

# **Statement submitted to the Congressional-Executive Commission on China**

**by Stanley Lubman**  
**Visiting Scholar, Center for Law and Society and Lecturer in**  
**Law, School of Law, University of California (Berkeley)**

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I welcome the opportunity to submit this statement to the Commission. I have been specializing on Chinese law and related matters since 1963 as a scholar of Chinese law teaching at universities in the United States (Stanford, Columbia and Harvard, in addition to Berkeley) and Europe (the Universities of London and Heidelberg) and simultaneously, since 1972, as a practicing lawyer representing foreign clients in China. For twenty years I headed the China practice at two American law firms (1977-1993) and an English firm of solicitors (1993-1997). A third and growing dimension of my involvement with Chinese law has been work on projects related to law reform. During the 1980s I participated in the activities of the Committee on Legal Educational Exchange with China, funded by the Ford and Luce Foundations and USIA, which brought Chinese law teachers to the United States for study and research; since 1998 I have participated in law reform projects in China under the auspices of the Asia Foundation, where I am advisor on China legal projects.

## **SUMMARY**

Twenty years of reforms have led to remarkable transformations in China's society and economy, and have also driven an extensive program of legal reform. The Chinese leadership, desiring to accelerate economic reform, has recently agreed to strengthen legal institutions in order to comply with obligations that China has assumed upon accession to the WTO. Sustained effort over a period of years will be needed for China to be able to meet its WTO commitments regarding trade-related laws.

Wider legal reform, extending beyond trade-related matters, is also contemplated, but faces considerable difficulties. Efforts must be made from the top down, although official policy and many officials have less than a firm commitment to the rule of law; efforts are required from the bottom up, although Chinese civil society is weak and undeveloped. For protection of human rights to expand, the leadership must energetically support legal development, and legal culture among officials and the general populace must change. Broadened political participation, too, could deepen the extent to which legal institutions can protect human rights in China.

The policy of the United States should simultaneously aim at a number of goals:

The U.S. should energetically promote legal reform, including the establishment and strengthening of institutions that will buttress the protection of rights by Chinese. Congress should advance beyond the small commitment it has hitherto made to funding U.S. assistance to Chinese law reform, and support well-planned efforts by foundations, NGOs and universities. At the same time, Americans should not assume that Chinese institutions must be judged by the extent to which they resemble our own.

The U.S. should condemn human rights abuses by bilateral diplomatic means and in international forums. At the same time, American criticism and insistence on change in Chinese institutions should be tempered by recognition of the limits on U.S. ability to change internal Chinese conditions.

American perspectives on China should not focus on single issues or clusters of issues. Balance is necessary among human rights and other issues in Sino-American relations that are significant to U.S. national security. Critics of human rights abuses should avoid demonizing China and thereby complicating the shaping of policy on other questions.

## CHINESE LEGAL REFORM SINCE 1979

### Accomplishments

Reform has brought a fundamental new orientation toward governing China, in which formal legislation has become the major framework for the organization and operation of the Chinese government. To implement economic reforms, since 1979 China has generated an extraordinary volume of legislation. Illustratively, legislation has been used to frame commercial activity; to express policies of state macroeconomic control and their implementation; to give legal recognition to new rights and interests; and to create a framework for direct foreign investment. China has acceded to an extensive range of treaties and international agreements that signal its participation in a global economic community; legislation has been used for a host of purposes related to building the necessary infrastructure for a marketizing economy, as in regulating basic industries, setting standards for environmental protection, and sanctioning violations of intellectual property rights. Institutions intended to curb administrative arbitrariness have been created, and codes of criminal law and procedure have been promulgated and revised.

The courts have been reconstructed. Formerly scorned as "rightist" institutions at the end of the 1950s and as "bourgeois" during the Cultural Revolution, they have been rebuilt in a four-level hierarchy. Courts are increasingly being used as the forums in which rights created by legislation are asserted by citizens against each other and, to some extent, against state agencies. The bar, too, has been established; there are probably now over 150,000 lawyers. Although most of the 8,000 law firms are state-run, the number of "cooperative" firms is growing.

### Obstacles

Ambivalence in leadership policies on the rule of law Chinese policy toward the rule of law reflects an ambivalence that is sharply illustrated by President Jiang Zemin's statement in February, 1996, when he stated Let China be ruled by law, a phrase that was given extensive publicity throughout China. Unfortunately, that was not the entire sentence: In the next phrase, Jiang exhorted all to maintain the long-term stability of the nation, that is, preserve the leading role of the Chinese Communist Party (CCP) over Chinese society.

Just as symbolically, in 1999 China's National Peoples Congress amended the Chinese Constitution to insert the rule of law into that document as a leading principle for the first time. It co-exists there, however, with Marxism-Leninism, Mao Zedong Thought and Deng Xiaoping Theory, all doctrines that insist on CCP dominance.

The persistence of pre-reform institutions of the Party-state;  
ineffective implementation

In some areas, the authoritarianism of the Party-state continues. Chinese criminal law and criminal procedure remain heavily dominated by the police and by Party influence over individual cases; recurrent campaigns to punish crime distort the operation of the criminal process. Police still have the power to send alleged offenders against certain laws to labor reeducation camps for as long as three years. Both within and outside the criminal area, much legislation has only been hesitantly and incompletely implemented.

### Deficiencies in the judicial system

The operation of the courts is seriously deficient. The judiciary is inadequately professionalized: Only some ten percent of all judges have a complete four-year legal education; many judges have previously served in the army or in other jobs that did not qualify them for their current tasks. Corruption is

widespread. Moreover, the extensive decentralization of power that has taken place since 1979 has led to the phenomenon that Chinese call local protectionism. Because local judges are appointed and the courts are financed by local governments, when deciding disputes the courts often favor local enterprises on which the local governments depend for their revenues. In addition, the courts are frequently criticized for their unwillingness to enforce judgments rendered by courts elsewhere in China against local defendants.

The difficulty of enforcing judgments has surfaced not only in disputes among Chinese parties, but in attempts by foreign parties that have obtained awards from foreign arbitration tribunals or from the China International Economic and Trade Arbitration Commission (CIETAC). In one case of which I have extensive personal knowledge, the Zidell Valve Corporation of Houston, Texas obtained CIETAC awards against two separate Chinese defendants that were found to have sold millions of dollars of flanges to Zidell that did not meet contract specifications. When the Chinese parties refused to pay the amounts awarded, Zidell brought timely suit in the appropriate courts in Beijing and Taiyuan. The courts violated Chinese law by raising issues that had been definitively disposed of by the arbitral tribunals; by failing to report the cases to the Supreme Peoples Court; and by misapplying Chinese law to decide in the defendants favor a spurious claim that the proper legal representative of the plaintiff had not authorized the suit. The courts, including the Supreme Peoples Court, to whose attention this case has been called, remain unresponsive to protests against the blatant obstruction to the plaintiffs attempt to exercise its rights to enforce Chinese arbitral awards. This case is not unique, and the courts plain violations of law and procedure suggest the persistence of ongoing problems in the functioning of the courts. Although central government leaders have endorsed proposals to reform the courts in order to remove or lessen the impact of local protectionism on their work, judicial reform has not yet been decisively advanced. It may be desirable for the central government to finance the judicial system, but there is considerable question whether it has the necessary financial resources.

## **RECENT CHINESE COMMITMENTS TO DEEPEN THE RULE OF LAW**

Chinas accession to the WTO has brought Chinas leaders to realize the need to deepen of law reform with regard to trade-related and certain other laws. They seem willing, too, to engage in wider legal reform, but some obstacles will impede the further strengthening of institutions.

Uniformity of compliance with WTO obligations Chinese commitments in the Protocol of Accession include an undertaking to ensure that local government regulations would conform to Chinas WTO obligations. Some impetus will be given to uniform administration by implementation of the Chinese undertaking to establish a mechanism under which individuals and enterprises can bring to the attention of the national authorities cases of non-uniform application of the trade regime, (Protocol of Accession, Art. 2 (A) 4) but it may be difficult to bring about effective national action to modify or annul local deviations from WTO standards. Nationwide uniformity may be a distant goal, and

Transparency The Chinese government has undertaken not to enforce unpublished laws, formerly common. It has also promised that China shall make available...upon request, all laws, regulations and other measures pertaining to or affecting trade...before such measures are implemented or enforced. (Protocol of Accession 2 (C)1) Compliance with this provision will require legislatures and administrative agencies to make public, before they become effective, a much wider range of rules and regulations than they have before. The term rules and regulations is used here generically to cover both laws promulgated by central and local governments and various forms of rules issued by administrative agencies; in practice, the terminology is more complex and the relationship of various norms to each other is very disorderly. Attempts are under way to put greater order into the system, and the formulation of legislation is being transformed from the passive translation of policy into a specialized professional activity.

Compliance with the undertaking quoted above also would import a high degree of transparency into law-making and rule-making processes that have been impenetrable to outside gaze for decades. China has never required a consultation phase in these processes, and is just beginning to experiment in this area. The Legislation Law adopted in 1999 provides generally for legislative bodies and administrative agencies that are drafting legislation or rules to engage in consultations with concerned citizens or organizations. Similarly, the State Council has recently adopted regulations on the drafting process of its rules that provide for in-depth, on-the-spot investigations and studies of the main issues in the draft regulations; when the vital interests of citizens, corporations, or other organizations are involved, hearings may be held. A similar provision is included in regulations on the drafting of rules by State Council agencies.

These provisions reflect the Chinese leaderships willingness to begin to consider ways of channeling inputs from Chinese society. Preliminary reports suggest, however, that some experimental hearings have involved only carefully chosen participants. Considerable time will have to elapse for experimentation with these new procedures to unfold -- and for officials to change their mentalities so that they will accept comment on proposed rules from outside the drafting bodies.

**Judicial Review of administrative acts** One of Chinas most ambitious undertakings upon accession to the WTO is its commitment to institute judicial review of administrative actions:

China shall establish or designate and maintain tribunals contact points and procedures for the prompt review of all disputes relating to the implementation of laws, regulations judicial decisions and administrative rulings of general application... Such tribunals shall be impartial and independent of the agencies entrusted with administrative enforcement (Protocol of Accession 2(D)1)

It is unclear whether the main tasks of scrutiny of administrative decision making will be performed by courts. If so, apart from the weaknesses that have been mentioned above-low professionalization, local protectionism and corruptionthere are others as well, because the powers of the courts are limited.

The Administrative Litigation Law that became effective in 1990 permits affected parties to sue administrative agencies in the courts for alleged illegal application of an administrative rule, and some litigation has ensued. A more recent administrative punishment law places limits on which organs have power to create different types of punishments; specifies mandatory procedures for imposing different types of punishment; requires that decisions to impose punishments must state the reasons therefor and requires agencies to comply with procedures set out in law.

Courts may only review the legality, not the reasonableness of the acts complained of. However, Chinese regulations are intentionally drafted in vague language to give maximum discretionary authority to agencies, and as a result it may be difficult to establish that a regulation was actually violated. As long as an administrative action is technically consistent with the rule it applies, the act may not be challenged in the courts. The courts are at the same level in each locality as other administrative agencies; in the past, in interpreting administrative regulations, the courts have usually deferred to the agencies own interpretations of their rules. If a court finds a rule to be inconsistent with a higher-level regulation it may not invalidate it; although it may refuse to apply it, such non-application hardly ever occurs.

The courts also lack the power to decide on the inherent validity of administrative rules, regulations, decisions or orders of universal application. Under the Chinese Constitution and legislation doctrine, legislatures are superior to the courts in power; only they may invalidate legislation and administrative rules, while courts may not. The Legislation Law of 1999 provides for only limited challenge to national or local legislation or administrative rules, by written request to the Standing Committee of the National

Peoples Congress. Governmental organizations -- but not citizens -- may challenge State Council regulations by written statement to the State Council itself; anyone may address challenges of department rules to the State Council; and anyone may the administrative enactments of large cities.

Administrative law reform is under way. For example, the State Council is drafting a law on licensing intended to address the need to define--and limit -- the powers of local governments and agencies to issue rules for granting, suspending or modifying licenses, including procedures to give affected parties ample opportunity to present their views, in some cases in the context of a public hearing. Work is actively going forward on drafting a statute that is intended by the Legislative Affairs Commission of the NPC to be an administrative procedure act for China. A crucial unresolved issue is whether the powers of the courts can be increased to bear the burden that such a law would place on them.

The requirement of uniform, impartial and reasonable administration of law  
Chinas commitment to standards in the GATT derived from the rule of law is further stated in its acceptance of a key provision in the Protocol of Accession (Art. 2 (A) 3):

China shall administer in a uniform, impartial and reasonable manner all its laws, regulations, rules, decrees, directives, administrative guidance, policies and other measures pertaining to or affecting trade in goods, services, trade-related aspects of intellectual property rights or the control of foreign exchange.

The major obstacles that lie in the path of implementation of this provision should be clear: The links between the courts and administrative agencies and the defects in the courts that have already been noted here, as well as local protectionism and corruption, all seriously dilute the state capacity of PRC institutions to meet this general standard.

## **HUMAN RIGHTS**

The foregoing review of some salient characteristics of Chinese legal institutions provides a context for considering the system from the perspective of human rights. A sober review of accomplishments to date suggests that the a legal system in China is still a work in the making, and that realization of even trade-related legal reforms will require considerable time and effort. This is all the more true with regard to human rights.

I believe that the protection of human rights can expand as certain legal institutions are strengthened. Expansion of the nascent legal aid scheme, judicial reform and reform of administrative law and procedure would all bring obvious benefit. Progress will depend, among other things, on the pace of economic reform and the stability of the current regime or whatever post-Communist regime might succeed it. Moreover, it is wise to be cautious about the extent to which economic development can generate legal and political reform. It is a necessary condition for such reform, but it hardly makes such reform inevitable. Critical, too, will be the extent to which institutions of Chinese civil society can grow and seek to improve protections for human rights.

Americans should also keep in mind that whatever form legal institutions and rights-based protections might take in the future, they are likely to vary from our institutions and from the ideals that we often project onto China. The legal traditions of the two nations are very different, and transition away from totalitarianism is rife with uncertainties.

I emphasize here the importance of legal culture, by which I mean nothing more than the attitudes toward law of both officials and the general populace. The Chinese legal tradition did not know any doctrine of individual rights, and ill-fated Republican rule did little to plant the seeds of rights-based doctrine. After

the PRC was established in 1949, it did not advance any notions of individual rights. The protection of legal rights, much less human rights, is a new transplant brought to inhospitable Chinese soil. Regardless of any foreign assistance or pressure, much work must be done by even the most willing government to nourish that frail transplant in China. This is not to say that conceptions of human rights cannot grow in China. Quite the opposite; after almost thirty years of traveling and working there, I am sure that many Chinese understand very well that the rule of law is a desirable alternative to governmental arbitrariness and lack of protection for individual rights.

The task of strengthening rights-based doctrine is all the more difficult because of a crisis in values that is likely to continue for years. Economic reforms have weakened traditional ideas of morality, already bruised by Communist rule, and faith in socialism and in the rule of the CCP. No system of values have taken their place. Social cohesion is threatened by social inequalities that have been created and aggravated by economic reforms; moreover, foreign access to Chinese markets will increase economic distress further in some sectors of the economy and foster the social instability that the Chinese leadership seeks to avoid.

In the face of the enormous social flux in the worlds most populous nation, Americans, policy-makers and otherwise, have no choice but to be modest about what the United States can do to influence internal conditions in China. Such restraint should be complemented by emphasizing Chinese conduct that affects U.S. national security, and which should therefore assume first priority in diplomacy. Nonproliferation, the status of Taiwan, the future of the Korean peninsula, Chinese participation in the war against terrorism, Chinese diplomacy in South Asia and missile defense are only the most obvious issues.

Those members of Congress most concerned about human rights abuses might reconsider the approach that has allied them with other members who regard China as a future enemy and who disdain engagement. Demonizing China will not contribute to enhancing institutions that can protect human rights, while engagement in legal reform projects could possibly have constructive effects that would be welcomed by many Chinese and by foreign observers.

### **AMERICAN SUPPORT FOR LAW REFORM IN CHINA**

Congress should seriously consider funding meaningful and well-planned projects for the building of Chinese legal institutions. For all the vocal insistence from Congress on improving Chinese legality, Congress has been reluctant to appropriate funds to support such institution-building. Presidents Clinton and Jiang agreed on a program of legal cooperation in October 1997, but Congress provided no financial support for it. Since then, fortunately, Congressional has expressed willingness to support rule of law programs.

NGOs and academic institutions can contribute to law reform efforts. Recent experience of the Asia Foundation is an example. The Foundation decided in 1998 to promote administrative law reform, and obtained support from the Smith Richardson Foundation for a three-year program of Sino-American consultation. As director of the project, I formed a committee of leading American experts on administrative law and on Chinese law. Our Chinese counterparts are members of the administrative law drafting group of the Legislative Affairs Commission of the National Peoples Congress. Our committee reviewed and commented on a draft law on licensing (1999); sent specialists to lecture on administrative law (2000); and organized a conference on the impact of the WTO on Chinese administrative law (2001). We now hope to help the same group in its work of drafting an administrative procedure law.

With Chinas accession to the WTO, Chinese interest in foreign training and consultation on important areas of law has grown. The Asia Foundation is now financing a program for training officials of the

Legislative Affairs Office (LAO) of the State Council on the requirements that WTO accession now imposes on China. The local offices of the LAO will be responsible for reviewing proposed local laws and regulations for compliance with WTO standards. In March, 2002 a group of American WTO experts will lecture in Beijing; thereafter, Chinese officials will visit the U.S. to learn about U.S. administrative law; in a third stage, after returning home, Chinese officials will meet U.S. counterparts to discuss practical problems of making new Chinese laws and administrative rules consistent with WTO requirements. The Asia Foundation experience summarized here illustrates the contribution to incremental progress that can be made by NGOs, foundations and universities.

Congress ought to support other programs that combine expertise on specific areas of the law with familiarity with Chinese circumstances; that promise to have significant effects; that involve sustained interaction between Chinese and American personnel; and that emphasize repeated contacts with the same counterparts over time rather than one-time trips or delegations in either direction.

### **CONCLUSION**

I have presented a mixed view of Chinese legal reform during the last two decades, and have outlined current uncertainties without predicting a likely outcome. It seems clear, though, that U.S. refusal to assist legal development will contribute nothing positive to the prospects for the growth of the rule of law in China or, even more remotely, to the further dilution of authoritarianism. Although the eventual outcome is in doubt, Chinas accession to the WTO may mark a new stage in its legal development. The United States ought now bring its influence and assistance to bear on furthering that legal development.