

## Congressional-Executive Commission on China Roundtable

### What's a Liberal to Do? The Pursuit of Non-liberal Rule of Law in China

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I am very pleased to be here today. In these times of international conflict, the necessity of developing a positive, peaceful and mutually beneficial relationship with such a geopolitically important country as China is readily apparent. However, if the U.S. and other countries are to play a role in helping China become a responsible member of the international community that, despite differences from time to time, can work with rather than against the U.S., then we in the U.S. must have an accurate understanding of how China sees its role in the world and the challenges that China faces in its efforts to modernize. Nowhere is this need for understanding more apparent than with respect to the implementation of rule of law, a notoriously contested concept here in the U.S. and around the world. Let me begin then by defining some terms in order to clarify areas of agreement and disagreement.

#### 1. **Thick and Thin Theories**

Rule of law is an essentially contested concept. It means different things to different people, and has served a wide variety of political agendas from Hayekian libertarianism to Rawlsian social welfare liberalism to Lee Kuan Yew's soft authoritarianism to Jiang Zemin's statist socialism. That is both its strength and its weakness. That people of vastly different political persuasions all want to take advantage of the rhetorical power of rule of law keeps it alive in public discourse,

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but it also leads to the worry that it has become a meaningless slogan devoid of any determinative content.

The fact that there is room for debate about the proper interpretation of rule of law should not blind us to the broad consensus as to its core meaning and basic elements. At its most basic, rule of law refers to a system in which law is able to impose meaningful restraints on the state and individual members of the ruling elite, as captured in the rhetorically powerful if overly simplistic notions of a government of laws, the supremacy of the law and equality of all before the law. In contrast, states that rely on law to govern but do not accept the basic requirement that law bind the state and state actors are best described as a rule *by* law or *Rechtsstaat*.<sup>2</sup>

Conceptions of rule of law generally come in two varieties. A thin conception stresses the formal or instrumental aspects of rule of law—those features that any legal system allegedly must possess to function effectively as a system of laws, regardless of whether the legal system is part of a democratic or non-democratic society, capitalist or socialist, liberal or theocratic. Although proponents of thin conceptions of rule of law define it in slightly different ways, there is considerable common ground. The key features are that there must be rules for lawmaking and laws must be made in accordance with such rules (including by the courts through precedent) to be valid; laws must be general, public, prospective, relatively clear, consistent, stable, impartially applied and enforced so that the gap between law and practice is relatively small.

There is general agreement not only about these criteria, but that these criteria cannot be perfectly realized, and may even in some cases be in tension with each other. While marginal deviations are acceptable, legal systems that fall far short are likely to be dysfunctional. Of course, a thin theory requires more than just these elements. A fully articulated thin theory would also specify the goals and purposes of the system as well as its institutions, rules, practices and outcomes.

Typical candidates for the more limited normative purposes served by thin theories of rule of law include: (i) ensuring stability, and preventing anarchy and Hobbesian war of all against all; (ii) securing government in accordance with law by limiting arbitrariness on the part of the government; (iii) enhancing predictability, which allows people to plan their affairs and hence promotes both individual freedom and economic development; (iv) providing a fair mechanism for the resolution of disputes; and (v) bolstering the legitimacy of the government. States may agree on these broad goals and yet interpret or weigh them differently, leading to significant variations in their legal regimes. For instance, a greater emphasis on stability rather than individual freedom may result in some states limiting civil society, freedom of association and speech. Moreover, in periods of rapid economic or social transformation, some of these goals, such as predictability, may be sacrificed for other important social values.

A variety of institutions and processes are also required. The promulgation of law assumes a legislature and the government machinery necessary to make the laws publicly available. Congruence of laws on the books and actual practice assumes institutions for implementing and enforcing laws. While informal means of enforcing laws may be possible in some contexts, modern societies must also rely on formal means such as courts and administrative bodies.

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<sup>2</sup> As with rule of law, *Rechtsstaat* has been interpreted in various ways. While some interpret it in more instrumental terms similar to rule by law, others would argue that the concept entailed at minimum the principle of legality and a commitment on the part of the state to promote liberty and protect property rights, and thus some limits on the state. In any event, the concept *Rechtsstaat* has evolved over time in Europe to incorporate democracy and fundamental rights. Accordingly, it is often now used synonymously with (liberal democratic) rule of law.

Furthermore, if the law is to guide behavior and provide certainty and predictability, laws must be applied and enforced in a reasonable way that does not defeat people's expectations. This implies normative and practical limits on the decision-makers who interpret and apply the laws and principles of due process or natural justice such as access to impartial tribunals, a chance to present evidence and rules of evidence. One must also look beyond the traditional branches of government to the legal profession, civil society, private actors who increasingly take on government functions, and the military, which in many countries continues to be a force capable of undermining the legal system and rule of law.

In contrast to thin conceptions, thick or substantive conceptions begin with the basic elements of a thin conception of rule of law but then incorporate elements of political morality such as particular economic arrangements (free-market capitalism, central planning, etc.), forms of government (democratic, single party socialism, etc.) or conceptions of human rights (liberal, communitarian, "Asian Values," etc.). Thick theories of rule of law can be further subdivided according to the particular substantive elements that are favored. The four most common conceptions in China: statist socialist, neo-authoritarian, communitarian or collectivist or liberal democratic.

We in the U.S. are most familiar with the Liberal Democratic version of rule of law favored in modern Western states.<sup>3</sup> Liberal democratic rule of law incorporates free market capitalism (subject to qualifications that would allow various degrees of "legitimate" government regulation of the market), multiparty democracy in which citizens may choose their representatives at all levels of government, and a liberal interpretation of human rights that gives priority to civil and political rights over economic, social, cultural and collective or group rights.

In contrast, Jiang Zemin and other Statist Socialists endorse a state-centered socialist rule of law defined by, *inter alia*, a socialist form of economy, which in today's China means an increasingly market-based economy but one in which public ownership still plays a somewhat larger role than in other market economies; a non-democratic system in which the Party plays a leading role; and an interpretation of rights that emphasizes stability, collective rights over individual rights and subsistence as the basic right rather than civil and political rights.

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<sup>3</sup> The tendency to equate rule of law with liberal democratic rule of law has led some Asian commentators to portray the attempts of Western governments and international organizations such as the World Bank and IMF to promote rule of law in Asian countries as a form of economic, cultural, political and legal hegemony. Critics claim that liberal democratic rule of law is excessively individualist in its orientation and privileges individual autonomy and rights over duties and obligations to others, the interests of society, and social solidarity and harmony. This line of criticism taps into recent, often heavily politicized, debates about "Asian values," and whether democratic or authoritarian regimes are more likely to ensure social stability and economic growth. It also taps into post-colonial discourses and conflicts between developed and developing states, and within developing states between the haves and have-nots over issues of distributive justice. In several countries, arguably in *all* countries, it has resulted in an attempt to inject local values into a legal system established by foreign powers during colonial occupation or largely based on foreign transplants. See Carol Rose, 'The New Law and Development Movement in the Post-Cold War Era: A Viet Nam Case Study', *Law & Society Review*, vol.32 (1998), p.93; Barry Hager, 'The Rule of Law', in The Mansfield Center for Pacific Affairs, ed., *The Rule of Law: Perspectives from the Pacific Rim* <<http://www.mcpa.org/rol/perspectives.htm>> (summarizing complaints of critics). Takashi Oshimura, 'In Defense of Asian Colors', in Mansfield Center, *Rule of Law*, at p.141; (claiming that the individualist orientation of [liberal democratic] rule of law is at odds with Confucianism and "the communitarian philosophy in Asia"). See also Joon-Hyung Hong, 'The Rule of Law and Its Acceptance in Asia', in *id.* at p.149 (noting the need to define rule of law in a way that is acceptable to those who believe in "Asian values"). Randall Peerenboom, 'Beyond Universalism and Relativism: The Evolving Debates about "Values in Asia,"' *Indiana Int'l & Comp. L. Rev.* 2003.

There is also support for various forms of rule of law that fall between the Statist Socialism type championed by Jiang Zemin and other central leaders and the Liberal Democratic version preferred in Western states. For example, there is some support for a democratic but non-liberal ("Asian Values" or New Confucian) Communitarian variant built on market capitalism, perhaps with a somewhat greater degree of government intervention than in the liberal version; some genuine form of multiparty democracy in which citizens choose their representatives at all levels of government; plus an "Asian Values" or communitarian interpretation of rights that attaches relatively greater weight to the interests of the majority and collective rights as opposed to the civil and political rights of individuals. Japan's legal system, particularly in the criminal law area, arguably is an example of a collectivist or communitarian rule of law system.

Another variant is a Neo-authoritarian or Soft Authoritarian form of rule of law that like the Communitarian version rejects a liberal interpretation of rights but unlike its Communitarian cousin also rejects democracy. Whereas Communitarians adopt a genuine multiparty democracy in which citizens choose their representatives at all levels of government, Neo-authoritarians permit democracy only at lower levels of government or not at all. For instance, Pan Wei, a prominent Beijing University political scientist, has advocated a "consultative rule of law" that eschews democracy in favor of single party rule, albeit with a redefined role for the Party, and more extensive, but still limited, freedoms of speech, press, assembly and association. One can get a better sense of what a soft authoritarian rule of law legal system in China might look like by considering the legal systems in Hong Kong, Malaysia and Singapore.<sup>4</sup>

A full elaboration of any of these types requires a more detailed account of the purposes or goals the regime is intended to serve and its institutions, practices, rules and outcomes, which I provide in my recently published book *China's Long March Toward Rule of Law*.<sup>5</sup>

Nevertheless, this preliminary sketch is sufficient to make the following points. First, despite considerable variation, all forms accept the basic benchmark that law must impose meaningful limits on the ruler and all are compatible with a thin conception of rule of law. Put differently, any thick conception of rule of law must meet the more minimal threshold criteria of a thin conception. Predictably, as legal reforms have progressed in China, the legal system has converged in many respects with the legal systems of well-developed countries; and it is likely to continue to converge in the future.

Second, at the same time, there will inevitably be some variations in rule of law regimes even with respect to the basic requirements of a thin conception due to the context in which they are embedded. For example, administrative law regimes will differ in the degree of discretion afforded government officials and the mechanisms for preventing abuse of discretion. Judicial independence will also differ in degree and in the institutional arrangements and practices to achieve it. And differences in fundamental normative values will lead to divergent rules and outcomes.

Hence signs of both divergence from and convergence with the legal systems of well-developed countries are to be expected. Indeed, whether one finds convergence or divergence depends to a large extent on the particular indicators that one chooses, the time frame and the degree of

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<sup>4</sup> See Peerenboom, *Varieties of Rule of Law: An Introduction and Provisional Conclusion, and the chapters on these countries, in Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries with Comparisons with France and the U.S.A.* (forthcoming RoutledgeCurzon, 2003).

<sup>5</sup> See also Table 1 summarizing some of the key differences.

abstraction or focus. The closer one looks, the more likely one is to find divergence. But that is a natural result of narrowing the focus.

Third, when claiming that China lacks rule of law, many Western commentators frequently mean that China lacks the Liberal Democratic form found primarily in modern Western states with a well-developed market economy, and indeed with the particular common law variant found in the U.S. Although a handful of isolated legal scholars and political scientists in China or living in exile abroad have advocated a Western-style Liberal Democratic rule of law, there is little support for liberal democracy, and hence a Liberal Democratic rule of law, among state leaders, legal scholars, intellectuals or the general public.

Accordingly, if we are to understand the likely path of development of China's system, and the reasons for differences in its institutions, rules, practices and outcomes in particular cases, we need to rethink rule of law. We need to theorize rule of law in ways that do not assume a Western liberal democratic framework, and explore alternative conceptions of rule of law that are consistent with China's own circumstances. While the three alternatives to a Liberal Democratic rule of law each differ in significant ways—particularly with respect to the role of law as a means of strengthening the state versus limiting the state—they nevertheless share many features that set them apart from their liberal democratic counterpart.

Fourth, assuming as seems likely that China will ultimately implement some version of rule of law, the realization of rule of law in any form will require significant changes to the present system.

Finally, it bears noting thin and thick conceptions are analytical tools. It is not a question of one being the right way to conceive rule of law and the other wrong. They have different advantages and disadvantages, and serve different purposes. Thin conceptions highlight certain features and purposes of a legal system. Even a more limited thin rule of law has many important virtues. At minimum, it promises some degree of predictability and some limitation on arbitrariness and hence some protection of individual rights and freedoms. While the notion of legality may seem like all too thin a normative reed in cases where the laws themselves are morally objectionable, even the harshest critics of rule of law acknowledge that getting government actors to act in accordance with, and to abide by, the laws is no small achievement. Certainly dissidents rotting away in jail after being denied the right to a fair trial and other procedural protections appreciate the importance of even a thin rule of law. Similarly, business people and the average citizen alike appreciate a legal system in which laws do not change daily and are regularly applied in a fair manner by competent administrators and judges free from corruption. By narrowing the focus, a thin theory highlights the importance of these virtues of rule of law.

Conversely, because thick theories are based on more comprehensive social and political philosophies, rule of law loses its distinctiveness and gets swallowed up in the larger normative merits or demerits of the particular social and political philosophy. As Joseph Raz observes, "If rule of law is the rule of the good law then to explain its nature is to propound a complete social philosophy. But if so the term lacks any useful function. We have no need to be converted to the rule of law just in order to believe that good should triumph. A non-democratic legal system, based on the denial of human rights, of extensive poverty, on racial segregation, sexual inequalities, and religious persecution may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies."

As a practical matter, much of the moral force behind rule of law and its enduring importance as a political ideal today is predicated on the ability to use rule of law as a benchmark to condemn or

praise particular rules, decisions, practices and legal systems. But all too often, rule of law is simply invoked to criticize whatever law, practice or outcome does not coincide with one's own political beliefs. For example, liberal critics take China to task for imposing limits on labor unions, restricting the right of peaceful demonstration by requiring prior registration, and imposing content-based restrictions on Falungong. Contrast such complaints with the following. A law provides that contractors must have five years of experience and meet various other requirements to obtain a license; nevertheless, a government official denies a license to a contractor who meets all of the requirements, and a court refuses to overturn the decision because local courts are funded by the local government. Two government agencies issue conflicting regulations, and there is no effective legal mechanism to sort out the conflict. A suspect is entitled to legal counsel according to law, but in practice the authorities refuse to allow him to contact his lawyer. Your dispute with your insurance company regarding payment for hospital bills incurred as a result of a car accident remains pending in court after seven years due to judicial inefficiency. The rich and powerful are regularly exempted from prosecution of certain laws whereas others are prosecuted in similar circumstances. The first set of issues involve differences in substantive normative beliefs and political philosophies of the type that differentiate advocates of competing thick conceptions of rule of law; the second set of issues points to failures captured by a thin conception of rule of law, for which there is widespread support in China.

Distinguishing between thin and thick theories makes it possible to use rule of law more effectively as a benchmark for evaluating legal systems by clarifying the nature of the problem. China is still in the process of establishing a functional legal system. Its legal system is plagued by thin rule of law issues such as weak legal institutions, incompetent and corrupt administrative officials and judges, excessive delays, and limitations on access to justice including high court costs (relative to the resources of many) and the lack of legal aid. These kinds of problems are qualitatively different than more political issues such as how broad free speech or freedom of association should be, or whether labor should have the right to form unions and strike. Obviously, these latter issues are tremendously important and deserve to be discussed. But whether the most effective way to do so is by riding into battle hoisting the banner of rule of law is debatable. When invoked by parties on both sides of an issue to support diametrically opposed results, rule of law quickly becomes conceptually overburdened and unstable.

A thin theory therefore facilitates focused and productive discussion of certain legal issues among persons of different political persuasions. Being able to narrow the scope of the discussion and avoid getting bogged down in larger issues of political morality is particularly important in cross-cultural dialogue. Criticisms of a legal system in a country such as China that point out the many ways in which the system falls short of a liberal interpretation of rule of law are likely to fall on deaf ears and may indeed produce a backlash that undermines support for rule of law, and thus, ironically, impede reforms favored by liberals. Conversely, criticisms are more likely to be taken seriously and result in actual change given a shared understanding of rule of law. To the extent that there is common ground and agreement on at least some features of a thin theory of rule of law, parties can set aside their political differences and focus on concrete reforms. For instance, the U.S. and China, notwithstanding the U.S.'s liberal democratic conception of rule of law and the Chinese government's statist socialist conception, have been able to agree on a wide range of reforms to improve the PRC legal system, including judicial exchange and training programs aimed at improving the quality of PRC judges; programs to assist in the development of a legal aid system; exchanges to strengthen the securities regulatory system and the administrative law system; seminars on electronic commerce, corporate law and the enforcement of arbitral awards and court judgments; and even a symposium to discuss the legal aspects of protecting human

rights, including issues such as China's legal responsibilities under international rights agreements, the rights of criminal defendants and the legal protection of religious freedom.

There are then many opportunities for cooperation within the existing framework. But should liberals support legal reforms aimed at non-liberal ends?

## 2. **Should Liberal Democrats Support Legal Reforms Aimed at Non-liberal Rule of Law?**

Early law and development movement of the 1960s and 1970s maintained the evolutionary thesis that legal reform would inevitably lead to economic growth, which would in turn lead to liberal democracy once a middle class arose. This thesis was not borne out in practice in all cases. Many states failed to develop economically, or even if they did, some remained authoritarian. In fact, in the absence of political pluralism and opportunities for participation in government, a stronger legal system at times strengthened the hand of authoritarian regimes.

Some thirty odd years later, it is generally clear that a legal system that complies with thin rule of law is required for sustained economic growth.<sup>6</sup> What is less clear is that economic growth and rule of law will lead to democracy and a liberal interpretation of human rights. The notion that economic growth and liberal democracy need not go together was one of the central issues in the Asian values debate, which while overly polemicized did raise serious questions about the relationship between law (and in particular different thick conceptions of rule of law), economic development, and forms of political regime, and conceptions of rights. Thus, in Hong Kong, Singapore and Malaysia one finds well-developed legal systems that comply with a thin rule of law certainly in the commercial area and indeed with the exception of a few highly politicized cases in other areas of law as well. Yet soft-authoritarian and collectivist or communitarian thick conceptions continue to prevail over liberal democratic conceptions.<sup>7</sup>

In the case of China, skeptics allege that the Party is simply acting strategically in accepting some limits on its power implicit in the notion of rule of law in order to strengthen its position. The Dean of Beijing University Law School Zhu Suli, for instance, has suggested that rule of law will promote economic development, which in turn will strengthen the Party-state both fiscally and in terms of legitimacy. A stronger Party may be better positioned to resist meaningful political reforms.

There is no gainsaying the fact that the instrumental aspects of legal reforms may enhance the efficiency of authoritarian governments. In the absence of democracy and pluralist institutions for public participation in the lawmaking, interpretation and implementation processes, law may come to serve the interests of the state and the ruling elite (as it may even with democracy and

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<sup>6</sup> For a summary of empirical surveys, see Peerenboom, *China's Long March*, chapter 10.

<sup>7</sup> In Singapore, the most vocal challenge to the government's view comes from liberals. But there is also a communitarian or collectivist perspective that seeks a middle ground between the more statist-orientation of the government's soft authoritarianism and the excessive individualism of liberals. According to constitutional scholar Kevin Tan, Singaporean style communitarianism is an axiom of faith in governing nowadays, resulting in a premium being placed on national security, economic growth and nation-building. While "legal rights are not trampled upon at will, in balancing the rights of the individual and community, the state-articulated concerns of public interests have gained precedence." Although Tan suggests that most of the support for communitarianism comes from political elites, he also allows that the community-based approach toward rights has acquired popular resonance in mainstream Singaporean society. Eugene KB Tan, 'WE' v 'I': Communitarian Legalism in Singapore', *Australia Journal of Asian Law*, vol.4 (2002), p.1.

pluralist institutions). It is possible therefore that rule of law will serve authoritarian ends in China. Of course, many within China reject democracy and believe that at present China needs an authoritarian government (whether socialist or not) to oversee economic reforms and maintain stability, though they disagree about just how hard or soft the authoritarian regime should be. Clearly, both Statist Socialists and Neo-authoritarians and even to some extent Communitarians see the potential of legal reforms to strengthen the state as a positive aspect. In the long run, however, Communitarians view rule of law as a means of limiting the state and a stepping stone toward democracy. Moreover, all expect law to impose some limits on the state and thus to mitigate to one degree or another the harshness of the rule by law authoritarian regime of the Mao era.

While legal reforms could help Statist Socialists solidify their power and support a relatively hard authoritarianism, the dangers of the ruling regime misusing rule of law for its own authoritarian ends should not be overstated. As noted, even a Statist Socialist rule of law differs from instrumental rule by law in that law is not *just* a tool to be used by the ruling regime to control the people or promote the interests of the privileged few (of course law is a tool for enforcing state policies and ensuring social order everywhere). Rule of law entails limits on the state and the ruling elite (who are also bound by the law), provides a basis for challenges by citizens of government arbitrariness and serves to protect the rights and interests of the non-elite. It is striking that while critics in many developed countries have the luxury of belittling the concept of rule of law, those who have had the misfortune to suffer its absence appreciate its virtues and count among its biggest supporters.

Moreover, the choice facing Chinese reformers is not authoritarianism or democracy, but authoritarianism with rule of law or without it. Authoritarianism in China is not the result of legal reforms to implement rule of law. On the contrary, the ruling regime would be even more authoritarian in the absence of legal reforms. Where legal rules are applied with principled consistency to both the state and its citizens, as required by rule of law, they generally restrain rather than expand the arbitrary exercise of state power. Further, as some PRC scholars have observed, while historically the development of rule of law has depended on promotion by the authorities, it also results in a change in the conception of authority. In the past, the Party's authority to rule was based to a considerable extent on the charisma of revolutionary leaders who fought off the Guomindang and foreign oppressors and allowed China to regain its dignity and stand on its own two feet. However, with the death of the old guard, new leaders have had to base their authority on other grounds. To use Weber's terminology, implementation of rule of law entails greater reliance on formal rules by trained professionals rather than decision-making by charismatic individuals, and thus results in a transformation from charismatic to a more formal rational authority.

Perhaps most important, in the long run, implementing rule of law usually will alter the balance of power between the state, society and individuals, while at the same time alterations in the balance of power resulting from economic reforms and factors beyond the legal system will create further pressure to implement rule of law. The establishment of a legal system with some degree of autonomy acts as a counterweight to political power and provides a basis for challenging state power. While a strong civil society is not inevitable, it is more likely in a state that implements rule of law than one that does not. A strong civil society is arguably more likely to seek and more likely to obtain political reforms aimed at further limiting the power of authoritarian states and increasing the power of society. Thus, even if the goal is democracy and protection of human rights, it makes sense to ensure at minimum that a thin rule of law is realized. A more likely result in China than a stronger authoritarian regime is that rule of law



will be a force for liberalization and come to impose restraints on the rulers, as in Taiwan, South Korea and even Indonesia and Malaysia.

### 3. **What Can Liberal Democrats Do?**

What can foreign governments, international development agencies and NGOs do to support and expedite the development of rule of law in China? First of all, it merits reiterating that the reform process will be driven primarily by domestic actors responding to domestic concerns. While foreign actors can play an important role in the process, they should bear in mind that rule of law is an ideology. Implementation of rule of law will directly challenge not only the Party but also other vested interests in society. It will alter the balance of power between the Party and the state, among state organs, and between the state and society. It will also lead to changes within society, and require a new cultural orientation that assigns a much higher place to reliance on universally applicable laws and dispute resolution by impartial and autonomous courts than in the past. What may seem on the surface to be merely technical suggestions for tinkering with legal rules or modifying institutions to cope with pressing commercial issues such as local protectionism frequently implicate much broader political and normative concerns.

That said, taking a particular thick conception of rule of law as the basis for reforms raises more ideological issues than basing reforms on a thin version. By focusing on the more technical features of a functional legal system, a thin theory of rule of law increases the likelihood that people of fundamentally different political persuasions will be able to find sufficient common ground to carry out meaningful reforms of the legal system. Accordingly, governments, multilateral agencies and NGOs that are interested in taking advantage of whatever political space is available to pursue concrete legal reforms are more likely to be effective if they base their discussions with PRC authorities on the core elements of the thin version. Not surprisingly, many donor institutions such as the World Bank have chosen to emphasize the technical aspects of legal reforms rather than the broader normative dimensions and the potential of reforms to lead to social and political changes. To insist on first reaching agreement over which thick conception of rule of law is normatively superior would divert attention away from the significant virtues of even a thin rule of law and result in missed opportunities to realize concrete changes in the legal system that would significantly improve the quality of life for many PRC citizens.

This is not to deny that issues such as democracy and human rights or the normative basis for laws are important. Rather, the point is simply to suggest that while such issues should be discussed, they need not be the focus of conversation every time legal reformers meet to consider how to improve China's legal system.

In suggesting reforms or commenting on reform proposals then, foreign actors should be attuned to differences in ideology, values and institutions. For instance, China's legal institutions were modelled to a considerable extent on Germany's civil system via Japan. Rather than relying solely on the experiences and advice of American professors or lawyers, the U.S. government or U.S.-based aid agencies should try to include on their team of legal reform advisors experts from around the world and in particular from Germany, France and Japan. Foreign actors should also make sure that they have sufficient local knowledge to ensure that their reforms proposals are appropriate and feasible given the current level of institutional development, existing cultural attitudes and the current political limits.

Unfortunately, it is very difficult for most foreign actors to gain an accurate picture of what is happening in China and to assess what the possibilities for reform are, for a whole host of reasons

including language barriers, lack of access and transparency, and the speed with which China is changing. Accordingly, there is a danger that the prescriptions offered by foreign experts will not be implementable. Many of the more successful reform initiatives have been bottom-up proposals from those in the trenches who are confronted with practical problems in their daily work. Although foreign actors frequently may not have sufficient local knowledge to propose context-specific solutions, they serve a useful purpose when they provide a menu of alternative approaches. They also play a valuable role in working with those in China to adapt approaches from the general menu to China's own circumstances or in bringing their own experiences to bear on proposals generated by those in China.

At present, China's legal system is beset by a number of problems. As a result of more than a decade of feverish legislating, the legal framework is by and large in place, though work continues to pass important laws such as the Administrative Procedure Law and existing laws are constantly being revised. This process of amendment is likely to continue until China reaches a more stable social, political and economic equilibrium. Thus, there is ample opportunity for foreign parties to play a role as advisers in the legislative process.

But the real work lies in institution building. Although there are still some gaps in the framework and loopholes in the existing laws, tinkering with doctrine or passing more laws and regulations alone will have little impact. At this point, the biggest obstacles to a law-based system in China are institutional and systemic in nature: a legislative system in disarray; a weak judiciary; poorly trained judges and lawyers; a low level of legal consciousness; a weak administrative law regime; the lack of a robust civil society; the enduring influence of paternalistic traditions and a culture of deference to government authority; rampant corruption; large regional variations; and the fallout from the unfinished transition from a centrally planned economy to a market economy, which has exacerbated central-local tensions and resulted in the fragmentation of authority.

There is therefore much that needs to be done, and can be done, even within the existing political framework, which will continue to evolve over time. I have outlined a reform agenda in my book *China's Long March toward Rule of Law*, which includes specific reforms to address each of the major institutions: the legislative system, the judiciary, the legal profession, the administrative law regime and the role of the Party vis-à-vis the legal system. I have also attached a report summarizing various reform recommendations and issues. I would like to stress that much work also needs to be done to strengthen the procuracy (Chinese prosecutorial organ, also referred to as the procuratorate) and police. Indeed, the procuracy and police may be the two areas most in need of improvement. At least in the case of the procuracy the time seems ripe as the procuracy is now under the leadership of a reform-minded chief.

More generally, the U.S. and other countries should seek to engage rather than contain China. The greater risk at present is not that a stronger China will oppose U.S. policies around the world but that a strategy of containment aimed at keeping China weak and subservient will strengthen the hand of hard-liners and slow reforms within China. The gravest threat to stability in China is the increasing discrepancy between the economic structure and political structure. The failure of political reforms to keep pace with economic reforms is the most likely path to regime collapse. Should the ruling regime collapse and China descend into chaos and perhaps even civil war, the consequences would reach far beyond China's own borders. For the sake of regional peace and global stability, the U.S. and other countries should seek ways to promote further reforms rather than seeking ways to contain China. The opportunities for engagement and for mutual benefit and learning are unlimited, provided all sides proceed with open minds.

**Table 1: A Comparison of the Four Ideal Rule of Law Types Plus Rule by Law**

Type of Legal System	Economic Regime	Political Regime	Rights	Purposes of Rule of Law	Institutions/ Practices	Rules
Liberal Democratic Rule of Law	Free market  Minimum government interference and regulation  Clear distinction between public and private  Administrative discretion limited	Democratic elections at all levels;  Neutral state  Limited state  Civil society as independent of state	Liberal  Emphasis on civil and political  Deontological view of rights as antimajoritarian trump on social good  Freedom privileged over order  Autonomy over social solidarity and harmony  Freedom of thought and right to think over need for common ground and right thinking on important social issues  More attention to rights than character-building, virtues and duties	Limited government  Prevent government arbitrariness  Protect individual rights  Predictability and certainty: economic growth, allow individuals to plan affair  Dispute resolution, protect property rights largely through formal legal system  Government efficiency and rationality  Legitimacy	High degree of separation between law and politics  Independent and elected legislature;  Autonomous and independent judiciary, with life tenure for judges, appointment and removal relatively non-politicized  Administrative law: mechanisms for reining in discretion, capable of holding even top leaders accountable; public participation; public can hold government officials accountable by throwing government out of office  Independent legal profession	Protection of civil and political rights; no registration requirements for social groups; strong rights to protect accused in criminal cases
Chinese Communitarian Rule of Law	Market economy; Managed capitalism;  More government intervention;  Public/private division not as clear;  More administrative discretion	Democratic, multiparty elections  Reject neutral state  Larger role for state  Civil society, but limits; groups free to go own way subject to general limits, although some groups, particularly commercial associations, may still	Communitarian  Emphasis on indivisibility of rights, collective rights; Economic growth at expense of rights (liberty tradeoff)  Utilitarian or pragmatic conception of rights  Stability and order privileged over freedom	Balance between law as means of strengthening state and limiting state  Stability  Prevent government arbitrariness  Protect individual rights  Predictability and certainty: economic growth, allow individuals to	Moderate to high degree of separation between law and politics  Independent and elected legislature;  Autonomous and independent judiciary, with life tenure for judges, appointment and removal relatively non-politicized; arguably likely to decide cases	Broad laws to protect state: state secrets; endangering state?  Illiberal laws: limit civil society, freedom of expression: registration of social groups; or privilege group – no exclusion of tainted evidence

		<p>establish corporatist or clientelist relations with government, but soft or societal form of corporatism</p>	<p>Social solidarity and harmony as important if not more so than autonomy</p> <p>Freedom of thought and right to think limited by need for common ground and consensus on important social issues</p> <p>Attention to character-building, virtues and duties as well as rights</p>	<p>plan affairs</p> <p>Government efficiency and rationality</p> <p>Dispute resolution, property rights protected through formal and informal mechanisms, more reliance on corporatist and clientelist ties</p> <p>Legitimacy</p>	<p>based on substantive agenda</p> <p>Administrative law: mechanisms for reining in discretion, capable of holding even top leaders accountable; but more deference to agencies in policy-making, emphasis on efficient government balanced to some extent by need to protect individual rights; opportunities for public participation in rule making and interpretation; public can hold accountable by throwing out of office</p> <p>Independent legal profession, though perhaps monitored by state agency such as ministry of justice</p>	
Neo-Authoritarian Rule of Law	<p>Market economy;</p> <p>Managed capitalism;</p> <p>More government intervention;</p> <p>Public/private division not as clear;</p> <p>More administrative discretion</p>	<p>Single party rule, No elections or only at low level or appearance of genuine elections but limits on opposition party</p> <p>Reject neutral state</p> <p>Even larger role for state</p> <p>Civil society, but limits, perhaps corporatist or clientelist relations with government</p>	<p>“Asian Values” or communitarian</p> <p>Emphasis on indivisibility of rights, collective rights; Economic growth at expense of rights (liberty tradeoff)</p> <p>Utilitarian or pragmatic conception of rights</p> <p>Stability and order privileged over freedom</p> <p>Social solidarity</p>	<p>Balance between law as means of strengthening state and limiting state favors strengthening</p> <p>Strengthen:</p> <p>Emphasis on stability;</p> <p>Predictability and certainty: mainly for economic growth, less to allow individuals to plan affairs</p> <p>Government efficiency and rationality</p>	<p>Moderate separation between law and politics.</p> <p>Legislature not elected</p> <p>Judicial Independence may or may not be limited</p> <p>Administrative law system, capable of checking government officials, professional civil service; more emphasis on rational government than protecting individuals;</p>	<p>Broad laws to protect state and social order: state secrets law; endangering state interests;</p> <p>Illiberal laws: limit civil society, freedom of expression: registration of social groups; or privilege group – no exclusion of tainted evidence</p>

			<p>and harmony over autonomy</p> <p>Freedom of thought and right to think limited by need for common ground and consensus on important social issues; limits on right to criticize government</p> <p>Attention to character-building, virtues and duties as well as rights</p>	<p>Dispute resolution, property rights protected through formal and informal mechanisms, more reliance on corporatist and clientelist ties</p> <p>Legitimacy</p> <p>Limits:</p> <p>Government must act in accordance with law;</p> <p>Law to prevent government arbitrariness</p> <p>Protect individual rights, but not priority and limited</p>	<p>more deference to government in policy-making; opportunities for public participation and monitoring</p> <p>Legal profession supervised by MOJ</p>	
Statist Socialism Rule of Law	<p>Market economy;</p> <p>Much government regulation;</p> <p>Public-ownership</p>	<p>Single party rule, no elections or only at lowest levels</p> <p>Reject neutral state</p> <p>Much larger role for state</p> <p>No or very limited civil society, high level of corporatist or clientelist relations with government, hard or statist form of corporatism</p>	<p>Emphasis on subsistence, economic growth at expense of rights (liberty tradeoff)</p> <p>State sovereignty</p> <p>Utilitarian or pragmatic conception of rights;</p> <p>Rights as grant from state</p> <p>Stability and order privileged over freedom</p> <p>Social solidarity and harmony over autonomy</p> <p>State prefers unity of thought to freedom of thought, right thinking to right to think; tendency to exercise strict thought control if possible; at minimum, strict</p>	<p>Emphasis on strengthening state</p> <p>Stability</p> <p>Predictability and certainty: economic growth</p> <p>Law as way means of enhancing government efficiency and rationality</p> <p>Dispute resolution, property rights protected through formal and informal mechanisms, more reliance on corporatist and clientelist ties</p> <p>Legitimacy</p> <p>Some limits on state:</p> <p>Government must act in</p>	<p>Moderate to low separation between law and politics.</p> <p>Legislature not elected; Party influence on lawmaking process</p> <p>Functional independence of judiciary; no interference by other branches; courts as independent as opposed to judges, so adjudicative supervision; arguably likely to decide cases based on substantive normative principles defined by state; regime wants courts to serve Party interests</p> <p>Legal profession: subject to political</p>	<p>Broad laws to protect state: state secrets; endangering state;</p> <p>Illiberal laws: limit civil society, freedom of expression: registration of social groups; or privilege group – no exclusion of tainted evidence; administrative penalties such as re-education through labor</p>

			<p>limits against attacks on ruling party; emphasis on thought work to ensure common ground and consensus on important social issues</p> <p>Attention to character-building, virtues and duties as well as rights</p>	<p>accordance with law, but accept limits begrudgingly</p> <p>Prevent government arbitrariness</p> <p>Protect individual rights, but not priority and limited view of rights</p>	<p>requirements, partial independence, mainly due to corporatist nature of relationship with MOJ</p> <p>Administrative law: more discretion; more responsive to Party policy; system imposes weak limits on top leaders, limited public participation in rule making, interpretation and implementation; limited ability for media and public to monitor</p>	
Rule by Law	<p>Could be planned economy, free market, or managed capitalism</p> <p>Government intervention high</p> <p>Public/private distinction non-existent or unimportant</p> <p>Control by administrative policy and fiat</p>	<p>Single party rule, no elections</p> <p>Reject neutral state</p> <p>Totalitarian or authoritarian state</p> <p>No or very limited civil society, state dominated corporatist arrangements</p>	<p>Emphasis on subsistence, economic growth at expense of rights (liberty tradeoff)</p> <p>Socialist conception of rights as bourgeois; emphasis on duties, particularly duties to state</p> <p>Rights as grant of state</p> <p>Rights exist as programmatic goals only, no real protection of rights</p> <p>State sovereignty</p> <p>Social solidarity and harmony over autonomy</p> <p>State enforces strict thought control; unity of thought over freedom of thought</p> <p>Strict limits against attacks on ruling party;</p>	<p>Law is tool to serve interests of the state; Party's role not defined in law; no meaningful legal limits on rulers</p> <p>Law enhance government efficiency</p> <p>Law not meant to protect individual rights</p> <p>Dispute resolution, but many disputes settled administratively or by Party leaders rather than in courts</p> <p>Heavy reliance of mediation to resolve disputes "among the people", formal legal system used to suppress enemies</p> <p>Party members not subject to courts</p>	<p>No minimal separation between law and politics</p> <p>Party policies supplant and trump laws</p> <p>Legislature not elected, just rubber stamp</p> <p>Courts not independent; Party determines outcome of specific cases; adjudicative committee used to enforce Party line; courts serve Party interests</p> <p>Legal profession: lawyers as workers of the state; no independence; work in state firms; limited rights to defend accused</p> <p>Administrative law: main purpose is government efficiency; officials wide</p>	<p>Law relatively unimportant; much of day-to-day governance by policies;</p> <p>Absence of many major laws – criminal law, contract law, civil procedure law</p> <p>Laws ignored</p>

					discretion, govern by fiat; no administrative laws provide individuals right to challenge government; no or extremely limited public participation in administrative process	
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## Appendix II

### Legal Reforms in China

This report assesses the current and future obstacles and potential for legal reform, and suggests ways to facilitate reforms consistent with an overall objective of promoting the rule of law and the protection of individual rights.<sup>8</sup> Part I provides a general overview of legal reforms in China. Part II offers some general observations about what can be done to support reforms based on the discussion presented in Part I and a recent meetings with participants in previous projects and others in the legal community. Part III focuses more specifically on legal research in China, both by academics and by the research arms of government entities such as the National Judges Institute. Part IV focuses on judicial training. Part V takes up a hot topic being debated in the Chinese legal community: the need to establish one or more centralized committees or entities to guide legal reforms.

#### I. Overview of Legal Reforms: Moving Beyond a Court-Centric Approach

It is essential to begin with an overview of legal reforms in China. First, many bilateral and multilateral assistance programs have focused on “judicial reforms” in the narrow sense of courts and judges. The reasons for this were basically twofold. Courts and judges are clearly central to the successful implementation of rule of law, and without doubt PRC courts and judges are a weak link in the rule of law chain. Further, given limited resources and virtually unlimited areas in need of reform, many donors chose to concentrate on funding a couple of areas where it felt its support could have the greatest impact. Focusing on the courts allowed donors to fund a range of projects to address various interrelated problems, thus providing a more comprehensive and potentially more effective reform package.

While understandable, a court-centered approach has certain disadvantages. PRC courts have a somewhat more limited role than courts do elsewhere: for instance, legal interpretation and review of regulations for consistency is done by different entities. Further, as in other systems, other entities such as the prosecutor and police also play important roles in the implementation of law. *An overview of the legal system suggests that donors could increase their impact on legal reforms by funding other entities or other projects not related to the courts, with the procuracy and police being particularly suitable candidates in terms of need, though questions remain as to the possibility of designing effective programs.*

Second, courts and all legal institutions function in a particular context. Even if donors wish to continue to focus on the courts, it is important to understand the general context in which courts are operating in order to choose projects that are feasible and likely to lead to significant reforms. Accordingly, I discuss briefly some general factors affecting legal reforms – the political and constitutional structure, economic reforms and the unfinished transition to a market-oriented economy, tradition and culture, the urban-rural divide, and the negative affects of widespread

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<sup>8</sup> The assumption is that rule of law tends to result in better protection of individual rights. However, it also is important to note that the meaning of rule of law is contested. A thin or procedural rule of law does not entail a particular conception of rights. In contrast, thick or substantive theories of rights incorporate particular interpretations, conceptions or theories of rights – such as liberal, communitarian, Asian Values, etc. Some scholars have argued that a thin rule of law lacks sufficient normative content to adequately protect rights. However, even a thin rule of law necessarily entails some protection of rights as rule of law entails meaningful limits on the state.



corruption. I then turn to the particular legal functions and the institutions responsible for them in China: legal education, lawmaking/legislation, legal interpretation and implementation of law.

## **A. General Factors**

### **1. Political and Constitutional Structure**

Legal reformers must take into consideration China's political structure, including the role of the Party, the unitary structure in which the National People's Congress (NPC) is the highest organ of state power such that there is a separation of functions but not separation of powers in the sense of constitutionally equal and independent branches, and the particular division of powers among state organs – including the procuracy's role as supervisor of the courts, the dispersion of lawmaking and interpretation authority to a wide variety of organs and the division of powers among central and local levels. Some of these features are not unique to China. Given certain similarities in institutional structures, it makes sense to look first to European civil law countries for comparative purposes. In contrast, this very different political structure from our own suggests that legal reforms modeled on the U.S. are likely to require adaptation if they are to be successful.

Although reforms over the last twenty years have resulted in the Party ceding responsibility for daily operations to the usual state actors, the Party unquestionably remains an important institution in China, and is likely to continue to be so for some time. Nevertheless, there is much that can be accomplished by way of legal reforms within the current structure (in part because many reforms are in the Party's interests and in part because the Party's options are increasingly constrained by objective factors such as the needs of economic reform, pressure from globalization and China's increasing involvement in the international legal order, most notably the WTO). On a theoretical level, more attention needs to be paid to what the acceptable parameters of rule of law within a single party system are: what would be an acceptable role for the Party consistent with the requirements of rule of law?

Most importantly, however, rather than knee-jerk reactions to any role for the Party whatsoever, it would be more productive to adopt a pragmatic approach that focuses on what the actual role of the Party is in practice and the advantages and disadvantages of various forms of Party involvement in the legal system. When is Party involvement helpful and when it is not? What forms of involvement (by which Party organs or groups) are acceptable? How can the various roles of Party organs be modified and improved to increase the positive consequences and diminish the negative ones? What are the channels for influencing the Party's role? Are some organizations better situated to undertake this kind of work than others? For instance, Li Buyun has suggested that Chinese Academy of Social Science's (CASS) semi-official status increases the likelihood that his project on judicial independence will influence decision-makers. At present, the channels for influencing decision-makers in China, particularly Party organs, is opaque at best. Indeed, the role of Party organizations in the actual operation of the legal system seems to be poorly understood and little discussed in public. While academics and others may be reluctant to discuss the Party's role for obvious reasons, to the extent possible, more open discussion of the pros and cons would be useful. Funding projects involving Party organs or Party schools would be highly desirable, assuming that the right personnel were involved. For instance, Fang Shirong, formerly the Dean of Southcentral University of Law and Political Science, has now taken an influential position in a Party school, and thus is well-positioned to lead what could potentially be an extremely informative and influential project.

Recently, Party leaders have expressed an interest in social democratic parties, sending teams to Western and Eastern European countries to explore how the Eastern countries made the transition and how such parties operate. This also would seem to provide an opportunity for legal scholars, in conjunction with political scientists, to rethink the role of the Party, especially in relation to the legal system and rule of law.

More generally, rather than simply assuming that China must adopt political and legal institutions like those in the West (whether civil or common law), reformers should be encouraged to first gain a better understanding of the particular problems faced by practitioners and what methods those on the ground have developed to overcome the problems. Such information might be valuable in selecting from the menu of options available from other countries, adapting the approaches used in other countries to fit China's circumstances or even in creating new institutions. Of course, China's legal institutions have converged to a considerable extent with those in other countries. Moreover, China's problems, while to some degree specific, are not wholly dissimilar to the problems faced by other states as they modernize. Accordingly, China need not reinvent the wheel. Nevertheless, there remains considerable room for creativity and institutional novelty.

## **2. Economic Reforms**

China's unfinished transition to a market-oriented economy creates problems for legal reforms and rule of law. Laws change rapidly; there is considerable inconsistency in laws; local governments ignore or bend central laws to attract investors and promote economic growth, pressure courts to find in favor of local parties or engage in other forms of local protectionism, etc. It will be years before a reasonably stable economic equilibrium is reached.

On the other hand, economic reforms also create opportunities for legal reformers. Legal reformers may be able to harness the power of economic reforms to promote changes. For instance, the conflict of interest that exists when government agencies are also market players has led to the demand to separate agencies and businesses, with agencies focusing on their regulatory tasks. Similarly, as part of its protocol of accession to the WTO, China has also committed to reducing inconsistency in laws; applying and administering laws in a uniform, impartial and reasonable manner; expanding judicial review of administrative acts; creating a mechanism in which investors can bring to the attention of national authorities cases of non-uniform application of laws; establishing an official journal to publish all trade related legislation; providing a reasonable period for public comment before trade related legislation takes effect; and providing an inquiry point for investors to obtain interpretation of laws and regulations, etc.

A number of donors are sponsoring WTO-related projects and other projects that focus more specifically on commercial law. Donors should not ignore opportunities created by economic reforms to strengthen institutions, as the affects of strengthening institutions are likely to spillover into other areas of law.

## **3. Tradition and Culture**

Legal reformers face a number of challenges given China's past and its current social conditions. As often noted, law has traditionally played a somewhat different and less important role in China than in other countries. Raising the level of legal consciousness and getting people to trust in the

legal system and respect the law is no easy task (a task complicated by media and academic reports portraying judges as incompetent and corrupt).<sup>9</sup>

Moreover, some practices such as extensive reliance on *renqing* (feelings) and *guanxi* (personal connections and networks) often undermine attempts to govern in accordance with law. Similarly, laypeople often have an unrealistic expectation of law. The traditional emphasis on substantive justice supports the mistaken impression among many that the legal system is capable of solving all social problems and rectifying all forms of injustice. It also leads to parties pursuing adjudicative supervision and other channels to review final court decisions.

Legal reforms that are at odds with social practices and values are likely to be difficult to implement. Thus, attempts to implement the criminal procedure law, restrict capital punishment or even curb the widespread reliance on torture find little support from a populace wary of increasing crime. Like American citizens, Chinese citizens have supported the government's war on crime and terrorism, even at the expense of civil liberties.

Law in action programs, including legal aid clinics, consumer protection agencies, and support for administrative law reforms, may help to some extent to demonstrate to people the value of law. At the same time, where possible, efforts should be made to educate people as to the limits of law and to create more reasonable expectations.

#### **4. Urban – Rural Divide**

The vast differences between rural and urban China create challenges to legal reformers. Simply gathering accurate information about the operation of law in the countryside, attitudes toward law among rural residents and problems faced by rural legal organs is difficult. Clearly, rural areas have more difficulty attracting legal talent. Designing meaningful projects capable of addressing the problems that arise in rural areas is not easy. Such projects require for starters an accurate understanding of what is happening in the countryside, which could perhaps be obtained through survey work, cases studies and web-based information networks of the kind being established by the National Judges Institute.

#### **5. Corruption**

Widespread corruption, including judicial corruption, is eroding confidence in the ruling regime and threatening to undermine efforts to establish rule of law. Corruption is definitely one of the most important and difficult issues in China's legal reform. It is notoriously difficult to study corruption or to measure it. It is also difficult to come up with practical plans to reduce corruption. While it would be naïve to expect too much by way of results given the institutional nature of corruption, one suggestion might be to study court systems that enjoy a relatively clean reputation, such as Shanghai. Comparative studies with other countries might also be useful. The World Bank and others have been interested in this topic recently. A few years ago, the Chinese Academy of Social Sciences held a conference on judicial corruption. However, it is not clear what came of it, and whether it led to a research or reform agenda or any follow-up projects (a fate unfortunately all too typical of academic projects).

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<sup>9</sup> Corruption and competence are problems of course. However, the media tends to focus on negative issues simply because when the system works properly it is expected and not news: man bites dog is news whereas dog bites man is not.

## **B. Institutional/Functional Approach**

One way to approach legal reforms is to focus on particular institutions: the courts, NPC, procuracy, etc. Another way would be to focus on particular legal functions: legal education and training, lawmaking, legal interpretation, and implementation. Still another approach would be to focus on particular areas of law: administrative, criminal, family, environmental, etc. Here I use an institutional/functional approach.

### **1. Legal Education**

Many of China's legal problems stem from the fact that many people responsible for making, interpreting and implementing law –whether government officials, lawyers, procuratorates or judges – lack adequate legal knowledge and training. In part this is a historical artifact resulting from the Cultural Revolution. But it is also a function of current methods of legal education and training.

Foreign assistance agencies have supported a number of legal education projects. Given the utmost importance of improved legal education, such projects and the challenges facing legal educators should be the subject of a separate study and appraisal. Suffice it to note in passing that law schools ought to put more emphasis on legal analysis and (practice-oriented) research rather than memorization of black letter law. Rather than lecture, professors should stimulate students to think about law and to encourage interaction. In addition, clinical legal education should be further developed.

As discussed below, judges, procuratorates, police and government officials need both remedial (basic) legal education and more specialized training tailored to their particular responsibilities.

### **2. Legislation: Laws and Regulations**

Lawmaking (broadly defined to include all legislation, regulations and normative documents) in China suffers from a number of problems, including lack of transparency and participation in the lawmaking process; the failure to publish or provide ready access to many regulations; the poor quality of much legislation, despite steady improvement; and inconsistencies between higher and lower level regulations. As in other countries, a number of entities are authorized to make law: the NPC and local people's congresses; administrative agencies; local governments; even the courts if one counts the practice of the Supreme People's Court (SPC) of issuing legal interpretations that have the effect of laws. However, in China, the mechanisms for ensuring consistency are underdeveloped.

The passage of the Law on Legislation (*Lifa Fa*) and the future passage of the Administrative Procedure Law (APL) will alleviate some of these problems, allowing for greater participation, requiring hearings and the publication of laws, and providing for new ways to challenge inconsistent regulations. Yet there will continue to be problems, and thus there are likely to be ample opportunities to fund worthwhile projects that focus on specific areas of reform such as: research for and drafting of the APL (including empirical research on particular administrative agencies and the issues they face and comparative research on administrative procedure laws in other countries); development of legislative and administrative hearing processes, including drafting of regulations and training; the creation of nation-wide databases for laws and regulations (some donors are now supporting various databases, but without any apparent attempt

to coordinate their efforts or link up the databases); and the establishment of entities and procedures for reviewing legislation for consistency.<sup>10</sup>

To be sure, although a number of solutions have been proposed and a number of steps taken to reduce the level of inconsistency, they are not likely to suffice for reasons explained elsewhere.<sup>11</sup> In the end, deeper institutional reforms, including judicial reforms to increase the independence and authority of the courts – in particular giving the courts the power to annul administrative regulations – are likely to be required.

### 3. Legal Interpretation

Legal interpretation in China leaves much to be desired. There is no constitutional court. The National People's Congress Standing Committee (NPCSC) rarely fulfills its constitutional responsibility to interpret laws. There are no clear procedures for obtaining an NPCSC interpretation. When the NPCSC does decide to act, the interpretive process lacks transparency and opportunities for public participation. Nor is the issue of the role of legislative history clear.

To fill the void, the SPC issues interpretations in a variety of guises, from comprehensive interpretations (*jieshi*) to generally applicable replies (*pifu*) to replies applicable only in the specific case (and in some cases explanations of their interpretations, as in the case of explanation by the drafters of the Security Law interpretation submitted internally to the SPC adjudicative committees but subsequently published by the Jilin People's Press). Yet the SPC's legal authority to issue comprehensive interpretations is unclear. Moreover, critics note that the practice of issuing replies violates a party's right to an appeal. Needless to say, the status of internal explanations of interpretations is even more dubious. As with NPC interpretations, the entire process is shrouded in mystery and lacks transparency and meaningful public participation.

Similar problems plague interpretation by the procuracy and administrative agencies. In addition, different departments or entities often issue conflicting interpretations. In some cases, *Fagongwei* (the NPC committee in charge of drafting and legal affairs) was charged with taking the lead in mediating conflicts between the different entities and coordinating interpretation, even though there was no legal basis for the *Fagongwei* to issue interpretations of laws.

In short, legal interpretation would seem to be an area ripe for reform, possibly even a major overhaul (especially now that the SPC has stated that parties may in certain circumstances directly invoke the constitution to protect their rights). It might be worth considering a project that takes a comprehensive look at legal interpretation, including empirical research into how interpretation actually works in the various entities, what the issues are, and how the process could be improved. Perhaps this could be one of the tasks of the centralized Legal Reform Committee discussed in Part V. As the experience with the Law on Legislation suggests, the procuracy is not likely to give up its power to interpret laws easily.

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<sup>10</sup> This list is by no means meant to be exhaustive. It also bears noting that many foreign actors have already sponsored projects aimed at building institutional capacity by training drafters of laws and regulations at the NPC, State Council and in various organizations, as well as having sponsored the research for and drafting of various laws and regulations.

<sup>11</sup> See Peerenboom, *China's Long March Toward Rule of Law*, chapter 5 (Cambridge University Press, 2002).

## **4. Implementation**

The obstacles to implementation vary depending on the area of law: criminal, administrative, family, environmental, commercial, etc. Thus, in some cases, it makes sense to focus on area-specific projects, such as administrative or criminal law projects that are particularly central to the protection of rights. Different regions also face different problems. Nevertheless, there are general systemic and institutional obstacles to enforcement that cut across the various areas, albeit with varying degrees of relevance and importance to any given area. Accordingly, an institutional approach that focuses on institutional capacity building is warranted.

### **(a) The Courts**

Rule of law requires a judiciary that is technically competent, independent, and enjoys sufficient powers to resolve disputes fairly and impartially. China's judiciary falls short on each of these dimensions. Clearly, comprehensive judicial reform is required, including deep institutional reforms.

However, judicial reforms must be sequenced and implemented in accordance with the judiciary's institutional capacity to change. Suddenly providing more authority and independence to incompetent and corrupt judges could result in more rather than fewer wrongly decided cases, which would then further undermine the legitimacy of the legal system. On the other hand, it will be difficult to attract and retain qualified personnel to the judiciary without increasing the authority and independence of the courts. Accordingly, a series of incremental reforms is required whereby the authority and independence of the courts is increased over time as the judiciary becomes more competent and capable of handling the additional responsibility.

### **(i) Technical Issues**

A number of recent reforms have sought to improve efficiency (by separating functions within the court, imposing deadlines for handling cases, etc.), access to justice (by limiting fees and providing legal aid) and the quality of the trial by appointing more qualified presiding judges and requiring judges to write better judgments, etc. In addition, trials are now open to the public, and judgments are being made available online, thus increasing the transparency of the courts and subjecting them to public scrutiny and supervision.

Currently, there seems to be considerable interest in evidence rules and the use of summary procedures. A new Evidence Law is being drafted, and the Supreme People's Court, Supreme People's Procuracy and the Ministry of Justice have recently jointly issued regulations that provide for summary and simplified procedures in criminal cases where the defendant admits guilt.

There is a tendency to announce a particular reform and then fail to follow-up to investigate the extent to which reforms are actually being implemented, how effective they are, what obstacles have arisen, what modifications or solutions have been tried, etc. Consolidating reforms is as important as devising new reforms. Grantees often apply for funding for each new reform that is in the works, rather than going back and testing how earlier reforms are working. Donors might want to consider funding longer term projects with a follow-up component, or just to fund follow-up projects, to ensure that reforms are consolidated.

## (ii) Personnel Issues: Quality of Judges and Legal Assistants

Recent reforms have sought to address a bloated judiciary with many judges lacking in sufficient legal knowledge and training. Raising the standards for becoming a judge, instituting a unified national exam, selecting the most qualified judges to be presiding judges, requiring court presidents and vice presidents to have a legal background, transferring unqualified judges to non-adjudicative positions, reducing the number of judges, closing off the route for secretaries and ex-military officials to become judges, etc. – all deserve to be applauded.

Nevertheless, serious problems remain. Again, it would be useful to know more about how the recent reforms are working. Anecdotal evidence suggests that the *shenpanzhang* system is not working as well as it should. Promotion is still based largely on factors other than legal knowledge and performance, including seniority. Academics debate the extent to which ex-military officials are still engaged in adjudicative work, the reasons why they are, and what should and can be done about it.

Current hot issues include how to increase efficiency by distinguishing between judges (including assistant judges) and clerks/secretaries, and dividing up responsibilities among them (with different training and career paths for judges and secretaries). This is an area worth exploring. While comparative studies may be useful, the first step should be to get a better picture of what is happening in courts around China. Moreover, it is more likely that Europe would be a better place to look for relevant experience than the U.S., given the different career paths of judges.

Another hot issue is the unified judicial exam. The implications of a unified national exam are only now being thought through. The exam has been conducted for two years, and no doubt a number of issues have arisen.

The quality of the judiciary is a major issue that involves funding considerations (Should judges be given raises? What should happen to judges who are terminated or transferred to non-adjudication positions?), appointment and promotion considerations, and the issue of judicial independence. These issues go to the heart of institutional reforms and the restructuring of the courts. Nevertheless, even within the existing parameters, much can be done to improve the quality of the judiciary. The most obvious means is through training, which because of its importance is discussed separately in Part IV.

## (iii) Judicial Independence

Given the low level of competence of many judges and problems with corruption, there must be a balance between judicial independence and judicial accountability. Nevertheless, judges are currently subject to too much supervision and outside interference. The independence of the courts is threatened by the lack of adequate funding, the reliance on governments at the same level for funding and the way judges are appointed. Judges are subject to pressure from the Party (through various channels, both from outside the court and within the court), government officials, people's congresses, procuracy, senior judges within the court and higher level courts, the media and members of society. Addressing these issues would require major institutional changes, including in some cases amendments to the Constitution that would alter the balance of power between the courts and people's congresses and the procuracy.

One issue is how best to promote greater judicial independence given the politically sensitive nature of judicial independence and the fact that major institutional reforms would be required to make much headway. The Ford Foundation has funded a project by CASS, headed by Li Buyun,

that involves an empirical study of interference with the courts as well as a comparative and theoretical angle. The project is supposed to produce a book on judicial independence plus several reports that will be forwarded to decision-makers in China by taking advantage of CASS's quasi-governmental status. This project is to be applauded for including an empirical component that attempts to understand more specifically the forms and sources of interference with the courts. However, there are already a number of empirical studies about the frequency and source of interference with the courts. In fact, Li noted that Supreme People's Court President Xiao Yang recently commissioned a study but then set it aside when it turned up so many problems. Thus, it is questionable whether the problem is lack of knowledge about the nature and severity of the problem. It is also questionable whether Li's study will have any more impact than previous studies, though as noted above Li hopes that CASS's special status and connections (and I would add Professor's Li's own status and connections) might make a difference. Moreover, presumably Li's study would be published, and thus could lead to a public debate that might create further pressure for reform.

There have been a number of proposals regarding how to overcome local protectionism and increase judicial independence, from the creation of a federal court system to the establishment of cross-provincial regional courts to centralizing funding for the courts and judicial appointments. A project looking in detail at each of these proposals (and possibly others) might be worthwhile. More specifically, one of the concerns with institutional reforms that would centralize funding is that it would create too big a fiscal burden for the central government. A study that would try to calculate what the costs would be and that would address issues such as how the center would collect fees from lower courts, calculate a budget, allocate funds, etc. might be valuable.<sup>12</sup> Proposals to promote experimentation in the way judges are appointed – or to collect information about such experiments to the extent that they are already occurring – would also be worth exploring.

#### (iv) Authority of Courts

Courts in China lack stature and authority. Projects that explore ways to expand the authority of the courts merit consideration. For example, it might be worth exploring ways to allow some courts to strike down certain abstract acts (though this may require constitutional change). The authority of the SPC to interpret laws and regulations could also be given a firmer legal foundation. However, given the difficulty of these reforms and finding entities to push for them, it might be more feasible to concentrate on expanding powers already enjoyed by the courts. For example, courts have been reluctant to take full advantage of their powers to strike down specific administrative acts based on abuse of authority. Courts have also rarely taken advantage of their powers to hold individuals, companies or government entities in contempt if they do not cooperate with the courts in enforcing judgments, providing evidence, etc. To be sure, unless the way courts are funded and judges appointed is changed, courts are not likely to become terribly aggressive in challenging government entities or officials.

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<sup>12</sup> In 2002, there was CASS conference on judicial reform in which one of the four main topics was how to deal with local protectionism. There was considerable discussion of the practical issues involved in restructuring the way courts are financed and judges appointed. Again, coordination, sharing of information and dissemination of results is important. Whether the CASS conference will produce tangible results in the form of conference papers is not clear. More generally, as many of the issues that affect the court (legal aid, funding for equipment and salaries, etc.) touch on issues of public finance, foreign agencies might want to consider breaking down the internal walls within the typical programming structure so that those responsible for legal affairs and economic/public finance could fund collaborative projects.



## **(b) Agencies**

Government agencies are a key player in the implementation of law. Yet agencies are plagued by local protectionism, departmental turf-fighting, cut-backs that seem to have resulted in young and poorly trained people assuming positions of power (at the Ministry of Foreign Trade and Economic Cooperation (MOFTEC), for example). More generally, officials are poorly paid, and corruption is widespread. Further, agencies enjoy considerable discretion for various reasons. While agencies everywhere enjoy considerable discretion, and there are good reasons why agencies in China should enjoy even more discretion in some circumstances, the legal mechanisms for checking discretion – letters and petitions, administrative supervision (and Party discipline), reconsideration, and litigation – remain weak.

The task of improving the quality of administrative agency officials is complicated by the tremendous diversity of agencies, which makes it hard to devise effective training strategies. Moreover, the sheer number of officials presents obvious problems. Some donor agencies with large budgets, such as the EU, have established training programs for key agencies or departments within agencies, such as MOFTEC and its Treaties and Law Section. France has also established a program between its school for civil servants and its Chinese counterpart. There have also been various programs aimed at training up officials responsible for patents, copyrights, and trademarks and developing the institutional capacity of entities that deal with intellectual property issues. Although these programs may only be a drop in the bucket, as it were, they may be effective when they target specific departments with a clearly defined agenda.

The Ford Foundation has supported a number of projects in the area of administrative law, including support for drafting of administrative legislation (including regulations for the courts with respect to implementing the State Compensation Law), training of administrative law judges, study abroad for PRC administrative law specialists to research judicial review, administrative licensing and the U.S. Administrative Procedure Act, and a book on comparative administrative litigation.

There are still some holes in the regulatory regime: a licensing law, compulsory enforcement law and administrative procedure law are being drafted. Improvements can also be made to existing rules and mechanisms for reining in government officials. For instance, reconsideration bodies lack independence. China might consider tough rules against ex parte communication and a system where reconsideration personnel are not members of the agency whose actions they are reviewing.

On the whole, however, China's administrative law regime remains weak due to various context-specific factors discussed previously, many of which have little to do with the administrative law system as such, including shortcomings in the legislative system, weak courts, poorly trained judges and lawyers, corruption, a low level of legal consciousness among government officials and the citizenry, and the fragmentation and overlapping of authority that have resulted from the transition to a more market oriented economy. Thus, improving the administrative law system is largely an indirect process involving general institution building.

**(c) Procuracy**

The procuracy has attracted relatively little attention from academics, Chinese or foreign, or from foreign donors.<sup>13</sup> At this stage, there would appear to be a need for more research to better understand what the procuracy is doing and the issues it is facing. One possibility would be to encourage the National Procuracy Institute to establish an internet information network along the lines of the one established by the National Judges Institute.

One issue that is apparent is the tension between the procuracy and the courts. While many believe the procuracy's right to supervise the court should perhaps be limited, a firm empirical basis is lacking to back up the argument. Moreover, it might be easier to persuade the procuracy to accept limitations on its powers if such limitations were combined with proposals to increase the authority or responsibilities of the procuracy in other ways (for instance, encouraging the procuracy to bring class actions suits rather than relying on private lawyers, a suggestion raised in passing by Zhu Suli).

Presumably the procuracy is facing many of the same types of technical and personnel issues as the courts. Clearly there are similar issues with respect to lack of sufficient legal knowledge and training. As with judges, training of procuratorates is a daunting task. While there are differences in training judges and training procuratorates, many of the issues are the same, including the need to develop practical materials, difficulties locating qualified instructors with the necessary legal knowledge and practical experience, the need to train large numbers of procuratorates that have very different legal backgrounds and work in quite different environments, and the need to effectively disseminate the results of training received at training centers to others who could not attend the training sessions.

Foreign agencies could play a valuable role in strengthening the procuracy by taking advantage of what they have learned in supporting court projects. For example, representatives of the National Procuracy Institute proposed more trips abroad for their researchers or for senior procuratorates to observe other systems. As discussed below, such trips seem to have produced limited results. While they may be useful in some circumstances, they require careful planning and other conditions. Other donors have also noted that sending procuratorates (and judges) abroad for training has been hampered by the insistence on the part of the courts and procuracy that they select the trainees. Language, dissemination of information gained from training and the impact of those trained when they return are also issues.

Simply facilitating information transfer between the two national institutes would be useful, particularly given that the National Procuracy Institute seems to have made greater headway in tackling some of the training issues than the National Judges Institute, for instance with respect to the development of practical materials and investigations into the use of distant learning technologies. Conversely, as noted, the information network being established by the Judges Institute might be useful for the procuratorate. Similarly, both the procuracy and the courts are doing research, often on similar topics, without any coordination.

**(d) Police/Public Security (Gongan):**

Without doubt, the police/public security are the front lines in the implementation of law; equally without doubt, their role in the implementation of law is a major trouble area. Like the procuracy,

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<sup>13</sup> There are some exceptions: The Canadian International Development Agency and Sweden have done some projects on prosecutors.

public security has received insufficient scholarly attention. Yet the problems facing potential researchers and reformers are even greater. By its nature, police work is primarily local. The implications are several: collecting information and designing effective programs is likely to be difficult, because different localities are likely to face different problems; top-down approaches are not likely to be effective; training will be difficult because of the sheer numbers of police, their different backgrounds and their different problems. Further, police work is often secretive. One of the problems documenting use of torture or violations of laws in collecting evidence or interrogating suspects is that police act differently when they are being observed by outsider observers.

Nevertheless, there are likely to be opportunities for strengthening police work in accordance with law. Technical assistance or exchange programs may provide Chinese police with new information or techniques for investigating crimes that render reliance on torture less necessary, for example. Surely other countries have had problems with torture, and may have some useful lessons to share about what to do about it.

Again, some donors have begun to work in this area, including Office of the High Commissioner for Human Rights (OHCHR) and Norway, both of which have had programs on policing. The OHCHR held a workshop in Beijing on July 5-6, 2001 that apparently (i) discussed international standards applicable to police conduct; (ii) shared comparative studies of training and operation manuals for police, particularly with respect to human rights elements; (iii) identified follow-up steps to integrate relevant UN material into police training in China. Norway sponsored an international workshop on Rights, Crime and Policing in China attended by PRC, European and North American experts. Sweden also sponsored projects on prisons and public security in 1996 and 1998 respectively.

#### **(e) Lawyers**

China's legal profession has made great strides in terms of numbers and quality, though much remains to be done. Many lawyers are still poorly trained and lack sufficient legal knowledge to carry out their tasks. There is still a shortage of lawyers, particularly in rural areas. Like lawyers elsewhere, many PRC lawyers want to practice commercial law, while few want to practice in less lucrative areas such as criminal or environmental law. Professional ethics are a problem. Chinese lawyers involved in litigation frequently engage in unethical behavior (often because there is little alternative if they are to compete with other lawyers and serve their clients' interests). Chinese lawyers and law firms also cultivate clientelist relationships with the Ministry of Justice, MOFTEC, the State Administration for Foreign Exchange and even the courts. Bar associations remain weak, with key positions often filled by justice officials.

Chinese firms tend to be small. Many firms are really not firms at all but rather just a nameplate where each individual lawyer works independently and is compensated on an eat-what-you-kill basis. Management problems are common, and keep firms from reaching a size required to compete with major international firms. Firms tend to invest little in the training of younger associates. Younger associates often leave, in part because they see little point in staying given that they are paid little, receive little training and are not likely to be allowed to make partner. On the other hand, younger associates often have an inflated sense of their abilities and market value, and an unrealistic sense of what it takes to develop a practice.

The role of lawyers is often poorly understood. Lawyers frequently encounter problems in carrying out their work, and even at times are subject to physical abuse or arbitrary arrest. Some judges and procuratorates resent the fact that lawyers make so much more money.

The legal profession is a hard group to target for reforms. The quality and technical skills of lawyers is likely to improve over time as legal education is improved, the bar for becoming a lawyer is raised (presumably the Lawyers Law will be amended soon so that would-be lawyers will have to have a college degree to sit for the unified national exam), and market competition, particularly in the cities – resulting from the increase in foreign firms after WTO and the sheer increase in numbers of Chinese lawyers - forces lawyers to up their game to survive. In contrast, post-graduation training seems to have little effect. For starters, it is difficult to design a meaningful training program for lawyers with different practices (foreign investment, intellectual property, criminal, etc.) and legal backgrounds. Lawyers at top firms are generally much better trained than the trainers. Meanwhile, lawyers in rural areas may have a weak foundation in law.

Efforts to inculcate professional ethics through educational campaigns and persuasion are not likely to have much effect. A more practical approach would be to encourage malpractice litigation. Indeed, a study of malpractice litigation would be useful: how often does it occur, in what kind of cases, what are the results, etc.

Malpractice suits are not likely to have much of an impact on clientelist relationships. The main solution is likely to be administrative and market reforms such that the MOJ's control over lawyers (and hence their ability to extract rents) is diminished and successful firms no longer need to rely on the MOJ or special assistance from other agencies to attract and service clients.

## **II. What Can Foreign Actors Do to Facilitate Legal Reforms and Achieve Greatest Impact?**

### *Be Realistic*

Clearly, many of the obstacles to implementing rule of law in China are beyond the capacity of any foreign donor to change. Some problems, such as the institutional reforms necessary to enhance independence of the courts, require political will on the part of China's decision-makers. Other problems are even beyond the powers of China's leaders: there is simply no way to create a qualified corps of judges overnight, for example.

### *Pick Institutions That Can Deliver*

A superficial comparison between the National Judges Institute and National Procuracy Institute suggests the importance of working with entities and individuals that can deliver. Projects might look good on paper. But they may not achieve the desired results if they are not properly implemented. Whereas the National Judges Institute has received considerable funding from the Ford Foundation and other donors, the Procuracy Institute seems to have been largely ignored. Nevertheless, the Procuracy Institute seems to have developed a more coherent plan and made greater headway on training issues than the Judges Institute. That said, certain individuals within the Judges Institute seem to be working on valuable projects, such as the information network. The Shanghai Judges Association and to some extent the Zhongnan training programs also seem to have produced positive results or at least to have begun to think about and address problems that the Judges Institute is only beginning to grapple with.

### *Government Entities or NGOs*

Many foreign agencies have worked extensively with NGOs in other countries. In China's case, social organizations are more closely controlled and likely to be affiliated to one degree or another with a government organization. They are in that sense "quasi non-governmental organizations" or "Quangos." In some cases, an entity's non-government status may open up possibilities for experimentation that would not be possible with government entities. Such organizations may also be less bureaucratic.

Nevertheless, many reforms will require support of government entities, either to disseminate the results or to translate the results into legally binding legislation, changes in the regulatory structure or institutional changes. Thus, in some cases, an entity's quasi-governmental status may offer benefits.

In any event, some projects can only be done with government entities. Moreover, in some cases, such as protection of lawyers, Justice Bureaus have proven more effective than bar associations.

### *Central versus Local or Regional*

Although legal reforms are often described as top-down, in fact many initiatives for reform come from those working on the front lines. Central authorities then gather information from the various local experiments and disseminate it. Accordingly, there is a role for both central and local entities.

To date, many foreign-funded projects have been rather center-centered. However, one of the problems is that many central laws and center-initiated reforms are out of step with the reality on the ground. As a result, the gap between law on the books and law in practice continues to be wide. Moreover, as noted repeatedly, academics and others in central agencies are not always aware of the concrete problems facing those in the trenches. In addition, the vast regional diversity and differences between urban and rural areas requires more input from below.

Foreign actors might wish to fund more projects outside of Beijing and more projects by those on the front lines, particularly those that produce information or that take a different approach to a common problem and are likely to lead to pilot programs being expanded to other regions. To be sure, there is a limit to how much funding there can be for local projects. Thus, supporting information networks is particularly important. In funding empirical projects, foreign actors should also try to ensure that the projects are methodologically sound and representative of all (or at least a significant part) of China.

### *Other Suggestions*

- Spread the wealth. It is important to cultivate long-term relationships, and supporting repeat players reduces certain transaction costs. However, many of the usual grantees over time develop access to many other funding sources. It is equally if not more important to support young and upcoming talent, and to support projects that are not Beijing-centered.
- Specificity of project design and goals and a sound methodology. In general, projects seem to be more successful when they have clearly defined (and realistic) goals and the methodology is sound and well thought-out in advance. In some cases, giving money to certain highly qualified individuals or institutions based on their previous track record, a

general proposal and an interesting and important topic may produce results. But on the whole, clearly defined projects are preferable.

- Many of the most promising possibilities for reform are being generated by those on the front lines. Accordingly, academics should be encouraged to work together with practitioners both in designing and executing projects. Such projects are more likely to have clearly defined and realist objectives and lead to concrete reforms that are implementable.
- Follow-up. The results of projects could often be better utilized or improve through follow-up programs. It is important to make sure that the results of projects are disseminated broadly. For instance, in one case, a number of judges' manuals and publications were produced. But is not clear whether these works are being used in the courts as intended. More generally, donors should follow-up major reform initiatives with empirical studies to ensure the reforms are consolidated, as noted above.
- A greater effort should be made to take advantage of what others are doing and to facilitate and coordinate the exchange of information. For instance, a number of foreign agencies have funded several different entities to research evidence rules. However, it is not clear that there have been any attempts to bring the various project sponsors together.
- Trips abroad for senior leaders are frankly all too often a boondoggle. While in some cases they may serve a valuable purpose, they require certain conditions. First, the agenda must specify in detail what issues are to be discussed and what the goals are. The participants should actually be knowledgeable about the issue and capable of effecting change upon their return (which means not too senior and not too junior, since senior people are often figureheads and junior people lack any power to change things). Prior to departure, preliminary research should be done by academics and others within the various institutes on the topics so that the participants are up to speed and there is a foundation for discussion. Conversely, those on the foreign side should be carefully selected and well-briefed, either by PRC or foreign experts on Chinese law who are familiar with the issues. Language is also an issue. Excellent translators are required – though based on personal experience I would note that simultaneous translation is almost always a disaster.
- Research trips for senior and junior academics or researchers within institutes also should be used with care. Too often, the participants do not have a clearly defined research agenda or the language skills to get much out of a trip abroad. Moreover, in many cases, it would be more efficient to arrange for materials to be sent from various countries so that the researcher could gain a truly comparative perspective. The materials would then also be in China and available to others. To that end, donors might consider identifying and supporting a librarian assistant at a major university in various countries (i.e., several librarians, perhaps on a part-time or hourly basis). The costs saved from travel abroad could be used to offset the costs of the librarians and of obtaining and providing materials (many of which are now in electronic form and thus do not involve major shipping costs). In addition, in selecting candidates, especially for study abroad, a thorough review of their prior written works should be conducted to ensure that they have the necessary skills to do research.
- The use of foreign experts and distinguished speakers often suffers from the lack of understanding on the part of foreigners of China's system and what is happening in China; too little time for discussion and free exchange of ideas; language problems; and problems disseminating the information to a larger audience. To remedy these problems, foreign

experts need to be extensively briefed by those who understand China. They should also be given a list of specific issues to address in advance. Where possible, they should prepare a written draft, which can then be translated into Chinese in advance. More time would then be spent on discussions and Q&A, which is often most valuable to the participants who have their own questions and issues they want addressed. Again, excellent translators are essential. The use of tapes and CDs or the publication of summaries may increase dissemination.

- Given limited resources, it is imperative that there be greater use of technology to collect information and disseminate results. The information networks are a good example, as are the CDs produced by the Ford Foundation showing a mock trial, and the Procuracy's exploration of distant learning. While distant learning and the use of CDs, etc. may not be as good as having small personalized classes taught by leading experts, there is really no choice but to adopt a second best approach and use more technology.
- Many research projects suffer from poor methodology. In part, that is a function of the difficulty of doing research in China. Nevertheless, there is still considerable room for improvement. One suggestion would be to encourage legal researchers to work with sociologists and others who are better trained in empirical methodologies. Another suggestion would be to create an Empirical Research Center (much like what we have at UCLA Law School) and hire some Ph.D.s in statistics and others with experience in designing survey instruments. Applicants would then be required to work with the Center to develop their survey instruments and to do the statistical analysis.

### **III. Legal Research**

Some agencies fund legal research, both basic and applied. Although academics and researchers within other entities do both types, academics tend to do more of the former and other researchers more of the latter.

#### **A. Academics: The Need for More Applied Research**

In the mid 1990s, the announcement of the official policy – “rule the country in accordance with law, establish a socialist rule of law state” – stimulated debate about the meaning of rule of law and the purpose and manner of legal reforms in China. PRC academics held a number of conferences on such topics and produced a number of theoretical and practical books and articles on rule of law. As such, academics have played an important role in the legal reform process. Nevertheless, problems remain. Much of the theorizing about legal reforms has been based on a Western (i.e., a liberal democratic) conception of rule of law and has assumed legal, political and economic institutions and social conditions and values that are not present in China and in some cases not likely to be realized in China anytime soon. Alternatively, more critical or nationalist legal scholars – noting the difficulty of transplanting foreign institutions, practices and values to China – called for rule of law with Chinese characteristics or emphasized the need to rely on native resources (*bentu ziyuan*). Unfortunately, they generally failed to specify in any detail what these native resources were or to articulate an alternative theoretical basis for, or conception of, rule of law.

As a result, those on the front line of legal reforms (judges, prosecutors, legislators, lawyers and officials in government agencies – collectively practitioners) complain that legal theorists have failed to provide an adequate theoretical basis for reforms. Practitioners claim that reforms are chaotic and out of control – there is no guiding plan. The failure to think through larger issues

such as what the purpose of law in China is – or rather, what the purposes of law in China are – results in haphazard, inconsistent and ill-conceived reforms that often do as much harm as good. Practitioners also argue that academics are out of touch, too idealistic and unrealistic about the possibilities for reform. In addition, they claim that academics rely too heavily on the US and common law system, or that academic reformers latch onto one aspect of a foreign legal system without understanding how all of the parts relate. For example, civil trial reforms led to a more adversarial process as in common law states. Yet the reforms were not accompanied by changes in the process for pre-trial discovery. Nor did the reformers give adequate consideration to the role and capacity of Chinese lawyers and their ability to effectively present their client's case.

To be sure, the importance of theory for reforms should not be overstated. Few countries have successfully implemented rule of law in accordance with some preordained theoretical blueprint. Legal reforms are necessarily evolutionary, context-specific and path-dependent.

Moreover, China is increasingly pluralistic. There are important differences in the conceptions of rule of law and the different emphases in the purposes of law among central leaders, local officials, academics and Chinese citizens. There are also differences within these broad categories as well. Urban and rural residents are likely to experience law in different ways; business people and workers are likely to have different demands from the legal system. And surely not all central leaders think alike. Thus, no single view of law or single theory can capture the diversity of perspectives. A variety of theoretical perspectives may be needed.

The diversity of perspectives may undermine or at least complicate efforts to mediate conflicts of interest and develop an overall plan for legal reforms. Nevertheless, there is some value in clarifying different theoretical positions and considering their potential impact on legal reforms, in part to facilitate an informed debate about the merits of the various conceptions. Further, it is possible and indeed likely that some reforms will receive broad-based if not unanimous support, notwithstanding the differences in theoretical perspectives. Thus, one of the tasks is to identify common ground and opportunities for engagement, cooperation and progress. But that requires that academics and theoreticians be intimately aware of what is happening on the ground and of the day-to-day problems and constraints facing the various institutional actors. In short, they must combine theory with practice and base theories on a firm empirical foundation derived from survey work and case studies. *What is needed then seems to be creative, constructive, empirically-based theory by academics personally engaged in legal reforms.*

#### *Some Specific Suggestions*

- It might be useful to hold a conference to (i) explore in a systematic and serious way possible alternative theoretical bases to a rule of law with Chinese characteristics; and (ii) attempt to develop an overall plan for legal reforms. In either case, I would suggest including political scientists, sociologists, economists and practitioners rather than just legal scholars.
- Moreover, academics themselves have complained that they have little impact. In part, this seems to be because academics do not disseminate their works widely or effectively. Accordingly, there should be some proposal to do more than hold a conference. At minimum, decision-makers and practitioners should be invited to the conference; a volume should be produced; and efforts should be made to publish shorter essays in relevant specialized publications like *Fazhi Ribao (Legal Daily)* or other publications aimed at judges, procuratorates or the police as well as generally circulated newspapers. The choice of publisher is also important. As Chen Weidong, Professor of Law at China People's University, noted, he opted for Zhongguo Fangzheng Press instead of the more academically



prestigious presses because of the politically sensitive nature of his research and the political background of the press.

- Donors might also consider funding what I would call mid-range theoretical and comparative work. At this stage, there is little need to fund general studies of legal reform, civil and common law systems, comparative judicial systems, law and society, and the meaning and significance of process.<sup>14</sup> Rather, these topics should be approached from the perspective of real issues identified by practitioners. For example, a number of judges and others have noted that the change to a more adversarial process without the accompanying features of a common law system (such as discovery and evidence rules, etc.) has led to problems. Thus, there does appear to be the need for academics and others to approach the issue of civil versus common law systems through the particular prism of China's own circumstances and the efforts to overhaul the civil and criminal trial process.
- On the whole, however, funding should be reserved for more specific applied research projects identified by practitioners. Thus, academics have played a valuable role in drafting legislation (Contract Law, Criminal Procedure Law, Evidence Laws, etc.). They also have a valuable role in researching specific hot issues: e.g., the right to silence; protection of witnesses; security law issues such as insider-trading rules, etc. Whatever issue is identified by practitioners, academics can research how other systems handle it, prepare a background report for practitioners, prepare a briefing report for foreign experts asked to lecture on that topic, etc.
- In general, academics should increase their cooperation with practitioners *if* they want to increase their relevance and impact. (Of course, some academics will simply prefer to research whatever interests them, without regard to its potential impact.) While that may mean practitioners are taking the lead in defining the research agenda, the research that is done is likely to have a greater impact.
- Academics should also do more empirical research, again where possible with practitioners, to overcome the impression that they are out of touch with reality or that their proposals are not feasible.
- In carrying out comparative research, academics should look more to Taiwan and Asian countries, particularly those at (or recently at) more similar levels of economic and institutional development.

## **B. Research by the Courts (and Other Entities Like the Procuracy)**

In many ways, the challenge facing researchers in courts, the National Judges Institute, etc. are the mirror image of those facing academics. On the one hand, because of their institutional affiliation, they are more likely to know more about what is happening on the ground and be able to identify real problems and suggest practical solutions. But they are not as well situated in terms of resources or contacts to do basic or comparative research. Moreover, although a number of projects called for practitioners to produce written products, practitioners are busy and less diligent about actually carrying through on their writing obligations, and in many cases no

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<sup>14</sup> This is not to deny the importance of such topics. However, given limited funding and the desire to fund projects that will result in concrete improvements in the legal system, academics can explore these topics on their own.

product was produced. The written products of practitioners may also suffer from poor methodology and a limited perspective. In some cases, practitioners seem to be working on similar projects as others without any awareness of what has been or is being done by others.

Again, a few points might be worth considering:

- Both academics and practitioners would benefit from closer cooperation. Practitioners have a better sense of what the day-to-day issues are; academics have the benefit of more resources and perhaps a broader perspective. Thus, practitioners should take the lead in identifying pressing issues and then work with academics to come up with practical solutions based on China's own circumstances and the best practices elsewhere.
- Practitioner researchers could also play a valuable role in summarizing academic articles on theoretical issues or other key issues and publishing the summary in trade journals.
- Another possibility would be to have a column each issue on a particular topic (identified by those in the trenches). The column would summarize local experiences and solutions. Academics would be asked to comments as well. The National Judges Institute journal, *Falii*, or the information network would be good places to hold such a discussion.
- The Institute's journal, *Falii*, might also consider a section just listing and summarizing major new developments: laws, cases, and judicial interpretations. Interested parties could then raise questions or offer comments on the information network.

#### **IV. Judicial Training**

Judicial training programs face a number of challenges: (i) there is an incredibly large number of judges; (ii) judges possess different levels of legal knowledge; (iii) judges in rural areas face different types of issues than judges in urban areas; judges in higher courts face different issues than judges in lower courts; (iv) good judges are busy and not often available for training; (v) training occurs in many different places, at different level courts; (vi) it is not clear how to take advantage of judges who are trained to disseminate knowledge to those who were not at the training sessions; (vii) it is hard to evaluate the impact of training; (viii) the National Judges Institute is bureaucratic and slow-moving; (ix) it is difficult to find people with the requisite theoretical, legal and practical knowledge to do the training; (x) there are as of yet no appropriate materials for judicial training.

In light of the above:

- Donors should try to work with lower level training entities to develop materials and pilot programs that can be presented to the National Judges Institute for consideration/adoption. The national level entities could then offer a menu of program choices based on the experiences of different locales. Obviously, funding local training such as the Shanghai Judges Association or Zhongnan program has distinct limits. Such programs only reach a small number of judges relative to the total number of judges to be trained. Thus, the main value of such programs lies in their ability to serve as pilot programs and to experiment with different teaching methodologies and approaches. Unfortunately, at least in the case of Zhongnan, teaching method still seems to be a lecture format largely by academics using materials designed for undergraduates, with little input from participants.

- Different courses should be developed for different types of judges. While there may be a core part of the course that is similar (such as a general theoretical section, the part on the role of judges in a modern legal system or a section on professional ethics), much of the content will vary. The courses can be divided along the following lines: (i) presidents and vice presidents versus other judges; (ii) different courses for those who need remedial education and those who do not – it should be noted that the need for basic remedial courses should diminish over the next ten years; (iii) courses should also have a general component and then a specialized component depending on the judge's special area of responsibility: civil, criminal, family, IP, etc.
- As for content, it seems there are four main components: (i) legal theory – the role of a judge, what judicial independence means, etc. (the need for this type of theory should decrease over the next ten years as legal education improves and the judiciary's role in society becomes clearer); (ii) general techniques of judging: legal reasoning, writing judgments, running a trial, managing evidence, etc.; (iii) professional ethics; and (iv) substantive law. Surprisingly, a number of judges indicated that they found the general legal theory refreshing and eye-opening.
- As for instructors, Zhongnan and the National Judges Institute have relied on leading academics and judges to provide much of the content. Although the NJI has instructors, they actually do little instructing, mainly because they are young and inexperienced and cannot command the attention and respect of the judges who come for training. Obviously, relying on top academics and judges is problematic: they are busy; they have only limited time to spend on training; and the time they spend on training takes them away from research or court business. Accordingly, these valuable resources should be used wisely. For example, leading judges and academics should play a role in designing an effective curriculum and course materials. Second, their lectures should be taped or transmitted through distant learning means. It makes little sense to run around to five different places giving the same lecture. To be sure, much of the value comes from discussion. However, it appears that few instructors leave much time for discussion anyway. Moreover, it may be possible through distant learning techniques or the use of the online information network to make the process more interactive.
- There should also be more efforts to train up the trainers, particularly at lower level courts, and to provide them with practical guidance for carrying out their jobs.
- Some judges have also complained that instructors may not be sufficiently knowledgeable to address the specific legal issues they are dealing with in their cases. Posting such questions on the information network might provide some interesting discussions. In general, as apparently is the case in other countries, most of the training should be done by former judges or judges who are rotated into and out of the training program.
- Relying on materials used in law schools to teach undergraduates is clearly not appropriate. Materials should be more practical and interactive. It might be useful to start with materials used in night schools. The materials from the Procuracy Institute might also be useful. Song Bing thought that one translated work on legal reasoning and some of He Weifang's collected essays on the judiciary and social justice could be useful.
- Materials and courses in general should also be designed to teach judges general skills such

as legal reasoning and how to analyze issues. They should also serve the purpose of teaching judges how to do research (where to find laws, use databases, etc.). Clearly, with the rapid pace of change in existing laws and the development of new areas of law, judges will regularly be confronting new issues that require the ability to master new bodies of law. Over time, there will inevitably be more research tools available (annotated law databases, etc).

- In general, existing programs suffer from the lack of input from participants and a lecture style of teaching. Judges should be encouraged to submit questions from their own cases in advance. During training, the instructor should try to facilitate discussion of the tough issues (rather than simply providing “the answer”). Cases provided by judges can also provide the basis for a spontaneous demonstration of how to do research and analyze new laws.
- Once the session is concluded, participants should be asked to fill out a form evaluating the instructor, the course, the materials, etc., and offering suggestions for improvement.
- To increase the incentive, participants should be required to take an exam.

#### *A Conference on Training and Education*

It may be time to hold a major international conference on training and education in light of the passage of the unified exam requirement and the accumulated experiences with judicial training. The conference could focus on training of judges and procuratorates. The main invitees would be foreign experts from training institutes in other countries. In addition, some academics could be invited to discuss basic legal education.

To be useful, there would need to be a specific agenda. Foreign China law scholars and PRC academics/judges could prepare a background report on China’s situation. The foreign experts would be asked to prepare a general introductory report on their institutes and practices. The Chinese participants would then select specific topics/issues. The foreign academics would be asked to prepare written reports in response to the specific topics/issues.

#### **V. Centralized Legal Reform Committee**

Many practitioners and academics alike suggest that a rule of law or legal reform committee (or working group) is needed. They argue that reforms are out of control. In some cases, local governments are forging ahead with ill-conceived plans. For example, some academics criticized one region’s experiments with the right to silence for being in violation of the Criminal Procedure Law and counterproductive. In other cases, some regions may come up with solutions to problems confronted by other localities but the information is not disseminated. The center, for its part, often announces reform initiatives that are out step with local conditions. As noted, central authorities also fail to follow up on reform initiatives to verify that they are being implemented. Conflicts of interest among different entities leads to conflicting reforms that undermine each other and produce confusion at the lower levels.

Accordingly, the committee would be charged with, *inter alia*, coordinating reforms, gathering and disseminating information, mediating conflicts among different interest groups and entities and devising an overall, long-term plan for reforms. While such a committee might play a positive role, it is no panacea. Indeed, it raises a number of important issues.

### *What Type of Committee: Party, Government or NGO?*

Some people have suggested the committee be organized as a civil organization while others argue the committee should be established under the NPC. The arguments for a civil organization are that an NGO might be freer to discuss many of the sensitive political issues associated with legal reforms, such as judicial independence. Moreover, an NGO think tank could float ideas in the media and among state actors and build support for controversial reforms.

On the other hand, one of the disadvantages of an NGO think tank is that it might not have a sufficiently strong and identifiable political base to be effective in getting its reform agenda implemented. As noted, academics have complained about their lack of impact on China's decision-makers. This problem might be alleviated to some extent by including representatives from NPC, SPC, Supreme People's Procuratorate (SPP), Ministry of Public Security, Ministry of Justice (MOJ), etc. Nevertheless, the organization would not have as firm a political base as it would if it were established under the NPC.

Some have suggested that an appropriate model might be Tigaisuo (a government think tank). However, Tigaisuo was closely associated with Zhao Ziyang, and consisted of economists with a fairly clear market-oriented preference. In contrast, there are no obvious top leaders to serve as patron of the Legal Reform Committee. Moreover, there is likely to be more division in values and perspectives among the members of any such Committee than in the case of Tigaisuo. For example, the Committee would presumably include representatives from the NPC, SPC and SPP, MOJ, as well as academics, lawyers and representatives from public security. Yet one of the reasons the Committee is needed is the existing conflict of interest between these entities. Thus, there is less likely to be common ground on important issues than in the case of Tigaisuo.

A committee under the NPC would provide a more solid political base. However, the Committee might then become very bureaucratic. It might not be able to address sensitive issues as readily. Moreover, the NPC is itself a player. For instance, one of the current conflicts is between the NPC and the courts with respect to supervision. The NPC and the SPC are also currently in tension with respect to legal interpretation. The recent SPC reply making the constitution justiciable creates the potential for even greater conflict if the SPC tries to assume more of a role in constitutional interpretation. More generally, it is doubtful that the NPC has sufficient political authority to mediate conflicts between the SPP and the SPC, for instance. To be sure, the NPC (through *Fagongwei*, the NPC's law-drafting committee) did play a coordinating role in mediating conflict between the courts and procuratorates with respect to interpretation and implementation of the Criminal Procedure Law. However, whether it would have sufficient authority to mediate more fundamental conflicts that could result in shifts in the balance of power between the two entities – for example with respect to the procuracy's right to supervise the court – is more doubtful.

As the ultimate authority, the Party might seem like a logical place for such a Committee. Perhaps the Political-Legal Committee could take on the role, as suggested in the past by some PRC academics. A Party-based Committee might be better positioned to force recalcitrant entities to give up some of their powers. Moreover, one of the issues is the Party's role in the legal system. A Party-based Committee might be better situated to oversee changes in the Party's role. On the other hand, housing the Committee under the Party would probably result in the Committee pursuing a more conservative (what I would call a Statist Socialist) agenda than would otherwise be the case.

Further, whether any entity has sufficient knowledge how best to restructure and the authority to bring such change about may be questioned. Thus, arguably the primary benefit of the committee might be to create a forum for discussing the issues, publicizing the problems and debating possible solutions. At some point, the problems may become so severe that all parties recognize a solution is necessary, thus making change possible.

The best approach might to establish both an NGO think tank and a Committee under the NPC. The relationship between them could be one of loose association, with some people being members of both to facilitate transmission of information and coordination and cooperation.

### *The Need for Realistic Expectations*

One can appreciate the desire for an overall, coherent plan for reforms. Clearly, a Committee could be useful in providing some structure to reforms, gathering and disseminating information, coordinating reforms across departments and ensuring that reforms work together as a package rather than undermining each other, and sequencing reforms so that powers granted an entity are consistent with its level of development and capacity. The Committee could also mediate conflicts of interests in some cases. At minimum, it would provide a forum for different government entities to explain their positions and look for common ground and ways to resolve conflicts.

Yet an overall reform plan would be difficult to devise. Arguably, the Committee's task in devising such a plan would be easier if it were able to draw on various theoretical models for reform. As noted, it is doubtful that any single theory will prevail given the diversity of perspectives of the fundamental purposes of law and differences in social and political philosophies. In any event, any such theory would be too abstract to be of much use. However, if theoreticians are able to come up with various alternative theories of rule of law, they might be useful in at least clarifying where there is common ground and where there are differences.

Even assuming it were possible to achieve consensus on the rough outline of some long-term reform agenda, the agenda would necessarily be fairly abstract and subject to revisions as the situation evolved. While there is no shortage of technical issues requiring attention, for example, identifying the issues and the challenges and the possibilities for improvement is largely something that must come from those on the front lines. This is not to deny the value of long-term planning. Pan Wei and others have sketched a long-term rule of law agenda that clarifies the priorities and sets out a reasonable time table, and thus serves a useful purpose for guiding reforms. However, Pan Wei is a political scientist. His broad outline could be filled in to some extent by legal scholars and practitioners with a better understanding of the changes in laws, institutions and practices that are required to implement rule of law.

### **Conclusion**

As a foreign observer, I do not pretend to have sufficient local knowledge to offer detailed suggestions about specific areas of reforms or specific suggestions as to which reforms are most feasible or likely to succeed. Accordingly, I have tried to present an overview of reforms, leaving those with more detailed knowledge to suggest specific reforms.

Clearly, one of the difficulties facing donors is that there is no shortage of deserving funding opportunities. One could make a good case for funding theoretical projects and applied projects, academics and practitioners, central or local projects, and any or all legal institutions. Moreover,

in many cases, it is hard to assess in advance which projects are more deserving or likely to have an impact. Indeed, even looking back, it is often difficult to measure the impact of specific projects. For a long time, exchange programs were considered a failure because many people failed to return to China. But in recent years, many of those who stayed abroad are now making their way back to China, often bringing with them a much more sophisticated understanding of foreign legal systems and much greater technical skills than they would have brought back had they returned immediately. Similarly, it is hard to say how much a senior official will get out of a trip abroad. While there may be no immediate applications, such trips might result in a more fundamental change of attitude that results in the official adopting a more positive approach to reforms.

Nevertheless, decisions must be made, even if based on limited knowledge. I would emphasize the following points:

- The focus should continue to be institution-building, but donors may wish to shift focus from the courts to the procuracy and public security or at least adopt a more balanced approach where projects are chosen based on their merits rather than compliance with some predetermined agenda. In particular, donors may wish to support cutting edge pilot programs that could then be supported by other donors if they are successful.
- While theoretical projects in some cases may be worth pursuing, in general projects should focus on concrete issues identified by practitioners, with academics playing a more complementary role. Projects that involve cooperation between practitioners and academics should be strongly encouraged.
- Projects should have a firm empirical basis, and be followed up by empirical studies to ensure that results are consolidated and to revise strategy and respond accordingly if need be.
- Donors should strive to increase information gathering and exchange, particularly among academics and those on the front lines, and among different government entities and other entities that play a role in the legal system.