



A Law unto Themselves

The Chinese Government has acknowledged that corruption in the judiciary is a serious problem. Zhang Xian Chu reports

Apparently, judicial corruption in China has reached the point where the country's top leaders are dealing with it personally. For example, in a speech published in the *People's Daily* on 26 December 1997, President Jiang Zemin, openly admitted in the National Conference on Political and Legal Affairs held at the end of last year that there are conspicuous problems in the political and judicial teams. He said that from time to time the people were complaining strongly about the judiciary allowing the breach of laws and overseeing relaxed and unfair enforcement; taking bribes; and bullying and oppressing people. Mr Jiang said 'These problems have seriously affected the image of our judicial team and damaged the reputation of the Communist Party and the Government. All the problems, especially the harmfulness of judicial corruption must be recognised.'

The Conference also acknowledged that judicial corruption affects all stages of judicial proceedings, including investigation, prosecution and sentencing. The Conference decided to conduct a campaign against judicial corruption in the first half of 1998. According to Mr Ren Jianxin, President of the Supreme People's Court, the campaign will be focused on the breach of laws, enforcement at discretion, violations in handling cases and money-power deals.

Although complaints by Hong Kong people against judicial corruption in the mainland have often made headlines in local newspapers, some facts revealed in support of the campaign are still very striking. A division head in a Shenzhen People's Court was arrested recently for private dealing with a defendant before trial. Some judges in Zhuhai and Shantuo were also dismissed for corruption (see *Ming*

Pao, 18 December 1997). A strange case was recently reported in the *Legal Daily* (19 December 1997). A Shenzhen District Court re-accepted a case filed by a debtor when the court's original decision in favour of the creditor had been affirmed by an appellate court and become effective in 1996. The District Court issued its second judgment ordering the creditor to pay the debtor Rmb1 million without pursuing any due procedures and reviewing any new evidence.

In Anhui province, a group of judges that included the Vice-President of a local court was found to be involved in manufacturing a false case. In November 1995, a businessman was arrested by a judge upon the request of a friend of the judge's. In order to justify the unlawful arrest and detention, several judges manufactured a complete set of files back-dated to May 1995, forced the businessman to sign all the fabricated documents, and then accused him of hindering judicial proceedings. The forged documents were approved by all the members of the court's trial committee after they were entertained by the parties to the fraud. Most of the Rmb240,000 obtained from the businessman was divided among the judges before Rmb100,000 was given to the judge's friend. The victim was illegally detained for more than six months. Finally, only one judge was sentenced to one year's imprisonment, suspended for one year. The others were merely given internal Communist Party warnings, demotions or public criticism (see *Legal Daily*, 3 January 1998).

In Jiangsu province, 153 cases have been found to have been wrongly decided by an Intermediate Court in the past four years, mainly as a result of judges favouring their friends or receiving bribes. In the first eleven

months of 1997, forty-two judicial officers were investigated in Hainan province and dealt with for various abuses of process including the suspension of death penalties through the making of false evidence.

Despite the existence of these outrageous cases, it is not true that the quality and performance of the entire Chinese judiciary is deteriorating. On the contrary – a fair observation clearly reveals that progress has been made in recent years.

First, extensive legislation at both the national and local levels has attempted to put corrupt practices behind the profession. Since 1993, the Interim Regulations on Government Officers, the *Law of People's Police*, the *Law of Prosecutors*, and the *Law of Judges* have been promulgated and supplemented with many local implementing rules. As such, conduct standards are being established for the judiciary and enforcement bodies.

Second, great efforts have been directed to improving the quality of judicial personnel and their work. Examinations have been conducted to check their professional knowledge and skills; universities and training centres have been established to provide them with a higher level of education; and foreign experience has been studied through expanded exchanges with foreign judiciaries.

Third, some practical problems have been seriously dealt with in order to ensure the healthy operation of the judicial system. Initial achievements have been made in correcting local protectionism, interference in the execution of judgments, unlawful enforcement and procedural violations.

Fourth, the judiciary has been playing a more active role in safeguarding the stability of social order and in supporting the establishment of a market economy in China. The fact that the total number of cases handled by the People's Courts at all levels jumped from fewer than 1.6 million in 1986 to more than 5.23 million in 1997, demonstrates the role of the judiciary in China's increasingly litigious society.

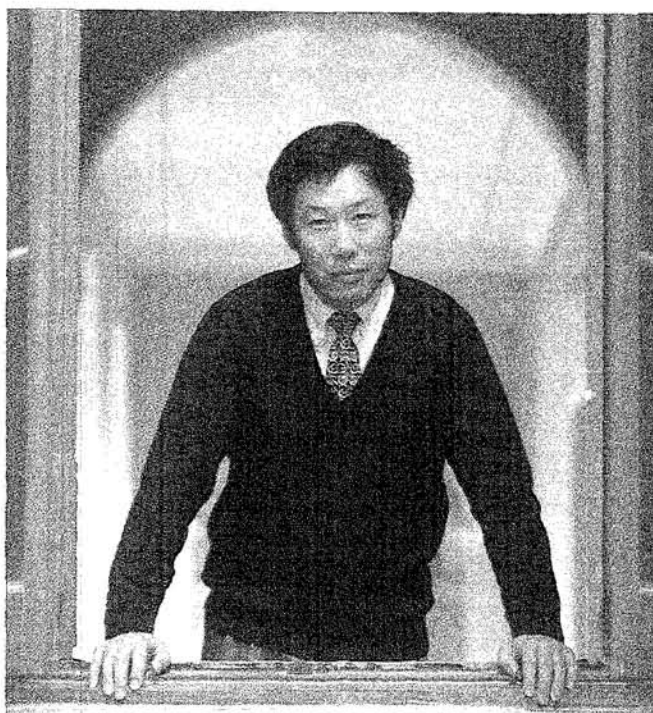


Fifth, as the new *Criminal Law*, and *Criminal Procedure Law*, and finalised *Civil Procedure Law* are implemented, the judicial process is becoming more transparent. The Supreme People's Court, for example, has continued to publish its interpretations, judgments and instructions fairly promptly.

In light of the above, how can the serious corruption be explained? The writer believes that the phenomenon reveals several defects in the current system. The lack of effective supervision and discipline is perhaps the most important cause of corruption. Despite the constitutional provision that judges be selected by the relevant People's Congress or its standing committee (as per arts 62, 67 and 101 of the *Constitution* and art 11 of the *Law of Judges*), in practice the party leaders have exercised the power of judicial appointment and control. Consequently, judges may not be truly responsible to the People's Congresses and in turn, the Congresses may not be able to effectively supervise and control the behaviour of the judges.

In his speech at the National Conference mentioned above, Mr Ren Jianxin repeated the principle that judicial reform should adhere to the vision of the Party's leadership and the socialist system and not be reliant on the scheme of checks and balances adopted in Western countries.

The quality of the judiciary has concerned many for a long time. It is no secret that unlike lawyers, most of whom hold law degrees or qualifications of equivalent standing, many judges are retirees from the army with no legal, or even general, higher education. More importantly, political loyalty to the Communist Party and the Socialist regime is a requirement for appointment to the bench. As Mr Ren Jianxin puts it, 'A judge not only needs to be in good command of laws



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and his professional work, but must have a firm political stand and be honest and upright.'

In order to become a practising lawyer in China, one must hold a higher education degree, pass the national qualification examination and complete practical training for one year. However, under the *Law of Judges*, a college graduate from a non-law major may become a judge with relevant working experience of two years. Moreover, the Law does not provide any national qualification examination for judges and creates an exception to enable those who could not meet the standards above to become judges after certain training.

Unlawful intervention in judicial proceedings is another problem that prevents courts and judges from faithfully and impartially performing their duties. There is bound to be continuing conflict between judges' adherence to the will of the Party's leadership and the denial of the principle of check and balances on the one hand, and their promotion of judicial independence on the other.

The unprecedented establishment of a market economy in China has opened

the eyes of more and more people to the possibility of improved living standards. As human beings, even judicial personnel may not be able to resist the temptation to better their lot. In a sense, the judicial circle is at a stage of development that has been experienced in many other jurisdictions. Thus, although the phenomenon of judicial corruption bears certain unique Chinese characteristics, it may still be considered an inevitable and common symptom of transition.

Last, but not the least, technical defects in the current legal system should also be blamed for the judicial abuses. For example, loopholes in legislation, disparities among the regulations issued by different state authorities, and a lack

of definitions of many important legal concepts have made abuses of process possible.

There is a continuing struggle between the demand of a market economy for judicial efficiency, impartiality, and professional conduct on the one hand, and the resistance of the traditional ideology to judicial reform, on the other. The current discipline campaign, as a temporary movement, will undoubtedly reduce the incidence of corruption scandals and result in the punishment of violators over a short period. The tougher job, nevertheless, is to reform the current system by introducing a supervisory scheme that will deter and deal with abuses effectively in the long run. This will improve the quality of the entire judiciary and further develop true judicial independence in China. In terms of the big picture, the upgrading of judicial performance will not be achieved in isolation, but to a large degree, depend on the progress of the rule of law in China.

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無法無天，一手遮天

張憲初分析中國法律之不足及改善之法

中國的司法腐敗顯然已經到了使國家領導人親自過問的地步。《人民日報》1997年12月26日發表了國家主席江澤民在去年年底召開的全國政法工作會議上的講話。在其中他公開承認，“當前政法隊伍中存在著一些突出的問題。有法不依，執法不嚴，執法不公，吃拿卡要，索賄受賄，貪贓枉法，欺壓百姓等問題時有發生”。他說：“這些問題嚴重影響我們司法隊伍的形象，損害黨及政府的威信。對這些問題，特別是司法腐敗現象的危急性，必須有足夠的認識”。

這一會議還承認司法腐敗已滲透到包括偵查、起訴、判刑等各個司法程序。會議決定在1998年上半年集中整頓司法腐敗的問題。最高人民法院院長任建新先生提出，整頓工作將以有法不依，執法不嚴，違法辦案和權錢交易為重點。

儘管香港人士對大陸司法腐敗的抱怨在香港報章上屢有出現，但近期為配合整頓而披露的某些事實仍然令人矚目。深圳人民法院一位處長最近因在審訊前與被告私下交易而被捕。珠海和汕頭亦有一些法官因涉嫌貪污而被免職（《明報》，1997年12月18日報導）。在最近《法制日報》（1997年12月19日）報導的一樁奇案中，深圳一法院在債務人向債權人索償價值並已經上訴法院肯定並已於1996年生效的情況下，竟然再次受理被告債務人就同一案件的起訴，在未經任何正當程序及審視任何新的證據的情況下，作出另一個判決，判定原債權人向債務人支付100萬元人民幣。

在安徽省，包括一個地方法院副院長在內的數名法官被發現偽造案件。1995年11月，一名法官應其朋友的請求把一名商人拘捕。為了使這一非法拘禁合法化，幾名法官合伙偽造了一整套日期為1995年5月的檔案，強迫該商人在偽造文件上簽字，然後指控其妨礙訴訟程序。在受過偽造案主腦請之後，偽造的檔案為法院審判委員會全體成員簽字批准。商人被迫交納的24萬人民幣由有份參與的法官瓜分，餘額10萬元則付給提出拘捕申請的法官朋友。此案的被拘商人被非法拘禁達半年以上。最後，只有一名法官被輕判一年徒刑，並緩刑一年；餘者只被給予黨內警告，行政降級或通報批評的處分（見《法制日報》，1998年1月3日）。

在江蘇省，一個地區中級人民法院在過去四年中竟然發現有153起錯判，且相當多數與人情關係及接受賄賂有關。在1997年的前

11個月內，海南省的42名司法人員因舞弊違法而被查處，其中包括為一死刑犯出具立功偽證以暫緩執行死刑。

儘管有這些令人難以置信的例子，中國司法機關的整體素質及並不是比以前下降了。相反，若平心而論近年所取得的進步也不少。

首先，中央和地方政府為防範司法腐敗進行了廣泛的立法。1993年以來《國家公務員暫行條例》，《人民警察法》，《檢察官法》和《法官法》等相繼頒佈並由許多地方實施細則所補充。因此，行為規範正在司法和執法機關中樹立起來。

第二，國家為提高司法人員的素質和改進他們的工作作了很大的努力。為檢查他們的專業知識和技能的考試已在一些地方開始進行；為司法人員提供這一步專業教育的高等院校和培訓中心已在各地建立；通過擴大對外交流，許多外國司法經驗也正在被認真地加以研究借鑒。

第三，一些實際問題已被認真處理以保證司法制度的健康運作。在糾正地方保護主義，非法干涉判決執行，違法執法和違反正當程序等方面都取了初步的成效。

第四，司法機關在保護社會秩序穩定和促進在中國建立市場經濟中一直發揮著日益積極的作用。全國各級人民法院審理各類案件的數量由1987年的不足160萬件躍升至1996年的523萬多件，這一事實說明了在人們日益看重以訴訟保護自己合法權益的中國中，司法機關扮演的角色。

第五，隨著新的《刑法》，《刑事訴訟法》和修改後的《民事訴訟法》的實施，司法程序的透明度正在提高。比如最高人民法院就不斷適時地公布其最近作出的司法解釋和指示。

既然如此，上述的嚴重司法腐敗又該作何解釋呢？筆者認為這一現象暴露了現行體制中的一些缺陷。缺乏有效的監督和制裁或許是最主要的原因。儘管《憲法》規定，法官應由有關的人民代表大會或人大教委會選任（見《憲法》第62，67和101條及《法官法》第11條），但在實踐中，司法任免和控制權一直是由黨的領導機關來行使的。這就使得法官不可能真正地對人民代表大會負責；同樣，人大也不能對法官的行為進行有效地監督和控制。

任建新先生在對全國政法工作會議的講話中一再強調了這樣一個原則，即司法改革

必須跟隨黨的領導和社會主義制度，而不能依賴西方國家三權分立的制衡原則。

司法人員的素質是一個長期使人關心的問題。與多數律師具有法律學位或具有同等資歷不同，很多法官是從軍隊復員下來的人員，沒有專業法律知識，甚至根本沒有接受過法律甚至一般高等教育。對司法人員更為重要的條件是政治上對黨和社會主義制度的忠誠。正如任建新先生曾指出的：“法官不僅要精通法律，熟悉專業事務，而且必須政治堅定，清正廉潔”。

要成為執業律師，必須具有高等教育學位，通過全國統一的律師資格考試，並完成一年的實習。然而，根據《法官法》，一個非法律專業的大學畢業生可能在具有兩年相關經驗後成為法官。這條法例並未要求法官參加任何全國統一的資格考試，還包含豁免，令那些不達到上述標準的人接受相當培訓後成為法官。

對司法程序的非法干涉是另一個影響法院和法官無私公正履行其職責的原因。審判機關堅持黨的領導和拒絕制衡原則與提升司法獨立之間的衝突將仍會存在。

在中國史無前例地建立市場經濟已使越來越多的人見到生活標準提高的可能性。司法人員也是人，不可能抵抗改善自己生活的誘惑。從某種意義上說，中國司法界正經歷著一個曾為很多其他司法體系所經歷過的發展階段。因此，儘管上述司法腐敗現象帶有某些中國特有的性質，但仍可以看成是難以避免並是過渡時期的普遍現象。

最後，司法濫權亦應歸咎於目前法律體系中的技術缺陷。例如，立法中的漏洞，不同政府機構制定規章間的不一致，許多重要法律概念缺乏定義都促成了司法濫權。

在市場經濟要求司法效益、公正和職業操守與傳統意識形態對司法改革的抗拒之間的衝突仍會繼續。目前的整頓活動，作為一項暫時的措施，肯定會在短期內減少腐敗的醜聞并使一些違法者受到懲處。然而更為困難的任務是通過引入足以有效打擊及處理濫權的機制對現行體制進行改革。這將改善司法機關的整體素質並進一步在中國發展真正的司法獨立。從整體著眼，司法機關表現的提昇不可能獨立地取得，而是在很大程度上取決於法治在中國的發展。

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