From Mediatory to Adjudicatory Justice:

The Limits of Civil Justice Reform in China

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1. Introduction

One of the most conspicuous changes in judicial policy toward the end of Xiao Yang's two terms (1999-2008) as the President of the Supreme People's Court (SPC) was the retreat from a concerted period of civil justice reform, the origins of which can be traced back to 1979, and which was at its most intense over the decade prior to 2006. The hallmark of this recent change in approach has been a shift of priority from adjudicatory justice to mediatory justice. By 2006, the SPC has openly conceded the failure of part of the judicial reform programs aimed at enhancing judicial professionalism. The SPC had also issued a series of judicial interpretations to steer the judiciary towards settlement of disputes through court-mediation. Because of this policy change, local courts are revising their incentive mechanisms to encourage and award judges to privilege mediation in resolving disputes. Judges and legal scholars are rediscovering the virtues of court-mediation, including its efficiency, cost-effectiveness and humanity.[1]

Traditionally, Chinese courts performed principally the role of settling individual disputes through court-mediation. From the establishment of the People's Republic of China (PRC) to the late 1980s, the political ideology of the Chinese Communist Party (CCP) demanded that courts settle disputes using "democratic methods", *i.e.*, by persuading and educating disputants rather than adjudicating their disputes according to established legal principles.[2] Even after formal civil law and civil justice system

1 HUANG SONGYU ed., SUSONG TIAOJIE YAOWU [SIGNIFICANT MATTERS REGARDING COURT-MEDIATON] (2006).

2 STANLEY B. LUBMAN, BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO 275 (1999); Michael Palmer, *The Revival of Mediation in the People's Republic of China (2): Judicial Mediation, in* W.E. BUTLER ed. YEARBOOK ON

were institutionalized as part of the post-Mao legal reform, political rule and social morality continued to marginalize legal rules. Courts continued to rely on mediation as the principal method of dispute resolution. The courts thus provided a venue not for applying positive legal norms but for applying, essentially, (Chinese) negotiation norms.

From the late 1980s, court-mediation did go into steady decline in the area of civil dispute settlement. The SPC, through a series of reforms to formalize and professionalize civil procedures, attempted to reduce the proactive, interventionist and inquisitorial role of judges in the trial and pre-trial processes, to give more autonomy and freedom to the parties in the disposition of cases, and to allow certain adversarial elements to creep in. Judges at the same time were no longer content with the role of settling individual disputes and desired a more active judicial role in finding, applying and pronouncing laws. Within approximately 20 years from 1988, the judiciary had achieved a certain degree of institutional autonomy. Professionalism and rule of law within civil justice (as reflected in the sophistication of procedural rules, the formality of court proceedings and enhanced education and training of judges) began to be established. As a direct consequence of these reforms, court-mediation declined steadily and significantly from the late 1980s through until the early 2000s.

SOCIALIST LEGAL SYSTEM 1989 145-171 (1990); Donald C. Clarke and James V Feinerman, *Antagonistic Contradictions: Criminal Law and Human Rights in China*, 141 THE CHINA QUARTERLY 135-154 (1995), and Fu Hualing, *Putting China's Judiciary into Perspective: Is It Independent, Competent and Fair? , in* ERIK JENSEN & TOM HELLER eds., BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHS TO THE RULE OF LAW Chapter 6 (2003).

However, judicial reform has taken place *within* the judiciary and was largely limited to the civil justice system dealing with ordinary civil and commercial disputes. It has had no impact on the political system and the reform had not resulted in any significant increase in judicial authority and independence relative to other institutions of the state. Because of the lack of real political power during these reforms, the process of judicial reform and autonomy within the civil justice were not entrenched. They remained vulnerable to political influences. When social conflict started to intensify in 2003 with a sudden increase in petition and social unrest and when disgruntled peasants, workers and others started to by-pass the judiciary in civil disputes and resort directly to the central authorities in Beijing, the court became the scapegoat and was blamed for the real and perceived judicial ineffectiveness. As a result, judicial reform was first halted and then partially reversed.

The recent resurgence of court-mediation is a direct attack, largely from outside the court system, on the decade-long reforms to promote judicial professionalism and formalism. The defining characteristic of the recent promotion of mediation is the instrumentalist focus on judicial effectiveness in containing and solving disputes. Formal (adversarial) adjudication has, allegedly, failed to provide an effective resolution to the growing social conflict. It has failed to build legitimacy for the reformed system. Mediation is now preferred because of the claimed failure of adjudicatory justice and because of the perceived effectiveness of mediatory justice. Judges, as a result of this political assault, have been pushed back from a more public and general role of norm finding and norm application to settling private disputes.

This paper studies the process of this transition by examining the rise, demise and a partial resurgence of court-mediation. The paper has six parts. After this Introduction, Part Two details the development of the PRC civil justice system and explains how its political marginalization helped create the space for its subsequent reform. Part Three analyses what might be termed phase one of the reform process, including the factors driving the striking shift from mediatory towards adjudicatory justice. Part Four considers the additional momentum of phase two of the reform process, which commenced with the appointment in 1998 of Xiao Yang as President of the SPC. Part Five reviews and clarifies the factors leading to the stalling and partial reversal of civil justice reform. Part Six is the conclusion.

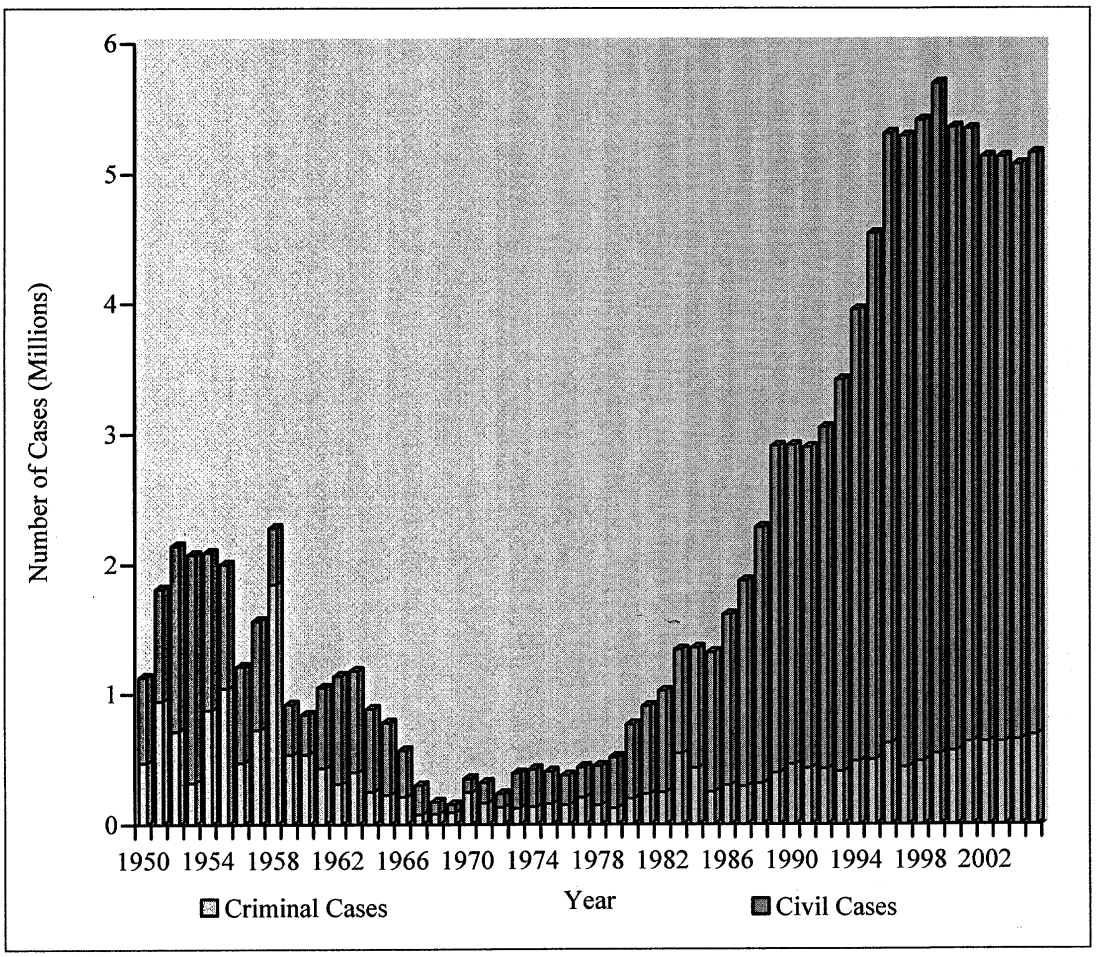
2. The Rise of Civil Justice

2.1. The Marginalization of Civil Justice

The most visible and striking change in the post-Mao Chinese judiciary has been the rise of civil law and civil justice in Chinese courts. Chinese courts throughout the 1950s, 1960s and 1970s were predominately criminal courts both in terms of the nature and number of criminal cases processed, although civil cases had been growing over the decades. Before 1979, criminal cases generally accounted for approximately half of the case load of the courts, and in a number of years, criminal cases exceeded civil cases. The gap between civil and criminal cases started to widen in favor of civil cases from the earlier 1980s. This trend has continued (Chart 1).

Chart 1: Numbers of Criminal and Civil Cases

Received by Courts in China (1950-2005)[3]



Criminal cases, in earlier times, were not only large in number but they were also regarded as politically and socially more significant. The defining characteristic of criminal justice was the politicization of crime and the instrumental use of courts to

3 "Civil Cases" include civil cases (1950-1998), economic cases (1983-1998), and administrative cases (1987-1998). For figures between 1950-1998, see RESEARCH OFFICE OF THE SUPREME PEOPLE'S COURT, QUANGUO RENMIN FAYUAN SIFA TONGJI LISHI ZILIAO HUIBIAN 1949-1998 (XINGSHI BUFEN) [COLLECTION OF HISTORICAL JUDICIAL STATISTICAL INFORMATION OF PEOPLE'S COURTS IN CHINA 1949-1998 (CRIMINAL SECTION)] 1-2 (2000) [hereafter CRIMINAL STATISTICS]; and RESEARCH OFFICE OF THE SUPREME PEOPLE'S COURT, QUANGUO RENMIN FAYUAN SIFA TONGJI LISHI ZILIAO HUIBIAN 1949-1998 (MINSHI BUFEN) [COLLECTION OF HISTORICAL JUDICIAL STATISTICAL INFORMATION OF PEOPLE'S COURTS IN CHINA 1949-1998 (CIVIL SECTION)] 1-3 (2000) [hereafter CIVIL STATISTICS]. For figures between 1999 and 2005, see ZHONGGUO FALU NIANJIAN [CHINA LAW YEARBOOK] (2000-2006) [hereafter CHINA LAW YEARBOOK].

maximize CCP's political control. The Maoist "two contradictions theory" had long provided the principal guideline for handling social conflict in China. PRC was a democratic dictatorship, often interpreted as democracy for the people and dictatorship for the enemies. The repealed 1975 PRC Constitution provided that:

> Socialist society covers a considerably long historical period. Throughout this historical period, there are classes, class contradictions and class struggle, there is the struggle between the socialist road and the capitalist road, there is the danger of capitalist restoration and there is the threat of subversion and aggression by imperialism and social-imperialism. These contradictions can be resolved only by depending on the theory of continued revolution under the dictatorship of the proletariat and on practice under its guidance.[4]

The Maoist theory divides social conflict into two types of contradictions: the antagonistic contradictions between the enemy and the people and the non-antagonistic contradictions among the people. Like other revolutionary states,[5] the PRC State is characterized by a dual system of justice, one for the people who are supportive of the regime, the other for the people who are hostile to the regime, *i.e.* the enemies. Criminal law had long been an instrument used by "the people" against their enemies.

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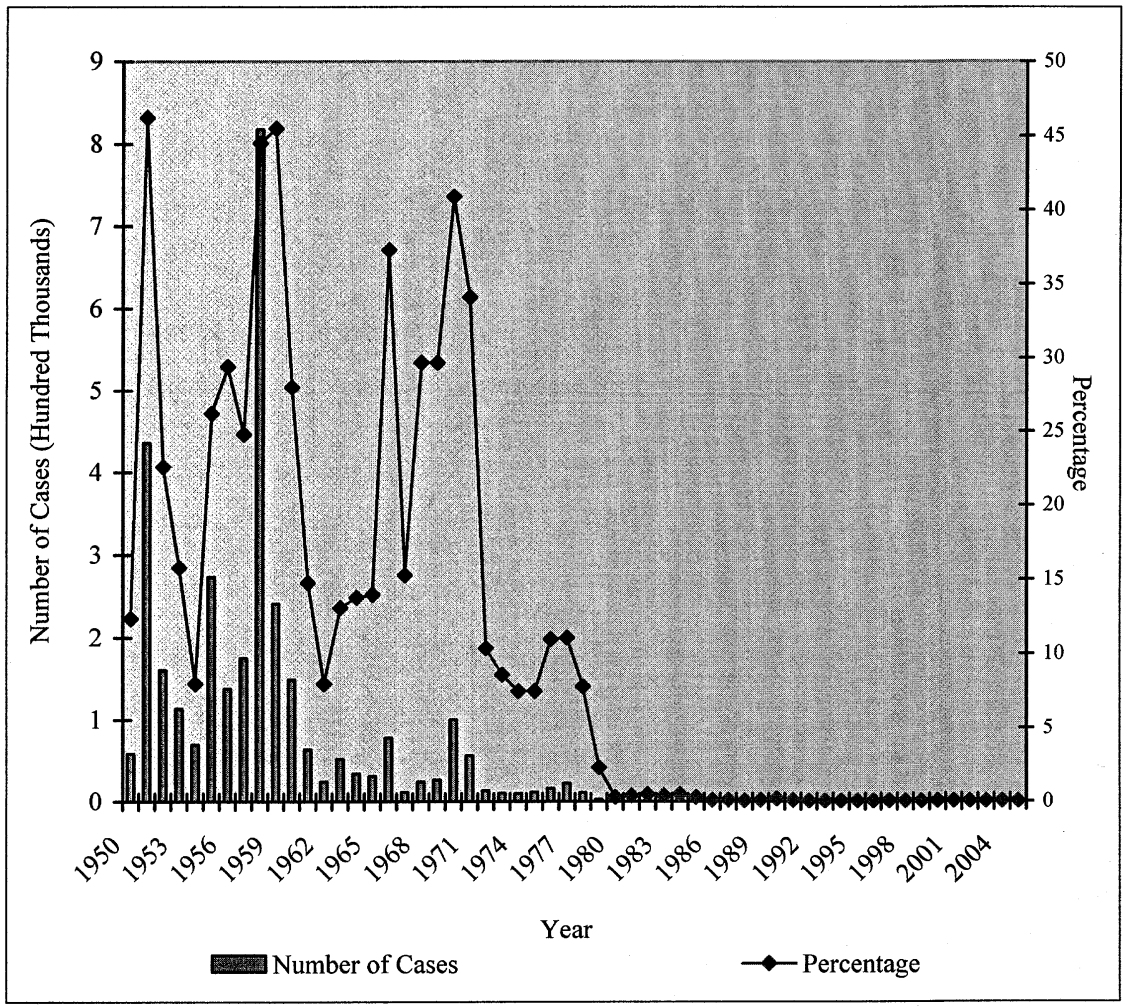
4 Preamble to the Constitution of the People's Republic of China 1975.

5 RICHARD ABEL ed., THE POLITICS OF INFORMAL JUSTICE (1982).

Crime, as defined, was also more than a violation of the criminal law; it was regarded as a manifestation of class struggles between the proletariat and the bourgeoisie and a challenge to the political order. Courts, as "places of dictatorship" and as "instruments of dictatorship", were used to fulfill the function of class struggle and class repression. Punishing counter-revolutionaries was the core judicial function. This situation is clearly reflected in the large proportion of counter-revolutionary cases received by the courts between 1950s and early 1970s (Chart 2).

Chart 2: Number of First Instance Counter-Revolutionary Cases in China (1950-2005)[6]

6 Figures of the years 1999-2005 include crimes of servicemen's transgression of duties. The percentage in the chart represents the percentage of first instance counter-revolutionary cases in the total number of first instance criminal cases in China. For figures between 1950 and 1998, see CRIMINAL STATISTICS, *supra* note 3; for figures between 1999 and 2005, see CHINA LAW YEARBOOK (2000-2006)., *supra* note 3.



Another significant aspect of the "two contradictions theory" was the justification for the "democratic" treatment of disputes among the people. For non-antagonistic contradictions, democratic measures included persuasion and education, following the model of "unity-criticism-unity". Mao's purpose was to emphasize that, while the struggle against class enemies continued, it was imperative to recognize the existence of non-antagonistic contradictions among the people, which should be handled patiently and leniently, and mostly, out-of-court. For Mao, there were two fundamentally different contradiction-handling methods, each having its own logic, institutions, procedures, and consequences.

Courts were reserved for serious offences. Civil disputes were internally absorbed by communities and workplaces and minor offences were punished by police. Indeed, the leftist leaders actually stated that "the organs of dictatorship should not be concerned with contradiction among the people", otherwise the proletarian dictatorship would be diluted and diminished.[7]

Given the predominance of crime and criminal process, courts lacked institutional autonomy in the process. At times, the control over the criminal process was exercised directly by the CCP, with the local party Secretary personally making decisions on the disposal of cases. But in most of the time, the CCP controlled the criminal process through the police, with the courts acting as a junior partner, playing a mere symbolic, and supporting, role in suppressing counter-revolutionaries and other class enemies.[8]

2.2. Civil Disputes and Civil Justice

The rise of civil justice arose as a result of three significant changes in China's political and legal matrix since the late 1970s. The first was the CCP's "open door policy" and the shift of core state policy from revolution to modernization. After the Third Plenary Session of the 11th Central Committee of the CCP and the promulgation of the third PRC Constitution in 1978, the CCP started to correct and eliminate the radical political and legal ideologies and policies. Law and legal institutions were no longer defined as instruments of proletariat dictatorship. They were to serve the new

7 Zheng Hanzhou, *Report on the 2nd National Conference on Civil Trials (22 December 1978)*, 1 RENMIN SIFA [PEOPLE'S JUDICATURE] 2 (1979). Zheng was the Vice President of the SPC.

8 Fu Hualing, *A Bird in the Cage: Police and Political Leadership in PRC*, 4 POLICING AND SOCIETY 277-291 (1994).

economic policies and "four modernizations".

Second, political trials diminished in both quality and quantity. Counter-revolutionary cases, which dominated the work of the courts, dropped to such a tiny percentage that they no longer influenced the development of judiciary. Indeed, by the end of the 1970s, it was as clear as could be that the vast majority of crimes were no longer committed by class enemies — the criminal population was principally composed of juvenile and young offenders. They were children of the working class. As such, the old mechanisms and procedures associated with "dictatorship" and "class struggle" were no longer applicable and the whole criminal process needed to be re-designed and softened to take care of what were essentially contradictions among the people.[9] With the passing of Criminal Law and Criminal Procedure Law in 1979, criminal trial, for the first time, took into consideration of the rights of defendants and their representatives, and were, to some extent, governed also by legal norms and subject to legal control.

The third change was the quantitative and qualitative change of civil disputes. Not only the number of civil cases was rising and expected to continue to rise, but also courts were experiencing new types of disputes associated with economic liberalization and reform. Civil justice prior to the 1980s was responsible mainly for handling matrimonial matters, disputes between neighbors, small inter-personal debts and tortuous liability among acquaintances. Those disputes largely took place among family members, neighbors and co-workers, and other people with on-going relations,

9 Fu Hualing, *Juvenile Delinquency in Post-Mao China*, 16 INTERNATIONAL JOURNAL OF COMPARATIVE AND APPLIED CRIMINAL JUSTICE 263-272 (1992).

sharing certain common social and economic linkages that were difficult to sever. Within the static social and economic relations, civil justice primarily served to restore the disrupted inter-personal relations within closely-tied communities. There were indications, by this time, however, that economic modernization was likely to generate new commercial disputes among strangers and place new demand on courts.

It was at this historical moment that the SPC started to recognize and promote the importance of civil justice. In a series of national conferences on civil trial works, the SPC initiated a process of civil justice reform that would last for three decades. Jiang Hua, the former SPC President, for example, spoke of the importance of civil justice at a major national conference on civil trials held in Qingdao between December 1978 and January 1979.[10] First, he claimed (erroneously) that, with the exception of the ten years during the Cultural Revolution, civil cases had always had a higher percentage than criminal cases. He predicted that civil disputes were likely to rise in the near future.

Second, Jiang argued, civil justice was equally important as criminal justice and should have given equal treatment in courts. The marginalization of civil justice was a result of the radical political thinking:

> Because of the biased judicial thinking of treating people's courts as a "knife handle" (刀把子) of dictatorship, civil trials in people's courts

10 *Civil Adjudication is Equally Important*, in JIANG HUA ZHUAN [THE BIOGRAPHY OF JIANG HUA] Section 5 of Chapter 16 (2007), available at <http://book.sina.com.cn/nzt/history/cha/jianghuaz/66.shtml> (Visited on Sept. 27, 2007).

were not treated seriously. The thinking of "privileging criminal trials and discounting civil trials" ran rampant in people's courts, and many civil adjudicators, including some leaders had only insufficient recognition of the importance of civil trials.[11]

For Jiang, there was no reason to privilege criminal trials anymore because the vast majority of criminals were no longer counter-revolutionaries and, even in criminal trials, courts were mainly handling "criminal problems that have occurred amongst the people". Framing crime in this innovative way, Jiang Hua was able to weigh civil and criminal trials equally. Given that criminal justice and civil justice dealt with contradictions among the people, the theory of class struggle and contradictions between enemies and people that used to set criminal justice apart from civil justice was no longer valid as a device to determine how courts should operate.

On the contrary, according to Jiang Hua, civil justice touched on various disputes among the people. Civil cases were complicated and had strong policy-orientation. Then he said something that would come to dominate judicial discourse 30 years later:

[Civil cases] concern the interests of the state, collectives and individuals ... and affect the harmony of the family, stability of the society and the construction of the four modernizations ... when

11 *Id.*

handling civil cases, people's courts must take the overall interest into account in making decisions and the decisions have to be not only lawful, but also appropriate and reasonable.[12]

By stressing the importance and uniqueness of civil justice, the SPC repositioned itself in the judicial administration and started to assert its institutional autonomy. The first thing was to clarify the relationship between court work and Party leadership. There was no doubt that courts were under the leadership of the CCP, and as SPC Vice-President Zheng Hanzhou said, civil trials could only be completed when the courts were put under the leadership of the Party. Having accepted the Party leadership, Zheng then specified fours circumstances in which courts should report directly to the Party Committees for instruction:

1) the rise and decline, characteristics and trends of civil disputes and the main problems facing civil trials;
2) important, difficult and foreign-related civil cases;
3) important decisions given by superior courts; and
4) any change by a superior court of decisions that have been approved by a CCP committee.

This was a short list involving cases that accounted for only a small percentage of the total civil cases in late 1970s. Most importantly, Zheng called upon the courts to adjudicate independently and decline to follow instructions of a Party Committee in

12 *Id.*

cases there was inconsistency between Party instructions and legal provisions concerning the disposal of individual cases. Zheng said:

> Where people's courts have grounds to disagree with a Party Committee of the same level on key matters of fact-finding and policy and law application, people's courts may ask the Party Committee for a reconsideration of its decision, people's court may also report the matter to the people's court at the next higher level. Leading comrades and civil adjudication cadres must at all time insist on truth, correct mistakes and handle cases satisfactorily, in the spirit of being responsible to the Party and the people.[13]

This was one of the earlier signs of judicial autonomy in post-Mao China. In a subsequent section, Zheng touched upon a more sensitive issue relating to the relations and tensions between being loyal to law and loyal to the Party. Zheng asserted that since China was entering into a historical period of development and modernization, and was strengthening the socialist legality, "leading comrades and adjudicators of people's courts must insist on the judicial principle of following legal provisions and adjudicating independently without subjecting themselves to the interference of any department, institutions or individual.[14] Only adjudicators, collegial panels and judicial committees have the power to decide on the finding of

13 *Id.*

14 Extraordinarily, four years later, the same statement was written into the PRC Constitution in 1982.

facts and the application of policies and laws in a case."[15]

In answering the criticisms that obeying the law could be seen as disobeying the Party, Zheng explained that law was examined and approved by the CCP Central Committee, promulgated by the Standing Committee of the National People's Congress (NPC) and must be obeyed by the Party as well as the people. There could be no inconsistence between law and Party policies. Putting the CCP's power into a constitutional framework, the SPC was actually saying that CCP could not have made a decision that was inconsistent with law, thus any such decision would not be regarded as a CCP decision in the first place.

This was a provocative speech which, in important aspects, re-defined the SPC's relations with the CCP. The statement was publicly made to a national judicial conference and reported in some detail in People's Daily.[16]

2.3. Autonomy of Civil Justice

Within the court, the predominance of civil cases and conspicuous role of civil justice also caused a paradigmatic change. Less "political work" meant courts became less politicized. This created breathing space for thinking about and formulating judicial policies autonomously. Institutionally, courts were unconstrained by other powerful players (the police in particular), in the areas of civil justice, as they were in criminal justice. Courts in the civil justice system, facing two private parties, act largely on

15 Zheng, supra note 7, at 6.

16 *Correctly Handling Disputes Among the People and Developing the Environment of Stability and Unity*, RENMIN RIBAO [PEOPLE'S DAILY], Feb. 6, 1979, at 1.

their own. It is true that external authorities have designed numerous mechanisms and procedures, including the CCP leadership, the people's congress and procuracy, to hold all courts accountable. This external control was indirect and remote, however, and did not touch upon rules of civil procedures and their implementation.

Judicial autonomy was reflected clearly in the power of the civil courts in law-making and law-implementation. First, civil courts are largely free to formulate and implement court rules for handling civil and commercial disputes. One neglected aspect of the operation of the Chinese court system has been the near monopoly of law-making power of the SPC in matters relating to civil justice. With the CCP withdrawing into the background on civil and commercial matters, the judiciary, due to its institutional capacity to apply law and resolve disputes was in an advantageous position vis a vis other institutions. The courts may be weak in an authoritarian state, but the legislature can often be even weaker. The SPC was the principal sponsor of any civil procedure legislation and the legislative drafts prepared by the SPC were accepted and passed as law with little amendment by law makers. Rules of civil procedures were regarded as highly technical and the CCP, and the legislature for that matter, was content to leave the drafting and consultation to the SPC itself.

More significantly, the SPC is unconstrained in interpreting national legislation. In 1981, the Standing Committee of the NPC authorized the SPC to interpret national laws on its own in dealing with civil disputes. Armed with this delegation of interpretive authority, the SPC has developed a convention of effectively re-writing national legislation to suit judicial practice. SPC interpretations are more specific and

can be applied directly in cases at hand. Gradually what is binding in Chinese courts is not national law but SPC interpretations.[17]

The SPC does not only have the power to make and interpret rules of civil procedure, it also has the power to apply the rules and reform civil justice in the national judicial system. Indeed, the SPC, as the highest judicial authority, is free to push through major civil justice reform with few external constraints. Much has been said about the local control of PRC judiciary in both the Chinese and English literature. The dependence of local judiciary on the local CCP and government branches is stressed because of the latter's control over judicial appointments and court budgets. However, the SPC and higher people's courts (HPCs) dominate the agenda on professional matters, especially the running of civil justice, including the structure of civil courts, trial procedures, and rules on evidence. The role of mediation and its relations to adjudication are matters for the SPC to decide.

2.4. The Paradigm of Civil Justice

The principles guiding civil justice in China evolved from the 1950s to 1980s, but the general principle of preferring mediation over adjudication remained unchanged. Court mediation rate reached as high as 100 per cent in some local courts in the 1950s.[18] Before the establishment of the PRC, the CCP-led government used mediation widely in territories under its control. Upon the establishment of the PRC

17 See LIU NANPING, JUDICIAL INTERPRETATION IN CHINA: OPINIONS OF THE SUPREME PEOPLE'S COURT (1997); and Susan Finder, *The Supreme People's Court*, 7 JOURNAL OF CHINESE LAW 111-180 (1994).

18 Jiang Qibo and Liu Xiaofei, *Theoretical Structuring for Earlier Mediation Procedure in Filing Cases in People's Courts*, Paper presented at the SPC Workshop on Pre-trial Preparations, Zhuhai (On file with the authors).

and subsequent creation of the people's court system, the government generally regarded mediation as a necessary and key component of judicial dispute resolution, mandating courts to mediate before adjudicating a case. By 1958, the requirement to mediate became concrete and clear. Judges were required to follow a twelve-character directive: investigation and research, taking mediation as the principal method; and solving disputes where they arise (调查研究，调解为主，就地解决). Later the directive evolved into a 16-character one: relying on the masses, investigation and research, taking mediation as the principal method, and solving disputes where they arise （依靠群众，调查研究，调解为主，就地解决）.[19]

When the SPC initiated civil justice reform in the late 1970s, the earlier civil justice rejuvenation was limited to a few fundamental, yet formal, issues. The SPC first demanded a public trial of civil cases, forcing judges to act formally, openly and responsibly. In particular, open trials demanded formal rules and procedures for judges to follow and set the stage for further procedural innovation and reform. Second, the SPC recognized the substantive and procedural rights of parties in civil justice. This allowed the parties to play a more active and meaningful role in the process, again setting the stage for developing a more adversarial procedure a decade later.

While the judiciary was searching for new forms of civil justice, it had to handle the increasing disputes at hand and had to rely on what it knew best. Thus, it continued to rely on mediation. Mediation remained the key principle of Chinese civil

19 Id.

justice throughout the 1980s, and civil litigation was characterized as a four-steps-to-court procedure with mediation as one of the essential steps: interview, investigation, mediation and adjudication. Upon receiving a complaint, judges, it was expected, would interview both parties to understand the claims and defenses. Then judges should investigate the disputes and gather evidence to substantiate claims and verify defenses. Once the judges became certain about the facts and the law, they (the same judges) should assemble the disputing parties for mediation. Only after repeated mediation attempts had failed, would the matter in dispute proceed to adjudication. Proactive judging was thus the key to civil justice. Judges dominated the process because of the extensive pre-trial investigation process. The parties, on the other hand, became passive participants and had to place great reliance on the competence and integrity of judges.

Mediation constituted the paradigm for civil justice in China before the end of the 1980s. Trial judges were mainly trained in the Maoist "two contradictions theory" and lacked an alternative approach to civil justice. Courts considered mediation as the core of civil justice, and adjudication was rendered as a default position. With few judges being formally educated in law, it was natural for judges to rely on mediation and for the court to impose a high rate of successful mediations.

3. The Liberal Judicial Reforms

The shift in judicial policy toward adjudication has taken place across three levels. At the personnel level, formally trained judges have been replacing the old generation of

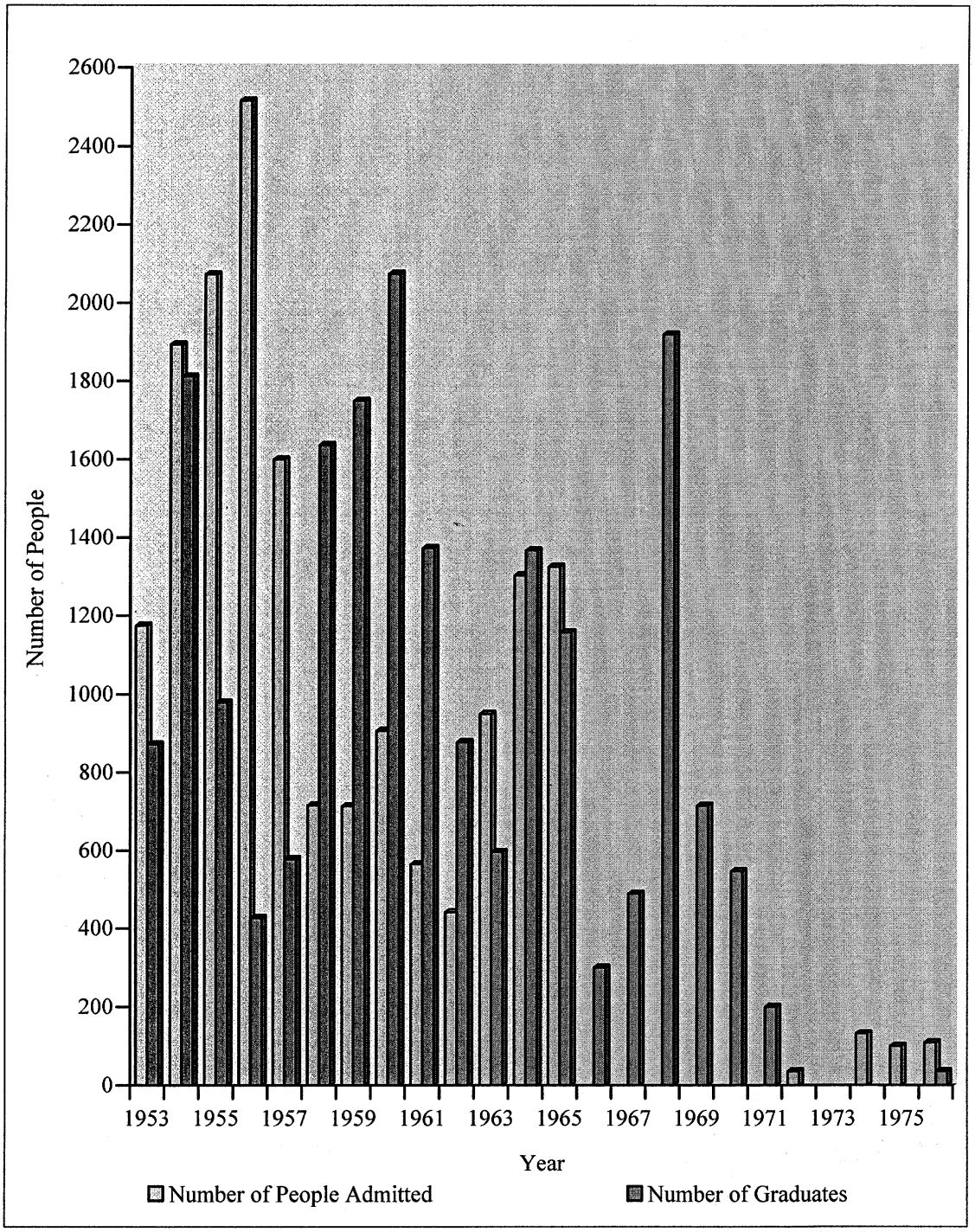
revolutionary cadres; at the ideological level, the judiciary has been promoting judicial professionalism and formalism in civil justice; and at the policy level, the judiciary has been emphasizing the importance of adjudication in developing rules and the rule of law. The shift in judicial policy began gradually and steadily to limit the use of mediation.

3.1. A New Generation

Chinese law schools in Communist China began admitting students in early 1950s. Theses admissions peaked in 1956 at 2,516 students.[20] Admissions began to decline from 1958 and came to halt from 1966 to 1971. Interestingly, Jilin University started to admit law students in 1972 (36 students), followed by Beijing University in 1973 (61 students). Before China re-introduced the national common university entrance examination in 1977, PRC admitted a total of 16,557 law students and produced 19,709 graduates, including students transferred to law schools after entering universities (Chart 3). These earlier legally-trained people played a key role in legal education and legal system reconstruction in the post-Mao era.

20 Available data shows that 1,175 law students were admitted in 1953. HUO XIANDAN, BUJIE ZHI YUAN: ERSHI NIAN FAXUE JIAOYU ZHI JIANZHENG [THE INDISSOLUBLE BOUND: THE WITNESS OF 20 YEARS LEGAL EDUCATION] (2003).

Chart 3: Number of People Admitted to and Graduated from Political-Legal Institutions in China (1953-1976)[21]



21 *Id.* The figures in the chart were compiled by the Judicial Education Administration Office.

Chinese law schools reopened and recruited law students on a large scale in 1978. In 1978, six law schools admitted a total of 729 students, and the number increased to 1,947 in 1979, 2,557 in 1980, 3,483 in 1981, and 3,678 in 1982.[22] The earlier generation of students had certain unique characteristics that no longer exist in Chinese law schools. First, the students were much older in age when they entered law schools. Second, the students had working experience before entering the law schools and were more mature. Finally, the students were the first batch of law school students for near 20 years. With a decade of accumulated unused talent, they represented the best of the best.[23]

The legal education that the students received was more political than legal and more ideal than pragmatic. China had very little law at that time but had high expectations as to what law could provide. Students studied more legal history and legal philosophy (both Chinese and Western) than technical legal rules. There was much less cynicism as to what law could and should provide. Immediately after the end of the Cultural Revolution, there was a cultural consensus within CCP and the society in general that the chaos and violence witnessed in China should never happen again and the best mechanism to prevent a recurrence was through the institutions of law and the rule of law. The fact that most of the students, like the political leaders, personally suffered during the Cultural Revolution only reinforced their faith in law. The new generation was not merely to apply or practice law, it was to change the law

22 *Id.*

23 *Id.* See also, Chen Huigu, *Searching for the Footprints of Social Change: An Analysis of a Group of Law Students Twenty Years After Their Graduation*, 3 BIJIIAOFA YANJIU [STUDIES OF COMPARATIVE LAW] 138 (2006).

and use the law to change society. The new generation of students regarded themselves as the watershed in Chinese legal development, representing the division between lawlessness and the rule of law. There was a strong sense of mission on the part of the fresh graduates to subvert the existing (and discredited) system and start a new way of doing things.

When the first batch of law students graduated in 1982, their practicing opportunities were equally unprecedented. There was a serious shortage of legal expertise in key positions in the judiciary at every level. Logically, most of the graduates joined the judiciary and procuracy at the central and provincial levels.[24] The legal profession was at its infant stage and attracted only a minority of the graduates. There was such a thirst for expertise in the formative years that the fresh graduates immediately became useful and instrumental in reforming the judiciary. The combination of talent with opportunities provided the catalyst for legal reform in China.

With more law school graduates entering the judiciary, they formed an important faction within the court. They formed a new identity and developed new interests that were different from, and challenged, their revolutionary comrades. The overall percentage of formally trained law school graduates is still small in the judiciary in China. The percentage was much smaller in the 1980s. In 1983, for example, among the 130,000 court personnel in China, only about 8,000 had tertiary education qualifications, which accounted for seven per cent of the total number of court

24 For an interesting study of the career path of 389 law students graduated in 1985 in a unnamed law school, see Chen, *id.*

personnel in China in that year. Less than three per cent of the total number of court cadres/police were university law graduates,[25] most of them were legally trained in the 1960s.[26] According to a SPC report, only 500 university students were allocated to the courts in the whole country in the three years from 1980 to1983. Ten years later, formally educated legal professionals were still a tiny percentage in Chinese courts.[27]

But the percentage, while being true, could be misleading. During the 1980s, we know that over 80 per cent of the law school graduates joined various legal organs (司法机关) at the central or provincial levels and in coastal cities.[28] Many of them joined the SPC, Supreme People's Procuratorate (SPP), and Ministry of Justice (MoJ) in Beijing or their provincial counterparts. These are high level decision-making bodies. This was especially true for the graduates in the first half of the 1980s.

Another cohort of these graduates joined legal institutions in the large coastal cities, such as Shanghai, Guangzhou and Shenzhen.[29] This was particularly true in the second half of the 1980s. By the late 1980s, judges in SPC, HPCs, and courts in

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25 *Judicial Exam Creates Professional Requirements*, RENMIN WANG [PEOPLE'S NET], available at <http://www2.qglt.com.cn/wsrmlt/jbzl/s/suzelin/sul.html> (Visited on Sept. 12, 2007).

26 Zhang Jianjun, *Construction of the Selection of Judicial Officers of China*, 10 GUOJIA JIANCHAGUAN XUYUAN XUEBAO [JOURNAL OF NATIONAL PROCURATORS COLLEGE] 45 (2005), at 50.

27 There were approximately 247,000 cadres in Chinese courts. Among them, 628 (0.25%) had a post-graduate law degree, 14,000 (5.6%) had a LLB and 68,700 (26.31%) had diploma in law. See HUO, *supra* note 20.

28 Zhao Xiaoqiu, *Changes in Legal Education in the Past 30 Years: Restoration is the Start of Everything*, FALU YU SHENGHUO [LAW AND LIFE], Aug. 6, 2007, <http://news.sina.com.cn/c/2007-08-06/163713604947.shtml> (Visited on Sept. 7, 2007).

29 Pan Jianfeng, *On Several Questions Concerning the Reform of China's Judicial System*, CHINALAWINFO.COM, <http://article.chinalawifo.com/article/user/article_display.asp?ArticleID=22890> (Visited on Sept. 12, 2007). For an interesting study of the career path of 389 law students graduated in 1985 in a unnamed law school, see Chen, *supra* note 23.

coastal, economically advanced, cities were highly professionalized (if formal legal training of judges is used as the yardstick).

A third group of graduates joined the legal academia directly or after graduate studies in China or overseas. They immediately started to introduce (often idealized) foreign legal practices and promote legal reform in civil procedures to modernize and institutionalize China's civil justice. Through their teaching and publications, they also influenced generations of future judges who would carry on the reform.

Together, they formed a liberal-minded legal community who shared a common conception of legal reform and who also, often, knew each other. Jointly, they initiated and carried out liberal judicial reform of China's civil justice system. Academic lawyers, using the freedom associated with their position, launched critical reviews of existing practices and put forward and support reform proposals. Judges in the SPC formulated and made decisions based on academic experts and the experience of legal reforms in the coastal cities.

Each party in the community contributed to civil justice reform in its own way. Judges in the SPC, with the support of HPCs judges, played a leading role in the reform process. Courts in coastal cities provided sites for pilot projects and, more importantly, provided an actual model of reformed civil justice in operation in the late 1980s and early 1990s. Legal academics drummed up support for reform programs. There was a gradual, but fundamental, shift in the understanding of the proper role and function of a judiciary in society.

3.2. Attack on Mediation

Changes are shaped by, and also shape, the ideology of legal formalism. Under the traditional model, the exclusive function of a court in a civil justice system was the resolution of individual disputes. Chinese courts, like courts elsewhere, make decisions on disputes between private parties. While the dispute resolution function is an important one, Chinese judicial reformers wanted their courts to play a more general, public and normative role in applying and proclaiming rules. A settlement court, the defining characteristic of Chinese civil courts in Maoist China, did not satisfy these key hallmarks of a modern, common rule defining judiciary.

For the new Chinese judges, a court was not a "court" if it principally performs the function of keeping peace and order rather than determining right or wrong and distinguishing the guilty from the innocent.[30] If the incentive structure in the court process is such that courts and their judges aim primarily at ending disputes and judges are rewarded and sanctioned accordingly, the resulting process can hardly be "judicial". Mediation privatizes and individualizes social problems. Since the ultimate objective is to resolve a case, there is a tendency towards case individualization, focusing on the particularity of disputes and disputants, not the general rules that may apply. Chinese judicial reformers stressed the importance of using general legal norms, instead of moral, economic, political, or other standards in deciding disputes, so that judges could develop predetermined, prescriptive, normative rules and determinate standards.

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30 THEODORE L. BECKER, COMPARATIVE JUDICIAL POLITICS: THE POLITICAL FUNCTIONINGS OF COURT 100 (1970).

Once the conceptual foundation against mediation was formulated, judges and legal academics joined their forces in challenging the cost-effectiveness, efficiency and fairness of mediation.

First, mediation as practiced was not voluntary. Parties settled mainly because of the pressures that trial judges applied. To increase the percentage of mediation undertaken, courts imposed quota on judges and rewarded judges who were able to achieve higher mediation rates among cases they handled. Judges, in turn, transferred the political pressure to the parties, inducing or forcing them to settle.[31] Because of the political demand for settlements, court mediation turned out to be "far more adjudicatory, aggressive, and interventionist."[32] Philip Huang has coined the concept of "mediatory adjudication" to describe a distorted form of mediation which is achieved through heavy-handed measures.[33]

Because of the lack of genuine consent, the agreement that the court imposed was often unfair. More likely than not, it was the weaker party, plaintiffs in particular, who compromised their interests in reaching a settlement. As Huang points out, "Chinese mediatory justice can turn clear-cut cases of legal right and wrong into unclear cases for compromise."[34] In a study in Shenzhen in which 210 judges in Shenzhen courts were asked 34 questions relating to court-mediation,[35] about two thirds of the judges

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31 LUBMAN, *supra* note 2, at 275.

32 Philip C.C. Huang, *Court Mediation in China*, 32(3) MODERN CHINA 275 (2006).

33 PHILIP C.C. HUANG, CIVIL JUSTICE IN CHINA: REPRESENTATION AND PRACTICE IN LATE QING 148 (1996).

34 Huang, *supra* note 32, at 306.

35 Wang Yong et al, *Changing the Understanding about Mediation, Deepening Mediation Reform and Fully Promoting the Functions of Mediation, in* DENG JILIANG ed., TIAOJIE ZHIDU GAIGE YU TANSUO [REFORMING AND EXPLORING THE MEDIAITON SYSTEM] 20-30 (2003).

admitted that mediation has been directly or indirectly imposed on parties. This was done by pressurizing and inducing parties to settle or stalling the parties through repeated mediation. In addition, judges initiated the mediation process in 66.3 per cent of the cases and 66.5 per cent of the judges said judges, rather than parties, played the main role in mediation, including facilitating mediation sessions and reaching a mediation agreement.[36]

Despite these pressures, in many cases, because of the real or perceived unfairness, parties were often reluctant to give in to judicial demands for settlement. As a result, the settlement process became lengthy and commensurately more time consuming. During Mao's time in power, judges handling divorce petitions were required to "make on-site visits to talk with the work units, relatives, and neighbors and friends to ascertain the quality of the couple's relationship and the roots of the problems."[37] Similarly, judges in post-Mao China handling real estate disputes would often need to pay visits to builders, contractors and purchasers to understand the nature and scope of the disputes. Because this process was more time consuming, city courts, facing a surge in civil cases, moved to abandon mediation in favor of speedier adjudication. In the Shenzhen study, nearly 70 per cent of judges said mediation as practiced was clearly defective in its design; and nearly 40 per cent of the judges said mediation could not make the dispute resolution process more effective.[38]

Mediation also bred corruption. In settling a case, courts enjoyed wide discretion.

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36 *Id.*, at 23.

37 Huang, *supra* note 32, at 288.

38 Wang et al., *supra* note 35, at 23.

Judges decided on facts and evidence. Judges chose the process which was to apply — mediation, adjudication and anything in between. Worst of all, there was no rules of procedures when it came to mediation — at least judges felt they were not guided by any rules. In the Shenzhen survey, 62 per cent of the judges said there was no or little guidance on mediation and 38 per cent of the judges said there were only indirect rules and constraints.[39]

There was little accountability in mediation. The process was secretive, informal and invisible, in which the regular accountability mechanisms did not kick in. Many judges preferred this mechanism with its lesser accountability. Secondly, the end product of the process was much easier to achieve than through an adjudicative process. It was much easier to write a mediation agreement than a judgment for the simple reason that it was supposed to be the agreement of the parties. In mediation, parties' participation and consent replaced the reasoning of the judges and it more or less sufficed that judges provided an accurate record of the consent. Thirdly, and most importantly, once an agreement was reached, the whole matter normally ends as far as court procedure is concerned. There was no appeal and thus no supervision from an appellate court and associated risk of a change of decision, or a reversal, or re-trial. The principal risk to which a judge is exposed in a regular judicial process is thus avoided. That explains why, despite all the criticisms of mediation by judges, some judges also, on balance, preferred mediation because of its ultimate perceived advantages.

39 *Id.* The indirect constraints include the time limit within which a judge is required to complete a case.

Mediation could take place at different stages during the trial process. The following statistics (Chart 4) demonstrate the informal and irregular nature of mediation:

Chart 4: When, Where and How Shenzhen Judges Conducted Mediation[40]

How many times of mediation was conducted in one case	Once (44%)	Twice (42.5%)	Three times (13.5%)
When	Pre trial (23.7%)	During trial (29%)	After trial (22.4%)
Where	In court (66.2%)	In office (31.6%)	Out of court (2.2%)
How	With both parties (67.8%)	Ex parte (32.2%)	

There was no formal record kept of the process. Since the same judges who mediated disputes also adjudicated them if mediation failed, these judges were placed in a strong position in influencing party choices. Given the nature of mediation, there were ample opportunities for *ex parte* contact with parties and their lawyers.

Mediation was more labor-intensive and time-consuming. It was common ground that mediated settlements took longer than adjudication. It is important to note that time, as calculated by days, was however shorter in mediation than in adjudication. For example one study of mediation and adjudication in a basic court and an intermediate court showed that, at the basic court, it took the court 61.8 days to adjudicate a case, but only 23.6 days to mediate a case. Separating county court (Civil Division One) from branch courts, it took Civil Division One 72.4 days to adjudicate a case but 43.2 days to mediate a case; for the branch courts, it was 51.2 days for adjudication and 33.2 days for mediation. The intermediate court followed a similar time line for cases on appeal (57 days for adjudication and 41 days for mediation).[41] Tang had similar finding in his study of 2,500 civil cases. According to Tang, 1,558

40 *Id.*, at 22.

41 Wu Hui, *Quantitative Comparison on the Effectiveness of Mediation and Judgment in Civil Litigation*; Tang Yingmao, *An Empirical Study of the Relations Between Judgment, Mediation and Enforcement*, 18(6) PEKING UNIVERSITY LAW JOURNAL 752 (2006).

adjudicated cases took an average of 99 days to complete; and 562 mediated cases took an average of 59 days to conclude an agreement.[42]

But a careful reading of the studies suggests that while it took fewer *days* to achieve a mediated result, it actually took more *hours*. Judges tended to work in a labor intensive-manner in ironing out an agreement as quick as possible before one of the parties changed the mind. As one author commented, while adjudication puts mental pressure on judges because of the accountability mechanism applying, puts pressures on judges physically because of the additional energy and time needed to achieve a result.[43]

Thus, mediation took more time when time is calculated by hours (as it should be). This explains why judges working under tight time constraints, judge of city courts in particular, came to prefer adjudication to mediation. When there is a light case load, judges are more likely to mediate disputes to avoid accountability. But when the number of cases rises and push comes to shove, judges cannot afford repetitive mediation to achieve consensus. They simply judge in order to bring the case to a speedier end.

Mediation was not necessarily more effective than adjudication in resolving disputes. While judges could press parties to enter into a mediation agreement by prolonging the trial or other means, the agreement was however not legally binding until the court served the signed agreement on the parties involved.[44] Naturally some

42 The rest of the 284 cases were classified as others, including withdrawal, transfer of jurisdiction, etc, which took an average of 66 days. Tang, *id.*

43 *Id.*

44 Article 191, Civil Procedure Law.

parties used mediation as a stalling tactic: agreeing to settle but engaging in lengthy negotiation but then refusing to honor the agreement.

Even after a mediation agreement has been properly served and became effective, parties, normally the original defendants, could still ask the court to re-try the case on the ground that the process was not voluntary and the outcome was unlawful.[45] Failing that, defendants simply refused to honor an agreement. Enforcement of court judgment is notoriously difficult in China.[46] Mediation was expected to improve enforcement because of the consensual decision-making, so that once the parties left the court, the matter would end – by immediate execution of the agreed settlement. However, empirical evidence shows otherwise. Enforcing a mediation agreement is just as difficult as enforcing a court judgment. While there was some reporting of near perfect enforcement in mediated cases,[47] more neutral and serious studies pointed out that the vast majority of mediated agreements were not voluntarily performed. In a Fujian study, the non-performance rate was as high as 83.5 per cent in 2003, 71.6 per cent in 2004 and 82.2 per cent in 2005 in one of the Basic People's Court in Minnan.[48] Indeed, parties rarely performed their mediated agreement voluntarily. In an Anhui study, 53.32 per cent of the mediated agreements proceeded to the enforcement stage.[49] Tang's study of 3,000 enforcement cases of financial disputes from 1998 to

45 Article 180, Civil Procedure Law.

46 According to a recent statement of Wang Songyou, Vice President of the SPC, 60% of the court decisions/mediation agreements were not complied with voluntarily and thus rely on the enforcement proceeding. Cited in Tang, *supra* note 41.

47 These statistics tend to appear in promotion materials to publicize the performance of a particular court.

48 Fan Meiqing, Mai Xianming and He Xiaohui, *Mediation: Case Completed But Dispute Continued*, RENMIN FAYUAN BAO [PEOPLE'S COURTS POST], Apr. 26, 2007, available at <http://rmfyb.chinacourt.org/public/detail.php?id=108145> (Visited on Sept. 28, 2007).

49 Wu, *supra* note 41.

2004 reached a similar conclusion.[50] Whatever the reasons were for the non-compliance,[51] mediation settlements were frequently not taken sufficiently seriously by losing parties.

Most importantly for SPC judges, mediation deterred the development of judicial professionalism and the rule of law. In court-mediation, judges became not only lawyers and educators, but also social workers tackling the deeper causes of a dispute. Take an example from Huang: a woman petitioned for divorce because the father-in-law had sexually harassed her. Rather than granting a divorce, the court, working with the village authority, helped the young couple build a separate house and arranged a better paid job for the husband, in addition to warning the father-in-law.[52] Mediation in China relies on life experiences and people skills, and places little stress on legal knowledge and skills, and what may be legally right or wrong[53]. The model judge/mediators have traditionally been dedicated CCP members with little education, not to mention little legal education. There were few incentives for judges to develop legal skills.[54]

The formally educated judges entered the system much younger. They had a better grasp of legal knowledge but they lacked the life experience that is deemed

50 Tang concluded that the percentage of cases entering enforcement proceeding was roughly equal between adjudicated cases and mediated cases. Tang, *supra* note 41.

51 The authors in the Fujian investigation mentioned three reasons: judges imposed an agreement without convincing parties; parties using mediation strategically for self-interest; and agreement not well drafted.

52 Huang, *supra* note 32, at 298-299.

53 This in part explains the lack of training and training materials for mediators. Since mediation is treated mainly as an art, not a science, the passing of mediation skills from one person to another becomes difficult.

54 During interviews with judges, one factor that affects whether mediation is preferred is a judge's educational background. Young judges with formal education tend to prefer adjudication to mediation. In the Shenzhen survey, 44.9% of the judges answered did not know how, when asked "why not resort more to mediation". Wang, *supra* note 35, at 22.

necessary for Chinese mediation. The young judges naturally prefer adjudication to mediation. Their basic skills determined this preference. In addition, judicial reform has forced a number of senior judges into earlier retirement or to occupy non-adjudicative positions. Increasingly, their posts are filled by fresh law graduates with little incentive and ability to solve cases through mediation.[55]

At a deeper level, mediation privatizes disputes and issues of social concern and blocks the development of general legal norms and the rule of law. This Chinese concern is best put by Owen Fiss and David Luban, who have succinctly pointed out how and why such widespread mediated settlement erodes the public realm, and reduces the opportunities to produce, clarify and reaffirm norms that are fundamental to society. For Luban, in particular, a court is a public forum engaging more a much wider audience than the parties to a case. The public has a vested interest in the adjudicative process, because a court distinguishes between right and wrong, defines rules and confirms social values, thus building a socio-legal framework to govern citizen behaviors. Mediation, according to Luban, compromises principles and privatizes public issues, creating "private peace" and avoiding public participation and accountability.[56]

It is debatable whether court-mediation could ever really rely upon, and develop sustainable and detached principles and rules.[57] In the Chinese context, Huang argued

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55 HUANG, *supra* note 1, at 25.

56 David Luban, *Bargaining and Compromise: Recent Work on Negotiation and Informal Justice*, 14 PHILOSOPHY AND PUBLIC AFFAIRS 397 (1985); and *Settlements and the Erosion of Public Realm*, 83 GEORGETOWN LAW JOURNAL 2,619 (1995).

57 Refer to the debate in the US.

that in the civil justice system of the late Qing, "[legal principles] were usually illustrated with specific situations, usually involving violations of the implicit principle" and "abstract principles could be formulated, and take on true meaning and applicability, only in conjunction with actual practice."[58] He suggested judges in the Mao and post-Mao eras mediated disputes in a similar manner. Many critics of mediation would disagree, and point out that there was little application of rules at all, and there was also little moralizing, either Confucian or socialist. What was left was the mere pragmatic concern to end disputes. But for the Chinese judicial reformers, the principal concern was not the presence or absence of principles or rules in mediation, but the importance of legal principles and rules in the process. The rule of law demands, privileges, and also depends on the existence and use of legal principles and rules in dispute resolution.

The Shenzhen survey already noted is all illustrative of the tension between mediation and justice. Slightly more than 40 per cent of the judges said mediation could not bring justice and fairness,[59] and near 40 per cent of the judges said the rights of parties were not clearly stated in mediation and thus could not be effectively protected.[60] The unfairness was reflected in the fact that in 85.8 per cent of the mediated cases, it was the plaintiff (the right-claiming party) who made concessions in accepting a mediated result, and in only 14.2 per cent of the cases, did the

58 Huang, *supra* note 32, at 139.

59 HUANG, *supra* note 1, at 23.

60 A minority of 20% of the judges preferred mediation because it was informal, cannot be appealed and this cannot be supervised by an appellate court. It was regarded as a low risk method of dispute resolution. *Id.*, at 22.

defendant (duty-owing party) make concessions.[61]

3.3. The Reform of Court-Mediation

The shift of focus in judicial policy from mediation to adjudication was gradual but highly visible. Once they occupied key positions in the judiciary, these fresh law-graduates judges, encouraged and assisted by their liberal minded teachers, put their beliefs and ideals into practice, initiating a series of civil justice reform.

The SPC started to rethink the role of mediation in civil justice in 1979 when China started to draft the first Civil Procedures Law. One product of the resulting debate was the replacement of "taking mediation as the principal method" with "emphasizing mediation" in the Civil Procedures Law (Trial) in 1982. Critics argued, however, that, while the new directive might have alleviated forced "mediation", civil justice remained tied to mediation, only supplemented by adjudication.

The SPC officially initiated civil trial reform in 1988. A key component of this reform was to limit the role of mediation and prevent the abuse of mediation that was common within the judicial process. While stressing the importance of mediation in solving disputes, SPC nevertheless denied the legitimacy of using the rate of mediation to evaluate the performance of courts and judges and criticized the common practice of unlawful and coercive mediation in strong terms. By the second half of the 1980s, the judiciary no longer privileged mediation. Rather than emphasizing mediation, the court started to use voluntariness and lawfulness as the core tests to

61 *Id.*, at 26.

measure the legitimacy and efficiency of mediation. The talk of the day was that a court should not impose an agreement without the genuine consent of the parties involved and that mediation must comply with the law both substantively and procedurally.

Realizing that court mediation was meant to be an integral part of civil justice, judicial decision makers started to distinguish cases in which mediation was encouraged, permitted or prohibited. The most significant development was the ban on mediation in judicial review cases. In administrative cases where an applicant seeks judicial review of an administrative act, Chinese law explicitly prohibits the use of mediation[62] because of the disparity of power between the two parties and because of the public nature of the case. A less visible, but equally significant development related to the effort to rein in excessive "mediation" in divorce petitions.

The 1991 Civil Procedure Law was an important milestone in the transition from mediatory to adjudicatory justice. As a matter of legal principle, the new law emphasized that mediation must be voluntary and lawful. Upon the failure of mediation, judges should proceed immediately to adjudication.[63] The SPC further clarified that if one party to a dispute or both parties declined mediation, judges should give prompt judgment. Even in the case of a petition for divorce in which mediation was the precondition for adjudication, judges should not repeat mediation

62 Article 50 of the Administrative Litigation Law states that "People's Courts in hearing administrative cases may not use mediation". For a discussion of the significance and challenges, see Michael Palmer, *Controlling the State: Mediation in Administrative Litigation in the People's Republic of China*, 16 TRANSNATIONAL LAW AND CONTEMPORARY PROBMENS 165-186 (2006-2007).

63 Article 9, Criminal Procedure Law.

without rendering a decision if one or both parties declined mediation.[64] While judges could persuade parties to settle through mediation, ultimately they were required to respect, and give effect to, party autonomy in civil justice.

Lawfulness was a more important requirement. Mediation was lawful only if it was based on a clear finding of facts and a clear distinction between right and wrong.[65] A more significant constraint on mediation was the newly imposed time period in which a court had to dispose of a case. According to the law, a court had to complete a case within six months for regular proceedings or three months for summary proceedings (after the court accepted the case).[66] Until the recent change of judicial policy, this legal mandate deprived judges of the opportunity to solve cases through prolonged and repeat mediation.

The courts took further actions to restrict or even deny mediation. Mediation centers for economic disputes, which were set up between late 1980s and early 1990s to mediate the newly emerging economic cases in city courts, were all abolished; a "one-step to court" process was widely implemented. As noted above, there was also legislative support for the denial of mediation. China's Administrative Litigation Law, which authorizes legal action against government action, denies the use of mediation as a legitimate method of solving this sort of disputes.

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64 Section 92, SPC Opinions on Several Questions on the Implementation of the Civil Procedure Law.

65 Article 85, SPC Opinions on Several Questions on the Implementation of the Civil Procedure Law.

66 Articles 135 and 146, Civil Procedure Law. Article 135 further provides:

> A people's court shall, in handling a case to which ordinary procedure is applied, close it within six months from filing the case. Where an extension of the term is necessary for special circumstances, a six-month extension may be given subject to the approval of the president of the said court. Any further extension shall be reported to the people's court at a higher level for approval.

New judges understood the role of courts, the commitment to law, and the value of settlement through mediation differently from their predecessors. But their understanding of the law and the courts was also shaped by the circumstances surrounding them and the cases they handle. Court cases have been growing steadily and, more importantly, the pressure of such growth has been disproportionately felt by urban courts, especially courts in the large, coastal cities. The pressure to complete the cases within specified time limits forces judges more to a formal(istic) model of judging, relying on formal rules and evidence as produced, to dispose of cases as quickly as they arrive. Judges in such court have little time, resources or patience to think carefully about the immediate (or longer term) social consequence of their judgment.

4. Xiao Yang's Judicial Reforms

It is within the above context that Mr. Justice Xiao Yang initiated his Five Years Plan for Court Reform[67] commencing in 1999. When Mr. Xiao Yang took the helm at the SPC, the time was ripe to accelerate and systematize the piecemeal judicial reform which had been previously achieved. China signed the International Covenant on Civil and Political Rights (ICCPR) in 1998 and the rule of law (as understood in the PRC) was incorporated into both the PRC Constitution and the Constitution of the CCP. In particular, the CCP was determined to strengthen the judiciary. Xiao Yang was confident of his ability to implement systematic judicial reforms.

67 SPC RESEARCH OFFICE ed., RENMIN FAYUAN WUNIAN GAIGE GANGYAO [OUTLINE OF THE FIVE YEARS REFORM PLAN OF THE PEOPLE'S COURT] (2000).

The core of judicial reform under Xiao Yang was the promotion of judicial justice and efficiency. Both terms are given specific meaning and each highlighted the new function and role of courts in China. Judicial reformers clearly distinguished substantive justice from procedural justice, arguing that justice in China was principally defined in substantive terms and was result-oriented. Little attention was paid to procedural fairness and justice. There had to be a shift in Chinese civil justice toward much greater emphasis on procedures. Judges and legal scholars reiterated the importance of the appearance of justice. Justice is defined principally in procedural terms.

What are the components of procedural justice? The quality of judges became a foundational issue. If judges without formal education are ideal for mediation and providing substantive justice, law school education and legal training are essential for providing procedural justice. Procedural justice relies on judges who are well versed in the law and who can act judicially. Many such judges joined the SPC and provincial courts, positions that allowed them to make and shape important judicial policies. Young judges institutionalized their professional ideologies by designing specific rules, and putting their beliefs about justice into practice. Throughout the late 1980s and early 1990s, the SPC issued a series of rules on civil procedure. As lawyers and judges started to use the rules, civil justice became more procedurally complicated. Gradually, the conceptual distinction between issues of law and issues of fact became clear and relevant, and judges considered their responsibilities in the law/fact equation and became aware of the methodological issues in finding them.

Judicial reformers dreamed of a modern and formalistic legal system characterized by its ability to elevate legal principles above messy factual situations.

Justice means party autonomy in civil cases with a corresponding shift in the burden of proof from the judges to litigants. The core of this phase of civil justice reform was to shift from judge-centric justice to party-centric justice. In this system, the inquisitorial judges would withdrawn into the background, while parties (and their representatives) were allowed, and indeed required, to play a more active and assertive role, contributing meaningfully to a more adversarial process. Courts shifted most of the responsibilities to parties, relieving judges from most of the fact finding. Judges, as legal specialists, would take care of legal delicacies, leaving the factual issues to the parties themselves. As it happens, judges were also likely making a virtue out of necessity in moving to a party-centric approach and allowing more party freedom. The sudden increase in disputes has made it impossible for judges to continue their inquisitorial style, time-consuming factual investigation plus repetitive mediation. Huang has observed that while the horizontal jurisdiction of courts may have expanded, "the (vertical) interventionist reach of the courts into the private lives of people has diminished". Courts have to give in to the legitimate demand of parties, especially when they are represented by lawyers.[68]

Once the parties were required to produce evidence, the SPC created new evidence rules for civil justice. Important rules governed the time limit for parties to produce evidence; admissibility of evidence once the time limit lapsed; exchange of

68 Huang, *supra* note 32, at 167.

evidence between parties before the trial; and exclusionary rules limiting the production of new evidence at the appellate level. Those new rules not only shifted the burden to produce evidence to the parties raising an issue, but also compelled the parties to act expediently, responsively, and professionally.

Given the new requirement of pre-trial preparation by the parties, the role of judges change correspondingly. Sitting in his or her court hearing submissions and evaluating evidence becomes not only possible but necessary. A natural follow-up change was to abolish all the pre-trial judicial investigation in a case, changing the procedure from *four-steps to court* to *one-step to court* in the early 1990s. As part of the measures against judicial corruption, judges were now prohibited from making any *ex parte* contact with parties or their lawyers (a key component of mediation as practiced) to ensure both the reality and appearance of justice.

The final component in the reform process was the requirement of prompt in-court delivery of decisions upon hearing cases. The SPC required judges to decide their cases and announce their decisions immediately following a trial in the majority of the cases they adjudicated. In-court delivery of judgment has been a long-standing issue, which was first raised and discussed in late 1980s, with a special focus on the use of this procedure in criminal trial — sentencing was announced in public immediately after a trial to maximize the deterrent effect. In the 1991 Civil Procedure Law, in-court delivery of judgment is one of the two ways that a court can render a decision, but the law does not further define the procedure.[69] In-court delivery of

69 Article 134, Civil Procedure Law. A court can also announce a decision on an unspecified future date.

judgment was a key component in Xiao Yang's first Five Years Reform Plan.[70] The SPC promoted the in-court delivery of judgments mainly to strengthen the decision-making power of individual judges so that judges could, and indeed are required to, exercise their own discretion. Judges, not their managers, are in charge of judging; and trial (the day in court). Neither the pre-trial investigation nor post-trial approval, would be the center of civil justice. In addition, in-court judgment delivery was expected to improve the transparency and effectiveness of the court work, and to reduce the opportunity of potential interference (both internally from the court system or externally) in the judicial process. If a judge rendered a decision immediately following a trial, interference in the process was less likely and the judge can judge more independently. Some of the judges actually used this opportunity tactically to avoid potential interference.[71]

The exact meaning of in-court delivery of judgment has been subject to debate. The mainstream position is that it is an in-court delivery of decision if a judge delivers a decision on the same day when the trial ends. There may be a prolonged fact-finding process and several mini-trials within the trial, it suffices as long as a judge can give a judgment on the same day when all the evidence is examined and cross-examined. While neither the Five Years Plan nor other SPC documents provide any detail as to how the procedure would operate, the principal idea was to press judges to try quickly and decide expediently (速审速决).

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70 The Five Years Plan and other SPC documents required the "gradual increase" in in-court delivery of decisions throughout the courts. See SPC RESEARCH OFFICE, *supra* note 67.

71 As one judge said, if a phone call came before the trial, he would say he had to hear the case first, and when the call was made, he would apologize that a decision had been announced already.

The combination of the uncertainty of the procedure and the above noted demands meant that local courts reacted actively and compelled/encouraged judges to achieve a high rate of in-court delivery of decisions. Under the promotion of the SPC, the rate of in-court delivery of judgments increased from about 20 per cent[72] in the early 1990s to 60-90 per cent in 2002.[73] But there are serious doubts about the accuracy of those figures. Jiang Liwei, for example, pointed out that the figures were wrongly calculated because local courts may have inflated the number by including cases that were withdrawn and mediated to a settlement. Jiang argued that the genuine in-court judgment delivery rate might have been as low as 10 per cent. He also pointed out that judges, facing strong pressure to raise the rate, may first decide the case before or during trials, and only "perform" an in-court delivery of judgment after a final court session.[74]

Nevertheless, other studies pointed out that the intended consequence of increased decision-making power on the part of the trial judges, enhanced transparency of the judicial process, and speedier trial, were achieved to a measurable degree. They also pointed out that an increase in judicial errors resulted from high pressures of achieving a high rate of in-court delivery of judgments.[75]

Judicial efficiency was also defined narrowly and the judicial bureaucracy defined judicial effectiveness largely according to either political imperatives or

72 Li Shengxue et al., *On In-court Delivery*, 40(1) FALU KEXUE [LAW SCIENCE] 79 (1992).

73 Jiang Liwei, *Questioning In-court Delivery*, 2 FAXUE [LEGAL STUDIES] 104 (2005), citing FAZHI RIBAO [LEGAL DAILY], Sept. 23, 2002.

74 *Id.*

75 Pan Changfeng and Zhang Guangxiong, *On Errors Associated with In-court Delivery of Decisions and Their Corrections*, 4 FALU SHIYONG [APPLICATION OF LAW] 80 (2007).

bureaucratic interests. One key measure of effectiveness is the three-month time limit for civil litigation, which is rigidly followed. Under the Civil Procedural Law, after receiving and accepting a civil case, a court should render a decision on the case within three or six months depending on whether summary or regular proceeding is to apply. Although the time limit was frequently violated in both county and city courts,[76] it was a constant issue that judges needed to face and struggle with. Judges in charge of case flow management, which has been computerized by city courts, monitor the time limit closely and remind judges constantly.

The second measure used to enhance judicial efficiency, which is more political than legal, is the case completion rate. Case completion requires courts to finish, at the end of the year, most, if not all, court cases received and accepted in the same year. Most courts achieve a near 100 per cent completion rate, meaning they complete all the cases they accepted within the same year. There is no clear justification for this policy and judges have difficulty in explaining why it exists, apart from speculating that the CCP/government imposes such an end of the year accountability on all CCP/government departments. Unlike other contentious judicial issues which are always debatable, this accountability mechanism is universally scorned within the judiciary.

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76 The common explanation for delay in city courts is the increase in case load, so judges are unable to complete the trial within the time limit. The explanation for delay in rural courts tends to be caused by the geographic distance between courts and litigants, in particular the transportation and communication problems. In Guangzhou Intermediate People's Court, 61 percent of the civil cases (totaling 11,086) in 2003 were completed within the time limit. See Sun Hailong and Deng Juanrun, *Objective Causes of Exceeding the Time Limit and the Countermeasures*, TIANYA FALU WANG [www.hilaw.cn], Oct. 19, 2006 (on file with the authors). For the problems facing county courts, see Ji Bumin and Ji Jinlin, *Causes for Exceeding the Time Limit in Civil Cases in Our Province and the Countermeasures*, TIANYA FALU WANG [www.hilaw.cn], Aug. 13, 2004 (on file with the authors).

Yet, courts throughout China continue to impose this requirement and recognize it as politically important. This requirement is extra-legal and cannot be justified in law. It is also illegal because it tends to deprive citizens of their rights to sue in a court of law and it also unduly interferes with the operation of the court. It is usual for courts to start their "count-down" toward the end of September and become cautious in accepting new cases. They then deny access to court for any cases that are unlikely to be resolved within the relevant year. Naturally, acceptance of such cases lowers the case completion rate and negatively affects the record of the court. It is a well understood rule that parties involved, lawyers in particular, are happy to comply and cooperate. In instances where a case cannot be declined directly, courts can postpone the date of acceptance to the following year.

The policy also interrupts the normal judicial procedure because judges have to rush cases through toward the end of the year. It becomes common that judges work for the whole month in December, non-stop, and courts are known to have opened in the evenings and weekends to meet the deadline.

This particular objective has placed tremendous pressures on courts and judges. The irony is that every court wants to achieve a high completion rate and most have achieved a near 100 per cent rate. They all end competing with themselves and have to try very hard to maintain the record they have created for themselves.

The third measure of judicial effectiveness that had a bearing on court mediation concerns the relationship between the trial court and the appellate court: the appeal rate by parties, the reversal/demand-for-retrial rate by an appellate court, and the rate

of adjudicative review. The appeal rate measures party satisfaction level and a lower appeal rate is regarded as showing an effective, first instance trial system. The reversal/remand rate measures the legal quality of trial decisions and provides a performance evaluation by a court at the next higher level. Adjudicative review is the ultimate test of outside supervisory institutions with respect to the performance of the lower court.

The measures were meant to provide incentives for judges to be more diligent and careful in judging, but they produced more problems than they solve. One of the most serious side-effects was the common practice among trial judges to seek advance legal advice from the appellate court on pending cases. Where a judge was uncertain about a difficult legal issue at hand, he or she would first attempt mediation to avoid accountability. Failing that, the judge (or the trial court) would communicate with the court at the next higher level, formally or informally, to seek legal advice before rendering a decision. It also became a common practice for a higher court to give detailed replies in the circumstances. Because of the advance legal advice from an appellant court, appeal becomes redundant and irrelevant.

The SPC has been critical of the first two measurements. Consistent with the first Five Years Plan to rationalize civil justice, the SPC has been trying to design the incentive structure so that the civil procedure system would take litigants' right to appeal seriously and a higher court would perform its supervisory role over lower courts through the formal mechanism of appeal. The SPC is particularly critical of the practice of seeking advance legal advice; even though the SPC itself is guilty of the

same abuse. On numerous occasions, the SPC has attempted to set legal standards for circumstances under which advance legal advices are permissible. Courts, especially those in large cities, seem to have followed the SPC instructions in restricting the use of such advance requests for advice.

But little change has been made on this front. In 1980, 6.2 per cent of the civil cases were appealed against the first instance decisions; 24.4 per cent of the appealed cases were reversed or remanded for retrial. In 1999, the appeal rate slightly rose to 6.7 per cent and the reversal and demand rate increased to 30 per cent. In 2005, the appeal rate further increased to nine per cent, but the reversal and remand declined to 23.1 per cent. Between 1999 and 2005, the number of first instance trials decreased by 13.8 per cent, the appeal rate *increased* by 15 per cent and the remand and reversal rate decreased by 11.1 per cent. It seems that while litigants had become more demanding of their right to appeal, the appellate courts lagged behind and did not exercise its supervisory functions (through the appeal mechanism) more actively.[77] For trial judges, the risk associated with adjudication, in particular reversal or remand, is diminishing.

The SPC has been more successful in challenging the third measurement and fending off external supervision originating from outside the courts, especially from the procuracy.[78] If appeal is the formal channel of judiciary accountability and source

77 Two explanations have been offered in China. One is that the quality of the first instance trial has improved, and there is no need for reversal or demand. The other explanation is that the higher court has intensified its supervision over lower courts through other informal means, such as giving advance legal opinions, before an appeal takes place. Evidence is much stronger for the second explanation.

78 Fu Hualing, *Procuracy*, *in* FRESHFIELDS ed., DONING BUSINESS IN CHINA Chapter 2.2 (2001, loose-leaf edition).

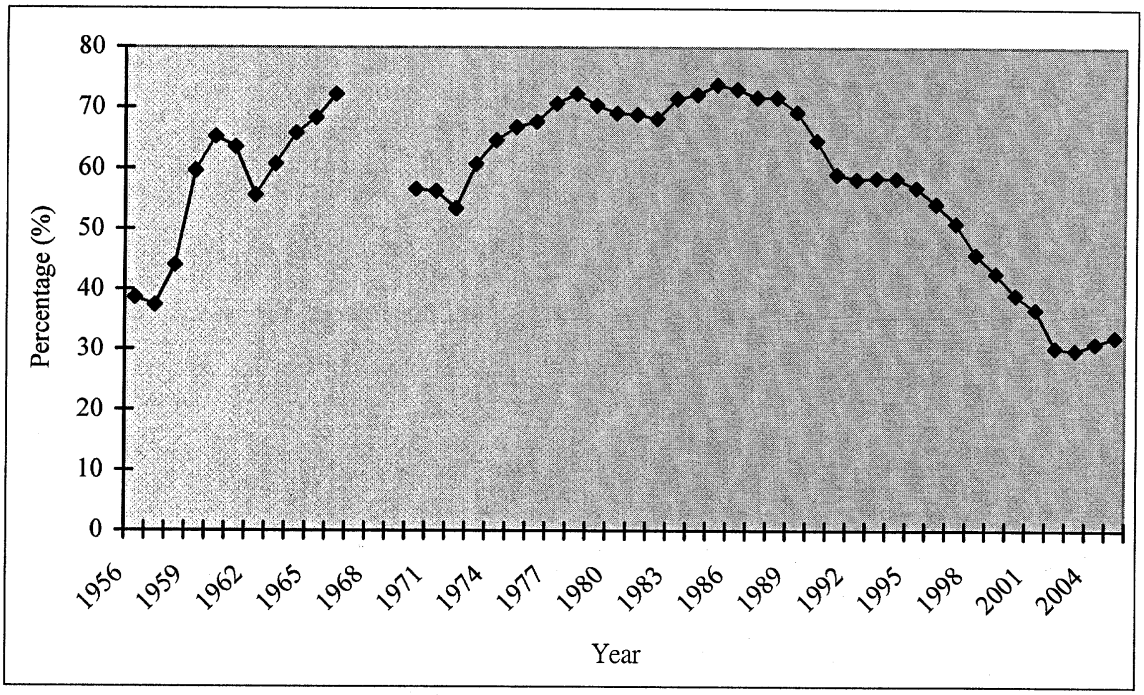
of judicial authority of a higher court, finality of a court decision is the ultimate test for judicial authority in the larger society. Chinese court decisions are notorious for their lack of finality and parties, through a variety of external institutions, may try to re-open cases that have become legally effective. The law provides little guidance — or restriction — on this practice.

The tug of war between the procuracy and the court on the supervision of civil trials has a long history. It was during the first term of Xiao Yang as the President of the SPC that the court gained the upper hand. Through a series of SPC replies to provincial high courts starting in 1999, the SPC gradually limited the legal authority of the procuracy in applying for adjudicative review of decided civil cases. This was done on a case-by-case basis and the accumulative effect was that, by 2005, adjudicative review through the procuracy was reduced substantially. In the mean time, the SPP gave in to the pressure of the SPC. The SPP standardized the internal adjudicative supervision procedure and limited the scope of adjudicative supervision over the courts. Between 1999 and 2005, first instance cases in courts decreased by 13.8 per cent, but adjudicative review, mostly applied for by the procuracy, decreased by 49.4 per cent. The judiciary becomes more effective and authoritative in the sense that it becomes much more difficult for outside institutions to supervise the courts and there is less access to courts once a decision is made and an appeal is heard.

Under the combined "assault" of judicial professionalism, procedural justice reform, and the introduction of adversarial proceedings, mediated cases declined steadily from mid 1980s to mid 2000s (Chart 5). The procedural reforms and the

new efforts to enhance procedural justice and efficiency have rendered mediation much less likely to occur in civil disputes.

Chart 5: Percentage of Civil Cases Concluded by Mediation (1956-2005)[79]



The decline occurred in courts across China. The decline was sharper in city courts than in county courts. The decline started in 1982 and continued steadily. Before 1996, the number of mediated cases increased although their percentage declined. After 1997, mediated cased dropped in both actual numbers and in percentage terms.[80] In Guangdong courts for example, mediation rate declined from 67.7 per cent in 1989 to 23.6 per cent in 2001.[81] In 2001, the mediation rate was as low as twelve per cent in courts in Shenzhen,[82] and in one of its District Court, mediation rate slummed to a mere eight per cent.[83] This steady decline and low rate

79 For figures between 1956 and 1998, see CIVIL STATISTICS, *supra* note 3; for figures between 1999 and 2005, see CHINA LAW YEARBOOK (2000-2006), *supra* note 3. Statistics was not available in late 1960s.

80 HUANG, *supra* note 1, at 25.

81 Ji Yuan, *Research on Mediation in the Judicial Process*, in DENG ed., *supra* note 35, at 43.

82 Wang, *supra* note 35. Mediation rate for civil cases at the appellant court fell to 2%. See also, *id.*

83 Zhu Zhu, *Restructuring Mediation*, in DENG ed., *supra* note 35, at 91. Among 6,577 civil cases decided in Futian District Court, only 578 were resolved through mediation.

of mediation were common among urban courts, especially the courts in major coastal cities. On the other hand, mediation remained relatively high in county courts and courts in small cities, even though a decline was also visible.

5. Disputes, Stability and the Politicization of Courts

5.1. Judicial Effectiveness

Civil justice reform has been self-contained in the sense that its impact has been felt mainly within the courts and among the judges. It does not affect any other key, powerful state institutions. Indeed, some watched judicial reform with admiration, but more with amazement and amusement. As long as the CCP remained largely uninterested in civil cases, courts achieved autonomy by default and reform continued. But the CCP's lack of interest in civil justice reform is a result of the perceived triviality of case matters. Once civil cases move from the periphery to the center, one can expect the CCP to take serious notice.

The CCP started to pay attention to civil cases in the early 2000s. The CCP became increasingly alarmed not just by the significant increase in the civil justice cases in dispute but by the public manifestation of discontent and the persistent and confrontational approach adopted by disputants. The number of citizen petitions has been huge in China[84] but what attracted the attention of central leaders was the sudden surge of petitions to central authorities in Beijing in the earlier 2000s. In 2003, the number of petitioners to the State Administration of Petitions rose 29.9 per cent

84 The number has been on steady rise from 1993. *Bureau Chief of the State Petition Bureau: 80% of the Petition Have Grounds,* BANYUE TAN [HALF-MONTHLY TALK], Nov, 20, 2003 [hereafter BANYUE TAN].

over the figure for 2002, and there was a 94.9 per cent increase in the first three quarters of 2004. Yu Jiangrong has argued that petitioners have lost faith in provincial and sub-provincial authorities and were bringing their frustrations directly to Beijing. The failure to satisfy the demand of petitioners was diminishing the credibility of central authorities. As a result, petitioners were becoming radicalized and seeking remedies outside the political system.[85]

What relevance does this alarm have to court and court-mediation? Courts are directly blamed for this upsurge in petitions because a large proportion of the cases that were petitioned to central authorities were "law-related" (涉法). Among the 632 petitioners Yu Jiangrong interviewed, 401 (63.4 per cent) had first resorted to courts for legal solutions to their problems before petitioning to Beijing. In 172 cases (42.9 per cent) the courts declined to accept their cases; in 220 cases (54.9 per cent) courts adjudicated the cases but found against the petitioners; and in nine cases (2.2 per cent), the courts were unable to enforce judgments in favors of the petitioners. The petitioners brought their cases to central authorities because of alleged judicial corruption.[86] Yu's research has been supported by official estimate. The Petitions Bureau of the NPC Standing Committee estimated that about 40 per cent of the petitions were against decisions made in the legal system, including the courts, that were perceived to be unfair. The Bureau further asserted that 80 per cent of the

85 Yu Jianrong, *The Defects of the Petition System and Its Political Consequence: Investigation on the Reform of Petition System,* available at HUAYANG SIFA ZAIXIAN [HUAYANG JUDICIARY ONLINE], <http://www.hy148.com/Article_Show.asp?ArticleID=398> (Visited on Sept. 15, 2007).

86 *Id.* There are no consistent figures on the percentage of law-related petitions, however. It is generally stated that law-related petitions are more than 40 percent of the total petitions. See Li Changfeng, *Exploration of Petitions by Peasants in the Transition Period*, 20(2) SHEKE ZONGHENG [Social Sciences Review] 48 (2005).

petitions were well-grounded.[87]

These complaints are being lodged in relation to matters where the judiciary has or should have rendered an "effective" resolution on the matter, bringing the contention to an end. Finality has not been achieved in many cases, however. Parties to disputes practice forum-shopping and the court of law is just one forum. Litigants, dissatisfied with a court decision, continue to petition political institutions and higher-level institutions. Ultimately, all the anger and frustration centers on Beijing. For the CCP, the courts have not only failed to end many disputes, the courts have actually aggravated the problem because of bureaucratic case handling, overcharged court fees, and real or perceived corruption. There is also the problem of enhanced expectations. Reform of court procedures, judicial formality and the rhetoric of fairness may have amplified the expectations of consumers who become more disappointed and frustrated when expectations do not comport with the results.

More important than the court's reputation as ineffective or the wasted judicial resources resulting from repeated petitions, as the judiciary is ready to concede, is the failure of courts to make positive contributions to maintaining social stability by containing disputes (and by establishing and maintaining public sphere, law-based social contract norms). The CCP's primary strategy of social control is to impose responsibilities on an institution or a level of government to prevent disputes from occurring or ending them when and where they occur. While this demand may be simply unrealistic, given the steadily increasing number of civil court cases, the courts,

87 China Experiencing the Petition Tidal Wave in 2003.

in the eyes of the CCP, have failed to fulfill an essential political duty because of their professionalization and reform.

In modern Western judicial systems, it is clear that the responsibility — and impact — of the work of courts extends well beyond the court door. The strict legal position is, however, that the courts just need to solve the dispute in hand. Powerful, organic norm-setting unfolds over time, of course. But this role is not articulated as a direct and immediate public responsibility of the courts. For the CCP, however, this role is crucial in the sense that the courts must be a major contributor towards maintaining broad social order. It is a task which courts cannot "wash their hands" of.

The simple, and often misleading, question is: why was it that civil justice in China, which was once able to perform the dispute settlement function to the satisfaction of both the parties and the CCP, no longer able to do so? Many critics blamed court reform and particularly the increasingly reliance on adjudication as the principal method of dispute resolution. The *ideal models* of mediation and adjudication work differently. In mediation, judges play an active role in persuading parties to compromise and settle. This process, as described earlier, was often painstaking, long and demanding. At the end, according to CCP's experiences and expectation, judges should be able to persuade parties to accept a compromise (or impose one) and, happily or reluctantly, the parties would agree to put an end of the dispute. Since most cases were settled, few cases were appealed to a higher court and even fewer would eventually migrate from the judicial system into the political sphere.

But adjudication, in the way it has been implemented in China, represented a drastic change. Judges were required to act as a neutral third party applying laws in an impartial and fair manner to the dispute before them. An unbiased judge listens to evidence as produced by parties and rules according to what he or she deems to be the proper law. There is no *ex parte* contact, no persuasion. The courts did not build (possibly were unable to build) a "basis" of strongly reasoned, norm reinforcing decisions covering the vast array of different types of civil disputes arising. Parties, mostly *pro se*, are expected to understand the judgments, accept the results and get on with their life.

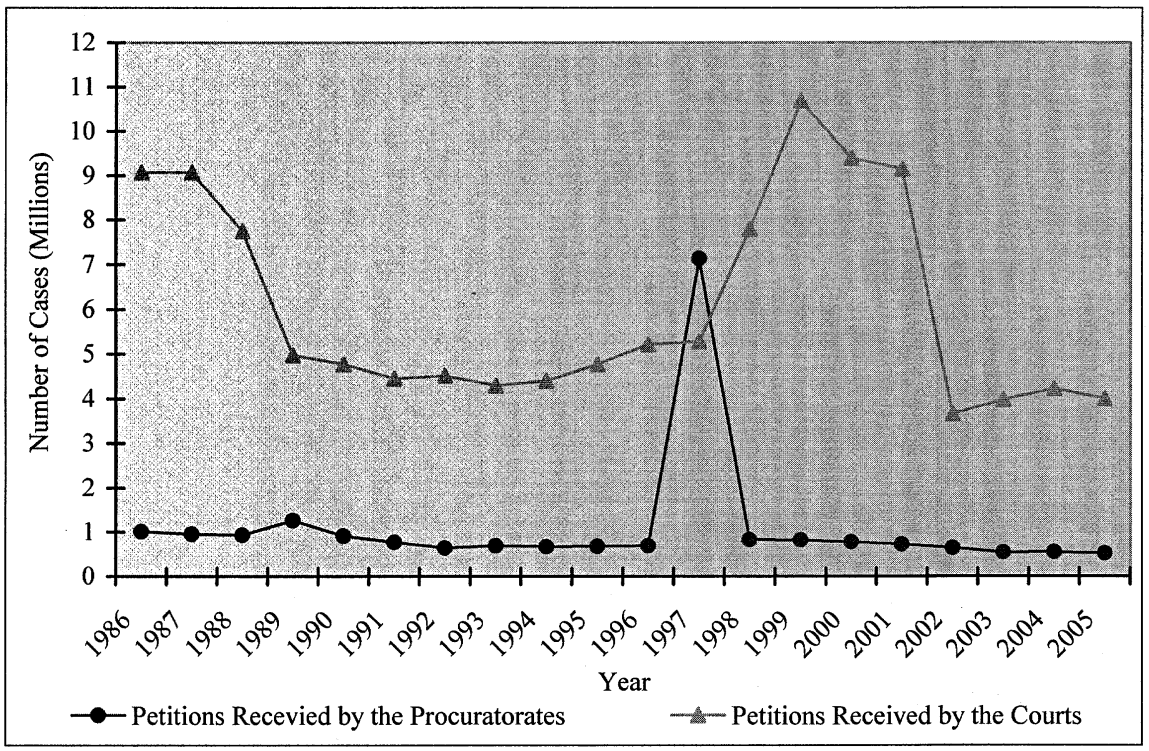
Critics of civil justice reform pointed out, things did not happen as judges or court reformers expected. Formalized procedures and courtroom formality failed to enhance the legitimacy or the validity of court decisions. Parties refused to end their disputes when the judges wanted them to end. Law, as found and applied by judges, did not have sufficient persuasive power over a sizable numbers of the parties who largely felt both unbound by, and dissatisfied with court decisions. The new judicial process confronted an early and growing legitimacy crisis, in other words.

Facing an increase in cases in which parties refuse to accept the finality of court decisions, critics of judicial reform, including many in the CCP/government blamed the reform-minded judges who allegedly displayed an excess of loyalty to law and not enough loyalty to the Party and the communal task of maintaining social stability. Judges, it is said, blindly followed the law without considering the social context of the cases and political consequences.

Further empirical studies are needed, but questions can be raised to challenge this conventional thinking. First, there seems to be no evidence to support the argument that there was an extraordinary increase in petition in China in 2002-2003, which caused the panic and the halting of part of the reform process. Statistics from the SPC and SPP indicate that petitions to these two popular channels actually declined at that particular period of time (Chart 6). A more feasible explanation could be that it was the decline of petitions in provinces that caused the rise of petitions to Beijing.

Chart 6: Number of Letters and Petitions

Received by the Courts and Procuratorates in China (1986-2005)[88]



88 For the courts' figures: For figures between 1986 and 1998, see CIVIL STATISTICS, *supra* note 3; for figures between 1999 and 2005, see CHINA LAW YEARBOOK (2000-2006), *supra* note 3. For the procuratorates' figures, see CHINA LAW YEARBOOK (1987-2006), *supra* note 3.

Indeed, according to Yu Jianrong, citing figures from the State Administration of Petitions, petitions to provincial and city authorities increased by 0.1 per cent and 0.3 per cent in 2003 respectively. Petitions to county level authorities actually declined by 2.4 per cent.[89] What happened was a surge of petition to central authorities in Beijing. In 2003, petitions to the State Administration of Petitions increased by 14 per cent (after more than years of continuous growth) and petitions to central authorities in general increased by 46 per cent. There was a near 100 per cent increase in the first quarter of 2004.[90] Whatever caused the increase of petition to central authorities in Beijing,[91] it seems clear that petitioning was not out of control in 2003 and there was no across-the-board increase throughout the country.

Second, most of the post-court petition cases originated in rural areas and concerned the rights and interests of peasants.[92] If the rise of petitions is a result of ineffective courts, it looks to be ineffective rural courts that are the cause. Judicial reform is much less visible and successful in county rural courts which are weaker institutionally. County judges are less professional and are legally less qualified. In general, county courts have not been much affected by the reform to professionalize and formalize civil justice. In any event, the number of mediation cases in county courts has been higher than that in city courts. This seems that it is not adjudication

89 Yu Jianrong, *A Critique of China's Petition System*, available at HUAYANG SIFA ZAIXIAN [HUAYANG JUDICIARY ONLINE], <http://www.hy148.com/Article_Show.asp?ArticleID=401> (Visited on Sept. 15, 2007).

90 *Id.*

91 Theories attempting to explain the slewed increase include the shift of political trust to central authorities; suppression of petition during the period of SARS; and the people-based policies of new Hu-Wen government, which were appealing to the vulnerable groups.

92 Yu, *supra* note 85; Li, *supra* note 86; Zheng Weidong, *The Petitions System and the Expression of Peasants' Interest*, 33(5) SHANGXI SHIDA XUEBAO [JOURNAL OF SHANXI NORMAL UNIVERSITY] (SOCIAL SCIENCE EDITION) 10 (2006).

that is causing the extra-judicial petitions. City courts, which rely more heavily on adjudication, have fewer petitions to extra-judicial organs. It is the county courts that have generated most of the petitions.

There was a concerted effort by the SPC to reduce the role of mediation in civil justice. This is a process originated in the SPC and gradually pushed downward, from higher level courts towards lower level courts and from city courts towards county courts. Whether the reform programs, as described above, can be successfully implemented depends on: the capacity of local courts to support the adjudicatory/adversarial style of process; judges who understand the rules of evidence; financial resources to build court rooms to carry out trials; and a functioning support structure for a more adversarial process. County courts lack all of the above. Equally important, the feasibility of the programs also depends on the capacity of litigants. To professionalize civil justice imposes major burdens on litigants. Unfortunately, reformers often take it for granted that litigants are able to develop the capacity to comply with these legal requirements absent of legal representation. To shift the burden to litigants would demand not only a certain degree of literacy but also a basic understanding of civil justice process, an insurmountable barrier for the vast majority of citizens in either mature or emerging legal systems. Assistance of legal professions becomes indispensable. But while lawyers abound in cities, they are conspicuous by their shortage and even absence in rural areas. It is only natural that judicial reform started and was better developed in city courts. Unfortunately, it arrived in city courts but then rarely migrated to places outside of cities.

The root of the problem is not too much procedural reform and judicial professionalism, but not enough reform. The most immediate cause of this is the failure of the SPC to continue to push through the reform to the full extent needed. This has helped create the social problems for which the court reform is blamed.

The lack of capacity of Chinese courts needs to be assessed within the context of China's economic transition. Most of petition cases tend to be cases that can be regarded as sensitive and politically important. Both official and academic reports point out that petitions mostly involved disputes closely relate to China's economic transitions from a planned economy to a (socialist) market economy. These are special categories of cases that may not be suitable for judicial solution in the Chinese context or elsewhere.[93] As Peerenboom has forcefully argued these problems are associated with growing pains of economic transition and "are not amenable to judicial solution – courts simply cannot come up with effective and enforceable remedies." [94]

Ultimately, however, the CCP has itself to blame for the court's lack of success and a capacity to develop legitimacy and efficiency. Courts are normally deprived of the power to make rulings on issues that generate petitions. In those cases, the local CCP committee or government makes decisions which bind the courts. The solution

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93 According to the Director of the State Administration of Petitions, Zhou Zhanshun, petitioners mainly complain on the following eight issues: 1) SOE restructuring and related labor and social security issues; 2) issues relating to agricultural taxes and fees and other issues relating to village election and governance; 3) issues relating to court decisions; 4) land appropriation in cities and towns; 5) corruption; 6) issues relating to restructuring of local government departments; 7) environmental issues; and 8) issues relating to benefits of demobilized soldiers. See BANYUE TAN, *supra* note 84. The issues that petitioners brought to Beijing in Yu Jianrong's study related to: 1) corruption; 2) government punishing petitioners; 3) burdens on peasants; 4) manipulation of village election; and 5) land appropriation. Yu, *supra* note 85.

94 Randall Peerenboom, *More Law, Less Courts: Legalized Governance, Judicialization and Retrenchment in China.*

to the issue of petitions is likely not more political interference in judicial work, but more serious ongoing support for judicial professionalism, independence and power.

5.2. Judicial Responsiveness

The experiences of the recent attempt at judicial reform of civil justice system demonstrate that judicial reform is not feasible when it takes place only within the judiciary. It also requires key external support mechanisms. The courts, because of the new formalism and procedural complexity, have, it is true, become increasingly bureaucratic, distancing themselves from the public. Judicial trappings make the judiciary less responsive to social needs. A direct concern relates to the developing evidential rule in civil procedure and the burdens that are placed on parties. The new evidence rules necessitate a passive judiciary. For reformers, the very passivity is the symbol of judicial rationality and professionalism. But for critics, passiveness indicates judicial bureaucracy, insensitivity, unresponsiveness and even arrogance. It has been rightly pointed out that the judiciary has a vested interest in shifting the burden of proof to parties. Judges prefer the newly developed "adversarial system" simply because judges no longer need to perform due diligence work associated with the pre-trial investigation and/or the tedious mediations.

The shift in the burden of proof needs to be studied in the context of the developing judicial professionalism and rule-oriented judging in China. Legal thinking is specialized and, in applying laws in adjudication, lawyers, including judges, need to organize the chaotic factual situations and put them into neatly

categorized legal boxes, separating them from the political and social contexts. Judges are becoming more responsive to law and their own bureaucratic interest, and less to the social needs of the parties. China is developing specialist legal knowledge and procedures; lawyers and judges are developing a monopoly over this knowledge and tend to use their knowledge to legitimize their power and generate respect and consent (and wealth). This specialist legal knowledge has yet to establish its authority and legitimacy over political demands and social morality; however. That process has begun but progress is unsteady.

Legal reasoning in litigation is also narrow compared with political and moral persuasion. In mediation, judges examine a dispute in a much wider context and situate disputants in broader social relations. Judges consider the case in its totality, taking into account legal and extra-legal considerations. Mediation tackles a dispute and may also tackle the cause of the dispute. Litigation, on the other hand, is expected to be largely rule-based dispute resolution which distinguishes legal considerations from political and social ones. It is a less useful tool in solving conflict embedded deeply in certain particular social settings and social relations.

The main criticisms against judicial reform are aimed not at professionalism or the bureaucratization but at the reform's social impact (or the lack of it). Judges become elitists and courts lose their skill (and former responsibility) to maintain a touch on the pulse of society. They are no longer focused on responding to societal needs. The bureaucratization, and the resulting elitist way of judging, has driven many cases away from courts. Worse, these disputes have been, thus, separated from access

to legal remedies, which could play a real role in alleviating mounting social problems. Too many cases that have entered the judicial process are not solved in a meaningful manner. Judges may write longer and better legally qualified decisions, but they are doing less in understanding the disputes and in helping disputants to resolve their problems. Judgments may contain more legal reasons and legal reasoning in an effort to provide legal justification, but they have little persuasive authority over the parties involved. Hence, the legitimacy problem persists.

The shift to adversarial civil justice represents an especially serious challenge in a country with an underdeveloped legal profession and a poor legal aid system, where most litigants are unrepresented in litigation. Civil justice in any mature legal system would collapse without the support of a strong, professionalized legal profession. Lawyers are effective in a strong system in reaching settlements for their clients and they also serve as a buffer zone between the court and the parties, absorbing most of the tenses that are bound to happen in a contentious legal process.

6. Conclusion

A key purpose of this paper has been to summarize the history of the operation of the civil justice system in the PRC. We can learn quite a lot about the difficulties of achieving legal reform in China from such a study. We can also build a better understanding of some of the many factors shaping all attempts at legal reform in the PRC.

Historically, the civil justice system has been regarded by the CCP as being of

comparatively minor political importance. Even during the Mao-era, civil justice was seen as a zone where ordinary citizen-citizen, civil disputes were mediated. "Class-enemies" were effectively quarantined from the system. Class enemies were of the utmost political importance and, under Mao's "two contradictions theory", they were singled out for attention by the criminal law regime.

An important consequence was that the civil justice system was left to operate within it is own "paddock" as it were, with minimal interference from party and government cadres and officials. It was here that a limited form of "civil society" could operate within the oppressively, micro-managed Maoist state.

The post-Mao era quickly witnessed the beginnings of a huge transformation across much of China. This really began with economic transformation. But social transformation, with the unraveling of much of the micro-meddling apparatus of the State, also soon commenced. Notwithstanding all this change, the One Party State (OPS) has remained the central political fact of life in the PRC. But the OPS, too, has changed hugely. In particular, it has sort to "privatize" much of its regulatory role by putting in place a widening selection of means to maintain social (and political) stability. For example, the media in the PRC, despite all the deadening controls, is now massively larger than before and is fundamentally commercial. The media's investigative role has also grown commensurately.

Another crucial development of the post-Mao era was the prioritizing of "law" and the "rule by law" by the CCP. On one point there was near universal consensus: all measures (consistent with maintaining the OPS) must be considered to ensure that

never again would China be convulsed by the political-social-economic madness that epitomized the Cultural Revolution at its worst. It was not surprising, then, to see the early re-opening of law schools as the "open door" era commenced. New graduates emerged, determined to do what they could to reshape the PRC – the watchword now was modernization, not revolution. Many graduates went into the traditional Mao-designed judiciary. Numbers of others went back to the academy to start yet more law schools and to re-staff existing law schools.

These lawyers and lawyer-scholars discovered the civil justice "paddock" – and began to see, over time, its rather remarkable possibilities. Here was a very large zone of the legal realm were CCP influence was limited. Moreover, as the OPS came less and less to dominate all life, its funding resources (and hence its micro-meddling capacity) shrank. The seeds were now planted for a major new experiment to commence in the operation of China's civil justice system.

The initial process of reform saw a serious challenge launched against the fundamental mediatory role of the Mao-era, civil justice system. During that period, the crucial task of the system was to resolve citizen-citizen disputes and maintain stability. The open door era witnessed the rise of an increasing number of civil law disputes which were much more commercial in nature, however. Previously almost all disputes were within largely discreet communities – the parties knew each other. Now strangers were in dispute and the issues were more complex. The new judging fraternity and their academic colleagues began to articulate the serious limitations of the mediatory system convincingly.

Thus began what might be regarded as the first phase of civil PRC justice reform. The old system, it was said, was time consuming, especially vulnerable to process-corruption and, worst of all, it was unable to develop and lay down clear legal norms to guide the building of a Chinese rule of law system. This latter fault arose from the reality that mediation generated context-based individual settlements where getting the parties to agree always trumped any quest to identify the "right and wrong" legal position of each party. Various key leaders in and opinion shapers of the SPC became convinced of the serious drawbacks of the dominance of mediation within the civil justice system.

The initial reform groundwork began as early as 1979. Next came the SPC drafted, new Civil Procedure Laws in 1982, 1988 and 1991. A major move to adjudicatory justice was the hallmark of these reforms. Civil justice courts were to become more professional and more formal. Consistent, detailed legal procedures were to become, over time, the crucial operating norm for courts. The old inquisitorial role of judges under the mediatory system had to go. Now the parties were to take over responsibility for gathering and presenting evidence. Judges would evaluate the evidence (not excluded by the new rules) and apply the law and pronounce an explained verdict. Consistent rules of procedure and the consistent application of the law would, it was argued, help build a body of legal-norms which would, in turn, enter the social landscape to guide a gradual but major enhancement of (modern) citizen and community self-regulation. New foundations for social stability would be crafted. Foundations which could, better still, be constantly maintained and enhanced

by the ongoing operation of the reformed civil justice system. The vision was to create a sound, modern private law system which would help to boost the credibility of the public law system. This, the advocates, saw, was a significant explanation of the way the most effective rule of law systems worked in the developed West.

With the elevation of Xiao Yang to head the SPC in 1998, what might be termed the second phase of civil justice reform commenced. This second phase stuck with the reform-priorities already established whilst re-energizing the reform process. Courts in urban centres and especially in the primary coastal cities embraced the reform agenda with renewed force.

One can see; now, however, that the reformers had, by this stage, made the entire reform process, a hostage to fortune. The rhetoric of reform raised expectations of real benefits amongst almost all stakeholders. Litigants were meant to enjoy fairer dispute outcomes, society was to profit from the growing creation of positive, behaviour regulating legal norms and the CCP was to benefit from enhanced stability – and, ultimately, legitimacy.

By this time, too, highly bureaucratic system-accountability mechanisms had been established. These demanded of the civil justice systems that virtually all disputes be adjudicated within three months and that all cases be completed by the end of each calendar year. A close eye was kept, as well, on how many first instance decisions were reversed on appeal. These "quality control" measures drew on the deep tradition and habits of the pre-market economy, centralized state. They did little to build enhanced performance into the system but they did help to distort the autonomy

and judicial soundness of the operating structure.

Making matters still more problematic was the substantial growth in the causes of civil disputation. As the OPS grew massively, corruption, environmental degradation, iniquitous land confiscations, consumer goods abuses and labour disputes, for example, all tracked this overall growth pattern.

Losing litigants within the reformed system frequently felt far from pleased. Forum shopping grew apace. But it probably grew even more from out of the vastness of rural China where disputes were many and increasing and the mediatory justice system was still dominant. In any event, the result was, from the central CCP point of a view, a perceived major growth in complaints to the Beijing.

The analysis which seemed, more and more to appeal to critics of the reforms was that civil justice reform had coincided with growing, increasingly noisy social grumbling which was frequently spilling over into mass street protests. It followed, thus, that civil justice reform, rather than being part of the solution was part of the problem. Civil justice system disputants just kept disputing. CCP detractors hankered after a lost "golden age" when mediatory justice provided contextual settlements which notably helped maintain stability amongst the masses.

"Back to the future" seemed to be the answer. By 2006, the SPC had openly conceded the failure of part of the judicial reform program. The SPC issued a series of judicial interpretations to steer the judiciary back towards settlement of disputes through court-mediation. This policy change encouraged local courts to revise their incentive mechanisms. Judges were rewarded for privileging mediation in resolving

disputes. Judges and legal scholars began rediscovering the virtues of court-mediation.

In fact, the responsibility for the faltering and uneven outcome of this long-term massive attempt at civil justice reform in the PRC is widespread, the detractors simplistic analysis, notwithstanding. It does seem clear that the reformers were over-reaching in their claims that civil justice reforms could open the door to some sort of fast-track implementation of the rule of law in China. The CCP and various levels of government, meanwhile, failed to support reform consistently and substantially. They also were strangely willing to see civil justice reform as some kind of dark-hand driver of growing social discontent. This was rather like blaming inadequate new levees for flood damage whilst ignoring evidence of record river levels.

Both sides had failed to take sufficient notice of two key factors underpinning the successful operation of civil justice systems in the developed West: (A) a well dispersed, well trained private legal profession; and (B) adequate systems of legal aid or private litigation funding. Factor B remains a fraction of what is needed in the PRC. Factor A is notably improving – but from a very low base. And both factors A and B are most badly covered in rural China.

What are some of the important lessons which can be taken from the post-Mao, civil justice reform project in China? And how can this understanding be applied to ensure greater long term traction for any next phase of reforms? We fully recognize that providing a complete response to these questions requires further research and a

separate article. Some preliminary points can be made now, however.

One basic insight of the reformers remains as sound as ever: China must build, over time, a better, more modern and fair civil justice system if it is ever to create any sort of enduring rule of law system.[95] In the West, the crucial way in which the operative civil justice system is fundamental to the maintenance of the public law system is often taken for granted. Yet any basic examination of those developed systems reveals this verity. Next, there is no handy short cut to a Chinese envisaged, rule of law system in civil law. In particular, basic building blocks, like a much enhanced legal aid regime and continuing greater dispersal of legal expertise are needed for the long term process of phase three civil justice reform.

Finally, the next phase of reform will have to draw on greater political will than hitherto. The CCP has "fostered" civil justice reform thus far by allowing it more than by actively promoting it. It is very difficult to imagine real progress being made – progress which could build on the partial gains to date – unless the CCP commits itself to supporting further civil justice reform, consistently and substantially. This is a "big ask". Yet it is this reform zone where serious long-term efforts are likely to contribute significantly to the building of the "harmonious society" which is now a central anchor of CCP policy. The potential of greater success in civil justice reform to enhance the capacity of the CCP to manage the vast OPS which it oversees, remains as striking as the task is daunting.

95 See RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARD RULE OF LAW (2002).