Chapter 14

China's Changing Judicial System in the Time of Globalization: Challenges of Integrating International Standards and the National Realities

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1 Introduction

Over the past two decades I have been privileged to meet Kamal Hossain in both formal and informal settings. He is not only a legal scholar and practitioner fully dedicated to the development of international law, but also an active promoter of the rule of law at the domestic level. We often discussed the inevitable challenges facing developing countries who are themselves making efforts to establish a fair and functional judicial system, paving the way for economic development, social progress and political stability. I have always found myself to be inspired by his clear comprehension of the complicated political and legal systems in the developing world, and his formidable vigour in striving for improvement.

For more than two decades China has been continuously active in judicial reform, aiming to develop a fair and efficient system to serve the society's changing needs. International law and foreign legal systems have certainly generated some reform measures, or had an effect on them. The principles and standards of fair trials, the prohibition of torture, equality before the law, special protection of women, children and disabled persons, etc., have been adopted into Chinese legislation and are routinely implemented in judicial work. In this article I discuss some of the major progressions of the Chinese judicial system in post-Mao China, and subsequently focus on the current dilemmas facing the Chinese judiciary. It goes without saying, that in a country with a population of around 1.3 billion, which is on a different level of economic development, has an increasing gap between the rich and poor and a political system that is restricted to domination by one Communist Party, these developments in judicial reform which were initiated in the mid-1980s have to cope with a variety of difficulties and obstructions in practice. At present, the Chinese judicial system remains in a fluctuating state of transition. On the one hand, this marks some pitfalls of the current system; on the other hand, it signifies the space and potential for improvement.
The Transition from Tradition to Modernization: Progress Achieved

2.1 A Change in the Perception of the Judicial System
In the first three decades of the People's Republic of China, the judicial system was significantly influenced by politics. The functioning of the courts was considered an instrument of the proletarian dictatorship. In the 1980s, the work report of the Supreme People's Court to the National People's Congress started to recognize the principle that the court should protect the legitimate interests and rights of the citizen. In the 1990s, the "strict enforcement of law and ensuring judicial fairness" became the slogan of the courts' work.

The proportion of civil and commercial cases brought before the courts has increased rapidly since the 1980s. Nowadays, civil and commercial cases account for around 80% of all cases handled by the courts, which has substantially altered the work of courts away from their previous focus on criminal cases. This expansion has had a profound impact on the function of the judicial system itself. It brought about a substantial change in the traditional conception of courts in which civil disputes were neglected and the courts were predominantly perceived to be a tool of the controlling ruler, punishing crimes on their orders.

As for the functioning of the courts with regard to the adjudication of criminal offences, in the past, all too often, a criminal suspect was detained indefinitely or convicted despite the absence of sufficient evidence. Now, however, a new attitude is emerging which places greater emphasis on the production of legally recognizable evidence, and which demands the release of a suspect or accused if evidence cannot be established beyond reasonable doubt. In the past, an arrest was coupled with a presumption of guilt and the defendant was required to prove his innocence in order to be released. Nowadays, the presumption of innocence is to a certain extent recognized by the law and there are minimum legal guarantees in place, yet this entrenched mind-set of a presumption of guilt is difficult to eradicate in its entirety.

2.2 Changes in Trial Procedure and Open Trials
Traditional Chinese trial procedures were akin to an inquisitorial civil law system, wherein the judge played a central role, actively leading the trial procedures. This included: collating and presenting evidence, the direct examination of witnesses, and their degree of control even extended to a party's actual delivery of their arguments. In the mid-1980s, parallel to the economic transition from a centralized planned economy to a market economy, economic disputes increased dramatically. As a consequence of the increased