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Doing Justice: Chinese Civil Procedure and Its Reform[1]

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Abstract: This essay approaches the main aspects of Chinese civil procedure and the structure of the Judiciary in China in light of its latest legislative changes. The essay will then propose reforms to conciliate the search for speed and efficiency with the fundamental guarantees of the parties.

Keywords: Chinese civil procedure. Judiciary structure. Reforms

INTRODUCTION

It is fair to state that the Chinese civil judicial system is one of the most efficient judicial systems in the world. According to recent Chinese Supreme Court statistics, over 99% of first instance civil cases are disposed of within six months and over 97% of civil appeals are disposed of within three months throughout the country.[3] Surveys

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2. The author is grateful to Benjamin Liebman, Carl Minzner, Ling Li and Linda Raynes for advice and comments.
3. Note that the cases in which the extension of the term of trial approved by the president of the court or the higher court are excluded. Ji Tong, Details of Cases Trialed and Enforced Nationwide in 2011

conducted by local courts also support this claim, revealing that the average period from acceptance to disposition of first instance cases is very brief—in many jurisdictions, shorter than two months.[4] According to these findings, Chinese judges have done an impressively efficient job compared to their foreign counterparts.[5] However, when judicial quality is considered (represented by the parties' attitude towards judicial decisions), reality depicts a much different picture.[6] Every year, tens of thousands of complainants who have lost their cases or have their cases rejected by courts, try to challenge the court decisions after civil procedure had been closed.[7] Many people flock to Beijing, China's capitol, to petition and complain through a unique alternative process to formal legal procedure called 'Xin Fang' (visits and letters).[8] In this regard, it is accurate to state that the Chinese civil judicial system is currently suffering from a deep crisis of public confidence and poor finality.

The perplexing landscape of China's civil judicial system is in such a state that it appears to be a paradox. On one hand, justice is not denied as most justice is not delayed. One the other hand, justice that is delivered speedily by the courts doesn't satisfy a host of parties in the end. Though there is little evidence clearly demonstrating the connection between speediness of adjudication and poor quality of decisions, it's without doubt that due process requires sufficient opportunities of participation, and such opportunities require adequate time for parties to have their grievances heard and taken into account carefully. Nevertheless, the judicial policy making body of the Supreme Court does not seem prepared to improve judicial quality at the expense of slowing down the current rate of judicial process.[9] They hope to diminish the public's dissatisfaction without making required changes that may affect judicial efficiency. This is incomprehensible. With China's rapid economic growth and widespread surges of

(*2011 Nian Quanguo Fayuan Shenli Gelei Anjian Qingkuang*), 5 People's Judicature (*Renmin Sifa*) 35 (2012); Ji Tong and Jian Ma, Details of Cases Trialed and Enforced Nationwide in 2012 (*2012 Nian Quanguo Fayuan Shenli Gelei Anjian Qingkuang*), 7 People's Judicature (*Renmin Sifa*) 55 (2013).

4. Yu Xu, An Overview of Jiangsu Province's Courts Work in 2008 (*2008 Nian Jiangsu Fayuan Gongzuo Quanjing Saomiao*), Jiangsu Legal Daily (*Jiangsu Fazhi Bao*), Feb. 6, 2009, Page A; Zhejiang People's High Court, ADR: Alleviate the Shortage of Judicial Resources to Be Needed (*Duoyuan Jiejiu Fangshi: Huanjie Sifa Xuqiu Yu Ziyuan Xique Maodun*), People's Court Daily (*Renmin Fayuan Bao*), Mar. 4, 2010, Page 8.
5. According to 2014 JWP Rule of Law Index, China was scored 0.67 for "Civil justice is not subject to unreasonable delays", compared to 0.56 of the U.S. and 0.25 of India. Available at <http://worldjusticeproject.org/rule-of-law-index>.
6. According to 2014 Rule of Law Index, China was only ranked 79/99 for civil justice. Id.
7. Available at <http://www.court.gov.cn/qwfb/sfsj/>.
8. Carl F. Minzner, Xinfang: An Alternative to Formal Chinese Legal Institutions, 42 Stanford Journal of International Law 103 (2006).
9. Supreme People's Court, Several Opinions on Effectively Practicing "Justice for the People," Vigorously Strengthening Judicial Justice and Continuously Improving Judicial Credibility (Zuigao Renmin Fayuan Guanyu Qieshi Jianxing Sifa Weiming Dali Jiaqiang Gongzheng Sifa Buduan Tigao Sifa Gongxinli De Ruogan Yijian), n. 9, 2013, section 4.

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civil disturbances, the courts need solve more grievances and disputes to gain more resources from the central and local authorities.[10] High efficiency of adjudication is a good way to justify their performance and enhance their capability of bargaining with the authorities. However, as civil suits accepted by the courts have continuingly grown (from 300,787 in 1978, the year China initiated economic reform and open up policy, to 7,316,463 in 2012),[11] the total number of the judges has only modestly increased during that time (from almost 60,000 to 196,000). The pressure of the courts to maintain their pace and to handle cases rapidly has sharply increased to an unbearable level.

This article will examine China's civil procedure in practice and propose how to reform it—specifically, how China can maintain judicial efficiency while boosting public satisfaction and confidence in the civil procedural system.

Part I provides an overview of the scope of Chinese civil procedure rules applied in practice and the basic organizational structure of Chinese courts. Chinese civil procedure cannot be comprehensively described or thoroughly understood without considering its unique, centralized hierarchical settings, case assessment, and evaluation system. Part I will also present the Chinese court's primary characteristics as a judicial institution in order to set the background for further discussion on Chinese civil procedure system.

For many scholars and practitioners alike, how a civil case is actually litigated in the Chinese courts remains a mystery.[12] It's especially true that, after almost ten years of a significant top-down movement of "turning against law,"[13] a dramatic shift in court-performed mediation has taken place in Chinese civil dispute resolutions. Part II will address how the Chinese courts dispose of civil cases in a highly efficient, yet defective, way. It will focus on the main stages of Chinese civil procedure in practice: filing and docketing, pre-trial preparation, trial, and post-trial.

Based on the observation and analysis above, Part III will probe into the fundamental flaws and shortcomings of Chinese civil procedure, which is both intensely driven and closely constrained by organizational assessment and management systems. In this part, focusing on the reform of civil procedure, the author will provide an overview and comment of the newest amendments of the CPL and then propose a solution to balance judicial efficiency and judicial quality, as well as to boost public confidence in the civil process system.

10. Xin He, Court Finance and Court Responses to Judicial Reforms: A Tale of Two Chinese Courts, 31 Law & Policy 463 (2009).
11. Available at the National Bureau of Statistics of China website <http://data.stats.gov.cn/workspace/index?m=hgnd>; <http://www.court.gov.cn/qwfb/sfsj/>.
12. Margaret Y. K. Woo and Yaxin Wang, Civil Justice in China: An Empirical Study of Courts in Three Provinces, 53 The American Journal of Comparative Law 912 (2005).
13. Carl F. Minzner, China's Turn Against Law, 59 American Journal of Comparative Law 935 (2011).

I
Chinese Civil Procedural Law and Its Institutional Background

The scope of Chinese civil procedure "law" in practice is fairly broad, ranging from the Civil Procedure Law ("CPL"), Judicial Interpretations issued by the Supreme Court,[14] local rules prescribed by different levels of local courts,[15] to judicial customs generated in specific organizational settings of the courts. Among them the CPL is the basic information required to understand the Chinese civil procedure framework. The latest vision of the CPL was promulgated in 2012.[16] But as is common in China, huge gaps always exist between the written law and the law in practice. This is also true for the CPL. In a sense, confusion is inevitable if one seeks to comprehend Chinese civil procedure only by making reference to the CPL.[17] Even taking numerous Judicial Interpretations and internal local rules into account, few people could exactly predict a judges' judicial behavior during the litigation process. The main reason for this is that, after only thirty years of turning to emphasize "rule by law" and then "rule of law", Chinese courts cling to a traditional preference for informality and particularism in adjudication.[18] Judges are not only allowed to enjoy a wide discretion in adjudication, but are also encouraged to dispose of cases flexibly and elastically, in order to achieve the harmony of legal effects and social effects of adjudication in a rapidly changing

14. Judicial Interpretation is formal legal source that can be cited as supplementary legal authority to statutes in judgments and orders. See Supreme People's Court, Rules Regarding to Judicial Interpretation Work (*Zuigao Renmin Fayuan Guanyu Sifa Jieshi Gongzuo De Guiding*), N. 12, 2007, art. 27.
15. Local rules in Chinese courts are internally prescribed by the very courts' judicial committees. Compared to Rule 83 of Federal Rules of Civil Procedure in the U.S., no notice or opportunity for comment is given to the public, and no copies of local rules must be furnished to the Supreme Court and be made available to the public. Chinese courts occasionally post some local rules on their official websites.
16. In 1982, not long after initiating economic reforms, China promulgated a provisional civil procedure law "on an experimental basis". In 1991, after almost a decade of practice, China enacted a formal Civil Procedure Law ("CPL") comprising 270 articles that embodied lots of reforms under the background of socialist commodity economy. In 2007, it dramatically amended two sections of the CPL-judicial supervision procedure and civil enforcement procedure-to address the rather serious problems of petition for retrial after procedure closed and failure to execute civil judgments. As a part of the legislation plan of setting up the Socialist System of Laws with Chinese Characteristics, in 2012, China made an overall revision of the CPL which affected 85 articles. The newest version of CPL includes 284 articles and more comprehensive covering several firstly adopted procedures, such as public interests litigation, small claims litigation and third-party opposition.
17. For instance, Article 52 of the CPL provides two kinds of representative actions analogous to the class action in the U.S. But in reality the courts always refuse to accept representative actions even all the elements of this article are met. To prevent mass disturbances happening, the courts try to cut a case of dozens or hundreds of parties into individual cases with much fewer parties. Such "sleeping" articles are not seldom seen in the CPL.
18. Margaret Y. K. Woo, Law and Discretion in the Contemporary Chinese Courts, 8 Pacific Rim Law & Policy Journal 584-593 (1999).

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society. However, against the backdrop of judges lacking sufficient professionalization and necessary job security (such as high salary), the judges are very likely to abuse discretion in order to pursue their own private interests.

In order to curb the self-interested discretion of judges, maintain overall judicial quality, and to ensure that judges will remain consistent with an top-down political and judicial ideology, the Supreme Court has recently drawn upon the experimental experience of local courts to set up a comprehensive Case Quality Evaluation System (CQES).[19] Under the evaluation system, nearly all aspects of judicial performance are assessed, scored and managed. From the comparative perspective of legal institutions, many western countries utilize different types of judicial performance evaluation to hold judges accountable, which influence the judges' performance on hot-button political issues to some extent.[20] But the Chinese courts' CQES is much more fundamental in recognizing and understanding the underlying incentive structures for the Chinese judges' judicial performance.

The reader should note that the organizational structure of the Chinese court is quite unique compared to its western counterparts. China has a unified court system consisting of four levels courts.[21] Each court has its own pyramidal hierarchy. On the top is the leading Communist Party Group (党组), headed by a Court President and consisting of high ranking officials in the court. This small group, ten members more or less, has all the administrative power of the court except those controlled by outside authorities.[22] The Court President is also responsible for his/her subordinates' judicial performance and based on which will be rewarded (or punished) by local authorities

19. Supreme People's Court, Notice on Issuing the Guiding Opinion of the Supreme People's Court on Carrying out the Case Quality Evaluation Work (for Trial Implementation) (*Zuigao Renmin Fayuan Guanyu Kaizhan Anjian Zhiliang Pinggu Gongzuo De Zhidao Yijian (Shixing)*), N. 6, 2008; Measures for the Indexing of Case Quality Evaluation of the People's Courts (for Trial Implementation) (*Renmin Fayuan Anjian Zhiliang Pinggu Zhishu Bianzhi Banfa (Shixing)*), N. 137, 2013. The revised CQES includes 31 indexes and covers three main aspects of adjudication: fairness, efficiency and social effects. For example, to measure judicial fairness, the related indexes include the rate of alteration during accepting and docketing, the rate of remanding or reversing by appellate court, the rate of trail violating procedure law, etc.
20. For example, in 2008, eight states in the U.S. provide their citizens with information obtained from official performance evaluations (JPE) of at least some of their judges standing for retention election. See David C. Brody, The Use of Judicial Performance Evaluation to Enhance Judicial Accountability, Judicial Independence, and Public Trust, 86 Denver University Law Review 1 (2008).
21. They are the Supreme Court, 31 high courts, almost 410 intermediate courts and over 3100 basic courts with more than 10,000 dispatched tribunals.
22. Leading Party group has the power to manage the court's own administrative matters, such as certain personnel matters, the use of funding, the management of equipment and supplies, and daily operations. Whereas court funding is still managed by the government of the same level and significant personnel matters continue to be decided by the Party committee of the government of the same level and the leading Party group of the superior court. See Huiling Jiang, Judicial Reform, China's Journey toward the Rule of Law: Legal Reform 1978-2008, Ed. by Dingjian Cai and Chenguang Wang, Koninklijke Brill Nv, Leiden, The Netherlands, 2010, p.215.

or superior courts.[23] For the President, the Adjudication Committee (审委会) is the major institution of controlling judicial outcomes, to which judges can submit complicated or sensitive cases to be determined without hearings.Below the leading Party Group, there are two kinds of branches at the same level: Judicial Divisions and Administrative Departments.[24] There is also a hierarchical structure within the Judicial Divisions branch. The Division-chief judge (庭长) is in charge of examining and approving judgments and orders, and division of daily administration simultaneously. At the bottom of court positions are ordinary judges – civil servants who seek career promotions mainly through their work performance, in which CQES and its variants in local courts play an increasingly important role.

Chinese judges are both constrained and driven by the CQES, directly and indirectly. On one hand, judges may gain material reward and moral encouragement if they achieve excellence in monthly, quarterly and annual case quality evaluations. Their chance of promotion to a higher rank and/or position increases if they continue to meet the targets.[25] On the other hand, judges could face various negative repercussions (anything from a minor fine or criticism to termination from their position), if they underperform in a judicial assessment and evaluation.[26] The influence that the CQES has over civil procedure can never be overestimated. Case evaluation systems act as a "conducting baton" for judges to follow, through which they are lead to fulfill targets set by their leadership. So the operation of Chinese civil procedure is both driven and constrained by organizational assessment and management. In this regard, Professor Cohen was quite insightful to state that, "In China, the focus is and must be upon institutions rather than procedures. Without strong legal institutions to implement

23. For example, an SPC decision issued in 2001 stated that court president and vice-presidents will be forced to resign if their courts issue illegal decisions that harm state or public interests, fail to investigate or reveal serious cases of wrongdoing sufficiently, or fail to engage in oversight over their courts. Supreme People's Court, Rule Regarding Accepting Blame and Resigning for Presidents and Vice Presidents of All Levels of Local Courts and Special (interim) (*Difang Geji Renmin Fayuan Ji Zhuanmen Renmin Fayuan Yuanzhang Fuyuanzhang Yinjiu Cizhi Guiding (Shixing)*), Nov. 6, 2001.
24. Adjudication committee has members overlapped but not the same leading as Party group. Besides president and vice presidents, the former generally includes senior division-chief judges while the latter often includes important administrative department heads.
25. Judicial divisions normally include civil divisions, criminal divisions, filing and docketing division, judicial supervision division, etc. Administrative departments normally include "political" (personnel) department, discipline inspection department, trial management office, etc.
26. For example, the judges of a basic court in Henan province will gain reward and promotion if they handle cases meeting the standard of "Six Zeroes". Six Zeroes is the goal set to achieve by the leadership of the court which includes no remanding, no amending, no letter and visit, no exceeding of the trial term, no complaint and no negative media report. See Liang Zhang, Where Did the Court of "Six Zeroes" Come From? (*"Liu Wu" Fayuan Shi Ruhe Liancheng De?*). Available at http://epaper.legaldaily.com.cn/fzrb/content/20140312/Articel04005GN.htm.

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and enforce them, civil procedures are not worth the paper on which their authorizing legislation is printed."[27]

II
Chinese Civil Procedure in Practice

1. FILING AND DOCKETING

When a plaintiff brings a complaint in a Chinese court, she must first pass through a gatekeeping procedure in which the Case Filing Division (立案庭) decides whether or not to accept (受理) and docket (立案) the case. According to Article 119 of the CPL, courts must, unless an exception applies, accept cases that meet the statutory standards.[28] Within seven days, the filing division has to decide to accept or deny a civil suit based on examining the statement of complaint and evidential materials.[29] No hearing or formal procedural participation opportunity is available to the parties. The courts are deemed to have absolute discretion in accepting or rejecting complaints (as they often do when they come across one that they unwilling to hear or make a decision on). This is often the case when the courts are required to handle politically sensitive cases or cases connected to social instability.[30] Typically, near the end of the year, the courts may arbitrarily reject to take cases just to make the statistics on the case clearance rate look better.[31]

27. Carl F. Minzner, Judicial Disciplinary Systems for Incorrectly Decided Cases: The Imperial Chinese Heritage Lives on, 39 New Mexico Law Review 63 (2009).
28. They are: (1) the plaintiff is a person, legal person or other organization that has a direct legal interest in the case; (2) there is a specific defendant; (3) there are specific claims, facts, and causes of action; and (4) the lawsuit is within the courts' scope of acceptance for civil actions and under the specific court's geographical scope of jurisdiction. A detailed discussion on the four requirements, see Nanping Liu and Michelle Liu, Justice Without Judges: The Case Filing Division in The People's Republic of China, 17 University of California Davis Journal of International Law & Policy 300-315 (2011).
29. The CPL, art. 123.
30. For example, the Guangxi High Court issued a notice in 2004 listing thirteen categories of cases that courts in Guangxi province will not accept. These include real estate disputes resulting from government decisions or institutional reforms, claims brought by laid-off workers resulting from corporate restructuring, and so on. Such categories of cases touch the area of potential social instability and probably cause trouble to the courts, which the courts are better off not accepting and hearing. See Benjamin Liebman, China's Courts: Restricted Reform, 21 Columbia Journal of Asian Law 27-28 (2007).
31. The fewer cases are accepted at the end of a year, the higher rates of cases disposed of annually and within the statutory trial term are reported. The reasons of rejection are sometimes ridiculous. Such as computers for docketing in the case filing division are broken; the filing judges are out for further professional training; the party should present the statement of complaint by himself, not solely by his legal representative; etc.

If a written order or notice of rejection is issued by the court, the claimant has a chance to appeal based on the order.[32] But if the filing division judge decides to dodge a troublesome case, he will only verbally deliver the decision, or just ignore the claimant's inquiries. In such a situation, the claimant is in fact deprived of the right for an appeal. While it is fair to say that the filing process serves as a critical judicial mechanism for Chinese courts to control their caseload and trial agenda, it is also fair to say that this process is also employed by Chinese courts to deny the public access to justice in particular cases or in specific period. The avenue of Xin Fang then becomes the only available option to aggrieved parties.

A case is docketed when it passes through the examination of the Case Filing Division. Within five days, the court must serve a copy of the complaint and summons to the defendant. The latter is expected to answer the complaint in writing within fifteen days of being served. Curiously, in the CPL, there is no rule written regarding the content of the reply or the consequence of failing to reply within the statutory time limit.[33] The court cannot enter a default judgment against the defendant who didn't answer promptly. As may be expected, the vast majority of defendants neither admit nor deny the allegations against them in the complaint, or even make any response to the complaint during the pleading stage.[34] A large number of them postpone answering until oral argument at trial.

After receiving a complaint and examining it, the judges of Filing Division sometimes pick up a number of cases, contacting both the claimant and defendant over the telephone, to dispose rapidly. The selected cases always seem to be those with parties that live in the local community and who can be called before the court over the telephone. These are also the cases that seem relatively simple—the sums of compensation sought by the claimant not too large. One filing judge presides over an informal conference in which he simultaneously serves the defendant, inquires about the main facts and issues of the dispute, listens to indictment and defense presented by both parties orally, and pushes the parties to reach a mediation agreement. The basic courts also vigorously pursue transferring cases to a variety of mediation workrooms set up in the courts or to mediation organizations outside of the courts at this stage of the process.[35] This multiple goal procedure is named "Mediation Before Accepting"

32. The CPL, art. 123.
33. The CPL, art. 125.
34. A regional survey showed that nearly 90% defendants failed to answer in writing within statutory period and 45% didn't answer at all. See Wei Xun, Zhentong Lin, A Survey and Thinking about Civil Pretrial Procedure (*Minshi Shenqian Chengxu De Diaocha Yu Sikao*), 1 People's Judicature (Renmin Sifa) 75 (2007).
35. In 2009, the Supreme Court issued an official opinion propelling to utilize extra-judicial resources to resolve disputes through mediation before or after accepting. Supreme People's Courts,Several Opinions on Establishing a Sound Conflict and Dispute Resolution Mechanism that Connects Litigation and Non-litigation (*Guanyu Jianli Jianquan Susong Yu Fei Susong Xiang Xianjie De Maodun Jiufen Jiejue Jizhi De Ruogan Yijian*), N. 45 ,2009.

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(诉前调解) when it is held before the case has been accepted, or "Mediation on Docketing" (立案调解) when it is held after the case has been accepted. If an agreement is reached before the case being accepted, the lawsuit will probably be docketed and disposed of with a written mediation statement, or be withdrawn from the claimant without being registered as an accepted case. The case will be calculated into the "Rate of Mediation and Withdrawal" (调撤率) which has become an important index for assessing judicial performance over recent years.

2. PRE-TRIAL PREPARATION

Cases proceed to the civil divisions of the courts if they are not disposed of in the filing division. Each case will be separately assigned to a trial judge by clerks of the division. If a case is beyond the scope of "the facts are evident, the rights and obligations are clear, and the disputes are trivial in character," which is the standard of applying simplified trial procedure in the basic courts and their dispatched tribunals,[36] the chief judge of the civil division would set up a collegial bench to adjudicate it. Due to the serious problem of staff inadequateness, most civil cases (more than 80%) are adjudicated through the simplified procedure under one judge's direction in the basic courts.[37]

The responsible judge, ex officio, sets a schedule for pre-trial activities and trial and has the scheduling order served to all the parties by court clerks or bailiffs. In the simplified procedure, generally, the time between a case transferred to the civil division and trial is no more than one month. During this period, the judge contacts the parties, pushes them to meet the opposite party at the court and settle before trial. Similar to the mediations in the filing division, it is called "Mediation Before Trial" (审前调解). A large number of cases have their "day in court" end at this stage. If he was unsuccessful in disposing of the case through mediation, the judge would designate a short period, normally no more than fifteen days, for the parties to produce evidence to the court. While in the primary procedure, the term of preparation for trial is lengthy and varies depending on the complexity of the case's facts. As required by an important judicial interpretation of evidence, the court must grant the parties at least thirty days, beginning from the day of being serviced, to produce their evidence.[38] If the period designated is not long enough, either party may apply for extensions, twice at most. When the period of production expires, no new evidence is permitted unless the evidence has been newly discovered or the opposing side consent to it being permitted.

36. The CPL, article 157.
37. Dingbo Yuan, Eight in Ten Cases Are Trialed by Simplified Procedure in Basic Courts (*Jiceng Fayuan Bacheng Minshi Anjian Shiyong Jianyi Chengxu*), The Legal Daily (*Fazhi Ribao*), Nov. 2, 2012, Page 1.
38. Supreme People's Court, Some Rules on Civil Evidence (*Zuigao Renmin Fayuan Guanyu Minshi Susong Zhengju De Ruogan Guiding*), N. 33, 2001. Art. 33 (3).

Each party has the burden to produce facts it is responsible for proving and has no statutory right to compel the other side to provide evidence to it. No technical discovery rules such as initial disclosure, deposition, interrogatory, and so forth are available in the CPL. The party that cannot produce some evidence because of "objective reasons" (e.g., a document that is held by the opposition or a third party initially refusing to bring it forth) may request the court to conduct its own investigation or collect the evidence for it. Since the judges are always under great pressure of handling many cases simultaneously, they will not intend to spend much time on an ordinary case. In practice, as a result, the courts rarely conduct such investigations. Similarly, unless the plaintiff offers a bond, the courts generally would not take measures to preserve the defendant's property or evidence held by other people. Such practice may help to save judicial resources during the process of litigation, but also damages the parties' faith in the administration of justice, taking account of the fact that only 20-30% of parties in civil cases are represented by counsel.[39]

If parties produce a large amount of evidence, the responsible judge would generally bring the parties together to exchange that evidences in court. Whenever there is an exchange of evidence, the period of production expires. This is the only chance available for parties to make comments on the credibility and admissibility of evidence, as well as to understand the evidences held by the other side before trial. The evidence with the parties' approval is filed and recorded as fact by court clerk and need not be examined by the parities at trial. Clearly, exchanging evidence may narrow the range of contested issues and reduce delay at trial.

3. TRIAL

Most cases, applying simplified procedure as mentioned above, are tried before a single judge. Cases applying primary procedure are tried before a collegiate bench consisting of judges and the People's Assessors selected from the populace, or judges only. Only the responsible judge presides over pre-trial conference or hearing to obtain information of the case and therefore explores the case deeply. The two other panelists, who seldom touch the case file before trial (no matter judges or assessors), are mostly there for show and rarely reject the responsible judge's proposal of disposition on merits after trial.[40] With self-mockery, some judges call themselves the "supporting player" along with the responsible judge at trial when they are invited to join a panel.

39. Randall Peerenboom, China's Long March Toward Rule of Law 362 (2002). Woo & Wang, Civil Justice in China: An Empirical Study of Courts in Three Provinces, p.921. Some parties seem to rely more on related persons (relatives, staff members, friends, etc.) rather than on lawyers as their agent in litigation. See Zhengrui Han: An Applied Genre Analysis of Civil Judgments: the Case of Mainland China, Dissertation for Doctor of Philosophy degree, City University of Hong Kong,2010. Available at <http://dspace.cityu.edu.hk/handle/2031/6519>, pp. 56-59.

40. According to a survey conducted by the Beijing First Intermediate Court, 33.5% judges said they always rely on the responsible judge's report of a case to make decisions. Gang Zhao and Yuantao

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At trial, Chinese courts generally prefer documentary evidence to witness testimony. Generally, only a few witnesses testify before the court. It is fairly common that a written statement of the witness or a record of conversation between the party's counsel and the witness is presented to the court.[41] As a result, the responsible judge may obtain and examine almost all evidences before trial. His main job at trial is just presiding over the process, listening to the parities' oral arguments, inquiring about any new information that he hasn't attained or noticed, and encouraging both parties to achieve a mediation agreement. The judge would not allow the parties or their attorneys to waste too much time on adversarial examination of evidences (something that is normally meaningless to him). Therefore, in spite of no principle or rule prescribed for "concentrated trial," the duration of the trial is strictly controlled by the judge and is, typically, cut short as soon as possible. In reality, it is not uncommon for a judge to preside over five hearings in one morning, especially in courts located in big cities where there are many cases waiting to be dealt with.

4. POST-TRIAL

After a trial is closed, the judge or the panel commences deliberating and the responsible judge begins to draft the judgment or order. When the draft of judicial decision is finished, normally it must be submitted to the chief judge of the division to examine and approve before being serviced to the interested parties. If a case is trialed by a collegial bench and the panel cannot reach a conclusion on the rulings, or the chief judge holds that a case is too complicated or sensitive, such case will be submitted it to the Court President. The latter will decide to hand the case over to Adjudication Committee or not. The committee members discuss and determine the result of the case based on the responsible judge's oral report. The Adjudication Committee typically handles only particularly sensitive or difficult cases, but it has the power to direct the judge or collegiate panel to enter a particular verdict. No party is allowed to participate in the conference of Adjudication Committee and maintain the procedural right to have his arguments heard. Such a practice is under severe criticism from the public and the academia as "the adjudicator presiding over a trial doesn't determine the case, while the decision maker has never participated in the trial" (审者不判, 判者不审).[42]

Liu, Anti Judicial Corruption Measures Used in the Beijing First Intermediate People's Court (*Beijing Yizhongyuan Fan Fubai De Dianxueshu*), People's Court Daily (*Renmin Fayuan Bao*), Aug. 2, 2009. page 1.

41. Woo & Wang, Civil Justice in China: An Empirical Study of Courts in Three Provinces, pp.934-35.
42. Donald Clarke, Power and Politics in the Chinese Court System: The Enforcement of Civil Judgments, 10 Columbia Journal of Asian Law 1 (1996).

Generally speaking, drafting judgment is the most burdensome duty for a responsible judge throughout civil procedure.[43] On the other hand, Chinese civil judgments are well known for their lack of sufficient legal reasoning and factual analysis.[44] Empirical research has found that it is common for Chinese judges to tailor the parties' arguments according to the judges' understanding of the dispute and close correspondence exists between the judges' factual conclusion and the brief narrative of plaintiffs' factual claim.[45] By this token, it is likely that a Chinese judge may spend lots of time on factual narrative and textual harmony construction, rather than on response to parties' arguments and therefore protection of parties' procedural rights. It might be more reasonable if all judgments were referred to a superior to be checked or examined by a trial management department. Not surprisingly, the partial or incomplete writing of judgments is often the source of much dissatisfaction or even anger from the parties whom the judgment addresses.

Because mediation statements are much shorter and simpler, in which no fact finding or legal reasoning is required, not to mention that the potential risk for judges to be found erroneous is drastically decreased, judges may even persuade the parties to achieve a mediation agreement at the post-trial stage of the process. Through the judges' unremitting efforts from beginning to end, more than 60% of civil cases of first instance are disposed of by mediation and withdrawal.[46]

III
Proposals for Reform of Chinese Civil Procedure

It must be said that China's civil procedure in practice has many advantages in resolving disputes promptly—practices that are worth investigation by foreign courts. For instance, a responsible judge handles a case from start to finish, judges preside over pretrial conferences or meetings to identify the issues of a case and get information from parties, a trial date is scheduled at an early stage of the process, and so on.[47] What's more important in maintaining high judicial efficiency, however, is that all

43. It is widely reported that Chinese judges have to work overtime and even sacrifice weekends to draft judgments. See Dingbo Yuan, Relaying on Job Security to Alleviate Judges' Workload (Huanjie Faguan Gongzuo Yali Yaokao Zhibao Zhidu), The Legal Daily (*Fazhi Ribao*), Nar. 18, 2014, Page 5.
44. The Supreme Court identified two focus areas of judges' writing which need significant improvement (the judges' legal analysis and the judges' examination of evidence) in the Five-year Reform Outline of People's Courts (1999).
45. Zhengrui Han: An applied genre analysis of civil judgments: the case of mainland China. Id.
46. According to the Supreme Court's statistics, from 2008 to the first half year of 2012, 64.3% of the civil cases of first instance are disposed by mediation and withdrawal. See Two Third of Civil Cases of First Instance Have Been Disposed by Mediation and Withdrawal in China (*Quanguo Jin San Fen Zhi Er Yishen Minshangshi Anjian Tiaoche Jiean*). Available at <http://news.xinhuanet.com/legal/2012-12/27/c_114184186.htm>.
47. These measures are widely proposed and supported by federal judges and state judges in the U.S. to improve judicial efficiency. See IAALS, Trial Bench Views: Findings from a National Survey on Civil

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judges are compelled and constrained by the judicial performance assessment and management system. Healthy competition between colleagues and the chance to gain rewards and promotion, propel the judges, with few exceptions, to do their best to dispose of cases as soon as possible. The procedure system, characterized by informality and particularism, also allow judges to take manifold measures to achieve this goal.

On the other side of the coin, there are fundamental flaws in the same judicial system. The judges with broad discretion engage in meeting the comprehensive judicial performance evaluation criteria and fulfilling the targets set out by their superiors, rather than responding to the parties' claims and protecting the parties' procedural rights. As an American scholar warned long ago, "the managerial judging is less visible and usually unreviewable. It gives trial courts more authority and at the same time provides litigants with few procedural safeguards to protect them from abuse of that authority."[48] The problem is far more serious in China because of the trial management and assessment system within the hierarchical structure of the courts. In this background, the judges have no other choice but to submit themselves to the superiors' direction and devote a disproportionate amount of time and energy to gaining scores in judicial performance assessment. If this personal or collective aim conflicts with litigants' procedural interests, which is inevitable, the courts normally sacrifice the later to achieve the former, just as mentioned above.

Meanwhile, as an integrated part of the political system in China, where it is implied that the state will commit itself to satisfy the general needs of the public (while simultaneously restricting political competition), the courts should respond to parties' dissatisfaction and grievances even after routine civil procedure closed. China has a long history of using the letters and visits system as a down-up information transfer system independent of bureaucracy to assist the centralized authority in rooting out corruption, correctly resolving individual cases, acquiring knowledge of local conditions, and reviewing the performance of local authorities.[49] The lack of alternative mechanisms for voicing public views also encourages those with grievances to resort to the letters and visits system.[50] That's why all the courts, controlled by authorities at different levels, must be responsible to address the influx of letters and visits connected with the cases they previously adjudicated. Inside the courts, there is a rigid principle stipulating that each judge must bear personal responsibility to terminate letters and visits arisen from the cases they disposed ("谁主办, 谁负责") The superiors of his division may also assume leadership responsibility ("谁主管, 谁负责"). For a judge, personally, the risk of handling letters and visits is quite unpredictable.

Procedure Source (December 2010). Available at <http://iaals.du.edu/library/publications/trial-bench-views-findings-from-a-national-survey-on-civil-procedure>.

48. Judith Resnik, Managerial Judges, 96 Harvard Law Review 380 (1982).
49. Minzner, Judicial Disciplinary Systems for Incorrectly Decided Cases, p.112.
50. Liebman, China's Courts: Restricted Reform, p.25.

If a judge failed to prevent the conflict of letters and visits from escalation, his career prospects would probably be ruined. In summation, the process of letters and visits is not only the last resort for parties whose procedural rights were not sufficiently guaranteed, but also a powerful (and even harmful) "weapon of the weak" that they turn to when no other option is available.

Chinese judges are sandwiched between their superiors and the parties who dare to spare no expense to achieve justice in accord with their own thoughts. On the other hand, due to information asymmetry in adjudication, the judges also have many practical strategies and tactics to shirk their judicial responsibility. Such tactics range from refusing to accept claims without a written order, pushing the parties to achieve mediation agreements throughout the litigation process, referring cases to Adjudication Committee to determine the outcome (thus making the Adjudication Committee members bear collective responsibility for the decision), to submitting advisory opinion requests (请示) to the higher court on how to dispose of a case (thus helping to reduce the risk of judgment or order being reversed or amended by the higher court).

This might explain why the Chinese civil judicial system has such a perplexing appearance. Various parties complain that their procedural rights are arbitrarily deprived and infringed upon by the courts, while the judges complain about their heavy workload, lack of job security, and poor judicial authority. Detailed discussion on how to reform Chinese judicial institutions is not the focus of this paper. Based on the observation and analysis above, the author would like to put forward some proposals to improve the Chinese civil procedure system. First an overview and comment of the newest amendments of the CPL seems necessary.

Aiming to improve judicial quality and increase judicial efficiency, while alleviating the public's dissatisfaction with court performance, as well as to promote social stability and harmony,[51] China's legislature started to revise the CPL in 2010. It was promulgated it in 2012, and came into effect on January 1st, 2013.[52] In order to secure justice and protect parties' procedural interests of the first instance, the new law emphasized that the courts must accept and docket all claims in accordance with statutory standards and issue written orders if reject to accept a claim;[53] expand interim injunctive mechanism and entitle parties to obtain a court order requesting

51. Shengming Wang, Explanations to the Revision Act to the Civil Procedure Law of the PRC (draft) (*Guanyu Zhonghua Renmin Gonghe Guo Minshi Susong Fa Xiuzheng An (Caoan) De Shuoming*), 31-32 New Laws and Regulations 61 (2012).
52. Standing Committee of the National People's Congress, Decision on Amending the Civil Procedure Law of the People's Republic of China (2012) (*Quanguo Renda Changweihui Guanyu Xiugai Zhonghua Renmin Gonghe Guo Minshi Susong Fa De Jueding (2012)*), Order N. 59 of the President of the People's Republic of China.
53. The CPL, art. 123.

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the opposing party to cease or undertake certain acts;[54] increase the courts' obligation to take actions to preserve evidence and property before filing or after accepting;[55] alleviate the economic difficulty faced by parties in collecting and producing witness testimonies and expert appraisals[56] and so on.

Meanwhile, in order to reduce judicial expense and delay, for the first time, the CPL lays out a general framework of small claims. It provides that, "When the basic people's court or its dispatched tribunal, tries simple civil cases specified in the first paragraph of Article 157, and the amount of the subject matter in a case is less than 30% of the annual average wage of the employed in the last year in a province, autonomous region or municipality directly under the Central Government, the judgment of first instance shall be final."[57] As expected by one high court, the rate of applications of the small claims procedure would increase to 30% of all civil suits while most small claims cases would be disposed of in one month after being accepted.[58] The new law also adds provisions of judicial confirmation of mediation agreements achieved in social organizations and provides that the order of confirmation issued by judges after examining parties' application materials has the same legal effect as mediations statement and judgment.[59] The legislators enacted such provisions with the expectation that the parties will be inspired to utilize ADR mechanisms outside of the courts to solve as many disputes as possible.

These statutory revisions definitely have positive effects on improving judicial quality and reducing judicial cost. But it is quite unclear whether the legislative goals of amending the CPL will be achieved. So far, the author cannot find any evidence showing that the difficulty of accepting civil cases has been alleviated apparently. While some basic courts have complained that the application of small claims procedure is far lower than expected.[60] In some basic courts, most cases that parties apply for the courts' confirmation of their mediation are those originally transferred to social mediations

54. The CPL, art. 100.
55. The CPL, art. 81; art. 100.
56. Art. 74 provides that the court should pay witness before due the reasonable fee of transportations, accommodations, dining, and so on, if it *ex officio* notifies the witness to testify before the court. Art. 76 specifies that the court should entrust an expert witness to make an evaluation on a specific issue concerning the fact if the parties don't apply to and it seems necessary.
57. Art.162 of the CPL. More specific rules will be set out by the Supreme Court and local courts.
58. The Zhejiang High Court issued a local rule concerning small claims procedure and announced that "28% civil cases will be trialed through small claims procedure in Zhejiang province". Available at http://news.china.com.cn/law/2013-01/07/content_27606060.htm.
59. The CPL, art. 194, 195.
60. For example, a survey of one basic court in Zhejiang province showed that only 3.9% civil cases applied small claims procedure, of which 39.4% transferred to simplified procedure or primary procedure, during the period Jan. 1 to Sep. 22, 2013. Available at <www.qzzjfy.com/page.asp?id=6282>. In another basic court in Anhui province, 4.4% civil cases applied small claims procedure in the first half of 2013. Available at <www.ahhyfy.chinacourt.org/public/detail.php?id=6432>.

organizations from the courts. Very few parties apply for judicial confirmation when they make a mediation agreement presided over by the People's Mediators or the mediators of industry associations.[61]

From the perspective of civil procedure which is driven and constrained by organizational management, these reform measures are important but seem trivial and do not touch the essence of the unique procedural system. The most important issue is that this civil procedure system lacks transparency and independent accountability. On one hand, judicial independence is not guaranteed by the procedure system against pressures and interferences from the exterior and from superiors. The judges are not permitted to retain the ultimate authority of adjudication, but have to refer judgments and orders to their superiors and follow the latter's decisions on disposing cases. On the other hand, the procedure system doesn't grant the parties adequate opportunities of participation and having their arguments heard. This contributes to the parties' discontent in not expressing their grievance fully as well as the courts' making decisions covertly.

Corresponding with the four stages of the trial process discussed in the former part of this paper, many reform measures tackle each of the stages to enhance judicial independence and personal accountability of the judges. These measures aim to increase the autonomy and transparency of the Chinese civil procedure and confront the resistance judges' have to managerial interference of their daily work.

First, at the filing and docking stage, if the filing division judges decide not to accept a claim, they must issue a written order clarifying the basis of rejection. If the plaintiffs insist that the rejection is not in accordance with the relevant provisions of the CPL and Judicial Interpretations, they are vested with the right of applying for a hearing on case accepting. With or without the defendants' participation, the courts should preside over the hearing and respond to the plaintiffs' allegation and arguments. Such reform contributes to decrease the function of the filing and docketing procedure as a means of gatekeeping. The filing judges and their superiors' discretion would be narrowly restricted to enable the parties' access to justice.

Second, at the pre-trial preparation stage, the courts should bear more responsibility for collecting evidence and inquiring into the merits of cases. Grounded in the reality that more than half of parties are not represented by lawyers and that evidence is often held by other organizations or persons who frequently refuse to provide them, the courts' investigation and collection is essential to find the facts of a case and sometimes is the only chance to discover the truth of a case. So the CPL

61. For example, in Wenling County People's Court, from 2010 to May, 2013, 94.9% cases of which mediation agreements confirmed by the court were the cases transferred from the court before accepting. During the same period, only 2% mediation agreements issued by Wenling People's Mediation Committee and Wenling United Associations Mediation Committee were put forward to judicial confirmation. Available at <www.tzcourt.cn/InfoPub/ArticleView.aspx?ID=5910>.

should safeguard the parties' procedural interest of application for the courts' evidence investigation. An evidentiary hearing should be afforded to the parties if there are fierce controversies on whether the party against whom the application is filed should provide the evidence. If the courts deny the parties' request for investigation, judges must issue an order explaining the grounds for denying the request.

Third, to avoid judges presiding over trials just to "go through the motions," the CPL and Judicial Interpretations should take verbal evidence, such as witness testimony and expert witness testimony, more seriously. As mentioned above, documents and exhibits are ordinarily obtained and examined by the judges before trial, but witness and expert witness are always present at trial to testify. In this regard, the actual trial is indispensable in determining the admissibility and credibility of verbal evidence in China. So it is pivotal to urge witnesses to testify before the court and guarantee the parties and their lawyers a chance of examination. This change will ultimately heighten the parties' (and the public's) trust in the judicial system.

Last but not the least, the judge or the panel who presides over a trial should have the ultimate authority adjudicating of the case. No further process is permitted without the parties' participation post-trial. The division-chief judge and the president of the court may retain the power of approving and issuing, but if they hold that the decision referred to them is erroneous, they must inform the judge or the panel and the parties, and inquire whether a new trial is deemed necessary. If a case is submitted to the Adjudication Committee, the committee members who vote on the decision must attend a new hearing and listen to the parties' oral argument directly. To summarize, no one is permitted to determine a case except those who presided over the trial to begin with. At the same time, all adjudicators should set forth accurate descriptions of the facts and evidence, as well as use logical arguments and legal reasoning when they issue a final judgment.[62]

These proposals focus on how to improve judicial independence and procedural transparency. No doubt that such reform measures will slow the civil litigation process down and cause more or less delays, but this should not be a large concern in China. The CPL sets a short term for adjudication and all the courts will continue to comply with it. Some revisions to the CPL will also reduce unreasonable delay and cost. For instance, a compulsory answer in a statutory period imposed on defendants would compel the defendants to respond to the claim promptly and help the courts to get understanding of the controversial issues of a case at the beginning of the process.

62. The Supreme Court has required that all the courts should post their judgments and orders on the official website established by it. It's more convenient for lawyers and the public to monitor the quality of judgments and orders. Supreme People's Court, Provisions on the Issuance of Judicial Documents on the Internet by the People's Courts (*Zuigao Renmin Fayuan Guanyu Renmin Fayuan Zai Hulianwang Gongbu Caipan Wenshu De Guiding*), N. 26, 2013.

5. CONCLUSION

Chinese civil procedure operates under a constraining, hierarchical trial assessment and management structure. The judges have strong incentive of disposing cases promptly in order to pursue rewards and career promotions. But such a judicial system does not provide litigants with enough procedural safeguards to protect them from the abuse of discretion. Litigants are vulnerable to infringement and deprivation of their rights by courts. From this perspective, it's understandable that while the Chinese judicial system performs in a highly efficient manner, it is, at the same time, suffering from a serious crisis of public confidence and trust. To resist managerial inference into the adjudicating process and to enhance the autonomy of the procedural system, some reform of the procedural system ought to be pursued. These pivotal measures, as discussed above, will guarantee litigants the opportunity for participation in the litigation process and improve the transparency of the civil procedure.

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