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## **Legal Reform in China: Problems and Prospects**

Carnegie Endowment for International Peace  
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*On Monday, April 18, 2005, the Carnegie Endowment for International Peace and the Asia Foundation held a joint conference on “Legal Reform in China: Problems and Prospects.” The conference gathered leading experts from China and the United States to discuss the efforts that China has undertaken to reform its judicial and administrative systems. Co-organized by Dr. Veron Hung of the Carnegie Endowment and Ms. Nancy Yuan of the Asia Foundation, the event drew a capacity crowd of approximately 140 participants from China, the United States, and Europe. Distinguished guests included the Honorable Zhou Wenzhong, the Ambassador of the People’s Republic of China to the United States, and the Honorable S. Jay Plager, Senior Circuit Judge of the U.S. Court of Appeals for the Federal Circuit. The event’s keynote address was given by the Honorable Sandra Day O’Connor, Associate Justice of the United States Supreme Court. In addition, Ambassador Zhou also delivered remarks on Sino-American relations and legal reform in China. The following is a summary of the second panel of the conference.*

### **Panel II:**

#### **Administering Justice for People (*sifa weimin*)—China’s Judicial Reform Efforts and their Limitations**

**Professor Wang Chenguang** began his remarks by observing that the environment for legal reform has gradually become more open, but that there are still numerous problems and challenges in the institutionalization of law. One problem concerns the professionalization of judges. The modern rule of law demands that legal personnel be professionals. In fact, the rhetoric of the Chinese leadership asserts as one of its goals the professionalization of judges and lawyers. So far, several measures have been implemented to attain this goal. For example, a uniform judicial examination for judges and lawyers has been established.

But new issues of concern have emerged. Of primary importance is the quality of judges at the grassroots level in the countryside. It appears that in poor rural areas, many local judges are still not qualified because very few of them have been able to pass the judicial examination. Those who have passed the examination often migrate to urban areas to have better job opportunities. The consequence is the lack of qualified legal professionals in rural regions and the inability of peasants—who, as Professor Upham discussed, are often the losers of the

development process—to obtain legal services that they may want to have. This problem has important implications. Peasants who are subject to unfair fees and taxations or who are at the risk of losing their land often do not have the knowledge or the means to pursue their interests through legal avenues and thus may become disaffected.

Some countries, such as Germany, that have faced situations in which professional judges are lacking have allowed non-professional judges to join professional judges to preside over certain types of trials, such as labor cases. Some sources show that in the United Kingdom, more than 95 percent of criminal cases and a great number of civil cases are handled by magistrates. In South Africa, the paralegal movement provided services to common people at the grassroots level. This suggests that non-professionals in China could play a useful role, even when the country is trying to upgrade the quality of its judicial personnel.

**Professor Cai Dingjian** focused his presentation on the constitutional dimension of judicial reform. He began by noting that China's constitutional system exemplifies the principle of parliamentary supremacy, in which the People's Congress oversees the judicial organ at the corresponding level. In recent years, the National People's Congress (NPC) has expanded its powers, and this has affected the court system. As an increasing number of citizens file complaints with their NPC delegates, who in turn, bring those complaints to the NPC, and as incidents of judicial corruption have drawn more attention, the NPC—which, according to conventional wisdom, is a weak institution—has increasingly been involved in supervising the People's Courts. This has aroused concerns among scholars, many of whom believe that such supervision conflicts with the principle of judicial independence. Four or five years ago, the NPC sought to establish a judicial supervision law, but it dropped the proposal in part due to objections from the legal community.

A second constitutional dimension of judicial reform involves the procuracy. Under the Chinese constitution, the procuracy is a state organ responsible for public prosecution, investigation of crimes committed by state functionaries, and supervision of courts and public security organs. There are several problems in providing one body with these three different authorities. First, because the procuracy is in charge of both public prosecution and supervision of courts, the judiciary can hardly be neutral and equal in status to the procuracy. Second, the procuracy itself is not supervised. To remedy this, the procuracy has established a so-called People's Superintendent System to invite citizens' supervision over its work. This, however, is not effective enough.

In addition, there is a third constitutional question concerning judicial reform. As cases of judicial corruption have increasingly become a public concern, the populace's demand for supervision by people's congresses over the judiciary has also grown. The NPC has welcomed such a demand. At the same time, however, judicial independence is widely regarded as a necessary feature of the rule of law. The dilemma and difficult issue thus appears to be how to strike the right balance between supervising courts and allowing an independent judiciary.

The issue of judicial independence is closely linked to the issue of local protectionism. Chinese judges are selected by and held accountable to local people's congresses. Two years ago, in Henan, a judge had to decide a case on the basis of either the national law or the Henan provincial law, which conflicted with the national legislation. The judge rightly decided to apply the national law, but the Henan Provincial People's Congress subsequently moved to

impeach him. This and other similar cases have contributed to the unwillingness of judges to cite particular laws and to be forthcoming in their judgments, all to the detriment of the judiciary's credibility and authority. The problem of local protectionism is thus an important constitutional question that needs to be resolved. The Chinese leadership should and need to deal with all of the above-mentioned constitutional issues.

**Judge Timothy Gailey** shared his observations of two judicial exchange and education programs that he took part in 2003 and 2004. The two programs were organized by the Massachusetts Judges Conference and the John W. McCormack Graduate School of Policy Studies at the University of Massachusetts, Boston, with support from the U.S. Department of State.

The September 2003 program, which Judge Gailey considered to be the most successful and stimulating educational program he ever took part in, featured an American civil mock trial, as well as post-mock trial seminars and question-and-answer sessions, conducted at different universities and law schools in Xian, Chongqing, and Chengdu. Thousands of students, professors, judges, lawyers, and prosecutors attended the program. In every venue, the unequivocal message from the audience was an eagerness to see American approaches to common legal problems and a strong interest in new ideas to improve the Chinese judicial system. In particular, questions of how to best deter judicial corruption were asked. Judge Gailey found this encouraging because it demonstrated both an openness and willingness to have the topic available for public discussion and the steadfast interest among students, professors, and judges to improve their legal system.

The Chinese judges with whom Judge Gailey met, while not necessarily constituting a statistically representative sample, showed a significant degree of interest in enhancing judicial independence and asked practical questions on how American judges work to preserve that independence. But Judge Gailey noted that while they evinced this strong desire for improvement and a sense of openness, they were not uncritical of the American legal system.

The American civil mock trial, Judge Gailey noted, was a jury trial that involved Chinese students and/or faculty serving as jurors. Although members of the audience were familiar with the concept of the U.S.-style jury, they had no actual experience with such a system. Question-and-answer sessions following the mock trials were full of skepticisms as to whether ordinary people can decide cases. These skepticisms were usually followed by the grudging acceptance that only more educated citizens should be jurors. Interestingly, when participants were told that ordinary Americans participate in juries in part to invest themselves in the judicial system, trainees often praised such a "democratic" system.

In the spring of 2004, a group of judges from western China came to Boston to observe American courts. They also presented a Chinese criminal mock trial, which included new procedures for live testimony by witnesses and limited cross-examination. The mock trial demonstrated a certain degree of pride on the part of those Chinese judges in the new procedures and in the evolving Chinese legal system.

Altogether, Judge Gailey observed, Chinese participants had some basic knowledge of the American legal system, which gave them the basis for a healthy degree of skepticism. They raised concerns that Americans themselves do about the U.S. legal system and showed interest

in attempted solutions. It appeared that the Chinese wanted to clearly see how the American legal system works and understand both its advantages and disadvantages. Judge Gailey also noted that the American participants' acknowledgment of the reasonableness of Chinese concerns paved the way for productive discussions. Judge Gailey mentioned that he is continuing to trade e-mails with individuals he met in western China, answering their queries but also asking his own questions. Judge Gailey concluded that this two-way communication is exciting and demonstrates that, despite differences, there are dedicated people on both sides of the Pacific working to improve both the Chinese and American legal systems.

**Professor He Weifang** shared some of his thoughts concerning the proposed amendment to the Organic Law of the People's Courts. While progress has been made over the past decade in legal reform, an increasing number of individuals have recognized that the current Organic Law of the People's Courts, which was enacted in 1979 and revised in 1983, impedes further reform. The amendment to the Organic Law has, therefore, been put on the agenda of the Chinese leadership. The Supreme People's Court (SPC) invited two teams of scholars, one of which is led by Professor He, to draft possible revisions. Recently, the two teams submitted their proposals to the SPC.

One of Professor He's proposals is to let the Organic Law be a real organic law. The current organic law has articles concerning the organization of courts, but these articles duplicate those in both the Constitution and the Judges Law. Some important articles that ought to be included are not in the current Organic Law. For this reason, Professor He's team has proposed to include in the new Organic Law five chapters to cover the establishment and function of courts, the adjudicatory organization of the courts, judicial administration, judges and judicial staff, and the courts' budget.

The draft prepared by Professor He's team also lays out four general principles. First, the court system should be stable; no special courts can be established unless the Organic Law is revised. Second, legal unification and the principle that citizens are equal before law should be fully realized. Third, judges should adjudicate according to law, free of influence from inside and outside of their courts. Fourth, courts should adjudicate according to law, independent of each other.

These four principles are innovative in the current Chinese legal context. In China, courts of special jurisdiction can be established at will. For example, in 1980, a court was established to deal with only one case—the trial of the Gang of Four. This phenomenon naturally undermines the stability of the legal system. In addition, no mechanism exists to ensure that the same legal provision is interpreted in the same way by different judges and different courts. The SPC has been unable to carry out the task of legal unification, in part because of local protectionism.

The final two principles touch on judicial independence. Both the Constitution and the current Organic Law provide that courts should adjudicate according to law, independent of interference from any administrative organ, social organization, or individual. However, neither the Constitution nor the Organic Law mentions specific organizations such as the Chinese Communist Party. Moreover, these legal documents emphasize the independence of courts, not the independence of judges, even though judges are at the core of judicial independence. Therefore, the proposal prepared by Professor He's team emphasizes the

independence of each judge and seeks to reduce opportunities that various sources of influence, including the president and the adjudication committee of each court, can exert influence.

Professor He's team also proposed to change the name of Chinese courts from "People's Courts" to "Courts" to reflect the professional, and not the popular, nature of judicial institutions. This proposal, which was covered in a leading Beijing newspaper, has stirred a heated debate. Stripping "people's" from the name of Chinese courts has been viewed by some as a departure from China's socialist system and as a challenge to the ruling party. In response, the SPC said that because the Constitution explicitly establishes People's Courts and because the courts' power to decide cases flows from the will of the people, the name of the People's Courts will remain unchanged. This debate has clearly indicated that revisions of the Organic Law are necessarily linked to the configuration of the entire Chinese political system. While this may sound discouraging to advocates of reform, Professor He reminded us that incremental progress even at the most technical level will, in the end, contribute to changes in the overall system.

**Professor James Feinerman** briefly commented on the panel presentations. He appreciated that Professor He mentioned the role of the Chinese Communist Party in supervising judicial organs. Believing that the party is unlikely to abandon this role, Professor Feinerman said that this issue will remain an important indicia of the extent that genuine reform will and can take place. With regard to the question of professionalism discussed by Professor Wang, Professor Feinerman reminded the participants that China, when the Organic Law was first enacted, did not have a body of legal professionals and that there was thus little time to implement serious legal training. Back then, it appeared that it would take several generations to train individuals to become legal professionals. In light of this, the progress that China has achieved is impressive. Referring to Judge Gailey's discussion of the difference in the career paths of judges in America and China – a judgeship in China is not conceived as a post that is attainable only after a lengthy period of legal experience and practice, Professor Feinerman noted that this difference contributes to the problem of inadequate professionalism in China.

Finally, Professor Feinerman commented on Professor Cai's remarks. He observed that American judges are also subject to considerable political pressure. Many state judges in the U.S. are elected and can even be, as in the case of California, recalled by the populace. Federal judges whose positions are created by the U.S. Congress are also subject to the will of the legislature. Parliamentary supremacy is also present in many Western countries, such as the United Kingdom, and it *per se* does not seem to compromise the rule of law. Thus, the NPC's supervision of the courts in China is problematic, but the key factor is not necessarily the power of the legislature, but rather the quality of that branch of government. Professor Feinerman also agreed with Professor Cai's assessment that the role of the procuracy in China is problematic. He concluded that continued movement in legal reform in China is impressive and that this constitutes an important step toward the right direction.

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