

UP FRONT WITH WANG YU

Much of China's apparent progress in legal reform is illusory, observe several experts in an interview with Wang Yu. Corruption and Communist Party monopoly of power remain major roadblocks.

GUO LUOJI, a well-known writer, is a specialist in Marxism but has more recently turned his attention to Chinese law and its practice. He was a visiting scholar at Harvard University for three years and now resides in Boston.

YU HAOCHEG was a leading proponent for the rule of law and human rights in China. In 1994 Mr. Yu came to the U.S. as a visiting scholar at Columbia University, participating in a project called, "China and Constitutionalism." Since then he has had to remain overseas in order to continue his investigation of constitutionalism and human rights for his country, and now lives in California.

TONG YI was imprisoned in China in the 1990s because of her involvement in the democracy movement. She subsequently came to the U.S. and completed a law degree at Columbia University, and is now a lawyer in New York City.

LI JINJIN was among the first group of students of law in China, graduating from Beijing University. He later obtained a degree from the University of Wisconsin and currently practices law in New York City.

Wang Yu A great many foreign and Chinese scholars have focused on legal reform in China over the past two decades. Many foreign observers seem to conclude that China has made great progress in implementing rule of law. Based upon your experience and observations of China's development, how would you assess the progress? And in what areas has China made progress?

Yu Haocheng In the past two decades China has made some progress in implementing rule of law, but not nearly enough. I see progress in the following areas:

- Although in many places only officially appointed persons participate in the court process, in certain places members of the public are allowed to sit in on trials. However, political cases are still closed to the public in the name of confidentiality. Two years ago the trial of Li Shaoming was conducted entirely in a "black box," closed to everyone but the participants.
- Convicts sentenced to death used to be displayed in public before execution as a warning to others. This common practice has now been abolished.
- Counterrevolutionary crime has been removed from the criminal code through amendment of the Criminal Law and Criminal Procedure Law, but the law of endangering state security still exists and can be used to cover many similar crimes.
- Detainment for interrogation is now prohibited under Criminal Procedure Law, but the institution of Reeducation Through Labor still exists.
- New legislation regulating lawyers defines them as social workers, not government cadres as they used to be.
- New regulations now require all judges and public prosecutors to be trained by the Institute of Political Science and Law. In the past they were selected from the army, without any formal legal qualifications. The only requirement then was loyalty to the Party.

However, I should point out that this progress has been accompanied by some recent setbacks. For example, Liu Di, a student of Beijing University, was arrested several months ago merely for posting some articles on the Internet.

Tong Yi I feel there has been a lot of focus on so-called "legal reform" in China, but the fanfare and enthusiasm generated outside of China has little substance to back it. It goes without saying that any meaningful legal reform has to be accompanied by meaningful political reform, but so far we have seen nothing on China's political landscape that suggests forward movement on political reform. On that basis, those who conclude that China has made progress in implementing rule of law are wrong.

Part of the problem is that these people cannot see the difference between "Rule of Law" and "Rule by Law." The Chinese government has certainly promulgated a great deal of legisla-

tion over the past two decades, but China's legal philosophy is still that the law is a functional tool for the governing Communist Party. The law is not yet something that individual Chinese can rely on to protect their rights through an independent court system. That's why China's legal modernization still has a long way to go in order to even come close to the basic components of rule of law recognized by major democratic societies.

Guo Luoji Some improvements have been made in legislation, but more serious problems have emerged in the enforcement and jurisdiction of law.

In the first thirty years of the People's Republic of China, 1949-1979, there was not even a basic legal code such as criminal law or civil law. Since China's opening up, the National People's Congress and its Standing Committee have drawn up several hundred laws. In March 2000 the Law of Legislation was adopted, establishing procedures and authority for the legislative process. The problem in China is that it is easy to make laws, but difficult to make them work. Statistics indicate that only 20 percent of the law is seriously implemented in many areas.

For example, in handling criminal cases, the police generally either abuse their authority or disregard the law. Plainclothes policemen beat up Falungong members in broad daylight in Tiananmen Square. More than 500 Falungong members have been tortured to death in detention centers and labor reform institutions. The police detain and arrest people without a warrant, and they also search people's homes without a warrant. They can detain people for long periods without charge and refuse to release them. In the criminal process there is no basic system of advocacy, and only one out of seven accused persons has any access to defense. Defense lawyers themselves sometimes get into trouble, some even sent to prison, simply for doing a good job. And while counterrevolutionary crime has been removed from the new criminal law, the replacement crimes of endangering state security and incitement to subvert government allow judicial organs to continue to punish people who exercise their freedom of expression.

Li Jinjin Since the crackdown against the Gang of Four in 1979, there have been some significant developments in China's legal reform. The process of legal reform, or legal construction, was meant to establish a socialist legal system under which there must be laws, these law must be enforced, enforcement must be strict, and violations of the law must be prosecuted. These four "musts" represent the principles of legality in China.

However, the principles of legality clearly emphasize that the law is to govern the people. In the beginning of the 1990s, after the crackdown of the Democracy Movement of 1989, a debate emerged in China over the distinction between Rule by Law and Rule of Law. Scholars participating in the "China and Constitutionalism" program conducted at Columbia University in the fall of 1992 discussed this distinction, and the general consensus was that China was seeking Rule by Law, under which the law is merely a tool used by the ruling

Communist Party to govern the country. In contrast, under what we know as Rule of Law, the law itself is the "king" governing society, even to the extent of putting restraints on the government itself.

Ten years have passed since the "China and Constitutionalism" program, but China remains firmly on the Rule by Law track. We have to acknowledge that China's legislatures, the national and local People's Congresses, have passed bills covering almost every field, from family planning, women and infant protection, disease control, forest protection and foreign trade to state security. Legislation has made some progress in reducing extrajudicial killings, arbitrary arrest, detention and torture. For example, the newly amended Criminal Procedure Law adopted the right to counsel, allowing suspects to obtain legal assistance in the early stages of a prosecution, as opposed to the old regulations that gave suspects access to a lawyer only after the trial date was set. Another significant change is abolition of Shelter and Investigation, an administrative procedure allowing the police to detain suspects indefinitely (from several months to years) without charge. However, China's human rights record remains notoriously poor, and the government has continued to commit numerous serious abuses. Human Rights in China has disclosed many cases of arbitrary arrest and detention in China.

WY Mr. Yu Haocheng, as an expert and ardent proponent of constitutionalism in China, could you please explain what constitutionalism actually is, and why it is so important for contemporary China?

YH Mao Zedong once said that constitutionalism is another word for a democratic system. But that is too simple and not comprehensive enough.

I would define constitutionalism as a democratic system that puts the constitution above all other laws as a means of protecting the civil rights of the people and effectively limiting the power of the government. That is to say, a constitutional government will implement rule of law, will guarantee human rights and will prevent the government from arbitrarily interfering with civil rights.

Why do I think this is important to China? Because China is, up to this day, a nation ruled by people, not a nation ruled by law. Though we have a constitution and many regulations in which civil rights are included, in practice people do not enjoy those rights. For example, freedom of speech is included in the constitution. But do people really enjoy this freedom? Arresting people who write something on the Internet tells us that they do not.

WY Then, Mr. Yu, do you see any hope of China changing for the better in the near future?

YH Under the current system I see reform-minded people even among the leadership. During his inaugural speech the new president, Hu Jintao, spoke of his high regard for the constitution and for implementing rule of law, and he backed this up

by attending a ceremony marking the 20th anniversary of the adoption of China's constitution.

Li Rui, a former secretary of Chairman Mao, has constantly and openly spoken in favor of democracy, and that also tells us there is an alternative voice within the Party.

However, in order to implement genuine reform, China needs above all to put into practice full freedom of speech for individuals and for the media.

WY Mr. Guo, in China many people now feel they can say whatever they want, so they feel they have freedom of speech. Do you think so? In your opinion, what is the current status of freedom of expression in Chinese journalism?

GL In comparison with the Culture Revolution era, Chinese people today can talk much more freely. More than twenty years ago, people exercised great caution, even when chatting with friends at home. Everyone was afraid of being exposed by someone else. If someone accused you of saying something counterrevolutionary, you could be put into prison or even sentenced to death.

However, the freedom of speech Chinese people now enjoy exists only in private conversation. People do not yet enjoy genuine freedom of speech, in which they can express their political views openly.

There is a sword of Damocles dangling over the entire Chinese media. Any improper speech can cause serious trouble for a news organization, including dismissal of the person in charge, reorganization or even closure. The leadership of *Nan Fang Zou Bao* [Southern Weekly] in Guangzhou has been changed several times, and *21st Century Global Report* is currently closed.

The Internet is the most effective medium for exchange of information, but the Ministry of National Security has hired thousands of Internet police to screen foreign e-mail sent to domestic accounts. More than 17,000 Internet bars were closed down in 2001 after the State Council issued its "Measures for the Management of Internet Information." Reporters Sans Frontieres strongly criticized the measures and labeled Jiang Zemin the "Enemy of the Internet".

WY We all know the three main obstacles for China's legal reform, namely the ongoing problems of corruption, lack of trained personnel and the role of the Party in the legal process. How would you evaluate the relative importance of these obstacles?

LJ Corruption is a serious problem in China. The Chinese authorities have enacted a number of the regulations to crack down on corruption, and the enforcement of anti-corruption law appears strict. Many high officials have been prosecuted, including the former mayor of Beijing, Chen Xitong, who was also a member of the Party politburo. The vice-president of the Standing Committee of the National People's Congress, Che Kejie, was also convicted and sentenced to death for corruption. Nevertheless, corruption is still not under control, and it remains a major source of complaint by the people.

The government of China has also made some effort to reform its judicial system. The judges and procurators [prosecutors] are required to meet higher professional standards than before. They cannot retain their positions unless they pass an examination and obtain a Certificate of Legal Profession. (However, the chief judges of the high courts have never been lawyers, or received legal education, and hold their positions through political appointment.) Judges in China have discarded their military uniforms and now dress in black robes like judges in western countries. More recently, the authorities have instructed judges to use gavels during court sessions.

The Supreme Court of the People's Republic of China has addressed the issue of ethics by establishing regulations to curb judicial corruption. Judges who violated prohibitions against accepting money or other gifts from litigants, or who meet privately with litigants, may be found guilty of malpractice under the new regulations. However, in reality there is no system to reliably enforce ethical standards in the legal profession. A successful lawyer still depends more on his "guanxi" – his connections with officials – than on his professional performance.

In short, while the Chinese government has enacted many laws, only the laws suppressing political dissent and maintaining state security and social order are enforced effectively. Laws meant to protect the people's basic rights or constitutional rights and laws against corruption are ineffective. This situation indicates that China is still far from the Rule of Law. The main obstacles to China's progress in legal reform are the absence of judicial independence from the Communist Party and the lack of freedom of speech.

GL I feel that the most serious problem is judicial corruption. An article in the magazine *Ban Yue Tan* [Semi-Monthly Chat] No. 5, 1998, described ten forms of judicial corruption, including bribery, extortion, bending the law to help friends and relatives, favoritism in releasing suspects or criminals, illegal detainment and so on. The judiciary is supposed to punish corruption, so when the judiciary itself is so corrupt, we know this regime is beyond saving. China is further away from rule of law than ever.

TY Among these three factors – corruption, lack of personnel training and the role of the Party – I would put the role of the Party as the single most important hindrance to meaningful legal reform. Exclusive rule by the Party defies any commitment to a democratic society, and in turn eliminates the possibility of just and equal treatment in China's legal system. Because the legal process serves as a tool for the Party to govern society, rather than as a means by which disputes can be justly resolved in a courtroom, ordinary Chinese don't trust the legal system and are willing to use it to define their rights and duties only as a last resort. People prefer to settle disputes themselves. Ironically, although stability is the Party's paramount concern, distrust of an ineffective and unjust legal system increases instability because people won't go to the courts to resolve disputes.

Corruption is an inevitable derivative of one-party rule rather than the root cause of an ineffective legal system. If one-party rule is transformed into a multiparty political system, corruption will be less prevalent than it is now because there will be more checks and balances in place. Even better, if the media enjoy freedom, they can also serve as an effective curb on corruption.

Lack of personnel training is a long-term problem, but not irremediable. If China's political system someday recognizes rule of law, equal treatment under the law and due process, legal education will catch up with these principles and we will not lack capable legal minds. Look at what has happened in the technology and economics fields over the past 20 years – China has accumulated a large reservoir of competent technicians and business people. Why? Because there is huge demand for such people in China now. This gives one hope

that China will eventually have competent legal professionals if it is willing to change its fundamentally unfair and unjust political system.

I think what China needs most in its legal reform is the concept of "due process." Although it is an extremely complicated concept in the U.S. system, the procedural component means that you need a just and fair process before any substantive rights can be adjudicated. In other words, it is a concept of "fair play" similar to the rules in a basketball game. People set the rules first and then play according to those rules. If you change the rules in the middle of a game, it is unfair. I don't think China has this concept in place in its legal system yet, and it will take a while for China to develop and implement it. For now, the Party can still change the rules in mid-play, thereby imposing an unfair advantage over its adversaries. This has to be changed first.

New Books in Brief

Guide to Online Legal Research in China

Edited by Joan Liu and Liying Yu
Law Press China (Falü Chubanshe),
forthcoming October 2003

Edited by curators of the New York University Law Library and Tsinghua University Law Library, this book examines the major online sources relating to the laws of Mainland China, Hong Kong and Macau, as well as those relating to foreign and international law. Aimed at assisting Chinese legal professionals, the book also includes sections on legal research strategies and research by subjects, as well as annexes on relevant print and CD-Rom resources.

Modernizing China's Military: Progress, Problems, and Prospects

By David L. Shambaugh
University of California Press, March 2003
374 pp., hardcover, \$34.95
International expert David Shambaugh offers comprehensive assessments of China's military capabilities and strategic intentions based on a decade's research involving unprecedented examination of Chinese military publications and interviews with PLA officers.

China's Use of Military Force: Beyond the Great Wall and the Long March

By Andrew Scobell
Cambridge University Press, June 2003

350 pp., hardcover \$65, paperback \$23
Andrew Scobell, a professor at the U.S. Army War College in Carlisle, PA, examines China's use of military force domestically, in the late 1960s and in Tiananmen Square in 1989, and abroad in Korea, Vietnam and the Taiwan Strait. Scobell warns that a "Cult of Defense" disposes Chinese leaders to rationalize all military deployment as defensive, and that China's 21st Century leaders may use military force more readily than their predecessors.

China in the WTO

Edited by Long Yongtu, Francisco Sercovich, Carlos A. Magarinos
Palgrave Macmillan, March 2003
224 pp., hardcover, \$70
Edited by Carlos Magarinos and Francisco Sercovich of the UN Industrial Development Organization and Long Yongtu, Chief Representative for Trade Negotiations in China's Ministry of Foreign Trade and Economic Cooperation, this book provides an authoritative assessment of the lessons learned in negotiations over China's accession to the WTO, and the implications of China's membership on the multilateral trading system. Particular emphasis is placed on the impact on emerging Asian-Pacific countries.

Taxation with Representation in Contemporary Rural China

By Thomas P. Bernstein, Xiaobo Lü
Cambridge University Press, April 2003

300 pp., hardcover, \$70

The authors examine taxation as a source of political and social instability in the Chinese countryside. The book reveals peaceful and violent strategies adopted by peasants in resisting their tax burden, and why the central government, even when siding with the peasants, has been unable to resolve the problem through a sound and reliable financial system.

Manager Empowerment in China: Political Implications of Rural Industrialisation in the Reform Era

By Ray Yep
Curzon Press, May 2003
288 pp., hardcover, \$95
The author examines how institutional changes in rural China caused by economic reforms have led to the rise of a managerial elite. Contrary to economic predictors, the author finds, an interdependence has developed between these managers and the state.

Sustainable Development in Rural China: Farmer Innovation and Self-Organisation in Marginal Areas

By Bin Wu, Dilip K. Das
Curzon Press, May 2003
288 pp., hardcover, \$90
The authors describe the challenges of unsustainable development in rural China and the role of farmers in developing innovative methods to address these challenges. The book focuses particularly on the examples of Shaanxi and Zhidan.