OVERVIEW OF THE DISPUTE RESOLUTION MECHANISM IN CHINA

by

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I. Court System and its Reforms in China

1. The current situation of judicial system

An independent and fair judicial power is crucial to the effectiveness of the market economy, the rule of law, and social justice. China's reforms are going through a period of structural adjustment, which must be backed up by an effective and fair judicial system. In China, the judicial authority over civil ,administrative and criminal cases is exercised by the People's Court. In the judicial proceedings, the People's Court administers justice independently according to law, subject to no interference by administrative organs, organizations or individuals. Furthermore, the People's Court shall base itself on facts and take the law as the criterion.

Chinese courts hear 5.2 million criminal, civil, economic, and administrative cases annually. Chinese Courts are supposed to deal a harsh blow to serious crimes that threaten social stability, to readjust the relationship between civil and economic affairs and eliminate social contradictions, and to guarantee the smooth implementation of major reform measures.[1]

As China is moving towards the “litigatious society”, the increasing litigation is classified into three categories, namely: civil and commercial cases, administrative

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[1] Xinhua, “Courts ordered to help economy grow”, China Daily, July 6,1998.

cases and criminal case. The trial of civil and commercial cases is governed by the Civil Procedure Law of 1991 and relevant substantive private law, the trial of administrative cases is governed by the Administrative Procedure Law of 1989 and relevant substantive administrative law, and the trial of criminal cases is governed by the Criminal Procedure Law of 1996 and relevant substantive criminal law. Among other things, civil and commercial cases are the most predominant categories in terms of workload, including but not confined to contracts, torts, financial disputes, intellectual properties, State-owned enterprise reforms, farmland contracting, agricultural development, real estate, labour disputes, etc.

China began to pay more attention to judicial justice issues in the autumn of 1997. But the current judicial system is lagging behind in the implementation of these laws and regulations, and some malpractice still occurs in the courts. The judicial shortcomings include the judicial corruption, ineffectiveness of the judiciary, and lack of independence of the judiciary. Judges' expertise should be further improved. Some of the judges abuse their power, severely damaging justice of judicature, and tarnishing the reputation of the courts. It is necessary to improve the examination and qualification system for judges so as to raise their competence. Rampant regional protectionism is one of the judicial shortcomings. The fact that local courts do not operate on an independent basis is the major cause of this regional protectionism. In terms of personnel, funds and equipment, these courts are administrated by local governments. Under the current Organic Law of the People's Court, judges are selected by local People's Congresses. Some local governments, in an attempt to protect local interests, seek countermeasures against national law. This has resulted in unjust practices in some areas.[2] It threatens to tarnish the dignity of Chinese law and the image of courts. Worse, it may shake Chinese people's faith in the rule of law. This problem needs a timely reform to ensure independence of judicial activities, and promote market economy.

To safeguard the independence, effectiveness, accountability, honesty and cleanness of the judiciary, China has started reforming its judicial system. Judicial reforms are also an important part of the legal and political reforms in China.

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[2] "Legal reform to keep pace with market", China Daily, February 20,1998.

Without such reforms, the market economy will be in danger of foundering. Of course, economic analysis can be used to help analyse judicial systems so as to advance the current judicial reform.

2. Strategies against judicial corruption

In recent years, some judicial officials abused their power for the sake of money or gave unfair judgment for personal revenge or interests, including taking bribes, corruption, embezzlement of public funds, and dealing with cases in a manner contrary to the law.[3] In Heilongjiang Province, for instance, judges have been punished for such malpractice. Between 1993 and 1996, sentences given in 438 court cases were found to be erroneous and 460 judicial officials were penalised as a result.[4] Their misdeeds have invited public complaints and tarnished the image of China's judiciary system. A strong public opinion is growing to fight against the abuse of power and corruption in the judicial sector, and develop a sounder system to weed out the roots of corruption in law enforcement departments.

To enforce internal supervisory mechanisms in courts and ensure justice, to give innocent people the power to redress injustice, and to discipline the judges, the Supreme People's Court issued in 1998 a new punishment regulation regarding malpractice in trial procedures to safeguard judiciary justice, according to which judges shall be put under investigation after they are found to have intentionally broken the law in court trials or carried out court verdicts and unintentional legal offences resulting in serious consequences. The new regulation is applicable in both substantial and procedural laws, intentional or unintentional violations of the law, and both ongoing and past illegal activities.

The Supreme People's Court of China set up a reporting centre in May 1998 to handle calls and mail regarding judges in the supreme court, provincial higher people's courts and intermediate people's courts. Major cases to be handled by the centre will include embezzlement, taking bribes, abusing power, concealing or forging

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3 Xinhua, “Judicial officials”, China Daily, July 30,1998.

4 Dian Tai, “Wei calls for fight against corruption”, China Daily, July 30,1998.

evidence, leaking secrets, unlawful coercion, dereliction of duty and illegal collection of money.[5]

Recently, there also have been cases in which the court retirees immediately got themselves re-employed as counsels. They used relations forged during years of working in the field to influence the judicial procedure and outcome. The Supreme Court prohibits retired judges from acting as defence lawyers or legal representatives in the region of their former service within three years of their retirement. According to a rule issued by the Higher People's Court in Yunnan Province, the plaintiff and defendant are entitled to question the qualifications of legal representatives. Violation of the regulation will bring the case to a second trial.[6]

The top priority in the campaign against judicial corruption is to rectify the judicial discipline and working style, and re-select the leadership of the courts at different levels, in a bid to ensure a clean and disciplined court system. In 1998, Courts across China corrected 11,563 error-laden cases that were tried before 1998 and punished 2,512 judges. The Supreme People's Procuratorate punished 1,215 prosecutors, including the chief and a deputy chief of the Anti-Corruption Bureau under the Supreme People's Procuratorate. The chief, Luo Ji, was removed for depositing money confiscated in a case into a bureau account. The deputy chief, Huang Lizhi, was removed for accepting a dinner invitation from a suspect in a case.[7] China appointed 594 new chiefs and deputy chiefs of anti-corruption bureaux at county and prefecture levels nation-wide in the second half of 1998 as part of its effort to curb judicial corruption. The appointments were made to replace former chiefs who had failed to pass a nation-wide examination and assessment survey, and to fill existing vacancies. As part of the campaign, 1,332 new presidents and vice-presidents of county and prefecture-level procuratorates were installed to fill vacancies left by those who had been demoted.[8] To investigate cases of judicial corruption, the Supreme People's Court appointed ten prestigious judges as superintendents who will be responsible for offering advice in handling major,

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5 Briefs, Reporting center, China Daily, May 12,1998.
6 Wu Jiachun, “Call urges judicial fairness”, China Daily, March 13, 1998.
7 Xu Yang, “NPC considers amendments”, China Daily, January 30, 1999.
8 Xinhua, “Anti-corruption chiefs named”, China Daily, January 16, 1999.

difficult or misjudged cases. They are also authorised to investigate major issues concerning judicial corruption in the courts, as well as cases involving parties from different jurisdictions. They are required to forward reports and suggestions based on their investigations to the Supreme People's Court.[9]

Another critical issue closely connected with judicial corruption is wrongly handled cases arising from authoritative judicial practice. During a revision of more than 4.41 million cases of various kinds in the first 10 months of 1998, 85,188 cases were deemed wrongly handled. Among them, 9,395 cases were corrected. The rest are being dealt with, according to the Supreme People's Court.[10] It would produce stronger public criticisms if the occurrence of wrongly handled cases could not be prevented and substantially reduced. The goal may be achieved through legitimate procedures, accurate verification of facts, good evidence, clearly stated judicial documents, and accurate and convincing applications of the law. It is essential to establish a system for investigating and prosecuting anyone who is held responsible for unjust or misjudged cases.

According to a regulation promulgated by China's Supreme People's Court, judges misjudging cases or breaking the law in making their judgements have begun to be punished from September 1998. The ultimate aim of the regulation is to improve the supervision system within the people's courts and ensure that justice is safeguarded. The regulation applies to all judges, including presidents of the courts, presiding judges and adjudicative personnel. People's courts have the power to determine whether a case handled by its personnel is misjudged or not according to relevant regulations and laws. Judges held responsible for misjudging cases will receive a disciplinary punishment. Those who have committed a crime in the process will be dealt with accordingly by judicial departments. The investigation of violations of trial procedure laws cover past and present infringements. China's Supreme People's Procuratorate issued a similar regulation covering China's procuratorial organs in late July 1998. Both rules are significant in building up a

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9 Shao Zongwei, “Reform brings new supervisory judges”, China Daily, October 31,1998.
10 Shao Zongwei, “Judicial Reforms Outlined”, China Daily, December 3,1998.

system for investigating misjudged cases.[11]

3. The far-reaching impact of open trials and live court broadcasts on judicial reforms

According to the Chinese Constitution and laws, except for three kinds of cases -- those involving national secrets, privacy and minors -- all cases should be tried openly. The verdicts of the above-mentioned three kinds of cases must also be announced publicly. To conduct public trials means to allow ordinary people including media reporters to attend court trials. This practice has proven effective in many countries to prevent lopsided adjudication, lax enforcement of necessary judicial procedures, and prejudicial judgements against the accused. But in practice, it has not been fully followed by many local courts, and court proceedings were not publicised until a few years ago.

Of course, for many years, some courts have opened their trials to only a certain number of visitors who hold a special pass issued by the courts. At the same time, the formality required to apply for the pass is usually complicated, which keeps away a great number of visitors. In cases that require the court to open session more than once, many courts choose not to inform the public of the schedule. What is more, some local courts say they do not have courtrooms big enough to accommodate all visitors. As a result, ordinary trials are usually conducted in the presence of a very small number of visitors.

According to current Constitution and legislation, every Chinese citizen has the right to information, including the right to know the truth about any case. However, this right can only be realised if China's courts conduct trials openly before the watchful eye of ordinary citizens. If China is to establish a sound democratic and legal system, China's courts must conduct their proceedings openly, in accordance with the law.[12]

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11 Shao Zongwei, “New rules improve judicial safeguards”, China Daily, September 4,1998.

12 “Trials should be conducted in public”, China Daily, February 6, 1998.

1) Opening court trials to the public

China began to reform its judicial procedures in 1996. Conducting an open trial has been a major requirement of the reform. But no regulations have been stipulated to punish those who go against judicial principles. Perhaps this is the reason the principles are being overlooked. Some law enforcement officers and judges are not sure about their ability to make the right judgement in certain cases. Furthermore, many courts fear that the participation of ordinary visitors, especially media reporters, may make trials complicated. That is the main reason for the unpopularity of public trials.

Xiao Yang, president of the Supreme People's Court, has pointed out that courts must consciously put themselves under the scrutiny of the public eye and that the “public trials" stipulated in the Constitution must be carried out.[13] Starting from June 10, 1998, Chinese citizens above the age of 18 have been able to audit any public trials held in the Beijing No 1 Intermediate People's Court. All that is required is to show an ID card. By doing that, the court has become the first intermediate court in China to allow its workings to be viewed. On the same occasion, journalists are allowed to report any cases tried publicly by the court, provided that their reports are accurate and responsible. For this purpose, an attention-grabbing screen of 200,000-yuan (US$24,096) was set up at the gate of the Beijing No 1 Intermediate People's Court, listing the cases to be tried in court, in full view of an interested public. More and more local courts are beginning to permit citizens aged 18 or above to attend most court hearings.

Open trials have a far-reaching impact on propelling judicial reforms and ensuring the integrity and justice of the legal system. Open trial is the most direct, widespread and forceful kind of supervision. It can increase judicial openness and transparency, prevent darkroom operations, and ensure that justice is served. One of the major reasons for the public complaints about the courts is that the trials are secret and not transparent. The public have an opportunity to observe and supervise judicial activities. This can curb or eliminate interfering factors such as personal favours, power, and money. It is an effective way to protect judicial independence,

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[13] Shao Zongwei, “Court trials now open to public”, China Daily, June 11,1998.

and to impose pressure on judges, urging them to improve their professional skills. It can also improve the legal awareness of the general public. Therefore, most legal and media specialists agreed that live broadcasts of courtroom hearings have a positive impact on China's legal reform, moving the system towards greater transparency.

2) Live court broadcasts

Xiao Yang, president of the Supreme People's Court expressly and repeatedly declared in 1998 that as long as the media respects the facts and takes an impartial stand, live coverage of trials is always welcome. More than 40 television stations across China have broadcast live court proceedings. The first was Nanjing City Television Station in Jiangsu Province. The station began broadcasting court live in April, 1994 with a weekly programme titled “Courtroom Fax”. More than 200 trials have been aired on the programme. The first nation-wide live broadcast of a court hearing by China Central Television (CCTV) on July 11 enjoyed an audience rating of 4.5 percent, higher than that of CCTV's noon news programme. The copyright infringement case involved ten Chinese film studios and was heard in Beijing's No. 1 Intermediate People's Court. A survey conducted in Nanjing reveals that many local residents are interested in the programme and frequently ask their friends to record it when they are unable to watch proceedings.[14] To date, at least eleven higher people's courts and 58 intermediate people's courts have begun live telecasts of trials to increase their openness and transparency.[15] Experts and lawyers are often invited to comment on the trials, and telephones are in place to allow viewers a chance to air their opinions.

A newly released 500-sample survey conducted by Beijing No 1 Intermediate People's Court indicates that 90.7 percent of its respondents think the trials they have attended are “just and fair”. Among the 172 respondents who have participated in courtroom actions, 92.5 percent said the judges listened attentively to the litigants. By the end of 1998, some 2,630 people had attended trials with valid identification cards. Since December 1998, all courts in Beijing have opened their courtrooms to

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[14] Xinhua, “Live trial coverage attracts viewers”, China Daily, August 6,1998.
[15] Xiao Shao, “Hot line improves media access to courts”, China Daily, February 11,1999.

ordinary citizens. The survey also shows that 75 percent of respondents are satisfied with the performance of the judges. People were asked to evaluate the judges' manners, attitude towards litigants' ability to control the trial, and proper dressing.

Being exposed to the public's eyes, it is only natural for the judges to be cautious about every word they say. Since courtrooms have been opened to the public, the quality and efficiency of handling cases in court have improved. Judges usually pronounce verdicts at a later date instead of right at the end of the court session. Both the complexity of some cases and the large number of legal provisions have imposed difficulties on the timely pronouncement of verdicts. The quality of judges, which the court will routinely improve, is another reason for the late verdicts.[16]

To improve media access to courts, the Supreme People's Court (SPC) has opened a telephone hot line to be used by the news media this year. The hot line is managed by spokesmen for the court. It follows the opening of a hot line reporting on law enforcement advice and another one directed to spokesmen for the NPC. In addition to convening press conferences, the spokesmen will help reporters locate people they want to interview, clarify some facts and inform them of cases of public concern. At present, the SPC holds five to eight press conferences each year. Reporters may still cover court stories on their own. Chinese courts at all levels will gradually establish a spokesperson system.[17]

It should be noted that although most of the public have viewed the live broadcasts of court cases, some of them have not. A number of people are worried that this practice will disrupt the trial process and deter witnesses from speaking the truth, because the latter might be afraid of retaliation or exposure to the public. Some people believe cases shown to the public should be typical cases, and ought to be used to serve an instructive function. These cases should be tried by judges of high calibre. It is stipulated in China's law that any case may be open to the public, except when the cases involve national security or personal privacy. If witnesses do

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16 Shao Zongwei, "Survey finds trials are 'just and fair'", China Daily, January 12, 1999.
17 Xiao Shao, "Hot line improves media access to courts", China Daily, February 11,1999.

not want to be exposed to the public, blurring their pictures on TV can be an ideal substitute.[18] All these concerns show that there is still a long way to go before this vivid and direct practice can be accepted by the public.

It is also an open question as to how to avoid any negative impact of broadcasting proceedings. Some people argue that cases involving violent crime or a large number of victims and witnesses should not be broadcast, while others argue that class-suit cases, such as consumers suing a company, would be suitable for a TV audience. Defendant and plaintiff should be informed of the live broadcast beforehand and should not be forced into the project. The media should remember they are only playing a minor role in these live broadcasts. Media coverage of the cases should not improperly influence the decision reached by the courts. Televised discussions by experts should be held after rather than during the court hearing.[19]

To fulfil the basic principle of the Chinese constitution of public trial, it is more crucial to improve people's legal awareness and judges' professional level rather than focusing on the limited space of the courtroom.

4. Reforms with the lay assessor system

The people's lay assessor system is an important part of the judicial system. The jury system was introduced to China at the beginning of this century, but ended with the fall of the Qing Dynasty (1644-1911).[20] China inherited the people's lay assessor system from the former Soviet Union. People's lay assessors had been instituted in regions controlled by the Communist Party of China before the founding of New China in 1949. China's first constitution in 1954 made a clear provision for such a practice in China's judicial system. However, the system was short-lived, falling victim to the “Cultural Revolution” (1966-1976). Although the status of the system was re-established in the 1978 constitution, it is only recently that it has again been given due attention.[21] The Supreme People's Court has proposed to the Standing Committee of the NPC to draft laws to regulate the selection, rights and

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[18] “Live show of trials raises law awareness”, China Daily, October 2,1998.
[19] Shao Zongwei, “Live court broadcasts benefiting legal reform”, China Daily, October 21,1998.
[20] It is also argued that China may experiment with juries in the reform of its trial system.
[21] Shao Zongwei, “Foundation for reform of assessor function set”, China Daily, December 4, 1998.

duties of lay assessors.

Unlike the jury system practised in Western countries, Chinese lay assessors share equal rights and duties with the judges in court. Forming a collegial bench with judges, they play a vital role in rendering trial judgements by a majority vote of lay assessors. They provide an effective channel for the people to participate directly in judicial activities and conduct supervision of the judicial activities.

Some courts in China have hired experts in special fields to function as lay assessors. The Beijing No 1 Intermediate People's Court started to hire IPR rights academics as lay assessors a year ago. The courts are currently paying more attention to lay assessors' proficiency in their individual fields than to their knowledge of law. This helps judges to determine the facts of a case.[22]

The people's lay assessor system should be further improved. People's lay assessors must have a certain educational level and have acquired some legal knowledge. Some local regulations state that people's lay assessors should at least have graduated from high school. Many legal professionals maintain that in cities like Beijing and Shanghai, lay assessors should have a college education. Since most lay assessors have no systematic legal education, they feel intimidated in front of judges, especially if disagreements arise. This often results in assessors just listening to trials without making their own judgements. Lay assessors should be encouraged to make their independent judgement, and deliver their opinion in good faith.

It is necessary to improve legal education to ensure that judicial power is vested in the right hands. While lawyers must pass strict professional examinations, many judges and procurators do not have to. In this situation, judges could easily reach the wrong verdict, while paying little attention to lawyers.

As to other issues concerning the internal judicial structure, the powers of collegial benches (made up of three judges) and single judges are expected to expand, and the function of judicial committees will be limited to difficult major cases only.

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[22] Zong Wei, “Awareness of laws, legal education vital to system”, China Daily, December 4,1998.

The practice will transform the role of the chief judges and presidents of courts from ratifying court judgements to ensuring proper trial conduct by all parties to a case.[23]

5. Reforms with the township courts

The implementing of the rule of law in the rural areas is an important part of the rule of law. There are 17,411 township courts in rural areas. Township courts are a branch of the county-level courts and are independent of township governments. The courts have a lot to do to help China's 900 million farmers solve problems arising from renewal of farmland contracts and the development of the rural economy. They handled 50.27 percent of all first instance cases in China's courts in the past five years from 1993 to 1998.

However, there are still problems at different governmental and judicial levels in building up township courts. Although they are not a part of the township Party committee of township governments, some township governments have used court staff as government employees. Some court arrangements could affect the outcome of trials.

China's Supreme People's Court has urged the courts to stamp out such malpractice, to stop getting involved in government affairs that are not part of their legal duties, and to conduct their activities in accordance with the law. It is necessary to formulate rules to rework China's to strengthen the judiciary's role, so as to help stop corruption in it and help further effect law and order in rural areas by standardising the operations of township courts, their governance, and their trial procedures.[24]

6. Improving efficiency, especially speeding up litigation resolutions

Efficiency is critical to judicial justice. According to Article 135 of the Civil Procedure Law of 1991, the trial of first instance shall be concluded within six months dating from the acceptance of the plaintiff's suite. According to Article 146 of Civil Procedure Law of 1991, the trial of first instance using the simplified procedure shall

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[23] Shao Zongwei, "Judicial Reforms Outlined", China Daily, December 3, 1998.
[24] Xinhua, "Legal reform touches on township courtrooms", China Daily, November 30,1998.

be concluded within three months dating from the acceptance of the plaintiff's suite. According to Article 159 of the Civil Procedure Law of 1991, the trial of second instance shall be concluded within three months dating from the acceptance of the party's appeal. Thus, it takes the parties nine months to get the final court rulings. However, both courts of first instance and courts of second instance are entitled to prolong the trial for due cause. In practice, some corporations or individuals need two or three years to reach the final court rulings. It has been reported that courts of second instance have taken around two years to deliver the final court ruling, requiring the court of first instance to rehear the case. This means that the plaintiff and the defendant had to follow another circle of trial including first and second instances.[25] It is urgent to speed up trials, reduce the judicial cost and improve the judiciary effectiveness. The Supreme people's court has realised that exceeding the time limit for concluding trials is a violation of the procedural law, and should be given the same attention as the correction of wrong judgements. During the first ten months of 1998, courts in China handled more than 4.3 million new cases and concluded more than 3.82 million.[26]

To improve judiciary effectiveness, it is necessary not only to create awareness among judges of modern, effective practices, but also to equip the office facilities with modern technologies. Some courts, including Beijing's Higher People's Court (BHPC), have launched the construction of the Court Computer Information Network. The project of BHPC will cost about 60 million yuan (US$7.228 million). The network is going to include a supporting system especially for presidents' decision-making, a lawsuit information system, an office management system and a public information system. It will connect Beijing's more than 30 courts from municipal to county levels. Beijing sees an increase of 10,000 to 15,000 cases every year, and its courts have already run out of space for additional officials. The courts expect this network to greatly raise their efficiency by freeing them from a tremendous amount of manual operations presenting a looming threat to judicial efficiency. Beijing residents will expect to get quick judicial consultation through the network, which will also greatly improve judicial transparency by releasing

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[25] Chijian, "A time-consuming suite ", Democracy and Law, Vol.8, 1998.
[26] Shao Zongwei, "Judicial Reforms Outlined", China Daily, December 3, 1998.

typical cases and trial results, and receiving related inquiries.[27]

To offer effective and timely judicial remedy to the consumers in vulnerable positions, it is feasible to establish consumer small claims courts or general small claims courts in China. Some local courts in Suihua region, Heilongjiang Province and Changde City, Hunan Province, have experimented with establishing special courts to handle the cases concerning consumer disputes. The author believes that it is more reasonable to establish the small claims courts in China, covering not only the consumers' small claims, but also other small debt claims based on either contract or tort.

7. Measures against unsatisfactory enforcement of judgements

In China, the biggest danger threatening the dignity of the rule of law is the fact that it has not been possible to enforce a considerable number of rulings in civil law and commercial law cases. According to the Supreme People's Court, nearly one million cases with a total value of 190 billion yuan (US$22.9 billion) were pending throughout China by September 1998. According to high court statistics, the national incidence of unexecuted cases now stands at 30 percent per year. In some courts, the backlog of adjudicated but unresolved cases has risen to a stunning 60-70 percent of the annual caseload.[28] In July 1998, Beijing had 9,882 un-enforced court decisions. Fifty-seven percent were civil cases, while 32.6 percent were commercial ones. The cases involve judgements valued in tens of billions of yuan. Compared with district courts, the city's higher and medium people's courts have had far more un-enforced court decisions, because of more complicated procedures and larger amounts of money involved. For several years, un-enforced court decisions have continued to damage the prestige of the law and have caused widespread criticism.[29]

The problem with the enforcement of court decisions did not appear until the late 1980s, when cases awaiting resolution peaked in many courts across China. The

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27 Tang Min, "Network to help courts in cases", China Daily, October 19,1998.
28 He Sheng, "Courts face hurdles in backlog", China Daily, November 30,1998.
29 Tang Min, "Beijing to speed up judgment enforcement", China Daily, September 10,1998.

situation was so bad that specific enforcement divisions had to be established in courts at all levels to cope with the problem. The debtors often try every means to conceal their real financial situations and put off repayment as long as possible. Some scofflaws have even used violence against law enforcers. Since August 1998, more than 30 incidents have been reported in Fujian Province in which about 30 law enforcers were injured during their attempts to resolve cases. Violence against law enforcement officers has become an increasingly serious problem. Four court police officers have been killed during the process of execution in the past three years.[30]

Local protectionism is an important factor in the context of the increasing number of un-enforced cases. It is not uncommon for local governments and local people's congresses to intervene in execution. They either exert their influence from behind the scenes or stand by the culpable litigants in public. Jilin provincial government has reportedly announced a list of 94 major enterprises in its province slated for "special protection", saying they are free from any liability in court-ordered debt collecting actions. There are probably more protected enterprises at the prefecture and county levels. What makes things even worse is that some local courts have even found themselves confronting local police and local procuratorates as they tried to carry out their duties. In extreme cases, local police have even clashed with judges or taken away the goods confiscated by the court. More than 50 such cases have been reported to the Supreme People's Court since 1992. The impetus behind these clashes usually comes from local establishment authorities.[31]

Meanwhile, the lack of a detailed, unified regulation over court enforcement also contributes to the current difficulties. For example, the provisions on the execution of verdicts in the civil procedure law seem a bit too simple to avoid a variety of interpretations. Many cases also result from a poor level of awareness of laws and a lack of a belief in the rule of law among both the litigants and those who could have a say in law enforcement.[32]

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[30] He Sheng, "Courts face hurdles in backlog", China Daily, November 30,1998.
[31] *Id*.

In December 1998, the Supreme People's Court issued a document concerning how to deal with resistance to execution of laws. It empowers the local courts with greater authority and provides practical measures to defend the law's honour. The Supreme Court is now launching a special training course for the senior judges responsible for the enforcement of judgements.

To enforce civil court orders, local courts have begun to take tough actions against debt repudiators who refuse to pay overdue court-ordered debts despite having the economic ability to do so. Initially, names of the repudiators are being published in the local press in an attempt to bring the problem to the public's attention. If the repudiators continue to ignore the court, executors from the courts may enforce compliance. Local media have given support to the campaign by publicising debtors' lists over the last two months. These tough actions have proven effective in South China's Guangdong Province, including Guangzhou, Zhan-jiang, Shenzhen, Dongguan and Foshan. For example, most of the 112 enterprises and 16 individuals whose names were publicised by Guangzhou Intermediate People's Court in the press have paid 520 million yuan (US$62.65 million) in overdue debts, accounting for 92.8 percent of the total.[33]

In early 1998, Beijing's courts launched a mass campaign to ensure that debtors cannot repudiate their obligations. 170,000 yuan (US$20,482) in outstanding debts was repaid within one day in Fengtai District People's Court.[34] Haidian Court announced a second order on July 17 to detain those who refused to carry out the court's decisions. On May 22, Haidian Court publicised the names of 54 units or individuals refusing to carry out court decisions involving more than ten million yuan (US$1.2 million).[35] In addition to making the name list of debt repudiators public and compulsory means of enforcement such as detention, some local courts are restricting the daily consumption level of debt repudiators. This has also proven effective.

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32 *Id*.
33 Wang Rong , “Campaign launched to protect creditor's rights”, China Daily, September 11,1998.
34 CD News, “Courts pursuing Beijing debtors”, China Daily, September 11,1998.
35 Xinhua, China Daily, July 28,1998.

8. The authority of interpretation of legislation by judges

In China, judges are only authorised to apply the legislation in the individual cases. They are not qualified to make the law. However, since some legislation is very general or even silent on a number of detailed issues, the judges need to exercise the authority of interpretation of legislation in order to determine the legal foundations for the case they are dealing with. It is possible for the judges to abuse such authority for the sake of personal interest.

Hence, it is necessary to deprive such authority on interpretation for certain issues. For instance, considering the difficulty of distinguishing between the acts of God and normal commercial risks, the unified Contract Law has deprived the local court judges of the authority to make the interpretation as to whether certain circumstances amount to an act of God. Only the Supreme Court has the authority to make a competent interpretation with regard to this issue.

It is also necessary to require that court rulings describe the detailed logic and rationale for making the interpretation of legislation comprehensively, and to disclose the interpretation of legislation by judges to the public. In practice, many court rulings are very simple and general with their wording, while the explanations for the interpretation of the legislation are sometimes not provided. It would be beneficial to impose some rigid requirements on the drafting of the court rulings.

II. Alternative Dispute Resolution (ADR)

1. Overview of the ADR: Types and functions

According to Chinese law, in the event of civil law and commercial law disputes, the private parties may pursue the following avenues of alternative dispute resolution in settling their disputes: (i) negotiation; (ii) mediation; (iii) arbitration. Of course, in case the negotiation or mediation fails to settle the disputes, and an arbitration clause is not provided in the contract and a written arbitration agreement is not reached afterwards, the parties may bring suit in the People's Court. Therefore, the Civil and commercial dispute resolution channels in China forms a pyramid, in which the negotiation mechanism functions as the bottom tier, the mediation

mechanism functions as the second bottom tier, the arbitration mechanism functions as the second top tier, the litigation mechanism functions as the top tier.

1) Negotiation

In China, the civil and commercial parties tend to hold negotiation talks between them. The negotiation mechanism encourages the parties to reach agreements on settling their disputes without the intervention of third neutral parties. Thus, negotiation mechanism is an indispensable part of contractual freedom. Since the two parties are in the best position to know their own interest, the negotiation results could usually satisfy the maximum demands and interest of both parties. Since no third party appears in the negotiation process, the negotiation mechanism is the most confidential technique among all the ADR techniques. Of course, the two parties may focus too much on their own interest and supporting reasons to ignore their opponent's interest and supporting reasons. However, due to the advantages of confidentiality, efficiency and friendship maintaining, the negotiation mechanism is the most predominant channel in resolving the disputes in China. The disputes parties only try mediation, arbitration or litigation after they have not found success in negotiation process.

2) Mediation

In China, mediation is classified into administrative mediation and private mediation. In administrative mediation process, a government agency acts as the mediator; in private mediation process, a private party, either a natural person, or legal person, including non-governmental organisation, acts as the mediator. Although administrative mediation process exists for the purpose of resolving private disputes, it is less important than private mediation in terms of disputes resolved.

In mediation process, there is a neutral third party assist and facilitate the dispute parties to negotiate each other, and to reach a settlement agreement. In China, there are various categories of mediators, including but not confined to, people's mediators at grass-root level, consumer associations, government agencies, etc.

Like negotiation, mediation also permit maximum private autonomy enjoyed by the parties due to the following factors: First, the mediator is chosen by both parties. Second, both parties are actively involved in the dispute resolution process. Third, the disputes are settled by agreements reached by both parties, not imposed by third parties.

Compared to negotiation, mediation could be made much more organised and effective, as a third neutral party will assist the two parties to identify the best approach to satisfy the needs of both parties. As a Chinese old saying indicates, the parties in question are usually naive, and outsiders are usually informed. Of course, mediation does not work very well in every dispute, as the success of mediation depends upon the co-operation from both parties. If one party refuses or fails in working closely with his opponent and the mediator, mediation will be frustrated. In these circumstances, the parties might need to turn to arbitration or litigation. Among ADR techniques, the mediation mechanism is the second most popular channel in resolving the disputes in China.

3) Arbitration

In case the parties are unwilling to solve a dispute through consultation or mediation, or fail to do so, the dispute may, be submitted to a Chinese arbitration body or some other arbitration body. However, the precondition for applying for arbitration is that there is an arbitration clause provided in the contract, or the written arbitration agreement reached by the parties afterwards. The arbitration clause or agreement shall have the following contents: an expressed intent to request arbitration; items for arbitration; and the chosen arbitration commission.[36]

According to the Arbitration Law of 1994, the arbitration award is finally binding on the parties, and the party that is not satisfied with the arbitration award may not bring the case to a people's court. But labour dispute arbitration is an exception. For if the workers involved are not satisfied with the adjudication of arbitration, they may bring the case to a people's court. If they are not satisfied with the judgement of the first instance, they may appeal to the court of second instance.

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[36] Arbitration Law, Article 16 (1994).

Of course, it is quite burdensome for the workers to follow both arbitration and suite channels.

2. Current situation regarding the use of ADR

1) Use of negotiation

In China, most private parties tend to consider negotiation the top priority to pursue in resolving their disputes. The main reasons are that negotiation helps to save the time, financial and other resources for the parties, and to avoid destroying the long-term business or community solidarity built in the business history. For instance, many business corporations in China have established special departments inside the corporations, responsible for processing the consumer complaints.

2) Use of mediation

Chinese traditional no-litigation culture has promoted the healthy development and maturity of mediation mechanism as an alternative disputes resolution, which has been known as "East Experience" in the eye of westerners. Therefore, both traditional and contemporary societies give special attention to mediation mechanism. For instance, people's mediators at grass-root level, new version of Chinese traditional mediators, are still an indispensable part of China's dispute resolution system. As to May of 1999, according to the statistics of Chinese Ministry of Justice, there are nearly 10 million mediators in China. They handled nearly 87,000 civil disputes in 1998. Over the past two decades, they have mediated nearly 130 million civil cases, 5.3 times those handled by courts. Their efforts have also prevented 2.86 million civil disputes from becoming acute, stopped more than 1.5 million attempted suicides provoked by civil disputes and halted 1.3 million civil quarrels from flaring up into criminal cases.[37] Since mediation itself is a product of no-litigation culture, able to save the face for both dispute parties on one hand, and able to reduce the disputes resolution cost, it can be expected that these mediators will continue to play important roles in resolving the civil and commercial disputes. Of course, mediators need further build their intellectual expertise, and get more actively involved in newly

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[37] Shao Zongwei, "Mediators face new challenge", China Daily, May 28, 1999.

emerged industries and social corners.

3) Use of arbitration

In the 1980s, foreign firms strongly objected to arbitration in China because they did not have confidence in the fairness of Chinese arbitration proceedings or the means of enforcing arbitration awards. By the 1990s, the China International Economic Trade and Arbitration Commission (CIETAC) has become one of the largest business arbitration centres in the world, and is considered to be a fair forum. Since the adoption of Arbitration Law in 1994, many major cities have established independent arbitration bodies. Beijing Arbitration Commission is one of the newly emerged arbitration bodies, and arbitrates around 500 commercial cases annually.

Generally speaking, the parties will voluntarily implement the arbitration award. If one of the parties fails to implement the award, the other party may apply to a people's court for enforcement. If the people's court that has been requested to enforce an arbitration award finds the award unlawful, it shall have the right to refuse the enforcement. If a people's court refuses to enforce an arbitration award, the parties may institute proceedings concerning the contractual dispute in a court.

As far as the speed of dispute resolutions is concerned, most arbitration bodies are able to conclude the resolution of the disputes within a fixed period. The Arbitration Law of 1994 is silent on the time limit requirements for delivering the arbitration award. This issue is always dealt with by the arbitration rules of arbitration bodies. For instance, under Article 48 of the Arbitration Rules of Beijing Arbitration Commission, the arbitration award shall be made within four months dating from the formation of the tribune of arbitration. Such time limit requirements are often satisfied.

3. Parties' viewpoints with regard to ADR

In contrast with the characteristic of American society, Chinese traditional society has been reluctant to resolve the disputes through litigation. Although development of market economy has stimulated the rapid growth of litigation in China, most Chinese people prefer ADR to litigation. There are various reasons to explain such attitude. However, Confucian no-litigation culture has played a crucial

role in shaping parties'viewpoints with regard to ADR.

One of the fundamental characteristics of Confucian vision of law can be summarized as no-litigation preference. In other words, although litigation were heard by the government officials who had both administrative and judicial powers, they were perceived as something undesirable, disgraceful and abnormal, and needed to be eliminated in an ideal society. Confucius himself expressed this argument very clearly: "In hearing litigation, I am like any other body. What is necessary, however, is to cause the people to have no litigation."[38] The ironical thing was that, Confucius himself was once a judge. However, he did not encourage people to go to court for dispute resolution. In the same line, Fan, a learned subsequent commentator, interpreted no-litigation as the following, "The purpose of hearing a case is to resolve the dispute itself, and block the sources giving rise to disputes". Yang also noted that, "Confucius did not consider hearing cases as a difficult job, rather considered no-litigation among and between the people as the most fundamental issue"[39]

Then, why Confucianism was so enthusiastically pursue a utopia without litigation? Theoretically speaking, such a litigation-disliking attitude could be traced back to the root of Confucianism vale system. In the relationship-oriented theoretical framework, Confucius paid special emphasis on the significance of "DE" (ethics, virtue and morality) building for a person who wants to become superior man (JUN ZI).[40] Since ethical requirements are broader, stricter and more comprehensive than legal requirements, no qualified superior man is satisfied with only complying with less rigor legal requirements. Such a characteristic thus remains the fundamental difference between superior man and mean man or small man (XIAO REN). Once people transform themselves into superior men, the whole society will be in harmony and peace, and disputes in society will become less and less. Therefore, less or even no litigation is a necessary condition for a society to become a harmonious and ideal society, so called "Common wealth World"(DATONG SHIJIE).

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38 Verse 13, Yanyuan 12, LUN YU.

39 Zhu Xi, Adavance 11, Book 6, ZHUXI JIZHU.
See also: http://read.cnread.net/cnread1/gdwx/z/zhuxi/lyjz/006.htm.

40 Chinese concept"JUNZI" could be translated into various counterparts, including but not confined to, "gentleman", "a man of complete virtues" or "superior man". Of course, it is difficult to choose a most appropriate word for the translation purpose.

No wonder why Confucius tried his best to persuade people to get rid of litigation as more as possible.

Confucius no-litigation attitude has greatly influenced Chinese mainstream legal philosophy at both official and grass-rots levels from Han Dynasty through late Qing Dynasty even contemporary China. In addition to the consideration of fame or face, a much more important concern is about the political stability possibly brought by litigation. At official level, most emperors and government officials consider diminishing litigation as one of their governing goals. Thus, the number of litigation served as an important yardstick to evaluate the political performance of the local officials. For example, Han Yanshou, a governor of Dongjun in Xi Han Dynasty, attributed the private litigation to his insufficient morality building. For this reason, he always closed himself inside home, re-examining his faults relevant for the private litigation. Consequently, the parties to the litigation also deeply blamed themselves, eventually, 24 counties within his jurisdiction witnessed no litigation for a period of time since then.[41]

Even the court of justice of Min Guo period in early twentieth century clearly endorsed the no-litigation preference. For instance, the Capital Higher Court of Justice in Nanjing had a horizontal hanging scroll, "Fairness and Justice"(MING JING GAO XUAN), its left couplet saying "the purpose of trial of litigation is to expect no litigation"(TING SONG QI WU SU), and its right couplet saying "the purpose of imposition of punishments is to reduce their imposition"(MING XING FU XU XING).[42]

To guarantee the value of no-litigation preference, the governing class tended to obligate the dispute parties to first exhaust private mediations to settle the disputes. In Song Dynasty, the judges usually tried to mediate between the plaintiffs and the defendants, in order to diminish the litigation. In Yuan Dynasty, it was mandated that, "all the disputes regarding marriage, family property, land and house, debtor's default, unless gross breaches of law, shall be mediated by the local community leader

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41 Zhang Jinfan, "Several Issues on the World Position of Chinese Legal Culture and its modernization". See, http://www.cin.hebnet.gov.cn/Others/Rendafazhi/d6j2.html.

42 Zhuming, "Minguo Shiqi De Shoudu Gaodeng Fayuan", Tuanjie Bao, November 27, 1999.

through convincing, in order to avoid the loss and waste in farming". In Ming Dynasty, most minor criminal cases and civil disputes were required to submit to mediation first by county sheriff, local official and clan seniors.[43]

Apart from the resistance of litigation on the part of governing class, grass roots people were also reluctant to bring litigation to the court. There are several reasons to explain their attitude. The first factor is the great concern about the litigation cost arising from motivating a case to the court. May people got afraid of endless involvement into the litigation process, and inevitable suffering of loss in terms of money and time that would be able to be shifted to farming. While the cost associated with private mediation is very moderate, the cost arising from litigation might be too high to under the parties' control. The second factor is judicial corruption. Judicial corruption had been a big social problem through most Chinese feudal history. There is old saying, "Although the gate of court is widely open, grass roots people should not go there if they only have good reasons, but don't have enough money to bribe the judges there" (GUANFU YAMEN BAZI KAI, YOULI WUQIAN MO JINLAI). Although there were many sophisticated written codes, most of judges were also the administrative in certain regions; it was very normal for the judges to follow the administrative procedures to hear the case, which was more arbitrary and less open. Arbitrary and less open judicial procedure in return to breed judicial corruption. The third factor is relevant to the concern about potential loss of face or fame. Although litigation cost was not a big problem for the parties, they might be deeply concerned about their potential reputation loss arising from the litigation. Chinese feudal society was a typical agricultural society. The farmers had been living in certain area for succeeding generations and usually kept very close touch each other. They also had to care a lot about the evaluation from other members in terms of family and clan harmony and personal morality. Whatever roles they might play, either plaintiff or defendant, the mere fact of being aliened with the litigation would convey a shamed and disgraceful message to other members in the clan and local community. Although there were litigation in certain periods or regions all the time, it was true that grass roots people generally try to avoid litigation

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[43] *See* also, Cheng Zongzhang, "Zhongguo Chuantong Shehui Wusong Guan Zairenshi", http://www.enweiculture.com/Culture/whlt/t993/zgct.htm.

as more as possible. Lack of sufficient litigation incentives also partly explains why attorneys had not created an independent legal profession in Chinese feudal society.

In English, ADR has various nicknames, such as “Adequate Dispute Resolution”or “Avoiding Disastrous Results.” These nicknames have strongly indicated the virtues and advantages of ADR. They are also the common attitude of private dispute parties in contemporary China.

4. Problems of the ADR

ADR is not perfect and is not workable in all the circumstances in China. Rather, all ADR techniques have their disadvantages. As far as negotiation is concerned, either of the two parties could block the negotiation process, and such blocking could happen very frequently especially when one party focuses too much on its own argument and ignores too much about the argument of its opponent. For instance, some business corporations ignoring social responsibility or business ethics, do not want to take into account the reasonable consumer complaint, and therefore force consumers turn to mediation, arbitration or litigation.

In contrast, mediator could make mediation process manageble by pointing out the problems frustrating the negotiation. However, the mediator is neither an arbitrator nor a judge. It means that the dispute parties have the final decision right as to whether to accept the mediator’s suggestion or not. Therefore, many private cases could not be properly settled by mediation in China. For instance, many consumer disputes of small claim are left unsettled due to the failure of cooperation on the part of business or consumers, lack of mediation staff and investigation means, lack of enforcement authority.

Arbitration also has its own disadvantages. First, it is possible that the two parties forget or fail in reaching an arbitration clause in advance, and that the two parties fail in reaching an arbitration agreement afterwards. Second, the arbitration bodies are not necessarily competent enough to hear hundreds of millions of private disputes. For instance, many arbitration bodies focus on hearing commercial disputes of large claim, but unwilling to hear hundreds of millions of consumer disputes of small claim. That is why many local consumer association have begun to

establish special arbitration bodies responsible for hearing consumer disputes of small claim.

5. Value in ADR

ADR functions as a very useful, effective and workable tool in resolving disputes. The values of ADR have already been demonstrated in the past Chinese history, not only by no-litigation culture, but also by the wide use of negotiation, mediation and arbitration in modern times.

The first value of ADR is efficiency and cost saving. General speaking, ADR requires much less resources to be devoted to settle private disputes than litigation. As mentioned above, based on current civil procedure legislation, it takes the parties nine months to get the final court rulings. However, both courts of first instance and courts of second instance are entitled to prolong the trial for due cause. In contrast, either negotiation, mediation or litigation could be concluded within shorter period. Shorter period of dispute resolution usually, if not always, means less cost, and less human resources spent on the dispute resolution process.

The second value of ADR is maximum confidentiality or privacy. When ADR techniques are used, the dispute resolution process is conducted in private, and not open to the public. Nobody except the parties, their attorneys, witnesses, is permitted to observe the dispute resolution process without the consent of both parties. The parties or mediators or arbitrators have no authority to disclose the final settlement results, unless both parties grant the permission. Contrarily, the litigation process must be open to the public, except for the cases involving national secrets, privacy and minors. Even the verdicts of these three kinds of cases must also be announced publicly.

The third value of ADR is maximum private autonomy or contractual freedom. In ADR process, the parties have the final and ultimate control over the procedural and substantive issues, including the selection of specified ADR technique, mediators or arbitrators, and low degree of formality than litigation. In contrast, the litigation parties have less control over the litigation process than ADR process. For instance, the judge is appointed by the court of justice, not by the parties. The litigation

process is much more formal than ADR process, and is usually highly structured by set legal rules.

Considering the value of ADR and possible negative effects of litigation, including costly and fame-destroyed consequences for the parties, Chinese traditional no-litigation culture is correct in arguing that litigation mechanism itself is not a value to pursue, even not the best tool to pursue the value of harmony. In recent past years, China adopted the policy of building rule of law. However, many people thought "rule of law" are closely connected with litigation, and consider active litigation as a yardstick to test the progress of rule of law. It is very easy for the people to forget the most fundamental value to pursue while they are busy in suing or being sued each other. Therefore, traditional no-litigation culture is positive in encouraging the private disputes to be resolved more effectively, gracefully and less costly than going to court of justice. Such channels might be negotiation, mediation or arbitration. However, traditional no-litigation culture could not be interpreted as to deny the justification of all litigation. Because in most cases, either plaintiffs or defendants are justified to protect their legitimate interests and rights through litigation, and the justice in individual cases would not be able to realize without litigation process. And Confucius himself did not said he refused to hear cases; what he said was to pursue an ideal society without litigation. Of course, when litigation become inevitable, Confucius would urge the court to hear the cases in efficient and economic way, and exhaust mediation procedure first, and enforce the fair and reasonable judgments as soon as possible. When modern China sets her first step in the track of moving to litigious society, there are always something positive could be learned from Confucius in promoting the growth of ADR mechanism in China.