

Experiential Education in China: Curricular Reform, The Role of the Lawyer and the Rule of Law – January 25-26, 2008

Panel 2: Reflections on Three Weeks: the “China Rule of Law Project: Training Clinical Teachers in China,” July 16 – August 3, 2007¹

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I. “To maintain social justice and law’s authority; and to construct and develop the rule of law:” Translating to Foreigners the Priorities of Chinese Clinical Legal Education

A. An Introduction

Any reflections on the experience of the U.S. clinical contingent in the China Rule of Law summer workshop must start with four key vignettes:

First: On the Sunday before the workshop began, we met with Yu Lei, the leader of the team of interpreters from the School of English for International Business, Guangdong University. The team would be responsible for interpreting discussions among, at any given, time, three to five native English speakers who spoke no Chinese, twelve or thirteen native Mandarin speakers who spoke no English, and three or four native Mandarin speakers with some facility in English; for six hours a day, five days a week, for three weeks. Ms. Yu and her students asked for our speeches and powerpoints for the ensuing days and weeks. We tried to explain: much of the workshop would consist of dialogue among the participants, rather than of lecture. We had prepared outlines of each day’s topics, but would not read from type-written speeches. Ms. Yu and her students left this initial meeting in polite, troubled contemplation.

Next: We move to Professor Cai Yanmin’s exhortation on Day 1.² Presenting as the keynote speaker during the convening plenary session, Professor Cai set forth one primary mission for lawyers, and thus for institutions of Chinese legal education: “...to maintain social justice and law’s authority; (and) to construct and develop (the) rule of law....”³ She emphasized that China’s legal educators should dedicate themselves to

¹ I rely heavily for many of the details of this narrative on my colleague Elliott Milstein’s submission, “Narrative Report for Period June 30 to September 30, 2007: China Rule of Law Project: Training Clinical Teachers in China” (Oct.31, 2007) and on my own contemporaneous notes of the three week workshop.

² Professor Cai Yanmin, Ph.D., Sun Yatsen University School of Law.

³ Professor Cai Yanmin, “The Legal Profession in China and Its Relationship to Legal Education,” Powerpoint presentation, July 16, 2007.

correcting the injustices resulting from China's epochal social changes – its widening divisions between rich and poor, its environmental degradation, its burgeoning bureaucratic corruption, and its workplace exploitation of legions of migrant laborers. Professor Cai summarized that Chinese law professors should strive to aid the disadvantaged, to promote the public interest, to maintain self discipline, and to further social justice; and to educate young lawyers through practice and study in every facet of that program.⁴

Next: at the midway point of the workshop, our Chinese colleagues announced their desire to present a demonstration of a simulated interview, one conducted by a clinic student of a new client. That simulated interview would be followed by a simulated supervision session. The goal was to integrate our preceding sessions about teaching modalities such as simulation, lawyering theory and supervision theory in a way that would show us a deeper reality about Chinese law students, legal practice, and legal problems.

Our colleagues presented their simulation on July 26, in two parts. They dramatized an initial interview between two clinic students and two peasant women, poor migrant workers in a garment factory. As seems to be the case in many Chinese law school clinics, the students met with the clients without the supervising attorney present. As two of the few workers with a primary education, the clients had been deputized by their co-workers to seek assistance from the law clinic. The women worked long hours under poor conditions. Their employer had asserted the absence of any written contract as justification for refusing to pay them for fifteen months. Several other workers had been fired without being paid, allegedly for stealing from the worksite.

In the next stage of the simulation, an enactment of the students' debriefing with their supervising attorney, the supervising attorney asked a great many detailed questions about the clients' workplace situation and the application of labor law to their grievances. When one of the students asked whether the clinic should represent the workers who stole, the dialogue changed. Rather than a discourse of "ask and answer," the supervisor asked the classic, "What do you think?," pushing both students for their views on whether "unworthy" clients deserve representation. Ultimately, the supervisor told the students to

⁴ *Id.*

represent these clients as well. When this portion of the simulation concluded, our Chinese colleagues – out of role – commented on the narrowness of the students’ questions, and suggested that the supervisor should have drawn the students out further in the discussion of the ethics of representation.

In the second part of the simulation, the new “clients” returned. First they offered the “students” a box of fruit. Then they offered the students an envelope. Their village had taken up a collection and charged them to deliver the proceeds to the clinic, to enable the students to resolve their case. The students seemed not to know what to do with this unwanted donation. The clients had no problem at all with suggesting the appropriate course of action: that the students use the money to take “someone” out to dinner; or that they turn it over to the supervising attorney, (“the prestigious professor”) who would know the right judges to give it to. In the ensuing demonstration of the follow-up supervision session, the supervising attorney made it clear that the students should return the money.

Last: During the last week of the workshop, two colleagues from ZGU circulated an essay that reflected on whether they could reconcile their deeply felt obligation to reinforce the “rule of law” in China, the professional ethic of “client-centeredness,” and the clinical pedagogy of “non-directive” student-centeredness, exemplified by the often annoying technique of answering a question with a question. At first reading, the commentary seemed to question whether the ethic and the pedagogy undercut the core mission of Chinese lawyers and legal educators. Subsequent explanations defused our initial concerns. None of us differed about the importance in our own cultures of promoting respect for a just legal order through our practice, our choice of clients, and the implicit and explicit messages we send to our students.

B. Lawyers as Visionaries, Educators and Exemplars: Concern and Commitment in Teaching and Modeling the Rule of Law

These episodes represent only a few among a flood of recollections. Each illustrates some facet of our relationship with our Chinese colleagues that we could have anticipated in general, yet not have predicted in the particular:

- Despite the best of intentions, in placing a high value on informal and spontaneous exchange, we initially ran afoul of conventions of interaction between interpreter and interpretee. The metaphor, logistics, and process of translation would weigh heavily on us throughout.

- Our colleagues' simulations revealed both a gratifying integration of our methods, but also some ambiguities. Were we watching dramatizations of what their students and they actually do? Of what they want to do?

- Our colleagues' concern about the relationship of clinical methodology to establishing the rule of law underscored the urgency of Professor Cai's message. When we in the United States bemoan the inaccessibility to our clients of legal and political systems that we criticize as "rigged," we are not thinking about an envelope stuffed with bills. That envelope was not a metaphor. I for one was surprised at the candor with which our colleagues' simulation depicted the rawness of corruption in the legal system and – perhaps more troubling – their clients' expectation and acceptance of corruption. Official indifference is more familiar to us than venality.

Throughout our three weeks, we were to hear and to observe many expressions of our new colleagues' passion for their complicated mission. All told, nineteen teachers from Chinese law schools teachers, five of them women, participated in the clinical portion of the workshop.⁵ They represented five universities (one, China University of Politics and Law, with multiple law faculties), all with different concepts of their mission in Chinese legal education and all with different histories of engagement with clinical legal education.⁶ Our colleagues were as diverse as their institutions. Some were emerging onto their law school faculties with their doctoral dissertations barely cold from

⁵ Milstein, *supra* note 1 at 2. The participants from the Washington College of Law (WCL) Clinical Program included Susan Bennett, David Chavkin, Robert Dinerstein, and Elliott Milstein. Other U.S. faculty who collaborated with the WCL faculty in the design and presentation on site of the clinical track of the workshop were Jennifer Lyman (George Washington University), Beth Lyon (Villanova), and Sarah Paoletti (University of Pennsylvania.)

⁶ Tsinghua University and Beijing University, two of the schools enfolded in 1952 into our partner school China University of Politics and Law (CUPL), participated in the initial Ford Foundation round of funding and programmatic assistance to develop clinical programs in 2000. Xu Shenjian, Remarks, Afternoon Plenary Session, China Rule of Law Project (July 17, 2007)(on the consolidation of faculties into CUPL;) Yang Xinxin, *Clinical Legal Education in China: A Briefing Packet* 6 (Ford Foundation Beijing, 2004)

the photocopier. Some were facing their first assignments in clinical teaching after years in academic legal research, aware that they lacked training both in clinical teaching and in the practice of law. Others were twenty-year veterans of clinical practice and teaching. Still others came new to teaching from well-developed backgrounds as practicing lawyers.

Despite these variations, at different points and in different ways, our colleagues expressed common aspirations: to labor in their role as lawyers and as legal educators to use and teach law to fight social and economic injustice. During our first session of meeting as a clinical working group, Bob Dinerstein elicited from the participants a list of goals for their clinical programs. Most would have resonated with any clinical teacher in the U.S.: to assist students in developing both skills and their concept of professional role, to teach collegiality, to teach “good values,” to choose work appropriate to the students’ level of preparation, to narrow the transition between thinking like a student and thinking like a lawyer, and to narrow the gap between theory and practice.

But our colleagues also expressed some goals more urgently: to move students to action, and to expose students to the suffering of the poor and the disabled. Our colleagues’ interview and supervision simulation exemplified only a few of the many compelling legal services needs to which they referred continually throughout the workshop, and to which they felt a strong obligation to respond.⁷

Given these priorities, our colleagues spoke frequently and pessimistically about their students’ willingness or ability to take responsibility for their clients and for their education. The introduction of American clinical legal education – in fact, of any model of classroom participation rather than passive reception of information - juxtaposes the hugely contrasting methodologies of reflection in action vs. “stuffing the duck”⁸ We were cautioned at various times throughout our contacts with Chinese faculty both in December 2006 and during the summer workshop that Chinese university education did not only fail to equip, but might hinder, students in accepting clinical methodology. Rote

⁷ For a recent description of the severity of the problem of exploitation of internal migrant labor in Beijing, and of the varieties of legal services response to the problem, see Margaret Y.K. Woo, Christopher Day, & Joel Hugenberg, *Migrant Access to Civil Justice in Beijing*, 4 LOYOLA U. CHI. INT’L L. REV. 101 (2007.)

⁸ Pamela Phan, *Notes from the Field: Clinical Legal Education in China: In Pursuit of a Culture of Law and a Mission of Social Justice*, 8 YALE HUM. RIGHTS. & DEV. L.J. 117, 128, note 55 (2005.)

delivery and memorization of doctrine is the standard delivery method for university education. Our Chinese colleagues voiced concern over and over again about their students' competence and willingness to engage fully in simulations and active learning, and to apply the lessons to client representation.

Several of our Chinese colleagues commented at length on more basic problems, those resulting from their students' inexperience and immaturity. Although law can be and is studied as a post-graduate degree, in China most law students and all law students enrolled in clinical courses are undergraduates. By definition, they are younger and presumably less experienced. As is the case in most United States schools, students elect and are not required to enroll in a course of clinical legal education. Our colleagues frequently expressed skepticism about their students' ability to assume responsibility for the client's welfare, let alone exercise independent judgment and initiative in doing so.

I raise these issues not because I think that we and our Chinese colleagues differ greatly in our desire to integrate activist values into our clinical teaching and practice (or in our anxiety that our students might not be up to the task.) In many ways, their concerns about their students' fitness to take on the daunting obligations of the reformist Chinese lawyer explain their willingness to entertain new and challenging methods of teaching. I do think that we underestimated the extent to which our colleagues feel pressure both to use law against injustice and to strengthen the belief that law can be used in that way: to establish what Pamela Phan has referred to as China's "culture of law."⁹ Our colleagues must teach their students to walk a fine line: to use every form of informal dispute resolution and influence at hand, given that the formal mechanisms are inaccessible or undependable; and at the same time to press for predictable, transparent processes. We do teach our students to consider what might be persuasive to an adversary in negotiation or to a tribunal. But rarely do events require us to discuss the advisability of developing a case theory that considers the openness of a decision maker to influence peddling, or a case strategy that includes the deployment of cash in an envelope.

II. Teaching Teachers: Avoiding Clinical Imperialism, Acknowledging the Pressure of Priorities

⁹*Id.* at 125.

Those of us who participated in the “clinical” track of this workshop recognized that the working title of our internal planning document, “Establishing and Enhancing Clinical Legal Education in China,” was a misnomer. Many had preceded us in “establishing and enhancing clinical legal education in China;” the experiences of those who have gone before are invaluable. Others already have constructed clinical curricula, complete with syllabi, simulations and assigned readings. We received and acted on useful advice. We were urged to “get them (our Chinese colleagues) on their feet,” to engage them in in-class simulation for two purposes: to demonstrate a favored active teaching methodology that they might use with their students, and also to dislodge them from their own patterns of passive learning. We adopted another recommendation to show our colleagues how they might teach from students’ cases; again, implemented via eliciting several scenarios and then using facts from one or two as the basis for classroom presentations and simulations.¹⁰

Despite the wealth of precedent and predecessors, it seems that each working group of clinical teachers at each conference or workshop constructs its own relationships each time. We wanted both to benefit from received wisdom and to encounter our new colleagues as they were, with their individual strengths and institutional relationships. Our preparation for the workshop also focused on the desire to avoid “clinical imperialism.”¹¹ We did not want to assume too much about the applicability of our methods to our colleagues’ practices and needs. We knew that differences in resources of all types, and in legal and educational culture and institutions, might render our lessons interesting but useless.

That said, we proceeded in belief in trans-cultural lawyering principles, such as client-centered lawyering; and trans-cultural lawyering skills, such as interviewing, counseling, and the construction of a persuasive case theory, necessary to effectuate those principles. As did our predecessors, we assumed the superiority of active teaching and active learning methodologies in conveying these principles and skills. We also assumed

¹⁰ Our colleague Jennifer Lyman was the source of much of this invaluable practical wisdom.

¹¹ See, e.g., Leah Wortham, *Aiding Clinical Education Abroad: What Can Be Gained and the Learning Curve on How to Do So Effectively*, 12 CLINICAL L. REV. 615, 651-654 (2006)(summarizing criticisms of the rigidity of previous “rule of law” programs;) Phan, *supra* note 8 at 134 (noting concerns about whether the hallmark of U.S. clinical legal education – the focus on the individual client’s case – would provide an adequate vehicle for reforming Chinese legal culture.)

the superiority of the prevalent clinical structure of class, supervision and “case rounds,” in which the classroom component introduces key concepts first through interactive classroom dialogue, then through in-class role-playing, and then through simulation; in which case rounds elicit group discussion of the application of the concepts to students’ cases; and in which the teacher’s meetings with the student to discuss her cases and her performance furthers the connection between the classroom lessons and the student’s development of her sense of herself as a lawyer.

We packed our agenda – two sessions a day, five days a week, three weeks – with a combination of presentations and demonstrations in the morning, and small group meetings in the afternoon. Our structure replicated and demonstrated the structure of clinical programs and clinical methodology. During the morning sessions, we elicited raw material and reflection from the whole group on their clients, students, obstacles, and aspirations. Then we transformed that data into the bases for presentations about lawyering principles and skills, eliciting participation from our Chinese colleagues through dialogue. Then we used the less exposed and more intimate small group sessions in the afternoons to deepen our conversations, and to encourage our colleagues to practice supervision techniques using simulations we had derived in class from their information about their clinics’ cases.

To generalize, our Chinese colleagues seemed engaged by the structure and by the method. Ultimately, as predicted, the workshop was most successful – meaning that the participants were the most energized and learned the most about each other - when our Chinese colleagues “got on their feet:” not to execute some exercise that we constructed out of their materials in service of our agenda, but to show us their priorities, obstacles and strengths. In retrospect, more time spent on our presentation meant less time for revelation. The balance was difficult to calibrate.

V. Conclusions and Recommendations

A. Experiential Teaching/Learning as a Transcendent and Transferable Methodology

A final image of the workshop persists: that of the intrepid Ms. Yu and her senior colleague, Ms. Lu Shen (by then, Inez and Luisa to us) arranging themselves side-by-side of each actor in the Chinese professors’ simulation and in each subsequent performance,

keeping up with the dialogue so fluidly that the interpretation was almost simultaneous. The anxiety about proceeding without a prepared script was gone.

I have thought about the possibility that the most successful collaboration we experienced throughout the three weeks was with our interpreters. Their transformation was dramatic, even joyous. They thoroughly absorbed the process of active learning, declaring to us repeatedly at the end of the workshop how much they would appreciate being included in our plans for the future.

How can we explain our interpreters' aptitude for active learning? Our relative mutual comfort in direct communication with each other accounts for some of this evolution, but not all. A more likely explanation: what happened to our interpreters affirms some basic tenets of adult learning theory. More than any other participants in the workshop, they were involved constantly in every phase (and phrase) of the work. The sum and substance of their task lay in providing and receiving continuous, immediate feedback: they would tell us whether the meaning of our English idiom was clear enough to translate, we would clarify our speech (and thus our thinking), they would revise their translation. These processes of mutual performance, assessment, and revision of performance were instantaneous. Over time, interpreters and interpretees adjusted their methods to each other. In short, we both learned by doing, commenting, and assessing.

Based on his research, and on his experience with Chilean law schools and other law schools in the "global south," our colleague Rick Wilson has suggested that experiential pedagogy may succeed in inculcating all the lessons we want to teach because it employs students and teachers in focused, and personalized dialogue, reflection and assessment. Students absorb and apply doctrine, assume the responsibility of role, and appreciate ethical dilemmas more fully when they are actively engaged in discourse with their teachers. When experiential pedagogy incorporates that kind of exchange, it can transcend cultural and linguistic differences. That transcendence is possible because the cognition of learning is common to all learners.¹² We could find no better or hopeful example of this principle than in the metamorphosis of our interpreters.

B. Social Justice as a Transcendent and Transferable Skill

¹² Richard J. Wilson, *Three Law School Clinics in Chile, 1970-2000: Innovation, Resistance and Conformity in the Global South*, 8 CLINICAL L. REV. 515, 570-3 (2002)

I may have overstated the case in presuming that all clinical teachers in the United States share our Chinese colleagues' priority to make social justice an essential element of the clinical curriculum. It is perilous to generalize anything beyond our immediate experience about either Chinese or U.S. clinical teachers. The variation of approaches to the question of whether social justice can, should be, or is taught through clinics in either country has been well entertained in clinical scholarship.¹³

Our immediate past experience with our Chinese colleagues demonstrated that, at least for them, social justice education is a priority. Clinical legal education in both cultures provides plentiful "teachable moments" for the inculcation of habits of social justice. In either legal culture, social justice education begins with intentionality of intake. Whether students, professors, or students and professors together decide which clients to represent, the opportunity to apply, analyze or construct the criteria for selection provide critical teaching moments through which students learn about institutional, pedagogical and societal priorities. Students in these settings also learn about "difference," about how dissimilarities between themselves and their clients in ethnicity, class, gender, or education may generate value judgments and impede understanding.¹⁴ They also see more clearly their own privileged status.

While, as I mentioned earlier, pressures on lawyers in China and in the United States to establish real process of law are in no way comparable, the necessity for public interest lawyers to learn how to practice "in the shadow of the law" is. For very different reasons, neither Chinese nor U.S. lawyers can rely solely on conventional or predictable legal processes to assert their clients' access to income, employment, food, shelter or medical care. Chinese lawyers may resort to informal dispute resolution because tribunals are unreliable or inaccessible, or because the law is non-existent or developing; American lawyers increasingly resort to coalition building, community benefits agreements and other non-litigative strategies because courts or legislatures have stripped away law's

¹³ See Phan, *supra* note 8; see, e.g., Jane H. Aiken, *Provocateurs for Justice*, 7 CLINICAL L. REV. 287 (2001); Sameer M. Ashar, *Law Clinics and Collective Mobilization*, forthcoming in 14 CLINICAL L. REV. (2007) (describing variations among U.S. clinical programs in their emphasis on social justice initiatives) (cited with permission of the author.)

¹⁴ We included Susan Bryant's *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33 (2001-2), which recommends exercises to detect and correct assumptions that students may make about their similarity to or difference from their clients, in a set of translated law review articles which we distributed to our Chinese colleagues last summer.

power to secure basic economic rights.¹⁵ In either situation, clinical legal educators must teach flexibility, agility, creativity, and willingness to endure uncertainty as skills critical to any practice of law, but particularly essential to the representation of clients who are poor, unpopular, and oppressed.

C. The Rewards of Proceeding without a Net

Our interpreters ultimately felt the exhilaration of improvisation. One obvious reason for this change was the absence of a language barrier. At the very least, our experience taught us the impossibility of success in any such exchange without the constant assistance of highly skilled interpreters. Inez's and Luisa's presence and counsel at every point were critical.

When we proceed to the workshop in July, 2008, we too might want to consider the merits of improvisation: of a structure that allows for more unstructured exchange. We all know that some of the most valuable interactions during any conference occur after hours, when participants enjoy the freedom to learn about each other in more relaxed settings. Thus, we particularly felt our interpreters' absence during our scarce moments of unscheduled time, during the mid-day recesses and in the evening. On the last day of the program, two of our colleagues from CUPL invited us to accompany them on a sightseeing visit to a museum in Guangzhou. That field trip metamorphosed into a walk in the park, and then to a celebratory dinner at a Mongolian hot pot restaurant (an added bonus: it was free beer night.) We learned more about our colleagues' backgrounds, aspirations, and frustrations in that one long afternoon and evening than we had in the preceding three weeks. Undoubtedly, without the shared formal discussions of the preceding three weeks, that interchange would have been unlikely; without the English proficiency of one of our two companions on this outing, it would have been impossible.

We have much yet to digest from the lessons implicit in the box of fruit, or the farmer's poisoned ducks and fishes (a real clinic case upon which we drew frequently for our in-class exercises during the workshop.) We frequently articulated regret and bewilderment that we did not know more about our Chinese colleagues' lives as teachers

¹⁵ See, e.g. Scott Cummings, *Mobilization lawyering: community economic development in the Figueroa Corridor*, from AUSTIN SARAT, STUART A. SCHEINGOLD (EDS), *CAUSE LAWYERS AND SOCIAL MOVEMENTS* (2006.)

and lawyers. We did not understand how we could have allocated what seemed like so much time to eliciting information about their clinics, their students, their clients, and their law schools and yet have pinned down so little. For that lapse, we cannot wholly blame the language barrier. As our colleagues Beth Lyon and Sarah Paoletti found when they visited the campuses of ZGU and CUPL this past December, it may be that there is no substitute for seeing our colleagues in context. If academic calendars will not allow for that luxury, then we must provide in our structure more time for our Chinese colleagues to present to us what they know, who they are and what they do.