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JUDICIAL SUPERVISION IN CHINA

by

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Introduction

In China the number of litigations has been increasing constantly since the “Reform and Opening” policies in 1978 (Table 1). Some of the factors for this rapid increase are: (1) reform towards a market economy, (2) reform of the state and administrative structures, (3) rapid growth of private enterprises, (4) rural reform and shift of the population to the cities¹. The types of litigation have also changed with the increase. The rate of criminal cases has decreased while civil and economic cases rose, and the content of civil cases also changed from marital and family issues to other types of economic disputes. Although there are questions concerning court practices, the social status of China’s courts has improved in these 20 years since the “Reform and Opening” policies².

Although the second instance is final in the Chinese court system, there exists a practice different from the West. That is, after the first and the second instance, there still remain a large number of “retrial” cases as if there were a third instances³ (Table 2). Nearly more than 20 percent of second instance cases are brought to retrial. It can be said in China, the “retrial” or review system is not an exceptional remedy measure, but only one of the typical steps in civil litigation procedures.

I. Judicial Supervision Procedure

Judicial supervision procedure is provided in Chapter 16 of the Civil Procedure

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¹ Institute of Law - CASS (2001), p.2.

² Wang (2000), pp.31-32.

³ Suzuki (1998), p.373.

Law. There are three routes for retrial. That is, (1) retrial by the court itself under the judicial supervision procedure, (2) retrial upon the application of the party concerned, and (3) retrial initiated by protest of the prosecutors' office under the judicial supervision procedure.

1 Retrial by the court

1) Proposal of retrial

The court has the authority to initiate a retrial under the judicial supervision procedure against any legally effective judgments. No complaint from the party concerned is needed. If the president of a court at any level finds a definite error in a legally effective judgment or written order of his court and deems it is necessary to have a case retried, he shall refer to the judicial committee which is the supreme decision-making body of the court for decisions (Art.177). The higher-level court also has the authority to propose a retrial. The Supreme Court and higher-level courts have the authority to bring the case up for retrial by themselves or direct a court at a lower level to conduct a retrial.

2) Conditions for retrial

The Civil Procedure Law only rules that a court shall bring the case up for retrial if the court "finds a definite error" in a legally effective judgment. Also, the standard for determining whether the higher court itself or the lower level court should conduct the retrial is not clear, but it is said that in the next few cases the higher court itself should conduct the retrial⁴. That is, (1) when the recognition of the fact of the original judgment is correct but the application of the law is wrong, (2) when there is an opposing opinion on the judgment in the lower court, (3) when there is strong interference from outside, and (4) when there are other special reasons that make it difficult for lower courts to conduct a retrial. If there is an error in the recognition of the fact, the retrial should be conducted at the lower courts.

It should be noted that in most cases, retrials proposed by the court itself typically originate in the complaints made by the party concerned. But still, there are

⁴ *Ibid.*, pp.375-376.

cases in which retrials originate from other sources, such as from the Prosecutors' Office, People's Congress and the Communist Party.

3) Limitations

There is no time limitation for the proposal of a retrial by the Court itself. If the court finds any errors in a judgment it can initiate a retrial at any time.

2. Retrial by the party concerned

1) Proposal of retrial

The parties concerned can apply for retrial to the court of original judgment or to a court at the next higher level if they consider that there is an error in the legally effective judgment (Art.178). The court must examine the application and notify the results to the applicant, and if the application meets the requirement, the court must decide to open a retrial (Art.179).

2) Conditions for retrial

The Court must begin a retrial if the application meets any of the following conditions (Art.179). That is, (1) there is sufficient new evidence to overturn the original judgment, (2) the main evidence on which the facts were ascertained in the original judgment was insufficient, (3) there was a definite error in the application of the law in the original judgment, (4) there was a violation by the court in the legal procedure which may have affected the appropriateness of the judgment in the case, and (5) the judicial officers have been found to have committed embezzlement, accepted bribes, committed malpractices for personal benefits and perverted the law in the adjudication of the case. In (5), there is no need for the conclusion of the judgment to be affected, only the mere fact is needed.

3) Scope of retrial

The scope of a retrial includes not only the legally effective judgments and written orders, but also legally effective conciliation statements. The parties concerned can apply for a retrial if there is evidence that the conciliation violates the principle of voluntary action or that the content of the conciliation agreement violates

the law (Art.180). In China more than half of all civil litigations are settled by conciliation, however many conciliation take place against the parties' will. One exception to the scope of a retrial is a judgment on the dissolution of a marriage, for which neither of the two parties can apply (Art.181).

4) Limitations

Application for a retrial must be submitted within two years after the judgment (Art.182). But since a retrial by the Courts or the Prosecutors' Office does not have any time limitations, the parties still have ways to make their claims through ordinary appeal procedures, even after two years.

3. Retrial by the Prosecutors' Office

1) Proposal of retrial

The Prosecutors' Office in China is not only an organization that prosecutes criminal cases, but it is also the organization responsible for legal supervision to maintain the unification of socialist legality⁵. The scope of its activities includes civil litigations in the court system, as provided in the Civil Procedure Law.

If the Supreme Prosecutors' Office or other higher level Prosecutor's Office finds any reason to protest a legally effective judgment made by a lower court, they can lodge a protest against the judgment under the judicial supervision procedure (Art.185). Local level Prosecutors' Offices can also request a higher-level Prosecutors' Office to protest a judgment made by the corresponding local level court. In the case of a protest by the Prosecutors' Office, the court must open a retrial (Art.186)

2) Conditions for protest

If the Prosecutors' Office finds any of the following circumstances it shall lodge a protest in accordance with the procedure for judicial supervision (Art.185). That is, (1) the main evidence on which the facts were ascertained in the original

⁵ *Ibid.*, p.381.

judgment was insufficient, (2) there was a definite error in the application of the law in the original judgment, (3) there was a violation by the court in the legal procedure which may have affected the appropriateness of the judgment in the case, and (4) the judicial officers have been found to have committed embezzlement, accepted bribes, committed malpractices for personal benefits and perverted the law in the adjudication of the case. Of these circumstances, it is said that the emphasis is on number (4), because the increasing number of prosecutions of corrupted judges is so serious that it might endanger the legitimacy of the court system⁶ (Table 3).

The sources of protested cases are, (1) claims from the parties concerned, (2) prosecution or claims from citizens, enterprises and other organizations, (3) direction by the Peoples' Congress or higher level Prosecutors' Office and cases transferred from other government organizations, and (4) cases discovered by the Prosecutors' Office itself⁷. Of these sources the majority of cases come from claims brought by the concerned party itself⁸. Regarding a protest against a civil litigation, it is said that the Prosecutors' Office will not initiate a protest unless there is a claim from the parties concerned⁹.

3) Procedure for protest

When examining whether or not it should protest according to the judicial supervision procedure, a Prosecutors' Office can obtain materials from the court, seek and collect evidence, and interview both parties concerned. The Prosecutors' Office has enacted a regulation especially for claims from the parties concerned, and this is quite similar to a court procedure.

II. Significance of Judicial Supervision System

While it is true that the number of retrial cases is so huge that it is difficult to

⁶ *Ibid.*, p.389.

⁷ Supreme Peoples' Prosecutors' Office "Provisional Regulation on Civil Judicial Supervision Procedure Protest Activities", 1992, Article 2.

⁸ Fu (2001), p.182.

⁹ Suzuki (1998), p.385.

just recognize a retrial as an exceptional remedy measure, taking the actual situation in China into account, the significance of this system cannot be denied. Especially in cases of wrongful application of the law or intentional misinterpretations, overturned misjudgments will serve to maintain the dignity and stability of the law, protect and relieve the legal rights and interests of the parties concerned.

Some of the reasons why misjudgments occur are, (1) corruption of judicial officers, (2) neglect of the law and procedure, (3) pressure from local leaders which is rooted in local protectionism¹⁰, and (4) lack of legal knowledge by the judges. It should be noted that most misjudgments are not due to negligence, but are intentional. Thus, if a court rejected a retrial just for the reason of following required procedures, it is obvious that the trust in the court system would collapse.¹¹

III. Problems of Judicial Supervision System

1. Conclusive judgment

In China, there is no notion of *res judicata*. A judgment only becomes legally effective. A legally effective judgment is enforceable, but since it is not conclusive the judgment always has the possibility of being changed. The judicial supervision system is designed to change a judgment at anytime. In fact, more than 20 percent of all retrial judgments overturn the original judgment, so it can be said that the validity of any judgment is unstable¹² (Table 4). Original judgments that have been already enforced could be retried and overturned. Even after a retrial, there is still the possibility of another retrial.

2. Disposition of rights

Both in the event of a retrial initiated by the court itself and a retrial initiated by the protest of a Prosecutors' Office, the retrial could be initiated even when the

¹⁰ Local protectionism occurs because the personnel and budget of the court is totally under the control of local government.

¹¹ *Ibid.*, p.398.

¹² "Revised" means overturning the original judgment and "conciliation" means making a new conciliation agreement that replaces the original judgment, so the total of these two are the cases in which the original judgment has been overturned.

concerned parties do not have any intention to argue against the original judgment. The parties concerned must participate in the retrial and are also responsible for the result of the retrial.

IV. Concluding Remarks

In Western countries the legitimacy of civil litigation is generally founded in the concept of “due process”, but in China it is founded in finding the truth and convincing both parties¹³. It is even thought inappropriate just to conclude a case by finishing all the procedures and leaving the judgment substantially wrong. In this sense civil procedure law is seen as normal only if it provides measures to ensure substantial justice to be served, rather than maintaining the stability of the law.

As China is moving toward establishing a socialist market economy and becoming more engaged in the global economy, there are more opinions that emphasize a “due process” approach. Although there is almost nothing relevant in the Judicial Reform taking place now in China, it is obvious judicial supervision will be a major issue in the near future.

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¹³ *Ibid.*, pp.398-400.

Table 1 Figure of Accepted First Instance Cases

	Total	Criminal	Civil	Economic Dispute	Administrative
1980	767,410	197,856 (25.8%)	565,679 (73.7%)	3,875 (0.5%)	---
1988	2,290,624	313,306 (13.7%)	1,455,130 (63.5%)	508,965 (22.2%)	8,573 (0.4%)
1989	2,913,515	392,564 (13.5%)	1,815,385 (62.3%)	690,765 (23.7%)	9,934 (0.4%)
1990	2,916,774	459,656 (15.8%)	1,851,897 (63.5%)	588,143 (20.2%)	13,006 (0.5%)
1991	2,901,685	427,840 (14.7%)	1,880,635 (64.8%)	563,260 (19.4%)	25,667 (0.9%)
1992	3,051,157	422,991 (13.9%)	1,948,786 (63.9%)	650,601 (21.3%)	27,125 (0.9%)
1993	3,414,845	403,267 (11.8%)	2,089,257 (61.2%)	894,410 (26.2%)	27,911 (0.8%)
1994	3,955,475	482,927 (12.2%)	2,383,764 (60.3%)	1,053,701 (26.6%)	35,083 (0.9%)
1995	4,545,676	495,741 (10.9%)	2,718,533 (59.8%)	1,278,806 (28.1%)	52,596 (1.2%)
1996	5,312,580	618,826 (11.7%)	3,093,995 (58.2%)	1,519,793 (28.6%)	79,966 (1.5%)
1997	5,288,379	436,894 (8.3%)	3,277,572 (62.0%)	1,483,356 (28.1%)	90,557 (1.7%)
1998	5,410,798	482,164 (8.9%)	3,375,069 (62.4%)	1,455,215 (26.9%)	98,350 (1.8%)
1999	5,692,434	540,008 (9.5%)	3,519,244 (61.8%)	1,535,613 (27.0%)	97,569 (1.7%)

Source: *Law Yearbook of China*.

Note: The total of 1988 - 1992 includes traffic cases.

Table 2 Figure of Accepted Cases by Instance

	Type	First Instance	Second Instance	Retrial	2nd / 1st	Retrial / 2nd
1989	Civil	1,818,385	112,500	22,282	6.2%	19.6%
	Economic	690,765	28,959	3,431	4.2%	11.8%
1990	Civil	1,851,897	116,362	24,694	6.3%	21.2%
	Economic	588,143	35,103	5,475	6.0%	15.6%
1991	Civil	1,880,635	127,113	29,919	6.8%	23.5%
	Economic	563,260	39,336	7,584	7.0%	19.2%
1992	Civil	1,948,786	125,096	32,288	6.4%	25.8%
	Economic	650,601	42,931	10,144	6.6%	23.6%
1993	Civil	2,089,257	114,997	29,417	5.5%	25.6%
	Economic	894,410	46,038	9,345	5.2%	20.3%
1994	Civil	2,383,764	122,099	30,050	5.1%	24.6%
	Economic	1,053,701	58,170	9,786	5.5%	16.8%
1995	Civil	2,718,533	139,298	34,683	5.1%	24.9%
	Economic	1,278,806	70,224	13,701	5.5%	19.5%
1996	Civil	3,093,995	159,846	37,604	5.2%	23.5%
	Economic	1,519,793	84,657	17,336	5.6%	20.5%
1997	Civil	3,277,572	182,766	44,745	5.6%	24.5%
	Economic	1,483,356	87,376	20,697	5.9%	23.7%
1998	Civil	3,375,069	207,186	48,694	6.1%	23.5%
	Economic	1,455,215	88,495	25,047	6.1%	28.3%
1999	Civil	3,519,244	246,241	57,430	7.0%	23.3%
	Economic	1,535,613	95,165	26,485	6.2%	27.8%

Source: *Law Yearbook of China*.

Note: Although retrial cases are mostly raised against second instance judgments, it includes both.

Table 3 Protested Cases and Penalized Judicial Personnel

	Protested Cases	Penalized Judicial Personnel
1998	11,652	2,512
1999	14,069	1,450
2000	15,770	1,338

Source: *Law Yearbook of China*.

Table 4 Figure of Decisions in Retrial Cases

	Type	Retrial Cases	Maintained (%)	Revised (%)	Withdraw (%)	Rejected (%)	Conciliation (%)
1989	Civil	20,658	12,362 (59.8)	3,321 (16.1)	1,452 (7.0)	--	--
	Economic	3,066	1,673 (54.6)	523 (17.1)	201 (6.6)	--	--
1990	Civil	23,582	14,689 (62.3)	3,626 (15.4)	1,740 (7.4)	--	--
	Economic	4,838	2,728 (56.3)	851 (17.6)	323 (6.7)	--	--
1991	Civil	29,286	18,330 (62.6)	4,331 (14.8)	2,473 (8.4)	--	--
	Economic	6,728	3,963 (58.5)	1,161 (17.3)	508 (7.5)	--	--
1992	Civil	31,980	14,529 (45.4)	4,451 (13.9)	2,617 (8.2)	3,912 (12.2)	1,528 (4.8)
	Economic	9,286	3,805 (58.5)	1,505 (16.2)	561 (6.0)	1,327 (14.3)	445 (4.8)
1993	Civil	30,639	11,340 (37.0)	4,415 (14.4)	2,745 (9.0)	4,727 (15.4)	1,887 (6.2)
	Economic	9,848	3,155 (32.0)	1,555 (15.8)	837 (8.5)	1,928 (19.6)	502 (5.1)
1994	Civil	30,783	11,639 (37.8)	4,646 (15.1)	2,275 (7.4)	5,206 (16.9)	1,613 (5.2)
	Economic	9,893	3,197 (32.3)	1,755 (17.7)	798 (8.1)	1,705 (17.2)	520 (5.3)
1995	Civil	34,475	11,733 (33.6)	5,074 (14.5)	2,712 (7.8)	5,528 (15.8)	2,853 (8.2)
	Economic	12,815	3,836 (29.9)	2,344 (18.3)	907 (7.1)	2,189 (17.1)	663 (5.2)
1996	Civil	37,274	12,491 (33.5)	6,105 (16.4)	2,700 (7.2)	6,834 (18.3)	2,087 (5.6)
	Economic	16,609	4,526 (27.3)	3,102 (18.7)	1,248 (7.5)	3,029 (18.2)	755 (4.5)
1997	Civil	43,347	13,072 (30.2)	7,579 (17.5)	2,762 (6.4)	8,361 (19.3)	2,244 (5.2)
	Economic	19,368	4,866 (25.1)	3,835 (19.8)	1,218 (6.3)	3,408 (17.6)	822 (4.2)
1998	Civil	48,152	10,984 (22.8)	10,343 (21.5)	2,544 (5.3)	10,087 (20.9)	--
	Economic	25,342	5,508 (21.7)	5,989 (23.6)	1,294 (5.1)	4,102 (16.2)	--
1999	Civil	56,103	12,200 (21.7)	12,450 (22.2)	2,957 (5.3)	11,386 (20.3)	--
	Economic	25,846	5,391 (20.9)	6,448 (24.9)	1,290 (5.0)	4,388 (17.0)	--

Source: *Law Yearbook of China*.