

Professor Stanley Lubman's comments at Panel I

The three papers that have been presented are united by emphasis on two themes, namely Chinese legal culture and the political will of the Chinese leadership to promote legal reform.

Frank Upham

- Points to the social costs of economic development;
- Asks if China's rural-urban divide is so great that it threatens to lead to the social instability that so concerns the Chinese leadership—a riot involving 30,000 protesters in Zhejiang that was reported last week underlines the importance of these concerns;
- In the controversy in Zigong that he discussed at some length, local legal elites directed an outcome that negated the rights of peasants whose land had been sold out from under them, then were relocated and subjected to high levels of industrial pollution. The courts were the instruments for frustrating, rather than vindicating, the rights of the protesting peasants;
- Upham cites vague property rights and an incomplete administrative law as important causes of the protesters' frustration;
- Upham further urged that incidents such as the one he discussed illustrate the need for and independent judiciary.

Wang Xixin

Wang is one of a number of Chinese legal scholars who has focused on the need for codification of rules that would foster and strengthen procedural justice.

Wang emphasized the following points:

- Procedural rights are not taken seriously by officials, although they use law to *symbolize* legitimacy
- The Chinese populace is not widely aware of concepts of procedural justice—although when public protesters invoke legal rules, this reflects some movement for “bottoms up” reform rather than the “top-down” approach that has marked Chinese legal reforms since 1979. Public participation in legislative and administrative processes is also growing.
- There is a need for uniform rules of procedure in the making and application of legislative and administrative norms.

Wang and his colleagues worked on drafting an Administrative Procedure Law for China throughout the 1990s, and I have myself worked with them since 1998 as convener of a committee of American administrative law experts organized under the auspices of The Asia Foundation that has consulted with the Chinese drafters. A draft law is now before the Standing Committee of the National People's Congress but it is not likely to be

enacted for years, and I am doubtful that, when adopted, the enacted version will be as deep and broad in its reach as the current draft.

There is a noticeable gap in the draft, because it does not directly address the need to increase the power of the courts over the Chinese bureaucracy. At present, under the existing Administrative Litigation Law, the courts can't question officials' misuse of their discretion, nor can they invalidate rules of general application.

Veron Hung

Veron tells us that the Shanghai courts are better than these in the rest of China in terms of the level of the judges' education, their training, the lower level of corruption, and the less frequent occurrence of intra- and inter-court interference in judicial decision-making..

Two major themes in the three papers

1. Political will for reform

The Chinese leadership does not seem not willing or ready to implement reforms that would strengthen judiciary and increase its independence

A subsidiary question:

It may be necessary to ask whether the Chinese courts are ready to be independent? Some Chinese scholars raise this question.

2. The importance of legal culture

Wang Xixin in his paper raises an issue that is crucial and that is touched in on different ways by all three papers:

- Chinese legal culture: by which is meant the attitudes of officials and populace alike toward law—its sources, function, power, legitimacy
- Chinese legal culture both before PRC was established and since then has not been hospitable to the concept of rights, and to the use of courts to vindicate rights
- Rights consciousness is rising, but only slowly—increased progress is possible, but the direction, content and power of further reforms depends on the political will of the Chinese leadership.