

Columbia Law School

## Scholarship Archive

---

Hong Yen Chang Center for Chinese Legal  
Studies

Research Centers & Programs

---

10-2004

### Looking For Law in China II: China's Legal Reforms After Mao: Accomplishments and Future Prospects

Stanley B. Lubman

Follow this and additional works at: [https://scholarship.law.columbia.edu/chinese\\_legal\\_studies](https://scholarship.law.columbia.edu/chinese_legal_studies)



Part of the [Administrative Law Commons](#), and the [Comparative and Foreign Law Commons](#)

---

**China's Legal Reforms After Mao: Accomplishments and Future Prospects**  
**Talk to be given by Stanley Lubman at Casa Asia, Barcelona, Oct. 29, 2004**

*INTRODUCTION*

In this talk I intend to summarize major accomplishments of Chinese law reform since 1978; and speculate on the future of Chinese law reform

- In the course of this talk, I will note where China began when legal reform was first undertaken in 1979, and the enormous size and scope of the task that was undertaken.
- I hope to give an indication both of the progress China has made, and of major obstacles to future reforms;
- I have chosen one area to emphasize because it may light the way for further meaningful reforms: **administrative law**
- I have also noted influences on future reforms that may come from outside China, especially the WTO, and also from foreign governments, NGOs and businesses.

*HISTORICAL NOTE*

First, I want to note some crucial factors that influence the development of China's legal institutions:

*Law in imperial China*

- law as administration, rather than a separate discipline
- an elaborate Code, but one that had little to do with civil law [other than land, marriage]
- magistrates not specialized in law [but higher levels]
- no emphasis on rights – Code was addressed to bureaucrats, to direct them in administering the empire
- civil dispute settlement  
largely outside the jurisdiction of the magistrates, and emphasis on settlement within the community.

a continuum of institutions dealt with most disputes - family, clan, guild, magistrate

If disputes did get to the magistrate, procedures could be very rough, and bribery and corruption among the employees of the magistrates was common; the emphasis, both in official ideology and common practice, was to compromise disputes, often by third-party mediation.

*experiments with Western models during the first half of the century*

codes based on Western models adopted, but with little effect

## law in the PRC before 1979

- *revolution*  
waves of campaigns; consolidation of power; destruction of landlords, bourgeoisie
- *Stalinist models used for courts and criminal law and procedure;*

Chinese “adaptation” departed from whatever regularity was required of the Stalinist institutions

- *Anti-rightist campaign, 1957-1958* [decisive rejection of regularized legal rules and procedures—refusal to codify criminal law, procedure [civil law absent because of socialization of property]
- *Cultural Revolution*  
courts and law even further reduced in significance

## *POST-1979 LEGAL REFORM* *economic reform*

beginning of uncertain and tentative moves to marketizing economy

### *legalization- change in role and function of law*

law now needed to define and regulate economic transactions

#### *legislation explosion, examples:*

- General Principles of Civil Law—a partial civil code;
- the institution of contracts progressively given definition of contracts [first among Chinese, then Sino-foreign, then unified contract law],
- forms of business organization such as limited liability companies
- foreign direct investment (“FDI”)-investment vehicles defined; their activity regulated, slowly since the reforms began in 1979. **Tentativeness** an understandable characteristic of legislative development
- Slow and necessarily piecemeal development of other areas of the law: company law, securities, secured interests, land law. Property rights have been particularly slow to evolve, although in recent years the importance of recognizing and defining private rights in property has been given authoritative symbolic recognition by amendments to the Chinese Constitution that affirm the inviolability of private rights.
- New forms of new transactions and new markets such as capital markets, venture capital—all of which have been and are developing piecemeal and tentatively

*Institution building 1: law-making*

**role of legislatures- originally rubber stamps, but slowly professionalizing and coming to represent interests in their jurisdictions**

staffs are increasingly professionalized and growing in size; specialized committees consider legislation

**problems in law-making:**

**The jurisdiction of the National People's Congress ("NPC") and the State Council (equivalent to the cabinet, at the head of the executive branch of the government) is poorly defined;**

**vast amount of administrative rules emanate from State Council, its ministries and commissions, local provinces and sub-provincial governments, and the relative authority of these norms has been poorly defined and very badly coordinated.**

Illustration: "Basic laws" are enacted by the NPC, "laws" can be enacted by its Standing Committee: these terms are not defined. The State Council can issue "administrative laws" but these are not defined either.

local People's Congresses—greater transparency, increased public participation in certain particularly advanced areas, such as coastal cities of Shanghai and Guangzhou

*institution-building2 : recreation of judicial system*

**4-tier system:**

2002- 226695 civil and commercial cases initiated; 89,000 non contract disputes; 1284415 family law-marriage and inheritance

**low legal educational level; professionalization**

Until 1995, when the NPC enacted the Judges Law, Chinese judges were not required to hold a college degree, and many judges were recruited from the ranks of retired military officers, law enforcement personnel, or Party cadres. Despite a steady rise in the educational level of Chinese judges in the 1990s, as of early 2003, only about 40 percent of China's 220,000 judges held a 4-year university degree, and only about 2 percent held graduate degrees.

In the July issue of a leading journal on Chinese business law, a Chinese lawyer was quoted: "Judges just make judgments sometimes without reflection, and don't have to give any reasons for their decisions. If you give a reasoned argument based on legal theory, there is a fair chance that you will fail and the judge won't be impressed with your efforts."

**corruption**

[2 chief judges of provincial courts punished seriously for extensive corruption in 2003]

**style of operation**

Courts act like, and are considered to be part of, the national administrative bureaucracy; only slowly is the work of courts, adjudication, coming to be regarded as specialized, and different from other bureaucratic decision-making

### **local protectionism**

Local governments, not the national government fund local courts, and selection of judges a local matter, with heavy influence of Chinese Communist Party. Local government influence on the courts is a severe impediment to fair adjudication and to enforcement of judgments

### **favoritism to local parties in original litigation**

**difficulty in enforcing judgments:** President of the SPCT said in his official report to the NPC in 2004 that

**“The difficulty of enforcing civil and commercial judgments has become a major ‘chronic ailment’ often leading to chaos in the enforcement process; there are few solutions to the problem.”**

I myself, and my clients, have experienced these problems. In one case, a US client was awarded damages by the China International Economic and Trade Arbitration Commission (CIETAC) in two separate cases in 1999 and has been trying to enforce the awards since then. Throughout years of effort the client has been frustrated by the actions - and inaction - of the courts in which it brought suit.

Zidell purchased flanges from two Chinese sellers, one in Beijing and one in Taiyuan. After American purchasers of Chinese flanges from Zidell began to assert claims for quality defects, extensive inspections disclosed basic problems in a substantial percentage of the many flanges in its inventory. In 1995, after unsuccessful negotiations with the Chinese sellers, Zidell brought separate arbitration proceedings against both.

Both arbitrations took place in Beijing, conducted by two three-man tribunals that eventually awarded damages of \$300,000 against the Beijing seller and \$1.269 million against the Taiyuan seller, in March 1999. In September, 1999 Zidell sued in the Beijing and Taiyuan courts to enforce the awards. Enforcement has been thwarted by long delays and a variety of obstructive tactics countenanced by the courts, which have aided the local

defendants to prevent execution of the arbitration awards issued against them.

Many specious and irrelevant arguments were raised by the Chinese defendants. The courts took years to reject these arguments; at one point a Taiyuan judge even told Zidell's Chinese lawyer that the file in the case had been lost and that the judge in charge of the case had retired.

My Chinese colleague and I complained for several years about these two cases to the Supreme People's Court in Beijing, which, we were told, in an "internal document" ordered the two lower courts involved to enforce both awards. Last summer, pressure from the Supreme People's Court finally compelled the Beijing defendant to agree to pay Zidell the principal of the amount awarded plus a portion of the interest owed.

As for Taiyuan, a recent meeting at the court there has confirmed what we had already heard elsewhere: The defendant has been staggering along for years on the verge of insolvency. It might not have been if the court had not stalled for more than four years.

The twentieth century closed with strong affirmations by the leadership and by the President of the Supreme People's Court ("SPC") regarding the need for further judicial reform to raise the professional level of the courts, reform their methods of decisions, reduce local protectionism, raise the standards of judicial ethics, and stamp out corruption.

#### **Further steps for reform**

**The effort that is going to be required to change the courts is prodigious:**

*Illustration 1: The role of courts is poorly defined*

The interpretation of laws is disorderly-

- **supposedly only NPC Standing Committee can exercise this power –but it has hardly ever done so in 50 years.** Courts are denied general interpretive

power except in specific cases, but in practice the SPC has frequently issued binding interpretations of legislation;

- courts may not declare any norms invalid for inconsistency with higher level norms, but they can refuse to enforce them- which often leads to consultation with administrative. agency involved

*Illustration 2: judicial opinions*

Until recently, most court decisions in China were short, formalistic, and often lacked detailed legal reasoning or references to the law. In recent years, the SPC has taken steps to improve the quality and availability of judicial decisions as a way to control corruption, root out incompetent judges, and improve the image of the judiciary. The SPC passed guidelines requiring statements of legal reasoning in judicial decisions and issued regulations on the publication of judgments.

The publication regulations call for influential or typical cases to be published in legal and general circulation papers, encourage courts to publish ordinary judgments in a timely manner, and highlight the Internet as an important medium for the publication of judgments.

These reforms have resulted in some positive changes. The number of legal gazettes and compendia of published court decisions has increased in recent years. More importantly, the SPC and many local courts have established Web sites on which they have posted a growing number of case decisions. Although courts and publishers still heavily edit many decisions, the number of complete judgments available and the quality of judgments is slowly on the rise. Finally, several local courts have begun to experiment with case precedent, a development that some Chinese legal scholars believe will enhance impartiality and efficiency in the judiciary. Despite these positive trends, courts face significant obstacles in improving judgments.

**Formidable obstacles to further reform**

**At the same time, there is little prospect that the position of the courts vis-a-vis the CCP and the organs of the bureaucracy would soon be elevated.**

### **recreation of bar and legal education**

150,000 lawyers now; increasing number of Chinese law firms and competent well-trained Chinese lawyers, some Western-trained

#### *low professional ethics*

It is difficult to make the transition from being servants of the state to an independent profession. The task is made more difficult by the frequent vagueness and gaps in the law, and the lack of uniformity of interpretation of laws around the country.

#### *Guanxi*

This Chinese word means “personal relationships, which have traditionally been of great importance in business and government alike. It is of continuing importance, although there are reports of changes. One lawyer suggests that it is more a question of obtaining information about legislation than of influencing outcomes of cases.

#### **POLICY ON LEGAL REFORM:**

##### **policy toward law ambivalent**

- “**yifa zhiguo**” :” rule the country by law was the phrase uttered by Jiang Zemin in 1994, and given wide publicity. But it was only part of the sentence in the speech in which he uttered it: The rest of the sentence said “protect the long-term stability of the nation” – which is a code reference to maintenance of the dominant leadership of the CCCP
- The Chinese Constitution still states that the guiding principles of China are Marxism-Leninism, Mao Zedong Thought and Deng Xiaoping Theory, all doctrines that insist on CCP dominance.

##### **new moves to protect rights under the Constitution**

##### **criminal law & procedure still reflect Maoist era**

- codes of criminal law and criminal procedure have been adopted and revised
- extra-judicial sanctioning processes are still used— the police can send persons to “labor reeducation” camps for as long as four years without any participation in the process by judges or lawyers
- In the formal criminal justice process 99% of defendants are convicted
- lawyers who defend their clients energetically in criminal matters are often harassed

#### **CURRENT SOCIAL AND ECONOMIC CONTEXT-CHINA IN FLUX**

It is important for the West to understand that legal reforms are taking place in a society that is undergoing extraordinary social and economic changes:

- **decentralization of administration**



- **continuing privatization of economy-but continued uncertainty about future of large State Owned Enterprises and lack of a social safety net**
- **growing complexity of nonstate economy**
- **social mobility: breakdown of communal, workplace ties**
- **economic disparities growing: rural-urban; coastal-inland**
- **increasing number of protests**
- **breakdown and flux in values**
- **corruption**
- **eroding CCP legitimacy**
- **rising crime**

**Chinese leadership paranoia about political opposition, mistrust of civil society**

**There is economic progress, but its consequences threaten social stability**

*LEGAL CULTURE IN STATE OF DEVELOPMENT, NECESSARILY SLOW*

#### **leadership**

Constitutional reform in March 2004-recognition of private rights

#### **officials**

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

#### **administrative arbitrariness/discretion**

*language of norms*

*tentativeness and flux*

*intentionally wide discretion*

But not adequately supervised:

Wang Xixin: "The allocation of powers is unbalanced due to the absence of the necessary checking mechanisms as a matter of law."

*legal culture: law=policy, still in minds of many officials*

*widespread misuse or nonenforcement of laws*

e.g., forced relocation of urban residents for benefit of property developers with links to local officials; expropriation of rural land for the same purposes

***GROWTH OF LAW INTENDED TO CONTROL ADMINISTRATIVE ARBITRARINESS***

***ALL –suit v govt agencies under limited circumstances***

***SCL: But standards of liability unclear***

***ARL: But no independent review***

***Great interest in admin law reform***

**Administrative Punishment Law**

Provided for hearing for the first time

**Transparency**

Regulations in 2001 on rule-making, providing for but not requiring notice and hearing in rule-making by administrative agencies

**Administrative Licensing Law** that took effect in 2004-regularizing and making more transparent the procedure for the processing of license applications.

Time limit of 60 days within which to decide; decisions in writing; reasons must be given when applications are rejected; rts of appeal

**Revision of ALL, SCL, ARL**

*Draft of APL (=US APA)*

APL drafted by committee of professors, judges, and officials designated for the purpose by the NPC; the draft now submitted to the Legal Affairs Commission of the NPC, and will now be the subject of intense debate among various agencies of the Chinese government; planning to revise other laws

Provides for notice and hearing on proposed legislation and rule-making

*“yifa xingzheng”* programmatic directive of the State council

An eleven page statement that lays out the parameters for creating, administering and monitoring the agencies of the Chinese state along lines that clearly express an attempt to apply conventional Western notions of the rule of law.

**Recognition of need to change legal culture-from above**

proposals to TAF to support programs for changing **guan<sup>1</sup>dian<sup>3</sup>** “concepts” of officials, including hundreds of mayors of prefectural level cities. “Concept”= “legal culture”

**legal culture: citizens’ attitude toward law-from below**

[BJ taxi-driver, mid 1980s]

***WTO ACCESSION AND COMMITMENTS UNDERTAKEN BY PRC***

***1. 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)

Progress noted above on administrative law reform intended to respond to this requirement; WTO accession has accelerated progress

## **2. Uniformity**

"China shall administer in a uniform, impartial and reasonable manner all its laws, regulations, rules, decrees, directives, administrative guidance, policies and other measures...pertaining to or affecting trade in goods, services, trade-related aspects of intellectual property rights or the control of foreign exchange."

Note on uniformity: CL&P in July 2004 discussed problems facing Chinese law firms. It stated that there is a "considerable challenge" facing law firms: "finding solutions to complex client issues where the regulatory environment is vague, ambiguous or irrelevant to the opinions on key issues formed by local authorities." Example quoted: Chinese law firm tried to get an opinion on a land use issue that could be used around the country consistently. The firm contacted land use authorities in BJ, SH and Tianjin.

"Their answers were totally different, and their interpretations were not even consistent with what the law says. We have to try and understand their positions and points because the black and white letter of the law doesn't stand for much sometimes, and there is no case precedent or court cases that are binding. How do you advise your client in such a case? This is the real challenge."

## **3. 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..."

Current system not adequate in view of foreign observers; competing currents make uncertain the outcome of the discussions on the draft APL

*FOREIGN ASSISTANCE ON INSTITUTION-BUILDING—AND SOME IMPLICATIONS*  
*Chinese government efforts and willingness to accept foreign assistance*

Meanwhile, the Chinese government has stimulated great interest within China in the WTO and fulfillment of WTO requirements. Extensive efforts are being made to train Chinese officials and others on the WTO. As Donald Clarke has stated in testimony to one of the two commissions created by Congress to monitor Chinese behavior under the WTO:

There have also been countless training sessions for Chinese officials, many with foreign financial support. The government has begun restructuring to facilitate the meeting of WTO requirements. While much work remains to be done there, can be little doubt of the energy and commitment shown so far by the government.

The Chinese government has demonstrated great interest in receiving assistance from the international community in training. Although in recent years the U.S. Congress has been reluctant to appropriate funds to support legal reform programs in China, China's accession to the WTO has prompted Congress to become a bit more willing to provide some funding for such programs.

*Contributions of foreign governments and NGOs*

Foreign governments, multilateral institutions, and non-governmental organizations (NGOs) are supporting legal reform efforts. The EU, World Bank, ADB, and Western governments are helpful. The Ford Foundation, the Asia Foundation, Harvard's East Asian Legal Studies Program, and Columbia's Center for Chinese Legal Studies are among the most obvious examples of American institutions that have labored for decades to convey to Chinese, in various milieus, some understanding of the values embedded in important Western legal institutions and the manner in which those institutions are intended to operate.

*Cross-cultural difficulties in providing effective assistance*

My own participation in Asia Foundation programs on administrative law suggests the contribution that foreign scholars of Chinese law can make to China's legal development. Foreign programs usually involve bringing foreign experts in the legal institutions of their own nations together with Chinese counterparts. Almost invariably, however, such foreigners--American judges, say, or law professors--understandably know

little or nothing about the operation and problems of Chinese legal institutions and their personnel, the organization of the Chinese Party-state, or the role and limits of formal legal institutions in that Party-state. Their Chinese counterparts and audiences, for their part, necessarily have only limited understanding of Western political and legal systems.

This cultural gap, to which I can only allude here, is a formidable obstacle to meaningful understanding by Chinese of the Western institutions to which well-intentioned foreign efforts attempt to introduce them. In light of this, American and other foreign specialists on Chinese law can exercise a necessary and useful role as cultural interpreters when they participate in the work of foreign governmental, university, or NGO programs intended to assist Chinese law reform.