

PART ONE

OVERVIEW: JUDICIAL REFORM IN CHINA CHANCES AND CHALLENGES

Judicial reform has become one of the most frequently used terms in China today. By the term Judiciary”, most people, including me here, mean courts even though the legal definition of judiciary in China is broader.

Observing the changes brought about by the 20 year’s reform, we should attach equal importance to the social change as we do to economic growth. At any rate, to let 1/5 of the world population to live under a more reasonable social structure is a more noble goal than just let them to be rich. This is the major reason why I highly evaluate the increasing role played by courts in social life.

Because of the original design and the task of China’s court system was so different from what they are required and what they are doing today, courts deficiencies have become the target of social criticism. If you are in a taxi, chatting with the driver, it is more likely that he would tell you what in his mind to reform the judiciary. The courts are just like a patient, and everybody else is considering himself a doctor or a surgeon, either can offer some good healer, or a helpful operation. Interestingly, the public is more prudent to openly criticize other State Apparatus than they do to the courts are.

This phenomenon, for me, presents some fundamental social changes.

First, courts are no longer something that don’t matter in people’s lives. The statues of courts bear in social life is leveled up by the date to date development of social complexity, and the higher expectations for the courts by the general public is higher. And maybe more important, judicial power is more welcomed to substitute administrative or Party’s power when there are conflicts.

For more than thirty years since P.R.C was founded, Chinese courts were in an idle position except in political movement. They are not supposed to be a judgement organ for social justice, but an instrument for “proletariat dictatorship”. A central government Circular in 1950 States that:” like people’s military and people’s police, people’s judicial work is also a

important instrument for the people's regime"¹ Under this instruction, Judgement is a kind of work that should not be neutral, but with class awareness, namely, be aware that who is your friend, and who is your enemy". Mao Zedong's famous formula, that is to use different ways to solve different social contradictions is also applied in courtrooms: contradictions among the people, the way of democracy, contradictions between people and enemy, dictatorship.

So before mid 80's, there was little room for courts to play. It is understandable that, in a society where there was no private property right, where labor was treated as a chess on the chessboard, where one was allocated no more economic resources than meeting basic subsistence needs, and where all the economic activities were organized and managed by the government, where economic entities were seen as players of the state functions, civil and economic laws are not needed. Correspondingly, in such a society, there was no soil for administrative litigation laws as well, because the ideology entitled government an Un-challenged position to represent people and to exercise all kinds of rights on behalf of them. So for quite a long period of time, to most Chinese people, "laws" equals to criminal rules. In most cases, the sentence "somebody violated the law" simply means, "somebody committed a criminal offense".

This situation started to change since early 80's. As economic reform and other social reforms are going into depth, more and more disputes are brought to courts. Economic section was established in mid 80's, and then followed the administrative law section in later 80's. In the year of 1997, cases filed to courts are almost five times more than that was in 1986. The following social factor may be considered as the reasons for the change.

1. Market oriented economic reform
2. Governmental organization reform
3. Rapid development of Private Business
4. Rural reform and the waves of floating population

In many cases, courts are the only place that people can go when they have conflicts.

Second, People's increasing awareness of rights. As the concept of rule of law starts to be rooted in the society, people entrust a heavy weight on courts, hoping social justice and a new social order should be created through court function. The old saying:" Never go to court when you alive, never go to heal when you die", which described the traditional attitude of Chinese people toward courts, is not true any more. " I am going to sue you in courts as a phrase that used to show the helplessness of the subject, was seen as he has no better ways to

¹ The Circular by the State Council of the Central Government on strengthening People's Judicial work , 1950

seek, now is a strong statement, with proud and power. It is true that the right to bring someone to courts, often offer a feeling of empowerment for many people, you don't have to be someone to exercises that right, as China was a society in which rights are distributed differently among the people. The pattern that "take your boss for dinner when there is a problem", has changed to "take your judge for dinner when there is a problem", this can be a exciting thing for those who has no boss to take or talk to.

The third, people's high expectation of courts and the current irrationality with courts structure and the spreading judicial corruption. As the role of courts become increasingly important, naturally people's expectation of the court is higher. Obviously, they are not satisfied with the current situation of the courts. Dealing with courts in current China means uncertain results, high cost, delayed process, and finally, even if you are survive of all the suffering, you can not get your court award.

The fourth, the discrepancy between comparatively well written laws in paper and the weak enforcement in real life. Since early 80's, along with the course of its opening and reforms, development of a new legal system has become an important part of China's modernization process. By 1998, the National People's Congress had promulgated more than 300 new laws, the State Council and various line ministries had enacted more than 4,000 regulations, and provincial People's Congress and governments had adopted more than 5,000 local regulations. But it is are very disappointing if we see the sharp discrepancy between laws in paper and laws in real life. Law enforcement by courts, are in a very poor situation. Some study shows that only 20% of the laws are being implemented, and 50% of the courts rulings on civil and economic cases are either not enforced at all or enforced with much discount or delay. A statistic released by the Supreme People's Court last summer demonstrated that difficulties in Enforcement has become a major issue. In the first 6 month of 1999, enforcement cases filed in courts reached 272,000, while the un-enforced court ruling reached 85,000, which involving RMB 2,590 billion.

It is true that our courts are facing a great challenge. The Five Year Reform Plan by the Supreme People's Court is quite right in saying that "the managing system and mechanism of trial work of people's courts has been critically challenged by the change in social relations, the adjustment of the social interest, the complexity of social contradictions". To meet the challenge, the only alternative is to make some change.

What are the problems that ought to be reformed ? The problems with China's courts, as we see them today, can be listed as two kinds. One is external and the other is internal. When I say external, I mean the constitutional structure, the relation between courts and the Party, Courts and the People's Congress, Courts and other State Organs. The external structure sets the political background as well as the tone for the courts. The internal problems, I refer to the internal structure and system within the courts themselves. We can identify the following problems, both external and internal, which have been subjected to discussion both by academics and by general public.

1. The nature and role of courts in the overall political structure;
2. The administrative arrangement of courts structure, the judge, the collegiate bench and adjudication Committee;
3. Qualification of judges and the ways to improve, and the related question
4. The recruitment of judges and the way they are appointed,
5. The independence of judges in making judgment
6. Judicial local protectionism
7. Financial arrangement
8. Trial Model
9. The administrative management of the courts

It is a long list, and the problems are associated with each other, sometimes it is hard to tell which is the egg, which is the hen. But, maybe just because the problems are so obvious and so unbearable both for the political authority and the general public, now is a good time to reform. The following can be favorable conditions:

1. Politically, the 15th Party's Congress has proposed the task of judicial reform as a integral part of the political reform. The Resolution on the Annual Report of the Supreme Court by the second session of the 9th National People's Congress has put forward requirement for judicial reform, Stated that:" The courts should be reformed in order to meet the demand of rule of law".
2. Legally, the fourth constitutional amendments by the second session of the 9th National People's Congress added the " run the country by law and construct a socialist country rule of law o the constitution, inevitably, it will open a wider room for judicial reform.
3. Socially, with the development of market economy as well as the increasing

awareness of rights, courts are required to protect the rights and interests of the clients equally and fairly, with due process . As The Outline for the Five Year Reform Plan by the Supreme Court put it:” to reform the judicial concept, model of management and operation that are not comply with economic construction and social development in the primary stage of socialist country’s necessary, and “ Courts reform has reached the consensus among the whole society”(article 2).

4. Internally, reforms that have been done within courts system in recent years has accumulated some useful experiences for further reform. The trial model reform, the trend to empower individual judge and the collegiate bench, regulating the power of the adjudication committee, separating the power on case filling, enforcement, and supervision from trial, have achieved plausible results.

The reform of the courts system is an inevitable task, but it doesn’t mean it is a easy task. We are facing lot of dilemmas. Those dilemmas are well stated in the Five Years Reform Plan as we read article 4 of the document. According to this article, courts reform must insist the following principles:

1. The Party’s leadership;
2. The political system of people’s dictatorship in the form of people’s congress;
3. Independent trial according to law;
4. The unity of the national legality;
5. Open to the useful experiences of foreign countries in court and judge management based on China’s specific situation.

If the five principles are equally important, the workable, or the desirable plan, given the existing political structure and ideology, which traditionally doesn’t support a independent judicial power, must not be a aggressive one. In another words, be aware of the limits, the unavailability of the political and social conditions that support a western style judiciary, like political pluralism, checks and balance in power structure, I personally would like to state the goal for judicial reform in current China as to shaping a stronger judicial power under the existing constitutional structure”. The reform planned for next five years is aimed this way.