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Policy, the Rule of Law, and Rural Land Reform in China

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CONTENTS

- I. INTRODUCTION 1**
- II. GENERAL CHARACTERISTICS OF POLICY AND LAW 3**
- III. LAW AND POLICY INTERACTIONS IN CHINA..... 6**
- IV. ACHIEVING THE RULE OF LAW IN CHINA 9**
 - A. PUBLIC AND PRIVATE LEGAL AUTHORITY..... 9**
 - B. CERTAINTY..... 10**
 - C. ENFORCEMENT..... 11**
 - D. GENERALITY..... 12**
 - E. CONGRUENCE 12**
 - F. INDEPENDENT LEGAL PROFESSION 13**
- V. SUMMARY OF RECOMMENDATIONS..... 15**
 - A. SUPREMACY AND AUTHORITY OF THE LAW 15**
 - B. CERTAINTY..... 15**
 - C. ENFORCEMENT..... 16**
 - D. GENERALITY..... 16**
 - E. CONGRUENCE 16**
 - F. INDEPENDENT LEGAL PROFESSION 16**

I. INTRODUCTION

Chinese decision-makers generally acknowledge that deepening the progression of rural land reform requires developing an improved legal framework to guide and govern rural land relations. Developing an improved legal framework, however, will require much more than enacting new legislation. It requires developing the rule of law in China's countryside and changing the historical interaction between law and policy in China, especially in rural areas.

Policies embody and convey values. Laws work to create the outcomes that are inherently suggested by policies. The relationship between law and policy in most Western countries is generally set and for the most part functional. That is, policy, which is put forth by a political party, an executive or legislative entity, or an interest group, serves to inform and guide the subsequent promulgation of laws, rules, and regulations. Policy, under the rule of law approach, is not used (for the most part) in these countries as a mechanism to implement itself. Rather, laws (and other tools) are used as the implementing vehicles.

The relationship between Chinese Communist Party (CCP) policy statements and directives and China's developing legal and statutory infrastructure has not been entirely resolved. Historically, the notion that CCP policy is the foundation of law and that law is a mature form of CCP policy has not only informed but in many ways defined the Chinese legal milieu. In many cases, CCP policy has been used (rather than the rule of law) as an implementation mechanism. However, recent (and notably successful) efforts toward rural economic reform and the development of a market economy in China have been accompanied by parallel strides toward reform of China's legal system to better function in the countryside.¹ Notably, the 1998 Land Management Law (LML) makes a specific commitment to rural legal reform and the rule of law by expressly calling for land use rights to be protected by law, by mandating that contracts be issued to specify legal rights and obligations, by providing for dispute resolution mechanisms, and by calling for implementation monitoring and legal liabilities.² Moreover, President Jiang Zemin's June 11, 1999, speech about rural development and the rule of law demonstrates a continuing central commitment to promoting the rule of law in China's countryside. Urging officials across China to promote the rule of law throughout the rural regions, President Jiang demanded that the drafting and implementation of laws regulating all of rural society be accelerated and that the policies and methods that show promise of being effective in rural reform be adopted into law.³ Clearly, China is making an increasing commitment to move from a rule of policy to the rule of law.

Yet, despite these recent developments, the historical and continuing interaction between policy and law makes China's laws and legal institutions less effective than they might otherwise be. For example, a June 18, 1999, CCP policy circular and *Renmin Ribao* article decried the ongoing conversion of China's farmland to non-agricultural uses and pointed out the need to use the rule of law (and specifically the Land Management Law) to enforce land management

¹ Perry Keller, *Legislation in the People's Republic of China*, 23 U. B. C. LAW REVIEW 653, 657-659 (1989).

² Arts. 13, 14, 16, 66-72, 73-84

³ Dian Tai, *Rural Law Spreading*, CHINA DAILY, June 12, 1999.

regulations. The circular says that the management of state affairs by use of law is the path to be followed by all levels of government.⁴

China's transition to the rule of law can move forward if the characteristics that make up the rule of law and the institutional environment within which the law can reign supreme are created and implemented. This effort will require that the central government continue to mandate specific changes and actions at all levels of government.

This report discusses the most important characteristics of the rule of law and its relationship to policy in a general context. Section II compares and contrasts two methods of reaching economic, social, and political goals—law versus policy—and describes in detail the characteristics of law and policy, including the strengths and weaknesses of each. Section III discusses law and policy interactions in China, as well as how and why China has moved towards the rule of law. Section IV describes some of the things that China might do to achieve the rule of law, both generally and in terms of rural land relations. Section V provides a summary of recommendations that might be pursued to further institute the rule of law in China and to create legal results that are more consistent with public desires and central government intent.

⁴ *Party Calls for Implementing Land Management Circular*, BBC SUMMARY OF WORLD BROADCASTS, June 24, 1999. The conflict between law and policy in China is exemplified by the CCP policy circular itself, in that a policy statement is used to implore local governments to conform to existing laws.

II. GENERAL CHARACTERISTICS OF POLICY AND LAW

This section compares and contrasts two methods of reaching economic, social, and political goals—law versus policy—and describes the characteristics of policy and the rule of law, including the strengths and weaknesses of each.

Policy embodies and conveys values and decisions about those values. Policy also suggests or carries with its creation the general directions or paths that must be followed to realize the values behind the policy. Most governments subsequently use tools to create or attain the desired outcomes that are inherently suggested by policies. Governmental policies, without such tools of implementation, would be no more than abstract ideals.

Political science literature uses a variety of classifications to describe these tools. For example, one scholar has categorized them as tools of information (publicity and the like), tools of treasure (from direct funding to creating market incentives and disincentives), tools of authority (laws, rules, and regulations), and tools of direct governmental action (directly operating a clinic or legal aid center, for example). Other scholars focus on the relative levels of restraint or restriction that are inherent in the tools. For example, tools of authority would be more restrictive than tools of information.⁵

Whatever the schema used to categorize such tools, many countries (and most Western countries) use the law and the rule of law as a primary means of creating the outcomes that are suggested by policy. China tends to rely more upon tools of information and less upon tools of authority (in the form of laws) than most Western countries. Stated differently, policy has historically been paramount to law in China, and policy (rather than law) has been used as the primary tool in the implementation of itself.

Western legal scholars and commentators define the purposes, characteristics, and elements of the rule of law in various manners and from a variety of perspectives. However, six common and essential elements can generally be distilled as constituting the rule of law. To the extent that these elements exist, the rule of law is realized.

1. **Public and Private Legal Authority.** Legal rules, standards, or principles (collectively, “laws”) must exist and there should be supremacy of this legal authority, as distinguished from a “rule of men” or the policy that stands behind the laws. The laws must bind both private citizens and the government. In particular, laws binding the government must guard against official arbitrariness and prohibit state coercion.⁶
2. **Certainty.** All laws must be prospective, published, knowable, clear, non-contradictory, and relatively stable. The laws must exist before actions are taken that will be judged against the laws. The laws must have the capacity to actually guide people in the conduct of their affairs, such that they can know in advance the legal consequences of their various actions. Notice or publicity of the laws must be provided, such that those expected to obey the laws can know of the laws. People must be able to understand the law and comply with

⁵ See Frans Van Vught, *The Effects of Alternative Governance Structures*, in *POLITICAL INSTITUTIONS AND PUBLIC POLICY: PERSPECTIVES ON EUROPEAN DECISION MAKING*, 117-128 (Bernard Steunenberg and Frans Van Vught eds., 1997). Note that tools of information are an example of where a policy (or information about the policy) may be used to implement that same policy. It is unlikely, however, that information can be used alone to effectively implement most policies.

it. Like cases must be treated alike. The laws should be reasonably stable, so as to facilitate planning and action over time, and such that the laws do not change so fast that they cannot be learned of and followed.⁷

3. **Enforcement.** There must be enforcement of laws against both private citizens and against the state. There must be effective procedures and institutions for enforcing the laws against private violence and private coercion and for ensuring that state action is in conformance with the laws. Included within this characteristic is a functional, well-trained, independent, and impartial judiciary, as well as a system of courts that is accessible, relatively speedy, and not costly to access.⁸
4. **Generality.** There must be generality in the laws, such that specific cases can be viewed as falling under the general laws and such that the laws can be applied to specific cases. Laws should be specific about what they permit and prohibit, but the laws should not particularize those to whom the laws apply.⁹
5. **Congruence.** There must be a congruence of laws with social values or the rule of law will not endure. As well, explicitly expressed laws must conform with the rules that can be inferred from patterns of enforcement by courts, the state, and police.¹⁰
6. **Independent Legal Profession.** A system and framework for legal representation and advocacy must be in place.¹¹

Policy and law can be fundamentally distinguished beyond simply noting that policy tends to lack the characteristics noted above. For example, law making (under rule of law models) is usually governed by stipulated procedures and typically affords the opportunity for public and government comment and input. Hearings and testimony before the law-making bodies are common. In contrast, policy-making procedure is flexible and variable. In some case, opportunities for input are limited to those that are a part of the policy-generating entity. Accordingly, law is generally more stable and has greater continuity than policy, which can be changed rapidly and easily. As well, law may reflect a broader discourse and more input. As another example, laws are generally more detailed and specific than policies, which leads to greater certainty and less opportunity for arbitrary action by officials. Finally, law is usually published as a precedent to its creation, while policy statements can be contained in internal documents only and not be subject to widespread publication. Without publication, citizens

⁶ GEOFFREY DE Q. WALKER, *THE RULE OF LAW: FOUNDATION OF CONSTITUTIONAL DEMOCRACY*, 24-25 (1988); Richard H. Fallon, Jr., *The Rule of Law as a Concept in Constitutional Discourse*, 97 *COLUMBIA LAW REVIEW* 1, 7-8 (1997); Jeffrey W. Berkman, *Intellectual Property Rights in the P.R.C.: Impediments to Protection and the Need for the Rule of Law*, 15 *UCLA PACIFIC BASIN LAW JOURNAL* 1, 34 (1996).

⁷ Walker, *supra* note 6, at 25; Fallon, *supra* note 6, at 7-8; Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 *BOSTON UNIVERSITY LAW REVIEW* 781, 785, 791 (1989); Mark C. Lewis, *Contract Law in the People's Republic of China – Rule or Tool: Can the PRC's Foreign Economic Contract Law Be Administered According to the Rule of Law?*, 30 *VANDERBILT JOURNAL OF TRANSNATIONAL LAW* 495, 500 (May 1997); Berkman, *supra* note 6, at 34.

⁸ Walker, *supra* note 6, at 28-29; Fallon, *supra* note 6, at 8.

⁹ Walker, *supra* note 6, at 25; Radin, *supra* note 7, at 785, 791.

¹⁰ Walker, *supra* note 6, at 27-28; Radin, *supra* note 7, at 785; Berkman, *supra* note 6, at 31-32.

¹¹ Walker, *supra* note 6, at 36.

cannot order their behavior to conform with the policy and the government may be ineffective at enforcement.¹²

¹² See ALBERT HY CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA 77-78 (1992).

III. LAW AND POLICY INTERACTIONS IN CHINA

This section discusses law and policy interactions in China, as well as how and why China has moved towards the rule of law.

In China, as in most other countries around the world (including market economies), policies reflect the goals and intent of the government and serve as the foundation for laws. In contrast to most market economies, however, policies in China are often written (though rarely widely published) and carry significant authoritative weight without a corresponding implementing law. CCP policies (in the form of directives or statements) are the foundation of Chinese law. The CCP initiates political, economic, and social change in China through the issue of policy directives. The August 1997 Notice Concerning Further Stabilizing and Perfecting the Rural Land Contracting Relationship serves as an example.¹³ This policy stood alone for almost a year before subsequent legislation was passed to put the policy's intent into law. Development of formal legislative processes over the past twenty years has made Chinese state institutions the source of most formal legislation. As mentioned above, such formal legislation typically follows the issuance of a precursor policy statement. In many ways, Chinese law is seen as a mature manifestation of party and state policy.¹⁴ The Land Management Law is an example of formal legislation following on the heels of an earlier-issued CCP policy. As well, CCP policy has often attained a quasi-legal force and status that has been strengthened by the reality that, where there is no pertinent legal provision, citizen and governmental conduct must comply with the relevant state policy.

The relationship between Chinese law and policy has not served to prompt the preeminence of the rule of law. China's relatively rapid development of economic reform policy has meant that, particularly in the environment of fledgling law-drafting and legal engineering skills, law lags behind policy. Therefore, policies are sometimes implemented without any legal basis, and sometimes existing laws are ignored, shunted aside, or bent when new policies conflict with the existing laws.¹⁵ For example, in 1990, a national CCP policy emphasis on the collective Chinese agricultural economy prompted some local cadres to arbitrarily change the terms of peasant production contracts and to raise fees and levies. Other cadres took back some or all of the contracted agricultural land. In response to these actions and a resulting weakening of peasant confidence in central policies, the central government made subsequent efforts to underscore the importance of agricultural and rural policy stability.¹⁶

The distinction between Chinese law and policy has also been blurred because the supremacy of state law (relative to CCP policy declarations) has not been firmly established in theory nor significantly observed in practice. Policy is often viewed as being supreme to law, and, in some cases, sufficient by itself as a tool of its own implementation. The distinction has also been

¹³ *Notice Concerning Further Stabilizing and Perfecting the Rural Land Contracting Relationship, No. 16*, General Office of the CPC Central Committee and General Office of the State Council, August 27, 1997.

¹⁴ See Chen, *supra* note 12, at 93-94; Perry Keller, *Sources of Order in Chinese Law*, 42 *American Journal of Comparative Law* 711, 729-731 (1994) (hereinafter Keller, *Sources of Order*); Keller, *supra* note 1, at 657.

¹⁵ See Chen, *supra* note 12, at 93-94.

¹⁶ DALI L. YANG, CALAMITY AND REFORM IN CHINA: STATE, RURAL, SOCIETY, AND INSTITUTIONAL CHANGE SINCE THE GREAT LEAP FAMINE 206 (1996).

muddled because rule of law models (in contrast to rule of policy models) always place the judiciary at the center of the functioning legal system, and, in China, courts are not seen as having a comparatively central position within the legal system.¹⁷

Under the rule of law, a law or rule attains a level of legitimacy and credibility internal to the state when officials accept the law as official and legitimate, binding on them, and subject to their application and enforcement. The question arises whether CCP policy should be accorded the level of legitimacy and credibility of law because Chinese officials do accept CCP policies (at least to some extent) as subject to these characteristics. That is, should Chinese law include policy statements? Two considerations would prompt a negative answer. First, as mentioned in section II, law and policy can in fact otherwise be distinguished. Law-making is governed by stipulated procedures (under rule of law models), whereas policy-making procedure is flexible and variable. Accordingly, law is generally more stable and has greater continuity than policy, which can be changed rapidly and easily. As well, law is usually published as a precedent to its creation, while policy statements can be contained in internal CCP documents only and not be subject to widespread publication. Second, the PRC Constitution in fact establishes a system of law-making entities at different levels of a comprehensive hierarchy. This possibility of determining the validity of a law or regulation by reference to the Constitution and the laws made pursuant to it provides a valuable way of ascertaining validity and authority.¹⁸ In short, the rule of law should be seen as a primary tool for promoting CCP and state policy. Policy should not be relied upon as the sole means of implementing itself and should not be accorded the same level of legitimacy and credibility as law.

Perhaps owing to the uncertain relationship between Chinese law and policy, the gap between existing Chinese law and the behavior of Chinese officials and citizens has been seen by some as the most serious obstacle to advocates of a Chinese rule of law system. The supremacy, authority, and enforcement of the law are lacking. Implementation of much enacted law has been difficult or ineffective, and many laws have not been followed by state administrative organs. Judicial action has not been seen as an effective means of enforcement, and higher-level administrative and legislative legal supervision has been weak and inconsistent.¹⁹

Also undermining the authority of Chinese law is an uncertainty as to its status and legitimacy. The vertical and horizontal status and position of the agent that promulgated the law influence determinations of legal supremacy and authority in China for existing laws. For example, regulations put forth by the State Council (or one of its ministries) may carry greater authority than National People's Congress (NPC) laws because the latter have frequently been vague policy statements that expressly contemplate later implementing rules. Vertical superiority brings nominally greater authority. However, that authority can be practically muted by bureaucratic distance. Horizontal position of the enacting agent can influence authority by virtue of bureaucratic connections (or lack thereof) and geographic location and remoteness.

¹⁷ See Chen, *supra* note 12, at 77.

¹⁸ See *Id.* 77-78.

¹⁹ *Id.* at 92-93.

Trial regulations having strong supremacy and force are often tested in geographic pockets, with national implementation expected to follow if the trials are successful.²⁰

A rise in bureaucratic, administrative, and judicial autonomy, born of a 1979 mandate to permit increased local decision-making power so as to promote the shift from a planned to market economy, has worked to spawn a localism that often runs counter to the rule of law.²¹ This localism can undermine legal supremacy and authority through incidents of corruption and self-dealing, the unwillingness to make and enforce judicial rulings, and a lack of bureaucratic coordination. Localism is seen by central state authorities as a major obstacle to legal reform. Central government, however, also sees legal reform as a key to promoting the success of the economic reform and to combating instances of localism.²² State and CCP leaders see equal application of the law to all, regardless of status, position, or power, as the primary thwart to the dangers of localism. The rule of law should transcend political and social status, relying instead on the universal, even-handed application of the law itself to enforce legal obligations and rights.²³

Despite the uncertain relationship between law and policy in China and the use of policy as a tool for its own implementation, it is clear that the rule of law is recognized by the CCP and state government as an effective way to create policy outcomes. This recognition is shown by the use of the rule of law to attract foreign investment to China. Foreign investors seek the risk-reducing characteristics that make up the rule of law. Legal authority, certainty, generality, congruity, enforcement, and a viable legal profession are all prerequisites to managing investment risk.²⁴ The Chinese central government has consequently enacted legislation that applies only to foreign investors as they interact with domestic enterprises. The Foreign Economic Contract Law (FECL), modeled after the Anglo-American common law of contracts, is one example. Reflecting the presuppositions that parties enter into contracts because they believe that the exchange will render each better off and that objective and predictable enforcement will allow wealth-maximization and the economical allocation of risk, the FECL also brings along with it some of the characteristics of the rule of law (supremacy, certainty, and generality). However, some critics note that this approach to isolating portions of China's law in order to provide these appealing characteristics fails to fully implement the rule of law because congruence and enforcement are lacking. The FECL fails to provide for separate courts, and the existing courts are seen by the critics as unable to adjudicate the disputes that might arise under the FECL and unwilling or unprepared to enforce the results of such adjudication. In any event, recent policy statements, the trend toward a Chinese rule of law for domestic consumption, and the legal "ring-fencing" to draw foreign investment (like the FECL's

²⁰ Donald C. Clarke, *What's Law Got to Do With It?: Legal Institutions and Economic Reform in China*, 10 UCLA PACIFIC BASIN LAW JOURNAL 1, 27-29 (1991).

²¹ Berkman, *supra* note 6, at 19-22; Lewis, *supra* note 7, at 507.

²² *See Id*

²³ Berkman, *supra* note 6, at 38.

²⁴ See Douglas Webb, *Legal System Reform and Private Sector Development in Developing Countries*, in ECONOMIC DEVELOPMENT, FOREIGN INVESTMENT AND THE LAW 45-65 (Robert Pritchard ed. 1996).

implementation) show that state and CCP leaders see how the rule of law can be used to implement policy.²⁵

IV. ACHIEVING THE RULE OF LAW IN CHINA

This section describes some of the things that China might do to achieve the rule of law, both generally and in terms of rural land relations.

A. Public and Private Legal Authority

To serve as an effective tool of Chinese policy implementation, the law must assume a place of supremacy and serve as the ultimate authority in a variety of transactions, mandates, and prohibitions. One route to increased certainty and accompanying stability of Chinese law and regulation may be exemplified by the Administrative Litigation Law (ALL) adopted in 1989, which grants a statutory cause of action to all PRC citizens or entities to sue in a Peoples Court if the citizen (or entity) believes its “legal rights or interests” have been violated by way of a “concrete administrative act.” The ALL provides a path for recourse when an agency confiscates or freezes property, infringes on a right of operations, withholds an otherwise properly issueable license, or otherwise implements coercive administrative measures.²⁶ As well, the court may be asked to void an administrative act if there has been a violation of legal procedure in the agency action.²⁷ It has been reported that courts in Sichuan and elsewhere have, pursuant to the ALL, voided local agency acts based on provincial land management regulations that conflicted with the national Land Management Law.²⁸

The 1998 Land Management Law (LML) provides an example where a clearly defined cause of action could help to establish the supremacy of the law. Article 16 of the LML provides for dispute resolution, but the LML does not expressly list the items or kinds of actions or disputes for which recourse might be pursued. June 1999 fieldwork in Jilin and Heilongjiang provinces indicated that the 30-year use right contracts have not been issued to substantially all farmers.²⁹ The LML (or subsequent implementing regulations) might provide for a cause of action if the use contract were not timely issued or failed to appropriately express the related land use rights and obligations. Such provisions of recourse against government intransigence, infringement, or coercion can enable the citizenry to help establish the authority of the law. In conjunction with the grants must come notice and publication of the rights, as well as an institutional and judicial framework within which to pursue the cause of action.

²⁵ Lewis, *supra* note 7, at 505-506, 509, 535-536; Webb, *supra* note 24, at 58. Critics note that “ring-fencing” alone is not a long-term answer to an ineffective legal environment. Domestic congruence—the law’s convergence with social values—is needed as well.

²⁶ David L. Weller, *The Bureaucratic Heavy Hand in China: Legal Means for Foreign Investors to Challenge Agency Action*, 98 COLUMBIA LAW REVIEW 1238, 1258 (1998).

²⁷ *Id.* at 1263-64.

²⁸ *Id.* at 1260.

²⁹ RDI farmer interviews in Jilin on June 7-10, 1999, and in Heilongjiang on June 10-12, 1999.

Central government officials have noted that local cadres have little sense of the rule of law or the characteristics that create it. Accordingly, another area where the supremacy of the law would profitably be established is at the local cadre level. The CCP infrastructure should be enlisted to provide training and information to local cadres about the rule of law, the need for legal supremacy, and the need to meaningfully embrace that supremacy. The central and provincial CCP apparatus would be well served to create standardized training materials and information to distribute to local cadres.

B. Certainty

Certainty of law permits both citizens and the government to shape their behavior in ways that conform to the law and to know of the legal consequences of that behavior. Certainty requires that laws be prospective, published, knowable, clear, non-contradictory, and relatively stable. The notion that, once a law or legal ruling is established by a court or administrative agency, the law or ruling will be followed again (by all equal or inferior courts and agencies) in a case of like or substantially similar circumstances creates a doctrine of precedent informing citizens that they will be able to make decisions with less uncertainty and lower transaction costs. It is this doctrine of precedent—of treating like cases alike—that brings consistency and certainty to the rule of law.³⁰

A lack of specificity, clarity, and publication of Chinese laws and standards within those laws has led to inconsistent or failed implementation of the laws in some cases.³¹ For example, Article 14 of the LML requires that a use right contract be issued that contains the rights and obligations of the collective owner and the land user, but those rights and obligations are relatively undefined in the LML. Fieldwork interviews indicate that contracts issued pursuant to this requirement vary widely in content and clarity. Central government officials note that the extent of implementation of central laws and regulations depends heavily on county interpretation of such measures. Greater clarity, specificity, and comprehensiveness in the laws and regulations would reduce the necessary interpretation. Had the LML (or implementing regulations) expressly described the required provisions or included a model contract, clarity, uniformity, and certainty would have been added to the contracting process and the related use rights and obligations.

Publicity of new laws can also facilitate the certainty necessary for the rule of law. Publicity about new Chinese laws has allowed citizens to know of their rights and shape their conduct accordingly. Recent fieldwork in several Chinese provinces indicates that national publicity about the new 30-year use rights has reached many farmers, providing some hope of certainty despite the lack of written contracts. Publicity, clarity, and sufficiently detailed content throughout China's newly emerging legal framework will reward all levels of government and citizens with lower risk levels, reduced transaction costs, less interpretation, more standardization, lower administrative costs, and more equitable treatment.

³⁰ Henry G. Manne, *What is the "Law" in Law and Economics?: The Judiciary and Free Markets*, 21 HARVARD JOURNAL OF LAW & PUBLIC POLICY 11, 18 (1997).

³¹ See Clarke, *supra* note 20, at 35.

C. Enforcement

Actual enforcement of laws and regulations (by both citizens and the government) in China has been dependant on a number of factors. First, the power of the bureaucracy (or lack thereof) that is responsible for enforcing the law has led to effective enforcement in some cases and to other regulations being completely ignored. Administrative monitoring has been weak. For example, the poor record of LML 30-year use right contract issuance indicates that the central and provincial governments have not done meaningful monitoring. The uncertain status of basic farmland designations and of the designation of flexible land provides another example. Simple administrative field monitoring could provide a clear indication of local implementation and compliance. Subsequent administrative oversight and follow-up in areas with poor compliance would likely prompt broader implementation of LML requirements. Some mechanism for sanction or censure of local government officials or village cadres that fail to respond to further directives would also help secure compliance.

Second, CCP participation has been required to energize effective enforcement in some cases. Where CCP participation (or joint promulgation of the law) is evident, enforcement has been more likely. CCP participation in the implementation of laws should be secured at all points where the CCP intersects with the government and particularly at the local level.

Third, although courts have theoretical enforcement power in some instances, judicial orders have been infrequent and enforcement of those orders has been weak. In other instances, the courts lack jurisdiction to exercise compulsory powers. For example, Chinese courts do not have the power to base decisions on provisions of the constitution.³² In some instances, judges lack appropriate legal education. As of 1993, some 33 percent of all judges were without post-secondary education. Recent efforts to expand the judiciary have resulted in many young, inexperienced judges joining the courts' ranks.³³ This inadequacy can be compounded by the difficulty of identifying the applicable law and by the confusing role played by policy statements. Laws are enacted by a confusing number of bodies and no current indexes to all laws are available. Only the Supreme People's Court published cases as of 1997. Not only would published cases serve as a source of precedent for the judiciary, but such collections would also serve as a guide to ordinary citizens in their quest to order their behavior and economic affairs. If parties to economic transactions cannot discern the law, they will tend to limit economic transactions to a small circle of acquaintances or will try to pass the costs of uncertainties along to their customers.³⁴

Some judges are corrupt, partial, or otherwise unwilling to render appropriate rulings. As well, Adjudication Committees that do not hear the case can overturn Chinese judicial rulings. These committees will also appoint particular judges to hear particular cases of import, which can decrease impartiality. Judges and courts are subject to the influence of party officials (particularly on the local level). Courts can have difficulties in enforcing judgements because courts lack effective contempt power, courts can lack the bureaucratic power to enforce

³² *Id.* at 30-33.

³³ Berkman, *supra* note 6, at 26.

³⁴ Clarke, *supra* note 20, at 65-69; Liwei Wang, *The Current Economic and Legal Problems Behind China's Patent Law*, 12 TEMPLE INTERNATIONAL AND COMPARATIVE LAW JOURNAL 1, 35-38 (1998); Berkman, *supra* note 6, at 22-26; Webb, *supra* note 24, at 58.

judgments against administrative entities, and local support of court enforcement may be absent or focused on protectionism.³⁵

Localism that runs counter to the rule of law can undermine enforcement through incidents of corruption and self-dealing, the unwillingness to make and enforce judicial rulings, and a lack of bureaucratic coordination. Localism is a major obstacle to legal reform. As discussed above, administrative enforcement and CCP participation at the local level could help the rule of law to transcend localism.

D. Generality

The notion that laws should be specific about what they permit and prohibit but not particularize those to whom they apply stands against the application of rules to specific enterprises or citizens. For example, a law that was directed toward and intended to restrict the actions of only the corn farmers in a particular county would promote inconsistency and difficulty of administration. Generality of the law (through indifferent application across large numbers of enterprises or citizens) can be used to effectively implement policy outcomes and economic reform and avoid the problems of micro-regulation (high transaction costs and inconsistency).³⁶

E. Congruence

A failure to take into account Chinese social reality has rendered some laws unimplementable from their inception.³⁷ Many Chinese citizens, lacking exposure to a rule of law tradition and reflecting the Confucian philosophy that people fulfill their highest potential when are in accord with the moral order of the universe, distrust and dislike the law and know little about legal theory (in comparison to Western citizens).³⁸ A normative tradition against litigation and for settling disputes through relational channels has historically endured. There is, however, a strong effort underway in China to bring about a greater knowledge of and respect for the law among both officials and ordinary citizens.³⁹ As well, the central government is seeking to create a greater awareness and understanding of legal institutions, and the route of protecting individual citizen rights by way of legal action is being promoted.⁴⁰ These efforts should continue and be increased.

The ongoing implementation of the rights and obligations contained within the LML provides an example of both a growing congruence of China's rural society with the law as well as the

³⁵ Clarke, *supra* note 20, at 65-69; Wang, *supra* note 34, at 35-38; Berkman, *supra* note 6, at 22-26.

³⁶ Clarke, *supra* note 20, at 16.

³⁷ *Id.* at 36.

³⁸ Wang, *supra* note 34, at 29; Lewis, *supra* note 7, at 530.

³⁹ See Dian Tai, *Rural Law Spreading*, CHINA DAILY, June 12, 1999; *Party Calls for Implementing Land Management Circular*, BBC SUMMARY OF WORLD BROADCASTS, June 24, 1999.

⁴⁰ Berkman, *supra* note 6, at 38-40.

failure to achieve the full congruence of the law with the rural social values. A growing congruence is shown by the farmers' knowledge of the 30-year use rights—national publicity has made many farmers aware of the use term and their farming practices are beginning to reflect this awareness. However, few farmers know of the LML's dispute resolution procedures and few county or township officials have created a framework for resolving disputes (as required by the LML). Here the social reality fails to match the legal intent.

Although it is clear that there must be a congruence of laws with social values for the rule of law to be effective and endure, it is also clear that the simple adoption of complex laws from advanced market economies is difficult to achieve. These laws reflect the legal and socio-economic environment in which they evolved. If enacted law is incompatible with existing legal and social values, the parties will likely choose informal alternatives or enforcement will suffer. Because skilled legal drafters capable of appropriately modifying imported laws or creating new laws are in short supply in China and because administrative resources are limited, legal reform and the quest for congruence should probably focus upon modest incremental change. Where possible, existing laws should be amended rather than replaced so as to preserve a frame of reference for officials and judges. The inevitable consequence may be the existence of outdated or ineffective laws for some period. Parties have been seen, however, to develop informal legal substitutes to carry them through the short-term, particularly in market transactions.⁴¹ For example, recent fieldwork has shown that some farmers are transferring their land rights for short terms and without written contracts despite a lack of detailed guidance.⁴²

F. Independent Legal Profession

China lacks sufficient numbers of well-trained, experienced lawyers. In the mid-1990s, there were only about 90,000 lawyers (and a total of only 380,000 legal personnel) in a country with 1.2 billion people. The national government has cited a need for 150,000 lawyers by 2000, and twice this amount by 2010. The current lack undermines law enforcement, makes representation of individual citizens difficult, renders many enterprises unable to represent their interests, hampers the substantive content of court proceedings, creates long court delays, and leaves all levels of government without the legal representation that they need to conduct their activities.⁴³ A strong and numerically adequate legal profession helps promote the rule of law by helping to rectify these noted shortcomings, and by actively reviewing legislative and executive acts.⁴⁴ To meet these needs, adequate numbers of law schools should be established and funded, and legal curricula should offer commercial and business subjects. Specific training might also be provided on the role of the rule of law in market economies. Along with legal training, standards for professional conduct and mechanisms for self-regulation should

⁴¹ See Webb, *supra* note 24, at 55-58; see also Ann Seidman & Robert B Seidman, *Drafting Legislation for Development: Lessons from a Chinese Project*, 44 AMERICAN JOURNAL OF COMPARATIVE LAW 1 (1996).

⁴² RDI farmer interviews in Jilin on June 7-10, 1999 and in Heilongjiang on June 10-12, 1999.

⁴³ Berkman, *supra* note 6, at 29-31; Lewis, *supra* note 7, at 526-529.

⁴⁴ Berkman, *supra* note 6, 29-31; Lewis, *supra* note 7, 526-529.

receive attention. A bar association with the capability to establish a code of ethics and to discipline lawyers for non-compliance should accompany the development of the legal ranks.⁴⁵

⁴⁵ Webb, *supra* note 24, at 60.

V. SUMMARY OF RECOMMENDATIONS

This section provides a summary of recommendations to further institute the rule of law in China and to create legal results more consistent with public desires and central government intent. The recommendations are organized around the characteristics that make up the rule of law.

A. Supremacy and Authority of the Law

1. Create and use laws as tools of policy implementation.
2. Do not use policy as the sole tool to implement itself.
3. Explicitly recognize the supremacy of the law in the Constitution and important umbrella and enabling laws.
4. Explicitly recognize the supremacy of the law in policy statements.
5. Create citizen causes of action (and the forums within which to sue) to permit citizens to help establish the supremacy of the law.
6. Stress citizens' rights to seek redress under the law through publicity and information.
7. Educate local cadres about the supremacy of the law.
8. Expressly prohibit (by law) official arbitrariness and state coercion.

B. Certainty

1. Make all laws prospective and have them address behaviors, cases, situations, and actions that occur only after the passage and publication of the law.
2. Publish all laws and make them available to the common citizen.
3. Give judicial cases precedential value and publish the cases.
4. Make all laws as clear as possible, so as to reduce government interpretation and to make them knowable by the common citizen.
5. Make all laws as complete as possible, so as to reduce private and government interpretation.
6. Make the law non-contradictory.
7. Make the law relatively stable so that public and private actors can rely on upon the law without risk when ordering their behavior.
8. Make all law pursuant to established procedures that allow for discourse and input by both private and public actors.

C. Enforcement

1. Permit and encourage (by law) citizen causes of action to permit citizens to help enforce the laws against each other and against public actors.
2. Give courts sufficiently broad jurisdiction so as to be able to effectively enforce the law.
3. Put effective procedures and institutions in place that provide for a functional, well-trained, independent, and impartial judiciary and for a system of courts that is accessible, relatively speedy, and not costly to use.
4. Require administrative enforcement, implementation monitoring, and sanction or censure of non-complying officials.
5. Obtain and publicize CCP endorsement of enforcement mechanisms.
6. Abjure localism that runs counter to central laws and regulations or that taints the judicial system or enforcement mechanisms.
7. Establish legal aid centers to help citizens learn of their rights and obligations and to help citizens enforce their rights.

D. Generality

1. Craft laws so that specific cases fall under the general laws.
2. Indifferently apply the law across large numbers of enterprises and citizens.
3. Make the law specific about what it permits and prohibits; do not permit the law to particularize those to whom it applies.

E. Congruence

1. Make the laws to correspond to the social reality to which they purport to govern.
2. Stress, by way of publicity and information, the importance of the rule of law and the ways in which it corresponds to China's social, political, and economic reality.
3. Educate local cadres about the importance of the rule of law and the ways in which it corresponds to China's social, political, and economic reality.

F. Independent Legal Profession

1. Develop a strong and numerically adequate legal profession to help promote the rule of law.
2. Establish and fund an adequate number of law schools.
3. Develop standards for professional conduct and mechanisms for self-regulation.
4. Accompany the development of the legal ranks with development of a bar association having the capability to establish a code of ethics and to discipline lawyers for non-compliance.

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