Commentary on ''China's Courts: Restricted Reform''

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Benjamin Liebman has written a good article on a difficult subject. I have only a few comments, divided into three parts. In the first two parts, I consider Liebman's approach to such a historically complicated matter. I think it is appropriate to deal with it by focusing on the central question of whether the role of the courts in China's political system has changed as a result of reform; after an initial discussion, I show that Liebman has actually engaged in a political system analysis to reply to that central question. The third part presents my initial ideas about three different possible tests for evaluating judicial reform. Using these tests, I will look at the question of the sense in which reform could be regarded as ''restricted,'' as Liebman has suggested.

The Central Question and Historically Appropriate Approach

Liebman adopts an extremely useful perspective from which to survey such a complicated reform process. He does not focus directly on the detailed, and mostly technical, contents of every judicial reform policy, nor attempt to describe all the effects of these reforms, which would have made a broad overview virtually impossible. Instead, he moves directly to the central question of whether the reform has resulted in a substantial shift or change in the position or role of the courts.

As a historical methodology, it is a useful approach because any acute and deep insights into a complex history require a main thread around which the related materials can be based, or more accurately renarrated, without getting bogged down in less relevant aspects.[1] Case-by-case evaluation of concrete policies may be a good approach to consider the legitimacy, feasibility and effectiveness of a specific policy or to work out what policy to adopt to achieve a desired goal, and has been effectively used by many Chinese scholars. However, it is much less useful in assessing the long-term prospects and progress of reform as a whole. Raising an appropriate central question is a good tool for helping to grasp a historical theme.

Given that that is the case, it is important to find a suitable central question. For example, simply asking what the effects of judicial reform are provides no clearly defined and agreed-upon external references and would lead to either a

1 History is usually a coherent and continuous picture created by the historian who uses constructive imagination on the available historical data. See R. G. Collinwood, *The Idea of History* (London: Oxford University Press, 1946).

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mission impossible or a slide into the case-by-case approach. Similarly, asking what effects – if any – judicial reform has had on public confidence in the judiciary does create a suitable reference-oriented framework for evaluation, but is a much narrower question because it could be regarded as a subset of the broader question of the position of the courts within society.

Different from these two sorts of questions, the question that Liebman has chosen not only provides the necessary point of reference – the effect of judicial reform on the political position of the courts – but also has the advantage of being relevant to virtually all reform measures. Questions as diverse as the effect of judicial reforms on judicial independence, openness, fairness, effectiveness, integrity, improved organization of the judiciary, improved judicial quality and public confidence on the judiciary can all be connected to this central question.

Political System Analysis

Liebman does not try to give an answer to his central question solely from the perspective of law. Actually, it is not a legal question but a political one. Liebman's approach is similar to the discipline of political science known as systems theory.[2] This discipline emphasizes the empirical study of actors and interactions among them in a specific political system as a means to understanding the actors' behaviour, position and dynamics. In this view, the behaviour of any actor can be attributed either to the demands of the actor itself or to the demands placed on it from outside forces, or to some mixture of both.

The systems analysis can be seen at various points in the article. For example, in Liebman's view, the modest growth of caseloads may reflect the coexisting and self-contradictory attitude of the Party leadership to the role of courts. On the one hand, the leadership hopes to strengthen the courts' competence to resolve a growing number of disputes. On the other, it does not rely on the judiciary to be the most important body to quell social dissatisfaction and uneasiness.

Certainly, the dynamics of judicial reform also involve the internal demands of the judiciary. However, the fact that the courts are to a large extent subject to the populism-oriented Party leadership means that even internal dynamics are mostly generated by the courts' response to outsiders' demands, and are limited by the demands of outsiders as well. Reform policies, whether on general matters such as legal training or on technical matters such as the evidentiary rules, are regarded by many scholars as efforts to promote the fairness and efficiency of courts, and further to have an indirect positive effect on judicial independence. Nevertheless, even if reformists from within the court system have similar ideas in mind while designing policies, they would rather talk about their goals in

2 Systems theory in political science was first conceived by David Easton. See David Easton, *A System Analysis of Political Life* (New York: Wiley, 1965); *A Framework for Political Analysis*, 2nd ed. (Chicago: University of Chicago Press, 1979).

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terms of judicial fairness and efficiency rather than in terms of judicial independence.[3]

This attitude may be a response to the perceived attitudes of the Party leadership and the public. The Party leadership is reluctant to create truly independent institutions that it cannot control, and many people fear that a fully independent judiciary, freed from Party or People's Congress supervision and discipline, would become even more corrupt and less responsive to public needs.[4] This is why Liebman has said that reform has not focused on changing the role or relative power of the courts within the system.

The internal demands of judiciary could also result in some limitations on judicial reform. The presumption that any actor in a political system will take self-interested steps to maintain its existence, as systems theory reveals, can partially explain what Liebman calls "controlled transparency." Since the courts are facing a lack of public confidence, it is no wonder that they try to reduce the number of negative media reports about themselves. And because the media in China are supervised by the propaganda departments of Party organizations, it is easy for the courts to restrict unflattering media coverage, as long as they can convince propaganda officials that negative reports will cause more problems with social stability.

Evaluative Tests and Restricted Reform in What Sense

After raising an appropriate central question and engaging in a political system analysis, Liebman reached a general conclusion that reform of the courts in China has been a case of restricted reform. I agree with the conclusion in the sense that judicial reform has not yet brought about any significant change in the position or role of courts in China's political system. Chinese courts are still heavily influenced by the Party leadership and Party organizations, other state institutions and the local authorities, and by the media and the public. Even though they have become more competent as fair and efficient arbitrators in dealing with ordinary cases, their lack of independence in deciding politically or socially sensitive cases, and the way they take into account many legally irrelevant considerations while deciding cases, demonstrates their real position.

3 For example, the Supreme People's Court Work Report (Zuigao Renmin Fayuan gongzuo baogao) delivered in 1996 mentioned emphatically that courts should exercise judicial power independently in accordance with law under the leadership of Party. Since then, from 1997 to 2006, there were only three SPC Work Reports delivered in 2000, 2002 and 2004, mentioning, but not stressing, the issue of independent exercise of judicial power. In the 2000 Report, the issue was connected with the readjustment of some branches of basic-level courts (*renmin fating*). The issue was connected with the requirement of WTO on the judiciary in the 2002 Report, and with the supervision and guidance of the SPC on the lower-level courts in the 2004 Report. Comparatively, judicial fairness has always been an important issue in annual reports.

4 See e.g. Tang Zhongmin, "'Sifa duli' buneng zhenzheng jiejue sifa bugong he sifa fubai" ("'Judicial independence' cannot veritably resolve the problems of judicial unfairness and judicial corruption"), *Tansuo* (*Probe*), Vol. 1 (2003).

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This article has also prompted me to think about another question: what test should be applied to evaluate the achievements of judicial reform in respect of the role or position of the courts? There may be three tests which need to be discussed. The first, adopted by Liebman, could be called the ideal-based test. This takes judicial independence as a necessary aspect of the rule of law in modern democracy and hence evaluates reform of the courts from the perspective of whether it has caused the judiciary to be more independent. It is also a principle generally accepted by most Chinese scholars that courts or judges should make decisions only according to the law without any obvious interference from outside.[5] From the perspective of the ideal-based test, as mentioned above, Liebman's conclusion is unquestionably correct.

The second one could be called the goal-based test, assessing judicial reform in the context of whether it has realized the goals laid out by the policy makers themselves. In China, despite the desire and expectation for judicial independence among many law scholars and students, official documents have never proclaimed this as one of the goals of judicial reform. Instead, as Liebman pointed out, the main goal is limited to improving the efficiency and fairness of the courts. From the perspective of the goal-based test, the conclusion would be that judicial reform has been modestly successful but still restricted. Many reform policies in general have improved courts' ability to be more efficient and fair, but judicial reform is still restricted since there are also many cases in which the courts have not satisfied the expectation of the public to adjudicate well.

These two tests are quite different, but have similarities in that both of them are results-oriented. Comparatively, the third test is to evaluate judicial reform against the background of the long and difficult process of political reform in China. I would like to call it a process-based test.

It must be admitted that the political reform being currently undertaken by the Party leadership and Chinese people is unprecedented in world history, a very big challenge requiring sophisticated wisdom. In particular, the Party leadership must, first, continue with economic reform, maintain economic development, and avoid the stagnation or collapse of the economy, which might cause a decline in the fortunes of many Chinese people and therefore directly threaten the legitimacy of Party governance; secondly, resolve as many complicated social problems as possible and maintain public confidence in the party-state's ruling competence; and thirdly, conduct political reform step by step, meanwhile guarding against the possibility of a political earthquake which might indirectly affect economic development. It is a more difficult mission in reality than on paper to manage these major matters, because they are linked to each other in complex ways and yet need to be faced simultaneously.

5 It is also a principle in China's Constitution. Article 126 states that the people's courts exercise judicial power independently, in accordance with the provisions of the law, and are not subject to interference by any administrative organ, public organization or individual. Many Chinese scholars rely on this article for judicial independence.

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Against this background, judicial reform, as part of the process of political reform, has been inevitably very hard and exceedingly slow. There are at least two reasons for a more positive assessment than the one presented by Liebman. On the one hand, the modest success of judicial reform has bred expectation for even more progress: popular attention to both the problems and the potential role of the courts appears to be higher than ever before. In some ways, the fact that the role of courts is increasingly contested may be viewed as one of the great achievements of the reform. On the other hand, since the future image of democratic politics with Chinese characteristics is not very clear, the question raised by Liebman as to what is the appropriate or potential future role of courts in China is still waiting to be explored. Instability is inevitable during a dramatic movement to an unclear future, but this instability may have positive effects for further development. The elites and the common people in China at least have learned a lot from the reform by discussing advantages, as well as limitations, of any possible measure to promote judicial competence and fairness. Such accumulation of knowledge is a necessary beginning for the future construction of a more satisfactory judiciary.

In sum, from the perspective of the process-based test, I would say rather that judicial reform has not been restricted in the past decade.

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