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The Rule of Law In China: Lawyers Without Law?:  
Hearing Before the Congressional-Executive  
Commission on China, 108th Cong., Apr. 1, 2003  
(Statement of James V. Feinerman, Prof of Law,  
Geo. U. L. Center)

James V. Feinerman  
*Georgetown University Law Center*

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# THE RULE OF LAW IN CHINA: LAWYERS WITHOUT LAW?

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## ROUNDTABLE BEFORE THE CONGRESSIONAL-EXECUTIVE COMMISSION ON CHINA ONE HUNDRED EIGHTH CONGRESS FIRST SESSION

APRIL 1, 2003

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\* Appointed in the 107th Congress; not yet formally appointed in the 108th Congress.

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# THE RULE OF LAW IN CHINA: LAWYERS WITHOUT LAW?

TUESDAY, APRIL 1, 2003

CONGRESSIONAL-EXECUTIVE  
COMMISSION ON CHINA,  
*Washington, DC.*

The roundtable was convened, pursuant to notice, at 2:30 p.m., in room 2255, Rayburn House Office Building, John Foarde [staff director] presiding.

Also present: David Dorman, deputy staff director; Tiffany McCullen, for Under Secretary Grant Aldonas, Department of Commerce; Alison Pascale, office of Senator Carl Levin; Keith Hand, senior counsel; Selene Ko, chief counsel for trade and commercial rule of law; Susan Weld, general counsel; and Andrea Worden, senior counsel.

Mr. FOARDE. Good afternoon to everyone. On behalf of Chairman Jim Leach and Co-Chairman Chuck Hagel of the Congressional-Executive Commission on China, welcome to this issues roundtable on the Rule of Law in China. The United States-China Relations Act of 2000 created the Commission and gave it the primary mandate of monitoring compliance with human rights and the development of the rule of law in China.

Today we have as panelists three experts to give us their opinions as to how to translate these abstractions into pragmatic ways of evaluating the rapidly changing situation in China. We also hope that they will be able to offer specific suggestions as to what kinds of exchanges and cooperative efforts might be most effective in encouraging the development of the rule of law in China.

Our three panelists are Dr. James Feinerman, the James M. Morita professor of Asian legal studies at Georgetown University Law Center here in Washington; Randy Peerenboom, professor of law at the UCLA School of Law in Los Angeles; and Raj Purohit, the legislative director of the Lawyers Committee for Human Rights. Both Jim Feinerman and Raj have been our guests before in the 107th Congress at hearings and roundtables of the Commission. So, welcome back. Randy, this is your first time. Welcome, and thank you very much.

I think we will start with Jim Feinerman. And the way we work this is that each panelist has 10 minutes to make an oral presentation. After about 8 minutes, I will tell you when you have 2 minutes remaining. If you for some reason aren't able to make all of the points you would like to make, we can catch up with some of them in the question and answer session.

When all three of the panelists have spoken, we will go to questions and answers. In the first instance, calling on our colleagues who are personal staffers to our Commission members. In the second instance, to our own CECC staff colleagues, including the person who organized this particular roundtable.

So, without further ado, let me call on Jim Feinerman. Thank you.

**STATEMENT OF JAMES V. FEINERMAN, JAMES M. MORITA  
PROFESSOR OF ASIAN LEGAL STUDIES, GEORGETOWN UNI-  
VERSITY LAW CENTER, WASHINGTON DC**

Mr. FEINERMAN. Thank you and thank the Commission and its staff for having this session today, and inviting us to share our views with you. I may have inadvertently set an agenda—I hope not—for the rest of the speakers by sending out my paper title, which is “Lawyers Without Law—Prospects for the Rule of Law in China after Deng Xiaoping.” And I will try in the time that I have to sort of summarize my points.

Those of you who are familiar with the literature of Chinese legal studies of the last 25 years will know that I was reversing the title of a famous work by Victor Li, a former professor of law and president of the East-West Center in Hawaii, who wrote a book during the Maoist era called “Law Without Lawyers.” The thing that inspired me to twist Victor Li’s words—if that is, in fact, what I am doing—was that I thought that circumstances had changed so dramatically since the period that he wrote about when China boasted of having no lawyers. Its legal system primarily consisted of using some rather coercive, draconian methods that had the functions of law to channel social behavior and control deviance.

I thought it was worth revisiting those ideas in the light of what has happened in the intervening two and one-half decades. When he wrote about Maoist China, Professor Li wanted to make clear that there existed individuals and entities which functioned like law and lawyers, despite the official lack of formal law and legal institutions. Hence the title of his book, “Law Without Lawyers.”

In the time that has passed since Li’s book was published, I think China has developed in ways that Victor Li himself would not have predicted from the vantage point of the mid-1970s. The death of Mao, the end of the Gang of Four, the accession of Deng Xiaoping just a few years after his book was published, in fact, and a reawakened interest in law or socialist legality. An old Soviet era quip noted that socialist legality has the same relationship to legality as an electric chair has to a chair.

The law with Chinese socialist characteristics that has emerged from that era, which began with a trickle of new laws, including the first statutes that encouraged foreign investment in China’s socialist economy became a flood of code and regulations today, even case law that is reported and available to those of us in the West who a few decades ago would have killed for even a single verifiable case report. The problem that we used to have, like Soviet Union Kremlinologists of that era teasing intellectual mountains out of informational molehills, has been reversed. We are inundated with straightforward legal information in almost unimaginable volume.

So that for those like Professor Peerenboom and I who try to teach courses in Chinese law, the idea of having what we had in law school, a single course in Chinese law and holding oneself out as an all-purpose expert on every area of the Chinese legal system, is impossible. It is necessary to specialize in, at the most, a few areas and maybe even one area as the field grows.

It is this very volume of legal information that is now available about China's legal system that led me to think that there maybe is actually less there than meets the eye. So, turning Victor Li's formulation around with apologies to some other legal specialists, like David Trubek and John Merriman, who used this phraseology before, I would like to argue that the "Lawyers Without Law" perhaps most accurately describes the current situation in the People's Republic of China. Let me just quickly say what I mean.

All of the trappings are visible. They have all the accoutrements of formal legality that were not present before. But, the crucial elements of a Rechtsstaat, a real rule of law, a meaningful rule of law, I think are still missing. The incidentals are there, but the substance is not. I think that the operative rules of the system are still, in many cases, buried elsewhere and not adequately described by the formal legal system, which is what I set out in my paper.

In the end, I think you can manage to reconcile the view that China has the embryonic beginnings of a legal system and, in fact, has made great strides since the period that Victor Li wrote about, and even compared to 10 years or 5 years ago. But, you have to think about the relevance—or in some cases, the virtual irrelevance—of law in the formal codified version to make such a reconciliation possible.

I think that the real explanation of how China works and what the state does with regard to legal matters is still pretty much outside the formal legal system, although, hopefully by iterating and reiterating the rule of law idea and talking about law, eventually it may come to conform with the reality on the ground. In a few sections, I try to deal with various issues to see how law and practice demonstrate my thesis, or rather how my thesis grows out of the evidence that I have been looking at.

Finally, I look at the personal relationships or "guanxi," which literally means connections in Chinese, for an alternative system that more closely explains the operative norms in Chinese society, the real law, but not the lawyers' law. And so I will talk about just very briefly the couple of things that I looked at in the system of foreign investment regulation, where there is perhaps one of the largest bodies of law, which is of great interest to foreign investors and to people who are going to make significant contributions to the economic development of Chinese society. Even there after two decades, there are problems.

In fact, even today many investors rely on informal processes of assurance by local officials, central officials when necessary, to overcome various gaps in the legislation. It is still the case that very often authorities will retroactively revise legislation to assuage foreign investors fears, or to address criticism and failed policies.

Even during an era of greater openness—some of it mandated by China's recent accession to the World Trade Organization [WTO]—

there is a continuing significance for so-called “neibu”—internal or unpublished—regulations. Eventually, these may all see the light of print, but it’s a difficult process to draw it out. In many aspects, foreign investment is governed by rules that foreign investors themselves are still not allowed to see, and just must accept as applicable to them.

My colleagues in the human rights field justifiably have criticized China’s use of the rule of law to try to justify things such as the crackdown on the Falun Gong, which is part of a broader governmental effort to control all organizations, religious, civil, social, and economic. The use by these organizations of modern means of communication such as the Internet has made them especially threatening to the Chinese authorities. The mechanisms that they use follow the principles enunciated in China’s Constitution, as well as a number of lesser laws.

Amnesty International, Human Rights Watch, and the Lawyers Committee have all made pleas for institutional reforms, which I think are necessary in other areas, including criminal justice. Every year hundreds of thousands of people suffer human rights violations due to the lack of legal safeguards, and the lack of independent bodies to prevent abuses, despite the formalization in two rounds now—first criminal law and then criminal procedure law, which were redrafted in the 1990s and significantly expanded. The judiciary lacks independence and continues to be subject to political interference. There is evidence that torture is rife and because of the system of administrative detention, anyone can be detained by the police for a number of years without committing any crime.

I know you have heard previous testimony about the implications for human rights and the rule of law of China’s HIV/AIDS crisis. We are now confronting a new threat of communicable disease—SARS. And here again, the lack of transparency and the fundamental issues regarding that in China’s system, which have obvious implications for law, also implicate China’s ability to operate with international authorities. Indeed China kept the World Health Organization [WHO] officials who were stationed in Beijing from going to the sites of infection in China for some time, even after the evidence of the outbreak was quite clear. Somewhat in violation, I think, of China’s commitments to that international organization, and of course, at great threat to the public health of surrounding regions, and potentially the rest of the world.

Let me just close in the few moments that remain to talk a bit about “guanxi,” connections. This is the substitute in many ways for law, and some people say reflects the weak legal consciousness on the part of the Chinese system, both among ordinary individuals and high-ranking officials. But, I think it also reflects the fact that many promulgated laws are not widely publicized. Much of the Chinese population is unaware of their existence.

Local cadres, on the other hand, are used to creating law with the stroke of their pens, or even the utterance of a single word. They have not been won over to a new system that threatens their prerogatives and promises them very little in return. And as long as the newly established legal institutions—such as courts, and judges, and lawyers—remain untried and underdeveloped, it is un-



derstandable that people turn back to the things with which they are most familiar. And the things with which they are most familiar are these institutions of social connections. It is a complicated issue in most societies and cultures, and it is particularly complicated and highly developed over millennia in China.

So, let me just say in conclusion, that this basic feature of personal relationships and connections between Chinese acts as a kind of substitute. In fact, Mayfair Yang, one of the most astute students of the institution of "guanxi" in modern China, sees it as having a kind of oppositional character, which explains its persistence, even in the face of law. It is the informal organization's, or the powerless individual's method of opposing or resisting formal organization. In many ways the behavior posits as its goal, opposition to formal organizations and even opposition to authority and law.

As a result, I think as long as the operative norms of Chinese society and many different strata continue to be the use of "guanxi," there will be a continuing subversion of the elaborate regulations and system of law that is being developed on paper in the People's Republic of China. Now in the end, I think that this can be overcome, as it has been overcome in other East Asian societies, including some majority Chinese societies on the periphery of mainland China. But, that is going to be the real test. The rule of law is only an illusion of wishful thinking that contradicts the central reality, I think, of the last two decades of post-Mao China, until it becomes clear that all of these institutions really function in a meaningful way. And that's the test that I think the system has yet to meet, yet to pass.

Mr. FOARDE. Jim, thank you very much.

Let's go right on to Randy Peerenboom. Speak right into the mike, and everything will be fine.

**STATEMENT OF RANDALL PEERENBOOM, PROFESSOR OF  
LAW, UCLA SCHOOL OF LAW, LOS ANGELES, CA**

Mr. PEERENBOOM. I am very pleased and honored to be here today. In these times of international conflict, the necessity of developing a positive, peaceful, and mutually beneficial relationship with such an important country as China, I think, is obvious to us all.

However, if we are to develop that kind of relationship we need to have a better understanding of how China sees its position in the world and the challenges that it is facing in developing its country and modernizing. Nowhere is this need for understanding more apparent than with respect to the implementation of rule of law, a notoriously contested concept here in the United States and elsewhere in the world.

So let me begin, then, by defining some terms in order to clarify some areas of agreement and disagreement. I think it will also put some of Jim's comments in context, because I think he raises issues that point to very different kinds of concerns. So let me take it from there.

Conceptions of rule of law generally come in two varieties. The first kind is a "thin" conception that stresses the formal or instrumental aspects of rule of law, those features that any legal system allegedly must possess to function effectively as a system of laws,