

Chinese Legal System

China Studies.

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***Features of Chinese dispute resolution and access to justice.***

# Justice is conscience, not a personal conscience but the conscience of the whole of humanity.

# Those who clearly recognize the voice of their own conscience usually recognize also the voice of justice.- Aleksandr Solzhenitsyn

There are three essential questions that we should consider when making an interpretation of the Chinese judicial system and its improvement:

*1) How should be China’s challenges in terms of access to justice better understood?*

*2) Are the efforts made by the Chinese government during the last decades enough?*

*3) What direction are these efforts taking?*

Thinking of these questions while making our research can help us to make a more correct approach for our understanding.

Fu Hualing, in his work *access to justice in China: potentials, limits and alternatives* talks about how a “legislative explosion” or “legislative miracle” has taken place in China since the late 1990s as product of the Chinese opening reform in 1979 and a new way of governance that has opted for relaying on laws in order to increase legitimacy and effectiveness. A large number of right-protective laws have been passed by the legislature since then to ensure a better protection for the rights of the citizens and to regulate government powers. Civil law and civil justice in courts have been rising and gaining place in a system where criminal cases were more common and typically considered more significant from a political and social point of view. However this transition hasn’t been simple, Fu Hualing points out that this agenda is still limited and faces multiple challenges, being the authoritarian nature of the party state one of them, since political interest is overwhelming and can derail the weak civil justice reform process. From another perspective China is facing many growing-pains due the complexity and diverse needs of its society, their traditional way of thinking and the changes that the country has been facing since the last decades, all of this displays a wide array of consideration that should be made.

The end of the late 1970’s represents a historic moment for China, along with political liberalization and the economic reform policies, law and social legality were considered as a pre-condition of economic development. The Supreme People’s Court recognized civil justice as important as criminal justice and emphases that it should receive equal treatment in courts; a 30 year process of civil justice reform was announced. There have been significant changes in the nature of social conflicts and incidences of disputes during this period, and the mechanisms implemented to address them have been dynamic and adaptable as well.

A gradual creation of court-centric civil justice system following certain degree of rule of law, has given room to open a legal market for lawyers including from professional licensed practitioners to figures such as “barefoot” or “black” lawyers. These last ones originally created by the government and regulated by the Ministry of Justice (MoJ) in order to serve the need of economic development and resolution of disputes especially in rural areas. By early 1980s *Judicial Assistants (JAs)* organization were set up in each township in rural areas and some street offices in in urban areas, employing barefoot lawyers and offering free services of mediation and disputes resolution, basically performing a public function by maintaining social order. In the mid-1980 there was a division of the main JA between the free of charge, and not, activities when the “Township Legal Services Stations” were created and a new figure called “Township Legal Workers” appeared, which could engage in a wide range of legal practices but was limited under registration in specific areas and restricted to non-criminal cases. It was until early 2000s when JA and the Township Legal Services Stations were formally separated by the MoJ.

Fu Hualing in his work emphases 3 important challenges that China has been facing during the implementation of the civil justice reform, and how they have different implications for rural and urban areas; here a brief description of each one of them:

*Competition between qualified lawyers and legal workers (barefoot lawyers)*: Although when legal workers has been indispensable by providing access to legal services in rural China, there have been constant struggles on redefining the role that these figures should play, since the constant growing of licensed lawyers and the need of moving towards to a more modern, transparent, efficient and standardized system that requires of professional and better qualified elements. In fact under the lawyers’ law of 2007 only licensed lawyers can represent clients in courts, but still make some exceptions which do not allow fee charging anyways, while these measures are better accepted in the urban areas than in the countryside.

*Legal aid and limitations:* Chinas legal aid system has grown quickly in terms of institution-building and professionalization since 1994, and as a response of scandals and tragedies from the early 1990s. The MoJ controls all about legal aid funding, policy, and delivery without active participation of any other entity. It established a common standard to deliver legal aid throughout China and every level of the government has their own legal aid center. Both salaried and private legal aid lawyers are employed to provide services to the needed community, they have also the supplementation of “barefoot lawyers” and volunteering students, to cover the vast demand. Another method use by the government to fulfill the legal aid demand is to attach a legal duty responsibility to the legal professionals, under law, lawyers have the legal duty of providing legal aid services when the government requests it. This is a requirement for the annual certificate renewal for law professionals. In another hand law firms normally seek for having a good relationship with the government and embrace this manner. Compering with other western countries, China faces much bigger problems; by the end of 2005 the government registered 23.65 million people below China’s poverty line, but according with international standards there are actually between 120 million to 130 million Chinese in poverty that year. All of this people need government assistance including legal aid. In the same 2005 a few more than 250,000 cases were handled by the government but in fact this number corresponds only to one third of the real legal aid need for the poor. The government then has limited legal aid to the poorest of the poor. Additionally in 2006 there were only 122,242 full time licensed lawyers in China which in their majority concentrate in the largest cities. With this numbers we can observer how far still China of meeting its potential legal needs.

M*ediation over adjudication*: One of the most important challenges faced by China when planning and performing its civil justice reform was the overstepping the traditional way of thinking when introducing the new way of disputes resolution. The Government then needed to recognize the special needs of the Chinese society according with their culture, since Judges and the new system were strongly criticized for blindly adulating the western style without considering the social impact of their judgments. Today at least in rural areas judges are encourage to provide a flexible mediation and application of customs greater than litigation when handling pure family disputes and other social sensitive issues as long as it doesn’t come into conflict with the law and doesn’t harm the interest of the state and others, in order to contribute to a more harmonious society. In the other hand the large Chinese cities had become more sophisticated and standardized when applying civil justice and litigation is commonly practiced and preferred. It is important to notice this phenomenon is closely related to the imparity of modernization and wealth distributing among the different areas.

Randall Peerenboom and Xin He in their article *“dispute Resolution in China: patters, Causes and prognosis”*, also describe much of the previously mentioned from Fu Hualing work, but with a different perspective since Peerenboom and He description covers the need of China to implement an effective way of dispute resolution in order to gain trust from the rest of the World and actively participate in international affair. They illustrate China’s achievements and challenges and compare some of these situations with other countries. In general they describe the pragmatic problem-solving approach that the government has adapted in order reach its goals in efficiency of dispute resolution and justice while maintaining socio-political stability and rapid economic growth, making a description of Chinese commercial law, the search for improving the business environment, move toward a more litigation system, judicial corruption problems, judicial independence, the role of mediation, socio-economic disputes, public law, constitutional developments and others. They also argue similar in a similar way than Hualing that the Chinese communist party relays on economic growth as their stronger tool to claim legitimacy. At the same time they consider that all the improvements made by China in terms of economics, rule of law and good governance have been possible thanks to the government vision on recognizing that different stages of development hold different challenges so it is reasonable to try new practices and abandon those which no longer serve their purposes.

In *“Civil justice reform with political agendas”* by Xianch Zhang, the author stresses that even when there has been an impressive achievement by improving and modernizing in general the Chinese legal system, there exist different sides of the story to tell due to the complexity and size of the country. He argues that the in recent developments there are contrapositions between the agendas of the civil justice reform and the government’s political one, compromising the judicial efficacy and professionalism. For China in order to access to the World Trade Organization it was necessary to ensure fundamental legal principles of this organization, such as impartial administration of law, non-discrimination and independent judicial. Since then China has adopted different reforms plans, including the Chinese characteristics of a socialist country in its preliminary stage of development, which endorse the idea of learning from external experience, foreign judicial system and institutions without going beyond the socialist really of China. As Zhang mentions in his Work the Western judicial model includes the promotion of the so-called universal values such as democracy, freedom, human rights, equality and rule of law, by following this model the socialist direction of China would be changed.

In his conclusion Xianch Zhang emphases that after 30 years the implementation and development of civil dispute resolution and rule of law in China has faced multiple challenges and the reforming pace may need to be adjusted according to the social conditions. At the same time, he suggests that the process has reached a point where political reforms are needed in order to guarantee and continue the progress of the civil justice reform, since the dignity of the law and the judiciary has been threatened by politician agendas. However, he also stresses that the trend for more serious civil justice reform is irreversible, where support has to be given to judicial professionalism, independence, and efficiency.

Huang Jialiang in *“How Are Laws Practiced? A Sociological Analysis Based on a Judicial Case in China”* makes a debate about formalism and instrumentalism in law, and exposes in a controversial way a criminal case in China. This document argues that even when the concepts of procedural justice and formalism have been gradually established in China, the logic behind is practically different from the logic intended theoretically. The whole operative system of the law represents a battle between the interests of various organs and the judicial process is affected by grassroots courts and a society acclimatized to substantive justice instead of procedural justice. In this scenery, ideas such as “serving justice” and “safeguarding the dignity of law” remind weak and powerless.

Jialiang goes deeper than the other authors on its explanation of the concept of “Mediation” as a Dispute-Settling Mode, where basically it is through various types of techniques that the parties are being encouraged to accept mediation, and in most of the cases, it reaches better grade of satisfaction between them.

Similar to the other authors mentioned before, he also exposed that there is a need of improvement of the rules of law in order to promote social transformation; he also remarks the people awareness of China is moving toward a more similar western rule of law system, ensuring that the future China will be much like the West is today.

**Discussion and observations**

It is a mistake to make an interpretation of the achievements and challenges of the judicial system of China without out contemplating the current dynamics of the international affairs; we live in a world that faces many social problems such as disparity in knowledge, education and wealth distribution, which consequently create many other adversities. In fact these circumstances question the model that has been promoted by West as “the best alternative”, which so far has only benefited on a relatively way the already considered developed countries. By understanding this situation, we can comprehend and find logical that a country with the characteristics of China searches for other alternatives, going against of what has been established by the West and somehow challenging the existing international system.

Today China holds a unique position in the World; every time this country is gaining more economic and political power, enough to propose real alternatives in ideas and methods to the international system and to defend its own sovereignty. China’s agenda then holds a double challenge, This country needs to evolve internally as a nation and society while gaining leadership in the international affairs, this last situation puts more pressure on the local agenda, since China has to prove to itself and the rest of the world that its system works and is being effective, in order to achieve acceptance among other countries and consolidate itself as a World leader.

The description gave by the different authors reflect the struggles of society under the pressure of a quick development and modernization with the necessity of fulfilling this double agenda. The Chinese people has been expected to change their way of thinking, living and life understanding at the same speed that buildings are being built up and the cities developed. This is actually something impossible to accomplish and even unfair from other perspective. The situation has caused many struggles and misunderstanding among Chinese people and even foreigners. However the achievements made by the Chinese and their government are important to recognize.

The white paper issued by the Chinese government in 2012 concludes and summarize the panorama and perspectives as follow:

*Through judicial reform, China has constantly improved the socialist judicial system with Chinese characteristics, enhancing rigorous, just, polite and incorruptible law enforcement by the country's judicial organs, promoting the country's scientific development of judicial work and personnel, and winning the public's approval and support.*

*As circumstances keep changing, there is no end to innovation. Judicial reform is regarded as an important part of China's political system reform; it is the self-improvement and development of a socialist judicial system with Chinese characteristics. It remains a long and arduous task, and* ***we will deepen the reform along with******economic and social development****. Establishing a just, effective and authoritative socialist judicial system with Chinese characteristics is the goal of our reform, and China will make continuous efforts to achieve this goal.*

http://www.china.org.cn/government/whitepaper/node\_7169026.htm

This interpretation, and the already started motion of modernization and self-right awareness of the Chinese society, is a good sign to keep the improvement going on and extend it to the different areas within the country.

The real challenge for the Chinese Government in order to guaranty justice relays not only in the creations and improvement of judicial organs and instructions, but also on granting homogeneous distribution of wealth, access and quality in education, transparency and corruption eradication, promote society participation, and the reinforce of values such as respect and honesty. Without these elements China would be doing the same mistakes many countries in the West have done already. From my personal perspective even when China has found many alternatives to implement laws in comparison to the West, it is still too early to ensure that China is actually going to a different direction, and there is also the risk of creating the same problems in a different version of it, instead of having better results not only for the Chinese but for the whole humanity.

Talking about the phenomenon of mediation versus adjudication, even though I personally agree that adjudication is a cold system and doesn’t guarantees justice, I see it as a more proper system than mediation, since mediation is too open and gives room for many interpretations, even if it is expected that mediation should not overstep law proposals. However I understand “mediation” as a needed transit stage seeking a better define judicial system. Since adjudication has grown along with the Western ideology and society, mediation and the whole judicial system in this case has to do the same with the Chinese ideology and society.

Progress in a society requires cultural evolution, and in theory this is achieved by economic growth and education. Although from my own perspective a common made mistake is the interpretation of philosophy as a concept. Commonly philosophy is understood as the result of our personal experiences, instead of including this concept in our education models by promoting the “cultivation of personal philosophy.”

The Chinese political agenda should not differ from guaranteeing access to justice for Chinese people, while for a better interpretation of the meaning of justice it is not enough to relay on traditions, the Chinese people need information, education, philosophy and better economic standards in order to recreate their own interpretation of justice.

The government needs to continue its pragmatic approach and keep improving their communication with the society in order for everybody to understand the direction that the country is taking.