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Reforms in China: Enhancing the Political Role of Chinese Lawyers

Carnegie Endowment for International Peace and the Asia Foundation
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On Thursday, June 2, 2005, the Carnegie Endowment for International Peace and the Asia Foundation co-sponsored a lunch seminar featuring Mr. Gong Xiaobing, the Director-General of the Department of Judicial Assistance and Foreign Affairs of the Ministry of Justice of China. Mr. Gong assessed the major challenges facing the legal profession in China and highlighted lessons that China could learn from the United States in enhancing the political function of lawyers in China. He also delineated several steps that China should take in order to improve the country's legal profession and further legal reforms. Dr. Veron Hung of the Carnegie Endowment commented on Mr. Gong's presentation and moderated the subsequent Q & A session. The following is a summary of the seminar. The full texts of Mr. Gong's remarks (both the original Chinese version and the English translation) and of Dr. Hung's comments are available at the Carnegie China Program website (<http://www.carnegieendowment.org/programs/china>).

Mr. Gong Xiaobing began his remarks by highlighting the progress that China has achieved in re-establishing and improving its legal profession. Some of the most important changes that have occurred since 1979 include the shift in the function of lawyers from working merely in the public capacity and serving the public authority to also protecting the rights and interests of private parties, as well as the establishment and implementation of a uniform judicial qualification examination for lawyers, judges, and public prosecutors. Today, lawyers are playing increasingly important roles in China. In particular, the percentage of attorneys serving in various levels of the People's Congresses and Political Consultative Conferences is the highest among all social professions in China.

The Chinese legal profession, nevertheless, faces important challenges. Many lawyers lack professional ethics and thus damage the overall image of the Chinese legal profession. At the same time, the political status of Chinese lawyers is not high, and the system that protects the rights of attorneys remains deficient. Lawyers often encounter four difficulties in criminal defense, namely difficulty in investigating and obtaining evidence, difficulty in getting access to case files kept by authorities, difficulty in meeting with the defendants, and difficulty in having judges consider their defense opinions.

There are numerous reasons for the existence of these problems. But, the most fundamental cause is the improper conceptualization of the function and nature of Chinese lawyers.

Officials at relatively high levels of government consider lawyers as businesspersons who can only make money and who are marginalized and irrelevant to mainstream political entities. Some even see lawyers as an opposition force in the political realm. As a consequence, in the current political system, lawyers do not have a formal path through which they can enter the “public power” domain. This contributes to the attitude among legal professionals: “if I cannot influence future political and social developments, why should I be concerned about and hold myself responsible for social and political stability?”

A key to solving these fundamental problems, Mr. Gong continued, is to strengthen the force for self-discipline within the profession. The practice of relying on external pressure to push for improvements should be changed to encourage more internal demands for discipline. To this end, it is necessary to discard the old way of thinking and to correctly position the legal profession.

The American experience in utilizing the knowledge and talent of U.S. lawyers offers several useful lessons for China. First, it is evident that lawyers have valuable skills and knowledge, which constitute important intellectual resources for a country’s governance. Indeed, in the United States, the proportion of congressmen, governors, cabinet secretaries, and presidents who were previously lawyers is significant. No other profession is as well represented in the current Congress or in the history of the U.S. presidency. In fact, some people have even claimed that the “rule of law” in America is, in more accurate terms, the “rule of lawyers.” This clearly shows that enhancing lawyers’ political function is not a subjective goal, but an objective development embedded in the political and legal system of any rule-of-law society.

Second, lawyers can actively contribute to the maintenance of political and social stability. Propelled by market forces and economic interests, American legal professionals have been able to discover conflicts of interests and social disputes and direct them, in a timely fashion, to legal channels for resolution. Under this mechanism, the U.S. has enjoyed social stability without enormous public expenditures. In addition, the active provision of legal services has created a significant number of jobs and a good source of tax revenue.

Third, opening a path for outstanding lawyers to enter the political system not only solves the problem of how a rule-of-law country could find political and legal talents, but also helps to somewhat alleviate negative factors in the political realm. In the U.S., the legal profession has become an important component of the American political system, thereby helping to foster solidarity, consolidate political power, resolve conflicts, and stabilize society. The 120,000 legal professionals in China can also act as a link to facilitate liaison between the ruling party and the public. As they interact with their clients, they can quietly and subtly shape the political directions of millions of individuals, families, and corporations.

Ultimately, the design of a system that could fully enhance the political function of lawyers is a political choice that China must make to realize the rule of law. Mr. Gong concluded his remarks by presenting seven steps that China should undertake. First, China should create channels through which lawyers can assume leadership positions at various levels of party and state organs. Second, China should open channels for lawyers, judges, and prosecutors to change their careers and build a system in which prosecutors and judges are selected from excellent lawyers who have compiled a rich record of litigation experience. Third, China should create the position of Attorney-General for the President and Prime Minister, as well

as the positions of Attorneys-General for heads of provinces, ministries, cities, and counties. These legal consultants should participate and be consulted in all major policymaking and state activities. Fourth, China should increase the number of lawyers who serve as delegates to the People's Congresses and the Political Consultative Conferences at the state and provincial levels. Fifth, China should amend and improve the Lawyers' Law, the Criminal Law, as well as three major litigation laws (the Criminal Procedure Law, the Civil Procedure Law, and the Administrative Litigation Law) to fully protect the basic rights of lawyers. Sixth, China should strongly encourage Chinese lawyers to provide legal aid for socially disadvantaged groups to help establish a positive image for the legal profession. And seventh, China should improve related systems for managing the legal profession in order to enhance professional conduct and ethics among lawyers.

Dr. Veron Hung briefly commented on Mr. Gong's remarks. She observed that her own research in Shanghai indicates that lawyers have played an important role in helping Shanghai's government develop a better political and legal system. In particular, legal experts staff the Legal Affairs Commission of the Shanghai legislature and review bills drafted by government departments. Since 2000, Shanghai's legislature and government have also identified the Shanghai Lawyers Association as a work unit that they must consult when any local regulations and rules are made. As a result, Shanghai's legislation is of better quality in comparison to those of the rest of China.

Dr. Hung also posed three questions to Mr. Gong. First, even if China establishes a system in which prosecutors and judges are selected from experienced and outstanding lawyers, will such attorneys be interested in assuming those positions, given the lower salary and the potential loss of freedom? Second, how can China ensure that revisions to the Lawyers' Law, the Criminal Law, and the three major litigation laws will be faithfully implemented to really protect the basic rights of lawyers? Would it be better for the party to let lawyers associations handle professional misconduct matters? And third, do Chinese leaders have the political will to fully enhance the political function of lawyers?

Mr. Gong briefly responded to Dr. Hung's questions. With regard to whether outstanding attorneys would be interested in becoming judges and prosecutors, Mr. Gong noted that, based on his understanding, there are two general categories of lawyers in China. The first consists of those who are primarily interested in earning money, and the second are those who are satisfied with their financial conditions and wish to enter the public sector. He agreed with Dr. Hung's observation – that the recent efforts by the Supreme People's Court to encourage lawyers to join the bench have not witnessed much success and that this is largely due to skepticism about the independence of judges. In this regard, Mr. Gong said that changes to the adjudication system of the People's Courts that will enable judges to independently adjudicate is a prerequisite to successfully recruiting attorneys to join the bench.

In response to the question of whether changes to China's laws will be faithfully implemented, Mr. Gong noted that this largely depends on the lawmakers' appreciation of the importance of protecting the rights of Chinese citizens. Much of the current inadequacies in the protection of lawyers' rights is related to the overall deficiencies in the protection of citizens' rights. If lawmakers realize the link between the two and pay attention to the rights of ordinary individuals in China, then it is likely that the laws will be faithfully implemented to ensure that the basic rights of lawyers are duly observed. With regard to whether it would be more

suitable for bar associations to handle professional misconduct matters, Mr. Gong merely noted that the current Lawyers Law does not provide judicial administration authorities with much legal basis to handle such matters. He recommended that the Lawyers Law be revised so that provisions concerning the protection of lawyers' rights are more numerous and concrete. In addition, provisions on professional conduct also ought to be more specific to provide judicial administration officials with a clear legal basis to handle such matters.

Finally, in response to Dr. Hung's last question, Mr. Gong said that it is important to view the Chinese reform process as a dynamic one. If we were to go back twenty years in time, we would not necessarily have believed what China has achieved today. Similarly, twenty years in the future, we may, by that time, achieve something that today appears to be beyond reasonable expectations. As China's economy continues to develop and as rights consciousness continues to grow, improvements are not impossible. Mr. Gong noted that when he began his work in designing and helping to establish a legal aid system in China nearly seven years ago, many individuals were skeptical and said that China was not ready for such reforms. However, contrary to these views, he and his colleagues have been able to establish such a system.

To have a clearer and more accurate appraisal of reform in China, it is necessary to utilize two perspectives. The first one – a “rough” or general perspective – concerns the overall direction that the Chinese leaders are adopting. The second one – or the “finer” perspective – focuses on details and concrete steps that can be taken to further reforms. In the future, as China continues to reform, it will need to learn from other countries' experiences and also need international cooperation and assistance. As long as a cooperative attitude is embraced to continually push China on the path of reform, it will be possible to find means to solve these various problems.

Following these responses, Dr. Hung opened the floor for question-and-answer.

Prof. Jerome Cohen of New York University School of Law echoed Mr. Gong's remarks by noting that the vast majority of China's leaders are trained in engineering and other technical fields and that the leadership lacks exposure to law and legal concepts. At the same time, as ideas concerning fairness and the rule of law are spreading in the Chinese Communist Party (CCP), there have been institutional changes and improvements. What can individuals in China, like Mr. Gong, do to hasten this process of change? How can China's leaders be exposed to and better appreciate law and legal ideas so that there is a stronger top-down trend in legal reform, in addition to the current bottom-up movement? Finally, Prof. Cohen asked whether Mr. Gong could elaborate on his observation concerning the deterioration of the legal practice environment.

Mr. Gong said that Prof. Cohen's questions are very important. In the earlier stages of reform, Chinese leaders emphasized science and technology as the top priorities in China's development. Gradually, Chinese leaders began to recognize the importance of a regularized market mechanism, and the top leadership is increasingly more receptive to ideas of a market economy. China is now poised to enter a third stage of development, one that is focused on the deficiencies of the country's political and legal system. In Mr. Gong's opinion, it is in this regard that China ought to undertake political and legal reform and will need more legal professionals to enter the public sector. Legal knowledge and practical experience will both be

extremely valuable to China, and these cannot simply be learned from books. The country will need seasoned legal professionals, as it continues on the path of reform and development. Mr. Gong also stated that he agreed with Prof. Cohen's assessment that the pace of reform in China can be faster. At the same time, to ensure that reform is sound and successful, a slower pace may be more favorable than having no reform at all or even backward movement. In addition, reformers can continually make improvements, by noting the broad direction that China is taking and bringing about concrete, step-by-step changes.

Prof. Randy Edwards of Columbia Law School stated that it is important to take into account and emphasize China's achievements in legal reform since 1979. In light of the fact that it has taken the United States over 200 years to thoroughly integrate its legal profession into its economy and politics, China's progress, Prof. Edwards said, is remarkable. Development in this area, he further noted, is intricately linked to legal culture. China has its own unique legal culture, one that is not particularly favorable to lawyers. In addition, in China, it is the government that is seen as the initiator of fundamental change, whereas in the U.S., the private sector and civil society is equally, if not more, important. Prof. Edwards further observed that fundamental change usually happens when the ruling party changes, which brings forth an opportunity to initiate critical reform. However, it appears that the CCP is not ready to "take a vacation" and that, as a consequence, Chinese lawyers do not see an opportunity to usher significant changes. Prof. Edwards asked Mr. Gong whether he could comment on these observations.

Mr. Gong said that he agreed with Prof. Edwards' remarks concerning differences in the legal cultures of China and the United States. He noted that America emphasizes private interests and rights, whereas China focuses more on the exercise of public authority. However, he believes that Chinese leaders are increasingly concerned about social stability and their governance. If they realize that enhancing the political function of lawyers will help them achieve their goals, they will support measures in that regard. Mr. Gong then stated that Prof. Edwards' question of whether the CCP is ready to "take a vacation" is a sensitive issue, but one that he is willing to discuss. He said that it is important to base any exploration of political and legal reform in China on reality. And the most important fact is that China should not descend into disorder, as chaos will adversely affect not only China, but also the United States and the rest of the international community. In this regard, stability is and ought to be the goal of the Chinese leadership, and discussions concerning political and legal reform should take place under the leadership of the CCP. This is not to say, however, that the CCP will or necessarily should rule the country for the next 100, 1000, or 10,000 years. The process of reform will be gradual and occur naturally, and changes – such as enhancing the political function of lawyers – should be considered in the broader context of society's overall development and of the country's overall interests. China is currently facing many challenges, but every challenge is also an opportunity. Mr. Gong said that he remains optimistic and that the country will be able to tackle these challenges and continue on the right direction.

Mr. Liu Kin-Ming of Apple Daily noted that Beijing recently arrested Mr. Ching Cheong, a reporter for Singapore's Straits Times, for investigation "on suspicion of being involved in spying matters." In this kind of sensitive case, is it possible for lawyers to play an effective and meaningful role?

Mr. Gong said that he is not familiar with the particular case of Mr. Cheong, but that if it is already in the judicial process, the case will be handled according to law. In general, lawyers can play a meaningful role, and they can do so even more in particularly sensitive cases. There are lawyers in China who are courageous to speak out. Moreover, because this case has aroused widespread international concern, judicial organs in China will face enormous pressure to manage this case properly and in accordance with Chinese law.

Mr. Matthew Oresman of the U.S. Department of Justice said there has been much discussion about the prospect of enhancing the role of lawyers in China's political system. Given the overall negative reaction of the population to the entrance of private entrepreneurs into the CCP, however, how would the public react to Mr. Gong's proposals?

Mr. Gong noted that lawyers will support such enhancements because it will elevate their overall political status. The public, Mr. Gong asserted, will also be receptive because increasing the status of lawyers and improving the protection of their rights will better enable individuals to fight for their own rights and interests.

Ms. Sue Chen of Voice of America asked whether Mr. Gong could clarify what he meant when he said that the legal practice environment in China is "deteriorating." She also asked whether Mr. Gong could discuss the situation of Mo Shaoping and Pu Zhiqiang, two lawyers in China.

Mr. Gong said that by "the environment for legal practice is deteriorating," he actually meant that longstanding problems faced by Chinese lawyers continue to exist. He also stated that Mr. Mo and Mr. Pu have not faced much interference in serving as defense lawyers in high profile, sensitive cases. He noted that Yale University invited Mr. Pu to come to the U.S. and that his acceptance of the invitation suggests that he has not faced undue pressure. Mr. Gong said that he was not particularly familiar with the case of Mr. Mo, but according to an acquaintance, Mr. Mo is continuing to work on his case and does not appear to face undue pressure.

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