

# The rule of law: Chinese law and business

A REPORT OF THE PRESENTATIONS AND DISCUSSIONS AT A WORKSHOP HELD AT  
RHODES HOUSE, UNIVERSITY OF OXFORD, ON 11-13 MAY 2005

The Foundation for Law, Justice and Society  
in collaboration with  
The Centre for Socio-Legal Studies,  
University of Oxford, and  
The Center for New Institutional Social Sciences  
at Washington University in St Louis

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## Introduction

**The Foundation for Law, Justice and Society** was founded to bridge the gap between academic research and policy, and to support the availability and accessibility of academic research for policy and practical issues. Its focus is specifically on the social role of law.

This workshop, 'The Rule of Law: Chinese law and business', was the first major event held by the Foundation. The development of the workshop was underpinned by the belief that the academic, research-based framework can be related to the practical world of transactions and doing business. In bringing together representatives from academia and the private sector, the workshop sought to identify issues important for further study, both in a practical and an academic way.

The workshop was co-supported by the Centre for Socio-Legal Studies, University of Oxford, and the Centre for New Institutional Social Sciences, University of Washington.

The former was established to facilitate multi-disciplinary research into the interaction of law and society, while the latter was founded to highlight the importance of institutional structures for understanding social life.

The workshop was divided into six substantive sessions over two days, covering four themes:

- **The rule of law and its place in China:** *A critical assessment of the past and a prognosis for the future;*
- **How is the rule expressed, used and supported in Chinese politics, economics, and law;**
- **The legal environment for doing business in China:** *Opportunities and obstacles;* and
- **Identifying the issues for further study and discussion:** *Open session.*

This report summarises the presentations and discussions carried out during the workshop. Its drafting reflects the Foundation's desire to ensure that academic research in the fields of law and justice are accessible and applicable to a wider audience beyond that of academia.

Mr John W. Adams, *Chairman, Foundation for Law, Justice and Society*

Professor Denis Galligan, *Member of the Board of Directors*

Oxford  
April 2006

## THEME ONE:

## The rule of law and its place in China:

### *A critical assessment of the past and a prognosis for the future*

The first theme of the workshop involved an examination of the nature of the rule of law, guided by several questions:

What does the rule of law mean, what are its elements, are there different versions of it? Is there a useful distinction between *rule of law* and *rule by law*?

Why is the rule of law important? Is it a universal social good or is it particular to very special circumstances? Does it have drawbacks?

Do we know what social, economic, and political conditions are necessary for establishing and maintaining the rule of law? What are the lessons to be learned from the experiences of other countries?

### The historical legacy of China's legal system

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Presented by **Professor Donald Clarke**,  
*George Washington University Law School*<sup>1</sup>

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Professor Clarke considered features of the modern Chinese legal system that can be explained only by understanding their historical background, in particular, China's statist legal tradition, which has its roots in both the legal order of Imperial China and that of Maoist Chinese socialism. In this context, *statist* means that law is regarded as an instrument to serve the interests and needs of the state, where parallels can be drawn with the role of law in the former communist regimes of east Europe. The foundation of Professor Clarke's presentation was that China's legal system, in its basic principles and assumptions is fundamentally different from legal orders derived from Roman law.

Clarke discussed various aspects of China's contemporary legal system, which can be explained by China's historical legacy and by the statist character of its law.

**Nature of rights and duties:** One of the striking characteristics of the Chinese legal system is that rights and duties appear to be continuous rather than binary. While conflict between rights is not unusual in any legal system, China is different in that, instead of certain interests being elevated to the form of a right, rights are created as another form of interest, and therefore do not have the protected status of rights as in western law.

*The continuous and non-binary nature of rights extends to state-imposed duties. There are different ways of characterising a duty in Chinese legislation: things that 'must in principle' be done as opposed to those which should be done. Even where the law does not explicitly provide room for manoeuvre, in the sense that there is a duty to do something, there is usually some scope for discretion and flexibility as to what is done and how it is done. One example is the time-*

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1. The summary of this talk is derived from notes taken at the workshop as well as from a written version of the presentation provided by Professor Clarke. Some sections are quoted directly from the written version.

*honoured practice of local governments taking action for which there is no real legal basis, as for instance the use of land-leasing experiments in Shenzhen prior to the revision of the constitution and land-leasing laws.*

*These flexible notions of rights and duties are reflective of the statist tradition of China's legal system, particularly the modern Chinese tradition of a socialist system and a centralised bureaucracy. A consequence of rights and duties being along a continuum, and having greater or lesser importance according to different contexts, is that bargaining and negotiation within and about the law are encouraged. This affects relations between government institutions and agencies; it also affects relations between them and private entities. Legal certainty is reduced in favour of uncertainty and variability.*

**Role of the courts:** China's historical legacy has also played a role in the limited sphere of judicial competence. Courts are not 'overarching oracles' that define how business and bureaucracy run. While historically, conflicts were often resolved by a common administrative superior rather than by recourse to courts, the growth of private business entities means that the parties to a conflict may now have no common superior. Recourse to the courts to resolve disputes is now more common. It would be a mistake, however, to think of the courts as superior institutions at the summit of the legal order. Their role is a lesser one, with major conflicts and disputes being resolved at the higher administrative and governmental levels, rather than in the courts. Government officials are in many respects outside the legal order, and subject to political controls rather than judicial ones.

**Citizen organisations:** It is important not to overlook the role of non-government institutions, though in China, the growth of such institutions is hampered by state suspicion. The state is particularly concerned to control information, such that a range of organisations that we might take for granted in

western societies, for example, credit reporting agencies, an independent and reliable press, and private arbitration organisations, are restricted in their growth.

**Social context:** Professor Clarke also emphasised the need to place China's legal system in its social context, one notable aspect of which is that other institutions are of greater importance to the development of the market sector and the economy, than the legal system. The well-known hypothesis that robust contractual and property rights are prerequisites for economic development must be qualified in the context of China, where informal and non-state institutions may go a long way towards providing the predictability and security that investment requires.

*The old notion of law as a tool is fading: there is now more explicit attention being paid to the autonomy of law and to the notion of rights.*

**Discussion:** The need for further empirical study of the state's role in the legal system was emphasised. Issues for study should include: what is the current role of the state; what should that role be; and what extent is the state's current role compatible with the rule of law?

What do we mean by rule of law: does it mean simply 'government under law', which is a rather thin version, or is there a thicker, more substantive version? Are there differing conceptions of the rule of law in China? Some may have a statist view of law, others may see law in liberal terms as a limitation on the state, while some may take an in-between approach. The old notion of law as a tool is fading: there is now more explicit attention being paid to the autonomy of law and to the notion of rights.

The need was noted for a comparative approach and for empirical studies of whether China has more non-binary, problematic rights than other countries, and

if so, why? Comparisons *within* China, and with Taiwan may be relevant.

To what extent is history a limit on changing the way the legal system can evolve?

The Chinese proletariat increasingly seems to be turning to the law to protect its rights, in an inversion of the classic Marxist theory of law. Whilst the rising Chinese bourgeoisie may have connections, or *guanxi*, it is those without connections who are using the law to help them solve problems, such as farmers taking action over taxation issues, and the owners of real estate who have had their land taken away by official action.

Discussion turned to the role of the Supreme Court and its position in relation to government. Its status and role as a supreme judicial body was questioned, and issues raised concerning its approach to interpretation of the law, of its own precedents, and of the Constitution. The traditional idea that the Court cannot deal with constitutional questions may be changing.

Can the fact that foreign investors' expectations seem to be met fairly regularly be attributed to more than *guanxi*?

## **Describing, predicting, and assessing the rule of law in China:**

*China as problem or paradigm for development of the rule of law and constitutional democracy*

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Presented by **Professor Randy Peerenboom**,  
*Center for Chinese Studies, University of California at Los Angeles<sup>2</sup>*

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After first discussing conceptions of the rule of law and predictions concerning legal reforms, Professor Peerenboom gave an assessment of legal reform in China, arguing that China is neither a problem case nor a model for success.

Professor Peerenboom argued that many of the ideas and metaphors used in describing China and the rule of law are too simple to do justice to what is really happening. He demonstrated that China is now following the path of other East Asian countries that have: achieved sustained economic growth; established the rule of law; and developed constitutional or rights-based democracies, albeit not necessarily liberal rights-based democracies. This appears to be the most successful model for relatively large countries in the contemporary era to achieve high levels of economic growth, implement the rule of law, and eventually democratising and protecting the full range of human rights through some form of constitutionalism.

Noting that the 'East Asian path' involves the sequencing of economic growth, legal reforms, democratisation and constitutionalism, with different rights being taken seriously at different times in the process, Professor Peerenboom highlighted key aspects of the model:

An emphasis on economic growth rather than civil and political rights during the initial stages of development, with a period of rapid economic growth occurring under authoritarian regimes.

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2. The summary of this talk is derived from notes taken at the workshop and from a written version of the presentation provided by Professor Peerenboom. Some sections are quoted directly from the written version.

As the economy grows and wealth is generated, the government invests in human capital and in institutions, including reforms to establish a legal system that meets the basic requirements of a procedural or thin rule of law. Over time, as the legal system becomes more efficient, professionalised, and autonomous, it plays a greater role in the economy and society more generally and perhaps takes more of the features common to law in western societies.

Democratisation in the sense of freely contested multiple-party elections is postponed until a relatively high level of wealth is attained.

Nascent but limited constitutionalism begins during the authoritarian period, including the development of constitutional norms and the strengthening of institutions. However, judicial independence remains limited, with protection of the full range of human rights, and civil and political rights particularly, suffering accordingly.

Greater protection of civil and political rights occurs after democratisation, though with ongoing abuses of rights in some cases, and with rights frequently given a communitarian or collectivist rather than a liberal interpretation.

### *China is at a relatively early stage of development but is meeting or exceeding expectations on most measures.*

Professor Peerenboom explained that China is at a relatively early stage of development but is meeting or exceeding expectations on most measures. The legal system has played a greater role in economic growth than often suggested, and is likely to play an even greater role in the future, which is consistent with the experiences of other countries in Asia and elsewhere. China has made remarkable progress in a short time in improving its legal system, having essentially started from scratch in 1978. As of 2002, China's legal system ranked in the 51st percentile on the World Bank's rule of law index, having risen from the 32nd percentile since 1996.<sup>3</sup>

Moreover, notwithstanding the repeated attempts by the US and its allies to censure China for human rights violations and the steady stream of reports from human rights groups claiming deterioration in rights performance, Chinese citizens enjoy more freedoms, including civil and political freedoms, than ever before.

Of course, this process of development will take decades at least to reach a relative state of equilibrium. Capitalism, rule of law, democracy and human rights are sufficiently contested in theory and varied in practice that the final outcome in China cannot be specified at this point, much to the chagrin of those who would choose to impose a highly idiosyncratic version of liberal democracy on China. As China negotiates modernity, and indeed post-modernity, it may give rise to one or more novel varieties of capitalism, rule of law, democracy and human rights. On the other hand, there is enough minimal, perhaps even universal, content to each of these four aspects of modernity to guide the process that is likely to continue into the next decades, barring extraordinary catastrophes.

Professor Peerenboom concluded with an account of the main variables that affect development of the rule of law. These are the political system, the cultural system, institutional capacity and development, and the level of wealth.

**Discussion:** Questions were raised as to what extent does the present legal system, formal or informal, encourage or discourage external capital investment?

Another set of is whether the rule of law is a relevant concept to apply when studying China; is it is worth trying to give China a grade in terms of the rule of law?

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3. The index is part of the World Bank's Good Governance Indicators. Daniel Kaufmann et al, *Governance Matters III: Governance Indicators for 1996–2002*, (June 2003), at <http://www.worldbank.org/wbi/governance/pdf/govmatters3.pdf>.

It was suggested that the code of conduct that allows business expectations to be satisfied in China comes not from the rule of law, but has other origins. Even in the USA, where the rule of law is high, commercial relations between enterprises are often based on informal codes of conduct that have been agreed by the participants, rather than on law. The upholding of expectations, which is assumed to be the function of the rule of law, may be met by means other than law. The relationship between law and informal norms needs to be explored further, and we need to develop a better understanding of when law is necessary.

*Studying the role of history is an interpretive enterprise, and therefore does not lend itself so easily to quantitative analysis.*

Studying the role of history is an interpretive enterprise, and therefore does not lend itself so easily to quantitative analysis. A qualitative understanding depends on taking account of as many variables as possible.

The suggestion was made that China is being subjected to double standards, in that we criticise its human rights record, but not India's, which scores much worse on torture, abuse, infant mortality rates and other factors. External criticism may not be helpful in dealing with human rights problems in China and, rather than improving the situation, may have the opposite effect of breeding resentment. A more cautious approach to assessing China may be desirable.

There are many avenues open for groups and associations to influence the law and law-making processes in China. Civil society organisations now have some say on important laws, a factor that is likely to increase in the future.

Attention was drawn to the fact that many factors other than law may provide predictability for doing business in China. These include relationships of trust; they also depend on the reliability of

administrative officials and agencies. It was noted that much business in China involves repeat-players so that both parties have incentives for developing and maintaining good relations.

**Why there are no viable shortcuts to progress in construction of the rule of law**

**Presented by Mr Andrew Halper,  
Partner, Eversheds, London**

Mr Halper noted several categories of the rule of law in western literature:

The rule of law as a state in which juridical norms are hierarchical such that the power of the administration is limited; rules draw their validity from superior rules; there is independence of the judiciary; and there is some form of control to ensure constitutionality.

The rule of law as the formal equality of all subjects before the law; with the primacy of law over policy; and individual autonomy as an important notion.

Mr Halper noted that China has traditionally had a more collectivist notion of law, such that the emphasis given by such writers as A. V. Dicey to protection of the individual, is relatively novel. Similarly, the Diceyan concept of impartiality in the application of law is relatively foreign in China. The need for such impartiality has led to a high concern with procedure in our western view of law. But we must be careful not to overstate the importance of our own conceptions of law when undertaking an assessment of China.

Referring to writings on African law that have forced people to reconsider some of their basic ideas, Mr Halper suggested that 'transplantation' from one society to another rarely works well. This is especially the case when we attempt to transplant perfect images or ideals of law, based upon

ideological myths; in reality, in our societies, legal pluralism is more widespread than we acknowledge.

*In China, state power and Confucianism were closely bound together, with law a poor relation of morality.*

He noted that Professor Stanley Lubman's seminal work on law in China refers to clusters of differences between China and the west, and, that in the west, the cleavage between church and state extends back at least 900 years, which allowed the law to develop a separate existence and character. On the hand, in China, state power and Confucianism were closely bound together, with law a poor relation of morality. Professor Lubman also notes the absence of a commitment to formal equality in China, where historically, status, and therefore unequal treatment, was important. In determining the way in which rules and governance develop, and the distinction between rights or benefits on the one hand, and claims grounded in relationships on the other hand, the size and diversity of China should be taken into account. In the consideration of these matters so much depends on the social context, and that can vary greatly from one part of the country to another.

In conclusion, Mr Halper suggested that though the development of China's legal system has not been linear, some western legal concepts have been adopted. Despite the lack of an historical foundation in China, western conceptions of law have become relevant to some extent and China may move closer to the Diceyan paradigm in the future.

**Discussion:** Attention was drawn to the need to view the legal system not as one unified whole, but as having many different parts and forms, with some parts working well, particularly the process of law-making at the local and national level. This may be seen as part of a concerted effort by the Chinese to define more clearly the legal position and help thereby to create a more certain environment for foreign business enterprises.

It was noted that the Chinese system is relatively weak on issues of enforcement. The informal system, and the role of compromise and accommodation, often replace proper mechanisms for enforcement are important in achieving effective implementation.

Some warned against cultural centrism and urged that it should be avoided when evaluating China. Nevertheless, rule of law issues have seeped, probably unavoidably considering the power of the ideas in international relations, into the debate within China, and have become part of the political and cultural discourse.

In comparing Russia with China, it was noted that one significant difference is that Russia lacks a public domain in which moral and social ideas are deeply held and shared. The consequence in Russia is that law is treated rather cynically and used by individuals and groups for their own ends, the suggestion being that China is very different in this respect.

THEME TWO:

## How is the rule expressed, used and supported in Chinese politics, economics, and law

Having examined progress in developing the rule of law in China, and having considered its meaning, our next object was to examine the political, economic, and legal environment of contemporary China, as it relates to implementation of the rule of law in China. The specific issues were:

How is law and government authority understood and represented in Chinese culture and history?

What are the challenges and obstacles in developing the rule of law in China?

How do western notions of the rule of law fit into the Chinese environment, and what progress has been made to date?

Is there an emerging 'Asian' version of the rule of law?

At the same time, participants were encouraged to consider the following issues:

What measures have been taken by the Chinese authorities to encourage and support the development of the rule of law?

What further measures need to be taken?

How has the rule of law been used by the authorities for their own economic, political, and social ends?

**The extent to which the law has been useful to the leaders of the People's Republic of China in politics, economic development, and institution-building, and in social control and social progress**

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Presented by Professor Jerome Cohen,  
*New York University Law School*

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Professor Cohen discussed changing concepts of constitutionalism in China. In 1982, the constitution was revised to make it suitable for opening-up of the country and for a new era in the aftermath of the Cultural Revolution. The constitution stated that no organisation or individual is beyond the reach of the

constitution or the law, and provided for equality before the law. The role of the Chinese Communist Party (CCP) was also to some degree down-played.

In 1999, the socialist state of the rule of law was established, and in 2004, several amendments were made to protect citizen's rights over private property, including inheritance entitlements. Other concepts await explicit provision, but are to some degree implicit in current developments, including freedom of expression and religion, and the independence of the courts, though we should be careful not to overestimate the practical effects of such concepts. Ultimately, the constitution legitimates government power, while at the same time increasingly acting as a form of limitation on such power.

Professor Cohen noted that there has always been conflict between freedoms and rights, on the one hand, and the role of the CCP on the other. In analysing the CCP, one should note the term 'rule of law' was first used by the Party leadership in 1997, while in 2000, some of the elements associated with the rule of law, such as party discipline, institutional reform, accountability and transparency, were incorporated.

The CCP's own conception of due process, fairness, and individual protection can be seen by analysing the way in which it treats its own members. Some progress has been made over recent decades, in particular, with reference to the rights of individuals before sanctions may be imposed. These now include the right to notice, to defend oneself, to produce witnesses, and to an objective analysis of the facts. In parts of the country, intra-party courts also exist, and in some cases they hold open trials. However, Professor Cohen also noted that such procedures are only available to certain Party members, rather than being universally applicable to all Party members in disciplinary proceedings.

On the issue of legislation, much has been achieved in recent years. The 'Law on Legislation' was created in March 2000 to consolidate existing processes and to provide a hierarchy of norms for making legislation. While this Law does not solve all problems regarding the legislative process, procedures now exist for challenging the constitutionality of a range of government acts. One example of its use is the Sun Zhigang case in which a university graduate, who was 'detained for repatriation' in Guangzhou, died in police custody, creating a storm of public opinion and prompting an attempt by three law professors to show that the regulation authorising detention and repatriation violated the constitution. In order to prevent this being taken as an opportunity for the Court to create a new constitutional precedent, the State Council, which was responsible for the regulation, cancelled it. This victory encouraged other efforts, including a challenge to the notion that courts do not have the authority to interpret the constitution.

Professor Cohen concluded by drawing attention to the need for further institutional developments, including the need for a constitutional committee under the People's Congress Standing Committee. However, he also noted that the constitutional scene in China is one of activity and excitement, and that it is likely, in future years, to include extensive lobbying of the CCP by representatives from the Ministry of Justice and other ministries, academic groups, the All China Lawyers Association, courts, and the prosecutor's office, among others.

**Discussion:** A distinction can be drawn between normal criminal processes, or *yenda*, and criminal law cases that are overtly political, such as Falun Gong. Criminal cases that may threaten the CCP in any way are handled in a similar manner to that of Falun Gong.

*There may be some pressure on the government, in an era of economic development, to be severe in addressing crime.*

There may be some pressure on the government, in an era of economic development, to be severe in addressing crime. This fits in with the government's emphasis on social and political stability. The public interest in improving criminal law is fairly low, and this may hamper its being modernised and brought in line with western ideas of due process.

A distinction should be made between the way in which the rule of law has developed in rural and urban areas. The divide, however is not only a rural-urban divide, it is also urban-urban, with many urban areas in west and central China having greater difficulties than eastern areas in moving towards a rule of law system.

Various cases were referred to, illustrating aspects of the current legal system and its relation to the state in China. One is the practice of using, or trying to use, laws that were never actually intended by the drafters to be judicially enforceable. Another is the

case of the constitution being enforced against a private party as opposed to the state, thus having a liberty-restricting rather than a liberty-expanding effect on citizens.

## Impact of the WTO on the rule of law in China

**Presented by Yuka Kobayashi,**  
*Research Student, Centre for Socio-Legal Studies, University of Oxford*

Ms Kobayashi began by outlining background information, noting that China joined the WTO in 2001, having left the GATT in 1949. Its WTO commitments consist of three documents: the Protocol to Accession and Annexes; the Working Party Report; and a Schedule of Commitments, representing the biggest WTO accession package in history. In acceding to the WTO, China agreed to a range of rule of law commitments, related only to trade, requiring: transparency; the uniform and impartial application of WTO rules; the publication and ready availability of legislation; and the availability of draft laws for public comment.

In considering whether China's entry into the WTO can be thought of as a test case for the rule of law, Ms Kobayashi examined the extent to which China has implemented the elements of the rule of law noted above, focusing specifically on the telecommunications sector in Beijing, Shanghai and Guangzhou. She suggested two levels of analysis: surface-level penetration or *Xu-ti*; and real, substantial-level penetration or *Shi-ti*. She reported that more activity has taken place at the surface level, including: 2000 new laws created; 800 laws abolished; and 300 laws in the process of being implemented. WTO inquiry points have been set up in major cities and a Ministry of Finance and Commerce Gazette seeks to unify the publication of laws. Ministry web pages containing details of laws and regulations have also been created.

At the real or substantial level, however, the laws remain unclear. This could be attributable to a lack of expertise in drafting technical legislation, but beyond this, laws that do exist are hard to obtain, and the period for comment on draft legislation is often insufficient. It also remains questionable whether any comments that are received are taken into account. Ongoing impediments to further change at the *Shi-ti* or substantial level include:

- turf wars and conflicting interests between the central ministries, and between central and local branches of government;
- local protectionism; and
- inadequate expertise on procedures involved in drafting adequate legislation.

In concluding, Ms Kobayashi suggested that the WTO may have helped to improve the rule of law in China in the areas of transparency and the availability of trade-related laws, but also noted that China is now armed with laws that may be used to quieten foreign companies; this could result in less flexibility than now exists in doing business in China.

**Discussant: Professor Derek Roebuck,** Institute of Advanced Legal Studies, University of London and Guest Professor, People's University of China

In discussing what is meant by the rule of law, and the relevance of templates for assessing the rule of law, Professor Roebuck referred to Papua New Guinea, which has both the rule of law and approximately 500 versions of customary law.

He noted that whilst the enforcement of law may continue to be a problem in China, restrictions exist on the enforcement of judgments in other places also. In this context, it is important to remember that we are all prisoners of tradition and that we must be moderate in our evaluation of other systems, including China.

## THEME THREE:

## The legal environment for doing business in China

### *Opportunities and obstacles*

Having examined the rule of law in its context and made some assessment of the current position in China, the next two sessions involved consideration, in an applied and practical way, of how business activities are conducted. This issue was approached by considering case studies, which were presented by businessmen with extensive experience of conducting business in China. The purpose of the presentations was to consider the extent to which the legal, political, and economic environment is conducive to business, and to highlight obstacles and shortcomings, as well as positive aspects.

After the presentation of each case study, the academic participants offered comments aimed at linking the practical issues identified to the general framework of concepts and ideas, with suggestions as to ways forward, solutions to problems, and general guidance.

#### Establishing a business in China: Opportunities and obstacles

Presented by **Mr Edwin Peissis**, *Businessman, New York, who is engaged in manufacturing and trading with China*, and **Mr Leo Chan**, *Businessman, China, who advises foreign entities wishing to do business in China*

Mr Chan noted that one is likely to encounter a number of legal obstacles in doing business in China. On the regulatory side, the arbitrary and inconsistent enforcement of laws, rules and regulations, can be a major obstacle. The enforcement of laws may also be location-orientated, and be hindered by corruption or by a lack of competence, particularly where enforcement relies heavily on regulatory bodies.

The judicial system also poses difficulties. In particular, the independence of the judiciary is hindered by a lack of qualified judges and other relevant professionals. The limited criteria for the recruitment of judges, the blurred concept of judicial independence, and the adverse environment for attracting qualified and competent lawyers to engage in litigation all hinder the growth of a strong and independent judiciary.

In doing business in China, one needs to:

- be prepared for unpredictability and for stiff competition;
- manage expectations;
- calculate the risks of commercial disputes and regulatory interference versus the opportunities available;
- keep in mind that the vast majority of companies and individuals are law-abiding;
- choose the right business partners; weigh up the benefits of different relationships, such as straight buy-sell, joint venture or other relationships;
- remember the importance of agreements;
- choose the right location in which to operate, given the great variation of approaches to the law; and
- engage professional support.

Mr Chan concluded that there is some evidence that, at the macro level, the Chinese government is now approaching the creation of a favourable business climate in a more reasonable way. Examples include the recent change of the head of the government in Hong Kong, and the way in which the process was carried out. Mr Peissis and Mr Chan also noted evidence of this in their personal interactions with

middle to senior level officials in China. At the micro level, officials appear to be better qualified, and display a more positive attitude towards issues that affect business, such as immigration controls. There are many issues that need to be resolved in the future, but the achievements of the past twenty years are quite remarkable, while developments will be subject to both the current political structure and ongoing economic progress.

**Discussants:** Professor Jerome Cohen, New York University School of Law

Professor Cohen noted several issues that continue to hamper business and other activities: corruption; officials establishing their own consultancies; arbitrary and inconsistent taxation; and a lack of qualified judges.

He also noted that there are alternatives mechanisms for dispute settlement other than court action or reliance on officials: arbitration commissions and mediation, formal and informal, are becoming more common.

Professor Cohen emphasised the need for competent professional advice before embarking on business in China.

**Ms Yuka Kobayashi**, Research Student, Centre for Socio-Legal Studies, University of Oxford.

*The attitudes of Chinese officials towards business may be influenced by factors such as the relevance of wider security, and economic and cultural interests.*

The attitudes of Chinese officials towards business may be influenced by factors such as the relevance of wider security, and economic and cultural interests.

In doing business, the importance of location should be emphasised; Shanghai, for example, is considered

by some to be relatively free from the bureaucratic restrictions of Beijing.

On the issue of agreements, Ms Kobayashi noted that the Chinese are likely to consider a contract as the beginning of negotiations rather than as the consolidation of an agreement.

## China in the International Petroleum Markets

**Presented by Mr Edward Pinion,**  
*Businessman, who is engaged in supplying oil to China*

In introducing participants to China's oil situation and Chinese oil companies, Mr Pinion noted that China is destined to be a major oil importer in the future. It has to compete for crude oil in the international market place and, in order to do so, will have to conform to the laws of international trade or be excluded from the international petroleum industry.

China has learnt quickly and pragmatically, and in so doing has adapted well to international standards in the petroleum industry. Mr Pinion noted that he knows of no major issues in the buying and selling of petroleum, in which China has not adhered to international standards of the rule of law. He went on to give an optimistic view of China's movement towards compliance with rule of law. The Air China case and the China Aviation Oil Company case were presented as examples of the Chinese government showing its adherence to international rule of law standards, without explicitly using such terminology.

Mr Pinion concluded that, in his experience, those in the petroleum industry in China are at the same level as other developed countries in Asia, and ahead of some that are less-developed. In their understanding of the rule of law, and how important it is for business contracts, Chinese business people are generally professional and knowledgeable, and exhibit a strict adherence to the common sense factors of the rule of law.

## Managing construction

### *how to cope in China*

**Presented by Professor Chengde Chen, Chairman SIP Group and Visiting Professor, The Queen's College, Oxford, who, as well as being a philosopher, is engaged in the construction industry in China**

Professor Chen emphasised that China is not a lawless jungle in which law is neither respected nor enforced, although he noted that the position varies across the country. The size and continuity of China's economic development can be explained only by a reasonable degree of adherence to the rule of law. He noted that the Chinese government considers China to be 'socialist with Chinese characteristics', but that it may be more accurate to describe China as 'capitalist with Chinese characteristics'. The wisdom of China is to adopt a capitalism approach while referring outwardly to socialism, as 'socialism is human conscience, while capitalism is human nature'.

The role of organisations, such as the International Federation of Consulting Engineers, was emphasised, in developing standard contractual terms for use in the construction industry. In outlining the role of special terms in construction contracts in protecting foreign investors in China, he noted that disputes are common over matters such as responsibility and liability for project delay. He also emphasised that in addition to contracts, working conventions and traditional means of interaction are important aspects of conducting business. He then outlined the role of independent arbitrators in settling disputes.

Explaining that western investors tend to be more cautious and to use lawyers, Professor Chen noted that those on the Chinese side are often not so inclined, or so aware of the need to use lawyers, or of the role of contracts in doing business. He noted that his own organisation seeks to maintain a balance of Chinese and western experts, so that the organisation can understand both sides of business.

**Discussants:** Mr Kaveh Moussavi, Head of Public Interest Law, Centre for Socio-Legal Studies, University of Oxford and Professor Donald Clarke, George Washington University Law School

Both Professor Clarke and Mr Moussavi noted the distinction between adhering to contractual promises and adhering to the rule of law.

Professor Clarke also noted that the Chinese government may make considerable amounts of money from the present arrangements and, therefore, the ruling elite may have little incentive to change or place limitations on the system.

## THEME FOUR:

## Identifying the issues for further study and discussion

### *Open session*

In the final session, workshop participants had two main goals: to draw together themes and ideas that emerged in the preceding sessions; and to identify issues warranting further study.

Professor Galligan chaired the session and introduced the system by providing some ideas to frame the discussion, as outlined below.

#### **Framing the Discussion**

In considering the conditions for economic prosperity and social stability, Professor Douglas North, in his opening lecture the previous evening, focused on institutional structures, making clear that legal structures are essential to ensuring both prosperity and stability. Professor Galligan noted that issues discussed throughout the conference follow on nicely from Professor North's lecture; they include questions as to: the kind of legal structures most appropriate for China, the means for achieving them, the stage China has reached in the process of legal development, and the factors and obstacles that affect that process.

*Law builds on relationships that already exist, so the question is: what does law add to those relationships.*

In considering why law is important, Professor Galligan suggested participants begin with *relationships between private individuals or companies*. Here, law builds on relationships that already exist, so the question is: what does law add to those relationships. Part of the answer is that law creates frameworks of rules and remedies that add value to existing relationships. Such relationships are real and organic; they are social relationships that law protects and contributes to rather than creates. The classical western political theorists, such as Hume, Locke and Hobbes, argued that the

development of a legal system allows society to progress by providing certainty, predictability and security in helping to ensure promises are kept, that property is protected, and may be transferred. For Hume, law was in this way 'enlightened self-interest'.

Another part of law's contribution to private transactions and arrangements lies in *enforcement*: law provides the means for their enforcement. Whilst some legal theorists like H. L. A. Hart have castigated other writers for focusing on the enforcement or sanction-based element of law, it is in fact important, indeed a vital aspect of modern law, regardless of how often it is invoked, and even if it is rarely invoked. The notion of the 'shadow of the law' becomes a part of the social environment in which business relations are conducted, in that the logic and dynamic of the social structure changes where there is a properly recognised system of enforcement.

A different set of issues comes into play in the *relationship between private companies and enterprises on the one hand, and the state on the other*. Here the purpose of the law often is to regulate activities that would otherwise be valid; the reason for such regulation being to realise other social goods that are considered to be important, such as environmental or consumer protection, or health and safety factors, or to ensure that business meets certain ethical standards, and so on. Regulatory law has a different set of dynamics from law that encourages and facilitates private

relationships; whereas the first builds on existing social practices and relations, the second tries to change them, often with the effect of constraining otherwise legitimate private activities.

This creates a paradox: we need law to take positive measures to realise or protect certain social goods, while at the same time the power of the sovereign state poses a threat to private interests. Private interests and transactions, the conduct of business in many of its aspects, become subject to the powers of administrative officials and agencies. Here we see how the rule by law has to be moderated by the *rule of law*. For the rule of law introduces controls and restrictions on the state, on the way its officials use their powers in relation to private businesses and their activities. Discretion must be subject to legal controls, ideas of generality and equality, certainty and fairness, have to become part of the legal environment in which officials act.

*We need law to take positive measures to realise or protect certain social goods, while at the same time the power of the sovereign state poses a threat to private interests.*

Professor Galligan noted that much of the discussion throughout the workshop was concerned with identifying factors relevant to these two sets of relationships: those between private individuals and or companies; and those between private individuals or companies, and the state. Numerous factors were identified that are relevant to them:

China's statist history and the way this is likely to influence future developments in Chinese law, including variable notions of rights and duties, which often lack the meaning or certainty that such notions have in the west.

The role of independent, well-functioning institutional structures in ensuring the rule of law, and in mediating relationships between individuals and the state; these include courts, arbitration and

the like; but it should also include other institutions that supervise and check government.

Distinctions between creating law in top-down and bottom-up ways, where regulatory law tends to be top-down (though the making of that law might involve democratic processes), thus not being rooted in social practices and relationships. Law of this kind is in a sense artificial and hard to make effective in practice. While other law, such as property rights, are created through bottom-up processes in which groups and communities spontaneously develop laws as practices, or where they utilise laws that were not necessarily intended for their benefit. Once law is 'on the books', it provides a public standard which may gradually be used for strategic ends and eventually become internalised within the system. In this context, rule by law may be the beginning of rule of law.

The dominant position of the Chinese Communist Party and divisions between the party and legal and political institutions in China.

The role of cultural systems in regulating the way in which people do business. In this sense, it is better if law is in harmony with culture - the closer the connections, the more likely people will utilise and rely on law.

In concluding, Professor Galligan noted that self-interest and the role of law in protecting one's interests was a theme that could have been developed further. In the future, we may wish to consider how interests can create certain pathologies, and what interests are not represented in the legal system.

**Discussion:** Attention was drawn to the need to identify variables for understanding and measuring future developments of the rule of law in China.

It was noted that the Chinese government appears to be moving slowly along a continuum towards better protection of the interests of individuals and companies, away from merely its own self-interest.

Activities outside China may affect the position of the Chinese government on rule of law ideas; for example, the international activities of Falun Gong.

It was noted that the law can be an instrument for exerting control by the state, although a well-developed system will also impose legal restrictions on the state.

The discussion came back to the nature of rights, and the distinction between binary and non-binary rights.

The importance was again noted of non-legal means of fostering stability and regulating business activities, including the role of informal, non-state institutions, with their own internal values; and the role of corporations in encouraging a move towards the rule of law.

Law may add 'marginal value', particularly in terms of consistency and stability.

Questions were raised about the importance of legal risk to investors and whether there are possibilities for studying this empirically.



## ANNEX I:

## Workshop programme

### Thursday 12th May 2005

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- 9.30 *Introduction*  
Professor Denis Galligan
- 9.45–11.00 **Session 1: The rule of law and its place in China: A critical assessment of the past and a prognosis for the future**  
  
*Speaker:* Professor Donald Clarke, *The historical legacy of China's legal system*  
  
*Chair:* Professor Denis Galligan
- 11.15–12.45 **Session 2: The rule of law and its place in China: A critical assessment of the past and a prognosis for the future (continued from Session 1)**  
  
*Speakers:* Professor Randy Peerenboom, *Describing, predicting, and assessing the rule of law in China: China as problem or paradigm for development of the rule of law and constitutional democracy*  
  
Mr Andrew Halper, *Why there are no viable shortcuts to progress in construction of the rule of law*  
  
*Chair:* Professor Denis Galligan
- 2.15–3.45 **Session 3: How is the rule expressed, used and supported in Chinese politics, economics, and law**  
  
*Speakers:* Professor Jerome Cohen, *The extent to which the law has been useful to the leaders of the People's Republic of China in politics, economic development, and institution-building, and in social control and social progress.*

Ms Yuka Kobayashi, *Impact of WTO on rule of law in China*

*Discussants:* Professor Derek Roebuck, Professor Itai Sened

*Chair:* Professor Itai Sened

- 4.15–5.15 **Session 4: The legal environment for doing business in China: opportunities and obstacles**

*Speakers:* Mr Edwin Peissis and Mr Leo Chan, *Establishing a business in China: Opportunities and obstacles*

*Discussants:* Professor Jerome Cohen, Ms Yuka Kobayashi

*Chair:* Mr John W. Adams

- 7.00–9.30 Reception and Dinner, the Founder's Library, New College

### Friday 13 May

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- 9.30–11.00 **Session 5: The legal environment for doing business in China: opportunities and obstacles (continued from Session 4)**

*Panel:* Mr Edward Pinion, *China in the International Petroleum Markets*

Professor Chengde Chen, *Managing construction: how to cope in China*

*Discussants:* Mr Kaveh Moussavi, Professor Donald Clarke

*Chair:* Mr Andrew Halper

- 11.15–12.45 **Session 6: Identifying the issues for further study and discussion: Open session**

*Chair:* Professor Denis Galligan

## ANNEX II:

## List of participants and email addresses

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### *Rapporteur*

**Ms Ingrid Barnsley**, Research Student, University  
of Oxford

### *Observers*

**Mr Matthew Chen**, Oriel College, Oxford

**Mr Robert Gibson**, Washington University, St Louis

**Dr Frank Pieke**, Director, Institute of Chinese  
Studies, University of Oxford, Oxford

**Dr Laura Soverino**, Visiting Research Student

### *Attended dinner on Thursday 12 May*

**Professor Michael Crommelin**, Dean of the Law  
School, University of Melbourne, Melbourne





