

Speech from the International Conference on "Genocide in the New Era": Genocide against Falun Gong in the Context of the Supposedly "Reformed" Chinese Legal System

The International Conference on "Genocide in the New Era", organised by "Friends of Falun Gong Europe" and "International Advocates for Justice", took place in Sweden's capital, Stockholm from January 26th to January 28th 2004. This is one of the conference speeches by Canadian lawyer Clive Ansley, entitled "Examines Role of Media in the Persecution of Falun Gong", which was given in the morning of Wednesday January 28th.

The crimes of the Chinese Government against the practitioners of Falun Gong are not in dispute. There is no doubt that the vicious and gratuitous violence perpetrated on those who simply speak in favour of the movement or hold up Falun Gong banners, the incarceration, torture and mass murder of Falun Gong adherents, together with the government and media campaign of hatred and vitriol against them, combine to meet the legal definition of "Genocide".

What is difficult for many international observers to reconcile is how this can occur in a country which is described by many influential opinion makers as having made huge and rapid strides in implementing the rule of law.

Who are the opinion leaders who have shaped the world's view of the "developing" Chinese legal system? Do their views accord with reality? What do we mean when we use the term "Chinese legal system"? What role do the Chinese "courts" play in the legal system? Does the Chinese Government have any intention whatsoever of implementing the "rule of law", ever? Finally, even within the pathetically meagre limitations of the Chinese "legal system", have the government's actions conformed to Chinese law as it exists today? When Jiang Zemin instituted this diabolical campaign of genocide against Falun Gong, did he invoke any legal process or legal machinery whatsoever? If not, how could the mass murder, incarceration, torture and general persecution of such a huge number of people occur totally outside the legal system? How could one man impose his will on the entire nation and do it 100% extra-legally?

It is necessary to specifically address all of these questions and understand their answers before we can begin to comprehend what has occurred in China since 1999 and more generally what has happened and continues to happen to a wide variety of dissident groups and individuals in China.

To much of the international community, China has in recent years been portrayed as a country whose leaders are determined to implement the "rule of law", a country which is steadily and rapidly constructing a credible legal system which will meet all international standards and expectations. I want to say at the outset that nothing could be further from the reality. I am often told that I should not judge the Chinese legal system by measuring it against mature and sophisticated systems in other countries which have developed over many centuries. Let me say at once that that is not my standard of measurement!

First, many commentators point out that China has only had a legal system since July 1st 1979, so "Of course, it's not perfect. Rome wasn't built in a day. At least it's moving in the right direction, right?" WRONG!

Two points:

1) I of course accept that China cannot be expected to construct a legal system overnight which will match the standards of western systems. I would be optimistic if it were true that the trend is in the right direction. IT IS NOT! COURTS ARE SUBSTANTIALLY WORSE TODAY THAN THEY WERE 15 YEARS AGO AND THEY CONTINUE TO DEGENERATE.

2) I do not criticize China for not meeting western standards. I do not use western yardsticks to evaluate China's performance. I evaluate the performance of the Chinese legal system by measuring it against its own written laws. THE CHINESE GOVERNMENT REPEATEDLY AND SYSTEMATICALLY IGNORES ITS OWN LAWS AND THE LEGAL PROCEDURES WHICH ARE SET OUT IN ITS WRITTEN STATUTES. THE "COURTS" EVINCE NO INTEREST IN LAW; MOST JUDGES NEVER READ THE LAW AND 100% OF THE "JUDGEMENTS" EMANATING FROM CHINESE COURTS ARE POLITICALLY, RATHER THAN JUDICIALLY DRIVEN.

Who Provides the Rose Coloured Glasses through which the Chinese Legal System is Typically Viewed?

Western Governments Influenced by Perceived Market Opportunities in China

Throughout all of modern Chinese history, the elusive (some would say mythical) dream of the limitless Chinese market has obsessed occidental nations. At the beginning of the current "Open Door" policy, one western manufacturer of cosmetics waxed exuberant over the fact that the population of China constituted a total of "two billion armpits" and that if even a small percentage of their owners could be induced to purchase deodorants, this would result in a bonanza!

Today there is no doubt whatsoever that trade and investment interests dictate the China policy of almost all Western nations. They know that China invariably moves to "punish" any member of the international community with the temerity to criticise the Chinese leadership for anything. France, Denmark, and Holland have all been hit hard with illegal economic reprisals for criticising China's flagrant violations of human rights standards.

Today, there is scarcely a government anywhere in the world willing to jeopardize its market share in China by speaking out against this Chinese regime, which is arguably the most repressive and blatant abuser of fundamental human rights among all the nations of the world. Crimes which may be denounced with impunity when committed by the governments of Iran, Iraq, Saudi Arabia, or Syria, are systematically ignored when perpetrated by the Government of China.

My Canadian Government is an excellent case in point. In 1994, when the Clinton Government in the US was making a feeble attempt to hold the Chinese Government accountable for human rights abuses, a confidential Canadian Government source stated that the Canadian Government had made the Chinese Government aware that if the USA imposed any trade sanctions against China, Canada had both the ability and the willingness to step into the breach and provide China with any product required.

Today, China is attempting to extradite from Canada a man who is claiming refugee status there. The Canadian Department of Citizenship and Immigration (CIC) is working hand in glove with the Chinese Government, the Chinese Police, and the Chinese prosecutors to arrange this extradition, notwithstanding the fact that such extradition would without doubt end the life of the refugee applicant. Further, CIC has, in flagrant violation of its undertakings to the tribunal hearing the case, identified to the Chinese police a number of Chinese citizens still in China who provided evidence in the Canadian hearings as Protected Witnesses, with solemn assurances that under no circumstances would their identities be made known to any Chinese authorities. Finally, the former Minister of Trade & Industry has written to the legal counsel representing CIC (and the Chinese Government), noting that he has been informed by the Canadian Ambassador in Beijing that "major diplomatic and trade considerations" hang in the balance in this case. It is thus blatantly clear that the Canadian government is entirely prepared to ignore all human rights issues in favour of improving Canada's trade and investment position in China.

In the course of implementing the instructions of the Chinese Government in this particular case, the Canadian Government has argued before the tribunal and the court hearing the case that there is no such thing as torture in China, because it is prohibited by the Chinese Code of Criminal Procedure. It has also argued that the Chinese courts are politically independent because judicial independence is guaranteed by the Chinese Constitution. The Canadian Government argues that the alleged recent reforms in the Chinese legal system ensure that the refugee applicant will be assured a fair trial. Can it be that these sophomoric arguments represent the genuine opinion of the Canadian Government? Is the government simply unbelievably naïve? No! I can personally attest from my own knowledge to the fact that the Canadian Government has over the past two decades always possessed accurate and up to date knowledge concerning the total corruption of the Chinese court system. The Canadian government today wilfully and with full knowledge misrepresents the nature of the Chinese legal system and whitewashes China's abysmal human rights record, purely for trade considerations.

The International Business Community

The deliberate intent to misrepresent the realities of the Chinese legal system and mislead the public is not readily discernible amongst investors and traders with economic interests in China. Rather, the problem here is that the business community as a general proposition simply does not care about human rights issues. Such topics are considered "political" and it is a hallowed shibboleth of commerce that political issues are and should be entirely separate from business and economics. Also, large segments of the international business community are not really aware of how the Chinese court system operates, because they are almost entirely unaffected by it. Every contract between a foreign party and a Chinese party in China, if the foreigner has retained a competent lawyer, will contain a dispute resolution clause providing for foreign arbitration, ensuring that the foreign party will never come within the jurisdiction of any Chinese "court". That is changing, and the perspectives of foreign investors may change also as a result.

But on those rare occasions when foreign investors are unable to avoid confronting the realities of human rights abuses in any country whose government is strengthened by their continued investment, amazingly the conclusion is always

reached that the best policy for influencing promoting democracy and ending human rights abuses just happens to also be the policy which produces the largest profits for foreign investors. The theory is that public criticism of brutish torturers will only offend those torturers and make matters worse; in contrast, public expressions of support, friendship, and solidarity will enable foreign investors and their governments to privately persuade the torturers to abandon their brutish methods.

Foreign Lawyers in China

The overwhelming majority of foreign lawyers practising in China would say that the Chinese legal system has improved tremendously over the past fifteen years or so. I do not dispute this, so long as we are very clear in our definition of "legal system". These lawyers are invariably speaking of the impressive outpouring of statutes and regulations which have provided a great corpus of legislation covering all aspects of investment in China and have made business there much more predictable. It is today far easier for a foreign lawyer in China to advise his clients on Chinese government policy toward investment in specific sectors of the economy and of the viability of any enterprise contemplated. But this "legal system" (read "legislative framework") has nothing whatsoever to do with the "court system"; nor does it have any relevance to establishing the "rule of law" in China, a subject we shall explore further very shortly.

What is the Role of the Chinese "Courts" Within the Chinese "Legal System"?

The development of the Chinese "legal system" is truly impressive so long as it is clearly understood that this term begins and ends with written rules determined by the government alone, guiding behaviour of foreign investors and Chinese citizens. The "courts" have no powers of judicial review whatsoever. There is reason to believe that at least some among the top Chinese leadership have never read the Chinese Constitution and don't even know what freedoms have been enshrined therein. When the government or individual ministers violate the Constitution or any other statute, there is no remedy available. There is no such thing as the practice of Constitutional Law in China because it is absolutely impossible for any Chinese "court" to hear a constitutional challenge to any decision or policy of China's leaders.

It is essential to understand that China's so-called "courts" are nothing more and nothing less than very low level administrative organs of the Chinese Communist Party. There is not a modicum of judicial independence. There are several reasons for this:

1) Judges are appointed and may be removed by the Communist Party (theoretically by the People's Congresses at each level, but these are mere rubber stamp bodies completely controlled by the Party);

2) "Judgements" are normally not made by the individuals who have heard the case in the public trial, but by an invisible back room body known as the "Judicial Committee", which receives direct input from the local Party Boss and which may in one afternoon decree judgements in up to 25 cases, having neither attended the hearings nor read the documents pertaining to any of them.

3) Supreme Court "Judges" are required to attend regular lectures by Party theoreticians, in which they are instructed that while it is of course important to pay attention to the law, they should be even more concerned with the social and political impact of their decisions.

4) Even the Chinese Constitution, as meaningless as that document is to Chinese society, stipulates that the judiciary is under the leadership of the National People's Congress. Moreover, by statute, the courts and the judicial process is placed under the supervision of the Procuratorate (the prosecution arm).

5) Quite aside from legal theory or statutory provision, the practice is for the Party to dictate required results to the "courts". Both Jiang Zemin and Li Peng used to routinely telephone the President of the Chinese Supreme Court to apprise him of a case which would shortly be submitted to his court and provide instructions on the "judgement" required.

6) The "courts" of China are corrupt from top to bottom, although the form of corruption varies according to the size of the case, whether it involves a "foreign element", and whether it is politically "sensitive".

a) At the lower levels, particularly in the case of civil litigation between Chinese citizens, the Party will often have no interest in the case and "judges" either on the visible tribunal or on the "Judicial Committee" may have the freedom of action necessary to decide the case. This allows them to augment their meagre incomes by indulging in the common garden variety of corruption by filling their pockets with "reimbursements" from Plaintiffs or Defendants, or both.

b) In the absence of simple bribery, the corruption is found in the very structure of the "courts", resulting in a system in which "The one who hears the case does not make the judgement; the one who makes the judgement has not heard the case."

c) A hybrid form of corruption occurs when the Party interest is an economic one; that is to say that the local party organization wishes to support the economic interests of a powerful local player, particularly where a foreign defendant is involved. About five years ago, Beijing sent a directive to all the lower "courts" decreeing that "When you have a dispute between a Chinese party and a foreign party, you must ensure that your Judgement reflects the national interest." The message was not too subtle for the "judges" and today it is virtually impossible for any foreign party to win a case against a Chinese party."

d) However, by far the most deleterious form of corruption is of course the fact that the "courts" are presented visually and publicly as judicial institutions but in reality their strings are pulled and they are manipulated, marionette fashion, by Communist Party ideologues completely outside the vision of judicial observers.

The fundamental issue here is that the Chinese Communist Party and its leaders are above the law and are not subject to the decisions of the "courts" in any respect. On the contrary, the "courts" are under the direct leadership and instruction of the Party and only the Party has the right to interpret the meaning of any law or regulation. It follows that no inherent "right" arises for any natural or legal person by virtue of the law itself. As in a Lewis Carroll fantasy, "the law means whatever the government, not the 'court', says it means." It is necessary at this point to clearly differentiate among "rule of law", "rule by law" and "rule of men".

"Rule of Law" v. "Rule of Men" and "Rule by Law"

In the Warring States period of the late Zhou Dynasty, several centuries B.C., during the flowering of a number of philosophical schools of thought, the central debate among the leading philosophers of the day was whether "peace, order, stability, and good government" was best served by selecting good and virtuous men and placing all power in their hands, or whether the protection of the citizenry was best realised by the enactment of a comprehensive and detailed set of laws and making all human beings subject to the law, rather than to the fiat of the leader of the day. This debate has continued in China right to the present and has still not been resolved. But for the moment, there is no doubt that the Chinese system embraces "Rule of Men", and not "Rule of Law". The omnipotent rulers are above the law and there is no way of making them subject to the law. But the confusion is further exacerbated by the failure of many commentators and writers to distinguish between "Rule of Law" and "Rule by Law".

"Rule of Law" means of course that the law itself is the highest authority, all citizens without exception are subject to the law and enjoy the rights enshrined in law, no individual is above the law, and any dispute concerning the meaning of the law is resolved by an independent and competent judiciary. It requires no more than a glance at the machinery of "justice" in China to realise that according to these criteria, the Chinese system does not begin to approach the prerequisites for the "Rule of Law". Again, we are not judging the Chinese system by Western standards. The Chinese Communist Party/Government claims to have already instituted the Rule of Law in China. It is perfectly fair and appropriate to judge the system against that apocryphal claim.

There is no doubt that the Communist Party/Government has attempted to utilize "Rule By Law" as a tool in maintaining its complete and total dictatorship over the Chinese population. Prior to 1979, there was a total absence of codification, which meant that for Chinese citizens they had no way of knowing when they were likely violating government

"standards" and thereby jeopardizing themselves unwittingly. For foreign investors, it meant they had no way of ascertaining in advance whether the government would allow foreign investment in a given economic sector, or if so, whether the government would require them to joint venture with a Chinese partner, or whether it would require the Chinese joint venture partner to hold a majority interest. Putting the rules in writing made government more efficient in all areas. But when the government changes its mind or policy, whether on criminal or investment matters, it simply ignores and over-rides the law. Because the "Rule of Men" prevails, utilising "Rule by Law" simply as a tool, no force, effect, or authority resides in the written law itself when the government decides to adopt a different stance.

Let us consider how this state of affairs applies to the ongoing Genocide being perpetrated against Falun Gong.

Article 35 of the Chinese Constitution provides that Chinese citizens enjoy freedom of speech and freedom of assembly. Article 36 provides that Chinese citizens enjoy freedom of religion. Yet anyone in China today who displays a Falun Gong banner, speaks in support of Falun Gong, or is found to be a Falun Gong practitioner, is subjected to almost unimaginable brutality in public while offering no resistance whatsoever to the police thugs who arrest them. They are then incarcerated without charge and murdered by the hundreds while imprisoned. On what basis have the constitutional rights of these people to freedom of speech, assembly, and religion been suspended?

The answer is simple. One individual, Jiang Zemin, exercising power in the same manner as the emperors of old, and without invoking any law or involving any court, has declared Falun Gong to be an "[*slanderous term omitted*]". To this day, no charges have been brought and no legal process invoked against Falun Gong practitioners. To be sure, ordinary criminals being sentenced to death for mass murders and other heinous crimes are, after the fact, falsely declared to have been Falun Gong adherents by a Chinese media which publishes whatever the Chinese Communist media orders it to publish. But neither Falun Gong nor any individual practitioner has ever been afforded the opportunity to mount a defence in court against the accusations of Jiang Zemin. This entire genocidal pogrom has been based on nothing other than the determination of one megalomaniac that the movement constitutes an "[*slanderous term omitted*]". In the face of this one would-be emperor's individual decision, constitutional guarantees are worthless and no law or court can come to the aid of Jiang's victims.

It is unclear whether this situation is what former Canadian Prime Minister Jean Chretien had in mind when he declared in the course of a recent visit to China that human rights had made great progress over the previous decade under President Jiang Zemin.

Conclusion

There is no legal system in China available to protect the victims of the brutality routinely dispensed by China's rulers.

This deficiency should not be seen as simply an indication that the system is still developing. China's political system is completely based on the principle of the Communist Party's absolute authority over all aspects of society and the subordination of all governmental, social, media, and judicial institutions to the Party. Neither Jiang Zemin, who almost certainly continues to manipulate the current leadership from behind the scenes, nor the Communist Party itself, has any intention of ever implementing the "Rule of Law" in China, for reasons which are self-evident. The "Rule of Law" is absolutely anathema to the continued power of the Communist Party and its perceived right to exercise total dictatorship over the Chinese polity.

In short, Jiang Zemin has been able to impose his will in implementing the mass murder and torture of Falun Gong practitioners simply because in reality, the old emperor system of government continues today in China in the modern form of the Party Dictatorship.

Published: Saturday 6th March 2004

<http://www.clearharmony.net/articles/200403/18250.html>

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