

Statement
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To the Chairmen and Members of the Commission:

I am honored to have been invited to testify at this, the first public hearing of the Congressional-Executive Commission on the People's Republic of China, given your charge to monitor compliance with human rights and the development of the rule of law in the PRC at this critical time in our bilateral relationship.

My fields of specialization are Chinese law and legal history, international trade (including the World Trade Organization), and the legal profession. I have been involved with legal development in the PRC from the early 1980s onward when, together with Professors Randle Edwards of Columbia University and Dr. Stanley Lubman, among others, I established the first regular program of instruction in American law in the PRC and the first sustained program bringing Chinese legal professionals to this country for advanced training. In addition, I have taught in China; provided advice to our government, non-governmental organizations, foundations, and others about Chinese affairs; and had extensive occasion to observe Chinese legal development.

In this statement I first offer a brief overview of my understanding of Chinese legal development - which I see as necessary for the realization in China of internationally recognized standards of human rights, but not a substitute for that vital end. I then turn my attention to American and other foreign efforts to assist legal development before concluding by suggesting directions in which attention might be focused. As time and space are short, this statement is perforce a summary for which elaboration may be found in the materials cited in my endnotes.

The Chinese Legal System

To assess the Chinese legal system today, we need to appreciate just how far legal development has come and how far it has yet to go before it meets any widely accepted definition of the rule of law.

Over the past quarter century, the PRC has been engaged in the most concerted program of legal construction in world history. At the end of the Cultural Revolution (1966-1976), the PRC's modest legal infrastructure lay in near ruin - with but a skeletal body of legislation, a thinly staffed judicial system, and a populace having scant awareness of law. Today, the PRC has an extensive body of national and sub-national legislation and other legal enactment, concentrated on, but not limited to, economic matters, and has joined major international agreements covering trade, the environment, human rights, intellectual property and a host of other issues. Moreover, as Dr. Lubman and Professor James Feinerman of Georgetown elaborate in their statements for this hearing, in acceding to the WTO, the PRC has agreed to bring both its pertinent substantive laws and their administration into compliance with international norms. The Chinese judicial system now has a nation-wide presence, with specialized chambers to address criminal, civil, economic, administrative and, in some instances, intellectual property law questions. Whereas a generation ago, China had fewer than 3,000 lawyers and approximately a dozen law schools, today there are over 125,000 lawyers and hundreds of law schools, with law a very popular subject for university study and well over 150,000 candidates yearly taking the bar exam. Chinese citizens now avail themselves of the formal legal system in an unprecedented manner, with, for example, some 5.5 million new litigations annually, and widespread

public interest in at least some legal issues, as was demonstrated, for instance, by the extensive and vigorous national debate surrounding proposals that led in 2001 to the revision of the marriage law.

These and other accomplishments need to be taken seriously, but so do the many respects in which the legal system continues to fall well short of meeting any widely accepted definition of the rule of law. As the United States Department of State's latest annual country report shows in detail, the legal system has yet to prove itself adequate to protect the rights of all Chinese citizens. Accounts, for example, of arbitrary arrests, torture and mistreatment while in official custody, and denial of the basic procedural protections that Chinese law is intended to provide abound - as has to a degree been acknowledged by senior PRC legal personnel. The re-education through labor system, whereby the police may sentence detainees for periods of up to three years in labor camps, continues - notwithstanding the objections of some PRC legal scholars and the international human rights community, including Dr. Mary Robinson, the United Nations Commissioner for Human Rights. And it is no secret that there are serious problems when it comes to efforts by citizens to avail themselves of such basic internationally recognized freedoms as those of association, assembly, and religious expression.

Turning our attention inward, the legal system itself is in need of substantial improvement. Efforts have been made, with foreign assistance playing a part, to nurture professionalism through intensified training, the promulgation of higher standards for legal personnel, and attempts to root out official mal and misfeasance, but much more remains to be done. The judiciary clearly does not enjoy the degree of independence from political authority that we associate with the rule of law. Judges typically are chosen from among Party members at the same time that actions of the Party itself are not reviewable in a court of law. Corruption plagues the legal system as it does Chinese society more generally - indeed, this is so pervasive a problem that one influential PRC economist, Professor Hu Angang of Qinghua University, estimates that it may have consumed as much as 15% of GDP in recent years. The educational level of legal personnel remains far lower than it should be, with some observers estimating that even today only roughly one out of every ten judges has a four year university degree in law. The legislative and rule-making processes are expanding to hear from a broader spectrum of interests, but they remain heavily top-down, typically lacking regular opportunities for in-put by ordinary citizens. And enforcement of the law can be problematic, as demonstrated last autumn when the Supreme People's Court temporarily put a hold on lower level courts accepting shareholder suits for damages and as is manifested by what Chinese authorities themselves describe as "local protectionism," meaning undue favoritism shown by the courts at local levels to the "home team."

The Role of Foreign Legal Assistance

The past two decades have witnessed a range of efforts from throughout the democratic world to assist Chinese legal development, although it remains modest in view of the enormity of the challenge (particularly if we wish to engage ordinary citizens as well as governing elites). In the case of the United States, the bulk of assistance for legal development until the late 1990s came from foundations, universities, non-governmental organizations, business, the bar, and private citizens, although our government did play a part through programs such as the Fulbright and the Committee on Scholarly Communication. Over the past five years, the US government has begun to take more of a role in legal development, first through the Clinton administration's rule of law initiative and more recently through both the Bush administration's choice of a lawyer with expertise on China as ambassador to Beijing and through the administration's recent request for and Congress's allocation of funds for Chinese legal development. Outside of the United States, support for Chinese legal development has tended to come more substantially from governmental sources rather than civil society, as evidenced by official developmental assistance provided by the governments of the United Kingdom, Germany, Canada, and the Scandinavian countries, among others. Additionally, multilateral organizations such as the World Bank, the Asian Development Bank and the United Nations Development Programme have also provided support.

As might be expected given their varied genesis, American programs have not been uniform in their approach and objectives. Some have accentuated linkages with the Supreme People's Court (which oversees the judiciary administratively) that have resulted in new training opportunities for Chinese judges. Others have counseled Chinese legislative drafters and writers of regulations (typically on an informal basis) and helped them establish data banks of Chinese and other laws. Yet others have focused on assisting Chinese law schools by providing otherwise unavailable materials about American and international law, enabling future leaders of Chinese law to study in this country, and arranging for a range of Americans to lecture on law (including constitutional law and human rights) in China. And still others have concentrated on civil society, offering guidance about legal aid, training advocates for the disadvantaged, and supporting centers concerned with matters such as women's rights and environmental justice. Although also diverse, non-US origin programs have tended to provide more support to official actors and, especially in the case of multilateral organizations, to concentrate on issues pertaining to economic law.

Given that there is no way scientifically to isolate the variable of foreign assistance from all the other factors influencing Chinese legal development, any assessment of it must in some measure be subjective. My own sense is that in general such assistance is of value. It is, for example, enabling relatively open-minded Chinese in and beyond legal circles to deepen their understanding of legal institutions in democratic societies and so to have a broader array of choices from which to think about change in their own society. It is acquainting their less open-minded colleagues with just how out of step China is with the norms of nations they may wish to emulate economically (if not politically). And it is providing financial, moral and even political support for China's emerging civil society (including entities that might otherwise have a hard time surviving).

In taking account of such accomplishments, it is important, however, not to overstate what we can expect from such assistance in the absence of meaningful political reform in China. Moreover, candor requires that we acknowledge problems that have cropped up with respect to such programs. Most notably, these include attempts by Chinese authorities at times to legitimate repressive activity by cloaking it in a veil of legality, and the wastage of funds used to support ill-conceived or ill-managed programs.

Directions

I strongly believe that we in the United States should increase our involvement in legal development in the PRC. In saying this, I appreciate that there are serious limits to what any kind of foreign legal assistance can accomplish and that there is a need to be staunchly vigilant against the possibility of such assistance being misused. Nonetheless, such involvement is worthwhile for many reasons. It has been and can be used to help some who suffer unfairly today, as borne out by the work done via the center for women's rights at Beijing University or the center for environmental justice at the China University of Politics and Law. It can buttress Chinese who are serious about building a better legal foundation for securing fundamental human rights, such as those bold individuals who have criticized the Party's role in the judiciary or others who have sought for years to have the law of criminal procedure redrafted so as to afford substantially greater protection to defendants. And it can aid in implanting ideas that may over time bear fruit, for whatever the nature and pace of political change in China, the Chinese people will need to draw far more than they now do on law and legal institutions if they are to achieve a more just and freer society.

As we think about further involvement in Chinese legal development, I would urge that we be mindful of the following:

1. Legal development is necessary for the realization of internationally recognized standards of human rights in China, but it is not a substitute for that vital end. Some here and in China may find it tempting to accentuate the former rather than the latter on the grounds that it less likely to come across as confrontational. That would be a mistake. As I demonstrate in my scholarly work, the two

are so interwoven that an insufficient commitment to fundamental rights risks undermining the integrity of legal development more generally. Indeed, the analogous point might be made about the ways in which economic, legal and political development are related. China's engagement with the world economy clearly has fostered overall prosperity and a greater appetite for economic and other freedoms, but it also is yielding enormous inequality and unleashing widespread social problems that without better legal and political institutions through which ordinary citizens can express legitimate grievances pose serious challenges to social stability and to that very prosperity.

2. As we seek to promote legal development, we need to hold true to our ideals, but not necessarily the particular forms through which we may seek to realize those ideals at any given moment in our own nation. All too often well-intentioned Americans present what we do today (or what we like to think we do) as the only alternative to China's current circumstances. I think that we make a stronger case for legality and pluralism, and better empower change in China when we help the Chinese to appreciate the different choices that different free societies make in their efforts to attain the ideals of rule of law and of democracy that all such societies share. We need, for instance, to be mindful that approaches we may advocate in our country, given our ready access to lawyers, may not accomplish the same ends given the relative inaccessibility of China's rural populace to professional legal assistance and given the greater role that administrative solutions are likely to play there for some time to come. In this vein, I might also add that candor about our own shortcomings, as well as pride in our accomplishments, is helpful in countering the objections of Chinese authorities that we are too ready to take their nation to task. The Enron debacle, for instance, has not gone unnoticed in China and, in fact, has become an issue in debates between the China Securities Regulatory Commission and the Ministry of Finance over the former's efforts to require use of foreign accounting firms.
3. We need to think further about both the targets for and sources of our legal assistance. With regard to targets, it is not realistic to think that we can advance the rule of law in China without engaging those who oversee and operate the legal system even as we stress the importance of legal institutions attaining far greater independence. Thoughtful and honest foreign assistance can be of value to Chinese legal personnel searching for ways in which to address the endemic problems discussed above. At the same time, however, it is absolutely essential that those providing foreign legal assistance break out of what has been an excessively top-down focus on a small number of Beijing-based entities and endeavor to reach out far more than it has to China's emerging civil society - so that our actions match our words about law being an instrument for citizen empowerment. With regard to sources, the fact that most American involvement has been a product of our civil society has, in my view, been a strength - making possible a genuine diversity of approaches and demonstrating that in our country universities and the bar are not agents of the government. Nonetheless, given the importance of this undertaking and the difficulty of securing greater private support, substantially greater federal support would be very helpful.
4. Finally, we need to appreciate just how massive an undertaking this is - for China will not attain a rule of law without a further change in the way in which Chinese citizens think of themselves and their relationship to authority. To note this is not to subscribe to cultural determinism - I think that ideas of justice and fairness ring as true to Chinese as to Americans. Instead, it is to urge that we understand that this is not an area amenable to quick fixes and to commit ourselves to work that will prove difficult and in which the ultimate shape of success and the credit for it will principally reside with the people of China.

I thank you for inviting me to offer this statement and stand ready to answer any questions you may have regarding it.

¹ The most comprehensive overview of this phenomenon in English is Stanley B. Lubman, *Bird in a Cage: Legal Reform in China After Mao* (Stanford University Press, 1999). My own views are elaborated in, inter alia, William P. Alford, "A Second Great Wall? China's Post-Cultural Revolution Project of Legal Construction," *Cultural Dynamics*, vol. 11, p. 193 (1999).

² These debates included considerable and heated discussion about appropriate roles about the interplay between the interests of the state and individual autonomy. I discuss these debates in a forthcoming paper entitled "Have You Eaten? Have You Divorced? Debating the Meaning of Freedom in Marriage in China."

³ The United States Department of State, *Country Reports on Human Rights Practices - 2000, China* (February 23, 2001).

⁴ See, "China: Procurator General Calls for Crackdown on Exploiters of Position," Xinhua [New China] News Agency, available in English via BBC Monitoring Asia Pacific - Political, December 27, 2000.

⁵ See, for example, Chen Guangzhong & Zhang Jianwei, "The United Nations International Covenant on Civil and Political Rights and China's Criminal Process," *China Jurisprudence*, No. 86, p. 98 (December 1998).

⁶ Professor Jerome Cohen of New York University Law School estimates that "over 90% of the country's approximately 180,000 judges are Party members." Opening Statement of Jerome A. Cohen before the first public hearing of the U.S.-China Security Review Commission, Washington, D.C. (June 14, 2001).

⁷ Hu Angang, *Zhongguo: Tiaozhan Fubai [China: Fighting Against Corruption]* (Zhejiang People's Publishing House, 2001).

⁸ Statement of Donald C. Clarke Before the U.S.-China Security Review Commission, Washington, D.C. (January 17, 2002).

⁹ The opening up of legislative drafting to a broader range of interests is discussed in William P. Alford and Benjamin L. Liebman, "Clean Air, Clear Processes? The Struggle over Air Pollution Law in the People's Republic of China," *Hastings Law Journal*, vol. 52, p. 703 (2001).

¹⁰ See Supreme People's Court, "Guanyu she Zhengquan Minshi Peichang Anjian zan bu Shouli de Tongzhi" [Notice on Temporarily Not Accepting Securities Cases Involving Civil Actions for Compensation], September 21, 2001. This and other issues of law enforcement in the PRC are treated in the Statement of Professor Clarke of the University of Washington, *supra* note 8.

¹¹ See, for example, the writing of Professor Jacques deLisle of the University of Pennsylvania. Jacques deLisle, "Lex Americana?: United States Legal Assistance, American Legal Models, and Legal Change in the Post-Communist World and Beyond," *University of Pennsylvania Journal of International Economic Law*, vol. 20, p. 179 (1999). See also Allen Choate, "Legal Aid in China," (The Asia Foundation, 2000) and Aubrey McCutcheon, "Contributing to Legal Reform in China," in *Many Roads to Justice: The Law Related Work of Ford Foundation Grantees Around the World* (Ford Foundation, 2000).

¹² A recent appropriation of more than 5 million pounds for a single project intended to beef up the Chinese legal profession is described at Frances Gibb, "Lord Woolf Goes to China," *The Times of London*, July 24, 2001.

¹³ William P. Alford, *To Steal a Book is an Elegant Offense: Intellectual Property Law in Chinese Civilization* (Stanford University Press, 1995).

¹⁴ Richard McGregor, "Creative Chinese Accounting Works for Andersen: Scandals Involving Local Firms are Boosting the Big Five," *Financial Times*, January 28, 2002.