

Can Legal Reform Foster Respect For Human Rights In China?

Remarks to the Congressional-Executive Commission on China

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Thank you Senator Baucus, Congressman Bereuter, and the other members of the Commission for inviting me to speak here today.

I have been working on legal reform and human rights in China for the past twelve years. I have done this in a number of different capacities. For four years, as a Program Officer in the Beijing office of the Ford Foundation, I made grants in China to support research and advocacy on human rights and related legal issues, to strengthen legal education and training, to promote village elections and other forms of popular participation, and to establish China's first nongovernmental legal aid centers. I have been an adviser to the United Nations High Commissioner for Human Rights on how to develop its new program of assistance for Chinese legal reform. I have been an analyst and consultant on Chinese legal developments for human rights groups here in the United States. And in 1999, I helped found The China Law Center at Yale Law School, where in addition to teaching and conducting research on Chinese law, we are developing and carrying out cooperative legal reform projects between U.S. and Chinese legal experts, many of them with important human rights implications.

As Congress recognized in establishing this Commission, it is vitally important that China make progress on human rights. This is important first and foremost for Chinese themselves, who have long lived under political systems that denied them fundamental freedoms and are now navigating a difficult transition toward a market economy and, hopefully, a more open society. But it is also important for the rest of the world. China's emergence as a global power is one of the most important geopolitical events of our lifetimes. It is essential that the China that emerges from this process is one that respects individual liberties and its internationally binding commitments on human rights. Progress on human rights in China is also vital to the United States. Our relationship with China is one of our most important bilateral relationships. It cannot be truly cooperative until the human rights situation in China improves.

Based on my experiences over the last twelve years, I believe that legal reform can help foster respect for human rights in China. Prior witnesses before this Commission have described the progress that China has made in developing its legal system since 1978, as well as the great deficiencies that still exist. As their testimony has shown, law is playing a vastly expanded role in China today. Whereas under Mao law was viewed solely as a "tool of the proletariat dictatorship," it is now being called upon to play multiple roles in economic and social life, including defining rights and establishing institutions and procedures for their protection. In many respects Chinese law still falls far short of international human rights standards. We see this every day in the Chinese government's use of the legal system to suppress political dissidents, religious groups, labor activists, and many others. However, as paradoxical as it may seem, law is simultaneously the principal medium through which Chinese are engaging in debate and experimentation about human rights and the closely related issues of the predictability, transparency, and accountability of state action.

The increasingly explicit human rights dimensions of Chinese law are reflected not only in theory but also in a range of legislation adopted since the late 1980s. Some of the most important legislation has been in the area of administrative law, which seeks to guide and even limit state power in China's increasingly market-oriented society. The 1989 Administrative Litigation Law created the first procedural basis in Chinese history for private parties to seek judicial review of the acts of state agencies and officials. This was followed in 1994 by a statute governing compensation for damages resulting from illegal state actions and in 1996 by the Administrative Penalties Law, which seeks to strengthen procedural safeguards for persons subject to administrative sanctions. Over the course of the early 1990s, China also adopted a series of new laws on the rights of traditionally disadvantaged groups such as women, children, and the handicapped. The protection of human rights has even become a legitimate objective in highly sensitive areas such as criminal justice, where efforts have been made to curb police powers of detention, enhance the role of defense lawyers, and make trials more open and fair.

These new laws contain serious flaws in conception and face many obstacles in implementation. Reformers within China are working to highlight these problems and to press for further change. In the meantime, Chinese themselves are making increasing use their expanded legal system. The number of cases in the Chinese courts, including successful suits against the state, has risen dramatically in the last decade. In addition, new groups have emerged to advocate for improved legal protection of rights, often through legal aid centers for women's rights or administrative litigation or the environment. As this shows, legal reform and other developments in China are creating increased rights consciousness and higher expectations for the legal system. This is a very important trend, for law should not only foster respect for human rights. It should also be a means by which individuals can demand respect for human rights.

Another recent trend in legal reform in China with important implications for human rights is the increased focus on structural reform. With greater use of law to order economic and social affairs and protect rights, more attention is being paid to the institutions necessary to make that law work in practice. In the last few years, recognition of the seriousness of the problems legal institutions face in China (including corruption, incompetence, and outside interference) has triggered widespread interest in "judicial reform." Encompassing prosecutors, police, and lawyers, as well as the courts themselves, "judicial reforms" adopted or under consideration include increasing the transparency of legal proceedings, restructuring the relationship between the courts and local governments to reduce interference in the judiciary, modifying the internal structure of courts to give trial judges more power, allowing lawyers to play a more active role on behalf of their clients, and generally broadening the role of courts in adjudicating disputes, including suits against the government. These reforms touch on fundamental and often sensitive issues, including the relative independence and power of different institutions. As such they are complex and controversial and their implementation has sometimes been partial at best. But the fact that they are now being considered and debated shows that legal reform in China has reached a new stage of potentially great significance for the protection of human rights.

In addition, as law has become more central to life in China, the resources for further legal reform have become stronger. Whereas China had only two functioning law schools at the end of the Cultural Revolution, today it has more than three hundred. The scholars at these law schools and at legal think tanks represent a tremendous source of intellectual talent and reformist energy. In the last ten years, Chinese legal scholars have pioneered work in human rights theory and constitutional law, established China's first public interest law centers, and spearheaded legislative advances in criminal procedure and administrative law. Following China's signature of two major international human rights treaties in 1997 and 1998, many of them are now openly advocating further reforms to bring Chinese law into conformity with international standards. Two decades of legal reform have likewise profoundly altered China's legal professionals. While problems of judicial corruption and incompetence remain quite serious, judges in China today are far better educated and more sophisticated than twenty years ago, especially at higher levels of the system. The transformation of the bar has been even more dramatic. Whereas China had less than 2000 lawyers in 1978 and only 30,000 as recently as 1990, by the late 1990s the number had topped 100,000. In the course of these developments, the old concept of the interchangeable "political-legal cadre" has given way to a stronger sense of the distinctive

institutional interests and outlooks of judges, prosecutors, and lawyers. Together with greater awareness of the way in which their foreign counterparts work, this has stimulated important reforms, especially in criminal cases, to differentiate more clearly among their respective roles and thereby increase the transparency and fairness of the legal system.

The acceptance of human rights as a legitimate objective of the legal system, the growth of legal consciousness, the increasing emphasis on structural reform, and the emergence of a large number of sophisticated legal experts committed to rights - these are all significant advances that mean legal reform in China can and will continue to foster respect for human rights. But we must also honestly recognize that law as a force for change in China has real limits: new legislation is often vague and leaves too much discretion to lower-level officials; implementation is often incomplete and founders for lack of complementary reforms; the skills and integrity of legal professionals are often suspect. Moreover, while modern law carries with it values of rights, predictability, and accountability, it tends to reflect changes in society as much as it drives them. Fostering respect for human rights in China will thus depend on many other factors besides just law, especially given China's socialist legacy (which made individuals dependent on the state for every aspect of their lives) and its much longer authoritarian legacy (which has inculcated a tradition of deference to political authority).

In addition, while there is a significant and growing "bottom-up" factor to legal reform in China, China is still in many ways a "top-down" society. There must be the political will among Chinese leaders for greater rights protection if that is going to become a full reality. Such will does exist in some areas, in part because even China's leaders are not immune to broader social trends, and in part because it is in their interests to restrain wayward officials. But there are still many areas in China where law is simply irrelevant, where the legal system is manipulated by the Chinese Communist Party to target its opponents, or where legal "reform" actually serves to deprive individuals of their internationally-recognized human rights.

Thus while law in China can foster respect for human rights, it will not necessarily always do so. This means that we, in seeking to promote human rights, must think carefully about where and how to support legal reform efforts in China. We should be choosing to work in areas of the Chinese legal system where there is real potential for progress. There are numerous possibilities, but at present, some of the most promising work is in the area of "judicial reform," including steps to enhance the transparency, competency, and fairness of criminal and civil cases and strengthen the courts' ability to review state action under the Administrative Litigation Law and other statutes. Further efforts should also be made to promote the development of administrative law to increase the openness and predictability of government action and enhance opportunities for Chinese to participate in rulemaking and decisions that affect their interests.

We must also pick our Chinese counterparts carefully, to ensure that they are both influential in legal reform and genuinely committed to rights protection. In order to have the greatest impact, outside support should focus on institutional reforms that cut across a broad range of legal fields and provide a structural basis for human rights protection. Since institutional change is complex and slow, even under the best of circumstances, outside support for legal reform in China must also be sustained, providing reformers with a range of practical alternatives that they can tailor to the unfolding reform process.

Finally, support for legal reform within China must be combined with other approaches, including forthright criticism of the many respects in which Chinese law does not meet international human rights standards. The past has shown that, when well informed and combined with targeted support for reformers within China, outside criticism can play a significant role in promoting positive change in the Chinese legal system.

I believe that this Commission can play a particularly valuable part in these efforts. Through the work of its members and professional staff and through hearings such as these today, the Commission can document the course of Chinese legal reform, its current state, and its achievements and shortcomings in protecting human

rights. This will create a baseline for monitoring the Chinese legal system and criticizing its failings in an informed and effective manner. At the same time, the Commission can create a road map of the possibilities for further reforms and the particular ways in which people and organizations in the United States and elsewhere can contribute meaningfully to legal reform and human rights in China.

I thank you again for inviting me to speak today and I look forward to answering any questions you may have.