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## FOREWORD

# CIRCLING TOWARDS LAW

**By Sharon K. Hom**

There has been significant progress towards rebuilding the legal system in China since the early 1980s, including impressive legislative activity, training of legal personnel (lawyers, judges, law professors) and development of legal and administrative institutions and processes. The role of foreign foundations, governments and academic institutions has been prominent, especially in supporting exchange and capacity-building initiatives.<sup>1</sup> Substantive legislative initiatives to date have focused on economic law, civil law and other regulatory areas necessary to promote market reforms, along with administrative law and administrative procedure law.

Recent human rights-related reforms include the addition of a human rights provision in the PRC Constitution,<sup>2</sup> the return of death penalty cases review to the Supreme People's Court,<sup>3</sup> and the announced abolition of one form of abusive administrative detention, Custody and Repatriation. But does this emerging legal and administrative system protect human rights? What about the extensive system of administrative detention left intact, out of public sight and beyond judicial review? What are the costs, both to individuals and to Chinese society? What about spillover impact regionally and globally? What role can different actors play to advance human rights at this critical juncture of China's reform path?

These are difficult challenges in light of persistent structural and systemic problems including: endemic corruption and influence of *guanxi* (relationships), levels of legal competency, the role of the CPC and the lack of an independent judiciary and bar. While the number of lawyers in China has grown from about 200 in the early 1980s<sup>4</sup> to nearly 130,000 at present,<sup>5</sup> harassment, intimidation, detention and prosecution targeting Chinese defense lawyers undermine the development of a professional and independent bar. The crackdown on lawyers further undermines the criminal justice system and contributes to an overall chilling effect on rights defense work.<sup>6</sup> Professor Jerome Cohen, a prominent China legal expert, recently observed that the plight of Chinese lawyers might be like the plight of Chinese pandas—an attractive breed, but always on the verge of extinction.

## NEGOTIATING CHINA'S "RULES OF ENGAGEMENT"

This important historical juncture, especially in the final lead-up to the 2008 Olympics, presents domestic and international developments and windows of opportunity for more traction on human rights. Most importantly, despite crackdowns, detentions, censorship and surveillance, and a restrictive regulatory framework, Chinese lawyers, journalists,

petitioners and democracy and rights activists continue to raise issues of corruption, land seizures, environmental hazards, criminal justice issues and freedom of expression, and advocate for greater transparency and official accountability for past and present abuses.

Yet China's increasing integration into the international community also provides a platform for monitoring and engaging China on its implementation of international obligations. In its successful 2006 bid for membership on the United Nations Human Rights Council, China asserted its respect for the universality of human rights and pointed to its active implementation of international treaties.<sup>7</sup> Over the past two decades, China has signed and ratified key international human rights and labor rights treaties and conventions, including those addressing discrimination, torture, economic, social and cultural rights, and rights of women and children. This commits China to implementation, including reporting on its progress and participating in the international review and oversight of its record.<sup>8</sup> Although China has signed, but not yet ratified, the International Covenant on Civil and Political Rights (ICCPR), as a signatory it is obliged not to defeat the object and purpose of the treaty.<sup>9</sup> In addition, China is clearly demonstrating increasing sophistication in invoking human rights language, norms and procedures of the various human rights bodies and processes.

Yet, the numerous recommendations and conclusions produced by these international expert human rights reviews remain underutilized in bilateral and other international engagements with China aimed at advancing rule of law and human rights. For example, various UN bodies and special procedures have issued recommendations that would advance legal reforms in China, including ratifying the ICCPR, reducing the scope of the death penalty, abolishing Section 306 of the Criminal Law targeting lawyers, amendment of the Trade Union Law to allow for independent unions, and reforms aimed at clarifying or promulgating definitions for non-discrimination, crimes of torture and "endangering national security." In addition, numerous systemic and process recommendations, such as reporting disaggregated information (by gender, ethnicity, province and rural versus urban areas) and removing restrictions on freedom of expression, would enhance transparency and accountability.<sup>10</sup>

These recommendations for reforms also reflect domestic Chinese civil society debates, concerns and recommendations by Chinese legal experts and practitioners, and labor and other rights activists. One strategic challenge facing international actors is how to engage with China in a way that supports these voices and expands the independent civil space, while negotiating the trade-offs to maintain their access—access to domestic civil society groups, the huge China market or influential government relations. While the implementation challenges facing China are not unique, the daunting tasks facing legal reform efforts given existing political constraints are considerable.

Beyond formal legislative initiatives, adequate funding, training of personnel and strengthening institutions such as courts, the development of a rule of law that protects human rights will require a radical cultural shift that draws upon changes already underway. Despite the emergence of some kind of adversarial legal system, a political culture of corruption undermines human rights. Yet, the deployment of resources to implement the extensive review and overhaul of existing laws, as well as promulgation of new laws neces-

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sary to bring Chinese law into compliance with WTO accession obligations, the extensive training initiatives launched, and the prominent role of international expertise, all reflect the scope and speed of reforms possible given adequate political will.<sup>11</sup>

## **TOO MANY SECRETS**

Information control is another overarching obstacle to developing more effective approaches to addressing these systemic challenges and assessing current reform efforts. In a new report, *State Secrets: China's Legal Labyrinth*, Human Rights in China (HRIC) provides a detailed examination of this system of information control, and its chilling effect on efforts to develop the rule of law and independent civil society inside China. This state secrets system controls the public dissemination of an all-encompassing universe of information as diverse as the total number of laid-off workers in state-owned enterprises; national statistics on the death penalty; statistics on unusual deaths in prisons; statistics on trafficking in women and children; and data on water and solid waste pollution in large and medium size cities.

Accurate, reliable and accessible information is critical to developing effective solutions. The control of information not only affects the work of individual Chinese activists, journalists, business actors and academics, but also that of government agencies, non-governmental organizations and domestic and foreign institutions committed to grappling with the complex environmental, health and other social challenges facing China.

The Chinese government recently announced governance and legal reforms aimed at providing greater accountability and transparency. But will these initiatives really have an impact on loosening the Chinese government's grip on information control? One such recent development was the announcement of a national Open Government Information (OGI) law, to go into effect on May 1, 2008. The new law was heralded as recognition of the "right to information" and a significant step in promoting government accountability in China. However, one category of information excluded from the new OGI law, or from any of the local OGI laws enacted in the past five years, is information classified as "state secrets." Without addressing this huge universe of classified information, these OGI initiatives will have limited impact in addressing real problems covered up and exacerbated by lack of transparency and official accountability.

## **"HISTORY TAKES A LONG TIME"**

The articles in this issue of *China Rights Forum* examine some key areas of recent legal reforms and debates, including death penalty reforms, property law, corruption, and accountability for past injustices resulting from the June 4 crackdown and the Anti-Rightist Campaign of the 1950s. As these articles suggest, the reform road towards greater transparency and accountability is a rocky and circular one. The official failure to address the claims of victims of massive past injustices contributes to perpetrating present wrongs and a culture of impunity that undermines the construction of a truly harmonious society. The articles in this issue also examine the international dimen-

sions in areas such as extradition and international cooperation in criminal justice, or production and export of tools of torture, underscoring the interrelatedness and spillover effects of China's domestic human rights policies and practices. Tenzin Tsundue's testimony of his experience as a prisoner in China's penal system also underscores the critical role that foreign intervention and attention can play.

Professor Cohen notes the profound irony of China today—"when you go to Pakistan, you know you are in a police state, but when you go to China everything looks good; everyone is eating and drinking like there is no tomorrow. But they have no understanding of the Secret police . . . that is the underpinning of this marvelous progress."<sup>12</sup> Yet, like many human rights lawyers, activists and scholars working for legal reforms, Professor Cohen remains reasonably optimistic, pointing out that "history is on their side, but history takes a long time."<sup>13</sup>

## Notes

1. For an overview and critique of the various programs, see "Promoting the rule of law," *China Development Brief*, February 1, 1999, <http://www.chinadevelopmentbrief.com/node/247>; "Does this cat catch mice?" *China Development Brief*, July 1, 2003, <http://www.chinadevelopmentbrief.com/node/143>; Jerome A. Cohen, "Human Rights and the Rule of Law in China," Prepared Testimony before the Congressional-Executive Commission on China, September 20, 2006; Stephanie Wang, "Funding the Rule of Law and Civil Society," *China Rights Forum* 3 (2003), [http://www.hrichina.org/fs/downloadables/video/HRIC\\_issues\\_paper3.2003.pdf?revision\\_id=8756](http://www.hrichina.org/fs/downloadables/video/HRIC_issues_paper3.2003.pdf?revision_id=8756).
2. Constitution of the People's Republic of China, adopted and in effect December 4, 1982, and amended April 12, 1988, March 29, 1993, March 15, 1999, March 14, 2004.
3. The Decision by the Supreme People's Court Regarding Certain Questions on Unifying the Review and Approval Process for Death Penalty Cases, issued December 28, 2006.
4. "Number of Lawyers Rapidly Rising in China," *People's Daily*, July 8, 2002, <http://www.china.org.cn/english/Life/36430.htm>.
5. Randall Peerenboom. *China's Long March Toward Rule of Law*. (Cambridge University Press, 2002); "Senior Chinese leader calls for closer cooperation among Asian, Pacific lawyers," *People's Daily*, 4/22/2007. [http://english.people.com.cn/200704/22/eng20070422\\_368630.html](http://english.people.com.cn/200704/22/eng20070422_368630.html).
6. Human Rights in China, "Trends Bulletin: Setback for the Rule of Law: Lawyers Under Attack in China," (August 2006, updated February 28 2007); Human Rights Watch, A Great Danger for Lawyers: New Regulatory Curbs on Lawyers Representing Protesters (December 2006).
7. Permanent Mission of the People's Republic of China to the UN, *Aide Memoire*, April 13, 2006.
8. The PRC is a State Party to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), signed July 17, 1980, ratified November 4, 1980; International Convention For Elimination of Racial Discrimination (CERD), acceded December 29, 1981; UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment (1988); The Convention on the Rights of the Child (CRC), signed August 29, 1990, ratified March 2, 1992; and International Covenant on Economic, Social, and Cultural Rights (ICESCR), signed October 27, 1997, ratified March 27, 2001, with reservations regarding independent unions. International Covenant on Civil and Political Rights (ICCPR), signed on October 5, 1998, not yet ratified.
9. Vienna Convention on the Law of Treaties, signed May 23, 1969, entered into force Jan. 27, 1980, Art. 18.
10. See Human Rights in China, "China's Growing Prominence in the Multilateral Human Rights System," *China Rights Forum* 1 (2007). For a selected checklist of human rights recommendations of the UN for China, including specific citations to the relevant UN body or procedures.
11. Sharon Hom, "China and the WTO: Year One," *China Rights Forum* 1 (2003).
12. Remarks by Jerome Cohen, "Jerome Cohen and Jonathan Spence in Conversation with Orville Schell, III", talk given at Yale Law School, Bernstein Symposium 2007, April 13, 2007.
13. Ibid.