Law in Political Transitions: Lessons from East Asia and the Road Ahead for China

By Jerome A Cohen

China's Legal System in Transition

In December 1978, when the Chinese Communist Party's new leadership under Deng Xiaoping announced the "Open Policy" that launched the country's impressive modernization program, it also recognized the importance of constructing a legal system commensurate with China's new ambitions. At that time, the Soviet-type legal system that the PRC had adopted in the early 1950s lay in tatters, a victim of twenty years of political turmoil that had culminated in

The Cultural Revolution, whose spirit was encapsulated by a People's Daily editorial entitled "In Praise of Lawlessness"!

The new legal system was to fulfill many functions. It would provide for the orderly and efficient conduct of government not only at the central level but also at the provincial and local levels of a vast land and population. It would facilitate domestic industrial and commercial development and international trade and investment. And it would suppress what was deemed to be antisocial behavior, while assuring greater fairness and accuracy than had prevailed in the administration of justice during the three preceding decades of Communist rule.

At the time, only a quarter century ago, China displayed virtually none of the indicia of a formal legal system. Its Constitution was merely an unenforceable collection of political slogans and general principles. It had few useful laws and even fewer bilateral or multilateral agreements with other countries to offer guidance on legal problems. The National People's Congress (NPC), nominally the country's highest government authority, was in the process of resurrection. The courts were a shambles. The procuracy, which is responsible for criminal prosecutions and is supposed to serve as the "watchdog of legality", had been non-existent for twelve years, and Chinese lawyers for over twenty. China's Soviet-style commercial arbitration institutions were not suitable for settling disputes with Western companies, and legal education and publications were only beginning to revive.

Today, China plainly has a formal legal system, one that, from the perspective of a generation ago, can be seen to have made significant progress. An increasingly robust National People's Congress and its Standing Committee have enacted a huge amount of legislation on topics of all description. These laws have been supplemented by myriad regulations of the State Council, China's leading executive institution, and the central ministries and commissions under it, as well as provincial and local people's congresses and governments. The Supreme People's Court (SPC) and the Supreme People's Procuracy are both now vigorous organizations, although, like the State Council, they are subordinate to the NPC. They too have issued large numbers of "interpretations" and other documents, either separately or with each other and with other agencies, that are the substantive equivalent of supplementary legislation. The PRC has also concluded with other governments a large number of bilateral agreements bearing upon the domestic legal system and now adheres to many multilateral treaties concerned with international business law and human rights.

China today has a nationwide court system including over 3,000 basic courts and almost 200,000 judges.

The task of forging this huge and inexperienced group, originally staffed mostly by former military and police officers without legal education but now increasingly recruited from law school graduates, into professionally competent, honest, impartial and independent decision-makers is formidable. To do so the Supreme People's Court has labored mightily, within the confines of Party policy and the SPC's limited political power.

Much the same can be said about the procuracy. It now has almost as many legal personnel as the courts and is recruiting more and more law graduates. Lawyers, reestablished in 1980 and currently numbering approximately 120,000, play an increasingly important role in China's cities, especially in civil and business transactions. Their ranks too are strengthened each year by thousands of new law graduates, who now have to pass, together with would-be judges and procurators, a challenging unified bar examination, with a pass-rate, last year, of only slightly over 11%.

Legal education has become one of the fastest-growing branches of Chinese academic life, and the country now has almost 400 law schools of various kinds. Bookstores that never before had a legal section or even a shelf devoted to law are now filled with collections of laws and analytical treatises and teaching materials. They also carry "how to do it" self-help manuals on many topics such as civil and administrative law procedures, tax law and real estate transactions, for those who do not have access to or wish to avoid lawyers. There are now over 90 law magazines, rife with law reform proposals. Within the limits of Party policy, which fluctuates with the time, place and topic, the Internet has spawned nationwide legal discussions. It makes available information and views about law that newspapers and television, also under Party control, may have slighted.

Legal developments relating to foreign trade, technology transfer and investment have led this progress. During the decade prior to the tragedy of June 4, 1989, the PRC's desire for foreign direct investment stimulated steady creation of

a useful legal framework. The PRC's opening of capital markets in the early 1990s initiated a new wave of financial legislation and regulation, and its 2001 entry into the World Trade Organization has produced a host of substantive and institutional reforms that should continue for some time. China's international commercial arbitration organization is now the world's busiest, and almost 200 cities have established their own arbitration commissions to handle domestic and foreign-related disputes.

Development of law and legal institutions has contributed to a burgeoning popular awareness of law and indeed "rights consciousness". Profound social and economic change has fostered this trend. An economy formerly dominated by state-owned enterprises and the "state plan" is now increasingly free, transactional/contractual and open to private entrepreneurs.

A society that was once one of the world's most egalitarian now features accumulations of wealth that have created one of the world's biggest gaps between rich and poor. Much of this wealth has been created by collusion between government officials, still in command of land and other resources, and corrupt entrepreneurs.

This, in turn, has generated not only demands for the protection of the personal and property rights of the successful but also even stronger demand for such protection from losers in the ongoing socio-economic transformation, who desperately seek legal remedies to alleviate perceived injustices. Women, minorities, the disabled and other victims of discrimination invoke China's Administrative Litigation Law and related legislation to challenge arbitrary official action.

Farmers strive to use the courts to stop unfair official land requisitions or financial impositions by local cadres, and urban residents try to rely on the law to prevent developers and city officials from demolishing their housing without adequate compensation.

Too often such efforts fail. Legislation is frequently inadequate, and many conflicts between national and local norms, and the proliferation of regulations, interpretations and other edicts often produce incoherence and inconsistency. There are too few able lawyers, and those who are not afraid to undertake sensitive cases sometimes lose their license to practice law or are detained and punished for "damaging public order" and similar offenses.

Judges are often vulnerable to corruption, political control and the pressures of "guanxi" (social connections based on family, friendship, school or local ties). Since their appointment, promotion, assignment, compensation and removal are all at the pleasure of local government and Party leaders rather than the Supreme People's Court or provincial High Court, they and the litigants who appear before them are subject to the abuses of "local protectionism".

Even PRC arbitration, to which many foreign businesses and Chinese turn in an effort to avoid vagaries of courts, sometimes suffer from the same types of pressures that distort judicial justice. Prosecutors, who are supposed to guard against such illegal conduct, are usually too weak politically and plagued by their own vulnerabilities to remedy the situation.

Criminal Justice

The weakest link in the PRC legal system is criminal justice.

The codes of criminal procedure and criminal law, first enacted in 1979, three decades after the founding of the PRC, and revised in 1996 and 1997, respectively, lend themselves to abuse by law enforcement authorities. The PRC is, of course, far more notorious than the United States for its resort to the death penalty in many thousands of cases each year, with no fewer than 68 statutory provisions authorizing executions. The Chinese Government is so embarrassed by the number of executions it carries out that the precise figure is one of its most closely guarded secrets.

The Criminal Law is so broad and vague regarding both the conduct it prohibits and the punishments it prescribes that the regime has no difficulty imposing severe sentences on persons engaged in unapproved political or religious activity. Although "counterrevolutionary" conduct is no longer prohibited, its prohibition has been replaced by the equally imprecise crime of "endangering state security", which is often invoked. So too is the sending abroad of "state secrets", loosely defined, and often applied to information designated as secret after the fact, by the judicially unchallengeable National State Secrets Bureau.

Also punishable is the sending abroad of "intelligence", which turns out to be merely information in the public domain that the regime does not want disseminated outside China. Courts, and those Party and government leaders who dictate court decisions in sensitive cases, are free under the law to impose the harshest sentences "if the circumstances are serious" and especially "if the circumstances are especially serious."

Protections afforded by the Criminal Procedure Law (CPL) are too few, ineffectual, and riddled with exceptions to permit meaningful defense. When police or prosecutorial investigators wish to detain a person, they can do so on their own, without the approval of any outside agency. They need not notify the suspect's family or work unit of the detention, the basis for it or the suspect's location if, in their opinion, to do so might interfere with the investigation.

In most PRC criminal cases the suspect is denied "release under guaranty pending trial", the Chinese equivalent of bail, again a decision made by the investigating agency alone. Nor do the investigators need outside approval if they decide to search the suspect's residence, office or car.

If the suspect's family can afford a lawyer, the lawyer can be prevented from meeting his client for the entire investigation period, which can last for months or even years, if the investigating authority claims that the case involves "state secrets". In cases where the lawyer does manage to meet his client, that meeting is usually monitored by the police.

The lawyer, not considered by the law to be a "defense lawyer" until the investigation has concluded and the case has been sent to the prosecutor for indictment, is usually not permitted to question his client about the facts of the case but can only introduce him to the elements of the charge and his rights under the law.

Nor may the lawyer begin his own inquiry into the case, gathering evidence and interviewing witnesses, until the official investigation has ended. Even then, interviewing witnesses is dangerous because of the risk that a witness, under government pressure, may change his statement and the lawyer might then be accused of falsifying evidence.

The suspect has no right to silence, and reticent suspects are frequently subjected to torture, despite the Criminal Law's explicit prohibition of such conduct in accordance with the obligations the PRC assumed when ratifying adherence to the UN Convention against torture, in 1988.

Suspects are also frequently subjected to "overtime detention", even if one accepts the investigating authorities' dubious interpretations of the time limits set forth in the CPL.

The outstanding feature of PRC criminal investigation is the inability of the suspect, his lawyer, family or friends to challenge the legality of any official actions before an independent tribunal or other agency.

Any attempt to obtain administrative reconsideration of investigators' decisions by their higher authority is usually fruitless.

In principle, the local procuracy should be willing to review questionable decisions or practices, but political realities usually preclude this. The procuracy is without incentive to self-monitor its own investigations, as in official corruption cases, and even less likely to intervene in an investigation by either the Public Security Bureau or the State Security Bureau, whose investigators generally outrank their procuracy counterparts in the Party's political pecking order.

Any effort to seek judicial review is rebuffed by the courts on the ground that they do not enter a criminal case until after indictment. And neither the local people's congress nor government, the Party Discipline and Inspection Committee or the Party Political-Legal Committee that coordinates cooperation among the government law enforcement agencies will prove helpful. The result is unchecked discretion for the investigators and total frustration for the suspect and his lawyer.

Trial has its own frustrations for the defense. Witnesses rarely appear in court. The prosecution simply reads out their written statements, thereby depriving the accused and his lawyer of the opportunity to cross-examine them, granted in principle by the 1996 CPL revision. Rules of evidence are rudimentary, and illegally obtained evidence is often admitted in practice.

Defense lawyers must be careful during trial, as well as during earlier stages of the process, not to alienate prosecutors, who have the power under Section 306 of the Criminal Law, a provision aimed squarely at lawyers, to prosecute them for assisting in the falsification of evidence. This "Sword of Damocles", as it is known, has been invoked over 200 times.

Law Reform Prospects

Yet we can expect robust law reform efforts to continue in China, even in the field of criminal justice. The PRC is still considering whether or not to ratify the International Covenant on Civil and Political Rights (ICCPR), which it signed in 1998. Ratification would commit the PRC to changes in law and practice in the criminal justice area as profound as those changes in economic law and practice required by the PRC's entry into the WTO.

Regardless of ICCPR ratification, the Chinese Government, under strong domestic pressures to eliminate some of the most glaring defects in the CPL and some of the worst distortions of the CPL in practice, has already made clear its determination again to revise the CPL. Although optimists predict that the newly-revised CPL might appear by next year, we should not underestimate the magnitude of the task. A multitude of controversial issues awaits the NPC, and achieving a meaningful reconciliation of the conflicting views of the Ministry of Public Security, the Ministry of State Security, the Ministry of Justice, the Supreme People's Court, the Supreme People's Procuracy, the All China Lawyers Association, influential academic experts and relevant Party organizations will require enormous legislative skill, time and energy.

Pending comprehensive revision of the CPL, the NPC may decide to make certain urgently needed reforms earlier.

For example, should the NPC do something about "reeducation through labor" ("laojiao")? It is an administrative punishment that is not authorized by NPC legislation (as now required by other NPC legislation) and that is dispensed by the police, who can send someone to labor camp for three or four years without the participation of lawyers or the approval of the procuracy or the courts.

Although the Ministry of Public Security has been waging a public relations and lobbying campaign to retain "laojiao", even conducting limited experiments to allow lawyers into the proceeding in an effort to avoid losing this major sanction, its continuing existence is blatantly inconsistent with the premises of the CPL and the Law on Legislation, as well as perhaps the Constitution itself, as many Chinese judges, officials, lawyers and academic experts have pointed out.

Perhaps we can also expect an expanded role for the courts, and further strengthening of the courts and the legal profession in order to enable the courts to play this expanded role.

The Chinese Government is plainly facing a domestic crisis of confidence caused by the failure of its institutions to deal adequately with a rising tide of public grievances relating to environmental pollution, real estate manipulation, unauthorized local financial demands, corruption, discrimination and other official abuses.

Increasingly, interest groups, fueled by a shared sense of injustice, are taking to the streets and even rioting. These protests threaten political, economic and social stability and indeed the common people's belief in the legitimacy of Communist rule.

Too often, the courts, instead of enforcing national laws against lawless local officials or conflicting local regulations, serve as the instruments of the local elite against the victimized populace. And lawyers brave enough to assist protesters in their efforts to resort to courts in order to vindicate their rights are often detained or intimidated by local police and prosecutors.

It would be logical for the PRC leadership to try to lift local courts from the mire of "local protectionism" by placing the power to appoint, promote, assign, compensate and remove basic and intermediate court judges in the Supreme People's Court or the provincial High Courts so that local judges would become more responsive to national needs rather than local pressures.

It would also be helpful to review current criteria for compensating, assessing, promoting and removing judges.

Similarly, we might expect enlightened leaders to sympathize with the growing consensus, at least among lawyers and scholars, that Section 306 of the Criminal Law should be repealed, in order to encourage more lawyers to take part in and vigorously defend criminal cases, and to try to channel public disputes into the courts instead of the streets.

Emerging Constitutional Law

Although the PRC has had several constitutions in its 56 years, until recently few individuals or groups took seriously the idea that the provisions of the Constitution might actually be enforceable, whether through the NPC or the courts.

Neither Mao Zedong nor Deng Xiaoping endorsed Montesquieu's separation of powers. Nor did they embrace the revered Sun Yat-sen's distinctive five-power division

adopted by China's pre-Communist Government, that of Chiang Kaishek's Nationalist

Party, which is still in use by the Republic of China on Taiwan and which is only now beginning to totter. In the PRC system, following the Soviet model, the national legislature, the NPC, is the single supreme power, and all other government institutions—executive, prosecutorial and judicial—are subordinate. Power to interpret and apply the Constitution is lodged in the Standing Committee of the NPC, not in the courts.

Yet, given the realities of Communist Party control of government and public life, until two years ago no one activated this constitutional decision-making mechanism. The accepted view was that the Constitution recorded the nation's and the regime's basic principles, outlined the government structure and set forth the rights and duties of citizens.

It served many purposes—as national symbol, ideological rallying point, educational instrument, policy vehicle and propaganda tool—but was not generally thought to be the source of enforceable legal rights. Recently, as a consequence of rising rights consciousness, reflected in and further spurred by constitutional amendments mandating respect for human rights and property rights, the idea of translating the promises of the Constitution into real life began to attract China's expanding legal community.

An important stepping-stone was 1989 enactment of the Administrative Litigation Law, which for the first time made the legality of a broad range of concrete official decisions, but not abstract legislation or regulations, subject to judicial scrutiny.

The concept that government itself should be under the law—and not merely use the law as an instrument of its will—was strengthened by subsequent adoption of several other laws, especially a State Compensation Law offering limited redress, again through the courts, for certain wrongs inflicted by officials.

Without a constitutional amendment or at least authorizing legislation, could the courts, which are subordinate to the NPC, also begin to enforce constitutional rights and, if so, to what extent?

Could ordinary legislation authorize Chinese judges to invalidate on constitutional grounds abstract regulations and even laws of the NPC itself as well as concrete administrative decisions?

If judicial review of the constitutionality of legislation and regulations seemed out of the question without a constitutional amendment and if such an amendment was impossible to achieve in the current political climate, would there be any better chance of acceptance for a constitutional amendment that would establish a separate and independent Constitutional Court, along the lines of the German model that influenced the Republic of China on Taiwan and the Republic of Korea?

Many reformers recognized that the Party leadership is not prepared to endorse such a radical institutional move toward the rule of law. They believed that realism called for building on the existing constitutional structure by having the NPC prescribe procedures that would facilitate efforts to invoke the dormant constitutional decision-making power of the NPC Standing Committee, and, with little fanfare, that was accomplished as part of the Law on Legislation adopted in 2000.

This new procedure has actually begun to be used, and in a dramatic fashion that captured public attention. When in 2003 a hapless university graduate named Sun Zhigang died in police custody, the media and Internet ignited a storm of protest against the long unpopular State Council regulation on "shelter and repatriation" of migrants under which Sun had been detained.

Three courageous law professors then petitioned the NPC Standing Committee to invalidate that regulation as unconstitutional. By swiftly revoking the regulation, the State Council moved to avoid the necessity for a constitutional decision by the NPC Standing Committee.

This disposed of the immediate constitutional challenge, but it also vividly demonstrated to the country that a new legal weapon had entered the political arena.

Anticipating a flood of similar petitions relating to other grievances, the Legal Work Committee of the Standing Committee established a special office to give preliminary scrutiny to claims that government regulations violate the Constitution and should therefore be invalidated by the Standing Committee.

Since then, although the petitioning process remains cloaked in obscurity, a series of complaints has reportedly been filed with the Standing Committee against various State Council regulations. Literally tens of thousands of Hepatitis B carriers claimed that civil service regulations unlawfully discriminated against them.

Female civil servants petitioned to invalidate the requirement that women retire five years earlier than men, and thousands more have challenged national and local regulations authorizing demolition of their housing.

These complaints have not yet resulted in a constitutional decision by the Standing Committee but they have spurred administrative reforms and added to popular support for the concept of constitutionalism.

While popular demands are compelling the NPC Standing Committee to inch forward in the development of a mechanism for reviewing the constitutionality of administrative regulations, if not yet legislation, they are also beginning to stimulate the courts to reconsider their long-held view that judges cannot refer to constitutional rights even in deciding cases in which plaintiffs are only seeking relief against concrete administrative acts or private wrongs.

The Supreme Court led the way for lower courts in its landmark 2001 interpretation approving reference to the constitutional right to education as a basis for awarding the plaintiff relief against both a private party and a government agency, in a suit that was not brought to invalidate a law or regulation but to establish the liability of the defendants. Trial courts have since begun to grapple with a range of anti-discrimination complaints brought to challenge concrete administrative actions against individuals.

On at least two occasions the bringing of a suit alleging denial of equal protection of the laws resulted in termination of the challenged conduct, even though the court ultimately dismissed the claim as not among those authorized for adjudication under the Administrative Litigation Law. In two other cases, the court apparently granted relief to plaintiffs without clearly indicating its reliance on constitutional claims.

Plainly, this is an area that is only beginning to emerge, and the task of the foreign observer is not made easier by the limits of the PRC system for reporting judicial decisions, which makes it difficult to learn about and obtain court judgments.

Yet, one might wonder why, in view of the SPC's 2001 education case interpretation, lower courts seem reluctant to base their decisions on constitutional rights in concrete cases that do not attempt to invalidate legislation or regulations.

If, for example, gender discrimination claims are not deemed to fall within those that can be asserted under the Administrative Litigation Law, they plainly are covered by the Constitution's requirement of equal rights for men and women,

not to mention the Marriage Law and other legislation.

So long as courts do not tread upon the exclusive prerogative of the NPC Standing Committee to review the validity of legislation and regulations, but stick to the task of settling disputes about concrete administrative or private actions—a task that no one believes the NPC Standing Committee will ever take on—why should the courts deny Chinese citizens the benefits of their Constitution, while nevertheless consulting lesser sources of law?

Will the judiciary respond in a creative way to the challenges presented by an increasingly litigious society?

Much depends on whether the Party leadership has the wisdom and vision to appreciate the contribution that able and imaginative judges can make to stabilizing a country that is seething with injustice.

I am confident that the quality of the judges is improving, as one recent statistic suggests. A decade ago only 10,000 judges in the country, a mere 6.9% of the total at that time, had received an undergraduate education of any kind. Today, over 90,000 judges have reached that level, some 51.6% of the current total, and this trend toward greater education, increasingly legal education, will continue.

Due Process and the Communist Party

Albeit little known to most Chinese people, growing rights consciousness has even invaded the precincts of the Communist Party's 70 million members.

When dealing with the crucial issue of the imposition of Party sanctions against individual members, the most severe of which is loss of membership, the Party Charter has long recognized certain elements of due process—notice to the individual of the adverse action proposed and a right to be heard before a decision is made.

In practice, that provision has rarely been implemented. Recently, notable steps have been taken to put living flesh on the bare bones. For the past four years local Party Discipline and Inspection Commissions (DIC) in at least twenty provinces have reportedly conducted a range of experiments with what has come to be known as a "Party Discipline Tribunal" or "Intra-Party Court", that adopts some basic features of PRC criminal court trials.

In one respect the opportunity to cross-examine witnesses—this evolving institution may do better than most criminal trials.

Although details have varied, at these tribunals Party investigators are required to present evidence, including witnesses, and the accused is permitted to challenge the evidence, produce witnesses of his own and even have the assistance of a fellow Party member in coping with the evidence and arguing his case. Triers of the case are designated by the local DIC and, like real PRC judges in sensitive or difficult cases they merely report their findings to the tribunal's leadership for decision. In some cases the hearing is "open", in the sense of allowing certain Party members to attend, and the accused has a limited right to appeal an adverse decision.

These Party tribunals have apparently not yet been convened at the provincial or central level, but their emergence at the grass roots demonstrates the spread of ideas of fundamental fairness among the country's elite when it comes to dealing with itself.

Loss of Party membership, even in today's more mobile Chinese society, can be devastating. These Party tribunals also reflect the Party's increasing concern for enhancing its legitimacy, punishing corruption and ventilating the punishment process to reduce the likelihood that it too is corrupted.

The Relevance of Taiwan and South Korea

Taiwan and South Korea have much in common regarding development of the rule of law.

Their current democratic governments both emerged from decades of authoritarian dictatorship at the same time. Both places are deeply influenced by China's Confucian/Buddhist culture and imperial Chinese bureaucratic traditions, and, like the PRC, have little in their pre-modern past to sustain legal concepts and practices such as those relating to individualism, government under law, judicial independence and constitutionalism.

Each suffered decades of Japanese colonialism until 1945, and they learned even more about the virtues of a genuine rule of law from its absence during their respective post-World War II dictatorships.

Yet both made rapid social, economic and educational progress during the post-war era, and, as part of this process, created a legal elite of law professors, lawyers, judges, prosecutors and officials familiar with other legal systems and international legal standards. This is undoubtedly what enabled each to make a relatively smooth transition to a democratic legal system once political circumstances permitted.

Each also features a constitutional court that in the democratic era has been remarkably free in invalidating legislation, as well as regulations and administrative acts inconsistent with fundamental legal norms. Unelected judges making controversial constitutional decisions of profound political significance in a new and hotly-contested electoral environment would test the mettle of any system, especially one rooted in East Asian political-legal culture.

Japan's Supreme Court, by contrast, has been far more cautious in its constitutional decision-making. Thus far, constitutional judgments of Taiwanese and Korean courts have, by and large, been accepted as legitimate, even by powerful losers.

Some Chinese experts acknowledge that, as the PRC charts the course of its future law reform, there is much to be learned from the experience of both jurisdictions.

Why this is so is easy to understand, a brief reference to Taiwan will illustrate.

Would it be feasible for the PRC to establish an independent constitutional court despite China's uncongenial traditions for it?

Taiwan shares those traditions. Yet the recent example of its Council of Grand Justices suggests that, given political will, a constitutional court could function successfully in Mainland China.

Can the PRC create a judiciary that is politically independent, free of corruption and "local protectionism", and immune to the distortions of "guanxi" (connections)?

Under the Nationalist Party's dictatorship, Taiwan's judiciary and its prosecutors were a scandal. Yet, during the past fifteen years, starting long before the 2000 electoral victory of the Democratic Progressive Party ousted the Nationalists from the Presidency, Taiwan's judges—and prosecutors too—have undergone a remarkable transformation.

How did this happen? How is it possible to create a professional elite, including lawyers, that has actually begun to take legal ethics seriously, even while the political process is still awash in corruption? PRC leaders may not like the answers, but should pursue them.

Would Chinese criminal investigators be able to do their job if their powers to search, arrest and detain become subject to review by an independent court? What would be the impact of granting Chinese suspects a right to silence? What effective measures might be taken to enforce the PRC's existing, but often ignored, prohibitions against police torture and coerced confessions?

Should lawyers be allowed to begin defending their clients during the often lengthy criminal investigation stage? Again, Taiwan has a wealth of experience.

Perhaps most innovative and daring is Taiwan's recent determination to improve fairness and accuracy of criminal trials by adapting the Anglo-American adversary system—minus jury trial—to local needs.

This has produced formidable challenges: How to cross-examine witnesses in open court and deal with other complex evidence problems? How to change the roles of prosecutor, defense lawyer and judge to break the mold of the traditional continental European model adopted by Chiang Kaishek's regime three-quarters of a century ago?

PRC reformers are increasingly aware of the extent to which the continental European criminal procedures on which their system has also been based have themselves become more "adversary" in nature especially in the post-World War II years. They now confront the difficult issue of how far to follow through on the PRC's own considerable flirtations with the adversary system. Before making their decision on this major issue, it would seem highly desirable for them to take account of how a similar effort is faring in a legal environment much more similar to the PRC's than that of Europe.

China's long struggle to attain a civilized system of criminal justice is significantly undermined by the continuing power of police to avoid the criminal process entirely,

As noted, by consigning people to as much as three or four years in a "reeducation through labor" camp.

Even on this crucial question, the experience of Taiwan is strikingly relevant. For many years under the Nationalist Party, Taiwan had similar administrative punishments for "hooligans", political dissidents and others, until such punishments were held to be unconstitutional. At that point the legislature, no longer willing to punish dissenters but still concerned with "hooligans", established a special "Public Order Tribunal" under ordinary courts, in an attempt to deal in a constitutionally acceptable manner with the particular problems caused by "hooligans".

That legislation has confronted a succession of challenges before the Council of Grand Justices, which is considering yet another constitutional petition relating to this issue. Before deciding to adopt a similar "public order" tribunal to preside over future "*laojiao*" cases, as has been proposed, the PRC would do well to consult Taiwan's long effort to cope with this problem.

I urge the Commission to endorse the continuing support of Congress and the Executive Branch for rule of law-related cooperation with PRC lawyers, judges, prosecutors, officials and scholars and also the commencement of our government's support for research on development of the rule of law in Taiwan and South Korea, and its relevance to law reform in the PRC.

7 October *Friday*

Ritz-Carlton Hong Kong *8:00am-9:30am*

Where is China's Legal System Heading?

Speaker:

Jerome Cohen

Counsel, Paul, Weiss, Rifkind, Wharton & Garrison, New York

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