A reply to Jerome A. Cohen

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In his essay titled "A Looming Crisis for China's Legal System," Jerome A. Cohen paints a bleak picture of the Chinese legal system. The courts "are full of corruption" and "political interference is pronounced." However, "there is discreet, if passive, resistance." According to Cohen, legal professionals want to "inhabit a real legal system," thus taking "legal reforms seriously". While this dichotomy between legal professionals and the Chinese Communist Party (CCP) is to some extent a dim reality, I take issue with Cohen's underlying assumption that the principle aim of a legal system is to be neutral and independent. While laudable, this entry point clouds an assessment of where the legal system is moving because it neglects the fundamental role of the political power organizing it: the CCP.

The legal system does not operate in a vacuum. When starting an analysis from the legal system, it is necessary to locate its place within the Chinese polity. Cohen acknowledges this when he writes, "politics continues to control law". However, this control is rooted deeper than he acknowledges. If politics indeed controls law then how is law understood? *Fa* 法 has traditionally been an instrument of governance disconnected from a concept of "rights".[1] As an instrument of governance, law and the legal system have to be judged against the self-professed aims of the CCP: the promotion of economic wealth and social stability.

The aim of economic wealth is set forth in the Preamble of the Constitution as well as in the general program of the Party Constitution. Within Xi Jinping's "Four Comprehensives," strictly ruling the Party, governing the nation according to law and deepening reform all serve the construction a moderately prosperous society (小 康社会).[2] The plan for the establishment of a rule of law government (2015-2020) published in January 2016 highlights the importance of promoting rule of law development for achieving the two aims of "two one hundred years" and the "rejuvenation of the Chinese nation".[3] In February 2016, the President of the Supreme People's Court, Party Secretary and Chief Justice Zhou Qiang writes that courts should internalize the five big development principles to make a positive contribution to the socio-economic development and the realization of the 13th five-year plan.[4] Another recent example is the Notice of the Supreme People's Court to lower level courts to support the One Belt, One Road initiative.[5] The Court subsequently published another Notice stressing the political side of ruling and the necessity to engage in studying the Party Statute.[6] These Notices did not just showcase the organizational dominance of the CCP, but also invariably led to a relative change of priorities, thus shifting the basis of what good judgment means. The examples given are not outliers but represent the norm in policy documents and official discourse. What they show is that the standard against which the legal system should be judged are not abstract concepts such as judicial independence or human rights but rather its effectiveness as an instrument to provide legal support for the CCP's policies.

Social stability is a task the Political and Legal Affairs Committee has taken up. In 2014, Wang Yongqing, the Secretary General of the Central PLAC, argued that rule of law thinking means understanding how to balance powers.[7] This thinking is constructive and acts according to procedure while simultaneously maintaining justice and neutrality. In a speech at a meeting of the Central PLAC, Meng Jianzhu, member of the Politburo and the Secretary of the Central PLAC stressed the crucial role of the PLAC in standardizing the relationships between judges, procurators, lawyers and the police[8].[9] Similarly, analyzing Xi Jinping's speeches and writings, Qiu Shuiping concludes that Xi's thinking on the role and mission of the PLAC can be boiled down to "five factors to focus on more" (五个更加注重), including just law enforcement thinking, construction of

law enforcement, publication and information campaigns to foster public trust,[10] reinforcing the responsibility to enforce the law, and the establishment of a good environment for this enforcement. Quoting Xi Jinping, he emphasizes that the "life line" (生命线) of the PLAC is to be fair and just.[11] Hence, the PLAC's task is to mitigate social conflicts while balancing different interests,[12] rather than intervening in individual cases.[13] As such, it has to create a favorable environment.[14] This means that justice does not flow from a strict interpretation of the law rather than being a constructed synthesis of different influences and interests. Examining stability preservation in a Chinese county, Yan Xiaojun of the University of Hong Kong notes that the Secretary of the local PLAC is in charge of the effort to pre-empt threats to socio-political stability.[15] Yan further points out that in higher developed counties the process of dispersion is highly institutionalized and bureaucratized. In this, social justice is pitted against justice by law,[16] which is in the service of social and political stability.[17]

Given the deep subordination of law to politics, what role is given to lawyers? The theoretical exemplification of this leadership in the legal area finds its evidence in the Fourth Plenum's communiqué on the rule of law from 2014. On the role of law professionals, the Party wants to "develop a contingent of professionals devoted to the socialist rule of law and loyal to the Party, the country, the people, and the law."[18] The Deputy Minister of Justice, Zhao Dacheng, notes that the position and role of a lawyer is to mediate conflicts in society and protect stability.[19] A judicial research task group at the Ministry of Justice suggests basing the assessment of lawyers in their ability to create "positive energy" (正能量).[20] "Positive energy" is a composite of three quantifiable factors: (1) discourse consensus (舆论共识); (2) degree of government recognition (政府认可度); and (3) degree of discourse rationality (舆论理性度).[21]
In practice, this means that legal scholarship is constrained by control of teaching assignments and limits to publications that exist on the university level, but also through Party influence on legal training in universities,[22] unified exam procedures,[23] and political rituals.[24] The Fourth Plenum has put education of the rule of law for citizens on the agenda.[25] This especially pertains to the construction of a law culture.[26] An example for the intimate connection between education, Party, and the courts is the cooperation between the Fourth Intermediate Court in Beijing and the Political and Legal Studies University on the role and tasks of lawyers.[27]

Hence, rather than focusing solely on legal institutions, the oppression lawyers face from the state or government interference into cases, it is perhaps of even greater value to understand this system from within the confines of the aims of the CCP. Law is not all-powerful but on par with other instruments such as ideological education, Party building or economic reform. Thus, the Chinese legal system must be understood holistically as inseparable from the aim of achieving a moderately prosperous society and the CCP's political, ideological and organizational leadership that is outlined in the CCP's Constitution. As the promulgation of norms, this leadership encroaches on the whole of society through the strengthened built-up of grassroots Party organizations, ideology and education, while being politically set into stone within the Constitution.

Floar:
It is always difficult to add something new to any essay written by Jerome Cohen. I still have a vivid memory of the day when – as a student in Italy – I accidentally found *The Criminal Process in the People's Republic of China, 1949–63: An Introduction* in the academic library where I used to work. Many years later, I would be invited to visit New York University School of Law, where I spent four fantastic and extremely enlightening weeks giving talks, and doing research side by side with the greatest names in the field of China Law Studies.

Five years after my visit to New York University School of Law, things have changed, and we have entered a different stage of legal reform. Until 1978, a time when legal legal reform was proceeding at a much slower pace than today, the effects of change could be felt mostly within China's borders only. Today, China has become a global player, one which soon will play an even more significant role in shaping global norms. This fact alone justifies the close attention foreigners are paying to each one of the events that are taking place in different areas of China's legal system as I write. We live in a highly interdependent world, and the dynamics active in China's financial system, property market, and in each one of the other areas of the law, will no doubt set in motion similar processes elsewhere. A butterfly flapping its wings in Beijing can cause a hurricane in the European Union, America, Australia, or anywhere else in the world. This is neither rhetoric not metaphor, but one of the most important scientific truths discovered by American Mathematician Edward Lorenz.

The field of China Law Studies has always been highly pluralistic, and interdisciplinary. An easy categorization would be one that divided the field between the "Optimists", and "Pessimists", classifying the style, topic, and personal preferences of each scholar under neatly drawn categories. Beyond such an easy (and perhaps artificial) categorization, and all the differences in methodology, nationality, topic of research that exist, a minimum common denominator can be found.

Jerry Cohen's article refers to this minimum common denominator in an indirect way, and I am taking upon myself the task of explaining what this minimum common denominator is, and why it is useful. Jerry Cohen's reference are indirect because knowledge about this minimum common denominator is shared by all those who work in the field of China Law Studies. Therefore, the minimum common denominator does not need to be mentioned in an explicit way – it is an integral part of our worldview. It is something all of us know in a very good way.

To oversimplify a very large and complex body of theory (and perhaps even popularize it, since I am writing for a broad audience), the beliefs we all share are that:

(1) Law is an engine of development, broadly understood.
(2) The 'vanguard' of legal development – where my use of this term refers to someone who opens up a new road, and has got no other political connotation – is given by all those who practice law, in different ways.

Law and Development theory has been criticized on many different grounds. Some critics, particularly the most virulent ones, have displayed a greater talent in working on the *pars destruens*, than on the *pars construens* of their critique. If we are to make sense of the world around us, if we are to understand what direction legal reform is taking in China, we need a framework of reference. Despite its flaws, the framework provided by Law and Development theory is the one most widely shared and adopted.

This does not mean that the framework is perfect. As Karl Popper and Thomas Kuhn taught us, science – a broad designation which includes not only the hard sciences, but the social sciences as well – is made by testing and revising theories. Sometimes, these theories may work flawlessly, and yield accurate predictions. But, other times they may yield predictions that differ from reality.

We are at a crucial stage in legal reform, and Law and Development theory postulated that China would embark upon a trajectory of change different from the path legal development has

taken in the real world. This fact alone could raise many difficult questions. As this is a response to Jerry Cohen's opinion piece and Larry Backer's comments, this is perhaps not the best site where an answer to these questions may be attempted.

I will conclude this comment by saying that using theory to predict which path to development a legal system will walk is always very, very difficult. This difficulty does not stem from Law and Development Theory itself. It does not stem from any flaws of this theory. A theory that has survived for more or less forty years of continuous tests and criticism is, as facts prove, a theory which is useful and good. Neither does this problem stems from us – all those who out of intellectual curiosity chose to study how law is in China – or from any limitations in our field.

The difficulty of predicting what will happen in China's legal system ten years from now stems from a problem of an entirely different order. This problem was first raised by David Hume. Is is a problem to which the greatest minds of Western and Eastern philosophy have given only tentative solutions. This problem has a specific name. In Philosophy, it is known as the Problem of Induction. But that, perhaps, must remain the topic of a different discussion, one more suited to my teaching in Methodology.

Backer:
I very much enjoyed and learned much from reading Jerome A. Cohen, "A Looming Crisis for China's Legal System: Talented Judges and Lawyers are Leaving the Profession, as Ideology Continues to Trump the Rule of Law," *Foreign Policy* February 22, 2016 available http://foreignpolicy.com/2016/02/22/a-looming-crisis-for-chinas-legal-system/?utm_content=buffere4be8&utm_medium=social&utm_source=facebook.com&utm_campaign=buffer. I take this opportunity to briefly engage with some of the useful insights elaborated in that essay.

1. "In China, politics continues to control law." This is a curious opening statement. First in all states politics continues to control law. That is the essence of all political systems and especially the democratic republics of the West which are grounded on an ideology that presupposes a vigorous relationship between politics—from the selection of representatives to legislative ad executive offices—to the lobbying which is a means of direct engagement in a *political process that produces law*. Second, if politics does not control law then what does? In our global orders one notes three distinct possibilities. The first is rooted in God; that is the essence of theocratic systems. The second is natural law; but even natural law requires the political acts of consensus and acceptance. The third are systems of traditional law or the systems of law, divorced from executive authority, that was the basis for some of the multi-systemic governance orders of the medieval period in European history. Third, the statement may imply another—the common charge, especially among Western commentators, that China does not have a legitimate system grounded in sound constitutional principles that ought to constrain its political choices through the "law" of the constitution. Ironically *this is itself a political argument*, and one grounded in the belief that there is a *natural law of political organization* in which only one form of democratic system is legitimate and towards which all states must be made to embrace. Americans, especially, appear to be fond of this notion, and its underlying ideology, that their form of constitutional governance is the one to which all ought to aspire. Yet a number of commentators have suggested this this notion of the legitimacy of constitutional constraint, and its underlying ideology, are choices among many, and that it becomes harder to engage in a sophisticated analysis of China's domestic legal order by starting with the overlay of the ideology of a foreign legal order.

2. “The current leadership has rejected many of the universal legal values that China accepted — at least in principle — under communist rule in some earlier eras.” This is also an interesting statement in some respects. Let us take it apart and consider its premises. First the reference to the current leadership is a curious way of referring to the officials who were appointed to their positions in accordance with the governance structures of their system. It implies illegitimacy and amplifies the suggestion of illegitimacy in the first sentence. That illegitimacy is grounded in the statement at the heart of the sentence—that this leadership, these *individuals, have rejected* many of the universal values which the *Chinese state has accepted*. Here further amplification of lawlessness and of personal rule at the heart of the illegitimacy argument that lamentably tends to be the starting point of any Western analysis of Chinese legal and constitutional systems. But the statement it itself redolent with irony. For to support this implication if illegitimacy—it relies on the international commitment of individuals who the Chinese themselves have indicated themselves may have committed the error of cult of personality that the State and Party apparatus has sought to constrain in the years since 1978. Indeed, on the basis of the premises implied in the statement, the very commitments of the state made during the period of quasi personal rule might themselves be less legitimate in terms of the ideology against which these actions are judged, than the actions of the individuals who are the object of criticism in this sentence. As to those universal legal values, one encounters two problems. The first is the easiest. Just as the United States has failed to embrace a number of universal values, those in the International Covenant on Economic, Social and Cultural Rights, so has China refused to adopt the International Covenant of Civil and Political Rights. It is the latter from which many of these “universal values” might have been drawn. Just as the Americans would—and should—reject the notion that the American legal and constitutional system is illegitimate for failure to transpose the International Covenant on Economic, Social and Cultural Rights, so it is odd that China is criticized and its system deemed illegitimate for refusing, in turn, to recognize the International Covenant on Civil and Political Rights. The second touches on interpretation—that China has embraced universal values touching on legality is plain enough, though as a *political* matter and internal to its constitutional order. But these values, in turn, must be interpreted in accordance with the constitutional traditions of the state in which they are embedded. That last point, again ironically, is also a universal value and one much employed by European democracies through a number of doctrines, for example the “margins of appreciation” doctrines of the European Court of Human Rights.

3. “Today, for example, to talk freely about constitutional reform, even within the sheltered confines of universities and academic journals, is not a safe enterprise. And discussion of judicial independence from the Communist Party at the central level is a forbidden subject.” One arrives here at the heart of the argument of illegitimacy, the consequences of which will be the subject of the rest of the essay. But the statement first fails to understand the framework and structures of Chinese constitutionalism, and second it judges that system not by fidelity to its own normative principles, but by the normative principles of a (to the author’s mind universal and superior) set of normative principles (those “universal legal values” referenced in the preceding sentence). It also does not contextualize discussion fairly. As the recent efforts by students at Georgetown University to chill discussion about the legacy of the late Justice Scalia suggests, both the United States and China have been moving toward de facto (if not entirely de jure) structures of sometimes severe control of discussion of fundamental political issues within “the sheltered confines of universities and academic values.” Yet there is something important here—to the extent that such a suppression of conversation itself runs counter to the values and principles of Chinese constitutional norms, then it ought to be a subject of strong criticism. And indeed, it is possible to make that argument on the basis of the principles that constrain both the State and the Chinese Communist Party. But it is the

comparative not the internal, argument that is advanced here. And that is to be regretted, not because the comparative element ought itself to be avoided, but because the failure to arrive at the comparative discussion without a strong basis in the self understanding of the systems being compared, might well weaken the value of judgments that comparison might suggest.

4. "Yet there is discreet, if passive, resistance. Legal professionals are not happy, but they dare not speak for fear of losing their jobs. Some are simply giving up. In Beijing, reportedly, many judges have recently resigned in order to find other work, as lawyers, in business, or in academia." The obvious point first—it is ironic that having suggested that it has become difficult to speak of judicial independence in academia, that judges and other legal professionals are resisting by entering academia. If the object was to move to a societal space where discussion is possible, then these departing judges and legal professionals have chosen badly. If it is meant to register disapproval, it may have only limited effect. It is also possible to suggest that some of the reasons for the resignations may stem precisely from the consequences of judicial reform itself: for example, imposing greater risks on judges for decisions subsequently overturned, a fear of continued (and unlawful) interference by state and CCP cadres, and changing the structures of the judicial function in the ordering of trials. Thus passive resistance may go toward the form of the reforms rather than a discussion of them. And that discussion may not be public says nothing about whether discussions within the CCP itself are suppressed. This is an important distinction. If the CCP's drive toward greater intra-Party democracy is effective, a good measure would be the extent to which these discussions are being had within the Party. As important, the lawfulness of the discouragement of public discussion might be usefully considered in light of the CCP's core obligation to hear the people and them provide responses—the so-called mass line. Both mechanisms provide an excellent vehicle for discussion and criticism—to the extent that the Chinese state or Party apparatus are not living up to the requirements of their obligations. But that discussion is not made here, and need not, in any case, inevitably require the further implication illegitimacy. And, indeed, the rest of the essay appears to move quite usefully toward this sort of engagement. in the

5. The discussion, in the middle paragraphs of the essay, touching on the emerging structures of Chinese legality are both elegant and useful. The long march toward the construction of deep rule of law structures within China, and over a very short period of time (as the life spans of states are sometimes measured), suggests both the embrace of the universal values with which the essay started, but with Chinese characteristics, which the essay resists. And it becomes clear why: the problem is precisely the Chinese characteristics of the universal principles, especially *as applied*.

6. "Yet it's not clear whether China can go on from here to build what we would recognize as a more predictable, reliable, and independent legal system." Here one can see the central insight of the essay. And it is a good one. But it also includes a curious perspective. That curious perspective is revealed in the phrase ""what we would recognize as"—not what the Chinese would recognize as, in accordance with the premises of their own native legal and constitutional orders, but what "we" would recognize. To my mind, that recognition must start first by "recognizing" the system from within its own principles and frameworks. *And only then*, and in that context, might the comparative element add something useful, something powerful, to the discussion. The object of that analysis—the predictability, reliability and independence of the judicial system—is as central to the Chinese system as it is to the American system. Both have encountered contradiction, and crisis, in the implementation of these principles. Yet one does not, merely because of the potential racism in policer enforcement, in the corruption of criminal prosecutions and in the wealth based disparities of

justice in the United States treat the American system as illegitimate. One would instead focus on reform—and target that reform to the closer connection between *American* ideals and *American* realities. The same ought to apply in any Chinese analysis, but tied to Chinese ideals and Chinese realities.

7. And in furthering that project there is as much to criticize about the realities of Chinese progress toward Chinese ideals as there might be in the progress of American progress toward American ideals. The essay powerfully points to some areas worthy of further interrogation: popular discontent, corruption, local protectionism, and *guanxi*. A useful point of comparison here might consider the way that the same sorts of discontents exist in the United States, are tolerated, produce risks or are effective in the U.S. context. The questions raised in the essay—powerful, insightful and well targeted—produce as much discomfort for me in the United States, as it ought to produce discomfort in China. The issue of judicial discontent, then, tell us that reform is an ongoing issue in China, but it does not necessarily provide us with a starting point for analysis within the context in which discontent arises, nor does it point to the sorts of objectives that might alleviate discontent. Indeed, it is not clear that Chinese judges would inevitably always seek the same solutions as their American counterparts, nor should they, except in matters of fidelity to the normative principles on which the state is founded.

8. "Despite his emphasis on "rule of law," Xi wants local courts reliably to submit to the discipline of the central party and judicial officials. Despite his emphasis on "rule of law," Xi wants local courts reliably to submit to the discipline of the central party and judicial officials. He doesn't want local judges to be independent of the central government, but he does aim to stop the local influences that distort local judgments." This insight, powerful as a matter of comparison, nicely illustrates the difficulty of analysis form the perspective of an outsider which presumes that the world view of the outsider is entitled to deference as the grounding point for judgment. It goes to the issue taken up in the next paragraphs of the essay, the "relationship of the party to the legal system." This distracts from am analysis that raises important issues that ought to be of real concern to China. Here is the problem—in a Party-State system like that in China, it is clear that the traditional Western separation of powers constructs do not work, or at least do not work in the same way. Instead, political leadership is vested in the CCP (which is itself constrained by its own constitutional ideology) and administered through the state apparatus. The courts are one manifestation of this state apparatus. To the extent that the courts engage in interpretation of the law generally, or make choices about policies implicated in the interpretation of law, it makes sense for such questions of law to be determined in consultation with the CCP. The equivalent in western systems would be the hypothetical question jurisprudence of some states and the role of the European court of justice. That this interpretative function is not a *judicial* function should be of no moment as long as it is not a means of disguising the exercise of unprincipled personal discretion. On the other hand, application of law in particular cases should lie at the heart of the protection of judicial independent. It is in the meeting point of law, judge and individual litigants that the political element of the state and Party ought to recede. But this understanding is as controversial in China as it would be elsewhere. Still, here we have a more productive router to analysis and criticism—*within the normative parameters of Chinese constitutionalism, and from it outward*. This might provide a more relevant critique of reform in action than any grounded on the simple logic of if it does not operate like ours it must be broken, which is the staple of Western criticism.

9. "The party's role in criminal justice has become particularly evident in the current anti-corruption drive. In dealing with its approximately 90 million members, the party has been more important than the formal criminal justice system. . . . There is little transparency, but

what is clear is that the DIC process is entirely without constitutional or legal authority and is a blatant violation of the constitutional rights of the suspect." Here is the heart of the lawlessness argument that underlies much of the essay. Yet that argument is founded on two fallacies. The first is that the Chinese constitutional system must be read against the template of that of Western constitutions. And the second is that the constitutional authority of CCP cadres lies in the state and not the Party constitution. Unless one takes the position that the only possible organization of political power in states is the template embraced by Western states over the course of the last several hundred years, it is possible to recognize the constitutional element of this purportedly unconstitutional system. One might understand the Chinese State constitution as the expression of the basic line of the CCP in its leadership role over the administrative constitution of the state. Those principles, but not the constitution, may be equally applicable to the CCP, but as principle not as or through the organs of state. As such it may be possible, and perhaps even necessary, to construct parallel systems of discipline to conform to Chinese constitutional systems and to Chinese law. The bottom line—within the parameters of the Chinese constitutional system—there is substantial constitutional and legal authority for the operation of discipline and inspection committees. That raises the more important issue ignored in the essay—the analysis of the compliance by discipline and inspection committees with the constraints of law and constitution. It is possible for discipline and inspection committees to be both lawful and to require reform, and perhaps substantial reform, to ensure that they operate within the constraints of Chinese constitutional principles. That requires something Westerners are loathe to concede—the constitutional status of the CCP and its own constitution. But that also imposes an obligation to apply the CCP constitution constitutionally.

10. "Ironically, China's constitution is, in many respects, a reasonably well-developed document — the problem lies in its lack of enforcement. Attempts have often been made to enforce it in the courts, but, despite periodic wavering, the party has rejected them. The constitution, according to its terms, is to be interpreted and applied by the Standing Committee of the National People's Congress. Occasionally, human rights lawyers and activists have petitioned to obtain the Standing Committee's interpretation, but it is not eager to undertake its authorized role." It is in light of these quite distinct starting points for analysis—one starting from within the normative parameters of a foreign jurisdiction and projecting its values and the other starting from the normative parameters of Chinese constitutionalism and then in a global context—that one sees how the point made here by the essay can be understood in two quite distinct ways. For the essay, the failures to adhere to a particular reading of the formal framework of the Chinese state constitution is indictment enough, and enough to prove the point of the essay—the lawlessness of current reforms (understood as the failures of law within global normative standards applied to China). The failure to comply with the state constitution is indeed a weighty matter, but the solution may not lie within the state constitution, but within the interplay between State and Party constitutions. That is a necessary element to analysis that disappears in the Western embrace of state constitution formalism.

11. "The immediate future looks dim for legal reform in China." This conclusion is inevitable if the ending point of any analysis is the identity of Western and Chinese constitutional models, forms and habits. It is less inevitable if one concedes the possibility of systemicity within Chinese constitutionalism. But it also requires a significant attention to the sometimes large spaces between the Chinese constitutional systems as it is emerging as a self referencing and coherent system, and its application from the highest levels of state to the most humble villages far from the capital. It is to that project that both Chinese and foreign commentators might most usefully devote their efforts.