

SOCIAL REFORM AND PROGRESS THROUGH LAW A CHINA STORY XIN Chunying^{1 (*)}

Distinguished fellow guests, all scholars,

First, please allow me to express the warmest welcome to your arrival, on behalf of the scholars participated on the Chinese side. It is of special significance to hold World Congress of Philosophy of Law and Social Philosophy in China, a country with the cultural traditions of ancient law. It is not only because China has contributed to the world the great Chinese civilization, as well as the Confucianism and theories and thoughts of other ancient philosophers, but also because the main theme of this conference is *global harmony and rule of law*, while the topic of rule of law and harmony is a converging point of the ancient legal culture and the fulfillment of modern rule of law in China. It is of great significance for us to gather in Beijing today, to discuss issues on philosophy of law and social philosophies faced by human beings under new historical conditions, and share our thoughts.

The topic of my report is *Social Reform and Progress through law: a China story*. Law is a story, law making is a story as well, and legal history is a more complicated story. The China story is unique, in a sense; it reflects

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the development path and the philosophy of that country.

My report is divided into three parts: first, social reform through law , second , advantages and problems of the constructing model for rule of law, and third, a harmonious society—the goal of rule of law in China.

I. Social Reform through Law

To construct a legal system that fit the needs of modernization plays an especially important role in the development of China. Prior to 1980s, China adopted the strict planned economy system. To what extent the planning is? Taking an example, the clothes in China only had a few styles and they were in the same color. When a foreigner came to China, he may see the clothes people wear were all gray or blue, and there were only three sizes. Under the planned economy system, there was no social need for law, since a top-down administrative decision could solve any problem. We did not adopt the General Provisions of Civil Law until 1986, and prior to that, the typical civil law relation in the society was the marriage relation. There was no private property, contracts or loans. All economic relations were vertical and happened between the government and the people.

Under such a background, as an instrument for social reform, the functions of the rule of law are taken full effect in the following ways.

The development of a legal system provides effective guarantee for the economic development. China's reform began in the field of economy, more accurately, in the field of rural economy. At the end of 1970s, in order to survive, the farmers made a breakthrough in the system and policies,

abandoned the system of rural people's community, and explored new ways of land contract responsibility system, which marked the beginning of the rural reform. Farmers decided what they would grow in their lands and how to deal with the surplus products and labors. The following economic reform in urban areas focused on the development of individual private business, industry and commerce. In the process of the reform, people demonstrated their strong creativity. The economic reform was confirmed in law in time, which formed an institutional power. To safeguard the economic reform, the legislations related to economic reform made by the legislature in China takes up a great proportion in the whole legislations of recent years. Some economic legislation was enacted prior to the reform of economic system, which set up the rules and carved out the way for the reform. While others closely followed the practices of the economic reform and put those effective reform measures into law.

The development of a legal system provides effective guarantee for the Political reform. There are often comments saying that the economic reform in China is productive and successful while the political reform is lagged behind. However, it is not the real case. While concentrating on the economic development, China is steadily pushing forward its political reform. Legal reform is the lever of political reform. China is a country with a long history of rule of man. To some extent, establishing the authority of law and replacing it with rule of law itself is the most important political reform in modern China. In the 30 years of reform and opening up, one important part of the legal reform is to abandon the old political and

administrative system and to establish and improve a new administrative system, with the aim of realizing rule of law, on the basis of market economy. The accomplishments of legal reform can be witnessed from the following aspects:

First, the authority of law and democracy has been heightened in the political affairs of the state. In the early 1980s, there was a debate in China, named who has bigger say, county governor or the constitution. The background was that after the 1982 Constitution was adopted, many local officials regarded the Constitution as a piece of useless paper. Even the county governor, who was on the lowest level, had bigger power than the constitution. Certainly that debate sounds ridiculous today, but at that time, it was what we needed to solve in the theory.

Second, the government shall exercise their power according to law. In order to establish the authority of law in the social life, the government should first exercise their power according to law. In any countries, the administrative power constitutes a threat to the authority of law. As in a transition period, all levels of the Chinese governments bear heavy administrative functions. To avoid the abuse of power, we should emphasize on exercising the power according to law.

China has adopted a series of laws to restrict the power of the government and protect the rights of citizens. The Administrative litigation Law in 1989 was considered a law of “citizens suing the government”. In the last 20 years, administrative litigation has a stable increase every year, on average 30% of the verdicts are granted for citizens. The State Compensation Law in 1994

for the first time admits that the state and its officials may make mistakes and people can be compensated when their rights are infringed. The Law of Administrative Punishments, enacted in 1996, introduces hearings from western countries, sets up the procedure for expert consultation and emphasizes the transparency of governmental information. The Administrative Review Law, enacted in 1999, sets up a quasi-judicial procedure for administrative review and guarantee citizen's rights of inform, making statements and defense during the process of review. The Administrative Licensing Law in 2003 is of great significance in changing the functions of the government after China has entered the WTO, with the aim of restricting the power of the government and establishing a service oriented government.

The third important aspect of our achievements is judicial justice. Courts have become the most accessible instrument for people to solve their problems. The number of cases accepted by courts reached 10711275 last year, people takes courts as the place to seek final justice. In recent years, China is undergoing a series of judicial reforms, focusing on "justice and efficiency" and the judicial authority has been established gradually.

To fulfill commitments to the international community through legal reform. Since 1980s, China has been actively participating in the mainstream of the international community. In the Political field, China joined or approved a series of international human rights conventions, actively participates in the process of economic globalization, and joined or approved a series of international economical treaties, including United Nations

Convention on Contracts for the International Sale of Goods (CISG) and Paris Convention for the Protection of Industrial Property and so on. After 13 years' efforts, China has entered the WTO. The rules of international commercial activities have been transformed into domestic laws and become the guiding principles for commercial activities in China.

To make laws available to all aspects of the society to follow. Even in early 1980s, the Chinese legislature raised it clear to accelerate the legislation steps, to make laws and regulations available for all social activities to follow. After more than 20 years' efforts, China has primarily established the framework of a legal system, which is based on the Constitution and includes branches of law, such as administrative law, civil law, economic law, marriage law, labor law and social welfare law, the law for protection of natural resources and environment, criminal law, procedure law, military law and so on. Because of the availability of rules and their legal procedures, the way to solve disputes has been changed. This transition has become an important part in the changes of people's lifestyle. Conflicts and disputes, while they were fully dealt with by administrative ways, now more frequently are resorted to litigation. Go to Court was an unwelcome word in the past and one would be looked down upon if he or she had gone to a court. But now, people who protect their rights through legal remedies will be regarded as heroes. Rules define people's rights and exercising rights strengthens their consciousness as participants.

II. The advantages and problems of the “constructing model” for rule of law

August 27, 2009, the tenth session of the Standing Committee of the 11th National People's Congress (NPC) concluded. During this session, one new law was adopted, 59 laws were amended, and in the last session the nullification of eight laws was adopted. As of August 27, 2009, the pyramid of laws in China includes 229 state laws, 679 administrative regulations of the State Council, 8,561 local laws and regulations and 12,000 ministerial regulations. These numbers demonstrated the achievements in building a legal system in China in the last 30 years. The starting point of building the rule of law in China is the very few laws at beginning of the reform and opening up^A.

Constructing is among the most frequently used words in China society in the last 30 years. The saying of “construct” *the socialist rule of law* typically demonstrates the characteristics of the development of rule of law since the reform and opening up in China. Why *Constructing* instead of *evolving*? **Can we “construct” a rule of law, just as we can in constructing a road, a building, or a school?**

To understand why we “construct” need to explain from the characteristics of the modernization in China. The modernization process of China follows the pattern of constructing instead of evolving. The most

(A) In 1987, the Standing Committee of the NPC streamlined all the laws adopted between 1949 and 1978. Among the 134 laws adopted during this period, 111 have become invalid and 23 are still effective or are considered being amended.

frequently used word in the last 30 years is “constructing”. We use “constructing” in constructing a building, in adopting laws, and our goal is to construct a socialist legal system. Our foreign counterparts might feel curious about “constructing” a legal system. A legal system should evolve gradually, and how can we construct it? But in China, it is really a “constructing”, Like constructing a building needs a drawing, we form an annual and a five-year legislative plan, and our legislative work basically follows the plans. Someone might criticize that it may be divergent from reality. In fact, the legislative plan is based on the social needs, which reflect which law is in badly needed to be enacted and which law needs to be amended. We formulate the legislative plan based on the social needs and use it to guide our legislation work. If we compare it to that of the western countries, especially the European countries, we will find that many legal principles there were generated spontaneously, such as the commodity trading rules. Even for some of the rules in the capital market, first there were activities, based on which rules were recognized and became models, and finally evolved into rules or case law. However, the situation in China is different. To build a modern mansion as soon as possible, we mobilized all our intellectuals to first design it, and then build it step by step. There are advantages as well as problems of this model. The advantage is that we can build the modernization with purpose and thus avoid some of the problems through design with purpose. On the other hand, what we are doing is to design a general legal system for the society and wish the society to follow and obey it. The problem in practice is that our laws usually are not fully

implemented, because they greatly divergent from the reality. As a legislator, I would make a defense for our legislative work. It is not right to criticize that we have made a bad law. Instead, most laws are good, since the provisions are based on detailed reasoning and research, but there is really some deep gap between it and the social reality. We can often see that many laws are not obeyed and implemented, and even judgments cannot be enforced. Therefore, there is a saying that it is difficult to implement laws and enforce judgments. Hence, there are incidents like *legal IOU note*, which means that it is impossible to enforce a favorable judgment, and therefore someone would put it in auction and the buyer would try to enforce it. This path is not of a subjective choice, we have no alternatives. In order to change the backward state of China, we have to adopt the path of modernization led by the ruling party.

Another problem of building the rule of law is that law is considered as an instrument to achieve social goals. There are disagreements among scholars on this issue. It is commonly held that law should not be an instrument and it should be a reflection and a carrier of values. However, under our current situation, it should not only be a carrier of values, which embodies social fairness and justice, but also be a guideline for our goals. Sometimes, to solve a certain problem, we need to adopt a new law or amend a current effective law. Law is highly used as an instrument and I am not saying that it is not right to do so, and what I am saying is that we have such a characteristic. In China, in terms of building a legal system, the modernization realization is that the ruling party takes building the legal

system as a major task for building a modern country through its purposeful and organized acts. The ruling party sets out goals and realizes the goals by relying on its authority. It is our reality but also our political advantage.

III. Harmonious Society: Objective of China to Rule of Law

It has a long history in China to pursue a harmonious society. Lao Tzu, the founder of Taoism, raised the concept of *Way of Nature*, to advocate the harmony between nature and human. Confucius advocates *Do As You Would Be Done By*, and raised the human relation viewpoint of *To Accommodate Divergent Views*.

The fundamental connotations of Chinese socialistic harmonious society are democratic rule of law, fairness and justice, good faith and philanthropy, full of energy, stability and order, and harmony between nature and human. In order to construct a socialistic harmonious society, the laws shall play roles in three aspects as follows:

(1) To establish the legal foundation through democratic and scientific legislation

The key point of building a socialistic harmonious society is the coordination of the relationships among different social interested parties. It is the role of democratic and scientific legislation to provide the society a system designation for justice. Through harmonization of law values and law contents, it is expected to achieve social justice and fairness.

First, to realize the law values harmony through democratic and scientific legislation. The harmony of law values refers to eliminating the conflicts between various law values to the largest extent and realizing their compatibility and balance through coordination and reasonable limitation.

Second, to balance the harmony between freedom and order through law . Law should not only guarantee the full freedom of its people on all aspects and the vitality of the society, but also maintain the basic social order and provide a secure and stable society for the lives of most people.

Third, to balance the harmony between fairness and efficiency through law . Law should not only maintain the social fairness through means like guarantying the equality of rights and opportunity and protecting the weak, but also fully recognize the respective contribution and differences of capacity between individuals and guarantee the reasonable ratio between one's contribution and income.

Fourth, to balance the harmony between equality and difference through law. Law should not only recognize and confirm the reasonable difference

between individuals and the resulting differences in their incomes, but also recognize and maintain basic equality between individuals, especially the equality in terms of their dominant position, personality, rights and opportunity.

(2) To realize social harmony requires government in accordance with the law

In theory, there is an inverse relationship between public power and private rights. Under a nation's limited resources of power and rights, the bigger the public power is, the smaller the private rights are. Too bigger the public power is means autocracy, while too bigger the private rights are means the disorder of the society. It is an internal requirement for establishing a rule of law government and building a rule of country to clearly define the reasonable line between public power and private rights.

In a modern society, the relations between public power, especially administrative power and private rights is not only a traditional fighting and excluding relation, but also cooperating relation. The realization of private rights not only requires the respect from administrative power, but also its active exercise, which provides conditions and guarantee for the realization of private rights. Based on the principle for enforcing laws use power for the people, show concern for the people and seek benefit for the people and the principle of power comes with responsibility, that there is proper oversight on the exercise of power, that reparation is paid for infringement of rights, the fundamental goal of running the government in accordance with the law is to realize the harmony between the public power and private rights.

(3) Realization of social harmony requires judicial fairness from judicial organs

Harmonious society is not a society without any disputes or conflicts, but a society where disputes can be effectively prevented and timely resolved. A completed dispute resolving mechanism can effectively deal with social disputes and contradictions. Therefore, building a socialistic harmonious society requires a judicial system which shall be independent, fair, authoritative and highly efficient. The construction of a fair and authoritative judicial system is the necessary condition to guarantee a fair judicature in system level, to make sure the credibility and authority of the judicature, to attach legitimacy and acceptability to court judgments, and to eliminate parties' feelings of unfairness, being deprived, fear and uncertainty through litigation. In another word, only by a fair judicature, can the unification of legal effectiveness and social effectiveness realize, and can courts be recognized by citizens as the final deciding power when solving social disputes and contradictions.