



Hu Jia in China's Legal Labyrinth

by Jerome A. Cohen and Eva Pils



ON APRIL 3, 2008, the Beijing Number One Intermediate People's Court convicted Hu Jia, a 34-year-old Chinese commentator and activist, of the crime of "inciting subversion of state power" through publication of five articles and two interviews. It sentenced him to three and a half years in prison and subsequent deprivation of his political rights, including that of free expression, for another year. Although Mr. Hu's case has remained virtually unknown to the Chinese people, by the time of sentencing it had become famous worldwide. When on April 17 foreign journalists asked Chinese Foreign Ministry spokeswoman Jiang Yu about it, she gave the standard MOFA response to inquiries about political prosecutions: "The case was handled in accordance with Chinese law. China is a country under the rule of law, it abides by the law. No person is above the law and no one has a right to interfere with it."

It is not clear whether Ms. Jiang sent a copy of her encouraging statement to the Communist Party leadership. Yet, if Mr. Hu's case represents the reality of China's

rule of law, people inside as well as outside the country have reason to be afraid, so flawed was it in both process and substance. This case, like the previous ones of human-rights advocates Gao Zhisheng, Chen Guangcheng and too many other activists, revealed the continuing struggle between old and new conceptions of political rule, constitutional rights and justice, played out by the defense lawyers, the authorities, the family of the accused and a muted, ill and tormented defendant. Understanding this struggle is the key to understanding the future of China's political-legal system.

Many human-rights defenders, political dissidents and ordinary citizens seeking justice for themselves, their families and their communities have in recent years fallen victim to an increasingly formalized, but not liberalized, criminal justice system that is used to suppress their voices. Are the patient efforts of China's growing number of

Mr. Cohen is co-director of NYU School of Law's U.S.-Asia Law Institute and adjunct senior fellow for Asia at the Council on Foreign Relations in New York. Ms. Pils is assistant professor at the Chinese University of Hong Kong School of Law.

legal reformers and criminal justice experts to protect the rights of Chinese citizens doomed to eternal frustration, just as China rises to greater prosperity, power and international influence?

The 'Crime' of Opposition

MR. HU'S CONVICTION for "inciting subversion" was based on Article 105 (2) of the PRC Criminal Law. Enacted in 1997, this article is a shapeless provision that allows people to be charged for any speech the regime deems capable of encouraging others to "subvert" (i.e., oppose) the ruling power or the "socialist system", whatever that may mean today. Prosecutions of people under Article 105(2) have demonstrated that factual statements and assessments, even if accurate and valid and even if limited to advocacy of peaceful change, come within the scope of Article 105 (2). In his essays and interviews, Mr. Hu had engaged in peaceful, albeit sharp, opposition to the Chinese government and Communist Party. In the court's judgment he was quoted as saying: "We challenge this regime of dictatorship." The regime, he said, "maintains itself by ceaselessly devouring people. The soil of dictatorship breeds greed, corruption and power abuse."

Mr. Hu campaigned to help his country realize the nobler promises of its constitution as well as international human-rights law, in particular the International Covenant on Civil and Political Rights (ICCPR), which China signed 10 years ago but has not ratified. In the months before his detention, Mr. Hu, who first rose to prominence by publicizing the plight of AIDS victims, became China's most "plugged-in" and outspoken human-rights monitor, recording the sufferings of fellow activists and their families. He was also an especially vocal critic of Beijing's pre-Olympics suppression of other critics. On Dec. 27, 2007 these activities, intimately related to the forthcom-

ing Olympics, resulted in his transfer from several years of strict surveillance, harassment and informal confinement in his home in "BOBO Freedom City" apartment complex to the status of an alleged criminal offender confined in the much harsher conditions of a police detention center.

Mr. Hu, it turns out, is actually a third generation political dissident. His parents, his mother's father and her brother had all been declared as either "rightists" or "counterrevolutionaries" and subjected to an average of 20 years of forced labor. Although Mr. Hu should have benefited from the protections of a Criminal Procedure Law that did not exist when his elders were being persecuted, in practice those protections count for little. It is part of the logic of political systems that treat opposition as a crime that they must not only punish the opposition, but also break its spirit. This cannot be done in a way consistent with respecting the procedural rights of those accused of inciting subversion. To break its opponents, the Chinese state has to violate its own recent constitutional and statutory commitments to safeguarding criminal defendants against the worst abuses. Legislative progress has not deterred China's police from honing their skills to the degree that they can now "successfully" deal with dissidents much more quickly than their predecessors did.

Mr. Hu's case is a sad example. As his wife, Zeng Jinyan, pointed out, for the first month of his detention he was interrogated almost every evening for periods from six to 14 hours; nevertheless, every morning beginning at six o'clock he was required to sit silent and motionless on a bench with his legs extended for six hours until noon. This torture, together with the associated sleep deprivation, was designed to soften him up for the evening sessions, which consisted for the most part of "persuasion-education" rather than questioning. The goal of this endless indoctrination was to get the iso-

lated and increasingly fatigued suspect “to repent and change his mind so that he could be returned to society sooner.”

Mr. Hu’s jailers were also evidently counting upon his deteriorating health to diminish his resolve and ability to defend himself. This was actually the second round in their process of debilitating him. In 2006 he had emerged from his first police detention, which lasted 41 days, with cirrhosis of the liver that had developed during his confinement. Although well aware of the delicacy of Mr. Hu’s condition, those who controlled his second detention did not respond to requests by his lawyers and family for a medical checkup during the entire three months of his pretrial detention. Only after conviction, when his lawyers sought to meet him on the last day he was eligible to file an appeal, were the lawyers informed that no meeting would be possible because Mr. Hu had just been sent for medical evaluation.

At this writing it is not clear whether Mr. Hu had decided to appeal. Prior to his conviction, he told his lawyers that police detention conditions were so unbearable that he simply wanted to conclude the case as quickly as possible so that he would be moved from the detention house to the improved conditions often found in Chinese prisons. Mr. Hu, a Buddhist and vegetarian, was suffering from insufficient and inappropriate food, which aggravated his illness and weakened his resistance to police pressures. Informed by the court, but not by their client, that Mr. Hu had decided not to appeal, his lawyers have now filed a petition for medical parole.

Friends, Family and Lawyers

IN CASES SUCH as this, the police are usually not content only to break the accused. They also seek to implicate his family and friends in order to subdue his support group. To accomplish this, they frequently

coerce those close to him to say something, however slight, that would allow the police to label them “witnesses” to the “crime.” Mr. Hu’s wife, herself an activist and mother of a baby daughter, was subjected to pressures that came after the couple’s four-year ordeal had culminated in the criminal case against her husband. First, the police temporarily lived in their flat after taking away her husband. Later, the police moved to the flat upstairs from which they continued monitoring her every word, while pressing her to make a statement. For their own convenience the police, after first confiscating the couple’s electronic devices, returned Ms. Zeng’s cell phone to her. This not only enabled them to keep track of her contacts and plans but, more importantly, also facilitated their attempts to “educate” her into cooperation. Her tormentors made clear that failure to give them a statement could lead to her own prosecution. After a few weeks, Ms. Zeng agreed to give a symbolic statement that acknowledged that she and her husband had used different computers; but she remains under house arrest and pressure and surveillance from the police.

Friends were also drawn into the net, by being pressed to identify Mr. Hu’s recorded voice in radio interviews, for example, or to state that they had seen Mr. Hu post essays on the Internet. In a case in which the defendant never disputed the only facts at stake—authorship of the essays and interviews with which he was charged—the police nevertheless used abduction, detention and threats to coerce these “witnesses.” Yet in the end the court would not even permit them to attend the trial, which was farcically characterized as an “open hearing.”

Perhaps the most significant aspect of Mr. Hu’s case was the plight of his lawyers. In all systems criminal defense lawyers have to decide whether it is preferable to accommodate the authorities by advising their client to plead guilty in an attempt to obtain lighter punishment or to fight the

charges by resorting to the available legal tools. In political prosecutions in China the choice can be agonizing. Does one accept the logic of the traditional PRC “trial” as a process for exhibiting the prisoner’s presumptive “guilt” through “confession” and “repentance” that enact his mental subjugation? This was the choice made by defense lawyer Li Jinsong, who spoke of his client’s “low level of criminality” and demanded that Mr. Hu be given leniency as a first offender.

But the other defense lawyer, Li Fangping, refused to follow this logic. A veteran courtroom advocate, he pleaded not guilty on his client’s behalf, urging the court to limit the breadth of “incitement to subversion” by construing the statute in light of the nation’s constitutional protection of freedom of expression. He argued the way any lawyer in a liberal legal system would, contending Mr. Hu committed no crime but had merely been exercising his right to free speech. It was an argument based on the freedom Mr. Hu had fought for.

By following inconsistent strategies in the same case, Mr. Hu’s counsel mirrored a conflict characteristic of the reality of Chinese criminal justice. This was not the first time these defenders displayed their different approaches. Their variances may not have had much impact on the judges, who in political prosecutions generally pay little heed to the defense and, in this case, curtailed the lawyers’ presentations. But it could only have had a bewildering effect on reporting by the overseas media, as well as on the perceptions of those Chinese who learned about the case. Outside understanding of such cases is already difficult enough because of their nontransparency. Courts refuse to come to grips with issues of free speech and procedural fairness in their judgments. The regime may manipulate the release of information in an effort to discredit the defendant with his own supporters, saying that he has repented his

sins, as reported by Xinhua News Agency after Mr. Hu’s verdict; or it may even suggest that he collaborated with the authorities by “providing useful information.”

Prospects for Reform

WHICH OF THE two defense lawyers stands for the future of Chinese criminal justice? In considering prospects, we should be mindful of the past. In the days when political offenders were still charged as “counterrevolutionaries,” the option of waging a meaningful defense was even less available than it is today. The question now is whether and when it may prove possible for the constitutional and statutory protections that have gradually been evolving to be consistently implemented in practice. Although China’s leadership still prefers repression and control to an autonomous legal system and genuine justice, there occasionally are hints of a diversity of opinion among the Standing Committee of the Communist Party Politburo. Pressures for reform are generated by the large number of legal professionals who did not exist a generation ago and by increasingly influential public intellectuals. Last January, for example, over 14,000 Chinese citizens signed a petition organized by lawyers and scholars urging the state to ratify the ICCPR and to demonstrate commitment to human-rights norms. One test of that commitment will be whether the National People’s Congress promulgates much-needed reforms to the Criminal Procedure Law. A harder test, because approval would commit the government to protect freedoms of expression and due process, will be whether the NPC ratifies China’s adherence to the ICCPR. But the essential question remains whether legislative progress is reflected in practice, since, as Deng Xiaoping emphasized when they launched China’s famous and successful “Open Policy” in 1978, “practice is the only criterion of truth!” ■