

## Statement Presented to the Congressional-Executive Commission on China

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### The Rule by Law in China Today

According to Jeremy Cohen in his "The Plight of Criminal Defense Lawyers", presented to this commission on July 26, 2002, China's entire criminal process is in need of radical reform. In his view, a "radical, long-run political restructuring would be necessary to bring the PRC's criminal process into compliance with [even] minimal international standards." A cursory look at the problems Professor Cohen identifies reveals at least two types. On the one hand, the practice of criminal law in China itself violates the body of Chinese law, which includes but is not limited to the Constitution, the Penal Law, Prison Law, and Police Law. For example, although both the Constitution and Police law prohibit interrogation to produce (enforced and hence false) confessions, police interrogation and torture is a fairly common practice in China, as illustrated in many of the Country Human Rights Reports published by our Department of State. Specific instances described include torture by electric shock and the shackling of hands and feet; confinement of practitioners in mental hospitals; use of excessive force in detaining peaceful protesters; the death of more than 200 practitioners while in police custody with many of their bodies bearing signs of severe beatings and torture.; and the cremation of bodies before relatives examine them. See, U.S. Dep't of State, Country Reports on Human Rights Practices -- China (2000) Available at [http://www.state.gov/g/drl/rls/hrrpt/2000/eap/684.ht\[1](http://www.state.gov/g/drl/rls/hrrpt/2000/eap/684.ht[1)

On the other hand, in addition to Chinese violations of their own legal codes, the second type of problem identified by Professor Cohen has to do with the promulgation of rules, in the form of administrative orders, articles of legislation, notices promulgated by all sorts of entities and bodies, including even the courts. These create exceptions to the already drafted rules of law which put some disfavored group or class at a disadvantage in securing the rights the state acknowledges they have. In Jerome Cohen's piece, of course the disadvantaged are all of those accused of crimes, especially those accused of political crimes, and all of those trained to defend those accused of crimes – the criminal defense bar. In spite of the so called right to counsel afforded to all citizens, the People's Republic of China promulgated an exception for Falun Gong. As indicated in an announcement promulgated by the Judicial Bureau of Beijing, (see appendix), this notice as a practical matter denies all Falun Gong practitioners their constitutional right to legal counsel. Similarly, long after Falun Gong practitioners had been unlawfully arrested in China, the "anti cult" law was passed retroactively by the People's Congress to eradicate the practice by the label of evil cult. To top the anti even further, a third rule was promulgated in the form of a notice by the Supreme Court. It states that all persons who practice Falun Gong practice an evil cult. By such a notice, the Supreme Court has undermined not only the independence of the judicial branch of government, it has also undermined its modus operandi and raison d'être - to hear cases and render rulings. Before trial, with or without a trial, if you practice Falun Gong in China, you are guilty as charged. With or without an attorney, the deck is stacked.

The two above referenced types of problem identified by Professor Cohen are referenced in Ronald Dworkin's A Matter of Principle (1985 Harvard University Press). Chapter two, "Political Judges and the Rule of Law," is especially relevant since it distinguishes between two definitions of the "rule of law."

There is the rule-book conception, which insists that the "power of the state not be exercised against individual citizens except in accordance with rules explicitly set out in a public rule book available to all. The government as well as ordinary citizens must play by these public rules until they are changed, in accordance with further rules about how they are to be changed, which are also set out in the rule book." *Id at 11*. Those who subscribe to this view tend to care less about substantive justice – are the rules fair, do they protect individual rights, is it feasible to believe that such rules will in deed be enforced. As narrow a conception as this is, there is not question that China has indeed violated the rule-book definition of the rule of law, not only during the Cultural Revolution, the tragedy at Tiananmen, but also, and most notably now during the latest persecution of Falun Gong. Those just stated above as well as those stated below are examples of this formulation.

There is a second formulation, which permits us to further evaluate state law to see if it is consistent with even minimal international standards of law and, thereby permits us to distinguish between a rule of law, and the rules promulgated by, for example, the Nazis in WWII. This latter formulation additionally illustrates how in fact what is packaged in China as a rule of law, is in fact and indeed a rule by law.

In this second more expanded formulation of a rule of law, Dworkin observes that

Citizens have moral rights and duties with respect to one another and political rights against the state as a whole. This formulation insists, "That these moral and political rights be recognized in positive law, so that they may be enforced upon the demand of individual citizens through courts and other judicial institutions." *Id*, p. 12. This second conception requires more – including a judicial branch which operates independent of legislative and executive branches; an array of due process rights such as oversight of the judicial process itself, right to a fair trial, right to cross examine one's accusers etc. And of course a right for all to secure the rights the state acknowledges they have. In this formulation, the promulgation of new rules to deprive Falun Gong practitioners of their constitutional and legal rights itself signals that we are dealing with something other than the rule of law in China today

As a China expert noted recently, what appears as a rule of law in China is in fact a rule by law. Unlike the former, the latter is characterized by the state's use of the law itself to disfavor groups, to single out groups for unfair punishment, or, as in China and Nazi Germany, to oppress, torture, exterminate or eradicate groups or classes of persons in ways that shock the conscience and cause one to wonder anew – how can we be so noble and so base, and all be of the same human stock?

Actually it's important to note that a rule by law is nothing new in China. It was used to create and implement the Cultural Revolution. It was used to stifle the student democracy movement staged at Tiananmen. It is used to squash labor movements, any and all criticism of the government. Most notably and most recently it is used to deprive all persons who subscribe to the principles of Falun Gong of the right to think for themselves, the right to a moral conscience, the right to religious freedom, to freedom of speech, to assemble freely and peacefully, to appeal illegal laws of their legislature and farcical rulings of their courts. It is used and continues to be used to torture persons who refuse to relinquish any of the aforementioned rights not for one day, or two days, but endlessly for years on torture devices which can only bring tears to the eyes of those who truly contemplate what they are.

But in its latest guise, it is especially troubling and pernicious. In the very beginning of the persecution of Falun Gong, it appears visibly and clearly when 1) By order of former President Jiang, the police arrest Falun Gong practitioners without legal ground, 2) The former president himself defines the crimes retroactively, by trying to persuade the French newspaper Figaro, that Falun Gong, a peaceful meditative form of cultivation, is instead an evil cult, 3) By executive order, the legislative branch passes the infamous anti cult law to legitimate the illegal arrests by outlawing whatever range of meanings are referenced by the overbroad and unconstitutionally vague phrase "evil cult," and 4) When the Supreme Court instead of ruling on cases, expounds on the nature of Falun Gong by issuing a notice declaring, at the behest of former President Jiang, that indeed Falun Gong is an evil cult, and therefore even before or without a trial, all who espouse its principles are guilty of criminal acts. Not very different from the Nazis forcing Jews to wear the yellow triangle to identify themselves as enemies of the state, and hence not deserving of the rights afforded its genuine members.

Its beginning is replicated in its implementation. In early June of 1999, former President Jiang gave a speech to the Politburo of the Central Committee of the Chinese Communist Party wherein he creates the Office 6/10, a Gestapo organization mandated to usurp proper functions of all three branches of government, of important sectors of civil society, as well as private sector businesses and associations. Officials of this office are stationed in the appeals office where they are known to beat up FLG practitioners who attempt to file an appeal in accord with rights afforded to all citizens by the constitution. Officials of this office are stationed in schools, police stations, hospitals, mental hospitals, detention centers, labor camps, re-education centers. They issue the orders to doctors to force feed Falun Gong practitioners who refuse to admit that their spiritual beliefs are corrupt. They order the prisons' guards to place Falun Gong practitioners in cells with the most violent criminals where they are beaten if not to death then to near death regularly. They are stationed above the Ministry of Foreign Affairs and instruct ambassador staff, and those working abroad how most effectively to expand the persecution to those who practice Falun Gong here in the United States. Most pertinent herein, they too promulgate rules and the rules they promulgate are not only inconsistent with standards of common sense, decency, and morality, but they are

also rules established and promulgated to systematically, efficiently and effectively persecute Falun Gong practitioners and eradicate the practice utterly from the mainland of China, once and for all.

Finally, there are the sham show trials. According to an eyewitness of one such trial, after the government's only witness admitted he'd never met or heard of the defendant before the onset of his trial, the Judge without any evidence whatsoever still found him guilty as charged.

According to Mike Jendrzeczyk, Washington Director of Human Rights Watch's Asia Division, "cloaking this campaign in rhetoric about the 'rule of law' doesn't give any greater legitimacy to China's crackdown on Falun gong... The official ban... should be lifted; the government's pronouncement that it is a true cult and that it must be suppressed must be rescinded. All Falun Gong members in detention, formally charged, or sentenced to labor camps for peaceful activities should be released immediately." *Id.*

I would supplement those remarks by suggesting that we do all we can to promote the rule of law in China. That this Commission continues to do it can. Because a rule by law is dangerous not only for the harm it wreaks internally, but because as long as the rule by law is the norm, such atrocities as the Cultural Revolution, the tragedy at Tiananmen, and most unfortunately and notably the genocide it now perpetrates against Falun Gong will continue under the cloak of a rule of law.

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[1] .Since 1999, the United States Commission on International Religious Freedom has Designated China as a country of particular concern. See, e.g., Report Of The United States Commission On International Religious Freedom, 25 (May 2002)