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## **Legal Reform in China: Problems and Prospects**

Carnegie Endowment for International Peace  
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*On Monday, April 18, 2005, the Carnegie Endowment for International Peace and the Asia Foundation held a joint conference on “Legal Reform in China: Problems and Prospects.” The conference gathered leading experts from China and the United States to discuss the efforts that China has undertaken to reform its judicial and administrative systems. Co-organized by Dr. Veron Hung of the Carnegie Endowment and Ms. Nancy Yuan of the Asia Foundation, the event drew a capacity crowd of approximately 140 participants from China, the United States, and Europe. Distinguished guests included the Honorable Zhou Wenzhong, the Ambassador of the People’s Republic of China to the United States, and the Honorable S. Jay Plager, Senior Circuit Judge of the U.S. Court of Appeals for the Federal Circuit. The event’s keynote address was given by the Honorable Sandra Day O’Connor, Associate Justice of the United States Supreme Court. In addition, Ambassador Zhou also delivered remarks on Sino-American relations and legal reform in China. The following is a summary of the first panel of the conference.*

### **Panel I:**

#### **Conducting Administration in accordance with Law (*yifa xingzheng*)—Efforts to Regulate Governments and Challenges Ahead**

**Professor Frank Upham** began his presentation by noting that economic development is a process of profound social change, one that produces both winners and losers. Unlike losers in stable societies, losers in societies that are experiencing significant socioeconomic changes have a socially legitimate gripe. This is arguably an important political problem, one that involves the very legitimacy of the development process. In this regard, courts can and, perhaps, should play a key role in alleviating the misery of social change. Courts can protect the losers of the development process by providing a locus for social conflict and a rhetoric that integrates the losers into the development process.

The importance of sustaining the legitimacy of development is underscored by the case of Japan, where the country’s failure to adequately handle the dissatisfaction of its farmers contributed to the demise of the democratic system in the 1930s. China today faces a similar

situation of rapid and profound development. Significant urbanization in the country has made farmers become increasingly dispossessed. Unlike Japan, China appears to have decided to let legal institutions play a major role in resolving social conflicts. Yet Chinese courts seem to have difficulty playing an adequate role in remedying the injustices of development in China. The story of Zigong may help illustrate this.

In 1992, the government of Zigong obtained permission from the Sichuan provincial government to convert collectively-owned rural land to state-owned urban areas. Farmers in the locality initially welcomed the move, as they looked forward to acquiring the privileges of urban residency and greater job opportunities. But they soon found that the promised factory in which they would be employed was replaced by fancy housing, which they could not afford. Their homes had been destroyed, and they had to stay in sub-par, “transitional” housing. The farmers subsequently engaged in various forms of protests, filed administrative lawsuits with courts, registered complaints with bureaus of letters and visits, and even went to Beijing to petition. All of these efforts were to no avail.

In December 2001, the Supreme People’s Court (SPC) directed the Sichuan High Court to “handle the matter conscientiously and in accordance with law.” The response from the Sichuan High Court, however, was far from adequate. A judge of the high court told the farmers that “without approval of the [local] leadership,” the SPC’s instruction was meaningless. Finally, the court ruled that administrative decisions concerning compensation for destroyed homes were “abstract” administrative decisions. Because the Administrative Litigation Law of 1989 authorizes Chinese courts to review only “concrete” administrative decisions, the issue involved in the Zigong case was, therefore, not justiciable.

The court’s failure to provide the farmers with any remedy, Professor Upham concluded, is not due to local protectionism. In the case of Zigong, the conflict was not between the center and the periphery; rather, it was a clash between the local elites and the farmers of the same locality. Neither is the low quality of judges at fault because professional training is not required for discerning justice and for having the courage to help alleviate the impact of development. The key factor is the lack of judicial independence. The Sichuan court found itself captured by the provincial leadership and, thus, could not respond to the pleas of Zigong’s farmers and to the instructions of the SPC. Professor Upham suggested that developing a cadre of effective and qualified lawyers in rural areas would allow peasants in China to express their grievances and to have these grievances be recognized by courts.

**Professor Wang Xixin** observed that the Chinese legal reform process has featured the symbolic use of law by the government and by the Chinese Communist Party. Since 1999, when Chinese leaders vowed to “govern according to law” and to build a rule-of-law state, numerous slogans and formulas, such as “governing the provinces according to law,” have been coined and used. However, it appears that fundamental institutional reforms, in particular in constitutional and administrative law, have not accompanied this impressive rhetoric. Functional and institutionalized mechanisms are still needed to regularize and restrain state power and to limit the capricious use of public power. In 2004, the State Council of China issued an executive order to implement the principle of “conducting administration in accordance with law,” but the guidelines for the government agencies, while featuring the often-seen slogans, did not provide for substantial institutional reform.

One particularly troubling example of this phenomenon is the continued existence of re-education through labor (RETL), amid the Chinese leadership's pledges to "conduct administration in accordance with law." The Administrative Punishment Law and the Legislative Law clearly provide that administrative punishment measures, such as RETL, can only be enacted by the National People's Congress. Currently, however, State Council regulations provide the legal basis for RETL, which, despite being unlawful and unconstitutional, remains a regularly-used punishment mechanism.

Some positive developments have, however, taken place. In particular, there appears to be an increasing bottom-up pressure for further legal reform in China. In 2004 in Yingchuan, Ningxia Autonomous Region, for example, four thousand taxi drivers protested against the city government's decision to revoke all taxi licenses and to require all drivers to re-apply and pay the accompanying, and substantial, application fees. The drivers' protests attracted attention from the government of the Autonomous Region and the State Council, which, surprisingly, both expressed support for the taxi drivers and stated that the city government's decision was illegal. This, Professor Wang noted, exemplifies the presence of bottom-up forces in China to further legal reform and the increasing rights-consciousness of ordinary citizens.

**Dr. Veron Hung** observed that Chinese courts have had difficulty in regulating actions of local governments because of three major problems in administrative litigation: interference from administrative officials and Communist Party members, intercourt and intracourt influence, and judicial corruption. However, are these problems as significant in courts in Shanghai, a pioneering city in China? If not, what lessons can be learned from Shanghai's accomplishments?

At first glance, interference may appear to be more serious in Shanghai because the city's administrative caseload is smaller than that in the rest of China. Small administrative caseload is widely believed to be primarily caused by interference: government officials and party members pressure judges not to accept administrative cases filed by aggrieved parties. The notion that interference is more serious in Shanghai, however, is not supported by a comparison of the withdrawal rates of administrative cases. Withdrawal of administrative cases is another phenomenon that suggests interference: government officials and party members often pressure aggrieved parties to withdraw their accepted administrative cases from courts. However, the withdrawal rate in Shanghai—34 percent—is lower than that of the national average—42 percent. Dr. Hung's empirical research shows that the smaller administrative caseload in Shanghai actually stems from the fact that residents lodge fewer complaints against government agencies, which is, in turn, largely due to the Shanghai officials' and party members' better respect for the law.

Nevertheless, interference still exists in Shanghai and is most evident in "major and complex cases." Final decisions in those cases are made by each court's adjudication committee, which usually consults with the CCP's political-legal committee. The existence of interference in Shanghai shows two fundamental problems in the Chinese court system. First, the authorities' ill-defined requirement that judges must realize both legal and social effects in adjudicating cases provides the CCP's political-legal committees with opportunities to put party policies above laws during adjudication. Second, financial and personnel arrangements of the courts remain controlled by local governments and party organizations.

Intracourt and intercourt influence is perceived as less serious in Shanghai because judges in that city do not need to seek instructions from senior judges as often as their counterparts in other parts of China do. This is because Shanghai judges are better qualified and local governments prescribe clearer rules for judges to follow. Yet intracourt and intercourt influence still exists. Shanghai judges, like other judges in China, are wary of being punished and held accountable for making erroneous decisions, and to avoid such situations, they seek instructions from higher-ranking judges.

Finally, judicial corruption appears to be less serious in Shanghai. None of Shanghai's administrative judges have ever been punished for violating laws, and many of surveyed Shanghai residents perceived corruption in their city as less serious than in other places in China. Comparatively better pay and higher social status, as well as strict enforcement of disciplinary rules, all help account for this favorable situation.

What are some lessons that Shanghai has to offer? First, Shanghai's relative success in administrative litigation shows that the city's prosperity has enabled it to organize intensive training for judges and officials, offer attractive employment packages to encourage China's best talents to join Shanghai's courts and government, and discourage judges from taking bribes. Second, the fact that Shanghai's judiciary still suffers from interference and influence shows that some fundamental reforms have yet to be implemented. These include the provision of clear guidelines on how to integrate legal effects with social effects in adjudication and the abolition of the system of accountability for erroneous cases. Most importantly, reform should be implemented to free the courts' financial and personnel arrangements from the control of local governments and party organizations. Unfortunately, it appears that China's leaders are not yet ready to undertake this important task.

**Professor Stanley Lubman**, in commenting on the panelists' presentations, noted that all three had touched upon the interrelated issues of legal culture – the attitude of officials and citizens toward law – and the political will of the leadership to bring about meaningful reform. In particular, all three panelists highlighted the fact that the rhetoric of rule of law is increasingly inadequate and that institutional reforms ought to be undertaken, especially in light of bottom up pressures for legal reform. Evidently, the Chinese political leadership has not evinced a readiness to undertake such steps, but pressure from the bottom will continue to rise. Professor Lubman noted that Professor Upham had highlighted the importance of courts in remedying the misery of losers in the development process. Professor Lubman also expressed particular interest in Professor Upham's idea to develop a cadre of lawyers who would be able to work on behalf of peasants in rural areas. He noted that the spread of legal aid clinics is consistent with Professor Upham's proposal.

Professor Lubman recalled the paper that Professor Wang had presented at a Columbia Law School conference, which emphasized the lack of respect for procedural rights on the part of officials and the lack of corresponding awareness among the populace. Professor Lubman noted that observers of peasant protests have seen the farmers' use of law in agitating against local officials and the government's effort to popularize the laws at the symbolic level. This corresponds to the bottom up pressure that Professor Wang discussed. Professor Lubman further noted that Professor Wang did not mention the Administrative Litigation Law, which does not directly address the need to expand the power of the courts over the bureaucracy.

Under this piece of legislation, judges cannot question misuse of discretion or the reasonableness of administrative decisions, nor can they invalidate rules of general application. This, Professor Lubman argued, ought to be changed.

Professor Lubman said that Dr. Hung had done a convincing job of illustrating the better quality of Shanghai courts. He also noted that Dr. Hung came to a crucial point of political will, that current Chinese leaders do not appear to be prepared to enact fundamental reforms that will change the relationship of courts with local governments and party organizations.

Rights-consciousness, Professor Lubman stated, is in fact rising, albeit slowly, and incremental progress is possible. But political will on the part of the leadership remains key to further reform. Professor Lubman concluded by stating that China will long have the capacity to surprise us, as there seems to be a keen interest in developing a stronger legal culture in China. The Legal Affairs Office of the State Council recently proposed to allow a substantial number of mayors of prefecture-level cities from China to come to the United States to receive training on issues of rule of law. To the extent that this is indicative of a political will to build a stronger legal culture, it may provide some foundation for optimism on the future of legal reform in China.

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