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Thoughts on Rule of Law and China

by

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Abstract

This paper reviews developments in the legal system of the People's Republic of China since 1978 through the prism of rule of law concepts. Taking a six-prong definition of rule of law for its framework, the paper lays out both the unprecedented progress to date and the considerable challenges for the future, in the following areas: (1) Is there a set of rules which are known in advance? (2) Are these rules actually in force? (3) Do mechanisms exist to ensure the proper application of the rules and to allow for departure from them as needed according to established procedures? (4) Can conflicts in the application of the rules be resolved through binding decisions of an independent judicial or arbitral body? (5) Are there known procedures for amending the rules when they no longer serve their purpose? (6) Is the government subordinate to law? The paper concludes that China is in the midst of a transition towards a version of the rule of law in which Chinese characteristics are likely to predominate, whatever and whenever the end of that transition may be.

Keywords: Rule of law, Law enforcing mechanism, China.

JEL Classification No.: K10, K40.

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Eleventh Huang Lian Memorial Lecture
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Thoughts on Rule of Law and China
Natalie Lichtenstein¹

1. 2011 will mark my fortieth year of learning about China. Around the time that the People's Republic of China (PRC) took up its seat in the United Nations in 1971, I had the privilege of sitting in lecture halls like this one—at the Stanford of the East—where I was inspired by a series of legendary China hands, among them Professors John King Fairbank and Ezra Vogel. In studying a country with as long a history and as much pride in it as China, long study is both a sign of respect and a great aid to understanding the vast changes of the last three decades. Yet, if one is not vigilant, it can also be a barrier to seeing China today with sufficiently objective eyes. The unprecedented transformation of Chinese law so far surpasses what could have been rationally predicted in the 1970s that the enormous achievements can obscure the view of the enormous issues and challenges that lie ahead. Fortunately, here I can also be inspired by several veteran observers of Chinese law who continue to assess China's legal growth both knowingly and critically, such as Professors Jerome Cohen and Stanley Lubman.²

2. I am honored to be invited to present the 2011 Huang Lian Memorial Lecture today. A memorial lecture series to provide inspiration for other students is particularly meaningful for

¹ Professorial Lecturer in China Studies, Johns Hopkins School of Advanced International Studies; Professorial Lecturer in Law, George Washington University Law School. The views expressed are my own.

² Professor Cohen's regular blogs can be found at <http://www.usasialaw.org>; and Professor Lubman's regular blogs can be found at <http://blogs.wsj.com/chinarealtime>.

me, as inspirational scholars have had such a considerable influence on my academic and professional career.

3. Today, I offer you some thoughts on rule of law and China. I will structure my thoughts along the following lines: a glance at Chinese legal history and the fascinating question of its lasting influence; an overview of Chinese legal reform since 1979; a look at different concepts of rule of law; and then, taking a 6-part definition of rule of law, an examination of Chinese legal development in each area. I hope that by the end of this talk, you will see why I agree with those who say that China is in the midst of a transition toward some version of rule of law³ as well as with those who caution that Chinese characteristics are likely to predominate, whatever and whenever the unknown end of that transition may be.⁴

(A) Introduction: History and Definitions

(1) A Glance at Chinese Legal History

4. Before turning to Chinese legal development in the late twentieth and early twenty-first century, let us consider briefly some themes from China's long legal history over many more than these twenty-one centuries. China has been governed under a complex legal code issued by the emperor, since at least the Tang Dynasty (618-906 A.D.) if not earlier. The code evolved through successive dynasties until its demise along with the Qing Dynasty in 1911. Invariably, the code addressed primarily what we can think of today as criminal and administrative law. The code was implemented and enforced through magistrates at the district level across China, the lowest level government official for whom law enforcement and judicial decisions were

³ Peerenboom 2002 at 6.

⁴ Chen, Jianfu, 2008 (Conclusion).

among a myriad of functions.⁵ Those decisions were subject to review by higher levels of the bureaucracy, with the remote possibility of a petition directly to the emperor. (Interestingly, the notion that the highest ruler would overrule errant lower levels of the bureaucracy to make the "right" decision in one's case reportedly persists in China today, and can be seen in the extensive petitioning (*xinfang*) system.)⁶

5. While the formal legal system in Imperial times had little to do with commercial subjects, the informal system now appears to have dealt with economy and commerce in a relatively sophisticated way. Customary rules created a framework for commercial transactions, including, for example, loans, land leases and transfers and other commercial contracts, pooling assets into a business, and trading not just within villages, but even with Taiwan.⁷

6. Debates over the rule of law and rule of man date also back even further in Chinese legal thought. It has been suggested that:

“The first debate was probably provoked in 536 B.C. by an order of Zi Chan, the prime minister of the state of Zheng, to have the criminal law of his state inscribed on a bronze vessel put on public display. It was meant by him and understood by his contemporaries as a dramatic gesture to demonstrate the permanence of law and to assure the people that the law would be applied strictly according to its letter, free of government manipulation.”⁸

⁵ Jones 2003 at 16.

⁶ O'Brien & Li 2006 (27-49).

⁷ Lubman 1999 at 20.

⁸ Chang, Wejen 2000. The discussion in paragraphs 6-8 is drawn largely from this insightful essay.

This statement of rule of law (*fazhi*) reflected the Legalist school of thought, which saw law as a kind of craftsman's tool to achieve uniform results regardless of the ruler. Yet even the Legalist school did not suggest that the ruler would be subject to law.

7. The Confucian school can be associated, instead, with the rule of man (*renzhi*), relying on higher Confucian norms and education to achieve proper results. Rather than uniform results, true justice would mean giving each person his due. The higher Confucian norms were expected to constrain the ruler, but not the law itself.

8. After the Legalists were conclusively defeated with Qin Shi Huang in 206 BC, Confucianism dominated the development of the Chinese legal system, and debates over rule of law did not permeate legal thinking for the next two thousand years. Confucianism became the prevailing ideology, politically and legally. Its influence on the legal system can be seen, for example, in code provisions that prescribe different treatment for parties with different status (e.g., for a convicted criminal who is the only son of aged parents, filial duty mitigates against banishment as a punishment).

9. All this was formally superseded in the Republican period with new laws and, in the 1930s, the adoption under the Kuomintang government of a comprehensive civil code, based on German antecedents and Japan's own adaptation of them. The Communist Party's experience during the war in a more revolutionary legal process upended the Republican system on the Chinese mainland, and a Soviet-style legal system introduced after the founding of the PRC in 1949. Initial efforts at re-establishing order and building a legal system slowed down by the late 1950s, and ground to a halt during the Cultural Revolution (1966-1976).⁹

⁹ Jones 2003 at 39.

10. From this oversimplified sketch of Chinese legal history, there are several legacies of the past worth keeping in mind as we consider China's legal system today. The concepts of law are very different in many ways from many Western legal systems. Law had no divine origin and law was not concerned with morality but rather with punishment. With respect to morality, law was a supplemental tool, and *li* (orthodoxy) was the primary regulator. The family (more the clan than the nuclear family) was the central unit of organization, not the individual. Law was focused on punishment handed down from the state in areas of administration and criminal behavior, not focused on adjudication among individuals and not on economic regulation or dispute settlement. Law was, in short, a political and administrative tool to maintain social order and stability, not a mechanism for the realization of individual rights.¹⁰ Despite the distinct breaks with the past, some of these themes reappear in Chinese law today.

(2) An Overview of China's Thirty Years' of Legal Reform

11. The launching of Chinese economic reforms in late 1978 had an enormous impact on China's legal system. The unprecedented construction of the legal system since then has been largely motivated by the needs of economic reform, and now, building a harmonious society. In addition, the desire to restore legal order and protect against chaos after the Cultural Revolution was also an important motivation for reform in the early period.¹¹

12. What did this new economic direction mean for China's legal reforms? In the earliest years of economic reform, it was not hard to see that fundamental changes in the role of the legal system would be needed. For economic entities to be separated from the government departments that supervised them, made responsible for profit and loss, permitted to sell

¹⁰ Chen, Jianfu, 2008 (19-23).

¹¹ Cai 1999 at 139.

products at more flexible prices, allowed to hire and compensate workers, and given greater discretion over enterprise finances, they needed clear legal boundaries, rights and obligations, distinct from the government and from other entities. For the state to regulate their behavior, and that of agricultural producers, without directives and commands under mandatory or guidance planning, new forms of legislation and legal relationships were necessary.

13. The first period of economic reform, from 1979 to 1984, was characterized by improvements to the planning system. In the second period of economic reform (1985-1989) where there was a deeper focus on market reforms, more new laws were issued. After 1992, economic legislation was developed in many key areas (contracts, corporate law, banking law, financial law, among many others), with revisions in the next decade as China's socialist market legal system met with China's changing socialist market economy.¹² Since 2005, several important laws that had been under discussion for many years due to significant ideological debates were finally agreed and promulgated, such as bankruptcy law, property law and anti-monopoly law.

14. Indeed, in January of this year, Chairman Wu Bangguo, head of China's National People's Congress (NPC), gave an important speech, proclaiming that China has established a comprehensive socialist legal system that governs all sectors of social life and provides a legal basis for the country's economic and social construction.¹³ That pronouncement harked back to Jiang Zemin's call to the 15th Party Congress in 1997 to form a socialist legal system with Chinese characteristics by the year 2010.

¹² See Clarke 2007 for a detailed outline of legislative progress.

¹³ "Top Legislator urges China's lawmakers to solicit advice from public," Xinhua, January 24, 2011.

15. The legal framework for the socialist market economy is a key part of this new legal system, addressing many areas, such as: corporate and enterprise forms; contract; pricing and competition; unified and open market and general support for market reform; specific market legislation (capital markets, commodity markets, labor markets, land and real estate markets, agricultural and rural markets); foreign trade and economic cooperation; technology markets and intellectual property rights system; and the taxation system and accounting and auditing systems.

16. The new economic system also called for a different role of government, as administrator separated from ownership. What has come to be known as "administration by law" is developing through policy and practice. Administration by law relies on and is supported by key laws (administrative litigation, administrative reconsideration, administrative penalties, administrative licensing law, and state compensation law).

17. China's court system also developed to correspond to the different needs of the market economy, in contrast to the planned economy. The 1970s-1980s saw the post-Cultural Revolution restoration of the courts, under the Constitution and basic laws on people's courts and criminal and civil procedure. The courts continued to develop in the 1990s along with the socialist market economy and related legislation, notably revisions to the civil procedure law and the law on judges. A period of judicial reforms over more than 10 years now has continued to strengthen the ability of the courts to play a key role in the resolution of economic disputes. In 2009, courts across China handled over 11 million cases, an increase of more than 6% over the previous year.

18. China's accession to the World Trade Organization (WTO) a decade ago has had an important impact on legislation, administration and the judiciary. The impact of WTO on the market economy legal system can be seen in the flurry of revisions to laws and regulations on foreign trade and intellectual property, and review and revisions of licensing requirements in preparation for accession, requirements for transparency in administration and rule-making and judicial review by the courts.

19. In short, the massive change that economic reform brought to the Chinese economy created a need for massive change in China's legal system.

(3) Rule of Law: Different Definitions

20. Lawyers at the World Bank, as at other multilateral organizations, are accustomed to working in different legal systems with different definitions. At the same time, they are also accustomed to looking across legal systems for answers to the same legal questions, and finding different types of responses in different countries. Looking at the question of the rule of law—perhaps the legal question of all legal questions—is no different.

21. In the 1990s, as the Bank and other economic development institutions were grappling with the role of law in economic development, the World Bank General Counsel at the time, the late Dr. Ibrahim Shihata, put forth a definition of rule of law that was targeted at economic reform:

"Reform policies cannot be effective in the absence of a system which translates them into workable rules and makes sure they are complied with. Such a system assumes that: a) there is a set of rules which are known in advance, b) such rules are actually in force, c) mechanisms exist to ensure the proper application of the rules and to allow for

departure from them as needed according to established procedures, d) conflicts in the application of the rules can be resolved through binding decisions of an independent judicial or arbitral body and e) there are known procedures for amending the rules when they no longer serve their purpose."¹⁴

22. Interestingly, this definition does not include what would be the *sine qua non* of rule of law for many Western concepts of rule of law: the subordination of government to law. In the words of the 13th century English instrument, the Magna Carta:

"No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we [the King] proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land."¹⁵

Non-Western systems sometimes have a different perspective, as we saw in Chinese debates more than 14 centuries before the Magna Carta. Even as late as 1830, French constitutional tradition provided that "all justice emanates from the king, it is administered in his name by the judges, whom he nominates, and whom he institutes."¹⁶

23. Professor Randall Peerenboom discusses different views of rule of law at great length in his 2002 book, *China's Long March toward Rule of Law*. In brief, he characterizes two main schools of thought, "thin" rule of law and "thick" rule of law. The thin theory of rule of law stresses formal or instrumental aspects of law. "Although proponents of thin interpretations of the rule of law define it in slightly different ways, there is considerable common ground, with

¹⁴ Shihata 1991 at 85 (The World Bank and "Governance" Issues in Its Borrowing Members).

¹⁵ Magna Carta of 1215, clause 39.

¹⁶ Stephanie Balme, "Local Courts in Western China," in Peerenboom 2010 at 179.

many building on or modifying Lon Fuller's influential account that laws be general, public, prospective, clear, consistent, capable of being followed, stable and enforced."¹⁷ He goes on to outline the thick rule of law theories that abound, all beginning with the basic elements of a thin concept of rule of law but then incorporating elements of political morality, forms of government or conceptions of human rights. In sum, all forms of thick rule of law accept the basic benchmark that law must impose meaningful limits on the ruler and all are compatible with a thin rule of law.¹⁸ As noted above, Professor Peerenboom himself concludes in that book that China in the midst of transition toward some version of rule of law that measures up favorably to the requirements of a thin theory.¹⁹

(B) Rule of Law and China

24. This lecture will focus on Dr. Shihata's five elements that reflect what Peerenboom calls "thin" rule of law, while adding a sixth dimension essential for "thick" rule of law, namely, is the government subject to law. Perhaps Dr. Shihata was constrained in his definition by the requirement in the Bank's charter that the institution not interfere in the political affairs of its members, nor be influenced by their political character and that it base its decisions only on economic considerations.²⁰ Without adding the dimension of government subject to law, however, one cannot really capture the challenges facing China's legal development today and in the future.

25. What follows, then, is a high-level survey of Chinese legal developments over the past 30 years, from the following perspectives:

¹⁷ Peerenboom 2002 at 3, citing Lon Fuller, *The Morality of Law*, Yale University Press, New Haven, 1976.

¹⁸ *Id.* at 3-4.

¹⁹ *Id.* at 6.

²⁰ Articles of Agreement of the International Bank for Reconstruction and Development, Article IV, Section 10.

- (1) Is there a set of rules which are known in advance?
- (2) Are these rules actually in force?
- (3) Do mechanisms exist to ensure the proper application of the rules and to allow for departure from them as needed according to established procedures?
- (4) Can conflicts in the application of the rules be resolved through binding decisions of an independent judicial or arbitral body?
- (5) Are there known procedures for amending the rules when they no longer serve their purpose?
- (6) Is the government subordinate to law?

Based on this survey, I will offer some concluding observations.

(1) Is there a set of rules which are known in advance?

26. Written and publicly available rules, whether in the form of law, regulation, decree, circular or other instrument, serve several purposes. They offer predictability, if regularly enforced. They offer fairness, if enforcement is even-handed. They allow efficient economic decisions if the “rules of the game” are reliable. This basic requirement of rule of law may seem tautological, but the summary above shows that it is no simple feat. And, recalling the Chinese experience during the Cultural Revolution, or the experience of other countries in similar situations of extreme conflict, a set of known rules can be elusive.

27. *“A SET OF RULES...”* As discussed earlier, before the start of economic reforms in 1979, China’s legal system did not include most of the basic areas of law necessary for a market economy. Missing areas of law included contract, companies, securities, banking, enterprises, bankruptcy, property, debt, and guarantee, to name some of the more prominent ones.

Starting with the 1979 passage of China's first joint venture law, opening up led gradually to new laws in key areas. In his 2011 speech, Chairman Wu noted that, as of 2010, a total of 236 national laws, more than 690 administrative regulations and more than 8,600 local laws and regulations have been enacted. These laws and regulations form a multi-tier socialist legal system with Chinese characteristics--a significant achievement in the development of China's socialist legal system.²¹

28. At a higher level, China's Constitution has been revised during the reform period to provide a legal foundation for political, social and economic changes. The current Constitution was enacted in 1982, early in the reform period, and has been amended four times since. Each set of amendments has reflected important changes: the relative place of socialist public ownership, collective ownership and individual ownership in China's economy, the leasing of land rights and compensation for their taking, introducing the rule of law (a country governed by law) and state protection of human rights and private property.

29. "KNOWN..." Publication of laws has also become prevalent. Laws are published, available on the internet in various databases. So, too are regulations, with many fewer internal (*neibu*) documents than in earlier years. One continues to see indications of internal orders, such as in reported censorship of media content and treatment of dissidents. Nonetheless, the Regulations on Open Government Information that took effect in 2008

²¹ "Top Legislator urges China's lawmakers to solicit advice from public," Xinhua, January 24, 2011. Generally, the modern Chinese legal system is described as consisting of seven branches of legislation and three levels. The seven branches of legislation are: the Constitution and the Constitution-related laws; civil and commercial laws; administrative laws; economic laws; laws on society; criminal law; and litigation and non-litigation procedural laws. The three levels are: laws; administrative regulations; and local regulations, autonomous regulations and separate regulations.

provide for governments at all levels to disclose a wide variety of information relevant to the public, including administrative rules, regulations, and fees.²²

30. Nowadays, dissemination of law is part of administration and popularization of law among the people is one of the specific functions of China's Ministry of Justice. It is interesting to read how access to legislation can empower ordinary citizens, whether it is workers recounting (at least to foreign reporters) that the labor actions in 2010 were influenced by the popularization of the legal changes in China's labor laws that took effect in 2008,²³ or peasant protesters confronting local officials with copies of legal documents that undercut illegal demands for fees.²⁴

31. Moreover, in its accession to WTO membership, China agreed to publish its trade-related laws (defined as laws, regulations and other measures pertaining to or affecting trade in goods, services, trade-related aspects of intellectual property rights (TRIPS) or the control of foreign exchange), and to make them available to WTO members, individuals and enterprises. Indeed, China has also agreed under WTO to enforce only those trade-related laws that are published and readily available to WTO members.²⁵ This commitment puts a very high value on publication of laws.

32. *"IN ADVANCE..."* Another important development in public knowledge of China's laws and regulations is the increase in the public discussion of draft legislation as it is being prepared. Reports of debates once legislation reaches the legislative bodies actually date back to a brief period of flowering in the 1980s, when excerpts of the Standing Committee debate on the draft

²² Horsley 2007a.

²³ "China's Labor Tests Its Muscle," New York Times, updated August 16, 2010.

²⁴ O'Brien & Li 2006.

²⁵ Protocol on the Accession of the People's Republic of China to the World Trade Organization (WTO), November 10, 2001, Part I.2.C.

enterprise bankruptcy law were aired on television in 1986.²⁶ That phenomenon proved short-lived, but ten years later considerable controversy and debate was taking place in the drafting of key laws, such as the air pollution law.²⁷

33. Increasing use of public comments and hearings has been reported in the last five years. In Chairman Wu's January speech, he urged lawmakers to solicit advice from public and conduct in-depth research before tabling bills in legislature, and to find ways to enable the public to engage in the nation's legislative processes.²⁸ This openness is part of a growing trend. In a 2009 review of public participation, Jamie Horsley noted that both the NPC and the State Council had incrementally introduced a more transparent and participatory legislative process, and that local people's congresses and governments had in many cases regularized more participatory governance.²⁹ In 2008, the NPC Standing Committee announced that it would make public as standard procedure future drafts submitted to it for review and adoption, and the State Council announced that it would publish virtually all draft rules and regulations (other than those involving state secrets or national security). Similarly, the Supreme People's Court has initiated a practice of soliciting comments on draft judicial interpretations on its website.³⁰

34. Overall, there has been remarkable progress in establishing a set of rules known in advance in China. Yet there are areas where progress is clearly uneven. To give but one example outside the economic realm, there was a significant advance in Chinese criminal law

²⁶ Chang, Ta-Kuang 1987 at 348.

²⁷ Alford & Liebman 2001.

²⁸ "Top Legislator urges China's lawmakers to solicit advice from public," Xinhua, January 24, 2011.

²⁹ Horsley 2009, noting that the Property Law elicited over 11,500 comments from all sectors of society, and the draft Labor Contract Law released for public comment in March 2006 received even more - almost 192,000 comments, 65% of which were from ordinary workers.

³⁰ Horsley 2009, citing: for NPC, China Daily, April 21, 2008; for OLA, Notice of the General Office of the State Council on Printing the State Council 2008 Legislative Work Plan; for SPC, <http://www.chinacourt.org.cn/wsdc/more.php?location=2602000000>.

with the amendment in 1997 to conform to the international legal principle of *nullum crimen sine lege* (no crime without law making it so) expressed.³¹ Nevertheless, the reports of recent restrictions on the domestic liberty and foreign travel of Chinese scholars after the 2010 Nobel Peace Prize announcement lead one to wonder whether these individuals knew they were violating a law or regulation.

(2) Are these rules actually in force?

35. Rules that exist on the books but not in reality obviously lend little to development. In addition to being known, they must reasonably intelligible to those who are bound by them, and capable in reality of being obeyed. They have to make sense in the actual circumstances.

36. In earlier reform periods, there were several unusual ways in which the promulgated rules were often not in force. One aspect was confusion over which rules apply. Even once laws and regulations were enacted, and thus known in advance, it often proved challenging to resolve conflicts between different rules issued by different authorities, whether national (NPC or State Council), provincial or municipal, or a special economic zone or area. While the 2000 Law on Legislation has clarified the scheme to some extent, this can still be a concern.³² For foreign investors, for example, there has been what Stanley Lubman characterizes as a kind of rolling uncertainty—the rules for more established forms of investment became clearer, while those for new forms remained uncertain, and sometimes subject to center-local government tensions.³³

³¹ Clarke 1998 at 13.

³² Professor Donald Clarke has referred to the competing sources of legislative authority as polycentricity. Clarke 2005. See also Clarke 2007 (section 5.2).

³³ Lubman 2006.

37. Another aspect, in the periods of extensive experimentation in economic reforms, was the phenomenon of reforms without legal rules. For instance, the emergence of joint stock companies in the late 1980s and stock exchanges in the early 1990s all pre-dated a nationwide company law. Perhaps the first such example would be the 1979 Sino-Foreign Joint Venture Law, as it defined joint ventures as limited liability companies, a legal term not defined in China until the Company Law came into effect in 1994, some 15 years later.

38. Similarly, reforms not permitted under existing law also undermine the force of laws. An example often given is the leasing of land use rights in Shenzhen before the Constitution was amended in 1988 to permit such leases. Perhaps the developmental importance of the amendment is that the need to amend the Constitution was recognized and acted upon.³⁴

39. In more recent periods, greater emphasis on enforcement of law is evident. A policy push for enforcement of law was provided by the 1999 Constitutional amendment providing for “governing the country according to law” (yifa zhiguo). In 2004, a ten-year program to achieve administration by law was announced, under the State Council’s leadership.³⁵

40. Enforcement of the set of rules described under (1) above relies in part on the administrative law framework that has also been enacted. This framework includes laws to regulate administrative acts (administrative licensing, administrative penalties, administrative requisition and expropriation, administrative review and administrative litigation) as well as to provide for state compensation for administrative infringement of person or property. One

³⁴ Clarke 2003.

³⁵ “After promulgating the Decision of the State Council on Promoting Law-based Administration in an All-round Way in 1999, the Chinese government issued the Outline for the Implementation of Promoting Law-based Administration in an All-round Way in 2004, specifying the goal of building a government under the rule of law, and setting forth the guidelines and specific targets, basic principles and requirements, as well as major tasks and measures for the full-scale promotion of administration by law in the ensuing ten years.” State Council Information Office 2008 at 17.

can also consider the laws governing civil servants as another piece of the framework to support enforcement of law.

41. Chinese courts hear over 100,000 cases each year where citizens seek judicial redress for violations of these administrative laws in specific cases, despite the difficulties in getting these cases into court.³⁶ A structural reason for the low (but continuously increasing) number of administrative cases lies in the legal process of administrative reconsideration, where citizens can first request a higher-level administrative organ to reconsider the decision being challenged.³⁷ The success rates of plaintiffs in accepted lawsuits are in line with some developed countries.³⁸

42. Still, considerable challenges to enforcement of laws remain. One main reason cited for uneven enforcement is local protectionism, where local officials protect the economic interest of the area by favoring local firms or individuals and not properly enforcing the law against them.³⁹ Another barrier to effective enforcement is corruption, and concerns that the laws are not always enforced against wealthier or more bureaucratically connected figures. Differences in economic development across regions create gaps in enforcement as well.⁴⁰ Some have also noted that the many varying processes of dispute resolution (courts, mediation, *xinfang*) also add uncertainty to application of law.

³⁶ O'Brien & Li 2005.

³⁷ Fu 2003.

³⁸ Peerenboom (2003 at 400) points out that plaintiffs prevail in whole or in part in approximately 20-40% of administrative litigation cases in China, in comparison to 12% in the US and just 8% in Japan and Taiwan. However, Horsley (2010) points out that a recent study found that Shanghai plaintiffs overwhelmingly lose their OGI cases.

³⁹ Cai 1999.

⁴⁰ deLisle 2007 at 5.

(3) Do mechanisms exist to ensure the proper application of the rules and to allow for departure from them as needed according to established procedures?

43. Establishing a mechanism for the predictable, fair and transparent application of laws requires a sufficient number of competent and trained administrators, and an environment where rules are expected to be followed, not flouted. In addition, the rules must provide for application and variation in different circumstances, and thus a process for making exceptions. Otherwise, where application is impossible, the law will simply be ignored—chipping away at the expectation of compliance with laws.

44. *“MECHANISMS EXIST FOR PROPER APPLICATION OF RULES...”* The multi-year and multi-pronged efforts of the government to rule according to law mentioned above include mechanisms for the proper application of rules. These mechanisms must be first entail the positive: ensuring the proper set up, staffing and training of offices, making officials at all levels aware of the legal requirements. Then come the negative incentives through the administrative law framework above—if rules and procedures are not followed, there will be legal consequences. Increased openness in administrative decision-making, noted above, along with restricted scope for licensing under the Licensing law are both factors that will facilitate implementation of the administration by law plan.⁴¹ Similarly, increased accountability of government officials and a strengthened national audit office are other elements of ensuring proper application of rules.⁴²

45. While we saw that administrative litigation to enforce the requirements of administrative law does take place and that plaintiffs can succeed, there is still room for

⁴¹ Cai 2005 at 20.

⁴² Cai 2005 at 21-24.

improvement, even in the legal framework. As an example, there is still no overall administrative procedure law that would ensure administrative processes and decision-making in the areas not covered by the administrative penalties, reconsideration and licensing laws. There is also no mechanism to overturn a law in general through a process of judicial review, but only the possibility of obtaining redress in a concrete individual case.

46. Even without a general mechanism, however, public pressure can bring about better implementation of law. Professor Cai Dingjian cited the case of hearings on Spring Festival railway fare increases, which did not take place despite a requirement in the Price Law. In 2001, a lawyer challenged the Ministry of Railways, seeking administrative reconsideration of a price increase that took place without a hearing. The appeal was first accepted, and then rejected. The next year, however, the State Planning Commission held a televised hearing before deciding on the Railways' rate request. "Since then, extensive public hearings have been held on such issues as price fixing, administrative punishment, and urban planning."⁴³

47. *"MECHANISMS EXIST TO ALLOW DEPARTURE ACCORDING TO ESTABLISHED PROCEDURES..."* One mechanism used in China to allow departure from the rules has been flexibility in the drafting of the rules themselves. Chinese legislation in the past has employed this kind of "escape valve" to allow the law to be followed in varying circumstances. Looking way back to the first Provisional State Enterprise Rules in 1983, for instance, one finds that almost every area where an expansion of enterprise rights was permitted (such as selection and purchase of goods, sales, pricing and export of products), the rights granted were "within the scope of state regulations". On the one hand, vagueness and fluidity may have suited the

⁴³ Cai 2005 at 10.

evolutionary nature of Chinese economic reform; on the other hand, this contrasts with the legal precision that frequently characterizes company law in more developed market economies.⁴⁴ Often, this flexibility is explained by reference to the breadth and diversity of different conditions across China.

48. As professionalization has benefited China's legal drafters, laws in more recent periods show a marked increase in drafting precision.⁴⁵ Some former flexibility has been circumscribed. For instance, the Criminal Law was revised in 1997 to remove the provision allowing behavior to be deemed criminal by analogy to a similar provision of existing law, a practice that dates back to the Qing Dynasty code. Instead, the revised Criminal Law provides that acts not expressly stipulated in law as crimes may not be deemed a crime and subject to punishment.⁴⁶

49. In addition to providing flexibility in the rules, there are also some mechanisms to allow for departure from rules as needed. In 2004, the NPC Standing Committee established a specific office for reviewing regulations for consistency in national law, and in late 2005, the Standing Committee announced the adoption of new procedures for handling citizen constitutional and legislative review proposals filed under the Legislation Law.

50. This followed a sad case in May 2003, when the outcry over the death of a young man in police custody led to the revocation of the practice of custody and repatriation. A proposal had been filed with the Standing Committee by three legal scholars, arguing that this form of administrative detention violated the Constitution and the Law on Legislation, although there was no official connection between ending the practice and the proposal. As of 2008, citizens

⁴⁴ Lubman 1999 at 147.

⁴⁵ Corne 2002.

⁴⁶ Clarke 1998 at 42.

had filed at least 40 subsequent proposals for constitutional and legislative review with the Standing Committee.⁴⁷

51. Despite the use of flexibility in drafting and new mechanisms for Standing Committee review, the legislative conflicts noted above can often go unresolved for some time, necessitating what Professor Donald Clarke has called a kind of disobedience by consensus.⁴⁸

(4) Can conflicts in the application of the rules be resolved through binding decisions of an independent judicial or arbitral body?

52. China's judicial system has been built up in parallel with the legislative reforms of the last three decades. With most basic laws enacted and legal institutions in place, weaknesses in implementation of law have brought to the forefront the necessity of related institutional reforms, and judicial system reform in particular is widely discussed. Judicial reform was formally recognized at the 15th Party Congress in 1997 and since. The Supreme People's Court is in the process of implementing its third five-year reform plan.

53. *"CONFLICTS IN APPLICATION OF LAW CAN BE RESOLVED THROUGH... AN INDEPENDENT JUDICIARY..."* Are China's courts independent? Most observers would say, at best: not yet. There are several different dimensions to the question of independence.⁴⁹

54. First, there is the constitutional dimension. China's Constitution provides that China's courts are the judicial organs of the state (Article 123). Judicial independence is specifically articulated: "The people's courts shall, in accordance with the law, exercise judicial power independently and are not subject to interference by administrative organs, public

⁴⁷ Kellogg & Hand 2008. Cai 2005 at 10.

⁴⁸ Clarke 2007.

⁴⁹ Peerenboom 2010 groups together several informative and provocative essays exploring judicial independence in China.

organizations, or individuals.” (Article 126) While the Supreme People’s Court is the highest judicial organ and exercises supervision over lower level courts, the Supreme Court itself is responsible to the NPC and its Standing Committee; local people’s courts at different levels are responsible to the organs of state power that created them, generally the local people’s congress (Articles 127-128). The NPC elects the President of the Supreme Court; the NPC Standing Committee has the power to appoint and remove the Vice Presidents and judges of the Supreme Court on the suggestion of the Supreme Court President (Articles 62 and 67). Similar arrangements are provided for at the provincial and lower levels.

55. Even from this structural dimension, judicial independence under the Constitution is by no means absolute. Judicial independence must also be seen in the context of China’s political structure as a unitary state without separation of powers amongst legislative, executive and judicial branches. More precisely, the Constitution provides that courts shall “exercise their judicial power independently” and without interference from the executive branch, public organizations or individuals. At the same time, it provides that the courts are the judicial organs of the state, and are responsible to the people’s congresses at their respective level. People’s congresses exercise supervision over the courts, clarified under a 2006 law on supervision by the standing committees of the people’s congresses at all levels. One of the objectives of that legislation was to re-focus supervision away from individual case supervision by local people’s congresses that raised concerns. Clearly, if local people’s congresses interfere in specific cases, the courts cannot exercise their judicial power independently.

56. Under the constitutional scheme, interference by administrative organs is prohibited. In reality, local protectionism through the local people’s government and officials has been and

continues to be a major barrier to judicial independence. Because funding for the courts at provincial and lower levels comes through the local people's government at the same level, and judges are public officials at those levels, there has been much scope for direct and indirect interference and influence on local courts. The scope for local governments to affect the personal situation of judges over lawsuits may have been somewhat reduced over the last decade, since such non-salary aspects such as housing, education and other benefits have increasingly been marketized.

57. Greater centralization in funding is being introduced under the third five-year plan. A deeper but still partial reform under discussion for some time would be to introduce more centralization into funding and separation of local control over the courts. This could entail a two layer approach: The NPC would appoint and remove Supreme Court and provincial high court judges, and fund these two levels, while the Provincial people's congresses would appoint and remove intermediate and basic judges in their respective provinces and fund these two levels.⁵⁰

58. The Constitution does not address the role of the Communist Party in judicial independence—in fact; the only references to the Communist Party in the Constitution are the preamble mentions of the Party's leading role in the united front. Interference by the Party in judicial cases is mentioned by many scholars and observers,⁵¹ especially in sensitive political and criminal cases, and seen as less common in ordinary cases.⁵²

⁵⁰ Jiang 2010.

⁵¹ See, e.g., Jiang 2010 noting that the judiciary has less influence in the Party than other systems do, and the judiciary is constrained by Party and state officials.

⁵² See, e.g., Cohen 2008 observing that "so far as outsiders can observe a largely nontransparent system, the courts deal with huge numbers of ordinary civil and criminal cases in an apparently impartial manner" while politically sensitive criminal cases provide most obvious disappointments.

59. Beyond these structural constraints on judicial independence, there are internal and organizational dimensions to building judicial independence in China. The Supreme People's Court is now implementing its third five-year judicial reform plan. The first two plans were broad in scope, including: reforms of trial procedures, such as separation of the court's functions of accepting, hearing, supervising and enforcing case (an anti-corruption measure, among other aspects); internal supervision mechanisms; adjudication procedures (more adversarial elements introduced); and a notable increase in the professional background and qualifications of judges (through a uniform exam system, educational requirements, inter alia). A key reform was to require Supreme Court review of all death penalty cases.

60. To promote professionalization, for examples, a provision was introduced in the Judges' Law in 2001 to require college degrees for judges. Post-secondary training of judicial personnel went from 17% in 1986 to 100% in 2000. By mid-2005, over 50% of judges had university degrees, a sharp increase from 6.9% ten years earlier.⁵³ Gone are the days when demobilized army officers were transferred to the judicial system en masse and when the judiciary was one of the professions in which it was easiest for non-professionals to be employed.⁵⁴

61. The third five-year reform plan for 2009-2013 includes sentencing system reform, strengthening enforcement through separation of judicial review and execution, limiting retrials, introducing environmental protection case tribunals in the Southwest, and notably, promoting "incorruptible justice"⁵⁵ nationwide. Internal supervision would be strengthened under a

⁵³ Liebman 2007 at 625.

⁵⁴ Chen, Jianfu 2008 at 152.

⁵⁵ There are "five prohibitions" under the 2009 rules: no acceptance of dinner invitations or gift-giving; no unjustifiable contact with lawyers; no interference in cases handled by others; no malpractice for private gain (evaluation or auction); and no divulging secrets from court trials. Xu & Li 2010.

system of supervisors, while a case guidance system and sentencing guidelines will promote greater uniformity in court judgments. Transparency in open case filing, trial, enforcement, hearings and documents will strengthen independence by making interference harder to hide, and rules for relations with news media also address openness. Different forms of dispute settlement (mediation, arbitration, all under the rubric alternative dispute resolution, ADR) offer parties different ways to find justice, as well as reducing court caseloads. (There remains a concern that a better framework is needed to ensure that mediation and other innovative forms of ADR are voluntary and do not infringe rights, violate rules and weaken judicial autonomy.) Building on reforms in the first two phases on court fees and concern for poorer litigants, access to justice remains part of the third five-year plan.

62. Building independence internally will be a slow process. Other players in the justice system (public security, prosecutors, and police) may have more authority than the courts, so the judiciary will need to be seen as a highly competent and less corrupt institution to gain more independence. Corruption undermines independence, and despite ethical rules, corruption in the judiciary is frequently reported, sometimes at high levels.⁵⁶

63. *"CONFLICTS IN APPLICATION OF LAW CAN BE RESOLVED THROUGH... BINDING DECISIONS..."* Independent judgments are key, but so, too, is whether or not they are binding. Effective enforcement of judgments in China faces some of the same problems as independence (local protectionism, corruption). The judicial reform plans have separated out enforcement functions, to enhance independence and reduce opportunities for corruption.

⁵⁶ Cai 2005 at 3. In 2010, a former Vice President of the Supreme People's Court, Huang Songyou, received a life sentence for bribe-taking. "Supreme Court VP gets life for taking bribes," China Daily, March 17, 2010.

Finality is another aspect of binding decisions, and the Supreme Court has taken action under the reforms to limit retrials and to find some limit to repeat petitions.

64. *“CONFLICTS IN APPLICATION OF LAW CAN BE RESOLVED THROUGH...AN INDEPENDENT ARBITRAL BODY...”* Arbitration in China is also available to resolve disputes. In addition to the well-known foreign arbitration body, CIETAC (China International Economic and Trade Arbitration Commission) established in 1954, over 180 local arbitration commissions have been founded since the arbitration law came into force in 1995. These local arbitration commissions can arbitrate both domestic and international disputes, and some have achieved a certain level of independence.⁵⁷ Recent revisions to CIETAC's arbitration rules may promote further the independence and impartiality of CIETAC tribunals, which foreign commentators and parties have often questioned.⁵⁸

65. In addition, mediation has seen a transformation and resurgence in China in the last decade. While people's mediation has a long history in China, it was used in the early Communist period often for political purposes rather than to resolve disputes. Today, it is seen as a way to promote social stability through finding a lasting resolution to social disputes. It can also be used to reduce burgeoning court caseloads such as in the labor field, where labor arbitration and mediation have been active processes in the reform period. The passage in August 2010 of a new law on people's mediation provides a sounder legal framework for the 4 million or more mediations concluded by people's mediators each year.

66. Yet, despite certain progress, major reforms are still needed to achieve the judiciary's goals of justice and fairness. The daunting problems facing China's judiciary include local

⁵⁷ Chen, Fuyong 2007.

⁵⁸ Moser 2007.

protectionism, weak enforcement of judgments and interference with judicial independence (from civil society, local governments, local legislatures and within the court itself), as well as corruption within the judicial system itself.

(5) Are there known procedures for amending the rules when they no longer serve their purpose?

67. The importance of amendment procedures for rule of law is simply to ensure that when rules no longer fit the needs of the society or the economy, the rules can be changed instead of ignored. Chinese legal reform has many examples of amendments, such as the revision of three separate laws into the unified contract law, or the most recent series of legislative actions to make Chinese laws compatible with China's WTO requirements. Indeed, hundreds of regulations were revised or abolished to reduce licensing requirements and to ensure that remaining requirements were appropriate to the new era. In the 2000s, there have been revisions of laws that were heralded a decade earlier as milestones in their own right—Company Law, Banking Laws, Securities Law. Since 2000, the Law on Legislation has formally set out the procedures for revisions.

68. These changes are an important indication that a proper legal mechanism has been used when the legal provisions begin to diverge from reality or desired goals. It is also important to recognize that, in its economic laws, China shares a difficulty with other transition economies, for it often strains the imagination of legislators and policy makers to craft rules to govern a future economy radically different from the one they have known. In some ways, China's law drafters and legislators even 10 years ago were drafting and legislating into "the dark", trying to fashion principles and procedures for an economy that did not yet exist. Small wonder that

adjustments will be needed as the actual course of economic reform and attendant legal and policy issues continue to come to light.

69. In 2011, Chairman Wu has emphasized the need for lawmakers to pay more attention now to revision and improvement of existing laws.⁵⁹ Nevertheless, there is often a time lag in taking up the revisions, leading to what Donald Clarke calls a kind of disobedience by consensus.⁶⁰

(6) Is the government subordinate to law?

70. As noted above, this element of rule of law is at the center of Western notions of rule of law. Whether it is emphasized as strongly in Chinese thinking, the fact is that government is—slowly, gradually—becoming subject to law in China. As Professor Benjamin Liebman has pointed out, after 30 years of reform, law has begun to regulate both state and individual behavior, playing a role in regulating conduct not just in economic development, business and investment, but also in consumer rights, environmental protection, labor and employment relationships. Legal reforms have begun to limit state as well as individual conduct, in areas such as administrative law and land regulation, shaping state behavior even if it not always a constraint.⁶¹

71. Similarly, while noting that China today is not a rule of law state, Jamie Horsley has noted that China is moving beyond the "rule by law" paradigm, and is "slowly establishing elements of a 'rule of law' system that increasingly provides mechanisms also to restrain the

⁵⁹ "Top Legislator urges China's lawmakers to solicit advice from public," Xinhua, January 24, 2011

⁶⁰ Clarke 2007.

⁶¹ Liebman 2009.

arbitrary exercise of state and private power and offers the promise, if not the guarantee, that Chinese citizens and other actors can assert their rights and interests in reliance on law.”⁶²

72. One concrete element of government subordination to law is the administrative litigation law that permits citizens to sue the government. As noted above, China’s courts hear thousands of administrative cases each year, and, of those cases accepted, plaintiff success rates are not out of line with other jurisdictions.⁶³

73. The State Compensation Law has also recently been revised, to permit citizens to be compensated for wrongs by administrative agencies. While case under the previous law were few and far between (1500 cases per year), the new law includes some noteworthy revisions that could increase that number. The amended law now allows victims to apply directly for compensation either to a higher-level administrative unit or by filing a lawsuit, allows compensation for acts that are not illegal (and may just be negligent) if the victim’s “legitimate rights and interests” are harmed, and allows compensation for psychological injury.⁶⁴

74. In many ways, however, there are clear indications that the law does not invariably limit the actions of government agencies or officials. Better enforcement of laws is precisely aimed at the problem of governing according to law. But weak enforcement, whether influenced by local protectionism or corruption, sends the message to society that the government is not limited by law. The fact that corruption charges against officials are usually treated as a breach of Party discipline, and only secondarily as criminal behavior to be prosecuted in courts reinforces the perception that law does not apply to those in power. Other examples in the

⁶² Horsley 2007b.

⁶³ See discussion at paragraph [41] *supra*.

⁶⁴ Lubman 2011.

foreign press include the detention of rights lawyers, leading Professor Jerome Cohen to observe last week: "Making lawyers disappear and subjecting dissidents to constant harassment makes it hard to take seriously the government's claims that it is devoted to rule of law."⁶⁵

75. Corruption is a major target of government efforts. Those efforts have aimed both at constructing a firm legal framework to outlaw corrupt behavior and to punish it, and at empowering institutions to root out corruption. The overall legal framework to combat corruption is relatively complete, with room for improvement in implementation.⁶⁶ A recent government white paper on corruption characterized the severity of the problem, noting that, in the 21 century:

"the focus has been shifted to investigating and dealing with cases in which leading cadres take advantage of their control over personnel affairs, judicial powers, right to administrative examination and approval, and right to administrative law enforcement to act in collusion with lawbreaking businessmen, trade power for money, and solicit and take bribes, cases in which leading cadres provide protective shield for underworld and evil forces, and cases of serious infringement on the interests of the people, and cases of corruption that cause mass disturbances and major accidents due to negligence."⁶⁷

The Party's organs for discipline inspection and the government's supervisory departments work together to root out the causes and symptoms of corruption.

⁶⁵ "China's Intimidation of Dissidents Said to Persist After Prison," Andrew Jacobs and Jonathan Ansfield, New York Times, February 17, 2010.

⁶⁶ Guo 2006.

⁶⁷ State Council Information Office 2010.

76. One prominent reminder of the impact and influence of corruption has been the prevalence of media accounts of land takings for local government or private gain. Recent actions have also been taken to address the impact of numerous land takings and home demolitions on social stability and public perceptions of the rule of law. In the case of urban demolitions, for example, regulations were announced in January 2011 which had had nearly 100,000 comments in two rounds last year.⁶⁸ These new rules provide for compensation first and relocation later, forbid violence or coercion to evict homeowners, rule out land developers' involvement in the procedures, and provide for compensation no lower than the market price of similar properties. In rural areas, a Ministry of Land and Resources campaign aimed at reducing expropriation of land from farmers and forced demolition of buildings has also been recently announced.⁶⁹

C. Concluding Observations

77. This survey shows, in my view, that China has made considerable progress and yet has some way to go in developing the rule of law. Certainly, there are signs that point in the direction of rule of law: a vast body of legislation and serious efforts to implement and enforce it; increase in use of the judiciary to resolve disputes and deepening attention to the reforms needed to bring fairness, impartiality and efficiency to China's courts; development of the legal profession and the expansion of the private practice of law in response to market needs; growing depth and breadth of the legislative debates; and individual resort to legal provisions in all forms of disputes.

⁶⁸ "New Rules put an end to forced demolitions," Xinhua, January 28, 2011.

⁶⁹ "Ministries to crack down on land abuse," China Daily, February 18, 2011.

78. The challenges cannot be underestimated, in my view. The judicial system must overcome local protectionism, governmental and legislative interference, financial dependence, ineffective enforcement and corruption. The legislators and the executive branch must complete the legal framework at the same time as they revise laws that become out of date as the market economy spreads and WTO implementation deepens.

79. At the political level, there is need for continued and serious support for legal and judicial reform from the country's senior leaders, for several reasons. First, in many countries, entrenched interests may not perceive deeper reforms as in their interest, so the expansion of judicial independence or rooting out of corruption in administration cannot be achieved by the judiciary or the central administration alone. Second, in today's China, there is a widening diversity of interests and power groups, as well as an income gap. Third, there is a particular tension in court decisions between popular sentiment and formal law, especially where provocative media stories are involved. Politically and legally, China needs mechanisms that can intermediate those differing interests, whether through people's congresses in law drafting, in the implementation by local agencies, or in the judicial system.

80. But rule of law goes deeper than legal codes, databases, judges' training and legislative hearings. Rule of law, at heart, is a state of mind. To develop that legal culture, I believe, individuals need to experience regularly and consistently a legal system that compels enterprises to honor their commitments, that prohibits governmental interference in private economic activity, and that protects the rights of individuals to the enjoyment of the fruits of their labors. Individual entrepreneurs, government officials, farmers, Party leaders, people

from all walks of life must share the experience that their daily actions and lives can be improved through the legal rules, and harmed by failure to comply with them.

81. And this is where economic development is key to the development of the rule of law. Economic reforms have made corporate profits and personal incomes depend increasingly on the enforceability of contractual rights, on the clarity and transferability of property rights, on the restricted sphere of government influence in day-to-day business transactions. Economic reform has created incentives for individuals and enterprises to push the legal system to meet their need for stability, predictability and fairness. In a complex and interactive way, economic reforms in China are making legal rules matter—and the legal system is providing the rules of the game for economic reform.

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