THE POSITION OF JUDGES IN CIVIL LITIGATION IN TRANSITIONAL CHINA—JUDICIAL MEDIATION AND CASE MANAGEMENT

Yulin Fu and Zhixun Cao

ABSTRACT

The judge's position in civil litigation in China is viewed within two interlaced dimensions with transforming perspectives: (1) the role of adjudication in civil litigation in contrast to judicial mediation; and (2) the judge's role in civil adjudication in contrast to the position of the parties. Prior to China's first code of civil procedure (the 1982 ‘Test Code’), civil litigation was mainly resolved through mediation by the judge, and very rarely with hearings, proof or adjudication. In the 1990s, the 1991 Code and judicial reforms began to stress the formalisation of the judicial process and neutral judgment as a result of criticism of the judge's mediation powers for their procedural randomness, potential compulsory nature and low efficiency; at the same time, the parties' responsibility to supply factual and evidentiary material as well as their procedural participation were expected to serve as a 'supervision' of or a limitation to the judge's omnipotent power. However, as to case management, the judge still operates and controls the entire process to a large extent. Since the start of this century, a more complicated tendency has appeared: mediation is emphasized again both as a judicial method and as a method within ADR; meanwhile, the concept of 'active justice' has influenced the strengthening of the judge's position, yet the parties' burden of proof and their participation in some stages of the proceedings still remain.

Keywords: Civil Litigation, Judicial Mediation, Case Management, Judicial Reform

1. INTRODUCTION

The original trial mode in China was extremely inquisitorial (Offizial­maxime; chaozhiquan zhuyi, 超职权主义). The court took control of a

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The latest amendment to the Code of Civil Procedure of 31 August 2012 was released by the Standing Committee of the NPC after the conclusion of the present chapter. References to this amendment are therefore absent in this chapter.
large number of issues, which lowered judicial efficiency, raised legal costs and tended to lead to corruption.

As the Supreme People’s Court (SPC) endeavoured to promote the statutory principle of the 1991 Code of Civil Procedure (1991 Code) of open trial and the principle that “the party that brings the claim has the burden of proof” (shei zhuzhang, shei juzheng, 谁主张谁举证), it initiated the so-called Civil Trial Mode Reform. The reform placed great emphasis on three issues: identifying the trial phase rather than the pre-trial phase as the key moment in litigation; focusing on the presentation of evidence by the parties rather than the collection of evidence by the judges; and strengthening adjudication rather than mediation as the main approach in resolving legal disputes. While the reform was not a complete success, remarkable achievements were made including the improvement of the dispositional rights of the parties and the enlargement of their responsibilities, the enhancement of transparency in the judicial process, the introduction of restraints on the power of judges, an improvement of the status of the judicial profession and a greater independence of the judiciary. At the same time, the limitations of the reform are obvious. In particular, the reform did not shed light on the parties’ rights of procedural participation and selection, and it did not activate the parties’ ability of self-management, which was curbed by the long-standing tradition of dependence on the judiciary. As a result, the reform plans which intended to transfer procedural power to the parties actually empowered irresponsible judges to take a time out and to neglect their legal duty to pursue the truth. Moreover, the internal defect of the typical ‘all or nothing’ type of judgment which was the result of the reform could not be widely accepted by Chinese legal culture which follows the Doctrine of the Mean (zhongyong, 中庸) in its Confucian tradition. In this way, the reform to some extent worsened the crisis of trust in the judiciary.

An increasingly burdensome caseload of petitions (shensu, 申诉) challenging final judgments placed mounting pressure on the government, and directly resulted in the revision of the 1991 Code in 2007 by the National People’s Congress (NPC). One of the objectives of the revision was to strengthen the retrial procedure. What is more, the courts began to reconsider their position, re-emphasizing mediation and even creating the slogan ‘Active justice for the people’ (nengdongsifa, 能动司法). It is not difficult to see that the judiciary was trying to alter its former position of the 1990s which strongly advocated the independence and the professionalisation of the judiciary. Simultaneously, the distribution of cases and the classifica-