



## **Rule of Law in China:**

### ***Proposals for Reform of the Judiciary***

**by**

**The Rule of Law Forum**

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## **Rule of Law Forum**

### **Re: Proposals Relating to the Rule of Law in China**

The following are the proposals of the Rule of Law Forum for the promotion of the Rule of Law in China:

#### **1 Restrict Access to Judges and Judges Access to Others during Litigation**

- (a) To amend the law so as to prohibit meetings between judges and parties to litigation or their representatives, after commencement of litigation, outside the presence of all of the parties to the litigation or their legal representatives, except where a proper ex-parte application is being made.
- (b) To amend the law so as to restrict judges access to other persons in the court or judiciary, except in rare cases, so as to require the panel of judges (or single judge) that handles a case, to consult solely among themselves and to render a decision without consultation with any other person in or out of the court, except in rare, very difficult cases, which may be referred by the panel of judges or single judge to the adjudication committee of the court for its recommendations.

#### **2 All New Judges to be Required to Take the Bar Examination or Other Equally Rigorous National Examination**

To require all new Judges to take the same bar examination lawyers are required to take or a National exam at least as difficult as the National Bar Examination. With regard to Judges who are already in place, such Judges should be sent on legal training courses before the end of the year 2000 and be required to take the National Bar Examination before the end of 2001. Judges who have not passed the National Bar Examination by the end of 2002 should be transferred to less responsible positions within the court system until they have passed all sections of the National Bar Examination or an equivalent National Examination for judges.

### **3 Judges Remuneration to be Partly Incentive Based**

To use a portion of the court fees collected at the commencement of litigation from the litigants to establish a fund that should be administered by the Chief Justice of the Supreme Court, under the supervision of the State Council, to provide financial incentives for Judges to continue their legal education and thereby improve the quality of their work, so as to increase their professional competencies and remuneration levels.

### **4 Eliminate the Enforcement Tribunal and Strengthen the Authority of Court Bailiffs, etc**

To simplify the current procedures regarding enforcement of judgements, by dissolving the enforcement division of the courts and have enforcement of judgements carried out under the nominal supervision of the judges that rendered judgement, but in fact by bailiffs, judicial police and court clerks, whose authority shall be strengthened so that they may effectively perform said enforcement and other functions.

### **5 To Provide Overseas Training and Interaction with Foreign Judges for Judges in China**

To have foreign corporations and organizations sponsor Judges, particularly from district courts and high courts throughout China, for trips of several weeks, to visit foreign courts, arranging visits with judicial personnel in said Courts, with the aim of developing collegial relations between Judges in China and Judges in other jurisdictions and introducing Judges from China to foreign methods of judicial administration and adjudication.

## **Rule of Law Forum**

6 March 2000

# **Rule of Law Forum's Proposals: Explanation**

## **1 Restrict Access to Judges and Judges Access to Others during Litigation**

- (a) Present practice in China permits parties to meet with the judges, after commencement of litigation, outside the presence of other parties; and also permits persons not involved in the litigation to visit judges responsible for said litigation and to involve themselves in said litigation. This clearly results in importuning of judicial personnel and, at times, corruption. We propose ending this practice.
- (b) Judges often consult voluntarily or otherwise with heads of tribunals, senior judges of the court, appeal court judges and the like, obtaining opinions and allowing themselves to be influenced and thereby affecting their independence and forestalling effective appeals. This practice should be severely curtailed.

## **2 All New Judges to be Required to Take the Bar Examination**

Judges are not required to take a rigorous examination in law after their graduation from a law department of a college or university. All attorneys are required to take the bar examination. There is no reason why, as a minimum, the same requirement should not be made of judges who presently tend to be less knowledgeable about the law than attorneys.

## **3 Judges Remuneration to be Partly Incentive Based**

Remuneration of judges is very low. However court fees that must be paid by litigants are relatively high and are based on a percentage of the claim made. We propose using some of these funds to increase judge's remuneration on an incentive basis.

## **4 Eliminate the Enforcement Tribunal and Strengthen the Authority of Court Bailiffs, etc**

At present, once the decision is made by a judge or panel of judges, and judgement is entered, enforcement of said judgement is sent to another tribunal, called the enforcement tribunal. This creates serious problems in that the judges in the enforcement tribunal knows nothing about the case. The losing party tries to re-litigate the matter and or block enforcement of the judgement. The enforcement tribunal is also over-burdened and a substantial center of corruption, both financial and political. The enforcement tribunal should be done away with and enforcement placed nominally with the tribunal and judges that render the decision. However the 170,000 or so judges in China are also overworked and should be less involved in enforcement. Bailiffs, court police and clerks' authority should be strengthened to effect enforcement.

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**5 To Provide Overseas Training and Interaction with Foreign Judges for Judges in China**

Judges in China, particularly at the district and high court levels, have little occasion to learn about the administration of justice in other jurisdictions and to meet with foreign judges so as to develop a sense of their own professional status. We are requesting government, institutional and corporate sponsorship for judges in China to go to the USA, Hong Kong, United Kingdom, France, Germany, Japan, Holland and elsewhere, particularly district and high court judges. It is very important for judges to feel part of a distinguished profession and to have an opportunity to learn about the work of judges in other jurisdictions. Sponsorship would consist of paying for economy roundtrip tickets, housing and food, for a period from three weeks to a maximum of three months, for one, two or three judges.

*DCB/ch\*ruleoflaw\*explanation\*991115*

## 对中国“依法治国”政策的建议

下面是“依法治国论坛”对促进中国“依法治国”政策的建议：

### 一、诉讼期间应限制与法官接触

- (A) 修改法律以禁止诉讼当事人或其诉讼代理人在立案后以及诉讼程序开始后、在没有全部诉讼当事人或其诉讼代理人共同在场的情况下与法官单独会面，除非有正当的“单方会见”申请，“单方会见”亦应有书记员一人共同在场并记录在卷。
- (B) 修改法律以限制法官除取证外在法庭或法院或法院外部接触他人，案情罕见除外，以要求审理案件的合议庭（或独任法官）仅在其内部商议案情，做出裁判，而不与合议庭外的任何其他人商议案情，除非案情罕见或属疑难案件，可以由合议庭或独任法官提交审判委员会提出建议。

### 二、要求所有新法官通过律师资格考试或其他具有同等水平的国家级考试

要求所有新法官通过与律师一样的律师资格考试或其他具有同等水平的国家级考试。对于已任职的法官，应于 2000 年末之前送其学习法律培训课程，并要求其于 2001 年末之前通过全国律师资格考试。在 2002 年末尚未通过全国律师资格考试的法官应调动到法院系统内部责任较轻的工作岗位上直到其通过全国律师资格考试或具有同等水平的国家法官考试的所有科目为止。

### 三、法官的收入将以部分奖励为基础

使用诉讼开始时向诉讼参加人征收的诉讼费的一部分设立一项基金，由最高法院院长在国务院的监督下管理，从经济上鼓励法官们继续进修专业并改善其工作质量，包括出国调查、交流、访问，以提高他们的业务素质 and 报酬水平。

### 四、取消执行庭，加强法庭执行官等的职权

通过解散法院的执行部门，以简化现行的裁判执行程序，名义上是在作出裁判的法官的监督之下，实际上是通过执行官、法警和书记员来贯彻执行裁判。这些执行官、法警和书记员的职权应予加强，以便他们有效地履行上述执行和其他职能。对有条件执行而又抗拒执行的当事人要采取强有力的强制措施，直至承担刑事责任，改变执行难的问题。

### 五、为中国法官提供海外培训及与外国法官交流的机会

寻求外国公司或组织资助全中国的法官，尤其是来自基层法院、中级法院和高级法院的法官到海外调查访问数周以参观法制较健全的外国法院，并访问外国法院的审判人员，从而发展中国法官与外国法官之间的同事关系，并向中国法官介绍外国司法及审判方法，双方交流经验、心得。

依法治国论坛

2000年三月六日

## 依法治国论坛的建议：解释

### 一、诉讼期间限制与法官接触及法官与他人接触

(A) 中国当前的司法实践允许当事人在诉讼开始之后，在没有其他当事人在场的情况下，单独会见法官；还允许与诉讼无关的人会见负责所述诉讼的法官并参与到所述的诉讼中去。这很明显会导致向司法人员请托并会不时导致法律有关公正、公平，甚至导致腐败。我们建议结束这种做法。

(B) 法官之间经常自愿商议或与庭长、法院的高级法官、上诉法院的法官等商议，以听取意见，同时受到影响，因此影响了他们的独立性并阻止了有效的上诉。这种做法应当受到严格限制。

### 二、要求所有新法官通过律师考试

法律不要求法官在大学或学院的法律系毕业后通过严格的法律考试，而要求所有的律师通过律师资格考试。没有理由不对当前法律知识趋向比律师少的法官提出同样的要求。

### 三、法官的收入将以部分奖励为基础

法官的报酬很低，然而，诉讼参加人必须支付的以诉讼请求的百分比为基础的诉讼费却相对很高。我们建议使用这些收费中的一部分建立激励机制以提高法官的报酬。

### 四、取消执行庭，加强法庭执行官等的职权

当前，独任法官或合议庭一作出裁判，判决一生效，上述判决的执行就送到另一个叫做执行庭的机构。由此产生的严重问题是，执行庭的法官对案情一无所知。败诉方竭力寻求重审并/或阻挠判决的执行。执行庭还不堪重负，并很有可能成为一个蕴藏腐败的土壤。执行庭应被取消，而执行的责任名义上应由作出裁判的法庭和法官负责，然而，中国 17 万左右的法官工作负担过重，应少参与执行。执行官、法警和书记员的职权应予加强以有效地执行判决。执行判决十分重要，是法律最终体检与完成，判决后不能执行是不尊重法律的行为，不仅立法会受到影响，法律的权威也会受到损害，其祸害无穷。



## 五、为中国法官提供海外培训及与外国法官交流的机会

中国的法官，包括基层法院、中级法院和高级法院的法官，没有机会了解其他国家的司法，也没有机会与外国法官会面从而形成对自己的职业地位的感觉。我们请求政府、学会和公司为中国法官尤其是基层、中级和高级法院的法官到美国、香港、英国、法国、德国、日本、荷兰及其他国家和地区提供赞助。法官应感到自己是一个主持公义的杰出行业的一部分，并有机会了解其他国家法官的工作。赞助将包括在从三个星期到最多三个月的一段时间里为一、二或三名法官支付经济舱双程机票和食宿费。

A:rule of law\*建议的解释/TRANSROLE991116