

LETTER FROM AMERICA

A Scholar's Insight Into China's Budding Legal System

By Richard Bernstein

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NEW YORK — It was the early 1970s, and Jerome A. Cohen, at the time a specialist on China at Harvard Law School, was having dinner with Prime Minister Zhou Enlai in Beijing.

“I told Zhou, ‘You should put somebody on the International Court of Justice,’” Mr. Cohen recalled. “Well, he and the other Chinese officials at the dinner laughed uproariously. They thought I was Jack Benny. Why would Communist China want to put somebody on a court where they’d be outvoted by all those capitalist judges?”

“But they’ve done it,” Mr. Cohen said, illustrating one of the things that seems normal in China today but that was almost unthinkable when China’s opening to the world was brand new. “They’ve staffed all international organizations with excellent legal talent.”

Mr. Cohen, who essentially created the U.S. study of law in the People’s Republic of China, has been following developments in Chinese law for roughly half a century, lately as professor of law at New York University and as a frequent commentator on various legal and human rights cases in China.

It’s fair to say that when Mr. Cohen got started, the U.S. study of modern Chinese law didn’t exist, and neither really did law in China. And so, he’s had a privileged view of a remarkable development, the creation virtually from scratch of the entire Chinese legal system.

Mr. Cohen recently celebrated his 80th birthday, which seemed a good time to ask him to assess how China has done over the years.

Most people who follow the frequent accounts of human rights violations in China would answer that China hasn't done very well, and when it comes to human rights, Mr. Cohen largely agrees. In the last few years he has become a major source of information about human rights, or their absence, in China, his specialty being the instances where China fails to observe its own law.

Only last week Mr. Cohen published an article on the case of Xue Feng, a naturalized U.S. citizen recently sentenced to eight years in prison in China for helping his U.S. employer purchase a commercial database on Chinese oil resources — an act that the Chinese Ministry of State Security deemed to be a violation of the country's catchall state secrets law.

Mr. Cohen's article, published in *The South China Morning Post* and in Chinese in *The China Times* on Taiwan — both newspapers that are paid attention to inside China — listed at least half a dozen instances in which the police or prosecutors broke China's own law in their handling of Mr. Xue's case.

After he was seized by the Chinese police in November 2007, for example, Mr. Xue was held incommunicado for months in a secret prison. He was tortured. He didn't have access to legal counsel for about a year. And his trial was closed not only to the public but to Mr. Xue's family — all in blatant violation of China's own Criminal Procedure Law.

In addition, the U.S. Consulate wasn't informed of the arrest of Mr. Xue for 32 days, rather than the four days provided for in the two countries' consular agreement.

But while Mr. Cohen has the expertise to point out these violations and to publicize them, he takes a moderate and balanced view of the overall picture, seeing some promise in the creation of an entire legal culture that simply didn't exist before.

“There are now some 200,000 judges, close to 180,000 prosecutors, roughly 170,000 lawyers, and thousands of law professors, as well as tens of thousands of people with legal training who staff local, regional and central government agencies and most large enterprises,” Mr. Cohen said. “And while they have different viewpoints, they all do have an interest in promoting a legal system that's blatantly inadequate in some respects, but does well in others.”

Over the years, Mr. Cohen has met with members of numerous legal delegations organized by the Chinese Supreme Court that have visited the United States, including one soon to arrive to study punishment policies — “because they want to improve, and they know they are under enormous criticism abroad because of their death sentence policy.”

“Last year a delegation came to study exclusion of illegally obtained evidence, an effort to stop coerced confessions and torture,” Mr. Cohen said, pointing out that last month China published new rules trying to ensure that coerced confessions wouldn’t be admitted in courts.

“But,” Mr. Cohen said, “when it comes to the most basic questions of the fundamental decencies that every government should observe toward its own citizens, this government and this party have failed to cut the mustard.”

It’s a paradox, explained in part by Mr. Cohen as an unintended consequence of China’s efforts to build a legal system, which its leaders want for the sake of credibility and legitimacy.

“They’ve done a lot to create an awareness of law and rights, and they’ve trained a series of overlapping legal elites that want to use their legal educations to help people defend those rights,” Mr. Cohen said.

But with more and more people seeing the law as a means of challenging arbitrary authority — by protesting being evicted from their homes by real estate developers, for example — the security apparatus steps in to enforce what China often calls “social stability.”

“The first reaction of the leaders is repression,” he said. “And in cases that involve state security, they’re not too fastidious about their own law.”

Mr. Cohen has what might be called the foreigners’ advantage in calling attention to China’s human rights shortcomings. He can freely write and publish, where Chinese colleagues cannot. And, while he has no doubt angered the authorities from time to time, he is clearly held in high esteem by many in the budding Chinese legal world itself.

In May this year, Tsinghua University Law School in Beijing held a conference on criminal justice and the role of defense lawyers in honor of Mr. Cohen’s 80th birthday, which would seem to be a sign of progress in itself, even if, as is

often the case in China, a note of repression marred the event. At the last minute, one leading Chinese criminal defense lawyer was removed from the program by the authorities — no explanation provided.

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