China's Legal Reform At the Crossroads

by Jerome Alan Cohen

CHINA'S LEGAL SYSTEM is careening towards a crossroads. The country's phenomenal economic development and correspondingly rapid social changes have dramatically increased pressures on courts to cope with problems that other government agencies have failed to resolve. This is especially true in the countryside, where village, township and county officials have too often lost the confidence of the people, but it is also true in the cities.

While courts are ill-equipped to handle some of these problems, other outlets for grievances—notably the petitioning system—are pitifully inadequate. The central and provincial governments have not been creative in establishing new institutions to handle complex challenges such as those that have arisen over land use transfers.

Thus, aggrieved citizens who are reluctant to run the risks of public protests or undergo the futility of formal petitioning naturally turn to the courts. Indeed, Communist Party and government leaders—bedeviled by the urgent need to bring "harmony," or at least "stability," to a society whose recent prosperity has exacerbated tensions between haves and have-nots—seek to channel popular demands for justice into the courts rather than on to the streets.

This is a relatively new phenomenon in China. Thirty years ago, when Chairman Mao's death and the arrest of the Gang of Four marked the end of the Cultural Revolution, few would have thought of going to court (*daguansi*) as an option for settling grievances, whether against the government or a private party. In 1976 the courts were a shambles. "In praise of lawlessness"—the title of a 1968 People's Daily editorial—encapsulated a decade. What little

Mr. Cohen is an NYU law professor specializing on China and adjunct fellow for Asia at the Council on Foreign Relations.

substantive and procedural law there had been prior to the onset of the Cultural Revolution in 1966 had lapsed into disuse and was badly out of date. Not only were the courts a hollow shell, but the procuracy and the legal profession had been formally terminated years earlier.

Since the December 1978 Party Central Committee plenum that launched China's transformation and assigned an important role to law, however, much progress has been made in carrying out the pledge of Deng Xiaoping and his cohort to "establish a socialist legal system with Chinese characteristics". The elements of a formal, European-style legal system are easily identifiable in China today, and no nation has ever produced legislation—substantive, organizational and procedural—more quickly than the People's Republic has in the past quarter of a century

The judiciary has been strengthened in many ways. The number of judges is approaching 200,000. There are almost as many prosecutors and perhaps 140,000 lawyers, not to mention legal specialists throughout central and local governments and legislatures and state-owned and private enterprises. There are now roughly 400 law schools, and thousands of able law professors whose scholarship is now prolific and increasingly impressive. Large- and medium-sized cities have their own arbitration commissions, as well as China's international arbitration commission, to offer as alternatives to the courts. A nationwide network of lay mediation committees has also been resurrected.

Additionally, legal aid organizations of various types have begun to flourish. An increasing number of NGOs have also become legal activists, sometimes led by lawyers but largely staffed by laymen who learned the law on their own, often on the basis of their own harsh experiences. Individual "barefoot lawyers" have spontaneously sprung up, especially in rural areas, to fill the yawning gap for legal services.

There can be no doubt that China today has a legal apparatus that is functioning even as it continues to develop. The courts now handle approximately eight million cases a year. Moreover, fanned by government propaganda on behalf of "human rights" and the "rule of law," "rights consciousness" is rising rapidly in China both among the poorer, rural segments of the population as well as among the elite. As the foreign press reports daily, workers, farmers, migrants, religious minorities, displaced residents and the politically dissatisfied are increasingly outspoken, and this has caused severe social unrest in many places. Much of this unrest has found its way to the courts, and it will continue to do so unless the public comes to perceive the judicial option as not worth the candle.

How well are the courts handling their current caseload, and can they credibly assume the added burdens of these new, varied and sensitive cases? The answers to these questions are important to China's stability, but they are hard to obtain in a country of China's size and variation. Moreover, foreigners and Chinese scholars alike have limited opportunity for systematic observation and research concerning the courts. Unfortunately, what is known is disturbing. Some Chinese courts are still woefully lacking in professional compe-

Some plaintiffs have been detained in mental hospitals in order to treat their "litigation mania."

tence, especially at the lower levels and in rural areas. While the inadequacies of such courts are gradually being addressed, prospects are dim for defeating the underlying problems that distort fair and independent judicial decision-making: massive corruption, political interference, and "local protectionism" that skews court judgments against outsiders. The *guanxi* system, or the corrosive network of personal connections that undermines the impartiality to which judges are sworn, is a pervasive and likely permanent influence.

Judges are hired, paid, promoted and fired by local officials. Formerly, most judges were formerly recruited from the military or police and given legal training after taking up their new positions, but increasing numbers are now fresh out of law school and inexperienced in both law and life. Usually, decisions in nonroutine cases are made by administrative superiors within the court rather than the customary panel of three judges who hear the case. The court's "adjudication committee," composed of its administrative leaders, decides sensitive or complex cases behind closed doors after only listening to a report from the judge in charge of the trial. Outside agencies—including higher courts as well as the local and central Party apparatus—frequently influence rulings behind the scenes.

Such is "judicial independence" with Chinese characteristics! The results of this situation have become apparent in daily life. In too many cases, plaintiffs with justifiable legal grievances are simply denied access to the courts by one means or another. In some instances, court personnel refuse to accept the case, often without giving reasons. Or the case may be accepted, but procedures are manipulated to maximize the plaintiff's frustration and expense. Plaintiffs are also often subjected to extrajudicial harassment to pressure them to settle claims informally, well short of the relief they deserve. In cases of political protest, persistent plaintiffs have occasionally been detained in mental hospitals in order to treat their "litigation mania."

Local lawyers, dependent on the favor of local officials for their livelihood, frequently are unavailable to poor farmers seeking to redress illegitimate taxation, police bullying, uncompensated land confiscation, or wrongfully withheld wages. Out-of-town lawyers courageous enough to assist are often obstructed, beaten or detained. The blind "barefoot lawyer" whose plight I described in the November 2005 issue of the REVIEW continues to suffer the illegal imprisonment in his farmhouse that began last August 11. He and his wife are severely beaten each time they attempt to break their illegal confinement in order to meet their "clients" and pursue their litigations against local officials.

Such experiences are helping to fuel the increasing number of mass protests and riots that have been reported by the Ministry of Public Security. Although the government's recent emphasis on the rule of law and constitutional rights has heightened

expectations of judicial remedies for injustice, the courts' failure to fulfill those expectations often results in greater social unrest. Unless China's leadership acts strongly now and initiates comprehensive reform the judicial system, their quest for stability will be in vain.

ARE THERE PROSPECTS for major judicial reform? One has to be skeptical, to be sure. Fundamentally reforming China's courts will be as difficult and complex a task as restructuring China's state-owned enterprises, and it will require a comparable sustained expenditure of political capital by the nation's leaders. Thus far, however, no legal reform package equivalent to the SOE reform package proposed by former Premier Zhu Rongji has made it to the Politburo. Nor does one seem to be on the horizon—although, as the examples of Khruschev's "de-Stalinization" and Gorbachev's *perestroika* illustrate, communist law reformers do not prematurely show their colors. Certainly the current leaders seem to be frozen in Brezhnev-like conservatism, having just squelched a range of important legislative initiatives that would have improved the quality of justice.

Yet the situation is not hopeless. A curious document, the Second Five-Year Reform Program for the People's Courts (2004-08), was issued by the Supreme People's Court (SPC) on October 25, 2005, and it became available to the public very recently. Sandwiched between the obligatory ideological cliches of its introduction and conclusion are no fewer than 50 goals for court reform. As a whole, they demonstrate a cautious awareness of the importance of bringing greater professionalism, independence and integrity to the judiciary, even while acknowledging and indeed reasserting the leadership of the Party and the supervision of both the people's congresses and the political consultative conferences at every level.

Outside observers as well as Chinese lawyers and litigants will soon be able to confirm the extent to which these reforms are actually implemented. Revising adjudication procedures for death penalty cases is the first stated goal and is the only reform in the criminal justice area that the current leadership seems to have any appetite for. With the help of a small group of academic experts, the SPC is now drafting detailed improvements with all deliberate speed. Requiring witnesses to appear at court hearings (instead of merely submitting written testimony) would be another major improvement, since it would subject them to cross-examination, the greatest instrument yet invented for the discovery of truth. Another goal—to stop judges from basing their decisions on "oral" evidence obtained through torture or other illegal means—would be highly challenging. The narrow yet vague articulation of this goal suggests how controversial it still is for courts to exclude coerced confessions and the evidence they furnish.

Other goals involve internal reforms that are less observable to outsiders or even lawyers. Instead of abolishing court adjudication committees, as many experts proposed, the SPC has decided to improve them and expand their role. In an effort to effectuate the principle that judges who

hear a case should decide it, the SPC calls for trial panels to increasingly decide the cases that they hear. But it also calls for the adjudication committees themselves to conduct hearings—even full trial-type hearings—before deciding the complex or sensitive cases that come before them.

In order to reduce the potential for arbitrary decision-making, the program advocates unifying judicial standards and establishing "guiding opinions" and "guiding cases" for the benefit of judges. Reflecting a dilemma that confronts all legal systems, however, the program endorses the creation of criminal sentencing guidelines while at the same time emphasizing the need to strengthen procedures for "relatively independent sentencing."

The program's boldest proposal is its most tentative. By suggesting reforms in the method of selecting judges, it hints at the desirability of loosening the grip of local powerholders over local courts. It calls for courts to begin "exploring within a certain geographic area the implementation of a system of uniform recruitment and uniform assignment of judges for duties in the basic level courts." As delicately used here, "uniform" is a euphemism for "central"—that is, recruitment and assignment by the SPC rather than each local court.

Out of obvious concern for curbing corruption, the program also stresses the importance of improving the compensation of judges as well as the procedures for evaluating their performance and determining their advancement.

One other tentative innovation seeks to enhance the autonomy of local courts, freeing them from the interference of local officials. The SPC is apparently to begin "exploring" the establishment of guaranteed national financing for local courts by inserting provisions in central and provincial government budgets.

These proposals to move the initial appointment of judges to Beijing, to reduce the reliance of local courts on local finance and to make the judicial vocation more professional and attractive are, of course, commendable. But at this stage they are little more than a gleam in the eye of the politically weak SPC.

Moreover, in the improbable event that these goals can be attained in the near future, China's courts would still be bereft of the impartiality and independence that are the essence of judicial credibility. Ending the distortions of the judicial process will require effective prohibition of all kinds of external interference in the adjudication of concrete cases—from Party, government or other sources, including the media. If they continue to be political puppets, courts are unlikely to satisfy the rising rights-consciousness of China's dynamic society.

Will the next "Five-Year Reform Program for the People's Courts" do better? One can always be patiently optimistic. After all, Rome wasn't built in a day. But China's leaders—many of whom are engineers—seem reluctant to even conceive of the legal infrastructure that remains to be built. ■