

A LEGAL *LAOGANBU* LOOKS BACK

China's legal system is still awaiting a great reformer, Jerome Cohen observes. In an interview with Sharon Hom, Cohen, an Adjunct Senior Fellow in Asia Studies at the Council On Foreign Relations and Professor of Law at New York University Law School, reflects on his decades of involvement in law reform in China.

SHARON HOM I thought we'd start by going back a little bit. People like you and Victor Li and Randy Edwards are really the pioneers.

JEROME COHEN We're the *laoganbu*. In fact Victor is "second generation." Victor was my first serious student at Harvard Law School. Came in 1964. He'd already got a J.D. at Columbia. And don't forget Stanley Lubman and Anthony Dicks of England.

SH Well, there you are. You are not only the pioneers, you actually trained so many of the others.

JC And I take credit for even those I had nothing to do with!

SH Can you just talk about how in 1970 you decided to do China and, when there was no law, to do Chinese law?

JC First, it's even worse than you say. I decided in 1960. August 15th, 1960, at 9:00 a.m. I had my first Chinese lesson. Confucius said, "San shi er li," establish yourself at 30. And that's going to be on my tombstone. By the '70s, China was obviously a subject of enormous interest, if not yet optimism, because they were still in the Cultural Revolution until '76. But in 1960, most people thought I must be having a nervous breakdown to study China when U.S.-China relations were very, very bad, so bad that of the four members of Congress who, in the spring of '60, voted to bring Communist China into the U.N. General Assembly – not the Security Council – three of them were voted out of office in the November election because of that. Amazing. And in January '61, Jack Kennedy

was going down Pennsylvania Avenue to his inauguration with Dwight D. Eisenhower, and in effect Ike said, "The only thing that will bring me out of retirement is if you move to recognize Red China." So at that time most people thought, why is Cohen throwing away a promising career? It must be masochism.

SH So if it wasn't masochism, what was it?

JC It was luck. I owe it all to Dean Rusk. Dean Rusk was President of the Rockefeller Foundation. During the second term of the Truman administration, '49 to '53, he was Assistant Secretary of State for East Asia. During World War II he became known as an Asia hand because he knew about the China-Burma-India area, and on that basis Dean Acheson, the Secretary of State, made him assistant for Asia. But Dean Rusk made one mistake. He was among those who told the President and the Secretary of State that, when China threatened to enter the Korean conflict, if we sent our troops into North Korea to the border with China, we would find the Chinese were bluffing.

I wanted to be a pioneer. I didn't want to just teach tax law or labor law. I wanted to do something different.

Now, when you make a mistake of such monumental proportions, usually it makes you think again. And he thought again. And when he became President of the Rockefeller Foundation, he did a great deal to train a new generation of people who knew a lot more about China. He trained people in economics, politics, history, sociology, language, you name it, everything but law. Then in April 1960 his law school classmate, Frank Newman, then Berkeley's about-to-be dean, came to him and said, "Give us a chair at Berkeley in African law." Frank was so naïve, he thought that Africa was the wave of the future. In 1960, all the British and French colonies were coming to statehood, and he thought we ought to have a chair in African law. Rusk responded, "Gee, that's very important. But by the way, who knows something about China and law?" At that point Newman came back and told me, and I thought, well, that's interesting, and I forgot about it.

But Dean Rusk didn't, and he called up three months later – actually, Ken Thompson, his assistant, called Bob Scalapino, Berkeley's great expert on Northeast Asia, and said, "Would the law school like to train somebody for Chinese law?" Since I was a junior person, and the dean was busy, the dean said, "You take care of it. Find us a Chinese who's already a lawyer whom we can hire, or find us some East German who studied law on the mainland, or find us an American lawyer who's willing to study about China." I failed on all fronts, except I persuaded myself. Most people thought I was having a nervous breakdown. Why throw away a good career on China? It doesn't make sense. The retiring dean, William L. Prosser, that old curmudgeon, said, "The school will just keep you in a corner all the time until the Ford Foundation comes around once a year and says, 'Anything interesting going on here?' Then you'll be brought out. And other than that," he said, "you'll amount to nothing." Of course he couldn't see beyond his eyelids.

SH But what did you see at that time when all these other people thought it was professional suicide?

JC I wanted to be a pioneer. I was leaving law practice and a comfortable salary to be an academic. And if I was going to do that, I didn't want to just teach tax law or labor law. I wanted to do something different, like you're doing, something you can't do as a practicing lawyer for one reason or another. I had this desire to do something international or comparative, and I didn't know how to break in, what to do. During the spring of my first year of teaching, as I was finishing preparing for courses, I started to think, how am I going to get tenure around here? What am I going to write about? I didn't know what to do.

And then this came up, and it hit me, about June or July, when the opportunity came, that somehow luck is very important in life. China was going to be a very important force in my future and that of my grandchildren. There was no one in America who knew about China's legal system, and it sounded like one had to know everything to know anything. One had to know history, social sciences, language, everything. I thought, people will pay me to do this? Of course I should do this. It seemed very logical. And the new dean's only problem was, what are you going to talk about when you go to cocktail parties? I said, "Frank, that's the easiest thing in the world. I won't talk about administrative law or tax. I'm going to talk about something exotic."

It was the greatest thing I ever could have done. And Berkeley was a wonderful place to start, even though most of my law school colleagues thought I had made a mistake. I had some wonderful colleagues in the social sciences and history – Joe Levenson, Franz Schurmann, many marvelous people. Then Harvard's John Fairbank came along and, in his usual academic imperialistic way, immediately decided I should move to Harvard, and I went along with the gag. The Harvard Law School was a very welcoming place, and they saw the importance of China. My timing was lucky, because the Cultural Revolution came along shortly thereafter and

diminished people's optimism that China might develop a legal system.

SH What do you think made Harvard the place that saw it at that time, whereas a lot of people couldn't see beyond the political cold war climate?

JC Harvard had already invested in Soviet law and international law. Roscoe Pound had been out in China during the Chiang Kaishek era. And the dean when I got there, Erwin Griswold, although he was a tax lawyer, had a vision of the world. He liked to travel, and he liked to see the world as it was going to be 30, 40 years down the way. I remember someone once said about him, "He's great on the big questions. But life consists of a lot of little questions." But actually, you've got to hand it to him. He knew China would be important. Again, I was very lucky. Originally I owe it all to the South African human rights movement that got Frank Newman interested in Africa; and to the Korean War, which got Dean Rusk to say that we needed to know more about China.

Rusk never liked some of my policy proposals on China, normalization of relations and all that – for eight years he sat on all such ideas when he was Secretary of State. Yet later he was very proud of what he had done in sponsoring not only my training but also that of Stanley Lubman. He knew that we were trying to help China develop a legal system. He lived long enough to see that, which was nice.

A Legal System Develops

SH You made a really wonderful comment recently about looking back at this last 20-some-odd years of reform, that you thought that China was doing something very interesting pre-1978 by attempting to do development without a legal system. Now presumably they're trying to develop with a legal system. But do you think they're really moving to development with a legal system? Or do you think there's more of an opportunistic and strategic approach to the terms of implementing a controlled legal reform?

JC Oh, of course, they want their own type of legal system, one that suits their needs. And "they" happen to be the leadership of the Chinese Communist Party. Rather than considering the whole nation's needs, they see these needs in a special way. And for that purpose they're aware that they need a legal system that's capable of attracting foreign investors and of sustaining domestic economic development.

In other words, I see the decision they made in '78 based on at least five factors. One is that every country has to have law as an instrument of state building. You had to reconstruct the country after the chaos of the Cultural Revolution. You have to have a legal system that can communicate the leaders' norms and can enforce them. So law is very important to build a new state, just like the Meiji Restoration at the end of the 19th century in Japan.

Second, they need law as an instrument of economic development. Buyers have to know that sellers are really going to

come through with the goods or pay the consequences. Similarly, sellers have to know buyers will take the goods off their hands, or the legal system will enforce the contract. I think that's very, very important to them.

Third, if you're going to do business with the world and benefit the way all the countries around China benefited while China was going through its internal struggles in the '50s and '60s, then you must have enough of a legal system to give at least the illusion of confidence to foreign business people. Lenin recognized that in 1921 when he started the NEP, the New Economic Policy. In effect he said, "How will the British and French investors come to Russia if we don't have a legal system? We need codes of law." Well, Deng Xiaoping recognized that, and he wanted foreign cooperation, so that was a third motive.

A fourth motive was they had just come through a hellishly chaotic period where maybe over a hundred million people were seriously harmed by the Cultural Revolution, and they wanted to avoid future confusion. For that you need a legal system to punish antisocial behavior. But, fifth, you also need to have a legal system that will respond to the demands of the people for protecting their basic rights. That was another profound feeling that came out of the Cultural Revolution.

So you have a number of motives. Sometimes they reinforce each other; occasionally they come into conflict, like the desire to suppress crime, but the desire to protect people who are accused of crime. So that's really what it was all about.

Now, they want their kind of legal system. The leadership has never been willing to pay the price of constricting their own freedom of action that having genuine, consistently enforced protections of the person would involve. They certainly want a legal system to suppress antisocial behavior, but they define what that is. If they think the Falungong is worth suppressing, they need a system that will do that effectively, without worrying so much about the fifth motive, the protection of individual rights.

They have to attract foreign business, so they've done a pretty good job of creating a legal framework for that purpose. It could be better. If they had a better, more consistently effective legal system, they could have attracted even more money, more financial investment, particularly insurance companies and investment banks coming in earlier. Even now many financial firms are holding back because they're afraid of lack of security due to inconsistent enforcement of contracts.

SH It seems that U.S. companies are on balance optimistic about the overall benefit to U.S. businesses of WTO accession in the long run, despite ongoing challenges such as lack of transparency, lack of independent decision-making and lots of problems with inconsistent applications between the central and the local and provincial authorities.

JC What gives them confidence is the willingness of the Chinese leadership, by and large, to informally resolve a lot of problems, even if the formal legal system has obvious shortcomings. Chinese leaders have a habit of giving a little candy

to every crying baby. And if the foreign investors or the Hong Kong bourgeoisie are unhappy, and they go to the leaders, and they make their case, they'll get relief, even if the system isn't improved. Sort of the way China's trying to solve their labor problems now.

SH Or their human rights problems.

JC On human rights they try to sweeten it for the mass of people, even though they sock it to the leaders of unrest. Foreign investors are treated much better. They know that they'll get a sympathetic hearing. That's the big difference between Vietnam and China. Vietnam doesn't do as well in meeting the grievances of foreign investors. They're much more socialistic, bureaucratic, ideological, backward in their thinking. Chinese leaders are very repressive in terms of personal rights that we value, civil rights, particularly criminal justice and expression rights; but they're very flexible, very open about what foreign investors need. And I found in my years in China that if you said something was good for foreign investment, it was very likely your suggestion could be adopted. But if you said something's good for human rights, they'd show you to the airport.

SH Because they don't really care about benefiting the whole society or country, but somehow they see a direct link to benefiting their own class interest, or their power and party interest?

JC I think they would always say they're considering the national interest because foreign investment does a lot to help the national interest. But obviously one seldom does anything for just one motive. And a lot of these leaders benefit. Some have even been accused of benefiting personally, or at least through their children. And foreign investment is certainly helping sustain their leadership. If they can keep ahead of economic demands, the Communist Party can stay in power. If they can't, they'll be out. They're running scared every year, despite very significant accomplishments.

A Legal Profession Develops

SH Other factors in China's legal development are special interest groups in the rising middle class, as well as lawyers as a group, and then the law professors. When you talk about the Chinese authorities and government being more open to a perception that it's good for business, how do you think that's going to play when you get these other groups who see rule of law adjustments and systemic and structural changes as important to serve other kinds of needs? I think lawyers would see the structural need to have an independent judiciary, to address rampant corruption, or to protect criminal defense lawyers. These are not problems that a little deal will make go away.

JC There's no doubt that we're now getting significant numbers of legal specialists in different occupations that are overlapping and often have congruent interests. So if you have 140,000 lawyers, and you have 240,000 judges, maybe almost as many prosecutors, and thousands of legal people who work

in corporations, and then you have the legal officials who advise the government agencies, and all the law professors, you're beginning to get a huge group approaching a million people who have similar interests in law and who are every year increasingly sophisticated.

Now, some of these legal specialists, of course, have contradictions within themselves. I suppose most people do, including in our country. I mean, look how the American liberal gets

the Politburo, that would have raised his visibility and increased his power, and it would have been seen throughout the country as a very tangible symbol of a possibly new era. Instead, the only legally-related official who got into the Politburo is the minister of Public Security, who doesn't know much about law but knows what he likes and can be expected to repress people rather than enforce their rights. And that's a discouraging signal.



Photo: Jeff Gima

torn between enforcing liberal principles in his daily life and doing what's good for the kids to get into college, using their own version of *guanxi*. I find many Chinese, even the greatest law professors, in their daily life still operate in a very traditional Chinese way, even though in their professional life they know that isn't good enough for China. They know you must abide by the law, you must have good legal institutions, but if you ask them about how to handle this or that, they'll still handle it in a non-formal, non-legal way, often through friends and connections.

Society will change gradually. But in the meantime you do have an increasingly alert, sometimes idealistic group that is trying to put pressure on the leadership to give more recognition to legal demands. I was disappointed, as many people in China were, that the change in the Politburo membership at the 16th Party Congress did not bring in the most symbolic, if not the most important, law reformer, the president of the Supreme Court, Xiao Yang. If Xiao Yang had been brought into

Nevertheless, I think China is such a bubbling, interesting place below the level of the leadership that there will continue to be a lot of important legal experiments, in criminal justice as well as in civil, administrative and other matters. We can only hope that this will add to the ferment and add to the numbers of people who are like-minded in wanting to see legal reform. And maybe by the 17th or the 27th Party Congress we'll begin to see significant progress. Someday, some political leader is going to make it his platform to be the one who brings stability to the Chinese people in the sense of reliable enforcement of human rights, i.e., political and civil rights. Who that somebody is we're waiting to see.

SH One of the occupational hazards of China watching is prediction. Looking ahead what do you see in the next ten years?

JC Well, the obvious person to take on the platform I mentioned would have been Xiao Yang or somebody like him. But

normally this doesn't come from a person who's a legal specialist, but from a political leader who's trying to differentiate himself from the previous leadership, the way George W. Bush has tried to distinguish himself from Bill Clinton. So we're going to see somebody in China who's going to emerge and respond to the need for legal protections and regularity, the way Deng Xiaoping emerged after the Cultural Revolution to meet the needs for stability and economic progress then. We never knew it was going to be Khrushchev in the Soviet Union. There was nothing in his career that was known to foreigners that would have led you to predict what he did in terms of de-Stalinization in the January 1956 Communist Party Congress in the Soviet Union.

And there was very little to make you expect Gorbachev was going to go as far as he did, based on his previous experience. But at least we know Gorbachev had studied law, and had shown some appreciation of how you run a more sophisticated government. Now in China when we look around it reminds me of what some of the students said in May of 1989. When Gorbachev came to Beijing, they said, "Our Gorbachev is in high school." And people couldn't figure out where. It's not as obscure as picking the next Dalai Lama. But the fact is, where do you find such a person?

Back in 1986 I recall a young, able Chinese who worked in the Party Central Committee staff came to America to study law at Columbia University. I thought, here we're going to train this fellow and send him back to join the experts on the Central Committee staff, and they'll have a really able legal apparatchik there. He graduated in May 1989, and he was going to spend the summer working for a Seattle law firm and then go back to Beijing. But when he got to Seattle, June 4th occurred and he didn't return.

But we keep looking. I think the Central Party School is a very important place, and that we law teachers and others should be doing more to cooperate with them. They now have some good law professors, but they need very much to raise the standard of their legal education. I gather their law students don't even qualify for the national bar examinations now. We ought to be trying to help them turn out good people, young people, but also provide better courses for the mid-career leader prospects, who go there for three months, six months, a year or whatever, so that those people who are going to be ministers, governors, and maybe higher officials of the government will be more sensitive to legal and human rights-type considerations. It could be that as things develop in the contest for leadership among the new group, somebody will say, now that there's apparently a new concern for the welfare of the impoverished classes, urban and rural, we should also show equal consideration for having a serious legal system.

A Role for Foreign Institutions

SH When you said "we" might do more to help, I was interested in your views about the role of foreign cooperation and funders. I think you're very familiar with all of the key law exchanges and programs run by the Ford Foundation and a

number of others. What do you think has been the most useful role played by these programs, what they call "capacity building" or "training and exchange" programs, beginning in '84 or '83. And what do you think, looking backwards, has been the limitation of these kinds of in-country capacity building programs?

JC Well, first of all, the scale at which anything has been done has been very small relative to the need. I introduced the Ford Foundation to China in April of '79. Ford was anxious about how the new leadership might regard them. For 30 years they'd been excoriated as "running dogs of the bourgeoisie and the imperialist world." With some trepidation, I fixed up a lunch between the Ford representative in Tokyo, Carl Green – who has always been interested in China – and Wang Daohan, who was then the vice minister of foreign economic relations, and who was the first leading Chinese official I knew who saw the need for legal training and education in the new era.

I got them together for lunch, and there was a lot of polite talk through the main course, but nothing was happening, and each was sort of waiting to see who was going to make the first move. Finally Wang Daohan got impatient, and he said, "Well, what do you think Ford Foundation is prepared to do for China?" And Carl Green screwed up all his courage, and he said, "Why, we're prepared to spend as much as a million dollars to help China." And Wang Daohan snorted, "Are you kidding? Do you know how big China is? Do you know what China's needs are?" And at that point Carl Green relaxed. He saw China would behave like other countries. It was quite an interesting experience.

After June 4th, 1989, things got much worse because except for Ford, virtually all the other foundations dropped China.

Ford has consistently had the vision to see the importance of law and do something about it. It's just that its contributions are chicken feed compared to the need. And yet its symbolic importance, its experimentation, etcetera, is very, very important. Ford did the so-called "CLEEC Program," where they supported the training of the faculty of eight major university law schools. I thought that was a very good thing to do then, and it has proved, in retrospect, to have been a good thing to do, but it was very limited. They also should have been doing more to help others in the field of legal education and also in the growth of the actual legal institutions themselves.

After June 4th, 1989, things got much worse because, except for Ford, virtually all the other foundations dropped China. You couldn't get a grant for a Chinese student studying law in this country for several years after June 4th, as though the other foundations decided to punish the young people of China because we didn't like what their leaders had done to them, which seemed to me rather stupid. But Ford, thanks to Peter Geithner and others, stayed the course. And they're still doing the most important funding, even though it's just not enough.

We need massive assistance for this effort. The United States government has begun to provide assistance over the past few years, but given the sudden budgetary crisis foisted on us by our new President, things promise to be worse before they're better, and that may put an end to the little amount of money that's finally being allocated by the U.S. government after many years of waiting. Of course, the Chinese government itself should do much more in this regard.

So as we look back, I think the Ford example is a good example, but we need many more sources of support – multi-lateral and bilateral foreign governmental support and non-governmental, foundation support. Also foreign universities have to reach out more to China. And it's a great opportunity for individual benefactors. More bang for a buck in China - you can get more done. Today we have many Chinese students wanting to come here to study law, whereas it used to be exotic and unusual to do so. But except for those who are or are going to be lawyers, it's very hard to finance their education here. And unfortunately, as with American law students, so many of them will be going into debt that they'll have no choice but to practice law, often in this country, just to pay it back. Yet what we need is more judges, professors and prosecutors, and even public security leaders, police leaders, to come here and study law.

Last fall at the Tsinghua-Temple-NYU LLM program that's been initiated, I had 44 mostly experienced young legal officials or legal specialists in my class. One of them was even the head of a public security substation in the city of Wenzhou. He had a law degree, but he was a police station commander, heading for the Ministry of Public Security, which needs more legally trained people.

So, contrary to Nancy Pelosi and a few others in Congress who think we shouldn't be training police officials, I think they're the most important people to train because they have the power in China. Unless you reach the people at the top of the Ministry of Public Security, you're never going to make as much progress in effectuating the reforms that the Justice Ministry and the Supreme Court and the law professors and other reformist institutions want. So I would give a very high priority to sensitizing and training police officials - I'd also love to reach the State Security Ministry, China's KGB, not merely the regular police.

So I think we have to convince our own political leadership that we're not going to teach Chinese police officials how to use their weapons better. We'd like to teach them how the criminal process should work, and, for example, why "re-education through labor" should be abolished, and why secret trials make China the laughingstock of the world and deny the government legitimacy and credibility, and also effectiveness. Look at this case in Canada, the Lai Changxing case. In effect, in order to get that fellow, who they claim is China's greatest smuggler, deported from Canada back to China, China has to prove that its criminal process meets minimum world standards. They haven't got him back yet, and it's going to take years. For months their system was put on trial before Canadian immigration officials. They had to send over prosecutors, lawyers and judges to convince the immigration board

that they had a credible system. This is going to happen more and more in an increasingly globalized world.

The criminal justice system of a country – and the United States has to worry about it now, too, in our post 9-11 posture – is one of what you might call the principal sales points, marketing aspects of what that country is up to. Each country wants to influence people favorably, to be a shining example. You don't want to be a laughingstock. China today, for anybody who knows what their trials amount to, is becoming a laughingstock, despite the fact that it's inflicting some tragic penalties on people.

I was an expert witness for the Canadian immigration people in the Lai Changxing case, and I gave them as balanced a view, as of two years ago, as I could. But everything I've learned since then has made me more and more depressed about the actual administration of criminal trials in China, especially in controversial cases. A week from today, in Yangzhou, they're going to put on trial this fellow Chuck Lee, who's a American citizen, a Falungong person. And the question is, is he going to get a fair trial? What is a fair trial? It's very hard for a political/religious activist to decide whether he or she wants to retain a defense lawyer and use the instruments available, even though those instruments don't give much opportunity for a fair hearing; or should one say, I'm not going to play ball with the system. I'll just tell the system what I think, and protest, because I know that the system is rigged for a pre-arranged result. This comes up all the time.

I think the police are the most important people to train because they have the power in China.

SH Your point about training the police, I think that's one of the debates not only within the bilateral dialogues that various countries conduct with China, but also at the UN. The Office of the High Commissioner was planning a Memorandum of Understanding with China on providing technical assistance, and one portion of that was to train the police, for which they got a fair amount of criticism from NGOs. I think the way that you're articulating need for that is important. The difficulty with these technical assistance training programs is that they have kept the design of them separate from any kinds of human rights criteria. You've got technical assistance for the police while the special rapporteur on torture is not allowed in to visit, and the working group on arbitrary detention is not getting an answer from officials regarding specific cases.

JC It should be a much more integrated approach.

SH They can't just say, we'll accept the training, and point to that as progress at the same time that they're denying international level visits by UN special rapporteurs and working groups. The other piece of it is how to have foreign input into the design and implementation and evaluation phases. I actually saw a participant list for one of the foreign police training programs, and the people invited were not necessarily people

who could make any difference. Foreign funders are designing programs without a real good sense on the ground. Now, some of the people that you're talking about, they're hands-on, and they could make a difference if their view of the world and their understanding of basic rights were changed.

JC I'm hoping that the American Bar Association is now going to make a serious impact in cooperation with China, not only in things as important as environmental law, but also in even more controversial and important things like criminal justice. The ABA and NYU Law School are about to have a conference with Chinese counterparts in Beijing, trying to elaborate on what is the real role of a defense lawyer in a fair criminal system. I think it will be a very interesting conference, and the Ministry of Justice, the All China Lawyers Association and law schools from China might want to have continuing cooperation on things like what is a coerced confession, how do you cope with it and how do you prevent it.

SH But what do you do when the Chinese say, as they have before, we have to have torture, because if we don't have coerced confession we won't be able to make the system function.

JC Here in America we're beginning to get to this point, also. When you press the Justice Department in Washington about why they insist on keeping these special people who are post-9-11 suspects incommunicado, they tell you, "Unless we apply pressure, and we keep them isolated, they won't talk." And now look at the most extreme cases, when we catch Al Qaeda leaders. Everybody is very frank now. Although they still put out the standard sentence, "Of course we're going to abide by the law," in the next sentence they tell you all the things they're doing that are obviously torture. This seems to be a universal human situation, and the only solution is to try to improve police education, administration and investigation so they don't rely so much on coerced confession. But it's the easiest thing to do. It's the cheapest.

SH The difficulty is starting from when they're saying that it's critical to the system's functioning as it's currently functioning.

JC Well, as a wit once said, "This is no time for candor." I believe you start from learning what the real facts are, and then you try to somehow come up with some reforms to improve the situation. This problem has been with us for a long, long time in human history, not only in China, and we have to do the best we can. But I do like your idea of getting the people who are involved in all kinds of legal technical cooperation with China exposed to people who have been participants in the Chinese system and know something about it and have a more integrated, rather than a separated, dispersed approach. That bears looking into.

SH It requires some sophistication on both ends because they're coming from quite different experiences and different perspectives.

JC That's a world I don't know at all. I'd be very glad to work with UN and other people who do this, but I know nothing about them. I don't even know what they've been doing. Maybe that's a failure on the part of academia to try to be more involved. I've been negligent about the ABA until this past year, but now I'm very happily involved in it, and I begin to think this is a worthwhile way for me to spend my time.

SH With your depth of experience in China and your demonstrated commitment to sensitive human rights issues over the years, I think you're someone who can encourage these groups to break out a little bit and expand their vision. The American Bar Association is one group that could take a role in making a legal system that does more than opportunistically serve the needs of special interests. The other group I had in mind, with WTO and the professional services opening up, is the growing cohort of American lawyers working in China, both within firms and as individual professionals. As members of the American Bar, these lawyers have obligations of public service and obligations to improving a legal system. Granted, that's supposed to be within our own legal system, but with the world becoming global and increasingly interconnected, there's some argument to be made that our commitment goes beyond the system in which we are admitted to the Bar, particularly when we have to work within a foreign system.

Another group is American legal scholars of China. We now have a third or fourth or fifth generation of them, and they're proliferating. I think there is some exploration of what greater role they could play. Because now it's not simply a matter of becoming expert on a baby system, it's a system that's quite complex and has enormous challenges facing it.

JC I'm so glad that you've raised this. This morning I talked to a famous Chinese professor, Professor Fang Liufang, from the Chinese University of Politics and Law, and I want him to discuss precisely this question, because he had this rather scathing review of Professor Dworkin's China visit of last May. I said to him this morning, should we all stay in the United States and simply work on post 9/11 justice in America and the problems of minorities in Harlem and elsewhere? Or, if we should still take a role in China, what should that role be? Should it include being an outside critic? Should we simply try to make institutional reforms without worrying about concrete cases? We want to really have a discussion of all this.

SH I would love to hear that discussion with Fang Liufang. The question you posed and the options of assessing that is a great starting point.

JC He obviously has views, but I can only get them sort of unevenly and implicitly in that article, which is one of the funniest things I've ever read. But still, I felt it was a little unfair to Ron Dworkin because, you know, he'd never been to China before. It wasn't his choice that they made such a grandstand circus of him. I've had that happen to me, too.

SH Blame the promoters. It's not the poor person who's been put on the tour.

JC And he didn't know what to expect there. Obviously he has his own thoughts. But I think, if nothing else, that those two articles, the Dworkin article on his trip in the *New York Review of Books* and the Fang article in *Perspectives*, are the seeds of what could be a significant debate. And I'd love to see Professor Dworkin take part, too, because he's got a lot of good ideas, a very distinguished person.

Removing Obstacles to Progress

SH Getting back to legal reform, can you identify what you think are the main issues and obstacles in terms of moving forward?

JC What really needs to be done is serious structural reform. I would start with eliminating the *Zhengfawei*, the Party political legal committee that operates at every level to coordinate the police, the prosecutors, and the courts. I think first they should just get rid of the Party control, because that would stop the public security chief of that level from controlling the group through his generally superior rank within the Party, which is an existing problem. Secondly, of course, I would deal with the problem of judicial appointment, promotion, salary, assignment and firing, by removing those aspects from the immediate locality's control. It's interesting that the Qing Dynasty, the Manchu Dynasty, did a better job of dealing with "local protectionism" than the Chinese Communist Party. Under the Qing Dynasty, after you passed the exams to become an official, you usually started by becoming a county magistrate, but you were never sent back to your own locality because they knew you'd become part of the *guanxi*, the relationship network, in your home area.

SH But if you stay longer, do you become indigenized?

JC They faced that one easily. You could never be a magistrate longer than three years in a given area under the Qing.

SH That's the precursor to the Ford Foundation and its limitations on field program officers. They're generally not posted to a field office for more than five years.

JC Under the Qing, after three years you had to be moved. Now, they don't do that today. If you look at the Japanese judiciary, by contrast, they move. And of course that's another way the government can control judges, giving you a good assignment, giving you a bad assignment, etcetera. But I think it's better that they have a judiciary responsive to national central demands than a judiciary responsive to locals. I didn't always think that before I understood as much as I think I now do about the Chinese system. I used to think China's a centralized, totalitarian state, and the more localism we can get, the more de facto federalism we can get, the better. But now I don't believe that. I believe the best hope of getting a rule of law in

China has got to come from the central agencies, like the Supreme Court, the Ministry of Justice, and the other agencies that are enacting and trying to enforce national norms.

The other day, preparing for class, I read a 1999 notice of the Supreme Court to China's judges, pleading with them to start writing judgments that will relate the facts of the case, that will respond to the legal issues raised and that will give reasons as the basis for making their judgments instead of reciting some rote formulae. You know, "since the facts are clear, the law is clear," it's just bunk. You can't tell anything about why the case is decided the way it is. They sweep all the questions that have been raised under the table. And here was the Supreme Court, virtually on its knees, pleading with the 240,000 underlings in the provincial and local courts. "Start listening to us. This isn't the first time we've told you this." And I felt sorry for the Supreme Court. I've occasionally criticized China's Supreme Court, including Xiao Yang, and I do feel their power to be heard in the national government is too limited. But I felt sorry for these people when I read that. It gave you a vivid demonstration of what they confront. They're confronting thousands of years of social reality. And how do you break through that? So I think central is the way to go now.

SH Lots of the funding and interest has really been in local development at the local level, village elections, democracy, political reform. Most people see progress as more likely to come from the bottom up.

JC We all know what the limits of village elections have been so far.

SH But it hasn't stopped the funders from looking at just the village election level.

JC I'm not against it. I think if they could get village democracy, great. But the reality is, you need the central government to improve the norms, and then to stop the village elections from being corrupted by local officials or the administrative people just above them. Because often it's a fight between the people at the local level and the officials next above them. And the people at the local level have to go higher up in the hierarchy to get relief. So even there, I think, it's people in the central government who have to enact better norms, more detail-specific, and they have to be able to enforce them.

Now, this gets to one of the fundamental problems of China that goes beyond human rights, which is where does government funding come from? And where do the funds go in the Chinese governmental hierarchy? And how can you expect the central government to really enforce these norms, which are generally more enlightened than the ad hoc norms at the locality, if they haven't got the budget to do it? So that means the tax system has to be improved, and it means they have to have a different set of priorities for allocating the revenues that they do manage to take in, including how much of a share the national government gets, compared to the locality. So this goes right to the essence of how they run their railroad.

How's the Chinese government going to function?

SH They can't even collect taxes from the local government.

JC I used to be a good friend of the long-term Chinese national tax commissioner, a very charming guy. And once I said to him, "Look, my client has to pay taxes in 11 different cities separately, filing 11 different returns. This makes no sense. Why don't you have them file a national consolidated tax return? Then you can dole out the money to the localities." And he looked at me like I had air between my ears. "You don't understand China," he said. "The local tax commissioners would be very angry with me if I tried to enforce such a system." And I said to him, "Is China a totalitarian dictatorship run from the center or not?" And he looked at me as though I didn't understand a thing about China to ask a question like that. I also remember going to the Guangdong Province foreign tax chief in 1983 or '84 and telling him, "You're not following the national tax law." He said, "You don't like it, you go complain to your friends in Beijing and see. In Guangdong Province, I run the tax law."

SH This is the problem they're having with WTO implementation. The government has committed to certain terms of international implementation, but the locals are not implementing these, A, because of local protectionism; B, because they don't understand; and C, they're not about to give up the ad hoc power that they have in controlling import/export, taxes, tariffs, everything.

JC So those are two structural changes I'd start with. Then you have the question of jurisdiction of the courts. You have to not only have personnel who are not responsive to local interests, but you have to have structural reform in the court system itself. For example, it would be very good, if you get a dispute involving a Guangdong company and a Fujian company, if you had some court, like a federal court, or a court above them, that could deal fairly with the dispute between two local entities, instead of forcing one party into the other party's local courts.

SH But is the concept of an independent review body something that may come through as implementation of WTO progresses? An example I can think of is the China Post. In the beginning they thought there was nothing wrong with the China Post as a direct competitor of express delivery services, and that it could at the same time review the licenses from their competitors. I think that's because of the whole lack of the concept of independence, which means you can't have the regulator also be one of the direct market competitors.

JC Well, my hope is that just as "it's good for foreign investment" became a cliché that opened up new possibilities for law reform, WTO requirements will be the newest vehicle for doing that. And you're putting your finger on the next thing that has to be done, which is trying to create in the court system something that meets WTO requirements for an inde-

pendent tribunal capable of fairly and objectively evaluating a case. That's why you have to get rid of the party structure, and that's why you need further internal court reforms, so the panel that's hearing the case actually decides the case.

SH I think there's support from the business community, which is very unhappy about the politicization of decisions being made in all sectors in terms of WTO accession. They want depoliticization of the processes, and this is exactly what you're saying.

JC But at the same time, if you're going to make the panel that hears the case the real decision-maker, then of course you've got to improve the quality. And you have to improve the information available to them. You have to improve their legal training. So each of these is a piece in the puzzle, and you can't consider any of them without considering how they all interconnect.

I think the courts have shown themselves capable of coming up with detailed reforms. What they haven't shown is ability to implement significant structural reforms. If you read the annual report of the Supreme Court president, it becomes increasingly frank every year. Xiao Yang spares very little in laying out what the problems are. What's disappointing is that the report is extremely short on positive recommendations, other than nibbling around at the edges of these fundamental problems. He hasn't got the clout. He hasn't got the power. He knows what has to be done, but he doesn't have the ear of the top leaders. That's why we need somebody like that in the Politburo, to become part of the power elite, not just to be told what to do. But this depends on a lot of factors in the political development and economic success of China. It will take broader progress to deal with them, and a real leader. You've got to have a Zhu Rongji for law reform. Look at Zhu Rongji, what a brilliant, forceful personality. Here's a guy who saw the need for reforming state-owned enterprises and reforming the banking system. This was his obsession, and he was out there as the standard bearer and the goad and the leader. Now he's leaving the scene, but the job still isn't done.

It's going to take equally long to reform the legal system. But we need somebody who has the same passion, the same vision, the same awareness for legal reform as Zhu Rongji has for economic reform. The first person and the second who does this may not succeed, although they'll make some progress. And it may take some fundamental political change to make it happen. It's going to happen because China's going to be more and more successful and important and play a role in the world. But will it happen in your lifetime? It ain't going to happen in mine!

Moving Forward

SH What are three or four accomplishments you've seen in the last 20-odd years?

JC China can take great pride in its progress since 1978, '79, in the articulation of norms of conduct, in domestic legisla-

tion and regulation and also in the creation of an international infrastructure of agreements that establish very important norms through multilateral agreements, participation in multilateral organizations and in networks of hundreds of bilateral agreements that it makes with different countries on a large range of matters. I think this has been a most impressive contribution. From the legislative point of view, what China has done in the last 20-odd years compares favorably to legislative progress almost anywhere. And I think legal scholars worldwide now have to recognize that China is the foremost example of law as an instrument of economic development. If they have no other interest in China, they could look at it as a tremendous laboratory to evaluate the use of law in encouraging economic development. So that's a very impressive accomplishment.

Less impressive, but now finally gaining tremendous momentum, is legal education. They are now increasingly training legal specialists who will have common interests with fellow legal specialists and perhaps contradictions with some in the government.

When I first went to visit Peking University in 1972, there was nothing going on. The professors were all down in the fields, having their heads reshaped. The next year, when I went back in '73, a few of the law professors were around, but they weren't really doing anything. They were distinguishable from their American counterparts in two respects. One was they had much deeper suntans from working in the fields. They looked a lot healthier than we did. And the other was they talked a lot less than we American law teachers, like you and me, like to talk. They had nothing to talk about. And they were afraid to talk even if they had something to talk about. Now compare that to the situation 30 years later.

In 1981, when I asked a woman law student at *Beida*, "Why in the world are you studying law?" she said, "Law is the hot ticket!" -- for different reasons, for different people. Now we have use of the Internet and other technology for disseminating norms and legal scholarship, plus the role of the law professor in taking part in legislation. This is pretty important. But, of course, good legislation only highlights the failure of consistent enforcement and the fact that they haven't been able to overcome the "Chinese way" of handling things through ad hoc, behind-the-scenes personal relationships and contacts. I've had some of my biggest disappointments there.

I'll give you two instances. Several years ago I had an arbitration in China where I was an advocate for foreign interests. I wanted one of China's leading law professors to come in and be an expert witness, to testify what the new contract law meant and why it would apply favorably in our case. And he just wouldn't do it. I was getting annoyed with him. He's a good friend of mine, and it wouldn't have been a big deal for him. Finally I just said, "I'm getting a little irritated. Why won't you do it?" "Oh," he said, "Don't worry about it, I've already taken care of the problem." I said, "What are you talking about?" He said, "Oh, I called the arbitrators, and I told them what I thought." He giggled self-consciously and said, "That's the Chinese way."

And then recently I was talking to a friend of mine who's a

Chinese entrepreneur, who's got a wife who is a judge. And I said, "Now, in your business, don't you have disputes? Do you go to local lawyers? How do you handle this?" And he said, "I never have to go to a lawyer. If I have a dispute in court, I just talk to my wife. She takes care of it."

SH That is the way. And it's been efficient and effective for them.

JC Very effective. So even the new entrepreneurs, who are clamoring for more predictability and stability in the legal system, when it comes to their own case they're going to use the tried-and-true method. It shows we've got a long way to go to affect behavior.

SH That's the challenge and difficulty of trying to change both a legal culture and a culture in the broader sense.

JC I should say the legal profession is the third positive development, and it's related to the fact that they've made progress in norms and they've made progress in legal education. Many of the new lawyers are sincere, good people. They're troubled by the role they're forced into. Although they're prospering, some aren't comfortable with some of the demands they have to meet to maintain that prosperity. There are many good people, but I think they should be more dynamic than they are. They're a little passive, except for a small group of criminal lawyers who are very impressive, sometimes financially successful, but all living on the knife-edge. If any day they could be seen to go over the line, they'd lose their law firm or their opportunity to practice or even go to jail.

SH That's an area that I'm particularly interested in. I agree with you that the role of the legal profession and legal education has really been expanding and becoming more important. But when you focus on the periphery of the legal system, you see what criminal defense lawyers are being subject to when they take sensitive cases, crossing that line that you don't know you've crossed until you've crossed it, which is the nature of arbitrary power and not a rule of law.

So while there are areas of progress, at the same time there's the double-edged sword of an increasingly central legal profession. You can't have a legal system without an independent legal profession that's going to protect people's rights. Could you talk a little bit about these politically sensitive cases? Is this the margin, that will be taken care of as the structure becomes more sound? Or is it really the center, where the rubber meets the road?

JC What I want to do is to make the case to the Chinese leadership that they lose when they don't have a transparent, fair and independent legal system, including criminal cases and politically sensitive criminal cases; that they would gain, compared to the current situation where they often say the trial is closed, or even if they say it's open they give tickets only to people they deem reliable so others can't get in. What they do is they deny themselves the opportunity to be seen to have evidence,

to be credible, to be legitimate, because who is going to believe them when they say X was carrying equipment that he was going to use to intervene with our telecommunications system on behalf of the Falungong? No. If they're too frightened to let people in to see what the evidence is against X and what X has got to say about it and what X's lawyer is doing about it, you can't believe them. I'm prepared to believe people can do some very silly things, and maybe some of the things they charge people with are true. But why in the world would I believe them as long as they deny me the opportunity? I have applied to be an observer at the trial next Friday of this Chuck Lee, who is being tried for having equipment to interfere with telecommunications broadcasts in Yangzhou. I'm not holding my breath that I'm going to be permitted to go.

I'll give you an analogy. In 1964 I visited Russia, then the Soviet Union, for the first time. I wanted to go see some criminal trials and I knew they were going to give me a hard time. So I asked a couple of Soviet experts to give me the address of the central courts so I could go on my own if I had to. Well, I was there in Moscow for about a week. And every day my host officials and I had these endless conversations that were nonsensical about why I couldn't go today, why tomorrow would be better. But they couldn't guarantee tomorrow until tomorrow, when they'd tell you maybe the next day. Nobody wanted to take the responsibility of taking me to a court because I might write or say something later that was critical and they would get blamed. So it was much safer to give me all this hokum.

I want to make the case to the Chinese leadership that they lose when they don't have a transparent, fair and independent legal system.

Well, the next to the last day I decided I'd had it, and I just went to the central courts. And I went in there, and it gave me a very good impression. The cases I saw were ordinary criminal cases. I also saw a civil case. And I came away with a much better impression than I had before of what was going on. I didn't know Russian, but there were people who came up to me and offered to interpret. It was very similar to an experience I had in New Delhi in the same year, actually, where people see you there, and they come up and talk, and then they want to ask you about America. It was a lot of fun. But as a result, I came away with a better sense of what they were doing than I would have had because of these guys keeping me from going there. In the same way, I feel openness on the Chinese side would be beneficial to the Chinese government.

To take another example, what would it cost China, after all, if witnesses came to court? That's one fundamental reform that has to be made. It's rather startling when you tell people you have major criminal cases and a right of cross-examination, but one that can't be implemented because witnesses aren't required to come to court. I mean, it's astounding. Immediately people think this is a farce. But in order to imple-

ment this reform you have to have courts that are stronger, courts that have backbone, courts that have coercive power, so if a witness doesn't come to court, the witness can be fined or given 15 days' detention. Contempt power is what they need, but surprisingly they have it only in the most limited circumstances, not in respect to witnesses at all. As far as I can see they only have it in the Chinese Criminal Procedure Code for people who are obstreperous in the courtroom. To maintain order in the courtroom, a judge can give people 15 days or a thousand-yuan fine. But why don't they have similar sanctions for making sure witnesses come to court, so that what goes on in the courtroom is legitimate and meaningful, instead of just a farce?

SH But your case for openness, if you were making it to the Chinese authorities or government, is that ultimately it benefits them because they would have the good experience and the feedback that you had in Russia or India. But the problem is that they're balancing – what would that give them? It would give them increased legitimacy in terms of the overall process. But what do they lose? They lose what they have now, which is control over the system and no accountability. So they've got to balance whether it's worth it for them, greater legitimacy in the eyes of the world, versus accountability.

JC But I don't think they'd lose control. I think they could convict the same people to the same extent. But the procedures would ultimately be seen to be insufficient -- unless they had a truly independent court. If they have a truly independent court, they lose control. That's why they haven't been able to accept it. But in terms of these other changes, they could make every trial open, they could allow cross-examination. It might be a little embarrassing sometimes, because it would show how shabbily prepared the prosecutors are. I've been in cases where the prosecutors were really *hulihutu*, they didn't know which end was up. But it didn't matter that much because they knew what the outcome was going to be, and they knew the defense lawyer would have only a limited opportunity to demonstrate how badly prepared they were. I think if you want a better system, more efficient prosecutors, you've got to put them on their toes. It would also help the regime's PR a lot. But my concern is, maybe it would only help their PR, and is that good for us?

In the end you've got to have a really independent system, and can they tolerate that? That's why I'd like to know more about Taiwan. How is it working out in Taiwan? Over the last 15 years Taiwan has been a neglected social science and law laboratory. We ought to be having research projects there that really tell us how they've made the shift. And South Korea's not irrelevant, either.

SH Well, that sounds more hopeful. From what you say it seems that within your lifetime and mine we'll see some changes.

JC We'll see some change, but how significant it will be, that's the question.