

Beijing should stop denying political exiles their right to come home, write **Jerome A. Cohen** and **J. Colin McGee**

Return of the native

After camping out at Tokyo's Narita airport for over three months in an extraordinary protest against the Chinese government's refusal to allow him to return home, Shanghai human rights activist Feng Zhenghu (馮正虎) made history in February. Having only recently turned him away for the eighth time, the government suddenly yielded, ending the worldwide publicity that had been poisoning the atmosphere for the impending opening of Shanghai's World Expo.

Is this embarrassing government reversal a precedent that should encourage the many Chinese political dissidents who have been yearning to end their foreign exile? Can they now return home if, like Professor Feng, they are prepared for the often illegal restrictions on their freedom that may await them? Has the mainland government decided to remove one of the obstacles to its long-pending ratification of the International Covenant on Civil and Political Rights, which, almost without

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exception, precludes states from excluding their own nationals? Or was the reversal in Feng's case a one-off "sport" of no enduring significance?

Certainly, the famous 1989 Tiananmen student leader Wu'er Kaixi (吾爾開希), now living in Taiwan, and the temporary Swedish resident Li Jianhong, who both unsuccessfully tried to return to China while Feng was demonstrating in Tokyo, must wonder whether similar imaginative antics on their part might now succeed.

Perhaps the Boston-based democratic organiser Yang Jianli, who holds PhDs from Berkeley and Harvard, regrets that he did not resort to Feng's tactics instead of misusing a friend's passport to enter the mainland in 2002 after vainly waiting a dozen years for permission to return. Yang was caught and served five years in prison.

These are not isolated incidents like the recent, disturbing US government practice of temporarily exiling a handful of Americans suspected of terrorism by

placing them on a "no fly" list. Because their political influence might be greater at home than abroad, hundreds, possibly thousands, of Chinese activists living abroad are refused re-entry. Only the Chinese government knows the statistics.

The problem goes far beyond Chinese living abroad. Although many domestic activists are prohibited from foreign travel, the Chinese government presses others to leave. Yet the risk that they might never be allowed to return has prevented many from agreeing. Thus, even some former "rights lawyers" who have served prison terms, such as Zheng Enchong (鄭恩寵) – now under illegal house arrest – have been reluctant to consider even short trips.

Does mainland law authorise exclusion of its own nationals? No legal justification was offered to support Feng's eight rejections or the decision reversing them. Before the reversal, a Foreign Ministry spokesman merely asserted that relevant agencies were following the law. Chinese legislation permits exclusion of nationals who lack a valid passport, and, since the government often refuses to renew the passports of overseas dissidents, it bars many on that ground. According to a regulation, those with valid passports, like Feng, can still be excluded if either the Ministry of Public Security or the Ministry of State Security in Beijing notifies the border authorities to do so, no reasons required.

Feng did not rely solely on his airport protest but also retained one of China's outstanding human rights lawyers, Mo Shaoping (莫少平), to bring a court complaint. Their complaint claimed Feng's exclusion was illegal because neither of the central police ministries had issued an exclusion notice. Moreover, although "the right to travel" was removed from China's constitution during the Cultural Revolution and has not been specifically renewed, the complaint also claimed that the exclusion was an unconstitutional denial of Feng's physical freedom.

Unfortunately, the court never accepted the case and in any event lacked the power to rule on constitutionality. Yet the Standing Committee of the National People's Congress, which is empowered to interpret the constitution, refuses to exercise that power.

A comparison with contemporary Taiwan is instructive. In 2003, Taiwan's constitutional court, the Council of Grand Justices, ruled that Taiwan nationals have a right to return home without asking for approval. That right, the court held, can only be restricted to protect the country's security and social order if stipulated by law – not mere regulation – and subject to



the constitutional requirement of proportionality or reasonableness. But even those limited restrictions have now been discarded by Taiwan's recent incorporation into its domestic law of the international rights covenant, which forbids states from excluding their nationals for almost any reason.

The mainland, too, should allow all its nationals to come home. This would eliminate a major hurdle to its ratification

of the covenant and permit a large number of able, dynamic and patriotic reformers to contribute to the motherland's further progress.

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