stalled?**

Caseload- up in 1990s, slump in recent years

New problems that courts not used to resolving

Labor disputes

Discrimination

Environmental litigation

Impact litigation

### **Problems that cts can't solve**

Environmental cases: economic growth v. clean air, water

Land disputes – takings for development, creating disputes over compensation [local govt links with developers]

Housing relocation

Enterprise reform –stripping of assets

Bankruptcy claims

Claims without legal bases

- Underlying values: substantive v. procedural justice
  - **Criminal law and procedure reforms**
- strike hard—succeeded by balance of severity and leniency
- yet although death penalty cases now reviewed by SPCT,
- severity still emphasized
- obstacles to defense lawyers
- pretrial detention still a problem-taking a guarantee and awaiting a trial is exception rather than rule
- evidence [see n. 91]
- Cheng Guangzhong draft of crim procedure law
- Death penalty
- \_change in procedure-reduction in executions
- RETL
- Numbers rising
- Problems continue:
  - Extrajudicial
  - Vague
  - Punishment severe
- Proposals for reform:
  - Retain with minor monitoring
  - Retain but reform extensively
  - Abolish and incorporate into criminal law
-

- Concern with social stability
- Many laws drafted in vague and imprecise language
- Financing still local
- Media pressure
- At same time: Legal culture changing among populace as well—assertion of rights, dissatisfaction with remedies for violation of rights
- Populism
  - Petitions—safety valve, but concern for social stability
  - protests

## **Judicial Review of administrative acts remains limited**

### **administrative arbitrariness/discretion**

### **language of norms**

The requirement of “uniform, impartial and reasonable” administration of law

One of China’s most ambitious undertakings upon accession to the WTO is its commitment to institute judicial review of administrative actions:

“China shall establish or designate and maintain tribunals contact points and procedures for the prompt review of all disputes relating to the implementation of laws, regulations judicial decisions and administrative rulings of general application... Such tribunals shall be impartial and independent of the agencies entrusted with administrative enforcement...” (Protocol of Accession 2(D)1)

#### **Summarize legislation**

[The Administrative Litigation Law that became effective in 1990 permits affected parties to sue administrative agencies in the courts for alleged illegal application of an administrative rule, and some litigation has ensued. A more recent administrative punishment law places limits on which organs have power to create different types of punishments; specifies mandatory procedures for imposing different types of punishment; requires that decisions to impose punishments must state the reasons therefor and requires agencies to comply with procedures set out in law.]

**Courts may only review the legality, not the reasonableness of the acts complained of.** However, Chinese regulations are intentionally drafted in vague language to give maximum discretionary authority to agencies, and as a result it may be difficult to establish that a regulation was actually violated. As long as an administrative action is technically consistent with the rule it applies, the act may not be challenged in the courts. The courts are at the same level in each locality as other administrative agencies; in the past, in interpreting administrative regulations, the courts have usually deferred to the agencies' own interpretations of their rules. If a court finds a rule to be inconsistent with a higher-level regulation it may not invalidate it; although it may refuse to apply it, such non-application hardly ever occurs.

**The courts also lack the power to decide on the inherent validity of administrative rules, regulations, decisions or orders of universal application.**

**Under the Chinese Constitution and legislation doctrine, legislatures are superior to the courts in power;**

**only they may invalidate legislation and administrative rules, while courts may not.** The Legislation Law of 1999 provides for only limited challenge to national or local legislation or administrative rules, by written request to the Standing Committee of the National People's Congress. Governmental organizations -- but not citizens -- may challenge State Council regulations by written statement to the State Council itself; anyone may address challenges of department rules to the State Council; and anyone may the administrative enactments of large cities.]

## ***VI LEGAL CULTURE IN STATE OF DEVELOPMENT, NECESSARILY SLOW***

### **legal culture-law=policy**

**Σ policy trumps law**

**Dominant policy: harmonious society/social stability**

**Translated into action in cts: emphasis on mediation rather than adjudication of disputes. {Zhengzhou cts, 2007 -; 2008 talk of quotas for mediation)  
Intimidation of judges? But maybe solve underlying problems**

**Here again, emphasis on substantive justice—but less concern to professionalize judges, at least according to standards influenced by Western ideal of rule of law**

**Most recently: Natl conference on political-legal work: Hu Jintao – New line on justice: CCP supreme**

New Chief justice is not law trained, emphasizes Party leadership and focusing cts on economic development and social stability.

**tentativeness and flux**

**growth of law intended to control administrative arbitrariness**

*foreign assistance for chinese legal reform*

**1980s, 1990s**

**CLEEC**

**Ford Foundation- legal aid centers**

*More recent*

**US Government—labor rights, WTO requirements**

**Asia Foundation, Yale Center for Chinese law**

**Temple U program in China**

## **1. Draft APL project**

- Conferences, 1998-2001
- Drafting accelerated on eve of Chinese accession to the WTO
- APL draft discussed in SF, December 2003
- Major points and problems
- *Too idealistic—inspired by US APA, would use formal hearing procedures from top to bottom, even though US does not.*
- *FOI provisions*
- *No reference to courts or to consequences of agency violations of law: A crucial unresolved issue is whether the powers of the courts can be increased to bear the burden that such a law would place on them.*

## 2. OLA project:

With China's accession to the WTO, Chinese interest in foreign training and consultation on important areas of law has grown. The Asia Foundation financed a program for training officials of the Legislative Affairs Office (LAO) of the State Council on the requirements that WTO accession now imposes on China. The local offices of the LAO are responsible for reviewing proposed local laws and regulations for compliance with WTO standards. In March, 2002 a group of American WTO experts lectured in Beijing; after that two groups of Chinese officials from OLA visited the U.S. in two-week study tours to learn about U.S. administrative law. Third stage was discussion in HK with foreign lawyers and businesses.

Book published in January 2004—"TAF gave timely, effective support and the project was successful."

### **Emphasis on rule-making, transparency, judicial independence**

- Sacramento
- Washington

**The Asia Foundation experience summarized here illustrates the contribution to incremental progress that can be made by NGOs, foundations and universities.**

### **Last word on foreign assistance**

Congress ought to support other programs that

- combine expertise on specific areas of the law with familiarity with Chinese circumstances;
- involve sustained interaction between Chinese and American personnel;
- emphasize repeated contacts with the same counterparts over time rather than one-time trips or delegations in either direction, and
- promise to have significant effects

Of short and long: contrasting perspectives on Chinese law reform

#### **1. extreme short-term**

**caricatures:** China responsible for trade deficit, manufacturing job losses, China not conform to WTO (stressing violations of IPR rights), China a cheater that does not conform to intl rules, manipulates currency.

China threat: US China Security Review Commission

some of these most critical on human rights, often emphasizing abortion and freedom of religion, demand faster conformity to US ideals.

Emphasize the need to avoid caricatures, either of Chinese institutions or those American institutions that are often employed uncritically as a standard to which all other nations should be held.

2. **moderate:** i.e., USTR, which marks considerable progress in WTO compliance, singles out IPR as most troublesome area, but notes Chinese progress in selected areas.

Note, though, that even the relatively moderate view singles out Chinese slowness in improving legal institutions as a serious issue, as do US companies in Asia that have contributed to the review of China's compliance with the WTO issued by American Chamber of Commerce in Beijing. Administrative transparency is an important issue in the eyes of these companies, which also express continued concern about the quality of the Chinese judiciary

**more funding available for ROL projects. Conference Nov 7,8 at State Department**

3. Chinese law reformers, working away incrementally: Ying Song Nian and Hunan project

3. SBL "cautious pessimist" lack of political will on part of leadership, slowness of process of change in legal culture, **need for political reform to accelerate legal reform in order to make govt and CCP truly accountable.**

Xin chunying at UCB, 2/24/06 : "we are doing political reform through legal reform."