Professor Jerome Cohen

“Is America's View of China Fogged by Liberal Ideas?”
Critical Issues Confronting China Seminar Series
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Professor Jerome Cohen of New York University School of Law kicks off Harvard Asia Center's talk series "Critical Issues Confronting China" of this academic year. As in many of his previous talks at Harvard University, he continues to focus on the relationship of law to power in China. Traditionally, law in China is viewed and used by the state as a means to punish "evil doers" instead of being thought of as a script to protect the accused from arbitrary government. To what extent has this tradition changed, if any? What is really going on in the legal realm in China after more than three decades of economic reform and opening up?

The title of Cohen's talk, "Is America's View of China Fogged by Liberal Ideas?" comes from a recent article by Christopher Layne in Bloomberg, which Cohen cites at the outset of his talk. Layne argues that unless the U.S. changes its views of China, shaped by the American liberal ideology, and makes reasonable accommodation to a rising China, then these two countries are heading toward war. Layne calls for the U.S. to abandon the belief in American exceptionalism, make real concessions to China on issues of Taiwan and the South and East China Sea disputes, and stop interfering in China's affairs.

Cohen counters, "Those of us who try to observe China objectively over the years are not mere reflections of liberal ideology." He distinguishes the current U.S.-China relations from those of 1950s, when, for example, the Central Intelligence Agency (CIA) actually recruited people to uproot the newly established communist China. In Cohen's view, that was really "interfering in China's affairs", whereas today's situation is fundamentally different.

Cohen highlights several things to look for from the up-coming 4th Plenum of the communist party of China (CCP) in October. Rule of law is expected to be on the agenda, but will the Chinese really change their traditional way of using it for hierarchical control and maintenance of social stability? Is the party merely preaching Rule of Law while practicing "Rule by Law"? Will the Chinese government and the party now submit to Rule of Law themselves, and let the judiciary system become truly independent of the party? What does the Chinese supreme leader, Xi Jinping, really have in mind? No one knows for sure.

What we do know, according to Cohen, is that President Xi has systematically attempted to centralize power by establishing a number of committees headed by himself; very high-level officials, such as Bo Xilai and Zhou Yongkang, have fallen under serious corruption charges. Cohen admits that he is not a fan of Zhou Yongkang because of his
experience with Chen Guangcheng's case, when Zhou was Minister of Public Security. But Cohen believes that anyone, including Zhou, is entitled to fair legal procedures and justice; however the Chinese legal system has yet to get its hands around this case because the Communist Party at the highest level has not made up its mind. Whether China's anti-corruption campaign is a mere vehicle for top leaders to eliminate their enemies remains to be seen.

While China's judicial professionalism has improved in recent years and many enlightened laws have been promulgated, there is still an element of Chinese exceptionalism in all of these improved appearances. At present, the local party and government authorities control appointment of local judges and approve court budgets. Such an institutional arrangement makes it inevitable that local courts be influenced by local governments and party branches, and that system is currently undergoing non-transparent change.

The Chinese party still routinely detains suspects in undisclosed places, and denies their right to access to lawyer and family members. This is why many susceptible officials under the party's corruption investigation commit suicide. Hundreds of lawyers have been detained for their human rights protection, for example regarding freedom of association, as in the case of the New Citizen's Movement, which demands top officials to disclose their financial assets. Such practices run contrary to China's wish to garner respect around the world.

Cohen attributes the outlook and the functioning of today's Chinese government - its institutions and ideology - to several sources. One is the Soviet influence during the 1950s. The Chinese do not like to be identified with the Soviet Union for nationalist reasons and because it collapsed in 1991; nonetheless the Soviet model has an enduring influence over China's institutional framework and its underlying rationale. China's legal system is still fundamentally a product of the Soviet system, but it has another indigenous strand of heritage. Before 1949 in the "liberated areas" under communist control, the Party's supremacy permeated through all aspects of government's decision making, not least the legal aspect, in which certain mass lines must be followed. From that tradition, the Chinese tend to emphasize the role of mediation in settling disputes, and prefer the informality of mediation to any formal legal adjudication.

Near the end of the talk, Cohen asks if there is any relationship between China's attitude toward domestic law and international law. On the dispute over the South China Sea, in January 2013, the Philippines took China to the international tribunal for dispute settlement under the UN Law of the Sea Convention. China emphasizes some exceptions which it made explicitly at the time of signing this law, and argues that this law is not applicable in this case. But Cohen notes that China refuses to make its legal arguments to the competent tribunal that will decide the case. However, recently China has softened its foreign policy regarding the South China Sea, at least on the surface. On the cross-strait relations, Cohen gives much credit to President Ma Ying-jeou of Taiwan.
for significantly improving Taiwan's relationship with the mainland through a series of agreements over the past six years without sacrificing its security relations. But President Ma will step down in two years, and more challenges remain ahead after his presidency.