

2. GOVERNMENT POLICIES AND ACCESSIBILITY IN CHINA

*Interview with Karen Tse &
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Q. 1: The term 'access' within the conceptual phrase 'Access to Justice' has undergone dynamic changes in the recent years; it is no more confined to mean access to judicial infrastructure alone, but has navigated further-in to the realm of reducing case pendency and raising legal awareness. In this light, how would you define this term and its essential components? You may contextualize the same within the broader contours of the legal aid movement in China. Could you also list five words that you believe fairly represent the concept of 'Access to Justice'?

A: Access to justice goes beyond the ability to access the court system in cases of suffering a legally recognized wrong. In the context of the rights of the accused, access to justice in its fullest form includes early access to competent legal representation within a system that upholds the rule of law and the rights of the accused.

The essential components of access to justice within this comprehensive understanding include a system that: (1) gives suspects access to an attorney from the moment they are arrested or interrogated; (2) provides legal aid for defendants who cannot afford an attorney; (3) ensures a sufficient pool of well-trained attorneys; (4) supports a basic understanding of the legal system among the general populace; and (5) legislates and enforces protections for the

accused throughout the process. This latter component includes the right to appear before the court without undue delay, be informed of the evidence in one's case, the right and ability to investigate one's case, and the ability to cross-examine the evidence, among other things. Within China, enhancing access to justice has included promoting a legislative and normative framework that promotes early access to counsel, advising populations (especially rural and other underserved populations) on how to access legal aid on behalf of family members in the case of

arrest, fostering a criminal justice community in order to promote criminal defense as a career option, and providing training as well as resources to legal aid and defense attorneys. Parallel to this, there have also been efforts to promote understanding among police, procuratorats (prosecutors), and the courts on the needs of defendants and the advantages of providing suspects with representation. Five words that describe this concept are: representation, rights, information, timeliness, and equality.

Q. 2: What challenges do China's unique economic and demographic conditions pose for accessing justice?

A: China is a country of stark contrasts between the larger, economically successful cities in the east, and poorer, more rural areas spread throughout the country. The greatest challenges for securing access to justice are most prominent in the poorer, more rural regions. Not only does China's expansive territory make it difficult to fund legal aid offices that can cover the entire territory of the country, but other structural reasons exacerbate relevant challenges. Many of China's most successful graduates flock to the larger cities, creating a "brain drain" situation for the more remote provinces. As such, there are fewer lawyers available in these locations.

Lawyers that do work there also have less access to training and mentorship. They are also likely to not be specialists or well experienced in criminal law or defense matters. The general population there may have little to no legal awareness. Literacy and language issues also impede realization of access to justice goals in certain locales. Lastly, there are leftover remnants of earlier times that also perpetuate a problem of perception, namely that having a lawyer will hurt, rather than help your case.

Q. 3: Is it true that, that the people in China would generally prefer informal justice mechanisms over formal institutions? If so, what is the reason for this?

A: Legal anthropologists disagree as to Chinese preferences vis-à-vis informal justice versus more formal justice mechanisms. Historically, there were systems established that some scholars would label "informal," and comparative scholars looking to distinguish systems like to highlight this fact. Indeed, the use of local mediation to resolve disputes is alive and well, especially among some semi-self-governing minority populations, although this is less prevalent with criminal justice matters. In most criminal justice cases, the expectation is that it will go through the formal justice process.

This can include mediation with the victim, providing apology and compensation in exchange for a recommendation of a lighter sentence. This system has parallels in plea bargaining and other reconciliation systems present in other systems around the world. At this point in history, it is more an issue of trust. If individuals trust that the court system will preserve their rights and interests, there does not appear to be any overwhelming preference among the general Chinese population to preserve informal systems at the expense of formal systems in the criminal law arena.

Q. 4: Article V of the Constitution proclaims the supremacy of the Constitution and that no one is above the law. How does this affect access to justice for the ordinary citizen?

A: Each sovereign state is responsible for organizing and advancing the mechanisms through which its constitution is implemented. State legislative bodies are selected in accordance with the PRC Constitution. Legislation is drafted and enacted in compliance with the Constitution. Many committed scholars and legislators work diligently on drafting these laws. There is also an open public comment period through which all citizens may have a say in legislative drafting. These laws are enforceable, though it is often popular to highlight examples where it is felt the system has fallen short. The recent anti-corruption campaign has shown many examples of high level leaders facing criminal charges, so it is not necessarily the case that powerful persons are above the law. Indeed, the anti-corruption campaign, at least in part, is meant to address situations where power was abused and help promote trust in the system.

Q. 5: How does the understanding of rule of law and access to justice differ in Chinese jurisprudence from the West's understanding? How does this influence justice-delivery mechanisms?

A: Most scholars translate the “rule of law” concept in Chinese law as more akin to “rule by law.” This “rule by law” understanding flows from more ancient legal conceptions in place during China’s dynastic past as well as remnants of Soviet influence after the establishment of the PRC, a time when China completely re-wrote its legal system virtually from scratch. The balance of powers in China is different than in most so-called “Western” systems, with the Communist Party enjoying privileges the executive branch would not in other places. The PRC Constitution is clear that the Chinese system is a “democratic dictatorship.” In a dictatorship, more rights are generally given over to the rulers. This conception also reflects to some extent the Confucian tradition of hierarchies, with corresponding duties and responsibilities. In practice, one of the resulting differences is a degree of deference to the Communist Party within the judicial system.

Q. 6: The practice of xinfang or petitioning to higher authorities against violations of the state against the individual has traditionally been a part of Chinese law. Could you shed some light on this concept of Xinfang?

A: The xinfang system is currently undergoing a massive reform.

Q. 7: The legal profession is regulated by the Lawyers' Law. Article 3(3) of the same speaks about how lawyers must be supervised by the state and administration. Do you feel it is time we put this provision in effect to make pro bono hours compulsory for a practicing advocate? If not, do you see this to impact lawyers' autonomous functioning and their ability to do justice to their clients in general?

A: China does have compulsory pro bono hours.

Q. 8: The Legal Aid Regulations, 2003 has made it the responsibility of the government to provide legal aid to its citizens. How is legal aid interwoven with access to justice? In this context, do you feel the burden of providing legal aid (which is broad spectrum) could be taken up by legal profession and the legal education?

A: In the past 13 years there have been dozens of new legal aid regulations, interpretations, and opinions issued that expand upon the scope of legal aid. In the context of the PRC, 13 years represents a third of the country's post-Mao history. At present, legal aid is no longer anywhere near as narrow as suggested. Improvements in access to justice in recent years. For example, in several provinces, they have reached near or at the 100% representation rate for criminally-charged juveniles.

In non-criminal matters, legal aid has expanded even more rapidly.

Q. 9: State-sponsored legal aid in China has been growing in leaps and bounds. What do you think can be the role played by non-state actors (NGOs, private lawyers, educational institutions, independent legal aid clinics) in addressing and in fostering the growth of legal aid in China?

This issue is presently being addressed, including by NGOs, private lawyers, educational institutions, and government legal aid centers. There are and have been hundreds of legal aid projects across the country working on this very issue, filling the gap between the state threshold level of indigence and those who still cannot afford a lawyer. There are also low-bono and sliding scale projects in China, as in other countries. Also as with other countries, in China there are restrictions on non-lawyers practicing law, especially criminal law. In many other contexts, however, law school clinical students and other para-legal style programs are helping fill the gap. Under new charity and non-governmental laws, that will come into effect in the coming months, the role of civil society in supporting these efforts is being re-defined.

At least in terms of domestic civil society, it is common for the government to work with non-governmental service providers to supplement government run institutions. In particular, many local organizations have taken on issues related to the environment, non-discrimination, and family law related matters. Even organizations and institutions not in a position to directly provide legal aid can work on promoting greater knowledge of the law among the general populace.

Q. 10: PILs (Public Interest Litigations) in China: what role do you think PILs play in promoting access to justice in China? Do you think the Judiciary would be forthcoming in exploring this essential component of justice delivery system?

A: IBJ works exclusively in the arena of criminal law. As such, this is not an area our work touches upon. At least in the area of environmental litigation and environmental crimes, there have been exciting new developments, including involving the procuratorate in pursuing cases where environmental harms have occurred. Apart from this, there is certainly public interest litigation occurring throughout the country, led by private lawyers and supported by civil society. In terms of changing the legal

framework that would permit different types of civil suits, this would not be within the scope of the judiciary, but rather the legislature. Change is ongoing.

Q. 11: Clinical legal education has been recently introduced in legal curriculum for some law schools. To what extent do you think clinical legal courses help the community? How might their impact be broadened to include not only legal aid and clinical education, but also access to justice in a broader sense?

A: The history of clinical legal education in China has already reached its second phase. Many of the pilot clinics launched by the first rounds of law school educators, who toured clinics abroad, are already reaching retirement. At the largest universities, there are numerous clinics in operation. As mentioned, due to new restrictions on unlicensed advocates, criminal law clinics are waning. Another hurdle is the fact that law school students in China are undergraduates, and may not have the capacity to provide the type of services post-graduate clinics would in other countries. Nevertheless, even in the criminal law system, clinical students continue to participate in legal rights awareness campaigns, distributing information to the community, teaching children in schools

about the law, and helping promote legal knowledge in other ways in the community. In non-criminal matters, supervised students are involved in helping those in need, thus enhancing access to justice. Resources allowing, these models should hopefully continue to operate and expand.

Q. 12: Recently, the China-EU Access to Justice Programme has materialized. It aims, primarily, to address policy-level concerns and aid sharing of best practices between China and the EU. Where do you believe that the impact of this Programme will be significantly felt and what might be the positive impact of the Programme on access to justice in China?

A: While IBJ is aware of this program and some of the impact it has had to date, this is all in relation to confidential conversations that cannot be disclosed. What can be disclosed, is that this program supported the promotion of legal aid, studies of legal aid models abroad, and directly supported access to justice in certain geographic locations. Where the pilots went forward will be where the impact will be most deeply felt, as this gave attorneys in those locations practice experience. It also gave justice officials in those areas experience witnessing the benefits legal aid can have on court efficiency and case

quality. Participants in that project will be conducting their own impact assessment, as will the EU.

Q. 13: A scenario that often arises in China is that the litigant is not economically powerful, especially when the opposing party is a corporation. Since the litigant cannot match the might of the corporation, this often leads to corporations getting away with labour and human rights violations. What are some specific measures that can be used to address this imbalance of power, so as to allow for an opportunity for free and fair trial?

A: All systems struggle with the issue that corporations and the economically powerful generally have greater access to legal resources to litigate and defend their cases. The role of the judiciary is to review cases with an eye for potential abuses of power. The Chinese government's current anti-corruption campaign has cracked down on judicial corruption as well as corporate corruption, including where state-owned enterprises are involved.

In China, the obligation to protect the human rights of citizens is with the government. There have been advances, for example, in areas such as food and drug safety administration, where

the government has pursued criminal and administrative cases to protect citizens against food safety violations. In privately-led cases, greater access to legal information and low cost representation will further promote an effective system of rights protections, though these civil cases are beyond IBJ's scope.

Within the criminal justice system, some worry that victim reconciliation systems disfavor the poor, who are less likely to afford restitution payments while the rich could essentially offer large sums to help lower their sentence. The current reconciliation reforms have restricted the severity of cases for which reconciliation is possible in an attempt to lower the impact of economic disparities. A combination of legal reforms, impact studies, legal aid, and legal information, therefore, can help shift the balance towards a more equal system. Indeed, as a socialist country, China is well situated to be a model for other countries in the global south on promoting equality in the justice sector, if it so chooses.

Q. 14: What role do you foresee from Law Firms in China in access to justice movement? Can law firms act as a beacon of hope in light of failed policies and efforts by governments across the

world in providing access to the basic judicial infrastructure to the disadvantaged?

A: At least in China, law firms have been an important component in promoting access to justice. Many law firms IBJ has worked with or encountered have taken initiatives to help fill the gaps related to access to justice. For example, some firms have opened entire pro bono departments within their offices, acting as training grounds for new attorneys while enhancing their profile in the community. Other individual attorneys also commit their time to training others, providing legal awareness in the community, or acting as mentors within their firm. All lawyers must fulfil pro bono requirements, either individually or by sponsoring other attorneys to complete the requisite hours. Some exceptional lawyers go above and beyond the required limit. There have even been a few dedicated public interest law firms established, including through personal funds, allocated lottery funds, and other resource streams. All these activities help promote access to justice goals.

While, objectively, there is so much more that could be done—and China has not yet developed a general pro bono culture—there are hundreds of law firms across the country that are testing

innovative ways to support their community, not only to support the greater good, but also to be seen as responsible actors within society. The more lawyers and law firms that get involved in these initiatives, the more pro bono, low bono, and other public interest endeavors will move from the exception to the norm.

Even so-called “failed” efforts referred to in the question represent learning opportunities for stakeholders involved. Access to justice, like health and education, is an essential component of a well-functioning society. As part of the legal system, law firms have a stake and a responsibility in promoting access to justice aims. At the same time, as with any business, they face their own limitations and constraints. Therefore, law firms can and do play an important part in enhancing access to justice, they cannot bear the entire burden of filling in existing gaps. Promoting access to justice requires collaborations with all stakeholders.

Q. 15: Do you believe that Legal Education in China has the potential to change the dynamics of the legal aid and access to justice movement? You may respond, considering that student groups comprise one of the least explored options in making an effective justice system, and also the recently introduced clinical education methodology.

[In September 2000, with the support from the Ford Foundation and some U.S. law schools, clinical legal education programs were developed in seven law schools: Peking University, Tsinghua University, Renmin University of China, Wuhan University, Zhongnan University of Economics and Law, East China University of Political Science and Law, and Fudan University.]

A: China is a country with both a long history, in terms of dynastic history, and a short history, when speaking of the PRC, especially in the post-Mao era from the tail end of the 70’s onward. Through the mentioned Ford project, clinics were introduced approximately 20 years after the establishment of the PRCs formal criminal legal system first began, and almost 15 years ago, from now. As mentioned above, clinics are no longer considered a recent reform by those working on the ground, having witnessed waves of support, followed by ebbs in enthusiasm due to competing challenges in funding, time, and resources. As with law firms, they are only one piece of a larger puzzle.

Given the tremendous responsibilities in terms of academic expectations placed on Chinese undergraduates, students have limited time to get involved in clinics. Nevertheless, these dedicated youths have been a tremendous force

in promoting access to justice goals, engaging in the promoting of rights awareness and the provision of legal services. It is questionable to call students a “least explored” option, given that, at least most international cooperation, in legal reform in China has in fact worked with students. IBJ has been working with law students for nearly 15 years in China and witnessed the positive impacts of those initiatives.

More important than placing greater responsibilities on these young individuals to provide the bulk of, or even a substantial portion of, legal services for the poor may be to instill in them a passion for public interest while they are at university. If any country or profession is to create a culture of pro bono and public service, it is important to start with promoting social responsibility in the classroom. Clinics afford students the opportunity to see law as a tool for serving their community, witness the rewards of helping others, and at least begin to cultivate a sense of responsibility, even if their initial years after graduation may be focused more on financial gains.

Q. 16: The recently announced Global Goals/SDGs by the UN aim to set a benchmark in achieving equitable societies.

One of the goals (Goal 16.3) specifically advocates for Access to Justice. Do you think this objective is achievable? If so, what kind of collaborative efforts do you recommend in order to collectively advocate and to achieve this ‘access to justice’?

A: A first matter is how one measures achievement. As with health, it would not be reasonable to discuss a world where no one is sick, and we cannot place a doctor at the doorstep to every home. In reality, all of the SDGs, like the MDGs before them, represent an ideal milestone to which governments, organizations, and individuals can strive. Enhancing access to justice is certainly achievable everywhere, while, at the same time, no country has or will achieve perfection. Justice is inherently one tool to deal with a range of societal problems. The more improvements and equality that is achieved in other sectors, the lessor the burdens will be on the justice sector. The good news, therefore, for countries facing crises in numerous areas, is that improvements in other areas will also likely improve access to justice as the proportion of necessary resources will lessen.

Secondly, in order to improve baseline “access,” an initial step is to promote legal awareness regarding the system already in place.

Information about the law and existing legal aid can be disseminated in the classroom, online, and on the radio. In China, the government and other actors have also been producing television dramas and documentaries to promote important legal knowledge.

Encouraging public interest among the legal profession is a key component to providing greater access to representation, especially where government funds may be limited. Law students and other para-legals can also be involved in these gap-filling measures. These efforts can be spearheaded by schools, civil society, government actors, and individual members of the legal profession. Training of these professionals is also essential.

Fair courts and functioning systems require adequate legislation. Raising awareness of these needs with the legislature can be done through bilateral discussions, civil society efforts that promote policy initiatives, and other efforts tailored to the particular country context, for example academic input or public petitioning.

In all of these components above, international civil society and governments can have a role by promoting related activities, such as through the provision of technical cooperation, funding, and

other programming that helps to empower local actors with potential solutions, encouragement, and needed resources.

Finally, a base level of funding from the government will always be indispensable to keeping courts operating and staffed. Some governments are willing to accept financial support, at least temporarily, from wealthier countries or funding bodies if they find themselves unable to meet their development goals. Sustainable solutions, however, require self-sufficiency. Within the development field, it is no longer acceptable to promote certain development goals at the expense of all others. A holistic approach to development will ideally both reduce the burden on the justice system and promote other avenues that contribute to available government resources, for example, via a more prosperous society and reasonable taxation.

Q. 17: What role can the current Access to Justice Index™ play: in influencing policy and decision makers and in overcoming or at least ameliorating the various barriers to access to justice?

As with any index or assessment, the Access to Justice Index™ can help reformers by saving time, providing lists of laws and data as well as

pointing towards remaining gaps that need to be addressed. In practical terms, organizations and institutions applying for funding to work on these gaps at both the local and international level, can more easily cite to the Index when applying for funding, or in writing their own proposals and studies to government bodies. They can also measure their progress to date against a continuously updated Index. This effort can further assist funders, governments, and intergovernmental bodies to prioritize their work both geographically and thematically. Finally, the Index reminds stakeholders of all the interrelating components necessary to better realize access to justice aims.

Importantly, by having an index focused specifically on access to justice, it helps draw much needed attention to access to justice as a development priority, reinforcing its importance.

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