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Article

Beyond law and politics: an empirical study of judicial mediation in China

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ABSTRACT

Beyond law and politics, how will other factors influence individual judicial behaviour in China? How do the gains of efficiency and substantive justice compare with the potential losses of procedural protections? Do judges see their role as to resolve the disputes between the parties by the most appropriate means, or is it only an attempt to render and enforce an authoritative binding decision? Through a series of interviews with Chinese judges, the research provides an empirical narrative on how judicial mediation is actually practiced in China and analyses values and limitations of judicial mediation. The article empirically illustrates the multiplicity of influences on judicial behaviour in China, and the perception of the role of judges in China. Conceptually, the article aspires to contribute to the field of comparative judicial behaviour. It attempts to expand our inquiry beyond the focus on the role of politics and law when analysing judicial behaviour.

> When adjudicating lawsuits, I am like any other person: the main objective is not just to make a judgment, but also to make the society free of litigation.
>
> —Confucius[1]

I. INTRODUCTION

Judicial mediation, as an essentially policy-driven process, has been widely practiced in China for years without a solid theoretical and institutional framework. The pragmatic approach tends to be translated into short-term behaviours for a quick result and immediate benefit. The research to date on judicial mediation in China has largely focused on political influence and rule of law.[2] From an institutional perspective, some commentators describe Chinese

[1] Confucius, Yan Yuan (13).《论语×颜渊篇第十三》：'听讼, 吾犹人也, 必也使无讼乎。'

[2] See, J Cohen, 'Chinese Mediation on the Eve of Modernization' (1966) 54(3) Cal L Rev 1201, 1201–26; S Lubman, 'Mao and Mediation: Politics and Dispute Resolution in Communist China' (1967) 55(5) Cal L Rev 1284, 1284–359; M Palmer, 'The Revival of Mediation in the People's Republic of China: Judicial Mediation' in WE Butler (ed), *Yearbook on*

courts as a society's 'order maintenance institutions'.[3] Judicial mediation is seen as a means to satisfy Chinese Communist Party's ('CCP') political agenda.[4] From a macro perspective, the statistics show that general practice of judicial mediation is largely influenced by the policy shifts, which went through a 'V' shaped development process, with fluctuations largely corresponding to the prevailing political campaigns (see Figure 1).

In the early stages of Chinese reform and opening up, the society needed judgments to define social norms, enhance the general public's legal awareness and adjust behavioural rules. As a result, courts commenced rigorous civil justice reforms in the 1980s and 1990s, which emphasized law, litigation and courts as institutions for resolving civil grievances. Great emphasis was placed on professionalization and institutionalization.[5] Consequently, the function of mediation was greatly weakened in many courts,[6] and there was a corresponding, steady decline in the number of cases concluded by mediation.

Since 2003, with the top-down policy de-emphasizing formal law and adjudication, China experienced a 'turn against the law'.[7] Mediation was believed to help maintain social stability, and to be consistent with the party-state's commitment to a 'socialist harmonious society' under President Hu Jintao.[8] Therefore, post the period of decline, judicial mediation has been revived in China, as the 'top-down authoritarian response motivated by social stability concerns',[9] the 'state channeling of social grievances'[10] and 'an exercise of state power by local bureaucrats under the guise of tradition.'[11] Courts were directed to prioritize mediation to respond to the feelings of the masses. Corresponding to the policy campaign emphasizing mediation, there was a steady increase in the percentage of civil cases concluded by mediation during the same period.

Since 2014, after President Xi Jinping rose to power, the new waves of judicial reform focused on improving the legitimacy and independence of the courts and building the general public's trust towards the courts, as an integral component of the CCP's rhetoric of 'ruling the country in accordance with law.'[12] The courts' professionalism, institutional capacity and

Socialist Legal Systems (Transnational Juris Publications 1989) 145–71; H Fu, 'Understanding People's Mediation in Post-Mao China' (1992) 6 J Chin L 211, 211–46; E Glassman, 'The Function of Mediation in China: Examining the Impact of Regulations Governing the People's Mediation Committees' (1992) 10 PBLJ 460; S Lubman, 'Dispute Resolution in China after Deng Xiaoping: Mao and Mediation Revisited' (1999) 11(2) CJAL 229, 229–391; 强世功, '《权力的组织网络与法律的治理化—马锡五审判方式与中国法律的新传统》' ['[The Network of Power and the Governance of Laws: Ma Xiwu's Way of Judging and the New Tradition of Chinese Law]' in 强世功 (ed) [Shigong Qiang], 《调解、法制与现代性：中国调解制度研究》[*Mediation, Legality and Modernity: Mediation in China*] (中国法制出版社 2001) [China Legal Publishing House 2001] 204–63; H Fu, 'The Politics of Mediation in a Chinese Country: The Case of Luo Lianxi' (2003) 5(2) AJAL 107, 122; B Han, 'Empirical Study and Theoretical Reflection of Judicial Mediation: a Survey on the Implementation of SPC Provisions on Court's Civil Mediation Work' (2007) 4 Leg Appl 75, 75–9; H Fu, 'Access to Justice in China: Potentials, Limits and Alternatives' (University of Hong Kong 2009) <http://ssrn.com/abstract=1474073> accessed 30 December 2022; M Palmer, 'Compromising Courts and Harmonizing Ideologies: Mediation in the Administrative Chambers of the People's Courts in the People's Republic of China' in A Harding and P Nicholson (eds), *New Courts in Asia* (Routledge 2009) 195–214; L Wang, 'Characteristics of China's Judicial Mediation System' (2009) 17(sup 1) APLR (Special Issue on Mediation) 67; H Fu, 'Mediation and the Rule of Law: The Chinese Landscape' in M Bälz and IAJ Zekoll (eds), *Dispute Resolution: Alternatives to Formalization* (Brill 2014); X He and KH Ng, 'Internal Contradictions of Judicial Mediation in China' (2014) 39(2) LSI 285, 385–312.

[3] D Clarke, 'Order and Law in China' (2020) 1506 Geo Wash L Fac 1, 51.

[4] C Minzner, 'China's Turn against Law' (2011) 59(4) Am J Comp Law 935, 935–84.

[5] Fu (n2), 'Mediation and the Rule of Law: The Chinese Landscape' 8.

[6] Wang (n 2).

[7] Minzner (n 4).

[8] Palmer (n 2); Y Zheng and SK Tok, *'Harmonious Society' and 'Harmonious World': China's Policy Discourse Under Hu Jintao* (University of Nottingham China Policy Institute, Briefing Series 26, 2007).

[9] Minzner (n 4) 936.

[10] H Lu, 'State Channeling of Social Grievances: Theory and Evidence from China' (2011) 41(2) HKLJ 547, 547–71.

[11] H Fu, 'Putting China's Judiciary into Perspective: Is It Independent, Competent and Fair' in E Jensen and T Heller (eds), *Beyond Common Knowledge: Empirical Approaches to the Rule of Law* (SUP 2003).

[12] E Nesossi and S Trevaskes, 'Procedural Justice and the Fair Trial in Contemporary Chinese Criminal Justice' (2017) 2(1–2) Brill Res. Persp. in Gov. & Pub. Pol'y in China 1, 25.

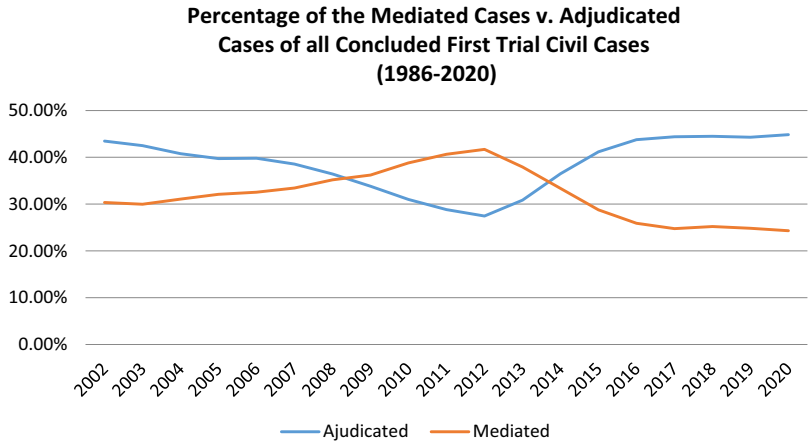

Figure 1: Percentage of the *Mediated Cases v Adjudicated Cases* of all concluded first trial civil cases (1986–2020).

Note: Data are from Legal Yearbook and the China Statistical Yearbook.

political independence have been strategically expanded by leadership under President Xi Jinping, and China is turning towards law.[13] The above policy shift has led to a cool down from the heat of mediation, requiring that the judges strike a proper balance between mediation and adjudication—'allowing the judges to adjudicate and holding them responsible for their decisions' has become the new slogan. As a result, the number of first trial cases concluded by mediation has been on a decline, while adjudicated cases have been on the rise during the same period.

While top-down policy campaigns have greatly influenced the courts' operation and the judicial practice in China overall, judges are not merely policy maximizers or mechanical legalists. Judges are human beings. On a micro level, beyond political sways and the role of law, are there other factors affecting individual judges' behaviours, such as their personal motivations, identity and cognitive biases? How is judicial mediation *actually* conducted in China? What are the values and limitations of judicial mediation?

The role of judicial mediation and informal justice in contemporary China also begs further questions. How do the gains of efficiency and substantive justice compare with the potential losses of procedural protections? What are the perceptions on the role of judges? Is the mandate of the judges to resolve the disputes between the parties by the most appropriate means, or is it only an attempt to render and enforce an authoritative binding decision? Do judges see themselves as dispute resolvers to resolve the immediate conflicts between the parties or as guardians of justice that transcends the parties?

These and other questions relating to judicial mediation in China need to be answered to have a well-informed and reasoned understanding of the current Chinese practice of judicial mediation. As Hong Kong's former Secretary for Justice commented: 'theoretical models of mediation cannot be tested unless they are put into practice, and practice of mediation cannot be polished without the support of proper research based on empirical data.'[14]

[13] T Zhang and T Ginsburg, 'China's Turn Toward Law' (2019) 59(2) Va J Int Law 307, 316.

[14] R Yuen, 'Keynote Speech on "Mediation in Hong Kong: The Road Ahead"' (Mediation First Conference, Hong Kong, 11 May 2012) <https://www.doj.gov.hk/en/publications/pdf/Mediation_Conference_2012_Publication_e.pdf> accessed 27 October 2022.

Through a series of interviews of Chinese judges in six courts in three different cities at different stages of economic developments, through a detailed empirical analysis of the views and conduct of the interviewed judges, including actual process and underlying values and perceptions, the research intends to provide an empirical narrative of how judicial mediation is actually conducted in China, and give some empirical evidence for academic debates over the effectiveness of judicial mediation campaigns and the normative desirability of such practice.

Conceptually, the research intends to contribute to the study of comparative judicial behaviour, which has grown into an important field to analyse and compare judging across the world.[15] While traditional comparative law often focuses on the legal structure, argument and interpretation, judicial behaviour adopts a positive perspective, striving to describe and explain judges' choices and their consequences, and mostly draws on empirical methodologies.[16]

The dominant models of judicial behaviour study consider that politics and the law are solidly institutionalized, constraining judges' behaviour through the 'law', broadly defined to include constitutional provisions, statues, past judicial decisions and the like ('legalist model'), reflecting ideological preferences ('attitudinal model').[17] The legalist model holds that 'law's rationality, neutrality and objectivity guide the judges' choices'.[18] A twist to the legalist idea is 'law-as-an-institution' approach, which suggests that 'law' is one of many institutions that shape judicial behaviour.[19] The attitudinal model believes that judges attempt to align the law with their political preferences.[20] In an authoritarian state, while politics and law serve as normative restraints on judges from acting on their personal preferences, they are not the sole reasons shaping judicial behaviour.

This study intends to go beyond the legalist and attitudinal model, taking into account other alternative models and to extend the study of judicial behaviour in non-democratic societies.

To illustrate the complexity of factors influencing judicial behaviour, this article takes into account the 'labor market approach', 'strategic accounts', 'identity approach' and 'cognitive biases' approaches.[21] The labour market model and strategic accounts are both based on rational choice theory from economics, according to which the judge is 'a rational maximizer of his ends in life, his satisfactions … his "self-interest"'.[22] The labour market model focuses on judges' personal motivations for their choices, such as job satisfaction, external satisfactions that come from being a judge, leisure, salary/income and promotion.[23] The strategic accounts model highlights the importance of interdependent decision-making. It considers that judges must 'attend to the preferences and likely actions of *other relevant actors* when

[15] See generally, L Epstein and SA Lindquist (eds), *The Oxford Handbook of US Judicial Behavior* (OUP 2017); U Šadl and others (eds), *The Oxford Handbook of Comparative Judicial Behavior* (forthcoming); M Sen, 'Is Justice Really Blind? Race and Appellate Review in U.S. Courts' (2015) 44 JLS 187; CL Boyd, 'She'll Settle It?' (2013) 1 JLC 193; A Melcarne, 'Careerism and Judicial Behavior' (2017) 44 Eur J Law 261; JM Ramseyer and EB Rasmussen, 'Why Are Japanese Judges So Conservative in Politically Charged Cases?' (2001) 95(2) APSR 331; N Garoupa and T Ginsburg, *Judicial Reputation: A Comparative Theory* (UCP 2015); R Posner, *How Judges Think* (HUP 2008); B Dressel, R Sanchez-Urribarri and A Stroh, 'The Informal Dimension of Judicial Politics: A Relational Perspective' (2017) 13 Annu Rev Law Soc Sci 413.

[16] U Šadl, L Epstein and K Weinshall, 'The Role of Comparative Law in the Analysis of Judicial Behaviour – Symposium: The Role of Comparative Law in the Social Sciences' (2022) 12(32) Am J Comp Law 1, 3.

[17] For a summary of these perspectives, see L Baum, *The Puzzle of Judicial Behavior* (U of Michigan P 1998); L Baum, *Judges and Their Audiences: A Perspective on Judicial Behavior* (Princeton UP 2006); B Dressel, R Sanchez-Urribarri and A Stroh (n 15) 414; U Šadl, L Epstein and K Weinshall, 'Symposium: The Role of Comparative Law in the Analysis of Judicial Behavior' (2022) 12(32) Am J Comp Law 1, 15.

[18] Šadl, Epstein and Weinshall (n 17) 25.

[19] ibid.

[20] See ibid 15; Dressel, Sanchez-Urribarri and Stroh (n 15) 423.

[21] See Šadl, Epstein and Weinshall (n 16) 24.

[22] RA Posner, *Economic Analysis of Law* (8th edn, Aspen Publishers 2011) 3.

[23] See Šadl, Epstein and Weinshall (n 17) 15–16.

they make their decisions if they are to achieve their goals.'[24] The identity approach explores the relationship between the choices judges make and their biographies. The cognitive bias approach considers that non-rational factors, such as emotions, intuitions, sympathies will distort the judges' purely rational decision-making.[25]

Built on the above theories, the article empirically illustrates the multiplicity of influences on judges' choices in China, including personal motivations (such as promotion and sense of honour), identity (such as the judges' seniority and position in the court, their age, professional competence, educational background, social experience and personal characteristics), consideration of the possible reactions from other relevant actors (such as external pressure from political leaders, risks of appeal, remand or overrule from higher courts, and possible petitions from disputants), as well as cognitive biases (such as human sentiments, empathy and emotions).

To be sure, the article does not suggest disregarding the political and normative restraints on judges from acting on their personal preferences in an authoritarian state. It also acknowledges that in some cases, for instance, when the authority of the regime could be threatened, the constraints can be so overwhelming that there is little space for judges to make their choices based on personal preferences. Instead, the article suggests that politics and law are not the only reasons shaping judicial behaviour. To use the anthropological terms, 'the ethical dimension of social life—the fact that every-day conduct is constitutively pervaded by reflective evaluation—is irreducible.'[26] Despite the structural constraints, human beings are often more than the passive effects of social structures or cultural systems in which they exist. This study is interested in how judges perceive and populate their role and give content to policy and laws daily. In this process, while judges implicitly or explicitly expressed some sense of duty to implement the top-down policy, they also have the sense of humanity and want to attain their personal belief of fairness and justice. Such human elements of judges are often neglected in the contemporary scholarship of Chinese judges or Chinese judicial system, given the predominance of political concerns. The article argues that both institutional structure and these personal factors are important to understand judicial behaviour in the Chinese context.

After the Introduction, the article will: explain the methodology of the empirical research (section II), use empirical evidence to illustrate how judicial mediation is *actually* conducted in China (section III), evaluate the success of the Chinese judicial mediation programme (section IV), analyse the perception of the role of judges in China (section V) and conclude (section VI).

II. DATA AND METHOD

In order to address the questions raised in the Introduction and to obtain the first-hand materials about the actual practice of judicial mediation in China, the author, together with a research assistant, visited six courts in three different regions of China at different stages of economic developments, and conducted semi-structured in-depth interviews with a total of 32 judges and officials, followed up by informal conversations with the author's personal contacts. It is acknowledged that the data are not statistically significant, given sheer size of judiciary in China. The six courts from three different regions cannot be said to represent the significant 'heterogeneity'[27] of court practices within China, especially given significant differences in court practices in rural China.

[24] ibid 17.
[25] ibid 20.
[26] J Laidlaw, *The Subject of Virtue: An Anthropology of Ethics and Freedom* (CUP 2014) 44.
[27] See He and Ng (n 2) 28.

This research focuses on qualitative non-numeric data, rather than quantitative data, because it can help us to identify and explain the patterns. To enhance the representativeness of these selected courts, the author has chosen the six courts from divergent geographic locations, including the Central and Western centre-city as well as the Southeast coastal area. The three cities in which the selected courts are located, are also at different economic development stages. One of the courts is located in a rural area, far from the major city. According to the National Bureau of Statistics, City A, City B and City C is located at top-tier, middle-tier and lower-tier, respectively, in terms of the per capita disposable income of households.[28] The investigations focused on courts at the basic level, which represent 76.9% of the judicial personnel and 89.28% of accepted cases in courts at all levels.[29] We have also included judges from intermediate people's courts (IPC) in order to test if there are any differences in the attitudes and practice of judicial mediation among different levels of courts. We have interviewed a total of 29 judges from basic-level and intermediate courts. In addition, we have interviewed three officials from the Supreme People's Court (SPC) to get some insights into the current status and future trends of judicial mediation from national policy planning perspectives.

To minimize the risk of bias and evaluate the potential impact of personal background and experience on the judges' conduct, we have tried to ensure a reasonable diversity of gender, seniority and years of experience of the interviewed judges. Amongst the 29 judges interviewed, there are 8 female judges and 21 male judges, aged between 29 and 58. Over a dozen judges have at least 10 years of experience in court. Thus, they could comment on the impact of the policy shift on the judicial mediation practice over the years from their personal experience. At least 13 judges have a master's degree and above.[30] All judges have some experience of judicial mediation, but their mediation experience varies significantly. Two of the interviewed judges have significant mediation experience (with personal experience of approximately 4000 mediated cases) and very high settlement rate (close to 80%) and were awarded as a *model judge-mediator*. Other judges' personal experience of the number of mediated cases ranges from 60 to 1300, with the settlement rate ranging from 25% to 60%.

The in-person interviews were semi-structured and focused on the judges' mediation preference, how judicial mediation is conducted, and their views on the current judicial mediation programme. Standard questionnaires were prepared based on the issues identified in the preparatory research to guide the interviews and ensure a degree of comparability. Interviews were conducted in groups. Group interviews will show how subjects interact spontaneously, such as by mirroring one another's views, competing for dominance or staking out individual perspectives. I observed that those who have strong personal charism or who are more assertive, tended to speak more. Interestingly, those with strong personal charisma tended to be the ones who are better at mediation. It also has to do with specific questions, such as the questions concerning the common techniques to use in judicial mediation, and naturally those *model judge-mediators* tended to be more dominating. Recognizing that some more junior judges or less assertive judges might be less forthcoming to express a different view when the more senior members already spoke of their views, I also tried to change the order of questions and invite the judges who spoke less to start out in responding to some questions. After the interview, judges were also asked to complete the questionnaire individually to supplement any information they may not have expressed during the interviews.

[28] *Source:* China Statistical Yearbook 2021, Per Capita Disposable Income of Households by Region (2020).
[29] 《最高法院院长在第十一届全国人民代表大会常务委员会第二十三次会议上的报告》[Report by the President of the SPC on the 23rd Meeting of the 11th Session National People's Congress Standing Committee].
[30] This figure is incomplete as some judges did not fill in the education background.

It is acknowledged that there is a limitation on how much information scholars can acquire from judges through the interviews, as they are unlikely to volunteer information that is self-detrimental. This sentiment was captured by Dressel, Sanchez-Urribarri and Stroh in their remark: '[j]udges generally form a cautious professional community that seeks to avoid close scrutiny.'[31] Some countermeasures are taken to encourage candid conversations. Specifically, the interviews were conducted in privacy, participating judges and courts were kept anonymous,[32] and the questions were carefully designed to encourage open discussions. The author has extensive experience conducting fieldwork in China and also has personal connections in most of the courts visited, which greatly facilitated the access to judges and ability to gain the judges' confidence.

In addition to interviews, the author also reviewed 100 judicial mediation cases selected from the Outstanding Examples of Mediation Cases in People's Courts across the Nation.[33] These recorded mediation cases summarized the mediation techniques used to promote settlement and included comments on the judicial mediation values to resolve such disputes by the Selection and Editorial Committee of SPC.[34] These views may or may not be the same from the individual judges' perceptions.

III. HOW IS JUDICIAL MEDIATION CONDUCTED IN CHINA?

The following section considers a range of factors that influence judicial mediation, including: How is judicial mediation typically conducted in China? Do judges' personal motivations, identity, intuitions and emotions, and other factors impact their preference towards mediation or adjudication? Do the judges' perceptions of the types of cases suitable or unsuitable for judicial mediation mirror the views from the authorities? What are the common techniques used to facilitate settlement? How do judges evaluate whether it is a successful or failed mediation? What do judges consider as key elements for a successful mediation?

The empirical research focused on the actual conduct of judicial mediation in China. In particular, judges were asked some specific questions, including, but not limited to: (i) information about their personal background and experience; (ii) has the policy shift towards mediation influenced their day-to-day judicial practice and if so how; (iii) what are their preferences towards mediation or adjudication and why; (iv) what types of cases they believe are suitable for mediation, what types of cases are inappropriate or difficult for mediation; (v) when they usually suggest mediation to the parties; (vi) how is judicial mediation typically conducted (including specific questions on whether they meet the parties separately, provide opinion on the merits, raise settlement proposals, the types of settlement reached, the main techniques used to promote settlement, etc); (vii) how do they evaluate whether it is a successful or failed mediation; (viii) what do they consider as key elements for a successful mediation; and (ix) how do they receive mediation training. The main empirical findings are summarized as follows:

A. Factors influencing the judges' preference towards mediation or adjudication

The empirical study reveals that a judges' preference towards mediation or adjudication is influenced by a number of factors, including: their identity, personal motivations, consideration of the likely actions of other relevant actors, as well as cognitive bias.

[31] Dressel, Sanchez-Urribarri and Stroh (n 15) 425.
[32] The judges and courts will be referred to by number to protect their identity.
[33] Notice of the Supreme People's Court on Issuing the Outstanding Examples of Mediation Cases in People's Courts across the Nation, 2012.
[34] 沈德咏 [Shen Deyong], 《全国法院优秀调解案例》[*Outstanding Examples of Mediation Cases in People's Courts across the Nation*] (人民法院出版社 [People's Court Publication] 2013).

1. Seniority and position in the court and consideration of the likely actions of other relevant actors

The judges' seniority and position may influence their preference. The high-ranking officials of the court (such as the president, vice presidents and division heads) tended to have a strong preference for mediation. Among the 10 judges who clearly expressed their preference for mediation,[35] 60% held senior positions of the court. Their choices reflect the importance of interdependent decision-making by considering other relevant actors' likely actions, such as external pressure from political leaders, risks of appeal, remand or overrule from higher courts, and possible petitions from disputants.

One factor that could impact their choices is the evaluation of adjudication quality from the higher level's court, which is based on several indicators, including, but not limited to: appeal rate, remand and overrule rate, settlement rate. If the parties reach a settlement agreement, the court will prepare a consent judgment, specifying the claims, facts of the case and the results of the mediation.[36] Since the consent judgment is reached on a voluntary basis, it is not subject to appeal.[37] Therefore, mediation is particularly preferred for new types of cases where the legal provisions are vague. Resolution of such cases by mediation can provide a kind of safety valve to the courts, by reducing the risks of appeal. Mediation can also be used to avoid supervision and increase the autonomy of the court from its hierarchic superiors, and is typical means to diffuse external pressures from political leaders on judges' decision-making.[38] In consideration of the possible reactions from the disputants, judges can use judicial mediation as an effective method to reduce petitions (known as *xinfang*).[39] One high-ranking official of an IPC commented that the judges could educate the parties on the legal provisions and address the emotional dimensions of the conflicts through mediation. If the deep-seated conflicts are resolved and the disputants' emotional concerns are addressed, the parties are less likely to appeal or file petitions.[40]

For ordinary judges, such considerations of external pressure are less critical. Twelve out of the 29 interviewed judges, most of whom are ordinary judges who do not hold senior positions, stated that they had no particular personal preference for mediation or judgment. Their judicial choices can be influenced by personal motivations (although such personal factors may also have implications for political and legal goals), such as job satisfaction, prestige, sense of honour, salary and promotion.

The ordinary judges' promotion (which also tends to increase job satisfaction, reputation and salary) is linked to the appraisal mechanism, which includes targets such as settlement rate, case closure balance, and appellate reversal ratio. In the early 2000s, settlement rate was the main criteria to evaluate judicial performance.[41] The judges were awarded for achieving a high rate of settlement by mediation. In some regions, there were very specific requirements to achieve a certain percentage of mediation rate of first instance civil cases (in some cases,

[35] Their preference is expressed either directly when completing the questionnaire or indirectly according to the number of cases they suggested mediation to the parties and their statements during the interviews.

[36] art 100 of the Civil Procedure Law (2021), promulgated on 9 April 1991, amended for the third time on 24 December 2021.

[37] See ch 14, 'Procedure at Second Instance' Civil Procedure Law (2021). If an error if found in the mediation process, it can only be handled in accordance with the trial supervision procedures. ch 16, 'Trial Supervision Procedure' Civil Procedure Law (2021).

[38] See X He, 'Pressures on Chinese Judges under Xi' (2021) 85 China J 49, 64. The article gave examples when the judge and the president of the court took an initiative to push for a settlement, when the municipal secretary of political–legal affairs summoned both the president and the judge to 'report the case' influence on the judgment. In the example given, the defendant refused to make any payments beyond 200,000 yuan, far below the plaintiff's expectation, so no settlement was reached.

[39] For a discussion of petitions in China, see CF Minzner, 'Xinfang: An Alternative to Formal Chinese Legal Institutions' (2006) 42 Ford Intl Law J 103, 103–79.

[40] Interview with Judge No 23.

[41] 艾佳慧 [Jiahui Ai], 《中国法院绩效考评制度研究——'同构性' 和 '双轨制' 的逻辑及其问题》['Performance Evaluation in Chinese Courts: The Logic and Problems of the Similarity in Institution and the Dual-Track System'] (2008) 5 法制与社会发展L Soc Dev 71.

the requirement was 60–80%, or above 90%).[42] In order to achieve their career goals, judges might be pressured to use mediation as a means to end the disputes in courts, and pre-empt social conflicts from escalation.

In the revised SPC Guiding Opinion on Carrying Out the Case Quality Evaluation Work[43] published in 2011, the settlement rate remains a positive indicator. However, the rate of application for enforcement of mediation cases was included as a negative indicator to reduce the inflation of the settlement rate.[44] The rationale was that the voluntary performance rate reflected the parties' satisfaction with the mediated outcome. Coerced settlement can lead to problems of enforcement and the occurrence of new disputes. With the policy shift since 2014, a high settlement rate is no longer the main criteria for the judicial performance. Judges are now required to balance mediation and adjudication.[45] The change in appraisal mechanism has also made an impact on individual judges' judicial choices. Most judges felt that there was less pressure to push for mediation and achieve a high settlement rate. The ordinary judges' settlement rate is between 25% and 40% and the rate is decreasing. Many expressed the view that mediation was not necessarily more efficient than adjudication, and the increased complexity and amounts in disputes of the accepted cases made settlement more difficult. Several judges mentioned that they would try hard to facilitate settlement for cases that they believed would have a high chance of settlement (such as claims involving primarily economic interests), and be inclined to render a judgment for cases that had a low chance of settlement (such as cases filed to seek fairness and justice). The judges' preference also depended on the attitudes of the parties. If the parties were pragmatic and willing to compromise some economic benefits in exchange for efficiency and peace of mind, mediation might be preferable. If the parties did not care so much about time cost, and were willing to pursue the litigation to the end, because they wanted to seek an explanation or pursue justice, it would be preferable to render a judgment.

The caseload of the courts also seems to have some impact on the judges' preference. A judge from a district court, with an average of 55,000 cases per annum, commented that judges in courts with 'too many cases and too few personnel' tend to have a stronger preference towards mediation. A settlement by mediation can save much time, including by reducing the amount of time transferring files by clerks and dealing with the possible appeal. On the other hand, judges in courts with a much smaller caseload may have less practical pressure to mediate and prefer to write a judgment.[46]

Another factor influencing the choices of ordinary judges is the award of excellence and a sense of honour. Judges with a high settlement rate are praised as a *model judge-mediator*. Some courts established a mediation studio named after the model judge mediator, giving the individual a sense of honour and prestige. To a certain extent, the selection of the 100 outstanding examples of judicial cases in China also encourages mediation, because the judges of the selected mediation cases will be rewarded by their respective court. Moreover, the courts that contribute the most will receive a best organization prize from the SPC.[47] On

[42] See Minzner (n 4) 957.
[43] Notice of the Supreme People's Court on Issuing the Guiding Opinion of the Supreme People's Court on Carrying out the Case Quality Evaluation Work, Issued in March 2011, after 3 years of trial implementation.
[44] 《张军就案件质量评估体系的修订作出说明》[Jun Zhang's Explanation on the Revision of the Case Quality Assessment System] (23 March 2011) <http://rmfyb.chinacourt.org/paper/html/2011-03/23/content_24747.htm> accessed 4 November 2022.
[45] 谷佳杰 [Jiajie Gu], 《中国特色诉讼调解制度之70年变迁与改革展望——基于司法政策对诉讼调解影响的分析》['Changes and Reforms in Mediation System with Chinese Characteristics in the Past 70 Years'] (2019) 6 山东大学学报 J Shandong U 44.
[46] Interview with Judge No 6.
[47] 《最高人民法院印发<关于扩大诉讼与非诉讼相衔接的矛盾纠纷解决机制改革试点总体方案>的通知》[Notice of the Supreme People's Court on Issuing the Overall Plan on Expanding the Pilot Reform of Dispute Resolution Mechanisms by Coordination between Litigation and Non-Litigation], issued and effective on 10 April 2012.

the other hand, awards and recognition are also made to judges who render an excellent quantity and quality of judgments as a *model adjudicator*.[48] Since 2018, the SPC started the selection of 100 outstanding judgments to acknowledge the quality writing of judgments. Judgments selected in the *guiding cases*[49] or *typical cases*[50] released by the SPC are also considered a prestige. The names of the court and relevant judges will also be released, which gives the individual judges a sense of honour. Some judges expressed their aspiration towards learning the mediation skills from the model judge-mediator in the court. Others considered that rendering sound judgments could give them a sense of honour.

2. Age, professional competence, social experience and personal characteristics of the judges

The judges' preference is also influenced by their personal background, such as age, professional competence, social experience and personal characteristics. Most of the judges with strong mediation preference are above 45 years of age, hold senior positions in the court, have ample social experience, and a robust personal charisma. Younger judges with less social experience and stronger professional competence tend to either have no apparent preference for mediation or even categorize themselves as adjudication-preferred judges.

One reason for such preference is that the lack of social experience and mediation skills make it more difficult for the younger judges to carry out mediation, which needs to be built on the parties' trust. The same settlement proposal raised by a young judge might be more difficult for the parties to accept. The young judges with strong professional competence also find it is easier and more efficient to write a judgment, which typically only takes half a day for simple cases. Thus, they are less willing to spend more time and effort to mediate, which can involve many back-and-forth discussions with the parties.

Local culture and dialect can be another barrier. A judge from a district court stated that many young judges came from different parts of the country. However, when they first arrived, they might not speak the local dialect fluently and understand the local customs to mediate local cases successfully. Therefore, it took a long time for young judges to adapt before they can feel comfortable mediating local cases.[51]

On the other hand, older judges with substantial social experience, less legal training and a robust personal charisma tend to prefer mediation. Many of the 'model judge-mediators' possess unique personal characteristics that make them a natural mediator and easy to build up trust from the parties. Such characteristics include patience, temperament, social experience, personal charisma, ability to understand the parties' needs and human sentiments, mediation communication skills, and in some cases, familiarity with the dialect and local customs.

3. Cognitive bias: human sentiments

The empirical study also shows the cognitive biases on judges' choices when considering whether and how to encourage settlement. Regardless of the judges' rational goals (ie adhering to the laws and policy, or achieving their career ambition), non-rational factors such as human sentiments, morality and empathy also have a meaningful impact on individual judicial behaviour. Even though many judges think they can 'suppress or convert' their emotions and the like into rational decisions, prior empirical research found that they are just as human

《最高人民法院关于印发全国法院优秀调解案例的通知》[Notice of the Supreme People's Court on Issuing the Outstanding Examples of Mediation Cases in People's Courts across the Nation], issued and effective on 31 March 2012.

[48] For instance, Danzhao People's Court selected 12 Model Case Adjudicators and Model Judge-Mediators for January–June 2020. See <https://www.thepaper.cn/newsDetail_forward_8231452> accessed 27 October 2020.

[49] See release of guiding cases <http://www.court.gov.cn/fabu-gengduo-77.html> accessed 27 October 2020. For more about the guiding cases, see the China Guiding Cases Project ('CGCP') of Stanford Law School <https://cgc.law.stanford.edu/stanford-cgcp-global-guide/> accessed 27 October 2020.

[50] See release of typical cases <http://www.court.gov.cn/zixun-gengduo-104.html> accessed 27 October 2020.

[51] Interview with Judge No 27.

as the rest of us.[52] For instance, experiments show that judges respond more favourably to litigants they like or those with whom they sympathize.[53] From the perspective of social psychology, such judicial behaviour derives mainly from intuition and emotion to make fast decisions rather than a rational decision or political influence.[54]

While these cognitive biases are features of human decision-making, which exist in judges across cultures and legal origins, the human elements in the judicial process may be particularly overt and even considered legitimate in China. In the Chinese saying, 'a just decision must be fair, reasonable and in accordance with the law',[55] law is only one of the factors to be considered to determine the rights of the parties, together with fairness and reasonableness. The determination of fairness and reasonableness naturally involves human sentiments.

Such cognitive biases are evident in the interviews with Chinese judges. Judges may face a moral dilemma if their personal belief of justice is inconsistent with the facts proven by the evidence presented (for instance, due to insufficient evidence preservation or presentation by the weaker party). If the judge renders a judgment based on their personal belief of justice, then they may face the risk of an appeal and remand or overrule of their decision. If the judge delivers the judgment based on evidence presented, they may also feel that doing so would be unjust.[56] In theory, the interviewed judges were all conscious that the judgments must be made based on proven facts and applicable law, not their personal belief of fairness or justice. In reality, facing such a moral dilemma, many interviewed judges stated that they might use judicial mediation to render substantive justice and attain their personal belief of justice and morality. They might also try to lean towards the weaker party during the process of mediation.

For instance, one judge considered that construction disputes were generally suitable for mediation because China's construction field regulation was not yet standardized, with frequent occurrence of irregular trading practices and difficulties in obtaining evidence, especially for the construction workers. A judgment based on the strict application of the law often led to unfair outcomes for the construction workers, the more vulnerable party. In such cases, mediation might render a fairer outcome, be more acceptable by the parties, and save a significant amount of time and money on fact-finding.[57]

Another judge gave an example of the case where an older man made a will to give his property to his second wife. Based on the parties' statements, the judge believed that the remarriage was intended to get the property and establish the will in her favour; however, the evidence was not sufficient to overturn the will. The judge believed that rendering a judgment based on the evidence would lead to unfair results to the parties (especially the children of the older man) and had thus attempted mediation to convince the parties to make a compromise.[58] Consciously or unconsciously, the judge's empathy and personal belief of fairness had influenced his judicial behaviour.

B. What kind of cases are suitable for mediation?

Most of the interviewed judges, including those who have a clear preference towards mediation, acknowledge mediation is not suitable in all cases—some disputes are considered more suitable for mediation than others. The research also reveals that the individual judges' perceptions of the types of cases suitable for mediation do not mirror the authorities' views. The authorities'

[52] See H Spamann and L Klöhn, 'Justice Is Less Blind, and Less Legalistic, Than We Thought: Evidence from an Experiment with Real Judges' (2016) 45 J Leg Stud 255.
[53] AJ Wistrich, JJ Rachlinski and C Guthrie, 'Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings' (2015) 93 Texas Law Rev 855, 880, 902.
[54] See Šadl, Epstein and Weinshall (n 16) 15.
[55] 傅郁林 [Yulin Fu], 《在合法与合理之间》['Between Reasonable and Law'] (2005) 2 北京仲裁 Beijing Arb Q 62.
[56] Interview with Judge No 5; Interview with Judge No 10.
[57] Interview of Judge No 6.
[58] Interview with Judge No 2.

decision to promote mediation for certain disputes is mainly from a social governance perspective (ie using mediation as a method of informal social control). Contrastingly, the individual judges' perceptions focus on the incentives for the parties to settle.

1. Cases that are commonly viewed as suitable for mediation

From the Chinese authorities' perspectives, courts should make great efforts to mediate cases related to people's livelihood and group interests that require the cooperation of the government and relevant departments, group cases, class action cases and bankruptcy cases that may affect social harmony and stability; civil disputes such as private debts, marriage and family inheritance; complex cases that are hard to prove with the preponderance of evidence; cases where the parties' emotions are seriously antagonistic; cases where relevant laws and regulations are lacking or unclear, and there are certain difficulties in applying the law; cases that are difficult to enforce after a judgment; sensitive cases attracting significant social attention; and retrial cases and petition cases with intensified conflicts, etc.[59] These cases are mostly socio-economic cases (so-called 'growing-pains' cases[60]) that are likely to result in an escalation of the conflicts. Inadequate judicial remedy for such cases is one reason for the authority to promote mediation and alternative channels to pre-empt such matters from escalation to maintain social stability.

There are some differences between individual judges' perceptions of the types of disputes most suitable for mediation and authorities' views. Most interviewed judges consider the following types of disputes are most suitable for mediation:

- traditional civil disputes between parties with a close relationship, such as neighbourhood disputes, disputes involving marriage and family inheritance, personal relations and property disputes arising out of personal relations;
- tort disputes (including medical malpractice disputes);
- disputes concerning infringement of reputational rights;
- disputes between parties with a long-term business relationship, such as property management disputes, heating contract disputes;
- cases that have prior judgments on similar matters; and
- some very complex cases.

The individual judges are mainly concerned with the incentives for the parties, who are more likely to accept a settlement because of the needs to maintain relationship, their evaluation of the likely outcome of the case, or their consideration of the costs of litigation. Family disputes are often considered suitable for mediation because the boundaries between right and wrong are often vague in family matters. According to the Chinese saying, *even the most upright judges can hardly make a right adjudication on family matters*. Resolution of such disputes by mediation could resolve the root cause of the conflicts and avoid new disputes in the future. It may also avoid the escalation of the conflicts, which is especially important when children are caught in the middle. Tort disputes and cases that have prior judgments are considered suitable for mediation because the consequences of the damage are explicit or prior judgments on similar matters can guide the parties' evaluation of the likely outcome of the case, and thus their Best Alternative to a Negotiated Agreement ('BATNA').[61] For

[59] para 4 of the SPC Notice on Giving Priority to Mediation and Combining Mediation with Judgment.
[60] See X He and R Peernboom, 'Dispute Resolution in China: Patterns, Causes and Prognosis' (2009) 4(1) East Asia Law Rev 1, 27.
[61] A concept introduced in R Fisher, WUry and B Patton, *Getting to Yes: Negotiating Agreement Without Giving In* (3rd edn, Penguin Books 2011) 64.

instance, in a property lawsuit, the same property company filed a lawsuit against many families in a community. If there was a judgment where the property management fee was reduced by 20% off, the parties might be more ready to accept the 20% off as settlement. Some very complex cases are also considered suitable for mediation because of the parties' evaluation of litigation costs. For example, construction contract disputes will generally involve many submissions and evidence, which requires significant investigations. Parties are more willing to accept mediation to achieve a more efficient resolution of such complex conflicts. Contrary to the authorities' views, most judges considered that cases where the parties' emotions were seriously antagonistic, or cases with intensified conflicts were not particularly suitable for mediation. This was because there were little common interests between the parties, which is key to a successful settlement.

2. Cases that are commonly viewed as inappropriate or difficult for mediation

From the authorities' perspective, the courts shall not mediate the following types of cases:

- Cases that are governed by the special procedures, the procedures for urging the debt repayment, the procedures of public summons and the procedures of bankruptcy and debt repayment,
- cases of confirming marriage and identity relationship; and
- other civil cases that cannot be mediated because of the nature of the cases.[62]

In addition to the above disputes, most of the interviewed judges also consider the following cases are not particularly suitable or challenging for mediation:

- cases involving traffic accidents;
- insurance disputes;
- labour disputes;
- cases involving a significant monetary amount in dispute;
- cases where parties are passive and are unwilling to make any compromise due to internal limitations within the company; and
- cases involving good faith and credibility;
- disputes involving food safety; and
- disputes concerning increasing housing prices in breach of contract.

The above disputes are considered to be difficult or unsuitable to mediate because there is little incentive for the parties to settle. This is either due to the lower costs of litigation in some types of disputes (ie for labour disputes, there is only a nominal litigation fee of 10 yuan[63]), or unwillingness to make any compromise from one party as a result of power imbalances (ie insurance companies in traffic accident cases, and employers in labour disputes where there is typically a large corporate party against an individual).

3. Variations in the judges' opinions concerning the suitability of mediation

There are also significant variations in the judges' opinions for the suitability of mediation. As stated above, individual judges' focus on the stakeholders' incentives to settlement, which

[62] art 1 of the SPC Provisions on Several Issues concerning the Civil Mediation Work of the People's Courts, issued on 16 September 2004, came into force on 1 November 2004, and amended in accordance with the Decision of the Supreme People's Court on Adjusting the Citing of Numbering of the Relevant Articles of the Civil Procedure Law in Judicial Interpretations and Other Documents as issued on 16 December 2008.

[63] See s IV.D below.

depends on the parties' sophistication, personal objectives, bargaining power and assessment of their BATNA. The variations in individual judges' views are due to their divergent personal beliefs, values, experience and the types of cases they have handled in the past.

Some judges believed that mediation was easier for cases involving a smaller amount in dispute. Conversely, others found those cases harder to mediate, because the small amount in disputes often indicated conflicts beyond monetary damage. One judge gave a few examples of the where a case was challenging to mediate despite the small amount in dispute. For instance, in a case of family disputes when the son-in-law beat the mother-in-law, the claim was only for 100 yuan as compensation. However, the mother-in-law would insist on getting a judgment, not for the monetary compensation, but for all neighbours to know about the assault. In such cases, the parties would be unwilling to mediate, notwithstanding the small amount in dispute.[64]

Some judges from the IPC also considered that mediation was more difficult in a second instance court. In the first instance, the judges can consider the dispute as a whole, making it easier to find a point of compromise. However, in the second instance, the appeal is often concerned with one or two specific issues in dispute, with little room for parties to make a concession. After the first instance trial, the parties' views may also have been strengthened making mediation work more difficult.[65] On the contrary, other judges considered that mediation could be easier because after the first instance trial, the parties may have adjusted their overall assessment of the case.[66]

The judges' views also differed on the role of lawyers in mediation. Some believed that the involvement of lawyers generally had a positive effect on mediation because the parties trusted their lawyers. However, there was also the agency risk; in some cases, the lawyers were unwilling to mediate as they received contingency fees rather than hourly compensation.[67] Others considered that the lawyer's role depended on the local social structure, culture and the nature of disputes.[68]

Some judges felt that the parties' sophistication could make mediation more difficult,[69] and ordinary citizens with less legal knowledge were more willing to accept mediation[70]; while others believed that mediation was more suitable with highly educated parties, as it was easier to convince them of the costs of not accepting the settlement.[71]

Some judges considered that in cases involving local customs (which can conflict with the legal provisions), and new types of cases where no legal precedent can be found, mediation was preferable[72]; while others believed that judgments were preferred to provide social guidance and set normative standards.[73]

C. When do judges suggest mediation to the parties?

Mediation can be used in any type of procedure, including first instance trials, second instance trials, enforcement, retrials, appeals and petitions.[74] According to the SPC Provisions concerning the Civil Mediation Work, mediation can be conducted before the defence period's expiration if the parties consent, or after the defence period expires and before the judgment is rendered.[75] In the former situation, the case has not yet been transferred to the trial

[64] Interview with Judges No 28.
[65] Interview with Judge No 22, 23.
[66] Interview with Judge No 9.
[67] Interview with Judge No 2.
[68] Interview with Judge No 23.
[69] Interview with Judge No 17.
[70] Interview with Judge No 18.
[71] Interview with Judge No 8.
[72] Interview with Judge No 13.
[73] Interview with Judge No 16.
[74] para 2 of the SPC Notice on Giving Priority to Mediation and Combining Mediation with Judgment.
[75] art 1 of the SPC Provisions concerning the Civil Mediation Work.

court, so mediation conducted at this stage is also called *pre-trial mediation*. If the pre-trial mediation is unsuccessful, the judge may proceed with the trial and propose mediation again. This may take place after the parties exchange oral statements, any time before a judgment is rendered (in-trial mediation) or even at the enforcement stage. In essence, mediation and adjudication proceed as a continuous procedure—there is not a clear distinction between the 'mediation phases' and the 'adjudication phases'.

The best moment to propose mediation is determined on a case-by-case basis. When there are no substantial disputes over the facts, the judges often propose pre-trial mediation. Proposing mediation before the trial starts is also considered advantageous because the parties have not yet undergone the 'confrontations' that often take place during the trial, so the atmosphere is more favourable towards mediation. If there are substantial disputes over facts, the judges tend to hold the trial first and conduct mediation in-trial after the parties have exchanged evidence and oral debates. In these cases, they believe that mediation would be more effective in those situations when the parties have begun to develop a more realistic assessment of their case and have realized the weakness of their positions and the potential risks of losing. This is encapsulated in an empirical survey, that revealed: 45.5% of the judges prefer to conduct mediation pre-trial; 34.8% prefer to conduct mediation during the trial.[76]

D. How is judicial mediation conducted?

1. Meeting the parties separately: 'caucus'

Meeting the parties separately is a commonly used technique when the judges conduct mediation, often referred to as the 'back-to-back' technique, or 'caucus'. The *back-to-back* technique is considered an effective way to clarify the positions, narrow down the gap between the parties' positions and facilitate settlement. During the *caucus*, the judges can ask for each party's bottom line separately. If the difference between the parties' bottom line is not significant, the judge may try to narrow down the gap to reach a settlement. Conversely, if the difference is too big, the judge may decide that there is a slim chance of settlement, terminate the mediation and render a judgment. The judges can also be more straightforward with the parties during the caucus, giving them a 'reality check'[77] by pointing to the case's weakness or reminding them of their BATNA.

2. Opinion on the merits

The Chinese judges take a cautious view about expressing their opinion on the merits of the case.[78] Most of the judges interviewed considered it inappropriate to tell the parties their views on the merits. Besides, their views do not necessarily represent the final result of the judgment, as the appeal court may hold different views. Therefore, they considered that it was important not to make the parties aware of their sense on whether they would win or lose in litigious proceedings.

That said, there is almost always an evaluative element when judges conduct the mediation in China. The range of techniques could include: questioning, probing, educating, reality testing (reminding the parties of the weakness of their evidence and their BATNA), persuading with moral arguments and enunciating the legal provisions. To facilitate settlement

[76] 韩波 [Bo Han],《诉讼调解的实证分析与法理思辨：对最高人民法院<关于人民法院民事调解工作若干问题的规定>的实施调查》['Empirical and Critical Analysis of Mediation in Litigation: An Investigation into the Rules on Issues Concerning Mediation Work of People's Courts of the Supreme People Court'] (2007) 4 法律适用 J L App 75.

[77] This practice is consistent with the way Chinese arbitrators conduct mediation, based on a series of interviews conducted with Chinese arbitrators, mainly acting for China International Economic and Trade Arbitration Commission, Beijing Arbitration Commission, and Wuhan Arbitration Commission in March–April 2007. See G Kaufmann-Kohler and K Fan, 'Integrating Mediation into Arbitration: Why It Works in China?' (2008) 25(4) J Int Arbitr 479, 488.

[78] This practice is also consistent with the approach of Chinese arbitrators who conduct mediation. See ibid.

discussions, the judges often educate the parties on the legal provisions and remind them of their claims' weaknesses. For example, in a divorce case, if the child is still being breastfed and the father insists on having full custody, the judge may indicate to the father that such a request is unlikely to be supported by the law.[79] The judges can also remind the party of what the court can rule under the law. In a divorce case during an in-trial mediation, Professors He and Ng observed that the judge reminded a party of what can happen if the court rules (by suggesting that the law requires a divorcee to pay 20–30% of his income for child support), and also invoked the Confucian filial ideal of fatherhood to persuade the parties to compromise (in this case, convincing the father to provide an extra 100 yuan as a child support contribution).[80]

The case-filing division of some district courts can also provide the parties with a third-party neutral assessment, in cooperation with the Legal Aid Office of the Judicial Bureau. The collaboration allows the Judicial Bureau lawyers to provide a risk assessment of the likely chances of success of the plaintiff's claims.

3. Settlement proposals

According to the SPC Provisions concerning the Civil Mediation Work, 'the parties may put forward a mediation proposal by themselves, and the person presiding over the mediation may also offer a mediation proposal for reference by the parties in the process of negotiation.'[81]

Most of the interviewed judges said that they would sometimes make settlement proposals to the parties. Some judges only make settlement proposals when the gap between the parties' positions is close. The judge might say as follows:

> After the investigation, the facts became clearer. Based on the preliminary finding of facts, here is a settlement proposal for your consideration. It is for you to weigh the pros and cons and evaluate your own risks to determine whether you accept the proposal. If you accept the proposal, you can reach a settlement. If you don't accept this proposal, you can choose to continue litigation.

The judges' settlement proposals can give the parties some pressure to make their own judgment about the risk of losing, costs and legal fees, etc.[82] Sometimes the settlement proposal can bridge the gap between the parties' positions when there is a deadlock. Some judges will also try to make settlement proposals lean towards the weaker party to deal with the power imbalance in mediation. The types of settlement proposals include a specific number (usually a middle point between the propositions of the parties), specific actions to be taken or a range of numbers within which the judge suggests the final solution could lie.

4. Types of settlements reached

The settlement agreement often involves monetary compensation. It can also include specific performance, such as continued performance of the contract, the parents' financial support, an apology, installation and maintenance and equity registration, etc.

[79] Interview with Judge No 15.
[80] He and Ng (n 2) 293–4.
[81] art 8 of the SPC Provisions concerning the Civil Mediation Work.
[82] Interview with Judge No 11.

5. Commonly used mediation techniques

Based on the interviews of the judges and records from collected judicial mediation cases, the commonly used mediation techniques by the judges can be summarized as follows:

- face-to-face meeting (joint sessions);
- back-to-back meeting (caucus);
- referring to prior decisions of similar situations;
- emotional counselling;
- field investigation;
- evaluations;
- showing sincerity to gain trust from the parties;
- calming the emotions and softening the attitudes of the parties;
- indicating the weakness and risks of losing and reminding the litigation costs to both parties,
- encouraging direct communications between the parties during the face-to-face meeting;
- seeking assistance from other parties, such as other family members, friends, other stakeholders and government bodies; and
- moral persuasion (reminding the parties of the importance of corporate image, family ethics, morality, social responsibilities), etc.

The judges also use a lot of psychological techniques in judicial mediation. A few judges mentioned that they would pay attention to the details in an attempt to connect with the parties and gain their trust. This included basic pleasantries, such as: serving water to the parties, inviting the parties to sit down, and starting the mediation with some light conversation before commencing substantive conversation relating to the case. The judges also acknowledge the parties' psychological feelings and the need to be heard. Some judges explain that their role is not just an adjudicator, but also a psychological counsellor, to meet the parties' needs to be heard, to listen to the parties' complaints, and then guide them to find a solution that they can both accept. When the parties' have emotional outbursts, the judges try to create a calm atmosphere for them to regain composure and return to a rational state, to focus on the legal aspects of the dispute and ultimately to resolve their conflicts.

There are also specific techniques tailored to specific types of disputes. For instance, in divorce cases, the judges often use a technique of blurring the parties' responsibilities. In family disputes, it is often difficult to judge who is right and who is wrong if a relationship breaks down (except for cases of bigamy or domestic violence, or other outward faults). One of the model judge-mediators also shared the specific approaches he typically uses depending on the background of the party: When dealing with elderly persons, it is critical to provide them with sufficient time to express their feelings and opinions, requiring the judges to be good listeners; When dealing with farmers and fishermen, whom generally have received a relatively low level of education, the judges need to help them understand their rights and obligations and relevant legal provisions: When dealing with female parties, attention needs to be paid to the details. The judge needs to help the parties consider different case factors and provide a reasonable settlement proposal.[83] Another model judge-mediator stated that his successful mediation experience is based on a strong understanding of the root cause of the parties' conflicts and their real interests. The judges must adopt a problem-solving mindset to conduct judicial mediation successfully. Often, the root of the conflict is not wholly reflected in

[83] Interview with Judge No 17.

the claims, so the judge needs to expand the scope of mediation beyond the claims to successfully resolve the conflicts.[84]

E. Evaluation of what counts as a successful/failed mediation?

According to the interviewed judges, the criteria for a successful mediation should include: (i) resolving the conflicts between the parties, (ii) voluntary performance by the parties of the settlement agreement, (iii) finding a right balance between the interests of both parties; and (iv) the party's satisfaction with the settlement solution. In the past, the settlement rate was pursued as single criteria for evaluating successful mediation, which has led to an unrealistically high settlement rate through coerced mediation. As a result, a high percentage of settled cases required compulsory enforcement. Since 2011, the judges' appraisal system also took into account the rate of mandatory enforcement of mediation cases, with the attempt to reduce the inflation of settlement rate.[85]

The following circumstances are considered to be a failed mediation: (i) the parties regretted reaching a settlement after the mediation (as this can lead to failure to perform the settlement agreement); (ii) parties were reluctant or felt coerced to accept the mediation; (iii) mediation created new conflicts; and (iv) the settlement was too biased towards one party, further intensifying the conflicts.

F. Key elements to reach a settlement

The following elements are identified by the interviewed judges as crucial factors for a judicial mediation to reach a settlement:

- The degree of trust the parties hold in the mediators;
- The effectiveness of communication with the parties;
- The degree of collaboration of the lawyers;
- The willingness of the parties to settle;
- The gap between the parties' positions and interests are not too big;
- The recognition and acceptance by the parties of mediation as a method of dispute resolution;
- The mediation skills, patience, and proper guidance of the mediators; and
- The parties' reasonable evaluation of their chances of success and BATNA.

G. Mediation training

There is no systematic mediation training or formal evaluation process of the mediation skills of the judges. The interviewed judges discussed the following ways they are able to learn and improve their mediation skills:

- Learning from experienced judges and observe senior judges in mediation sessions (with the consent of parties);
- Self-reflection throughout the process of the mediation;
- Learning psychology;
- Referring to the methods in the People's Mediation and administrative mediation;
- Attending training organized by the court, such as sharing sessions from some 'model judge-mediators'; and

[84] Interview with Judge No 11.
[85] See (n 43).

- Reading books on mediation techniques and documents or books complied by the SPC and the courts (such as the Outstanding Examples of Mediation Cases).

IV. EVALUATION OF JUDICIAL MEDIATION IN CHINA

What are the values of judicial mediation? What are the inherent limitations of judicial mediation? How do the gains of efficiency compare with the possible losses of procedural protections? How to ensure fairness if no settlement is reached after the mediation and the same person who conducted mediation will render a judgment? How do we evaluate the judicial mediation programme in China overall?

The interviewed judges are also asked to comment on the above questions. The individual judges' comments were also compared with the policy guidance, scholar writings, and the examples and comments from the SPC in the Outstanding Examples of Mediation Cases.

A. Values of judicial mediation

The arguments for praising judicial promotion of settlements could be summarily categories into three core groups of arguments: as the production arguments (section IV.A.1), the quality arguments (section IV.A.2)[86] and arguments concerning social values (section IV.A.3).

1. The production arguments

The production arguments relate to improving efficiency, reducing litigation costs and saving the court resources so that the courts can do more of what they are supposed to do with the limited resources available to them.[87] As such, even if a full settlement is not reached, mediation could still narrow down the scope of disputes remaining for adjudication.

Mediation is particularly important given the social and economic transformation and recent judicial reforms in China. Under the reform of the case registration system, all cases are accepted without review and filtering.[88] This has resulted in a significant increase in caseload.[89] However, the judge quotas reform has led to a significant reduction of the total number of judges that could independently adjudicate cases.[90] This has resulted in a phenomenon of 'too many cases and too few personnel'. Hence, mediation could enable the limited court resources to be allocated to adjudicate cases most in need of binding court decisions.

2. The quality arguments

The quality arguments consider that judicial promotion of settlements will result in superior outcomes to those that would occur in its absence.[91] Many judges consider that settlement through judicial mediation is more comfortable for the parties. Consequently, as parties are

[86] The classification of production arguments and quality arguments is drawn from M Galanter, '" ... A Settlement Judge, Not a Trial Judge:" Judicial Mediation in the United States' (1985) 12(1) J Law Soc 1, 8–12.

[87] See ibid.

[88] 最高人民法院 [Supreme People's Court], 《关于人民法院推行立案登记制改革的意见》['Opinions on Rolling out Reform of the Case Registration System'] (1 May 2015).

[89] 朱立 [Li Zhu], '最高法发布人民法院立案登记制改革成效' ['The Supreme People's Court Publishes Results of the Reform of the Case Registration System'], 中国长安网 [Official Website of the Central Political and Legal Affairs Committee] (29 July 2022) <http://www.chinapeace.gov.cn/chinapeace/c100007/2022-07/29/content_12654363.shtml> accessed 4 November 2022.

[90] Under the judge quotas system, the number of judges who can independently adjudicate cases is fixed according to factors such as the caseload, population density, and court structure. Judges that were denied a position in the new quotas would keep their old compensation levels but would only be allowed to play a supporting role in adjudication. See宋永盼, '法官员额制及其配置机制问题研究', 中国法院网, 2016年3月23日 [translation] <https://www.chinacourt.org/article/detail/2016/03/id/1827042.shtml> accessed 21 October 2022; He (n 38).

[91] See Galanter (n 86) 11.

more comfortable, they are more likely to accept the settlement, and this leads to a higher voluntary performance rate. Accordingly, they believe that imposed decisions are less likely to be complied with than decisions agreed upon by the parties.

The judges also consider that settlement is a better way to truly resolve the conflicts between the parties, as it can also address the parties' real interests and needs, beyond the scope of the claims. For instance, in family disputes, mediation can help the parties resolve the root cause of the conflicts based on their past relationship and common interests (such as the child's best interests)—concerns which are beyond the law. On the other hand, a binding judgment from the court can lead to a constant stream of new conflicts in the future, such as disputes over property and changes in child custody after divorce.

3. Social values

Departing from the production and quality arguments, social values of mediation include the promotion of public legal health, promotion of social harmony and social order, and the integration of modern adjudication concepts and traditional culture of Chinese mediation. Instead of being a private 'alternative' dispute resolution method outside the courtroom, mediation has always been seen as an integral part of China's civil justice system. Mediation has always been used as a way of social governance in China to maintain social stability and harmony and pre-empt the conflicts to avoid further escalation.

In this regard, the views of the authorities aligned with the individual judges. In several cases selected from the Outstanding Examples of Mediation, judicial mediation was considered by the authorities to be successful because of the social governance function it has fulfilled. For instance, the resolution of disputes by mediation avoided social problems such as:

- preventing the workers' employment being terminated and surrounding residents' difficulty in buying vegetables[92];
- eliminating the unfavourable factors affecting social harmony and stability, and contributed to the success of the Guangzhou Asian Games[93];
- avoiding the mass incidents and petitions[94];
- safeguarding the interests of maintaining family relationship and harmony, and promoting the family ethics and social values of 'harmony is precious'[95]; and
- protecting the legitimate rights and interests of the vulnerable groups (the workers), and urged the enterprises to take the initiative to assume social responsibilities,[96] etc.

Almost all interviewed judges emphasized the social values of judicial mediation. Mediation is considered to be particularly suitable for Chinese society, which is essentially based on human relationships. Even though mediation is not always more efficient than

[92] 上海人民印刷八厂诉上海万有全豫园菜市场经营管理有限公司房屋租赁合同纠纷系列案, 租赁合同纠纷 [Shanghai People's Printing No 8 Factory v Shanghai Wanyouquan Yuyuan Vegetable Market Management Co., Ltd.—Lease Contract Dispute Case], 上海市黄埔区人民法院 [Basic People's Court of Huangpu Shanghai] (2008); 载于沈德咏（编）[Deyong Shen] (n 34).

[93] 卢钰等诉中铁十六局集团有限公司、广州地下铁道总公司财产损害赔偿纠纷系列案, 财产损害 [Lu Yu et al v China Railway Sixteenth Bureau Group Co., Ltd. and Guangzhou Metro Corporation—Property Damage Compensation], 广东省高级人民法院 [High People's Court of Guangdong] (2010); 载于沈德咏（编）[Deyong Shen] (n 34).

[94] 温岭市国有资产经营有限公司诉叶跃明非法占有国有财产、返还原物纠纷系列案 [Wenling State-owned Assets Management Co., Ltd. v. Ye Yueming and others—Disputes over the Illegal Possession of State-owned Property], 浙江省温岭市人民法院 [People's Court of Wenling Zhejiang Province], 2010; 载于沈德咏（编）[Deyong Shen] (n 34).

[95] 严云泰等诉严嘉平等继承遗产纠纷案 [Yan Yuntai et al. v. Yan Jia, etc.—Inheritance dispute], 上海市第一中级人民法院 [First Intermediate People's Court of Shanghai] (2006); 载于沈德咏（编）[Deyong Shen] (n 34).

[96] 陈强诉周洪瑜、北京送变电公司、四川省输变电工程公司雇员受害赔偿纠纷案, 劳动争议 [Chen Qiang v. Zhou Hongyu, Beijing Power Transmission and Transformation Company, Sichuan Power Transmission and Transformation Engineering Company—Employee Compensation Dispute Case, Labor Dispute], 北京市房山区人民法院 [Basic People's Court of Fangshan Beijing] (2010); 载于沈德咏（编）[Deyong Shen] (n 34).

judgment, it may still be preferable considering the social consequences. For instance, in a dispute on alimony between father and son, a judge in a district court discussed the value of using judicial mediation to preserve family relationships. In this case, the father claimed alimony from his son, who had no job. The court ordered the son to pay alimony to his father according to the law. However, the disputes did not end with the judgment, and the conflicts between the father and son became even more intense. The father applied for enforcement of the judgment, but the son refused to make payment as he had no income.

The father subsequently requested the detention of his son. In retaliation, the son brought claims against his father, requesting him to vacate the public house and move back to his own home in Shanxi because the son was the legitimate lessee of the public house his father then lived. The interviewed judge was in charge of the second case. He stated that if the matter was resolved by a judgment based solely on the law (which was legally quite simple because the father must vacate the public house according to the law), the family would have been completely fractured. Instead, the judge convinced the disputants to resolve the conflicts by mediation, by using techniques of moral persuasion (ie referring to Confucian values of filial piety and the Chinese ideal that 'a harmonious family cultivates prosperity'). Finally, the case was settled. The son's claim to vacate the house was withdrawn, and the father's request for detention was also withdrawn. The family relationship was reserved.[97] In this case, the value of mediation was not for its efficiency (mediation was lengthier than a judgment would take), but for the social benefits it achieved.

B. Limitations of judicial mediation

The perceived limitations of judicial mediation include the weakened role of the court in setting legal norms (section IV.B.1), potential detriments to third-party interest and public interest with faked mediation (section IV.B.2) and the potential concerns of fairness (section IV.B.3).

1. Weakened role of the courts in setting legal norms

One of the commonly perceived limitations of judicial mediation is the courts' weakened role in norms setting. In judicial mediation, the facts and legal positions are often blurred in order to reach a settlement. However, mediation cannot establish legal standards or provide guidance for decisions of similar cases in the future. For new types of disputes, where legal provisions are vague or there is no clear guidance from prior decisions, some judges prefer mediation. However, a mediated outcome will not provide exemplary significance nor guidance for subsequent, similar cases.

A young judge from a coastal district court gave examples from his personal experience. He encountered several cases involving banking disputes, such as determining fault in case of stolen credit card and determining the bank branch's responsibility, where no clear legal guidance is provided in the law. He consulted the presiding judge who handled similar cases in the past if there is any legal guidance from the court for such matters. However, those cases were all settled by judicial mediation, and no prior decisions can be followed.[98] This shows the limitation of mediation and the importance of adjudication in legal norms setting. If mediation is over-used to replace adjudication, then the role of courts in the development of legal norms will be weakened, and the courts' authority will be undermined.

[97] Interview with Judge No 5.
[98] Interview with Judge No 16.

2. Potential detriment to third party interests and public interests

In practice, some parties maliciously fabricate mediation cases in order to transfer assets, evade legal liabilities, circumvent national laws and regulations and/or cause detriments to third-party interests or public interests. Once the court issues a judicial confirmation of the settlement agreement in the form of a consent judgment, the parties' settlement agreement becomes legally enforceable with the same effect of a judgment.[99]

In light of the increasing practice of fabricated mediation, the SPC Provisions concerning the Civil Mediation Work expressly states that the courts shall not confirm the settlement agreement if: (i) it infringes on the national interests and social public interests; (ii) it infringes on the interests of the persons not involved in the case; (iii) it is contrary to the true intentions of the parties; or (iv) it violates the prohibitive provisions of laws and administrative regulations.[100] The Civil Procedure Law also provides that where the parties maliciously conspire to use mediation (or litigation and other means of dispute resolution) to infringe upon the lawful rights and interests of third parties, the People's Court shall reject their request for judicial confirmation and impose a fine or detention according to the seriousness of the circumstances. Alternatively, a criminal investigation may take place.[101]

Many judges were cautious to review of the procedural and substantive legality of the settlement agreement when parties apply to the court for judicial confirmation. Judges need to carefully examine if there are genuine contractual relationships between the parties and ensure that the settlement agreement does not cause detriment to third party or public interests. In practice, if the parties deliberately conceal the real situation, and the judges do not take the initiative to review the evidence, mediation can be used by the parties to circumvent legal restrictions.

3. Fairness and procedural concerns

Another commonly perceived limitation of judicial mediation is the potential impact on fairness because at least one party needs to give up parts of their legal rights. Mediation reinforces the power imbalances between the parties, which can lead to an unfair outcome for the weaker party.

When the same judge acts as a mediator and subsequently as an adjudicator, there could also be concerns about procedural due process and impartiality. First, there is a risk of breach of procedural due process if the caucus is used in the mediation phase. On such an occasion, a party may disclose facts that the other side is unaware of and has no opportunity to respond to. Second, if the settlement fails and the adjudication continues, the judge's impartiality may come into question because of the confidential information he or she may have obtained during the mediation phase.[102] In the words of the late Sir Laurence Street, former Chief Justice of New South Wales and subsequently Australia's leading mediator: '[p]rivate access to a representative of a court by one party, in which the dispute is discussed and views are expressed in the absence of the other party, is a repudiation of basic principles of natural justice and absence of hidden influence that the community rightly expects and demands that the courts observe.'[103]

Interestingly, none of the interviewed Chinese judges raised the issues of due process and impartiality as limitations of judicial mediation. When asked about such potential concerns,

[99] art 100 of the Civil Procedure Law (2021).
[100] art 12 of the SPC Provisions concerning the Civil Mediation Work.
[101] art 115 of Civil Procedure Law (2021).
[102] The concern is similar to when an arbitrator acts as a settlement facilitator and then shifts the role back as a decision-maker if mediation fails. See Kaufmann-Kohler and Fan (n 77) 490.
[103] L Street, 'Mediation and the Judicial Institutions' (1997) 71 ALJ 794, 794–6.

the interviewed judges believed that there was no practical value to separate the mediation and adjudication process. They expressed that there should be no fear of influence on the neutral party's (ie the mediator's or adjudicator's) impartiality, as this issue is not unique to judicial mediation. During the regular trial process, judges could also take cognizance of improperly submitted documents or arguments and were requested to disregard them based on their legal training. The judges also believed that in practice, the parties rarely disclosed the confidential facts that could be detrimental to their case during the mediation phase, especially knowing that the same judge would later render an adjudication if no settlement was reached. The judges acknowledged that they could have developed some empathy or personal emotions towards one of the parties during the mediation process. However, they believed that this was unavoidable even during the normal trial process and was not explicitly related to mediation.

C. Evaluation of judicial mediation in China

The push for a high settlement rate under the slogan of 'mass mediation' and 'building a socialist harmonious society' since 2003 has aroused much criticism. Professor Minzner fiercely criticized China's revitalization of People's Mediation Committees and judicial mediation as part of the CCP's social stability policies, which generated a wide range of reverse effects, including the erosion of China's legal institutions and norms, the sacrifice of putative procedural protections for citizen rights in order to prevent further petition, and the Chinese citizens' loss of faith in the court system.[104] Professor Cavalieri concurred that the strengthening of mediation in China since early 2000 was part of a new strategy of social control, which slowed down the 'rule by law' as well as the protection of rights and legitimate interests of the weakest parts of Chinese society. This is because ADR practices may weaken people's insistence on legal rights and reduce the annoyances arising from the strict adherence to the principle of legality.[105] A judge from a basic court also warned that the judicial cost would hugely increase and the negative effect would emerge if settlement rate was higher than certain percentage.[106] Professor Ji warned that the mediation in some scenarios in China would create a black box where corrupted judges abused their discretion and evaded duties.[107] According to Professor Fu, the 'political model' had been dominating dispute resolution in China since the early 2000s, under which the court 'not only makes additional concessions in jurisdiction to mediation but also uses court-based mediation as the predominant form in judicial dispute resolution.' Judicial mediation practiced under this model 'marginalizes law and undermines the legal system.'[108]

Many of the interviewed judges also criticized the practice of 'coerced mediation', 'achieving mediation by refusing the docketing of the case' (以拖促调, or 'long-pending cases' (久调不决) in the past to achieve a high settlement rate under the 'mass mediation' (大调解) campaign. Since 2014, there has been a focus on improving judicial credibility and judges are now required to balance mediation and adjudication. As stated earlier, most judges felt that there was less political pressure to push for mediation.[109] A judge from an IPC stated that social harmony was an end, but it could not be used as a means to suppress conflicts. The court is essentially a national judicial organ. The weakening of mediation in recent years

[104] Minzner (n 4) 9.
[105] R Cavalieri, 'Between Justice and Harmony: Some Features and Trends of Chinese ADR from a Western Perspective' (2012) 1(4) Op J 1, 1–8.
[106] 孙春牛 [Chunniu Sun], 《警惕对'调解率'的误读》[Cautious about the Misunderstanding of Mediation Rate] 人民法院报 (2013年5月12日), [People's Court Daily] (12 May 2013) C2, 1.
[107] J Weidong, 'The Judicial Reform in China: The Status Quo and Future Discretions' (2013) 20(1) Ind J Glob Legal Stud 185, 212.
[108] Fu, 'Mediation and the Rule of Law' (n 2) 108–29.
[109] See above, s III.A.1.

has had a positive effect on strengthening the courts' credibility and has emphasized the courts' role as an adjudication organization, not a mediation organization.[110]

In the meantime, the contradiction between the limited judicial resources and the rapid growth of litigation has become increasingly prominent. The case registration system has led to a new surge in the caseload in the courts. From the implementation of the case registration system on 1 May 2015 until December 2015, more than 13.236 million cases had been registered in courts at all levels across the country, increasing 20.41% year-on-year.[111] As of 30 June 2022, around 0.14 billion cases have been registered nationwide since the implementation of the case registration system.[112] Many of the interviewed judges felt overburdened with new case registrations. The judge quotas reform has led to a significant decrease in the number of judges who can adjudicate cases. According to China News, a total number of 120,000 judges were selected through the judge quotas system, with a drop of 90,000 judges nationwide after the reform.[113] Although the number of judges has slowly increased to around 127,000 by the end of 2021,[114] the reform has caused a further burden on fewer judges to handle the explosive increase of caseload. The overburdened judiciary is under practical pressure to divert some cases to mediation so that the limited judicial resources could be reserved for the cases that a judgment is most needed.

The empirical research also reveals that some of the reforms intended to make justice more accessible by lowering court litigation threshold did not achieve its intended objectives. The Measures for Payment of Litigation Costs was promulgated by the State Council in 2006 to reduce litigation costs and ensure lawsuits are affordable to the general public.[115] In reality, however, the reduction of litigation costs has had the unintended side effect of abuse of litigation. Specifically, the parties can choose to exhaust the litigation procedure, including appeals, regardless of their chances of success. The low costs of litigation also reduce the incentives to settle, making mediation more difficult.

The parties, especially the most vulnerable, are caught in the long judicial battle, costing them time, energy and mental stress. For instance, the measures significantly reduced the costs associated with labour disputes to a nominal 10 yuan.[116] This has led to a dramatic increase in the number of labour dispute litigation. The appeal rate for labour disputes is also on the rise. However, given the low litigation costs, employers tend to exhaust the litigation procedures even if they understand their own fault and do not have any advantage of evidence in litigation. By abusing their litigation rights, the employers could also increase the costs of the workers' rights protection through the delays and mental stress caused to the workers who dare to defend their rights. Such strategy could also have a deter the current employees from making a claim.[117] All of this indicates that the original system designed to lower the threshold for labour dispute litigation has increased the litigants' burden. Contrary to the authorities' intention to lower the burden on employees when safeguarding their legal

[110] Interview with Judge No 19.
[111] 《构建我国多元化纠纷解决机制的三个向度》[Three Dimensions of Multiple Dispute Resolution Mechanism], 人民法院报 [People's Court Daily] (26 July 2019) <http://www.court.gov.cn/zixun-xiangqing-173412.html> accessed 29 September 2020.
[112] 朱立 [Li Zhu] (n 89).
[113] '法院员额制改革在全国落实, 9万法官被挡在门外' [The Reform of the Court Quota System was Implemented Nationwide, and 90,000 Judges were Blocked], 中国新闻网 [Chine News] (5 July 2017) <http://www.chinanews.com/gn/2017/07-05/8269363.shtml> accessed 10 September 2020.
[114] 先藕洁 [Oujie Xian], '司法体制改革提升群众安全感' [The Reform of the Judicial System Adds to People's Sense of Security], 中国青年报 [China Youth Daily] (6 May 2022) <http://zqb.cyol.com/html/2022-05/06/nw.D110000zgqnb_20220506_2-03.htm> accessed 4 November 2022.
[115] Measures for Payment of Litigation Costs promulgated by the State Council on 8 December 2006, and effective from 1 April 2007 <http://www.gov.cn/zwgk/2006-12/29/content_483407.htm> accessed 29 September 2020.
[116] art 13(4) of the Measures for Payment of Litigation Costs.
[117] See 姚新民, 黄鸣鹤 [Xinmin Yao and Minghe Huang], 《关于多元化纠纷解决机制地方立法设计的调研报告》['Report on the Local Legislative Design of the Multiple Dispute Resolution Mechanism'] (2015) on file with author, 5–6.

rights, and to simplify the settlement process for labour disputes,[118] most judges consider labour disputes to be difficult for mediation because of the low costs of litigation and unwillingness from the employer to settle.[119] The above finding also demonstrates that the individuals may act in ways that deviate from that intended by authorities.

V. PERCEPTION OF THE ROLE OF JUDGES IN CHINA

This final section seeks to briefly answer a suite of questions, including: What does the empirical research tell us about the perception of the role of judges in China? Do Chinese judges consider their mandate to resolve the disputes of the parties in the most appropriate means or to render and enforce a definitive binding decision? Do Chinese judges see themselves as dispute resolvers to resolve the immediate conflicts between the parties or as guardians of justice that transcends the parties?

A. Mixed roles and combined processes

Most interviewed judges considered their role was not limited to passively sit in court to handle cases and apply the law mechanically without considering the social consequences. Instead, they believed that judges should proactively assist the parties to resolving their conflicts through the most appropriate means possible, which was not limited to rendering and enforcing binding decisions. In some cases, even after the settlement is reached, the judges will continue to assist the parties to ensure the agreement is performed. For instance, after the heirs signed the settlement agreement in an inheritance dispute, the judge also assisted the parties to realize the sale of the house to divide the assets.[120] In a labour dispute, after assisting the parties to reach a settlement agreement, the judge supervised the implementation to ensure that all compensation payments were fulfilled. The judge even volunteered to provide a donation to the vulnerable party.[121]

Settlement facilitation and decision-making are both considered part of the judicial function. Indeed, mediation is often conducted in-trial by the judges, who will later become the adjudicators if the attempt to mediate fails. The distance separating adjudication and mediation is considered to be the smallest in China, especially when compared to the practice in the United States, Quebec and Japan.[122]

If mediation fails and litigation is resumed, all the judges that were interviewed believed that any information, opinion, view or statement, and any proposal or proposition expressing acceptance or opposition by either party in the process of mediation cannot be used in the subsequent judicial proceedings.[123] That said, judges are human beings. Their brain could still have been tainted after having access to the information during the mediation. From a psychological perspective, as illustrated in the polar bear study, the mental process of keeping the bear away from your mind leads you think about it much more than you usually

[118] See also the Labor Dispute Mediation and Arbitration Law of the PRC, adopted by the Standing Committee of the National People's Congress on 29 December 2007, which took effect as of 1 May 2008.
[119] See above, s III.B.2.
[120] *Yan Yuntai* (n 95).
[121] 雷敏平诉福州市第三建筑工程公司重庆分公司、福州市第三建筑工程公司工伤保险待遇纠纷案，劳动争议 ['Lei Minping v Chongqing Branch of Fuzhou No 3 Construction Engineering Company and Fuzhou No 3 Construction Engineering Company—Work Injury Insurance Treatment Case, Labor Dispute'], 重庆市巴南区人民法院 [Basic People's Court of Banan Chongqing] (2009); 载于沈德咏（编）[Deyong Shen] (n 34).
[122] He and Ng (n 2) 288.
[123] There is no express provision under the Civil Procedure Law with respect to the use of the confidential information obtained during the mediation phase. Most Chinese arbitration institutions prohibit any use of it in the subsequent arbitral proceedings. See art 47(9) of CIETAC Rules (2015); art 43(5) of BAC Rules (2022).

would.[124] Empirical studies have also demonstrated that judges who gained knowledge of privileged information during regular trial, and ruled that it was inadmissible, could apparently not prevent it from affecting their decision on the merits, because of the paradoxical effect of thought suppression.[125] In this regard, Professors He and Ng consider that 'the incorporation of mediation as part of the official trial process creates internal contradictions' because of the inherent role conflict for a judge to play the role of a mediator and the different principles in adjudication (adversarial and proceduralistic) and mediation (flexible, non-legalistic).[126]

Despite such concerns, the mixing of the dispute resolution process and roles does not appear to be problematic in the Chinese eyes. Such a blurring in notion can be traced back in traditional Chinese society when the elders often played the role of both a settlement facilitator and decision-maker.[127] The imperial Chinese legal process also accorded the local magistrate far-reaching powers, from mediatory, to investigatory, prosecutorial and adjudicatory.[128] The function of the settlement facilitator and decision-maker has never been clearly distinguished in the Chinese minds. The Chinese judges also believed that the procedural concerns were not uniquely linked to judicial mediation.[129]

That said, efforts are made to develop mediation beyond the in-trial model. There are successful examples of pre-trial mediation and integration of other forms of ADR into the litigation process. In some courts, there are established Centre for Integrating Mediation with Litigation, which will, at the case registration stage, direct suitable cases to designated mediators (ie People's mediators, commercial mediators) or designated mediation institutions to conduct pre-trial mediation. There are also specific platforms established to tailor the pre-trial mediation for certain types of disputes, such as the 'one-stop mediation platform' for traffic accidents and the 'expert mediation and neutral third-party evaluation' for medical malpractice disputes.

In some courts, a 'mediation studio' is established to handle pre-trial mediation, judicial confirmation, court referral to mediation and mediation training. The mediation studio is a separate space from the courtroom. The separation of space also plays a vital role in the psychological aspects of mediation. Establishing the places occupied by the persons in a space usually defines their roles. In the courtroom, the judges sit above the parties, as a visual reminder of the judges' authority.[130] In the mediation room, the judge and the parties often sit in a roundtable. If the space is circular, it indicates that all positions are equal. In a mediation studio named after one model judge-mediator, the author noticed that there was also a tea table. When the parties came to mediation, the judge-mediator would invite the parties for tea, facilitate some initial, general conversation, and then talk over their case sitting together at the tea table.

The separation of mediation and adjudication space appears to be more effective than in-trial mediation, as it makes the parties feel comfortable, it facilitates communication, and

[124] L Winerman, 'Suppressing the 'White bears'' (2011) 42(9) APA 44; M Daniel, 'Wegner et al., Paradoxical Effects of Thought Suppression' (1987) 53 J Pers Soc Psych 5, 5–13.
[125] AJ Wistrich, C Guthrie and JJ Rachlinski, 'Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding' [2005] 153 Univ Pa Law Rev 1251, 1297.
[126] ibid.
[127] See K Fan, 'Glocalisation of Arbitration: Transnational Standards Struggling with Local Norms' (2013) 18 HNLR 175, 196.
[128] W Alford, 'On the Limits of 'Grand Theory' in Comparative Law' (1986) 61 WLR 945, 945–56.
[129] See above, s IV.II.3.
[130] See 刘星 [Xing Liu],《基层法庭空间的塑造：从中国另类实践看》['The Shaping of Courtroom Space in Basic People's Courts: From the Perspective of Alternative Practice in China'] (2019) 4 法律科学 Sci L 20, 20–30.

generates a personal connection.[131] This creates a favourable atmosphere and facilitates mediation. Some judges made efforts to communicate and talk with the parties in the corridor whenever there is a gap between trials and were referred to by the parties as 'corridor judges' to praise their mediation efforts outside the courtroom. In this informal setting, outside the courtroom, it is easier for the mediator to gain the parties' trust. The discussions often extend beyond the in-trial accusations, counteraccusations or blaming and denials in an adversarial process, and can be much broader than the parties' legal positions. This enables the mediator to locate the common interests of the parties, facilitate settlement, and avoid some of the structural limitations of in-trial mediation.

B. Substantive justice

The Chinese judges also tend to seek substantive justice in resolving the immediate disputes, with less attention paid to the procedural protections and they present an ideal of legality that transcends the parties.[132] As discussed earlier, if the judges believed that strict application of the law based on proven facts could lead to unjust outcomes, they saw mediation as a way to achieve substantive justice in the individual cases.[133]

Many judges acknowledged that 'human sentiments' and their empathies towards one of the parties may affect the decision-making process. Some may take the initiative to investigate the evidence they believed could render substantive justice in the individual case[134]; others might lean towards the weaker party who could not prove with sufficient evidence, within the restraints of law and their scope of discretion.[135] Such attitudes and practice reflect the emphasis on substantive justice in the individual cases over procedural justice in China.[136]

Empirical studies show an interesting correlation that people high on power distance placed lesser weight on procedural justice than distributive justice concerns.[137] According to Professor Hofstede's cultural dimensions, China scored much higher in 'power distance index' than its Western counterparts, which indicates a society that accepts the legitimacy of the authority (see Figure 2).[138] As a result, procedural fairness is generally considered less important by the Chinese, who accept the legitimacy of the authority (ie high on power-distance).

To fully understand the root of such attitude, we need to bear in mind a very different relationship between individuals and the state.[139] In the West, there is a model of an explicit 'social contract', in which individual members of the society carefully gave away defined

[131] Some commentators describe Comfort, Communication and Connection as the three C of a mediator's job. See F Diez, 'Acerca del espacio y la mediación' ['About Space and Mediation'] (2014) 7(2) Revista de Mediación 26, 28–33 (with extended summary in English at 33–5).

[132] Regarding the absence of procedural justice tradition in China, see L Zhu and Y Xiao, 'Article V(1)(B) of the New York Convention in China: Applying the Due Process Defense without the Doctrine of Due Process' (2019) 49 HKLJ 57, 57–89; W Gu, 'When Local Meets International: Mediation Combined with Arbitration in China and Its Prospective Reform in a Comparative Context' (2015) 10(2) J Comp Law 84, 94; S Mo, 'Interpretation and Application of the New York Convention in China' in GA Bermann (ed), *Recognition and Enforcement of Foreign Arbitral Awards—the Interpretation and Application of the New York Convention by National Courts* (Springer 2017) 199.

[133] See above, s III.A.3.

[134] Interview with Judge No 10.

[135] Interview with Judge No 2; Interview with Judge No 13; Interview with Judge No 24.

[136] Regarding the absence of procedural justice tradition in China, see: Zhu and Xiao (n 132); Gu (n 132) 94; Mo (n 132) 199.

[137] T Tyler, EA Lind and YJ Huo, 'Cultural Values and Authority Relations: The Psychology of Conflict Resolution across Cultures' (2000) 6 PPPL 4, 1138–63.

[138] See G Hofstede, GJ Hofstede and M Minkov, *Cultures and Organizations: Software of the Mind* (3rd edn, McGraw-Hill 2010).

[139] See Alford (n 128) 951.

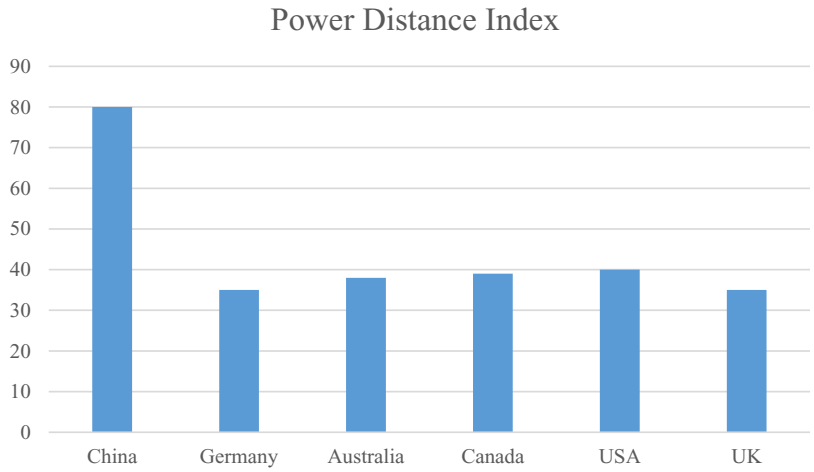

Figure 2: Power distance index.

Source: Statistic obtained from G Hofstede, 'Dimension Data Matrix' (*Geert Hofstede*, 8 December 2015) <https://geerthofstede.com/research-and-vsm/dimension-data-matrix/> accessed 22 October 2022.

dimensions of their personal freedom to a government that they elected.[140] By contrast, in China, the relationship between individuals and the state was far less adversarial. At least in theory, it was essentially one of trust, 'in which the Emperor and his representatives were conceived of more as senior relations than as public figures.'[141] Those in positions of power owned a fiduciary-like obligation to those over whom they exercised that power.[142] Within these historical and cultural contexts, it is natural that there is far less concern about the strict division between the public and private duty,[143] and the general public are more inclined to accept the legitimacy of the authorities.

VI. CONCLUSION AND SUGGESTED FURTHER RESEARCH

To conclude, the research provides empirical narratives of the actual practice of judicial mediation in China. The study illustrates that beyond law and politics, other factors, such as the judges' identity (their seniority and position in the court, their age, professional competence, social experience, personal characteristics), and several rational factors (personal aspirations for promotion, sense of honour, consideration of possible reactions from other actors) and irrational factors (cognitive biases, such as intuitions, human sentiments, emotions), have an influence and structure judicial behaviour. Conceptually, the article aspires to contribute to the growing field of comparative judicial behaviour beyond Western democracies. This study attempts to expand our inquiry beyond the focus on the role of politics and law when analysing judicial behaviour in authoritarian states.

This article advocates for a combination of different approaches, drawing upon methods in economics, sociology, social psychology, organizational sociology, political economy and behavioural economics when conducting comparative legal studies. Further research is

[140] See generally, JJ Rousseau, *Du contrat social ou principes du droit politique* (Marc Michel Rey 1762); J Locke, *The Second Treatise of Government*, P Laslett (ed) (CUP 1988); I Kant, *Metaphysical Elements of Justice* (John Ladd tr, 2nd edn, Hackett 1999).
[141] Alford (n 128) 951.
[142] ibid.
[143] ibid.

needed to study the informal dynamics in which courts and judges are embedded. Literature on judicial politics examining 'judicial networks' offers an interesting angle to research on the informal dimensions of judicial behaviour from a relational perspective.[144] To further explore the influence of the personal attributes of judges on judicial behaviour, some sociology literature on gender may also provide useful theoretical perspectives.[145] This research focused on the judges' perspectives. However, further study is needed to understand: the perceptions of the litigants themselves and their lawyers, to evaluate their satisfaction of the outcome of the judicial mediation, the nature of judicial mediation in China and make a fair and meaningful assessment of the practice, and 'the cultural context from which it emerged, within which it operated, and which it helped shape.'[146]

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[144] For study on judicial networks from the perspective of judicial politics, see Dressel, Sanchez-Urribarri and Stroh (n 15); R Sanchez-Urribarri, B Dressel and A Stroh, 'Courts and Informal Networks: Towards a Relational Perspective on Judicial Politics Outside Western Democracies' (2018) 39(5) Int Political Sci Rev 573, 573–84.

[145] For study on gender in Chinese courts, see: C Zhen, J Ai and S Liu, 'The Elastic Ceiling: Gender and Professional Career in Chinese Courts' (2017) 51(1) Law Soc Rev 168.

[146] See Alford (n 128) 951.