

**CONGRESSIONAL-EXECUTIVE COMMISSION ON CHINA
ROUND TABLE**

**"CHINA'S HUMAN RIGHTS LAWYERS: CURRENT CHALLENGES AND
PROSPECTS"**

OPENING STATEMENT

JEROME A. COHEN

**U.S.-ASIA LAW INSTITUTE, NYU LAW SCHOOL
ADJUNCT SENIOR FELLOW, COUNCIL ON FOREIGN RELATIONS**

JULY 10, 2009

DIRKSEN SENATE OFFICE BUILDING 628

I am delighted that the Congressional-Executive Commission on China is devoting today's Round Table to a discussion of China's human rights lawyers.

LAW WITHOUT (HUMAN RIGHTS) LAWYERS?

In 1977 Victor H. Li published a stimulating book entitled "Law Without Lawyers". China's Communists, he suggested, because of their country's distinctive tradition and culture, might blaze a new trail toward modernization, one that, unlike their former Soviet model, had little need for lawyers.

Yet Deng Xiaoping and his colleagues soon demonstrated that they thought otherwise. After Chairman Mao's death ended the chaos of the Cultural Revolution, China's new leaders altered the Soviet model for economic development, but resurrected its political-legal system, including its reliance on "socialist lawyers". Indeed, during the past three decades, the post-Mao leadership has increasingly expanded the roles of lawyers to help settle disputes, promote the evolving "socialist market economy", foster international business cooperation and legitimate the punishment of serious offenders.

In principle, contemporary Chinese lawyers are no longer Soviet-style "state legal workers" but independent professionals tasked with protecting citizens, including those at odds with the state. In fact, however, although their numbers, education and responsibilities have burgeoned, Chinese lawyers, like their Soviet predecessors, remain subject to significant restraints.

The Law on Lawyers amended in 2007 seemed to promise greater autonomy to human rights lawyers. Yet their plight has actually worsened in the twenty months since the 17th Communist Party Congress. The reconfirmed Hu Jintao-Wen Jiabao leadership placed veteran Party officials, without legal education or experience but with a strong police background, in charge of the Ministry of Justice and the courts as well as the Central Party Political-Legal Committee that instructs all legal institutions. These new appointees seem determined to eviscerate the country's "rights lawyers", who constitute a tiny fraction -- perhaps one percent -- of China's almost 150,000 licensed lawyers.

Local officials under the Ministry of Justice, and the local lawyers associations they control, quietly press activist lawyers not to participate in a broad range of "sensitive" matters or at least to follow their "guidance". Such cases include not only criminal prosecutions of alleged Tibetan or Uyghur "separatists", democracy organizers and Falun Gong or "house church" worshippers, but also claims against government for many kinds of misconduct and corruption, birth control abuses and forced eviction and relocation.

Even civil cases involving land transactions, environmental controversies, collective labor disputes and compensation for tainted milk and earthquake victims are off limits or controlled. The refusal to allow famous lawyer Mo Shaoping to defend public intellectual Liu Xiaobo against criminal charges arising from Charter '08's call for political reform is only the best-known recent example of this interference.

Lawyers who fail to heed such "advice" suffer many sanctions.¹ Their license to practice law is frequently suspended or, as in many current instances, their local lawyers association simply fails to give the endorsement required for annual license renewal. Their law firms are coerced to dismiss them or risk being closed, as some have been, and Party organizations within law firms have been reinforced.

Often, ex-lawyers who remain undeterred from assisting controversial clients are prosecuted and sent to prison by authorities who stretch the vague language of criminal law to cover their actions. Unfrocked Beijing lawyer Gao Zhisheng was convicted of "inciting subversion". Former Shanghai lawyer Zheng Enchong served three years for "sending abroad state secrets". Shenzhen lawyer Liu Yao's four-year sentence for "destroying property" was only reduced after an extraordinary petition from over 500 lawyers persuaded the authorities to end his 16-month detention.

In each case conviction means permanent disbarment and loss of livelihood. Moreover, even self-taught "barefoot lawyers", who are not licensed but play an important role in the countryside, have been sent to long prison terms on trumped-up charges, as in the case of the courageous blindman, Chen Guangcheng.

Perhaps most troubling is the frequent, physical intimidation of "rights lawyers". Today is the 156th day since the "disappearance" of Gao Zhisheng. His torture while

¹ For a selection of essays and materials relating to sanctions against human rights lawyers, see e.g., "Rule of Law," *China Rights Forum* (No. 1, 2009).

previously detained makes many fear that he is now dead, although the Chinese Government ridiculously claims he is free on probation.

Many lawyers, while seeking to meet with clients, have been beaten by police and their thugs. The well-known professor/activist Teng Biao not only lost his license to practice law but also was kidnapped and threatened by police. I can testify from various personal experiences that many "rights lawyers" are closely monitored and restricted in their movements.

Since release from prison, Zheng Enchong's life has been a nightmare of incessant summoning for questioning, illegal house arrest and casual police beatings, in addition to harassment of his wife and daughter. When six policemen barred me from visiting him and I asked for their legal authority, they merely kept repeating "We are police". A sequel to Victor Li's book might appropriately be entitled "Lawlessness Without Lawyers".²

THREE RELATED ASPECTS

Before closing, I should mention three other aspects of today's topic that deserve Commission attention.

1. The Relation of Human Rights Lawyers to Political Reform

² The above remarks are a slight expansion of an article that I published in the July 9, 2009 South China Morning Post in Hong Kong and China Times in Taiwan (in Chinese). See www.usasialaw.org.

There has been a difference of opinion among "rights lawyers" concerning the extent to which they should take part in political reform efforts. Some have maintained that, unless China undergoes democratic reforms that eliminate the Communist Party's monopoly of power, prospects for a genuine rule of law will remain dismal. They therefore believe that "rights lawyers" must play an active role in promoting peaceful but major revisions to the political system. Others -- a majority so far as one can tell -- agree that significant political reform is crucial to achievement of the rule of law but, given the prevailing climate of repression in China, they believe that at present lawyers should dedicate their energies to defending rights within the existing legal system, despite its defects and limitations. This does not preclude working for legislative improvements within the system as well as taking part in individual cases. But it does preclude direct challenges to the Party's monopoly of power.

Among "rights lawyers", the unfortunate Gao Zhisheng was perhaps the leading proponent of opting for political reform. He not only represented Falun Gong and many other controversial clients but also courageously challenged Party rule, condemned the systematic torture of Falun Gong adherents and called for genuine democracy. As a result, as previously indicated, he was deprived of his license to practice law, tortured, convicted of "inciting subversion" and, 156 days ago, "disappeared."

Yet the frustrations confronted by "rights lawyers" occasionally tempt even those who operate within the system to enter the political fray. Many an eyebrow was raised when Mo Shaoping, previously an exemplar of the "professional", non-political view,

signed Charter' 08's call for political reform.

2. Legal Restrictions on the Professional Conduct of "Rights Lawyers"

Earlier testimony before the Commission has detailed the plight of Chinese criminal defense lawyers.³ The extent to which the newly-amended Law on Lawyers may have improved the situation remains unclear. Some provisions in the amended Law, which was adopted just before the 17th Party Congress led to enhanced Party controls over the legal system, were designed to strengthen the rights of criminal defense lawyers and their clients. Yet other language in the new Law can easily be manipulated to restrict those rights in fact and to place vigorous lawyers in peril. This is especially true of Article 37, which makes lawyers vulnerable to criminal punishment for courtroom "language that endangers state security" among other things. In the absence of extensive empirical research, which, because of the sensitivity of criminal cases, is difficult even for Chinese scholars to conduct, any assessment of the "law in action" is problematic.

Yet even the "law on the books" plainly needs improvement. The Criminal Procedure Law, which last underwent substantial revision in 1996, must be updated to eliminate inconsistencies with the amended Law on Lawyers, and to deal with many long-unresolved issues concerning the lawyer's access to his client and to relevant files, freedom to gather evidence and greater opportunity to participate in the trial.

Fundamental questions, such as whether key witnesses should be made to appear at trial

³ See, e.g., Jerome A. Cohen, "Law in Political Transitions: Lessons from East Asia and the Road Ahead for China," July 26, 2005, <http://www.cecc.gov/pages/hearings/072605/Cohen.php>.

and thus be subject to cross-examination, have still not been answered sixty years after establishment of the People's Republic!

Moreover, the formal criminal process is not the only area where "rights lawyers" encounter frustrations. Daily press reports remind us that Chinese police continue to resort to the notorious but supposedly "non-criminal" system of "re-education through labor" (RETL), which authorizes police -- without participation of lawyers, prosecutors or judges -- to sentence people to as long as three years of imprisonment for a broad range of ill-defined activity. The Ministry of Public Security, in its efforts to beat back proposals before the National People's Congress to abolish RETL, has occasionally experimented with allowing lawyers to take part in RETL proceedings, but generally they are excluded. Usually, the lawyer's only possible role is to assist people who have already been sent off to RETL confinement with an appeal for judicial review in the relatively few cases when the detainees are able to contact and hire counsel. Because China's courts are not allowed to consider challenges to government actions on Constitutional grounds and because the Standing Committee of the National People's Congress has been reluctant to utilize legislatively-authorized procedures for entertaining Constitutional challenges, lawyers have not succeeded in demonstrating RETL's Constitutional flaws.

If the People's Republic should ratify the International Covenant on Civil and Political Rights, which it signed in 1998, that would, at least in principle, expand the role of lawyers in criminal justice and other sensitive matters. As things stand today, however, lawyers are even restricted in their ability to represent the increasing number of groups

who need legal assistance in seeking government relief for their grievances and in settling disputes. For example, the 2006 Guiding Opinion of the All China Lawyers Association forbids lawyers from helping groups of ten or more to petition government agencies; and they are required to inform, consult and heed local judicial administration officials and lawyers associations as well as other, unidentified "relevant agencies" regarding cases in which such groups retain them.

3. Licensed Lawyers and "Barefoot Lawyers"

By "barefoot lawyers" I mean laymen, not licensed lawyers, who have informally acquired some legal learning and who apply it, usually in the countryside, in advising people and representing them before courts and other agencies. Until his persecution by the local government in Shandong Province, the blind social activist Chen Guangcheng, now in prison, was a classic and famous "barefoot lawyer". Unable to enlist the help of the few lawyers who practice in rural Yinan County, Chen, who wanted to persuade the county court to order the local government to cease various discriminatory acts against himself and other disabled people, decided to rely on his own efforts. He learned through practice and from several "do it yourself" handbooks on litigation that were read to him by his family.

China has far too few lawyers in the countryside, and some counties have no lawyers at all. Furthermore, some lawyers do not want to take on certain types of cases, whether for financial, political or other reasons. Yet the demand for legal services is

rising in the countryside because of economic and social progress and the rising "rights consciousness" among ordinary Chinese that has accompanied this progress. Other important factors are the growing sense of injustice and popular anger against official corruption, plus the government's own propaganda that emphasized ruling the country according to law. Meeting the increasing need for legal services is a huge problem, and "barefoot lawyers" are an understandable, if insufficient, response.

Yet China's legal profession has not uniformly welcomed "barefoot lawyers", fearing that, through incompetence or corruption, they would further sully the reputation of a profession that has experienced difficulty overcoming traditional Chinese distrust and disrespect. Some rural lawyers worry that "barefoot" competition may infringe upon their income. Even some "rights lawyers" who hail from the countryside are wary of relying on "barefoot lawyers."

Until the need for legal services in the countryside has substantially diminished, however, the wiser path would seem to be to offer basic legal training and perhaps certification to the many thousands of "barefoot lawyers" who are urgently required. An experiment worth emulating is the training program organized by Wang Chenguang, former Dean of Tsinghua Law School, with Ford Foundation support. Certainly the issue deserves empirical research and greater attention.

I hope that these brief introductory remarks are useful and look forward to the presentations of my colleagues and the subsequent discussion.