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Judicial Transparency in China

Theory and Realization Path

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Foreword

Developing the Rule of Law by Furthering Openness Promoting Jurisprudence by Interpreting Openness

Only when there is openness and transparency, can there be trustworthy justice and trust based on justice. Openness and transparency are the ultimate embodiment of the rule of law and an essential requirement of its practice. The socialist rule of law with Chinese characteristics and its practice is exceptionally open and transparent. In government management and judicial construction, openness is viewed as an essential means of meeting public demand and responding to public concerns. The significance of openness and transparency is that they can effectively regulate the exercise of power and make it more standardized and efficient. Accordingly, the public can understand the operation of power, enhance their trust in public authorities, and have clear expectations of their status and the realization of their rights and interests. In addition, openness and transparency help build the most efficient communication mechanism and realize the positive and orderly interaction between public authorities and the public.

In recent years, a research team led by the Department of Survey and Studies of National Situation of Rule of Law, Chinese Academy of Social Sciences Institute of Law has been concerned about China's law-based transparency construction. It has been actively involved in the relevant legislative work and the research on the national situation of the rule of law and third-party assessment of the rule of law index in respect of government transparency, judicial transparency, and prosecution transparency for many years. On the basis of empirical research, the team has objectively revealed what has been achieved and what remains to be improved in the rule of law construction. The team has also put forward a series of constructive countermeasures to promote openness and transparency of the rule of law. This book is one of the academic results of the research practice mentioned above.

Based on the judicial transparency assessment data for 2019 and 2020, this book summarizes and analyzes the achievements and shortcomings in the current judicial

openness of the people's courts. Compared with the *China Judicial Transparency Index Report* released annually in the *Blue Book of Rule of Law: Annual Report on Rule of Law in China*, this book not only discloses more detailed assessment data and comprehensively analyzes the data, but also carries out an in-depth theoretical study of judicial openness by exploring many theoretical and practical issues including why judicial openness should be furthered, why judicial openness can be furthered in contemporary China, and how judicial openness can be furthered.

Exploiting interdisciplinary strengths and exploring the intrinsic relevance of history to the present is arguably the first feature of this book. Reading through this book, we can find that it not only describes the basis and situation of the current judicial openness, but also further analyzes the ideological and institutional sources of judicial openness. Especially the book reviews its development in history, including responding to doubts about whether judicial openness was provided and practiced in ancient China. Learning history enables us to know right from wrong. History tells us that judicial openness has been practiced in China since ancient times and that judicial openness is not unique to the west. It must be admitted that judicial openness in ancient China is fundamentally different from that in the present. An illustration of examples of judicial openness in ancient China is not aimed at rejecting outstanding fruits of judicial openness in the west, but at exploring the openness in Chinese judicial culture with a view to using the past for the present and carrying it forward in the socialist rule of law system with Chinese characteristics. Therefore, this book systematically reveals the fundamental differences between judicial openness in socialist China, judicial openness in ancient China, and judicial openness in western countries. That is a valuable part of the book's discussion of judicial openness.

The second feature of this book is the innovative research methodology and the organic integration of theory and practice. Theoretical discussion without practice is inconvincible, and practice without theoretical preparation and support may be shallow and unsustainable. The Institute of Law of the Chinese Academy of Social Sciences has always emphasized the links between theory and practice in legal research. That is also what the research team led by Researcher Tian He of the Institute of Law is persistently pursuing. The research methodology adopted in this book is to objectively observe the situation of judicial openness of the sample courts and visually reflect the condition and effects of judicial openness with various actual data and their correspondence by virtue of a complete and systematic assessment index system based on the theories of the rule of law construction and judicial openness. This innovative scientific method is different from traditional methods like historical analysis, documentary analysis, and questionnaire surveys. It is a new type of field research that expands the empirical research method by putting the researcher in the position of those who need judicial openness and the development of the rule of law (i.e., the general public) and investigating the operation of judicial openness. With the aid of such a scientific method, this book applies various theories of judicial openness to observe its actual operation. This book also tests and develops the theories of judicial openness and the rule of law construction while observing the operation of judicial openness.

The third feature of this book is that it focuses on the organic combination of a system and its effects. Whether a system is well designed, whether it is realistic, and whether it can solve practical problems requires repeated tests in practice. Therefore, in assessing the rule of law, we should first focus on its actual operation. This book is precisely an “in-person observation” of the operation of judicial openness, an essential system in the development of the rule of law. The results of the in-person observation are actual rather than mimetic, not only finding the highlights and effects of judicial openness but also, more crucially, finding where the system still lags and, even further, what flaws the system itself has. The book summarizes the problems comprehensively, rather than just praising the highlights; analyzes the causes systematically, rather than simply enumerating various phenomena; and constructively puts forward suggestions for its improvement, rather than stopping at disclosing the problems. That is the focus of the academic pursuit by the authors and their research team. By reading this book, one can understand the current situation of judicial openness in China through a set of data and discover the path to further judicial openness and the judicial system by analyzing various significant aspects. Moreover, one can think about the methodological improvement and academic innovation of legal research through judicial openness. We hope there will be more research results like this, which will help promote the rule of law and jointly improve legal research practically and innovatively.

Beijing, China
April 2021

Chen Su

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Chapter 1

Justice: From Mystery to Openness



Judicial openness in contemporary China includes six aspects: open case filings, public trials, open enforcement, open hearings, publication of judgments, and open trial affairs. However, historically the origin of judicial openness, both in the history of the Chinese legal system and foreign legal systems, is mainly an open trial. According to current research findings, “public trial or open trial” is the result of the bourgeois struggle against feudalism; in the modern West, “public trial” first became the fundamental principle of litigation. This conclusion is biased due to the lack of an in-depth understanding of the judicial history of China. As the historical origin of judicial openness, public trials in the history of the Chinese legal system and foreign legal systems have been developing independently but have the same effect.

1 Judicial Openness in Ancient China

1.1 *Movement of Enacting Statutes and Openness of Laws*

The campaign to eliminate legal mysticism was launched in the early legal history of China. In the Spring and Autumn Period, the imperial tactic of “unpublished penal laws resulting in unpredictable power” was rendered backward by a statutory movement on a grand and spectacular scale. This movement was consequent upon the monopoly of the old slave-owning aristocracy on law and justice, which restricted the development of the emerging landlord class. Fundamentally, the publication of written laws equally shows that law is in nature a political instrument; however, regarding the development of the legal system, it has opened up a new era for maintaining social order with written and open laws.

Legal mysticism was the inevitable value orientation when the law was in the bud. According to the *Interpretation of The Shoo King (The Book of Historical*

Documents), “there are 3,000 penalties in the Xia Dynasty”.¹ Nevertheless, the details of these penalties remain unknown for “the deceased emperors applied a system in which punishments varied with cases, instead of making penalties in advance for fear of the revolt of the masses...,”² and “a penalty will be set for a particular case, and there is no established law”.³ When law emerged, the masses had a vague understanding of it, could not distinguish it from other social norms, and were even ignorant of how to apply it, let alone necessary restrictions on its application. In the early times, the law could function upon the request of the ruling class due to its uncertainty and mystery. On the other hand, the ruled class suffered a lot from such uncertainty, and the fear that any action might be punished hung over everyone. Once the emerging class’s pursuit of higher status undermined the political and economic interests of the old aristocracy, it would, of course, become the top priority to eliminate threats that such uncertainty might pose. Consequently, the vassal states began to publish their statutory laws. In 536 BC, Zi Chan, in charge of government affairs of Zheng, a state in the Spring and Autumn Period, ordered to cast the provisions of the criminal law on the cauldron, and in 513 BC, the provisions of the criminal law were cast on the cauldron in the Jin State. The movement of enacting statutes continued with objections going on. “When the masses find that there is a law, they will not be obedient. Suppose they intend to fight for power and profits and use the published criminal law as a weapon to achieve a fluke success; in that case, it is hard to govern the state.”⁴ Attacking Jin’s “casting the provisions of the criminal law on the cauldron” from the perspective of the feudal ethical code, Confucius held, “I am afraid that the Jin State will perish due to the abandonment of hierarchy. Tang Shu, Jin’s earliest ancestor, developed ideas of humbleness and nobleness to govern his people and manage aristocrats according to their levels. In this way, the higher officials could be held in high esteem by the civilians and therefore could have the ancestors’ estate in good protection. ‘Du’, namely the hierarchy, makes a clear distinction between the noble and the humble. Jin Wengong, in charge of appointing officials, made a law when hunting and reviewing troops in Beilu, which contributed to his status as the chief of the vassals. Nowadays, the hierarchy respected by Tang Shu was repealed, and the criminal law provisions were cast on the cauldron. The civilians hence were exposed to those provisions cast thereon. How could they show respect to the noble? What estate to protect for the noble? Once the hierarchy was disrupted, how to govern the state? Besides, Zhao Xuanzi’s penal decree made during his inspection of the troops in Yi seriously damaged the hierarchy and could not function as law.”⁵ In spite of such surging objections as “the state will be in ferment”, the movement of enacting statutes could not be stopped, which was the

¹ Fu [1].

² *Zuozhuan (Commentary on the “Spring and Autumn Annals”), The 6th Year of the Duke Zhao Period.*

³ Wang [2].

⁴ *Zuozhuan (Commentary on the “Spring and Autumn Annals”): The 6th Year of the Duke Zhao Period.*

⁵ *Ibid.*

inevitable result of the class struggle and that of the development of law as an objective thing. After all, the practice that “a penalty will be set for a particular case” was not in conformity with the principle of efficiency, which should have been improved after the extensive application of the law. On the contrary, statutes could provide people with enlightenment once published, and then a return to enigmatic and arbitrary justice was out of the question. Nevertheless, law is, in nature, the tool for the ruling class to govern the state. In the era of exploiting classes, any emerging ruling class’s control of legal resources for its benefit was doomed to the old way of monopoly. The development of the law would be shrouded in its mystery repeatedly.

1.2 Public Trials in Ancient China

The promulgation of written laws marked the maturity of law, where the concept of “law” was separated from other norms and became self-contained and which was supposed to be the source of the concept of “justice” in a more strict sense. Accordingly, although there had been de facto judicial activities prior to the advent of statutory laws, the concept of “fa (law)” rather than “Bing”, “Li”, or “Xing” logically is thought to have originated after the promulgation of statutory laws. Its development is the same as that of “law”. The publicity of law came after the advent of written laws. However, public trials have been existing in the history of China. The judicial process was open to the public to varying degrees, even in the early times when “the emperors convicted a person of a crime after discussing the severity of a particular case, instead of applying penal laws made in advance.”

China’s tradition of public trials can be found in ancient legends. When the cognitive abilities of ancient people were underdeveloped, judgment by divinities was prevalent. Endorsing the legitimacy of a divine judgment in most cases involved some degree of public participation, which demonstrated the benighted rationality supported by public approval. Legend has it that the earliest judge in China decided cases with the help of Haechi, “which is an imaginary goat with a single horn, born with the ability to know whether a person is guilty or not. Gao Yao, when deciding cases, would order Haechi to touch the suspect with its horn if it was difficult to determine whether he was guilty. Haechi would do so if he were guilty.”⁶ In a trial, the judge and both parties were present; the presence of “both parties” is also a litigation tradition that accompanies law and justice. According to *The Shoo King: The Marquis of Lü on Punishments*, “After the plaintiff and the defendant are present, the judge will hear the statements from both sides respectively and determine the facts. If convicted, the defendant will be sentenced.”

To a certain extent, public trials were also embodied in joint trials and collective discussions held in the litigation in ancient China. In *Zhouli (The Rites of Zhou)*:

⁶ Wang Chong (the Eastern Han Dynasty), *Lung Heng (Balanced Enquiries)*: Shiyang.

Qiuguan (The Ministry of Xing): Xiao Sikou (Vice Minister of Xing), “Three interrogations were conducted to ensure that trials were right on the beam: interrogations of ministers, officials, and the people.” The scope of public trials gradually expanded with the development of trial procedures. “The method of three interrogations” became the origin of the system of joint trials and collective discussions in later generations. Joint trials, such as “trials in the Tang Dynasty by the minister of Dalisi, the minister of Xing,⁷ and the minister of the Censorate in major and complicated cases” “trials in the Ming Dynasty by the minister of Xing, the minister of Dalisi, and the minister of the Censorate in major and complicated cases” “reexamination in the Ming Dynasty by the minister of Justice, the minister of Dalisi, the minister of the Censorate, the minister of Li,⁸ the minister of Hu,⁹ the minister of Li,¹⁰ the minister of Bing,¹¹ the minister of Gong,¹² and the minister in charge of documents submitted by ministers to the emperor and the sealed appeals from ministers and civilians in major and complicated cases reported from local authorities” “trials in Summer” “trials in Autumn” and “trials after Frost’s Descent”, were a reflection of public trials to some extent.

The tradition of public trials in ancient China is not only recorded in historical materials but can be found in many remains. The “Ming Yuan Drum”¹³ placed outside a yamen¹⁴ is a sign that the government made the case public when a complaint was filed. In many places, the relic of ancient yamens confirms the common saying of “two rows of brick walls outside of a yamen’s gate being in the shape of the Chinese character ‘eight’”. Some agencies were arranged in a yamen along with this shape, which meant it was open to the people for their convenience to make complaints and offer advice. In terms of the shape and structure of the yamen, it was flat, simple, broad, and modest. A compound with spacious halls and extensive gardens was not typical of an ancient government office. In most yamens, outside its hall was a board hanging with characters of “Qinmin Tang (Pro-people Hall)” on it, while in the hall was a painting of “sea and the rising sun”, which showed openness and justice to

⁷ The Ministry of Xing: in charge of the nation’s justice and administration, and mainly functioning as today’s Minister of Justice.

⁸ The Ministry of Li: in charge of the selection, examination, appointment and removal, promotion, transformation of, and the granting of ranks of nobility to government officials.

⁹ The Ministry of Hu: in charge of national household registration, land, currency, various taxes, and salaries of government officials.

¹⁰ The Ministry of Li: in charge of important ceremonies, imperial examinations and reception of foreign guests of the imperial court, and mainly functioning as today’s Minister of Education and Minister of Foreign Affairs.

¹¹ The Ministry of Bing: in charge of the nation’s military officers and their training and weapons, and mainly functioning as today’s Minister of National Defense.

¹² The Ministry of Gong: in charge of the nation’s water conservancy projects and civil engineering.

¹³ In the Western Jin Dynasty, the “Deng Wen Gu” (a big drum people would beat when they tried to redress an injustice) outside the Imperial Court was used for people to “Gao Yu Zhuang” (appeal to the emperor). Later, similar drums were also put outside the local Yamens (governments in feudal China) to assist people in complaining on the “Day of Fang Gao” (the day when a plaque was hung at the Yamen’s entrance to inform that people could accuse someone before the emperor).

¹⁴ Government in feudal China.

pacify the public. Most cases were handled in the entrance hall, where a public trial was conducted. Before hearing the case, drums beat, and a drum roll could be heard miles away. “Beating drums before a trial was intended to inform the public that a case was to be tried ‘in public’.”¹⁵ During the trial, “local people were allowed to be the audience.”¹⁶ Folk records reveal cases of people watching the hearing, commenting on the words of the judge and the parties, and even taking part in the hearing all at once. The public had no access to the second hall, where the officials dealt with cases in confidence. Theoretically, hearing cases in the second hall was rarely seen. The original intention of setting up a yamen and the normality of public trials seen in the remains and historical records of the yamen reveal an ideal state that the people in ancient China expected and the pursuit of imaginary harmony. Justice in ancient China had another face. Due to the increasingly aggravating judicial corruption in the Ming Dynasty and the Qing Dynasty, the administration of justice slipped back into its old ways, secret and arbitrary. Therefore, there was sarcasm that “the yamen is open, but you cannot win the case without offering a bribe.”

1.3 Dissimilation and Extension of Public Trials: Open Trials, Publication of Judgments, and Open Enforcement

An open trial literally means that a case is tried in public. However, the connotation suggested by this term goes beyond its literal meaning and reveals the notion of “execution in public”. In *Water Margin*, “Out of the prison was the old woman with the last name Wang taken out and thereafter a sentence was pronounced in public. After a sign announcing the sentence was made, she was forced to make her cross on it. Then, she was pushed to climb onto a wooden donkey with four long nails and three lashings used to fasten her tightly. Sentenced by the governor of Dongping to death by dismembering the body, she was taken out to the long street surrounded by the crowd. Broken drums and gongs being played, the criminal was clubbed and compelled to proceed. Two sharp knives raised and a paper flower waved, the old woman was led to the center of Dongping and dismembered.” In this paragraph, “a sentence being pronounced in public” means pronouncing the sentence to the public. “Being surrounded” means that the criminal was “surrounded” up to the street by the onlookers following the government servants who led the way because there was no need to have such an old female offender “surrounded” by the servants. “The criminal being paraded in front of the crowd” and “the old woman being led to the center of Dongping and dismembered” shows public executions in ancient China. The etiquette that “royal family members are not sentenced and executed in public” proves that most executions of ordinary people were public.¹⁷ In Lu Xun’s *Medicine*, the scene where the crowd watched the execution is proof that public executions continued into

¹⁵ Xu [3]

¹⁶ Qu [4].

¹⁷ Zhouli (*The Rites of Zhou*): Qiuguan (*The Ministry of Xing*): Xiao Sikou (*Vice Minister of Xing*).

modern times. In addition to the death penalty, many other punishments were carried out in public. Humiliating punishments such as “cangue”, “ink”, and “piercing” implied public executions.

According to Zhouli: Qiuguan: Xiao Sikou, “Xiao Sikou decides cases by applying five punishments. In cases where a crime is committed, Xiao SiKou will decide it in a reasonable way, a judgment will be rendered in ten days, and a penalty will be imposed after the judgment is made known.” “To make a judgment known” means pronouncing the judgment in public. In addition, “Zhang Bang” was a method of official information disclosure handed down from ancient China, acting as a communication channel between officials and the public. Judicial documents were also made public through “Zhang Bang”. “Zhang Bang”, in its forms of “Bang Shi” and “Men Shi”, included the disclosure of judicial documents produced at every stage of the litigation and had various functions such as case filings, collection and demonstration of evidence, disclosure of property information related to the litigation, improvement of judicial efficiency, openness of judgments, and publicity and education.¹⁸ Judges also had a dereliction of duty when making the judicial documents public, which was an irregular practice as a secret trial was.

2 Judicial Openness in the Ancient West

In ancient Greece and ancient Rome, trials there were highly open due to the active participation of the public. It can be said that the public’s participation in the hearing made the trial naturally open.

There is a lack of first-hand records of the ancient Greek legal system. Information thereabout can only be found scattered in the writings of ancient Greek thinkers and politicians. “After studying the ancient Greek political system, Aristotle tried to put forward his ideal political system. He held that there should be three functions in a political society: deliberation, administration, and adjudication. In his opinion, the adjudication organ was not the independent judicial organ as we call it today, but the Assembly.”¹⁹ Because of the slave-holding democracy in ancient Greece, many significant cases were decided by the Assembly. Even in ordinary cases, a trial organization was composed of many people and had a turnover; a vote was taken to find the defendant guilty to demonstrate democracy. As legend has it, the jury consisted of 501 citizens in the trial of Socrates. “In ancient Greece, the organ for adjudication was separate from that for punishment. Hippodamus of Miletus recorded the way of the trial. When voting, the adjudicators cast pebbles into a clay pot to determine whether the defendant was guilty or innocent according to the number of pebbles in the pot.”²⁰

¹⁸ Zhu et al. [5].

¹⁹ Xu [6].

²⁰ Xu [6].

In the special judicial procedures of adjudicating significant cases, public participation and judicial openness were more prominent, such as the “ὄστρακισμός” of the polis of Athens. “ὄστρακισμός”, or ostracism, was enacted in around 500 BC and was first practised in 487 BC. Generally credited to Cleisthenes, an Athenian reformer, this law provided that the Council of 500 (or *boule*) convened a special Assembly every Spring where the participants decided verbally whether the democracy had been threatened and whether they would vote on ostracism. If anyone did ruin the democracy, then a formal Assembly was convened. Any citizen could vote against a particular candidate by writing his name on a piece of pottery, an ostrakon. For the result of ostracism to be effective, a minimum of 6,000 votes had to be cast. Then the man was announced to be ostracised and had to leave Athens within a specified period and stay away for ten years. He remained owner of his property. The banished man may return after his sentence was served and regain his citizenship. Ostracism was the procedure as a measure to prevent tyrants from usurping power and had an important effect on the maintenance of the slave-holding democracy in Athens.²¹

By contrast, there is a more successful historical record of the legal system in ancient Rome. The Law of the Twelve Tables was the earliest written code in ancient Rome and the beginning of the “written law movement” in ancient Rome and even in the whole of Europe. Furthermore, Ancient Rome had a large group of jurists that Ancient Greece did not have, which made every aspect of the Ancient Roman legal system supported by specific theories and Ancient Roman law the historical source of European law. Regarding public trial, “Cicero judicially advocated public trial and the principle of letting the punishment fit the crime. He proposed that a judicial trial be presided over by the consul but supervised by the senate and the comitia. A trial is open to the public. ‘The powerful are not allowed to do whatever they want, and the people are not offered the chance of pretense. When honest people have no way of knowing others’ opinions, a ballot board can cover up malicious votes.’”²² Rousseau wrote civilians’ participation in trials into his *The Social Contract*, “the most incredible fact of all is that, in the midst of all these abuses, the vast people, thanks to its ancient regulations, never ceased to elect magistrates, to pass laws, to judge cases, and to carry through business both public and private, almost as easily as the senate itself could have done.”²³

“In late Rome, absolutism gradually strengthened, and secret trials were prevalent in judicial practice.”²⁴ By the Middle Ages in Europe, trials were conducted in two ways: religious and secular, both of which were secret. Mainly aimed to persecute the heresies, “the Inquisition” established by the Catholic Church encouraged whistle-blowers, kept their information confidential, conducted a trial in secret, and extorted confessions by torture. Secret judicial acts of the Inquisition were the manifestation of excessive power and tyranny of the church and produced the spiritual oppression

²¹ Lu and Xu [7].

²² Liu [8].

²³ Rousseau [9].

²⁴ Depei [10].

of terror and intimidation. Trials by secular lords also moved from the autocratic centralization of late Rome towards secrecy and arbitrariness. In the Medieval Era, trials were not open to the public, and it was even difficult for those involved to participate in the proceedings, let alone defend themselves. Hence, the “documents only” trial became popular.

3 All Roads Lead to Rome: Value Selection and Practice of Ancient Judicial Openness Centered on the Establishment of Judicial Authority

Before the advent of the Age of Exploration, the bud from judicial mystery to judicial openness appeared spontaneously in different countries. Such historical “coincidence”, which is deemed universal and inevitable, represents the value of the historical origin of judicial openness. In fact, in both China and the West, judicial openness is rooted in the need to prove the legitimacy of judicial acts and establish judicial authority.

From the evolution of the guiding principles of the early Chinese legal system, we can see the process by which the rulers continued to “justify” their means of governance. After the founding of the Western Zhou Dynasty, the concept of the “mandate of Heaven” from the Shang Dynasty was still followed. “Heaven rewarded Wan Wang, making our small state of Zhou prosperous. Through divination, Wan Wang inherited the great destiny granted by Heaven.”²⁵ However, under the dominance of the doctrine of destiny, there were still some changes. The Zhou Dynasty justified its regime seized from the Shang Dynasty: “Fate changes,”²⁶ and “Heaven is just and impartial, and only helps those of virtue.”²⁷ The concept of “virtue” broke through the unchanging view of destiny, proved the legitimacy of the transfer of power, and demonstrated the legitimacy of the rule of *li* (etiquette) and law. The saying goes, “Virtue deserves destiny, and virtue shall be applied more than punishment.”²⁸ Such a way of governance, ideologically invoking the “mandate of Heaven” and practically “combining etiquette and punishment”, had much more certainty than the theocratic thinking of “Heaven punishing criminals” in the Shang Dynasty. It at least used “virtue” as a criterion easily identified and had a relatively definite division between “etiquette” and “punishment”. That is to say, “If a person behaves beyond the etiquette, he will fall into the scope of punishment. Etiquette and punishment are interdependent.”²⁹ This ideology, out of question, functioned more to establish

²⁵ *The Shoo King (The Book of Historical Documents): The Great Announcement.*

²⁶ *The She King (The Book of Ancient Poetry): The Greater Odes of the Kingdom: The Decade of Wan Wang.*

²⁷ *Zuo Zhuan (Commentary on the “Spring and Autumn Annals”): The 5th Year of the Duke Xi Period.*

²⁸ *The Shoo King (The Book of Historical Documents): The Announcement to Prince Khang.*

²⁹ *Book of the Later Han: Biography of Chen Chong.*

the authority of laws and judicial acts than the theocratic thinking, which advocated arbitrary punishment under the pretense of the mandate of Heaven.

Public trial or judicial openness, such as “deliberation in three steps”, was nothing more than to prove the legitimacy of judicial acts through the public’s conviction and establish the authority of laws among the general public through the accumulation of cases. In the Warring States period, the idea that laws and trials should be open to the public further developed. Mencius once expounded the theory of “listening to both sides to tell the difference between right and wrong”, “if the persons close to you hold that the suspect deserves death, ignore that opinion. If all the people around the state hold that the suspect deserves death, make an investigation. Kill him if it finally proves that he deserves death.”³⁰ The Legalist School has a far-reaching influence on future generations of laws and judicial openness. Han Fei-tzu defined the law as follows, “laws are written by government agencies and promulgated to the public.”³¹ Shang Yang’s story of “a log set up before the gate” also exemplifies the authority of laws through publicity.

Generally speaking, from mysterious theocratic law to judicial openness, the development of Chinese and Western laws is very similar. The range of openness was constantly expanded to establish the authority of laws and justice.

4 Judicial Openness in Modern Times

The old political system tried to struggle from death by keeping justice secret and corrupted. Such secrecy and corruption did not save it from dying but accelerated its demise. For the emerging class, the best way to prove the legitimacy of their revolution was to oppose secret justice. They could take this opportunity to gain the consensus to give the old system a deadly strike. Feudal nobles used openness as the most potent weapon to take judicial power from aristocratic slave owners. However, after they took the throne, monopolization and secrecy were all over again. History repeated itself. The bourgeoisie was also in pursuit of judicial openness at first. It was just the same old story, which happened in cycles of history, in the disguise of the Enlightenment. The openness of law and justice had been brought up again during the fight against feudalism. European Enlightenment thinkers then developed modern jurisprudence with openness as its essential character.

Locke held that “whatever form the commonwealth is under, the ruling power ought to govern by declared and received laws, and nor by extemporary dictates and undetermined resolutions: for then mankind will be in a far worse condition than in the state of nature, if they shall have armed one, or a few men with the joint power of a multitude, to force them to obey at pleasure the exorbitant and unlimited decrees of their sudden thoughts or unrestrained, and till that moment unknown wills, without

³⁰ *The Works of Mencius: King Hui Liang (Part 2).*

³¹ *Han Fei Zi: Criticisms of the Ancients, Series Three.*

having any measures set down which may guide and justify their actions.”³² Beccaria wrote in his book *An Essay on Crimes and Punishments* published in 1764, “All trials should be public, that opinion, which is the best, or perhaps the only cement of society, may curb the authority of the powerful, and the passions of the judge.”³³ These statements laid a theoretical foundation for judicial openness in modern times. Hegel elaborated on why justice should be open after the law is made public, “The rights of the subjective consciousness include not only that of making the laws publicly known (see §215), but also the possibility of knowing how the law is actualized in particular cases, i.e., of knowing the course of the external proceedings, legal argument, and so forth—the publicity of the administration of justice; for the course of law is in itself an occurrence of universal validity; and although the particular content of the case may be of interest only to the parties themselves, its universal content (i.e., the right within it and the decision on this right) is of interest to everyone.”³⁴ After gaining the triumph of the bourgeois revolution, western countries successively provided the public trial system. The 1791 Amendments to the United States Constitution, also known as the Bill of Rights, is the world’s first document to define the “public trial principle”. Article VI of the Bill of Rights says, “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law.”³⁵ Thus, it was set as one of the basic principles of the modern litigation system in the form of a constitution.

The establishment of the public trial system was closely related to the rise of bourgeois democracy and human rights. With the development of the rule of law theory, in modern times, the legitimacy of the law as a rule of social governance no longer needed to be repeatedly proven. The gradual establishment of a democratic political system generally left unquestioned the credibility and authority of laws passed by the majority. Therefore, the focus was shifted to the legitimacy of applying laws, and higher requirements were raised for judicial openness. Beccaria said in *An Essay on Crimes and Punishments*, “Among a people hardly yet emerging from barbarity, they should be most severe, as strong impressions are required; but in proportion as the minds of men become softened by their intercourse in society, the severity of punishments should be diminished, if it be intended, that the necessary relation between the object and the sensation should be maintained.”³⁶ Modern legal theories advocate that the judicial process should simultaneously have substantive justice and procedural justice. The legal motto is repeatedly quoted today: “Justice must not only be done, but must be seen to be done.” Article 10 of the Universal Declaration of Human Rights adopted on December 10, 1948, reads, “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge

³² Locke [11].

³³ Beccaria [12], p. 2.

³⁴ Hegel [13].

³⁵ Edited by Xie and Fang [14].

³⁶ Beccaria [12], p. 44.

against him.” Thus, the public trial was defined as an express procedural human right. Similar provisions can be found in the 1966 International Covenant on Civil and Political Rights.

The guiding philosophy of China’s modern public trial system changed under the influence of western learning. The public trial practice as a historical fact, without any doubt, is our tradition. In the late feudal society, autocracy assumed the extremes of judicial corruption, secrecy, and arbitrariness. However, we shall not deny that China’s ancient public trial system lasted for thousands of years.

Shen Jiaben, the late Qing scholar-bureaucrat, who was in charge of law amendment, pointed out that the public trial is “the first priority for a constitutional government”. “Open the court and allow the public to sit in so that everyone can witness the trial, justice and fairness can prove themselves, and government officials can be prevented from malpractices and corruption.”³⁷ According to Article 13 of the Draft Act on the Criminal and Civil Proceeding Law of the Qing Dynasty enacted in the charge of Shen Jiaben, “all court trials shall be open to non-parties to a case and shall not be conducted in confidence, with exceptions regarding decency or special cases.”³⁸ The Trial Regulations of Courts enacted in 1907 provided that “all prosecutions, initiated by prosecutors or investigating magistrates, will be assigned to judges by this court’s commissioner. All cases shall be tried in public.” “During the trial, the judge will try this incidental crime publicly if any incidental crime is found, and a preliminary hearing is not needed.”³⁹ Article 55 of the Court Establishment Act provided that “all arguments shall be held and all judgments shall be pronounced in an open court.”⁴⁰ Article 58 provided that “When there is any cause to stop opening the trial to the public, the court shall announce its decision and reasons to the audience and then order them to retire. However, the judgment still shall be pronounced in public.”⁴¹ These regulations failed to save the decadent Qing Dynasty from a downfall, although they had absorbed a lot of western legislative experience. After the founding of the Republic of China, the judicial openness theory advocated by western learning began to play its part.

Subject to Article 50 of the Provisional Constitution of the Republic of China, “All court trials shall be made public. If the openness of any trial is believed to jeopardize the harmony and order of society, it shall be held secretly.”⁴² The Provisional Constitution established the modern public trial principle in the form of the constitution. Hereafter, due to the unstable political power of the Republic of China, there came out several constitutions and constitutional documents. In terms of the public trial principle, some regulations kept consistent with the Provisional Constitution, while some took a backward step. In judicial practice, a conservative and inconsistent attitude appeared.

³⁷ Li [15].

³⁸ *Laws and Regulations of the Qing Dynasty* [16], p. 1911.

³⁹ Huai [17].

⁴⁰ *Laws and Regulations of the Qing Dynasty* [16], pp. 1824–1825.

⁴¹ *Laws and Regulations of the Qing Dynasty* [16], pp. 1824–1825.

⁴² Lai [18].

During the era of the Republic of China, the *Judicial Bulletin* became an important way to make public the judicial process and broaden its scope. “The *Judicial Bulletin* is a journal on justice published officially in the Republic of China”.⁴³ “The *Judicial Bulletin* published its first issue in October 1912 and ceased publication in March 1948. For over 30 years, the *Bulletin* published more than 1,000 issues with records of various legislative and judicial conditions... The founders started the journal adhering to the spirit that ‘Words carry out our minds. Reading one’s writings is reading his thoughts. Words can reach the farthest place that is unreachable for one’s mind and can be eternal’, and with the aim that ‘we make previous legal facts public to improve the judicial system’.”⁴⁴ The *Bulletin*’s contents were plentiful. “According to Article 3 of the ‘*Brief of the Judicial Bulletin*’ published in its first issue, the *Bulletin* contains figures, orders, regulations, official documents, judgments, reports, translations, selected comments, and miscellanies.”⁴⁵ After that, changes to its style continued. The *Bulletin* also published the contents not having much relation to justice, and the contents relating to justice were enriching. Besides the national *Bulletin*, provincial governments also published their bulletins. Local governments had similar journals playing the part of judicial openness, such as “*Judicial Daily*”, founded by Guangdong Province.

In addition, the modern legal profession system established in the period of the Republic of China also had a profound impact on judicial openness. “The legislation on lawyers in the period of the Republic of China has certain significance to the modern rule of law, mostly promoting judicial openness. The original intention of the legislation was only to follow the lawyer defense system of western countries and learn the so-called western democracy. At the same time, it broke our several thousand years of closed legal traditions and provided legal protection for ‘Songshi’⁴⁶ previously unrecognized. Lawyers’ participation in litigation may promptly correct judges’ improper judicial conduct, protect legitimate rights and interests of the parties, and improve judges’ trial efficiency. A lawyer as the connection between the interested parties and the judge, can help reach a consensus between the parties, and between the parties and the judge.”⁴⁷

In this period, the judicial openness system once again experienced a historic regression when Kuomintang’s “one-party autocracy” came to an end. The provision in the Provisional Constitution for secret trials of offenders “jeopardizing the harmony and order of society” was conservatively designed. Under the Nanjing National Government, such secret trials were used to suppress the communists. Similar provisions can also be found in the Regulations on Trials by Special Criminal Courts and the Interim Rules on Assessors in Anti-Revolution Cases. The Interpretation on the Organic Law of Courts explained, “The defense of a political criminal

⁴³ Zhao [19].

⁴⁴ Zhao [19].

⁴⁵ Zhao [20].

⁴⁶ In ancient China, Songshi was a person who gave advice to and wrote complaints for those in trouble.

⁴⁷ Chen [20].

is the most alarmist, making the audience have a strong desire to break the regime. That is why we shall keep the trials of political criminals in confidence.”⁴⁸ Kuomintang wished to use secret trials to prevent the spread of communism and maintain its dying governance. Such a dark judiciary aroused more resistance and accelerated its demise. The historical cycle of judicial openness and secrecy repeated itself in modern China.

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⁴⁸ Zheng [21].

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Chapter 2

Development of Contemporary China's Judicial Openness System



1 Tradition of People-Centered Judicial Openness

At its founding, the Communist Party of China (CPC) shouldered the historical mission of liberating the people. In the long-term struggle, guided by the Mass Line of “doing everything for the people, by the people, from the people, and to the people”, the CPC led the people in continuously achieving new victories. “Wholeheartedly serving the people” is the Party’s fundamental tenet and the purpose of all the Party’s work. The regime established by the people under the leadership of the Party carried out “the people’s democratic dictatorship”. That is real democracy and different from bourgeois democracy in nature. Therefore, only under the leadership of the CPC could judicial openness throw off the “law of history” that judicial acts were conducted from in secret to in public and then back to in secret.

During the democratic revolution, the revolutionary governments in the base areas led by the CPC were committed to the principle of people-centered judicial openness and its practice. The Provisional Regulations of the Adjudication Department of the Soviet Republic of China on Organization and Adjudication provided in Article 16, “Trials must be open to the public; if there is some connection in a particular case, it can be tried in confidence, and the judgment shall be pronounced in public.”¹ Documents like the Instructions of the High Court of the Shaanxi-Gansu-Ningxia Border Region on County Judicial Work, the Provisional Regulations on Organization and Adjudication, the Provisional Judicial System of the Taiyue Base Area, and the Interim Measures on the Assessor System of the Shanxi-Chahar-Hebei Border Region provided the public trial principle as well.

¹ Chunying [1].

2 Evolution of Judicial Openness After the Founding of the PRC

2.1 *From “Justice by the People” to “Justice for the People” After the Founding of the PRC*

Comrade Mao Zedong pointed out, “our regime is the people’s democracy. Governments and departments of state power at all levels should be people-oriented. The word “people” should be added to their names, such as people’s courts.”² Comrade Dong Biwu’s thinking on the rule of law helped a lot to the formation of the idea of justice by the people. On July 26, 1950, Dong Biwu put forward at the first National Conference on Justice that “the truth that the government does everything to serve the people should be adhered to and judicial work also serves the people.”³ On August 12, 1950, in his address to the Party’s members and cadres participating in the Conference, Dong Biwu proposed the concept of “justice by the people” for the first time. He stated that “the mass perspective, one fundamental viewpoint on justice by the people, requires us to maintain close ties with and serve the people, safeguard social order, and guarantee the people’s legitimate rights and interests.”⁴ In 1954, Dong Biwu put forward in his report delivered at the Central Cadre School of Political Science and Law that “judicial staff members must take a committed stand on the people’s interests, and apply the weapon of justice by the people wholeheartedly... Otherwise, that would result in a big mistake. Therefore, we must utilize this weapon for the people’s interests heart and soul.”⁵ Afterwards, on many occasions, Dong Biwu referred to the concept of justice by the people, which made that take root among judicial personnel and implemented in judicial work. People’s courts exercise power on behalf of the people and thus receive supervision by the people. After the founding of the PRC, the General Principles of the Organization of People’s Tribunals promulgated in 1950 provided in Article 5, “People are allowed to sit in on a court trial. During the trial, the audience may make a statement with permission.” Besides, Article 8 of the Provisional Regulations on the Organization of People’s Courts of the People’s Republic of China enacted in 1951 provided, “Cases shall be heard in public by the People’s courts unless otherwise provided by law.” The Constitution of the People’s Republic of China enacted in 1954 provided in Article 76, “Except under circumstances as specified by law, cases shall be heard in public by the People’s courts; the accused shall enjoy the right to have the assistance of counsel for his defence.” Since then, this judicial principle has been part of the fundamental law of China. Later on, the Organic Law of the People’s Courts of the People’s Republic of China, the Criminal Procedure Law of the People’s Republic of China,

² Edited by the General Office of the Standing Committee of the National People’s Congress and the CCCPC Party Literature Research Office [2].

³ Dong [3].

⁴ Dong [3].

⁵ Dong [3].

the Civil Procedure Law of the People's Republic of China, and the Administrative Procedure Law of the People's Republic of China, explicitly provide the public trial principle. The above laws together have established the basic framework of the judicial system of the PRC and laid a solid foundation for the sustainable development of judicial openness.

All state undertakings flourished in the new historical period. The building of the rule of law constantly reached new heights, and the ideology of judicial work developed from "justice by the people" into "justice for the people". Judicial openness stepped into a new historical stage as one of the main methods of "justice for the people" for the convenience of the people.

The Party's governing philosophy fundamentally guided judicial openness at the new stage with its constant development. According to the Report to the 18th CPC National Congress, "To ensure proper exercise of power, we should put power, Party and government operations, and personnel management under institutional checks and uphold people's right to stay informed about, participate in, express views on, and oversee Party and government operations." "We should improve the mechanism for community-level self-governance under the leadership of community-level Party organizations to make it full of vitality. We should broaden the scope and channels of such self-governance and enrich its content and forms, with the focus on expanding orderly participation, promoting transparency in information, improving deliberation and consultation on public affairs, and strengthening oversight of the exercise of power, to ensure that the people have greater and more tangible democratic rights." "We should make the exercise of power more open and standardized and increase the transparency of the Party and government affairs, judicial openness, and transparent operation of other fields. We should improve the inquiry, accountability, economic responsibility auditing, resignation, and dismissal systems. We should strengthen intra-Party, democratic and legal oversight as well as oversight through public opinions to ensure that the people oversee the exercise of power and that power is exercised in a transparent manner."

The Decision of the CPC Central Committee on Major Issues Pertaining to Comprehensively Promoting the Rule of Law adopted at the Fourth Plenary Session of the 18th CPC Central Committee proposed, "The Party should ensure public participation in the administration of justice." "The judicial administration system and the judicial operation mechanism should be improved, judicial acts be regulated, supervision over judicial acts be strengthened, and efforts be made to ensure that people enjoy equity and justice in each and every case." "We must ensure that the people's administration of justice is for the people's interests, rely on the people to promote the fair administration of justice, and safeguard the people's rights and interests through the impartial administration of justice." "We should build an open, dynamic, transparent, and convenient judicial mechanism. We should promote openness in court proceedings and procuratorial, police, and prison affairs. As per the law, we should promptly disclose the grounds for, procedures and outcomes of law enforcement and the administration of justice, and legal instruments in force to prevent manipulation. We should strengthen the interpretation and construction of legal instruments and establish a unified online system for the public access to legal instruments in force."

According to the Report to the 19th CPC National Congress in 2017, “We must strengthen checks on and oversight of the exercise of power, and ensure that power is exercised under public oversight, in broad daylight, and within the confines of systemic checks.”

Judicial openness is also a significant part of judicial reform that has put forward specific requirements for promoting judicial justice through judicial openness.

The nature of the PRC and its form (of government) mean that judicial power could no longer be monopolized by the minority of the people. Judicial openness in the new era is in the context of the supervised exercise of power. It mainly functions to regulate the exercise of power, prevent corruption, and implement justice for the people.

2.2 General Secretary Xi Jinping's Remarks on Promoting Judicial Openness

Many times Xi Jinping emphasized that the administration of justice should be people-centered, and power should be exercised in broad daylight. When presiding over the fourth group study session of the Political Bureau of the CPC Central Committee on February 23, 2013, he stressed that “We should strengthen judicial openness, and respond to the people's concerns about and expectations of judicial justice and openness.”⁶

On January 7, 2014, Xi Jinping stressed at the Central political and legal work meeting on justice, procuratorate, and public security that “transparency is the best prevention of corruption. If the administration of power is not open to the public or is selectively open to the public, credibility will be undermined. The more open law enforcement and the administration of justice are to the public, the more authoritative and credible the government will be. There are very few cases involving the interests of ordinary people that need to be kept secret. Therefore, law enforcement and the administration of justice should be open to the public unless otherwise required by law.” “We should continue to promote justice through openness and ensure impartiality through transparency. We should take the initiative in making public law enforcement and the administration of law and inviting supervision to render manipulation and judicial corruption impossible.”⁷

On September 21, 2014, at the central conference on the 65th anniversary of the founding of the Chinese People's Political Consultative Conference, Xi Jinping stated that “we should make the exercise of power more open and standardized, and increase the transparency of Party, government and judicial operations and official operations in other fields. We should ensure that the people oversee the exercise of power and that power is exercised in a transparent manner.”⁸

⁶ Xi [4].

⁷ Xi [4].

⁸ President Xi Jinping [5].

In his speech addressed at the second plenary meeting of the Fourth Plenary Session of the 18th CPC Central Committee, Xi Jinping stated, “we should adhere to the principle that judicial openness can promote justice and increase credibility. We need to establish an open, dynamic, transparent, and convenient judicial mechanism to render manipulation and judicial corruption impossible.”⁹

When presiding over the twenty-first group study session of the Political Bureau of the CPC Central Committee on March 24, 2015, Xi Jinping stressed, “judges and procurators have the power to try cases, and supervision should be strengthened over their exercise of power. Supervision by law, social supervision, and public opinions should be put in place. Judges and procurators should “act fairly”. The exercise of power should be kept within the confines of systemic checks so that the sunshine of equity and justice will warm the hearts of the people and the people can benefit from such reforms.”¹⁰

The Supreme People’s Court and the Supreme People’s Procuratorate have been implementing the Party’s policies and Xi Jinping Thought on the rule of law and gradually integrating judicial openness into every judicial activity by sticking to the principle of “openness being the principle while non-openness an exception”.

General Secretary Xi Jinping’s remarks on judicial openness have laid a theoretical foundation for the work regarding judicial openness in the new era. In particular, the idea of developing “openness” to “transparency” makes this theoretical foundation more appropriate for new historical circumstances so that judicial openness can move towards judicial transparency.

2.3 Building of China’s Judicial Openness System

China’s judicial openness is grounded in the Constitution and laws, and the CPC Central Committee has contributed a lot to it. Meanwhile, the Supreme People’s Court has been paying close attention to judicial openness when it is devoted to promoting judicial reform according to the arrangements by the Central Government. In particular, the judicial openness system has been systematized, which can be found in various documents and regulations issued in recent years on judicial openness. Since 2013, other judicial documents and interpretations have had judicial openness as the main content in addition to those documents specifically regulating judicial openness. Judicial openness has been deemed as an effective means of regulating trial and enforcement powers, safeguarding the parties’ right of action and the public’s right to know, responding to the concerns of society, increasing the public’s knowledge of the law, promoting their recognition of the rule of law, maintaining judicial justice, and increasing judicial credibility.

⁹ Xi [6].

¹⁰ Xi [4].