An uphill battle

How China's obsession with social stability is blocking judicial reform

BY PETER C.H. CHAN

During the past three years, China has proclaimed a judicial reform campaign that aims to follow the "rule by law" (yifa zhiguo) in civil dispute resolutions. In delivering the 2014 annual work report of the Supreme People's Court (SPC) to the National People's Congress on March 12, 2015, Zhou Qiang (president of the SPC) said, "2015 is a critical year for deepening the [judicial] reform in a comprehensive manner, it is a year to fully implement 'the rule by law'. . . . [We] endeavour to let the people feel that justice is done in every case." The adoption of "rule by law" principles would be particularly welcomed by international companies and likely would attract more companies to do business in China. But any real change in Chinese judicial practice and culture is unlikely. The Chinese judiciary has always been obsessed with the social effect of civil adjudication. One may attribute this to Wang Shengjun, president of the SPC[1] from 2008 to 2013, who turned Chinese courts into state-funded mediation centers designed to preserve a "harmonious society" (hexie shehui).

Wang Shengjun's departure and the ensuing reshuffling in the SPC's leadership did not in any significant way change the practice of civil-dispute resolution in China. Judges today still firmly believe that they have a clear mandate to resolve disputes in such a way that "the case is closed and the dispute is {truly} resolved" (*anjie shiliao*). The adjudicatory principle of *anjie shiliao* is a political concept, not a legal concept. Simply put, the successful disposition of a lawsuit is only accomplished under *anjie shiliao* if it is coupled with the eradication of social discontent with respect to matters arising from the dispute.

The Chinese judiciary as an institution is weak under the Chinese constitutional order. Article 128 of the Chinese Constitution reads, "The Supreme People's Court is responsible to the National People's Congress and its Standing Committee. Local people's courts at different levels are responsible to the organs of state power which created them." The president of the SPC is selected by the National People's Congress.[2] Presidents of all other courts at various levels are selected by the people's congresses at corresponding levels.[3] The direct subordination of the judiciary to the legislature means that there can be no real judicial independence in China unless the constitutional structure is modified — which is unlikely because Chinese constitutional theory specifically rejects the concept of separation of power.[4] While the legislature has *de jure* control

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over the judiciary, real control over the courts is exercised by the administrative authorities that control court budgets.[5] Mo Zhang observed that this fiscal link between the local administration and the courts has entrenched local protectionism in civil adjudication.[6] This situation is changing, however; recent judicial reform assigns fiscal decision-making authority for intermediate and basic-level courts to their respective provincial high court.[7]

The individual Chinese judge also is institutionally weak. There are certain features of the Chinese court system that tend to weaken the adjudicatory autonomy of the individual judge (such as the predominant role of the adjudicative committee in the court).[8] External interference with the adjudicatory process is the norm, rather than the exception.[9] Yaxin Wang has warned that the "bureaucratization of the court" severely hinders the development of adjudicatory autonomy in China. Under this bureaucratic culture, the collective decision of the court organization trumps the decision of the individual judge, even when the individual judge has superior knowledge and understanding of the case.[10]

The Chinese judiciary prizes discipline over the adjudicatory autonomy of the individual judge. Supervision by the court leadership and higher-level courts forms the fabric of the Chinese adjudicatory system. The institutional weakness of the individual judge is further exacerbated by the fact that the Chinese judiciary is not independent. According to Benjamin L. Liebman, while reforms in the past have, to a certain extent, helped transform the court from a mere instrument of the ruling elite to a public service that seeks to resolve civil disputes effectively, political forces still shape the appointment of the court leadership, the adjudication of politically sensitive civil lawsuits, and other key areas of judicial practice.[11]

Under the current SPC leadership, the judiciary's role remains politicized. The court's continuing main objective is to "maintain (social) stability" (*weiwen*) and prevent cases from evolving into "disputes involving the masses," or literally "mass events" (*qunzhong shijian*). So while the populist policies implemented by Wang Shengjun have technically lapsed, the current system still requires judges to perform the political function of maintaining social stability. This article seeks to explain this phenomenon from a proceduralist perspective by analyzing the trial management system in the context of Chinese civil dispute resolution. Reference is specifically made to the judicial preference for court mediation (over adjudication) as an illustration of the trial management system's effect on civil justice in China.

In China, the concept of "trial management" (also known as "judicature management") (*shenpan guanli*) is categorically different from the Western concept of "case management." Apart from considering the efficiency of handling cases, the concept of "trial management" embraces the administrative functions of managing the court institution, the individual judge's conduct (including disciplinary matters), and the implementation of policy objectives in civil adjudication (e.g., the policy objective of preferring mediation to adjudication). According to Yulin Fu and Zhixun Cao, from the Chinese legal perspective, the court's main function is dispute resolution.[12] The Chinese contemporary concept of "dispute resolution" is about the pursuit of a state where "the case is closed and the dispute is [truly] resolved" (*anjie shiliao*). *Anjie shiliao* is not a purely procedural concept but rather a socio-legal phenomenon. Trial management measures the procedural efficacy and social impact of court work by meticulously collecting and analyzing data on case processing. Among other benchmarks, trial management takes indices such as "mediation settlement rate," "withdrawal rate," "actual enforcement rate," and "the rate of reversal and new trial by remittal of first-instance decisions (decisions in error)" into account in the assessment of judicial merit. These benchmarks feature in a scoring matrix that is applied to evaluate a judge's performance by measuring the level of fairness (*gongzheng zhibiao*), efficiency (*xiaolü zhibiao*), and effectiveness (*xiaoguo zhibiao*) in the handling of cases by the court under review. Some academics in Mainland China, such as Yanmin Cai, have questioned the appropriateness of using indices like "mediation settlement rate" as points of reference for the evaluation of judicial work, because overemphasizing settlement rates may result in the proliferation of abusive practices in court mediation.[13]

This article surveys the key policy principles underlying China's civil trial management system by examining the overarching SPC interpretation of the so-called "Case Quality Evaluation" and the actual operation of the system. The article also contains the views of judges from both intermediate and basic-level courts that tend to validate the basic argument advanced in this article: that trial management promotes a mass case-processing system designed predominantly to alleviate social discontent in line with the prevailing political goal of maintaining public order and social stability (*weiwen*).

THE CORRELATION BETWEEN TRIAL MANAGEMENT AND CIVIL JUSTICE

The trial management system regulates procedural matters in litigation and manages the ever-increasing caseload of Chinese courts. While effective as a case-processing mechanism, it serves predominantly institutional goals. Fairness in the individual case becomes secondary when the institutional needs become pressing (e.g. the need to clear backlogs). This has far-reaching ramifications for the administration of justice in China. The problem is further complicated by the rigid and artificial criteria for evaluating "case quality" under the system.

The specific criteria for assessing a judge's performance (*faguan kaohe*) vary

from court to court. However, some common criteria are ascertainable. The promotion of court settlement through mediation is one of them.

In 2011, the SPC issued an opinion to provide guidance on trial management: the *Supreme People's Court's Several Opinions on Strengthening Trial Management Work in the People's Courts* (SPC Trial Management Opinion).[14] The opinion sets out a high-level framework for trial management:

- *Functional scope of trial management*: The scope of trial management is extremely wide, encompassing the evaluation of "case quality," promoting effectiveness and efficiency of litigation, and managing processes and workflow of the court.[15] Trial management covers all procedural stages of the civil process.[16]

- *Functional position of the Trial Management Office*: The Trial Management Office is a "conduit" between the Adjudicative Committee (*shenpan weiyuanhui*)[17] and different departments and divisions of the court.[18] The Trial Management Office advises the Adjudicative Committee on all matters relating to trial management and supervises the day-to-day management of court processes and workflow on behalf of the Adjudicative Committee.[19]

- *Basic objectives of trial management*: achieving *anjie shiliao* (i.e., "the case is closed and the dispute is [truly] resolved"). The "social effect" in a judgment is all-important from a trial management perspective. Higher courts have the mandate to supervise lower courts in trial management.[20]

With the institutional and political backdrop of trial management in mind, it is not difficult to understand the judiciary's tolerance of abusive practices in court mediation. Coercive mediation tactics are seen as a necessary evil in the routine disposal of cases.

From a procedural perspective, mediation occupies a unique position in any civil justice system in that it (if appropriately deployed) provides an alternative to litigation while preserving the parties' right of access to court. The procedural nature and function of mediation changes if policy is allowed to dictate the mediation process, especially when such policy contravenes the law. This is exactly what happened in China under Wang Shengjun's presidency. Mediation, in particular court mediation, became a policy tool to further the ruling objective of maintaining social harmony, sometimes at the expense of procedural justice. From a socio-legal perspective, a broader issue needs to be considered: Are the ruling elites in China still using courts as a medium to secure dominance, rather than respecting the judicial process (whether adjudication, court mediation, or court-annexed mediation) as a uniquely important domain in its constitutional matrix that is best left to do its business alone without external interference? This question is particularly relevant to an international audience that seeks to understand what China is doing in its new wave of judicial reform that allegedly aims to follow "the rule by law" (*yifa zhiguo).*

HOW THE TRIAL MANAGEMENT SYSTEM WORKS

The promulgation of the *Supreme People's Court Guidance Opinion Relating to the Commencement of the Work on Case Quality Evaluation* (2011 SPC Case Quality Opinion)[21] was a landmark development in trial management.[22] The opinion lays out a structure by which case quality and judicial efficacy may be measured. Its four themes are: (1) unifying standards in the Case Quality Evaluation system with the view to promote efficiency and fairness in litigation; (2) constructing a sophisticated, "scientific," and systemic evaluative framework encompassing adjudication and nonadjudicatory matters (e.g., enforcement work and management of judicial personnel); (3) institutionalizing the Case Quality Evaluation system with clear delineation of the responsibilities of different divisions within the court, as well as clarifying the supervisory and evaluative powers of higher-level courts over lower courts in relation to case quality evaluation; and (4) improving data collection, analysis, and management, and establishing effective reporting channels on matters concerning case quality evaluation.

Courts are expected to operate in a way that satisfies the requirements under the Case Quality Evaluation system. The overall "score" determines how well a court has performed in a given evaluation cycle.

The Case Quality Evaluation system consists of three levels of evaluative indices: (1) the primary index, consisting of a single "Integrated Case Quality Index," which is the "overall score" of the court under evaluation; (2) the secondary indices, consisting of the "Fairness Index" (40 percent of the primary index), "Efficiency Index" (30 percent of the primary index) and "Effectiveness Index" (30 percent of the primary index); and (3) the tertiary indices, which are components of the secondary indices and consist of 31 separate indices, encompassing a wide range of matters, each with different weights.

Among the 31 tertiary indices, the following indices incentivize and *explicitly* encourage courts to facilitate settlements through court mediation or persuade the claimant to withdraw the claim:

- "Mediation settlement rate" (*tiaojie lü*) (Tertiary Index No. 23): This index, which constitutes 8 percent of the Efficiency Index (secondary index), encourages a court to settle a dispute through court mediation at all stages of proceedings (including appellate and re-adjudication stages).[23] The underlying principle is that a high mediation settlement rate reflects positively on the court's ability to resolve disputes while achieving a stabilizing "social effect" (*shehui xiaoguo*). In other words, scoring well in this index shows the court is able to maintain social stability within the community and avoid escalation in the form of citizen petitions.[24]

- "Withdrawal rate" (*chesu lü*) (Tertiary Index No. 24): This index, which constitutes 6 percent of the Efficiency Index (secondary index), is a catch-all parameter to measure the court's ability to resolve disputes through nonadjudicative means other than court mediation. A claimant may withdraw

the lawsuit of his own accord or does so after the court has invested time in "facilitating" a withdrawal. Similar to the mediation settlement rate, a high withdrawal rate reflects positively on the court's ability to resolve disputes with maximizing the "social effect" in mind.[25]

Among the tertiary indices, the following indices have the *direct* effect of encouraging courts to prefer mediation (instead of rendering judgments):

- "Rate of reversal and new trial by remittal of first-instance decisions (decisions in error)" (*yishen panjue anjian gaipan fahui chongshenlü (cuowu)*) (Tertiary Index No. 3): This index, which constitutes 19 percent of the Fairness Index (secondary index), penalizes courts for rendering erroneous first-instance decisions (including factual errors, errors in the application of law, and procedural errors). The index captures not only appellate reversals (and remittals) but also reversals (and remittals) resulting from procuratorial protests (*kangsu*).[26] This index greatly affects the way judges view the role of court mediation in civil litigation. Given the substantial weighting of this index, judges tend to favor mediation, because a mediated settlement cannot be appealed (and rarely becomes the subject of a procuratorial protest). This institutionalized incentive to avoid mistakes discourages courts to render judgments and unduly distorts the role and function of court mediation.[27]

- "Rate of reversal and new trial by remittal of effective decisions (second-instance decisions)" (*shengxiao anjian gaipan fahui chongshenlü*) (Tertiary Index No. 7): This index, which constitutes 21 percent of the Fairness Index (secondary index), penalizes courts for rendering erroneous second-instance decisions (including factual errors, errors in the application of law, and procedural errors).[28] Under the Chinese appellate system, a decision at second instance is final (*liangshen zhongshen zhi)* in the sense that it is nonappealable. However, a second-instance decision can be reopened for readjudication if an error is found under Article 200 of the Civil Procedure Law (under the adjudication supervision procedure). Similar to Tertiary Index No. 3, this index encourages judges to push for settlements, because if a case is settled, it is less likely that it will be reopened through the adjudication supervision procedure.[29]

- "Rate of application for leave to re-adjudicate" (*zaishen shencha lü*) (Tertiary Index No. 29): This index, which constitutes 10 percent of the Effectiveness Index (secondary index), captures the rate of applications for leave to re-adjudicate what are otherwise effective judgments and nonappealable mediation statements.[30] The relevance of this index as a factor for evaluating the quality of adjudication is questionable. The fact that a party applied for leave to re-adjudicate does not signify error in the judgment or adjudication process.[31] The risk that a party will file an application for leave to re-adjudicate discourages judges to adjudicate. This is particularly true when the rate of applications has no necessary link with the quality of justice delivered.

Among the tertiary indices, the following indices have an *indirect* effect of encouraging courts to prefer mediation (instead of rendering judgments):

- Tertiary Indices Nos. 13-16 and 18[32] (which constitute 48 percent of the Efficiency Index (secondary index)) concern the speediness of civil procedure. Judges cannot dispose cases within a rigid timeframe when the caseload is unreasonably high. But these indices are inflexible and do not take into account the real situation of individual courts, which pushes judges to resort to nonadjudicative means (such as court mediation) to close cases within the designated timeframes.[33]

- Tertiary Indices Nos. 10-21 (which constitute 34 percent of the Efficiency Index (secondary index)) concern the volume of cases disposed of within a given year. For instance, Tertiary Index No. 21 imposes a requirement on the court to ensure that the disposal of cases per judge remains high every year. In other words, it is not enough to have a high overall volume of disposal; the court leadership must also ensure that each judge meets (or beats) the expected case disposal volume every year. These indices encourage judges to resort to nonadjudicative means (such as mediation), especially in complex and difficult cases, as they are usually more effective in achieving case disposal targets.[34]

- Tertiary Index No. 17 (which constitutes 9 percent of the Efficiency Index (secondary index)) and Tertiary Index No. 25 (which constitutes 15 percent of the Effectiveness Index (secondary index)) concern the speediness and effectiveness of enforcement proceedings.[35] Tertiary Index No. 17, known as the "Average Enforcement Time Index," measures the efficiency of the court in enforcement. The index calculates the average speed of enforcement vis-à-vis the statutory time limit for enforcement. The intention of this index is to encourage courts to push for speedy enforcement and observe the statutory time limit for enforcement. Tertiary Index No. 25, known as the "Actual Enforcement Rate," calculates the proportion of "entirely enforced" (*zhixing wanbi*) judgments in the total number of court enforcement processes completed within a given year. The rationale behind this index is that the *completion* of the court enforcement process does not necessarily mean that a judgment is "entirely enforced." For instance, a judgment creditor may invoke court enforcement proceedings in connection with part of the judgment debt (Judgment Debt X), thinking that he is able to recover on his own the remaining part of the judgment debt (Judgment

Debt Y). But it turns out that while the court enforcement process was duly completed (i.e. Judgment Debt X being recovered), Judgment Debt Y remained outstanding. In this situation, the court enforcement process is "complete" but the judgment debt is not "entirely enforced."[36] The problem with pushing courts to deliver quantitative enforcement results is that the *quality* of justice can be jeopardized. The problem is further complicated by the fact that courts tend to resort to the "enforcement reconciliation procedure" to achieve a speedy enforcement.[37] Under the enforcement reconciliation procedure, when it becomes clear that it is not possible to enforce the judgment debt to its full extent, parties may agree to "settle" upon a payment of a fraction of the judgment debt. For example, a claimant was awarded two million RMB (Chinese Yuan) in damages in a simple breach of contract dispute. However, the defendant was unwilling to pay and the claimant brought enforcement proceedings to the court. Noting the difficulty to push the defendant to pay the damages in full, the court encouraged the claimant to negotiate with the defendant for a "settlement." The claimant, fearing that he may recover nothing if he insisted on enforcing the entire judgment debt, compromised in the negotiation and agreed to take one million RMB. The enforcement reconciliation procedure, while technically not court mediation, is conducted under the guidance of the enforcement judge. When the enforcement division of every court is busy chasing numbers to satisfy Tertiary Indices Nos. 17 and 25, the enforcement reconciliation procedure is likely to be abused. Judgment debtors can take advantage of the court's need to complete enforcement processes speedily by deliberately dragging their feet so that the court will pressure the judgment creditor to settle for a lesser sum.

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THE TRIAL MANAGEMENT OFFICE AND OPERATIONAL ASPECTS OF CIVIL TRIAL MANAGEMENT

The Trial Management Office (*shenpan guanli bangongshi)* (Office), a constituent unit of the court system, has the mandate to manage all aspects of adjudication in a court. It is accountable to the court president and the powerful court adjudicative committee and is responsible for managing court processes (i.e., the workflow manager), evaluating case quality, assessing overall effectiveness of the court's adjudication work, and assisting in the evaluation of the work of individual judges.[38] The Office, however, does not evaluate individual judges. It may issue guidelines on trial management but cannot sanction an individual judge directly for failure to comply with such guidelines. The Office works with the judges to prescribe the number of cases each judge should accept within a given period to maintain case-processing standards.

The Office is set up with a strong policy objective in mind — to use the court as an instrument for social control, consistent with the Case Quality Evaluation system. But meeting the system's indices can be overwhelming for a judge. It takes time away from his work as an adjudicator, and the rigidity of the indices sometimes hampers his ability to effectively handle his cases.[39] Some courts are compelled to offer inflated statistics in the Case Quality Evaluation exercise to survive.[40]Another interesting feature is that the Office is partially composed of bureaucrats with no legal experience.[41] This situation, which in many ways threatens judicial impartiality, is consistent with the prevailing understanding that courts are part of the Chinese bureaucracy, rather than an autonomous organ. Like any other state machinery in China, courts are managed in a "scientific" and quantitative way. This practice goes against the international community's commonly held view that the judiciary of any jurisdiction plays a special role in society and should be managed in a way that reflects its special status. For instance, under the common-law system, the overall management of the courts is left to senior judges, not nonjudicial officials.

THE ASSESSMENT OF INDIVIDUAL JUDGES

Chapter 16 of the Judges Law of the People's Republic of China[42] governs assessment of judges by requiring that each court establish a "Commission for Examination and Assessment of Judges" (*faguan kaoping weiyuanhui)*.[43] The membership of the Commission for Examination and Assessment of Judges varies from court to court. Chaired by the president of the court, the commission members typically include the heads and deputy heads of various divisions of the court and other senior judges. The commission is an internal arrangement. While its establishment is provided under the Judges Law, its detailed operations are governed under internal regulations of the specific court.[44]

The Commission for Examination and Assessment of Judges reviews reversed

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judgments to see if the individual judge under evaluation was "at fault." In more serious cases, judges can be disciplined for reversed decisions where serious fault is found (e.g., accepting a bribe, complete neglect of the law). "Lesser faults" (such as erroneous interpretation of the law) result in the deduction of "marks" or "points" in the court's internal assessment record, which in turn affects the overall performance evaluation of the judge. Even when the judge is not at fault, an appellate reversal taints the record of the judge and renders the judge less competitive in a promotion process.[45]

The judicial merit system adds an additional layer of risk by penalizing judges if their judgments are reversed. The penalties create yet another incentive to prefer mediation, because a mediation statement (*tiaojie shu*) cannot be appealed (hence cannot be reversed). Yanmin Cai interviewed ten judges and found that the judges are increasingly burdened by the current performance appraisal system to such a degree that it is affecting the quality of adjudication.[46]

An intermediate court judge said that judges in China generally see themselves as bureaucrats rather than the vanguards of justice. When the volume of cases is overwhelmingly large, judges have no choice but to work in a "factory style" that allows very little time for attention to the quality of justice. Given the personal risks involved, no judge would be willing to go out of the way to do justice, especially if doing so will contravene the directions and policies of the court leadership. Scoring well in performance evaluations and avoiding complaints are the best guarantee to career advancement.[47]

It is indeed ironic that an evaluative system that claims to uphold quality turns out to be the culprit that jeopardizes the quality of justice.

A CRITICAL EXAMINATION OF THE CASE QUALITY EVALUATION SYSTEM FROM THE PERSPECTIVE OF PROCEDURAL JUSTICE

In spite of its name, the actual operation of the Case Quality Evaluation system and the numerous indices do not provide a *qualitative* assessment. Instead, each court is assessed on a *quantitative* scale. The cumulative effect of this grading system on the judiciary is not surprising: Courts focus on quickly terminating cases rather than on dispensing justice. Courts must worry, for instance, that a large *number* of cases overturned or remitted on appeal would reflect negatively on the court's ability to resolve disputes conclusively.[48] This is the so-called "scientific" nature of the evaluation system emphasized under the 2011 SPC Case Quality Opinion. Nowhere in the evaluation scale can one find qualitative metrics, such as the quality of the written judgments or the significance of the judgments (e.g. the "precedential value" of a court decision, obviously "precedential" in a nonbinding sense). The danger of focusing almost completely on numbers is that one inevitably loses sight of the bigger picture. A court may be doing an enormous service to the local community by accepting cases that are complex and sensitive (or that concern novel legal issues), but in doing so the court risks a higher rate of appellate reversals. Neither does the current Case Quality Evaluation scale take into account what the court has done to protect the procedural rights of the parties. Such a number-crunching system incentivizes courts to become rigid case-processors; it discourages the bench to venture into "hard cases" or to do justice in an *individual* case when it risks tainting the court's record. The individual judge in fact would even be "penalized" under the current system for demonstrating any form of judicial innovation, as an attempt to go against established norms might result in an appellate reversal (a key tertiary index under the Case Quality Evaluation system).

Adrian Zuckerman made it clear that the role of the court is not limited to dispute resolution: "[L]ike its criminal counterpart, the civil court provides a public service that is crucial to the maintenance of a society governed by the rule of law: a law enforcement service."[49] If the court is the enforcer of rights, a judiciary that overemphasizes mediation settlement rates and other quantitative results cannot at the same time be a good enforcer of rights. The trial management system is flawed in the following aspects:

- *Danger of encouraging efficiency without considering the context:* Efficiency (in terms of the quantity of cases processed within a given timeframe)[50] does not necessarily represent effectiveness of the system. The mechanical processing of cases is different from giving due regard to the merits of each case with a view of delivering justice, ensuring like cases are treated alike and fundamental rights are protected. The overemphasis on the case-processing function (which is a vital but not predominant function of the court) inevitably results in sloppy adjudication in which the judge simply applies the law summarily and in such a way that would ensure the least criticism from a superior court or the leaders of the same court within a prescribed timeframe. While undue delay is undesirable, effectiveness of adjudication is not measured simply by applying a straightjacket test of "who disposes the highest number of cases within one year." Proportionality, on the other hand, is a vital consideration for case manage-

ment, in that more judicial resources should be devoted proportionally to important and complex cases (especially those cases with possible precedent value) than routine cases. The quantitative nature of the judicial assessment scale obscures the true test of case management effectiveness.

- *Bureaucratic and populist orientations of the evaluation system:* Judges in China are treated by the administration more like government bureaucrats than judicial officers, especially when it comes to performance evaluation. The current evaluation matrix incorporates a mechanical and statistics-based assessment of the work of courts in a format that can equally be applied to any administrative unit under the bureaucracy. The current evaluation scale comprises "user satisfaction" factors that go beyond measuring the satisfaction of the actual litigants. For instance, under the second-tier Effectiveness Index, there are third-tier indices that evaluate the "letters and visits rate" (i.e., administrative petitions made against the court) and "general public satisfaction rate" (which is more of a populist concept than anything else).[51] It is questionable whether this form of evaluation is capable of assessing the quality of justice delivered in an individual court given judicial work is unique and not a routine civil servant's task. This form of assessment also deprives the court of its adjudicative autonomy.[52]

- *Irrelevance of evaluation factors/indices:* Certain third-tier indices under the "Effectiveness Index" (secondary index) are simply irrelevant in the assessment of adjudicatory effectiveness. For instance, the index of the "voluntary enforcement of judgment rate" evaluates the rate of voluntary enforcement of judgments by parties.[53] The rationale for this index is that a higher voluntary enforcement rate is the inevitable result of the higher quality of judgments.[54] Yet it does not take an expert to explain that an array of different factors contribute to the failure of voluntary enforcement, for example, the losing party becoming impecunious. To suggest that a low voluntary enforcement rate is reflective of poor adjudication ignores numerous other possibilities that could have contributed to nonenforcement.

- *The negative effect of penalizing the judge for every "incorrect" judgment:* Throughout Chinese legal history, magistrates have been held liable and suffered negative consequences for rendering incorrect judgments.[55] This tradition survived the demise of the Chinese empire. Under the contemporary evaluation system, courts and individual judges still face adverse consequences for incorrect decisions. For an individual judge, having a substantial record of appellate reversal (or having his judgments frequently re-opened under the adjudication supervision procedure) is not only a guaranteed career suicide, but also stigmatizes the judge as someone who is sloppy and unprofessional (e.g., some courts notoriously circulate the names of those judges who were "underperforming" in this regard).[56] A fault-adverse culture makes judges prefer mediation to adjudication as a mediated settlement insulates the judge from being criticized for mistakes because a settlement through court mediation is nonappealable. The combination of this fault-adverse culture and the active institutional encouragement of mediation[57] create an absurd norm in which courts press for a mediated settlement, at times without consideration of parties' wishes. This norm contradicts the black-letter law that all court mediation must be based on the principle of party voluntariness.[58]

- *Compromising procedural justice:* An evaluation system based on mechanical application of (predominantly) quantitative indices not only ignores the quality of substantive justice but also waters down procedural justice. Judges are preoccupied with hitting quantitative targets such that the fairness and sanctity of procedure become less of a priority.

- *Autonomy of the individual judge under siege:* When a court is under a predominantly quantitative evaluation system, its leadership would no doubt push individual judges to serve the bureaucratic goals of the court, rather than focusing on delivering quality justice by exercising the necessary judicial acumen and creativity. The autonomy of adjudication is therefore subject to the institutional needs of the court structure. In other words, the evaluation matrix creates a bizarre "merit system" where the nonadjudicator (who has no knowledge of the content or context of individual cases) evaluates the adjudicator on almost every aspect of litigation by using a checklist that measures predominantly quantitative excellence only. Such a "merit system" may be suitable for junior level bureaucrats, but it is definitely unsuitable for the judiciary.

THE TRIAL MANAGEMENT SYSTEM CONTRAVENES THE CHINESE CONSTITUTION

Article 126 of the Chinese Constitution reads:

> The people's courts exercise judicial power independently, in accordance with the provisions of the law, and are not subject to interference by any administrative organ, public organization or individual.[59]

Yet the trial management system allows an "administrative organ" within the court (trial management office) or "individuals" (trial management office members) to interfere with the adjudicatory decisions of the individual judge and imposes quantitative parameters on how cases should be handled. The system robs judges of the freedom to decide a case on its facts free from interference. Judges in China must meet the expectations enshrined in the Case Quality Evaluation system for career advancement. Serious deviations from these expectations are likely to result in disciplinary consequences. Thus, trial management becomes a hanging dagger for judges.

The evaluation covers even minute details of the judge's conduct at court hearings, as a pro-forma "observer log" designed for trial management purposes shows.[60]

Trial management is a glaring violation of Article 126 of the Chinese constitution. The all-pervasive nature of trial management violates adjudicatory autonomy of the bench. While the Chinese constitution is not directly enforceable in a lawsuit, the principles enshrined in it should give courts (especially the SPC) a moment of pause to think about whether this quantitative and arbitrary evaluation system is actually improving or jeopardizing the overall quality of justice in China.

CONCLUSION

Trial management frustrates the ability of the individual judge to handle cases independently. While a degree of bureaucratic interference (e.g., in matters like managing personnel and work delegation) is expected given China's legal tradition, the Case Quality Evaluation trespasses into the actual adjudicatory work of individual judges. The system requires judges to follow fixed parameters without any regard to the actual circumstances of the individual case (e.g., complexity, the actual liability of parties and whether there are any special circumstances). Institutional goals therefore override the imperative of defending justice in the individual case. A civil court that follows strictly the Case Quality Evaluation system is at best a center for mass case processing, not a forum for upholding rights. The business of adjudication becomes a game of avoiding mistakes and "toeing the party line." Judges are inevitably risk adverse and do not go out of the way to do justice if there are potential disciplinary consequences. It follows that, given such risk adverseness, judges are likely to continue to rely heavily on mediation, because a settlement is virtually an ironclad guarantee of "*anjie shiliao.*" As long as leaders focus on the social effect of civil litigation and the ill-defined concept of "*anjie shiliao*," any effort to reform the judicial system and to implement the "rule by law" will be an uphill battle.

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[1] Wang Shengjun was president of the Supreme People's Court between March 2008 and March 2013.

[2] XIANFA art. 128 (1982) (China); see also XIANFA art. 67, §7 (1982) (China);.Renmin Fayuan Zuzhi Fa (人民法院组织法) [Organic Law of the People's Courts] (promulgated by the Standing Comm. Nat'l People's Cong., Jan. 1, 1980, effective Jan. 1, 1980, latest amendment Oct. 31, 2006), http://www.law-lib.com/law/law_view.asp?id=177859 (last visited Apr. 15, 2016) [hereinafter Organic Law], art. 17 (courts at various levels must report on their work to the people's congresses at corresponding levels).

[3] Organic Law, *supra* note 1, art. 35. For details on the various levels of courts in China, see ALBERT HUNG-LEE CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA 187 (4TH ED. 2011).

[4] Throughout China's imperial history, the magistracy (which handled civil cases) had always been part of the bureaucracy rather than a separate and autonomous judicial organ. *See* Peter C.H. Chan, *The Enigma of Civil Justice in Imperial China: A Legal Historical Enquiry*, 19 M.J. 2 (SPECIAL ISSUE) 317, 322 (2012). This tradition has, in principle, survived until today. The contemporary Chinese court system is structured very much like any other government administrative body. For an overview of the hierarchical arrangement of Chinese courts, see Jianhua Zhong & Guanghua Yu, *Establishing the Truth on Facts: Has the Chinese Civil Process Achieved This Goal?*, 13 J. TRANSNAT'L L. & POL'Y 393, 396–97 (2004).

[5] Zhong & Yu, *supra* note 4, at 432; *see also* Chen, *supra* note 3, at 209.

[6] Mo Zhang, *International Civil Litigation in China: A Practical Analysis of the Chinese Judicial System*, 25 B.C. INT'L & COMP L. REV. 59, 91 (2002).

[7] Under the latest judicial reform package issued by the Supreme People's Court, which came into effect on 4 February 2015, the provincial high court will be empowered to make fiscal decisions within its provincial judicial system. As such, all the finances of China's intermediate and basic level courts will be managed exclusively by their respective provincial high court, not the local government or central authorities. The fiscal powers of the provincial high court include the power to collect and manage the income of courts under its jurisdiction. *See* Zuigao Renmin Fayuan Guanyu Quanmian Shenhua Renmin Fayuan Gaige de Yijian (最高人民法院关于全面深化人民法院改革的意见) [Sup. People's Ct. Opinions on the Comprehensive Entrenchment of Reforms in the People's Courts] (promulgated by the Sup. People's Ct., Feb. 4, 2015, effective Feb. 4, 2015), http://www.law-lib.com/law/law_view.asp?id=487180 (last visited Apr. 15, 2016).

[8] Here, "adjudicatory autonomy" refers to the individual judge's "substantive independence" in the "conduct of the judicial business." In the words of Shetreet and Turenne, "Individual judges are subject to no other authority for their decisions than the appeal courts." *See* SHIMON SHETREET & SOPHIE TURENNE, JUDGES ON TRIAL: THE INDEPENDENCE AND ACCOUNTABILITY OF THE ENGLISH JUDICIARY 5 (2nd ed. 2013).

[9] Peter C.H. Chan, *Efficiency and Truth in Civil Fact-finding: The Evolving Role of the Judge in Mainland China and Hong Kong and the Effect of the Policy Preference for Court Mediation on Fact-finding in the People's Courts*, *in* TRUTH AND EFFICIENCY IN CIVIL LITIGATION: FUNDAMENTAL ASPECTS OF FACT-FINDING AND EVIDENCE-TAKING IN A COMPARATIVE CONEXT 231, 256 (C.H. van Rhee & Alan Uzelac eds., 2012); *see also* Carl F. Minzner, *Judicial Disciplinary Systems for Incorrectly Decided Cases: The Imperial Chinese Heritage Lives On*, *in* CHINESE JUSTICE: CIVIL DISPUTE RESOLUTION IN CONTEMPORARY CHINA 58, 58–59 (Margaret Y.K. Woo & Mary E. Gallagher eds., 2011).

[10] Yaxin Wang, Professor, School of Law, Tsinghua University, Keynote Address at the Expert Meeting at Faculty of Law, Maastricht University: *The Role of the Judge and the Parties in Civil Litigation: Towards an Efficient Procedure under the Rule of Law in China and the EU* (Sept. 12-14, 2011). The Expert Meeting was part of a research project funded by the China-EU School of Law at the China University of Political Science and Law.

[11] Benjamin L. Liebman, *China's Courts: Restricted Reform*, 21 COLUM. J. ASIAN L. 1, 18–21 (2007).

[12] Yulin Fu & Zhixun Cao, *The Position of Judges in Civil Litigation in Transitional China – Judicial Mediation and Case Management*, *in* TOWARDS A CHINESE CIVIL CODE: COMPARATIVE AND HISTORICAL PERSPECTIVES 495, 495–519 (Lei Chen & C.H. (Remco) van Rhee eds., 2012).

[13] Yanmin Cai, *Case Management in China's Civil Justice System*, *in* CIVIL LITIGATION IN CHINA AND EUROPE: ESSAYS ON THE ROLE OF THE JUDGE AND THE PARTIES 39, 46 (C.H. (Remco) van Rhee & Yulin Fu eds., 2014).

[14] *See* Zuigao Renmin Fayuan Guanyu Jiaqiang Renmin Fayuan Shenpan Guanli Gongzuo de Ruogan Yijian (最高人民法院关于加强人民法院审判管理工作的若干意见) [Sup. People's Ct. Several Opinions on Strengthening Trial Management Work in the People's Courts] (promulgated by the Sup. People's Ct., Jan. 6, 2011, effective Jan.

6, 2011), http://www.law-lib.com/law/law_view.asp?id=355466 (last visited Apr. 15, 2016) [hereinafter SPC Trial Management Opinion].

[15] SPC Trial Management Opinion, *supra* note 14, pt. 3.

[16] SPC Trial Management Opinion, *supra* note 14, art. 4.

[17] The adjudicative committee is the most powerful organ within the court structure. Chen noted that for certain important and complex cases, the judge must first refer such cases to the adjudicative committee for discussion. The judgment must implement the decision/opinion of the adjudicative committee. *See* Chen, *supra* note 3, at 186.

[18] For instance, the Trial Management Office should liaise with the court's personnel management unit. *See* SPC Trial Management Opinion, *supra* note 14, art. 17.

[19] SPC Trial Management Opinion, *supra* note 14, pt. 4.

[20] SPC Trial Management Opinion, *supra* note 14, arts. 4 & 6.

[21] *See* Zuigao Renmin Fayuan Guanyu Kaizhan Anjian Zhiliang Pinggu Gongzuo de Zhidao Yijian (最高人民法院关于开展案件质量评估工作的指导意见) [Sup. People's Ct. Guidance Opinion Relating to the Commencement of the Work on Case Quality Evaluation] (promulgated by the Sup. People's Ct., Mar. 9, 2011, effective Mar. 9, 2011); *see also* Zhang Jun (张军) ed.,Renmin Fayuan Anjian Zhiliang Pinggu Tixi Lijie yu Shiyong (人民法院案件质量评估体系理解与适用) [People's Court Case Quality Evaluation System: Explanatory Notes and Annotations on Application] 359–72 (2011) [hereinafter 2011 SPC Case Quality Opinion].

[22] The 2011 SPC Case Quality Opinion, *supra* note 21, superseded the *Supreme People's Court Guidance Opinion Relating to the Commencement of the Work on Case Quality Assessment (Test Implementation)* (最高人民法院关于开展案件质量评估工作的指导意见(试行)) (2008).

[23] 2011 SPC Case Quality Opinion, *supra* note 21, app.

[24] Citizens petitions are also known as "letters and visits," or *xinfang* (信访) and *shangfang* (上访).

[25] 2011 SPC Case Quality Opinion, *supra* note 21, app.

[26] Minshi Susong Fa (民事诉讼法) [Civil Procedure Law] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 9, 1991, effective Apr. 9, 1991, latest amendment Aug. 31, 2012, amended law effective Jan. 1, 2013), http://www.law-lib.com/law/law_view.asp?id=394894 (last visited Apr. 15, 2016) [hereinafter Civil Procedure Law], art. 208.

[27] 2011 SPC Case Quality Opinion, *supra* note 21, app.

[28] *See* 2011 SPC Case Quality Opinion, *supra* note 21, app.

[29] Civil Procedure Law, *supra* note 26, Cap. 16, sets out the key procedural rules for adjudication supervision (*shanpan jiandu*). The adjudication supervision procedure allows a legally effective judgment or ruling (or mediation statement) to be re-opened for re-adjudication on the basis that the decision has been tainted by error.

[30] 2011 SPC Case Quality Opinion, *supra* note 21, app.

[31] The court has the discretion to determine whether or not to re-open a judgment upon receiving an application from the party. This in effect is the leave stage of the re-adjudication procedure.

[32] For instance, Tertiary Index No. 16 is called the "Index of the average time in disposing a case" (*pingjun shenli shijian zhishu*).

[33] 2011 SPC Case Quality Opinion, *supra* note 21, app.

[34] *See* 2011 SPC Case Quality Opinion, *supra* note 21, app.

[35] *See* 2011 SPC Case Quality Opinion, *supra* note 21, app.

[36] 2011 SPC Case Quality Opinion, *supra* note 21, at 206–08.

[37] Under the enforcement reconciliation procedure, settlement negotiations are conducted under the direction of the court using mediation techniques.

[38] This "job description" may vary slightly with different courts. This "list" is taken from a trial management circular published by a high court in an inland province in China.

[39] Telephone interview with a judge from an intermediate court in Beijing (Sept. 2, 2012). Due to the sensitivity of the subject matter, the interviews referred to in this article were conducted on an anonymous basis (between May 2012 and January 2014). It was understood that in using the contents of these interviews, the identity of the respective courts and/ law firms whereat which the interviewees work would not be disclosed.

[40] Cai, *supra* note 13, at 39–58.

[41] Fuhua Wang, *From "Trial Management" to "Case Management*," *in* Civil Litigation in China and Europe: Essays on the Role of the Judge and the Parties, *supra* note 13, at 59, 63.

[42] Faguan Fa (法官法) [Judges Law] (promulgated by the Standing Comm. Nat'l People's Cong., Feb. 28, 1995, effective July 1, 1995, amended June 30, 2001, amended law effective Jan. 1, 2002), http://www.law-lib.com/law/law_view.asp?id=15374 (last visited Apr. 15, 2016).

[43] Article 48 of the Judges Law of the People's Republic of China states, "The functions and duties of a commission for examination and assessment of judges are to guide the training, examination, appraisal and assessment of judges. Specific measures in this regard shall be formulated separately." *Id*. Article 49 provides the structure of the commission: "The number of persons on a commission for examination and assessment of judges shall be five to nine. The chairman of a commission for examination and assessment of judges shall be the president of the court." *Id*.

[44] Telephone interview with a judge from a basic-level court in Beijing (Jan. 10, 2013). The judge specialised in intellectual property disputes.

[45] Telephone interview with a partner at a law firm in Beijing (Jan. 3, 2014).

[46] Cai, *supra* note 13, at 53.

[47] *See* Telephone interview with a judge from an intermediate court in Beijing (Sept. 2, 2012).

[48] Under the Chinese civil appellate system, a decision at second instance is final (*liangshen zhongshen zhi*).

[49] Adrian Zuckerman, *The Challenge of Civil Justice Reform: Effective Court Management of Litigation*, 1 CityU. L.R. 49, 53 (2009).

[50] *See, e.g.*, Tertiary Indices No. 20 and 21; 2011 SPC Case Quality Opinion, *supra* note 21, app.

[51] *See, e.g.*, Tertiary Indices No. 30 and 31; 2011 SPC Case Quality Opinion, *supra* note 21, app.

[52] As the level of user satisfaction (which, by nature, can be highly subjective and populist-oriented) could affect the court's ranking among other courts and the allocation of scarce judicial resources, courts are inclined to serve populist goals and keep litigants satisfied, when in fact the main role of the court should be to enforce the rules and uphold the rule of law.

[53] *See* Tertiary Index No. 27; 2011 SPC Case Quality Opinion, *supra* note 21, app. The formula is 1 *minus* the number of application for court enforcement multiplied by the total number of enforceable judgments.

[54] 2011 SPC Case Quality Opinion, *supra* note 21, at 371.

[55] Minzner, *supra* note 9, at 58–90.

[56] Telephone interview with a partner at a law firm in Beijing (June 12, 2012).

[57] *See* Tertiary Indices Nos. 23 and 24; 2011 SPC Case Quality Opinion, *supra* note 21, app.

[58] *See* Civil Procedure Law, *supra* note 26, art. 93.

[59] XIANFA art. 126 (1982) (China).

[60] An "Observer Log" for civil and commercial cases of an intermediate court in an inland province in China.