

# The Current Situation of Chinese Judges: Lost in a Cloud of Conflict and Confusion

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## I. Introduction

The role of the modern judiciary in China is fundamental to the promotion of justice and judges are instilled with special duties and powers, which have become more fixed and less flexible through the passage of time, despite the rapid changes that are occurring in Chinese society. Judges enjoy quite a high status in society and are regarded as a professional and authoritative group responsible for ensuring social justice by neutral judgment based on the application of law.

However, the direction of development of Chinese judges, since the People's Republic of China was founded, has not progressed with any certainty in the history. Actually, the role of the Chinese judge was initially described as a dispute solver depending on the so called "mass line"<sup>2</sup>, which aims to build a kind of mobilization-type judiciary,<sup>3</sup> with the aim of educating the public about the new judicial system under the new regime.<sup>4</sup> After People's Republic of China was founded in 1949, the courts at that time were responsible not only for trials but also for uniting and educating the public in order to build a new social system which was to be

different from any previous regimes. Therefore, and to a great extent, the function of the courts and judiciary was mainly to re-build a new society, which is far from the function of the judiciary today. In order to unite people and consolidate the new regime, the "mass line" has been selected to play a very important role in judicial policies. Under such guided thinking, the judges were expected to mobilize people to take part in trials, not only for listening to public opinions and settling disputes, but also for educating the public in all matters associated with recognizing the features of the new legal system under the new regime. In other words, this was a way of making people adapt to the new judicial system; a tool for constructing the new society based on "mass line" judicial policies.

In the 1990s the judges' role later changed to become more neutral when the Chinese court system set up a new goal of establishing the rule of law.<sup>5</sup> Then in accordance with the judicial policy today, the role of judges was once again converted back into an active participant in social management, with the aim of ensuring social stability and economic development.<sup>6</sup> It is noteworthy that each time the judge's role is modified, the new characteristics add to the existing role; the previous characteristics are not replaced but they remain creating a curious mixture of judicial characteristics.

Although the promulgated "Judges Law of the People's Republic of China" (Judges Law)<sup>7</sup> has

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<sup>2</sup> 群众路线. This kind of policy required that judges should concentrate the unsystematic ideas from people and change them into systematic opinions, then propagate and explain them to the people again so as to popularize them. See MAO Zedong (毛泽东), On certain issues of leadership methods (关于领导方法的若干问题), in: Selected works of Mao Zedong (毛泽东选集), Vol. 3, Beijing 1991, p. 899.

<sup>3</sup> See "People's justice based on mass mobilization in China" (论我国的大众动员型人民司法), <<http://www.lunwen32.com/post/1302.html>> visited August 20th, 2011.

<sup>4</sup> Some scholars argue that the judicial policies in place when the People's Republic of China was just founded had been used for political purposes rather than settling disputes. See Stanley B. Lubman, Bird in a cage: Legal reform in China after Mao, California 1999, pp. 40-70.

<sup>5</sup> The most significant sign of the role change is the promulgation of Judges Law. "Judges Law of the People's Republic of China" (Judges Law, 中华人民共和国法官法), February 28th, 1995 (revised on June 30, 2001), in: Law Yearbook of China (中国法律年鉴) 2002, Beijing 2002, pp. 294-297, see art. 1.

<sup>6</sup> ZHOU Yongkang (周永康), Further promoting the social conflicts settlement, innovation on social management methods and fairly law enforcement for ensuring the good and fast economic and social development (深入推进社会矛盾化解、社会管理创新、公正廉洁执法 为经济社会又好又快发展提供更加有力的法治保障), in: Qiushi (求是) 2010, No. 4, p. 4.

<sup>7</sup> 中华人民共和国法官法 (supra note 5).

defined the judges' role to be neutral and professional, the concrete duties for the judges' role are often shaped by judicial policies in reality. For example, there are three important slogans in current judicial policy that have been used to shape judges' role in today's China: "judicial activism"<sup>8</sup>, "judicial popularization"<sup>9</sup> and "participating in social management"<sup>10</sup>. It is interesting to note that under these specific duties, the judges are required to play an active role in the public management of affairs even though judges are expected to be neutral and professional. Moreover, the most interesting feature of the Chinese judges' role is not the new duties that are attached by way of judicial policies, but the mixed role requiring the judges to perform the duty of balancing the application of modern law and promoting public views.<sup>11</sup> However, such multiple roles often conflict with each other, which can cause the Chinese judges a considerable amount of confusion.

It is worth mentioning at this point that, within the whole Chinese judiciary, there are two classes of judges that are under intense pressure arising from such a conflict in role leading to confusion. One group of judges are those that sit in local courts. Since they play the key role of maintaining social stability, they are expected to meet multiple requirements of role duties.<sup>12</sup> This is true, particularly with respect to the position of civil judges in local courts, as the present judicial policy considers

that court mediation is a very good way to maintain social stability. The local civil judges are asked to play an active role to persuade the parties to reach an agreement with each other, which can be a cumbersome event in some cases. To some extent, this is the reason why local civil judges often ally with various local administrative organs or in some cases, respected local persons to persuade the parties to accept mediation. This persuasive role conflicts with the autonomy of the judges and can affect their standing and respect as a judge in the community. Another sector of the judiciary that is affected are the junior judges who are still quite youthful. Expansion of the Chinese judicial system has led to an increase in personnel; in last decade, many graduates, masters and even doctorate scholars from Chinese and overseas law schools have been admitted into the judiciary and most of them are placed in local courts. They play an increasingly important role in terms of their judicial work and some of them have even undertaken leadership positions.<sup>13</sup> However, they are euphemistically known as "children judges"<sup>14</sup>, not only as a reflection of their youth, but also this criticism is related to their lack of practical experience.<sup>15</sup> These young judges have been trained by text-based legal education and most of them hold a professional judges' role as a neutral and professional dispute solver. Consequently, it is difficult for them to carry out their role with the experience and level of professionalism that is expected of a judge, which does little to change the public perception of such judges in practice.

The impact of the issue of role confusion faced by judges can be observed by considering the symptoms that such judges display; for example, the loss of self-identification, the uncertainty of role behavior choices and future development direction, as well as the lack of pride that is normally associated with being a judge. This article aspires to identify the judges' role in modern China from three perspectives based on three key terms given by the current judicial policies, so as to explore the confusion issue that is faced by Chinese judges', and also with the hope of helping to increase awareness and

<sup>8</sup> 司法能动, "judicial activism" means that the judges should try all possible ways not only for settling disputes timely and properly, but also for promoting social stability and economic development. See WANG Shengjun (王胜俊), Strengthening the judicial activism to play a better judicial function (发挥审判职能强化能动司法), in: Legal Daily (法制日报) on June 20th, 2009. This will be explored further below.

<sup>9</sup> 司法大众化, "judicial popularization" mainly means the judicial work should adjust its working methods so as to be in accord with people's actual needs and common lifestyles. See SHEN Deyong (沈德咏, the vice-president of the People's Supreme Court in China), The judiciary popularization should not be forgotten (司法大众化不能被淡忘), in: Legal Daily (法制日报) on December 21st, 2008. This will be analyzed below.

<sup>10</sup> 参与社会管理. The policy of "participating in social management" mainly means the judges should become involved in social public management areas so as to promote social stability, like law propaganda, offering legal advice and other help for people who ask for help, mediating disputes in a local place before the parties submit it to the court. See WANG Shengjun (王胜俊, the president of People's Supreme Court in China), The court should play an important function in strengthening and innovating social management (发挥法院职能作用, 加强和创新社会管理), in: People's Court Daily (人民法院报) on March 3rd, 2011; also see SHEN Deyong (沈德咏), Some reflections on promotion of innovation on social management methods for people's courts (人民法院推进社会管理创新的几点思考), in: People's Court Daily (人民法院报) on November 8th, 2010.

<sup>11</sup> Chinese judges today are asked not only to be professional under modern laws so as to promote the rule of law, but also should try their best to respect public opinions. This will be explained in details below.

<sup>12</sup> In order to resolve the conflicts between the parties in a peaceful way under the request of building a harmonious society, they should try to settle disputes by mediation as much as possible, and to some extent be responsible for preventing disputes in local places. See Notice of The Supreme People's Court on Further Promotion of People's Tribunal Work in 2009 (最高人民法院关于进一步做好 2009 年人民法庭工作的通知), in: People's Court Daily (人民法院报) on February 18th, 2009.

<sup>13</sup> FENG Ying (冯莹), 1+4: The model of training young judges in Chao Yang district court (1+4: 青年法官培养的朝阳模式), in: People's Court Daily (人民法院报) on November 1st, 2010. According to this report, the Beijing Chao Yang district court has received more than 200 graduates and masters of law in only three years from 2006 to 2008, and the number of young judges under 35 years old has been around 485 up until October in 2010, which accounts for 72.4% of its total staff number.

<sup>14</sup> "Children judges" (娃娃法官) refers to the judges who are very young, some of whom have recently graduated from law schools.

<sup>15</sup> HU Changming (胡昌明), Thinking and worrying about "children judges" ("娃娃法官"的思与忧), in: Legal Daily (法制日报) on November 11th, 2007.

understanding of the ongoing current judicial reform in China.

## II. "No Trial without Complaint" vs. "Judicial Activism" Policy

Compared with administrative power, judicial power has a strong independent character and the way in which it is exercised demonstrates some distinctive features, among which the most important one is the principle of "no trial without complaint". In other words, in order to ensure judges' neutrality and justice, the judges should be restrained and only be granted the power to deal with disputes, which have already been submitted to courts. This principle has been confirmed in Civil Procedure Law of the People's Republic of China (Civil Procedure Law) in 1991,<sup>16</sup> and further to judicial reform initiated in the early 1990s, the function of the application of law of setting behavior models for social activities has been emphasized, and therefore the role of the Chinese judiciary has been expected to convert abstract laws into concrete legal solutions through due process to settle practical disputes.<sup>17</sup> In other words, judges are expected to maintain a reasonable distance from society, settling disputes by application of law so as to ensure that society, as a whole, can be governed under the rule of law; this goal has been described as building a "rule-governed society".<sup>18</sup>

The goal of building a rule of law and the established legal principle of "no trial without complaint" are deemed as the important basis of judicial justice.<sup>19</sup> Many law schools have indeed provided legal education based on such principles and many university scholars have paid close attention to related research.<sup>20</sup> To some extent, scholars and practitioners have reached the consensus that judges should be passive and neutral resolvers of disputes and accordingly their respective duties and roles are to interpret and apply the law in submitted cases, so as to establish the judicial authority. Many famous mottos, like "judges must take

the facts of the cases as the basis of adjudication"<sup>21</sup>, or "judges must take the law as benchmark"<sup>22</sup>, were becoming very popular both for judges and scholars at that time. Some scholars even compared the trial process to some kind of battlefield advocating that the role of a judge should only be as an observer in the trial, otherwise he would not be able to determine the truth of the case if he tried to get closed to the parties.<sup>23</sup>

### 1. The Real Meaning of Chinese-style Judicial Activism Policy

The judges are expected to be passive when hearing a case and making a judgment, so as to maintain neutrality and justice. However, current Chinese judicial policy requires that judges should play an active role to settle disputes and prevent social contradictions. In order to settle disputes timely and to avoid raising further disputes, judges are asked to try their best to persuade both parties to compromise by mediation, to offer other solutions for disputes, or to ally with administrative organs and other relevant personnel to settle the dispute together. In order to promote this general attitude, and to confirm and encourage these measures alongside official trials and the application of law, current policy has introduced the term "judicial activism" as the guiding slogan;<sup>24</sup> an idea that was extracted from the American judicial review system.<sup>25</sup> The meaning of "judicial activism" within the context of the U.S. judicial system is that while judges should interpret and apply the law mechanically they should also use discretion to ensure justice. For example, in the process of trial procedures, the judiciary should not follow existing laws or pre-

<sup>16</sup> 中华人民共和国民事诉讼法, April 9th, 1991 (revised on October 28th, 2007), Gazette of the Standing Committee of the National People's Congress (全国人民代表大会常务委员会公报) 2007, No. 7, pp. 699-725, see article 13 and article 108.

<sup>17</sup> MA Jianhua (马建华), The professional judges and judges' professionalization (职业化的法官与法官的职业化), in: Journal of Law Application (法律适用) 2003, No. 12, p. 10.

<sup>18</sup> There are some debates on discussing whether the kind of "rule-governed society" could be regarded to have the real implications of "rule of law", and some scholars have doubted about it. See Randall Peerenboom, China's Long March toward Rule of Law, Cambridge 2002, pp. 2-10, pp. 126-187 and also pp. 450-512. However, establishing the goal of rule of law since 1990s should be deemed as a milestone on the way of Chinese judicial reform, and many fruits have been achieved in the reform process.

<sup>19</sup> XIAO Yang (肖扬), On the theory and practice of justice issues (关于司法公正的理论与实践问题), in: Journal of Law Application (法律适用) 2004, No. 11, p. 10.

<sup>20</sup> For example, see QI Yanping (齐延平), An analysis on the basis of judicial neutrality (论司法中立的基础), Law Science (Journal of Northwest Institute of Political Science and Law (法律科学西北政法学院学报)) 1999, No. 3, pp. 15-21; QI Yanping (齐延平), The contents of the neutrality for judicial power (司法权中立的内容构成), Studies in Law and Business (法商研究) 1999, No. 4, pp. 103-107; JIANG Huiling (蒋慧岭), The judicial neutrality in modern judicial ideas (现代司法理念中的司法中立), in: People's Court Daily (人民法院报) on February 10th, 2003; SHI Haiyan (施海燕), Preparing for the judicial neutrality (为司法中立创造条件), in: People's Court Daily (人民法院报) on June 7th, 2004, and so on.

<sup>21</sup> 法官必须以案件事实为审判依据, which comes from some provision in Civil Procedure Law (supra note 15), see art. 7.

<sup>22</sup> 法官必须以法律为准绳 (supra note 21).

<sup>23</sup> HE Weifang (贺卫方), Eight puzzles of Chinese judicial reform (司法改革八大难题), <[http://article.chinalawinfo.com/Article\\_Detail.asp?ArticleID=19684](http://article.chinalawinfo.com/Article_Detail.asp?ArticleID=19684)> visited August 15th, 2011.

<sup>24</sup> WANG Shengjun (王胜俊), Afterwards, the judicial activism has been emphasized again, see WANG Shengjun (王胜俊), Grasping the judicial regularity and insist on judicial activism to promote the scientific development of judicial work (把握司法规律, 坚持能动司法努力推动人民法院工作科学发展), in: People's Court Daily (人民法院报) on May 6th, 2010.

<sup>25</sup> ZHAO Gang (赵钢), The correct understanding and practice of "Judicial Activism" — An analysis based on the civil justice perspective ("能动司法"之正确理解与科学践行——以民事司法为视角的解析), in: Law Review (法学评论) 2011, No. 2, p. 4.

cedents instead they should interpret and apply the laws responding to contemporary social reality and the new trend of social evolution, so as to prevent unfair social results.<sup>26</sup> Generally speaking, the original meaning of judicial activism mainly refers to the judges' creativity in respect of judge-made law so as to ensure social justice and fairness.

However, as expected, "judicial activism" in China has developed Chinese characteristics, which are totally different from the western ones. It is clear from the official speech introducing "judicial activism", that the main intentions are as follows: Firstly, the purpose of "judicial activism" policy is for settling and preventing disputes, so as to maintain social stability and promote social developments; secondly, judges should actively control social contradictions by all kinds of means, which are not necessary limited by judges' original legal duty; thirdly, "meeting people's satisfaction"<sup>27</sup> should be the final standard to evaluate judges' performance.<sup>28</sup> Since these intentions have a particular implication on policy and politics,<sup>29</sup> "judicial activism" in a Chinese context is quite different from the concept applied in western countries.

The introduction of Chinese-style judicial activism is a further development of the continuous judicial policy implemented for the realization of so called "social effect".<sup>30</sup> Many scholars have commented upon the concrete meanings of this concept, almost all of which have emphasized that according to the requirement of achieving social effects and promoting social stability, the judges are not required to provide judgments based purely on the application of law, but they should alternatively balance the application of law with the parties' needs, considering past and potential disputes associated with the current case, with the intention of avoiding future disputes.<sup>31</sup>

Among the various measures suggested by the "judicial activism" policy, court mediation is not only considered to be an effective means of promot-

ing social stability,<sup>32</sup> but it is also deemed as the main "proper" way for judges to settle disputes. Indeed, the Supreme People's Court has stated that judges should make full use of court mediation so as to perform their duty better incorporating "judicial activism".<sup>33</sup> Moreover, it has emphasized that judges should employ a procedure referred to as "big mediation"<sup>34</sup>, which involves combining different methods of mediation together so that disputes can be resolved amicably by mediation as far as is possible.<sup>35</sup> During recent times, court mediation has been regarded as the core of the policy of "judicial activism".<sup>36</sup>

Under the guidance of this general and rather ambiguous term, many courts have developed numerous ways to implement the policy actively and creatively. For example, some courts have promoted mediation above litigation<sup>37</sup>, which means when the parties submit their disputes to courts, judges often play an active role to try to persuade them to stop litigation and pursue mediation. Another example is the community judge system<sup>38</sup>, in which courts normally select special judges for

<sup>31</sup> XIONG Xuanguo (熊选国), To understand the judicial work and achieve both of legal and social effects (认识和把握人民法院审判工作, 实现法律效果和社会效果的有机统一), in: People's Court Daily (人民法院报) on October 7th, 2008; XI Xiaoming (奚晓明), Trying the best to combine both the legal effect and social effect (努力实现法律效果与社会效果的统一), September 23rd, 2008; SONG Yushui (宋鱼水), To realize both the legal effect and social effect (实现法律效果和社会效果的统一), in: Legal Daily (法制日报) on August 25th, 2008.

<sup>32</sup> ZHANG Shouzheng (张守增), The People's Supreme Court issued new rules of civil mediation so as to strengthen the court mediation function and ensure the social stability (发挥诉讼调解作用 确保社会稳定和谐 最高法院出台民事调解工作新规定), in: People's Court Daily (人民法院报) on September 17th, 2004.

<sup>33</sup> See Provisions of the Supreme People's Court about Several Issues Concerning the Civil Mediation Work of the People's Court (最高人民法院关于人民法院调解工作若干工作问题的规定), November 1st, 2004, in: Law Yearbook of China (中国法律年鉴) 2005, Beijing 2005, pp. 572-573, and also see Several Opinions of the Supreme People's Court on Further Displaying the Positive Roles of Court Mediation in the Building of a Socialist Harmonious Society (最高人民法院关于进一步发挥诉讼调解在构建社会主义和谐社会中积极作用的若干意见), March 1st, 2007, in: New Laws and Regulations (司法业务文选) 2007, No. 20, pp. 28-33.

<sup>34</sup> 大调解. The conception of "big mediation" means that the judges should combine the people's mediation, the administrative mediation and the court mediation together, so as to settle disputes in local area as soon as possible.

<sup>35</sup> WANG Yinsheng (王银胜), The People's Supreme Court and other 16 national departments jointly issued a document to further promote the big mediation work (最高人民法院等16部门联合发文 深入推进矛盾纠纷大调解工作), in: People's Court Daily (人民法院报) on May 4th, 2011.

<sup>36</sup> WANG Shengjun (王胜俊), The judicial activism is the unavoidable choice for Chinese courts to serve the overall situation (能动司法是人民法院服务大局的必然选择), in: People's Court Daily (人民法院报) on September 1st, 2009.

<sup>37</sup> 诉前调解制度. HE Xiaohui (何晓慧), Strengthening mediation when cases are submitted and promoting a wide range of disputes solutions in Fujian courts system (福建法院强化立案调解促进多元解纷), in: People's Court Daily (人民法院报) on August 11th, 2011. See also CHEN Xiaokang/BAO Lei/LIU Yumin/GU Sheng/SUN Jingbo (陈小康/鲍雷/刘玉民/谷升/孙静波), To build an excellent group for mediation before litigations—A record for litigation filing reform in Fangshan district court (打造一支诉前调解服务尖兵——记北京房山法院立案诉讼服务改革), in: People's Court Daily (人民法院报) on August 11th, 2011.

<sup>26</sup> See Henry Campbell Black, Black's Law Dictionary, 6th ed., West. Publish Co.1990, p. 847.

<sup>27</sup> 让人民群众满意. SHEN Deyong (沈德咏), Some issues on judicial popularization (关于司法大众化的几个问题), in: People's Judicature (人民司法) 2008, No. 19, p. 8-13. This standard of "meeting the people's satisfaction" had been set as the essential evaluation standard for judiciary, which means the judiciary should meet people's needs and respected public opinions so as to make the people trust the judiciary.

<sup>28</sup> WANG Shengjun (supra note 24).

<sup>29</sup> Pan Yunhua (潘云华), Conceptualization on standardization of judicial activism (司法能动的规范化构想), in: Studies in Law and Business (法商研究) 2010, No. 5, p. 48.

<sup>30</sup> There are many Chinese judicial policies which have emphasized on the word "social effect" (社会效果). See SONG Yahui (宋亚辉), How can the public policy enter into the trial process—taking the judicial interpretation by the People's Supreme Court as an example (公共政策如何进入裁判过程——以最高人民法院的司法解释为例), in: Studies in Law and Business (法商研究) 2009, No. 6, pp. 111-121.

certain communities to be responsible for mediation of the dispute, legal advocacy and prevention of disputes in specific areas. Many creative measures for controlling social order are becoming increasingly popular in practice applying the "judicial activism" policy, which, in some circumstances, may even extend beyond judicial policy.

## 2. The Mixture of Role and Duties of Judges under Judicial Activism Policy

Judicial activism policy promotes the judges' active performance alongside official trial power and duty, which creates a dilemma for Chinese judges. On the one hand, they must follow a large amount of substantive and procedure law which requires that they should be passive and independent from public communities so as to ensure neutrality and justice; while on the other hand, the judges are often asked to play an active role to mediate cases and prevent the future disputes in accordance with the principal of "judicial activism" and "meeting people's satisfaction", and this often easily leads to questions about both the legality and legitimacy of judges' role.

In recent times, judicial policy regarding court mediation has changed frequently. From 1940s, court mediation was very popular, which was attributive to the formation and popularization of Ma Xiwu trial mode<sup>39</sup> as the sign of its rise. The Ma Xiwu trial mode, created by a judge named Ma Xiwu, is well known due to its distinctive features of mass line in trials. The main contents of this type of trial involve the judge finding the truth of cases by conducting research among the general public, listening to public opinion and trying to persuade the parties to attempt to resolve the dispute by mediation. Under public pressure, the parties normally would have no choice but to accept mediation.<sup>40</sup> Mediation is an old method of trial in China and it has never proven to be a very popular trial mode. The principles of this type of trial have been finally confirmed in "Provisions on Civil Cases Procedures (for Trial Implementation)",<sup>41</sup> promulgated by Chinese Supreme Court in 1979.

However, many problems affected this policy, including compulsory mediation, which is considered to be a form of illegal mediation that is not necessarily based on the truth of the case, over-emphasis on the mediation rates, etc. Such issues led to the development of new court mediation provisions in Civil Procedure Law of the People's Republic of China (for Trial Implementation, 1982)<sup>42</sup>. Unfortunately, these rules were not considered to be adequate,<sup>43</sup> which lead to the development of the voluntary rule requiring the decision of whether to be mediated or to be decided by the parties by virtue of the Civil Procedure Law of the People's Republic of China (Civil Procedure Law, 1991).<sup>44</sup> In addition to this, it is documented in Several Provisions of the Supreme People's Court on Issues Concerning Reform of Civil and Economic Cases Trial Mode in 1998,<sup>45</sup> that judges should proceed to reach judgments without any delay if the parties were unwilling to reach an agreement by way of mediation.<sup>46</sup> Shortly afterwards, in Some Provisions of the Supreme People's Court on Evidence in Civil Procedures in 2001,<sup>47</sup> the Supreme People's Court stressed that the trial should based on legitimacy, normative procedure and legal evidence.<sup>48</sup> All of these changes stipulated that judges should learn to play a passive and neutral role in the trial, and should make judgments based on due procedures and laws. Indeed, such measures of reform have resulted in a rapid decline of mediation rates since the late 1990s.<sup>49</sup> For example, in respect of civil and economic cases heard in the court of first instance, the court mediation rate decreased from approximately 80% in the 1990s to less than 30% in 2003.<sup>50</sup>

<sup>41</sup> 最高人民法院关于审判民事案件程序制度的规定 ( 试行 ), see para.4. It was abolished in 1996 as it conflicted with the Civil Procedure Law issued by the National People's Congress on 9th April 1991. See ( 最高人民法院决定废止的1979年至1989年间发布的司法解释目录 ), December 31st, 1996, in: Law Yearbook of China ( 中国法律年鉴 ) 1997, Beijing 1997, p. 570.

<sup>42</sup> 中华人民共和国民事诉讼法 ( 试行 ), October 1st, 1982. in: Wang Huan/Lin Zhun/Gu Ming/Sun Wanhzhong ( 王怀安 / 林准 / 顾明 / 孙琬钟 ), Collection of the Laws of the People's Republic of China ( 中华人民共和国法律全书 ), in: Jilin 1989, pp. 389-404.

<sup>43</sup> See art. 97, art. 100 and art. 102 Civil Procedure Law (1982).

<sup>44</sup> See art. 85 and art. 91 in Civil Procedure Law.

<sup>45</sup> 关于民事经济审判方式改革问题的若干规定, July 11th, 1998, in: Law Yearbook of China ( 中国法律年鉴 ) 1999, Beijing 1999, pp. 510-520.

<sup>46</sup> Art. 20 Several Provisions of the Supreme People's Court on Issues Concerning Reform of Civil and Economic Cases Trial Mode.

<sup>47</sup> 关于民事诉讼证据的若干规定, April 1st, 2002, in: Law Yearbook of China ( 中国法律年鉴 ) 2002, Beijing 2002, pp. 654-660.

<sup>48</sup> Especially see art. 15 and art. 16, as well as art. 63 and art. 64 of Some Provisions of the Supreme People's Court on Evidence in Civil Procedures.

<sup>49</sup> Yan Qingxia ( 闫庆霞 ), A study on court mediation ( 法院调解制度研究 ), Beijing 2008, p. 22.

<sup>50</sup> Yang Runshui ( 杨润时 ), The comprehension and application on judicial interpretation about court mediation for civil cases ( 最高人民法院民事调解工作司法解释的理解与适用 ), Beijing 2004, p. 19.

<sup>38</sup> 社区法官制度. WANG Yuanhui/HE Yinghan ( 王元晖 / 何应汉 ), Setting up "community judges" for dealing with domestic disputes ( 聘 "社区法官" 处理家务事 ), in: Xiamen Daily ( 厦门日报 ) on August 13th, 2011.

<sup>39</sup> 马锡五审判方式.

<sup>40</sup> ZHANG Yongjian ( 张勇健 ), From Ma Xiwu trial mode to tribunal work methods ( 从马锡五审判方式到人民法院审判方法 ), in: People's Court Daily ( 人民法院报 ) on April 3rd, 2006. About the general understanding for Ma Xiwu trial mode, see also Benjamin L. Liebman, A Return to Populist Legality? Historical Legacies and Legal Reform, in: Sebastian Heilmann/Elizabeth J. Perry ( eds. ), Mao's invisible hand: the political foundations of adaptive governance in China, Harvard University Press 2011, pp. 165-200.

However, in recent years, as a result of the increasing number of cases and the complexity of the disputes being heard during the social transition period, the function of court mediation has been rediscovered following the premise that it can help to maintain social stability. The Provisions of the Supreme People's Court about Several Issues Concerning the Civil Mediation Work of the People's Court in 2004<sup>51</sup> and the Several Opinions of the Supreme People's Court on Further Displaying the Positive Roles of Court Mediation in the Building of a Socialist Harmonious Society in 2007<sup>52</sup> provide that judges should try their utmost to mediate cases in all phases of the trial. Further, the function of court mediation has been emphasized again in the Notice of the Supreme People's Court on Issuing Several Opinions on Further Implementing the Work Principle of "Giving Priority to Mediation and Combining Mediation with Judgment".<sup>53</sup> As a result, the phrase "mediation's priority status in judicial reform" was held as one of the top ten terms for Chinese court system in 2010 by the media as solving disputes by mediation has been given a priority status according to the policy.<sup>54</sup>

Currently, it is visible nowadays that the revival of mediation has been represented as a very important form of "judicial activism". Accordingly, many kinds of mediation patterns have been developed by Chinese court system and have been further encouraged by judicial activism policy. Also it is observed to a greater extent that this kind of judicial activism policy aims to provide legitimacy for extra duties that have been consequently imposed on judges which encourages the courts to do so, providing that these duties can help to settle disputes peacefully and prevent contradictions effectively. Further to such a pragmatic level of thinking and considering current policy, Chinese judges are faced with a dilemma: the judicial activism policy requires them to be active when involved in settling and preventing disputes while this causes conflict with the judges' neutrality.<sup>55</sup> It is considered that Chinese judges have a duty to maintain a balance between the application of law and the needs of

society so as to maintain social stability<sup>56</sup>. However, the question of whether the imposition of extra obligations on judges beyond legal judicial power and duty is legal and legitimate by virtue of judicial activism policy, remains to be answered. Moreover, it is argued that requiring a judge to perform multiple duties would cause judges to lose respect, self-identification and authority when they become involved in allying with other social subjects to mediate or prevent disputes.<sup>57</sup>

### III. Professionalization vs. Popularization

The word of "professionalization" mainly refers to the "process of becoming, in which an occupation seeks to promote itself or be promoted by external agents into a professional occupation"; while the term professionalism "is rather different in that it has a longer history but essentially it is an occupational value or a normative value, something that in effect is a good thing and is worth preserving and worth protecting".<sup>58</sup> To this sense, it is proper for Chinese judicial reform to adopt the term "professionalization (zhiyehua)" to describe its goal for shaping the professional role of judges in terms of developing professional needs as a long-term professionalization process.<sup>59</sup>

An official explanation for Chinese judges' professionalization has incorporated some special phrases to describe it, which require that judges should possess unique professional awareness, professional skills, professional ethics and professional status. Further, the contents of professionalization for judges in Chinese judicial reform process have been categorized into four basic requirements and accordingly seven standards have been established. The four basic requirements are as follows: "unique professional awareness", "professional skills", "professional ethics" and "professional status",<sup>60</sup> while "strictly professional access", "enhancing professional awareness", "training professional

<sup>51</sup> 最高人民法院关于人民法院调解工作若干工作问题的规定 (supra note 33).

<sup>52</sup> 最高人民法院关于进一步发挥诉讼调解在构建社会主义和谐社会中积极作用的若干意见 (supra note 33).

<sup>53</sup> 最高人民法院关于进一步贯彻“调解优先、调判结合”工作原则的若干意见, June 7th, 2010, New Laws and Regulations (司法业务文选) 2010, No. 29, pp. 37-46.

<sup>54</sup> Liu Jie (刘洁), The priority status of mediation in judicial reform: an analysis on ten key words for courts system in 2010 (2010 年度人民法院十大关键词解读 调解优先 司法改革中的调解优先), in: People's Court Daily on 10th March, 2011.

<sup>55</sup> Wu Yingzi (吴英姿), The limitation of justice: between the activism and passivism (司法的限度: 在司法能动与司法克制之间), in: Chinese Journal of Law (法学研究) 2009, No. 5, p. 129.

<sup>56</sup> YAN Maokun (颜茂昆), The challenge and reform of Chinese justice: a speech by Xiao Yang in Yale University (中国司法: 挑战与改革——肖扬在美国耶鲁大学发表演讲), in: People's Court Daily (人民法院报) on October 12th, 2004.

<sup>57</sup> Especially, the performance of the young judges in trials has been evaluated as not achieving the desired social effects but only simply applying the laws, or not settling the disputes really but only closing the disputes superficially, see FENG Ying (supra note 12). The young judges are required to learn how to implement the mass line and collectivism in trials so as to meet the judicial requirement to serve actively and positively for the society, see LUO Shuzhen (罗书臻), Ten connection points between the judicial work and the "three important aspects" mentioned by WANG Shengjun (王胜俊在全国高级法院院长会议上提出 人民法院工作与“三项重点工作”的十个结合点), in: People's Court Daily (人民法院报) on April 25th, 2010.

<sup>58</sup> Julia Evetts, Professionalism and Professionalization, <[http://www.hegesco.org/index2.php?option=com\\_docman&task=doc\\_view&gid=99&Itemid=76](http://www.hegesco.org/index2.php?option=com_docman&task=doc_view&gid=99&Itemid=76)> visited September 1st, 2011.

<sup>59</sup> So this article doesn't use the word "professionalism" but the "professionalization".

ethics", "improving vocational skills", "establishing professional image", "enhancing job security" and "improving professional supervision" have been identified as the seven standards.<sup>61</sup> Generally speaking, the goal of judges' professionalization is to shape the unique use and value of judges so as to develop the professionalism of judges.

Not only has judicial reform involved the professionalization of judges, but also scholars have joined this campaign actively by exploring its implications, and many of them have reached consensus that judges should indeed proceed down the professionalization road to achieve the level of professionalism that is required.<sup>62</sup>

## 1. The New Goal of Building the Professional Role of Judges

The promulgation of the Judges Law in 1995 has been considered as the start of the professionalization process of Chinese judges.<sup>63</sup> Prior to this so called "Judges Law", there was no fixed standard for selecting judges, and the occupation of the judge was regarded as a normal job which was not distinguished from other social careers. As a result, many demobilized soldiers, administrative staff, court guards and even chauffeurs could be selected to be judges.<sup>64</sup> The promulgation of the Judges Law has changed this situation by establishing the compulsory entry examination for judges.<sup>65</sup> The ex-president of Chinese Supreme Court XIAO Yang made a

famous speech in 2002, which held that the professionalization and popularization are diametrically opposed concepts, and the most important purpose of the professionalization of judges was to abandon popularization.<sup>66</sup> This speech was considered to formalize the word "professionalization",<sup>67</sup> which was explored in detail by the document of Several Opinions of the Supreme People's Court on Further Strengthening the Construction of a Professionalization Judges Group,<sup>68</sup> which identified a number of aspects of judges' professionalization. The Supreme People's Court insisted that all judges must increase both their legal knowledge and specialized trial skills, and stated clearly that the promotion of judges would be based upon professional capacity. Since then, with the promulgation of additional regulations, theorists and practitioners have reached some agreement regarding the future direction and basic requirements of judges' professionalization. Such reform measures have had a remarkable influence upon the self-identification of judges, and many judges, especially young judges, are eager to play a professional role in trials, and enjoy the status as "scholar-judges" or as "expert-judges",<sup>69</sup> which means the judges are not only learned in the application of law, but are also deemed to be experts of esoteric legal theories. Meanwhile, the professionalization process has also attracted the attention of foreign scholars, and continues to be the inspiration of many interesting academic discussions.<sup>70</sup>

## 2. The Re-emphasis of "Popularization" Policy

Since "mass line" was the guiding principle of judicial activities when the People's Republic of China was founded, judicial policies at the time were focused too heavily upon a series of measures to implement this concept of "mass line"; such as

<sup>60</sup> The "unique professional awareness" (独特的职业意识), "professional skills" (职业技能), "professional ethics" (职业道德) and "professional status" (职业地位) are regarded as four basic requirements for judges' professionalization. See ZHU Mingshan (祝铭山), A speech given by vice president of People's Supreme Court Zhu Mingshan on strengthening judges' professionalization and creating a new situation for judges development (大力加强法官职业化建设 努力开创人民法院队伍建设新局面——最高人民法院副院长祝铭山在全国法院队伍建设工作会议上的讲话), in: People's Court Daily (人民法院报) on July 7th, 2002.

<sup>61</sup> The "strictly professional access" (严格职业准入), "enhancing professional awareness" (强化职业意识), "training professional ethics" (培养职业品德), "improving vocational skills" (提高职业技能), "establishing professional image" (树立职业形象), "enhancing job security" (加强职业保障) and "improving professional supervision" (完善职业监督) are held as seven standards for judges' professionalization. See ZHU Mingshan (supra note 60).

<sup>62</sup> For example, See WANG Chengguang (王晨光), The judge's professionalization and elitism (part 1): A trend of Chinese judges professional development (法官的职业化及精英化(上篇): 中国法官职业化的趋势) in: People's Court Daily (人民法院报) on May 27th, 2002; also see HE Weifang (贺卫方), the puzzle and resolution of Chinese judicial reform (司法改革的难题与出路), in: Southern Weekly (南方周末) on September 18th, 2008.

<sup>63</sup> WANG Doudou (王斗斗), The witness of judges' development in 30 years by key words: the number of graduates increases from several thousand to more than 200 thousand (时代关键词见证法官队伍30年变迁本科以上学历从几千人到20万余人), in: Legal Daily (法制日报) on August 7th, 2008. Also see ZHANG Zhiming (张志铭), The judges law and the process of judges' professionalization (法官法与法官的职业化进程), in: Journal of Law Application (法律适用) 2005, No. 7, p. 7.

<sup>64</sup> WU Jing (吴兢), The judges are on a professionalization road (法官走向职业化), in: People's Court Daily (人民日报) on July 24th, 2002.

<sup>65</sup> See 中华人民共和国法官法, February 28th, 1995, art. 51.

<sup>66</sup> XIAO Yang (肖扬), A speech on the construction of nationwide judges group (肖扬在全国法院队伍建设工作会议上的讲话), in: People's Court Daily (人民法院报) on July 6th, 2002.

<sup>67</sup> ZHANG Zhiming (张志铭), From the elitism to professionalization of the judge (从“法官精英化”到“法官职业化”), in: People's Court Daily (人民法院报) on July 26th, 2002.

<sup>68</sup> 最高人民法院关于加强法官队伍职业化建设的若干意见, July 18th, 2002, in: People's Court Daily (人民法院报) on July 25th, 2002.

<sup>69</sup> WU Jian (武健), Distribution on national program for construction of court personnel 2010-2020 (全国法院人才队伍建设规划纲要(2010—2020)), in: People's Court Daily (人民法院报) on June 23rd, 2011. It has mentioned that the court should promote the judge's capacity on many aspects such as the trial skill, the expert knowledge as well as the language ability.

<sup>70</sup> Some western scholars have observed that China has made a great progress of judges' professionalization since the Chinese judicial reform started in 1990s. See Stanley B. Lubman (supra note 4), pp. 1-5; see also Benjamin L. Liebman (supra note 40), p. 165. However, some scholars have argued that this kind of judicial reform has been limited by many factors in China and it is very hard for Chinese courts to achieve the real success. See Benjamin L. Liebman, China's Courts: Restricted Reform, <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1138446](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1138446)> visited August 31st, 2011.



encouraging judges to maintain close contact with local people so as to listen to their views, requiring judges to make thorough investigations searching for the underlying truth of cases by visiting people, mobilizing people to take part in trials, and advocating simple and summary lawsuit procedures for parties. As these measures are against the formality of judicial activities and require engaging the participation of the public by canvassing public support in settling disputes, some scholars have used the word of "populist legality" or "populism" to refer to such judicial methods within their discussions regarding the Chinese judiciary.<sup>71</sup> However, in respect of the current judicial situation in China, since the goal of establishing the rule of law has been already attained and the whole process of professionalization cannot be reversed,<sup>72</sup> it is difficult to conclude that Chinese judicial practice is moving towards so called "populism". On the contrary, such popularization measures do not mean that the goal of professionalization should be abolished,<sup>73</sup> as indeed the current policy has emphasized further the importance of promoting judges' professionalization process.<sup>74</sup> As a result, maybe the term "popularization"<sup>75</sup> (dazhonghua) more accurately reflects the measures stated in current judicial policy, whose purpose is not to achieve real "populist legality" or "populism", but to make the rigid rule of law much more flexible in practice. Another reason for the promotion of the use of "popularization" is to emphasize the process of shaping the judges' role by current policy, which is more akin to the concept of "professionalization" than "professionalism". Moreover, the term "popularization" is regarded as a corresponding term of "professionalization" when comparing the two.

Actually, judicial policy on "judicial popularization (sifa dazhonghua)" for judicial activities has been abandoned ever since the process of judge's professionalization started in the 1990s.<sup>76</sup> However, it has been re-emphasized in current official opinions, which state that "popularization" for judicial activities should not conflict with the reform of the professionalization of judges, and that popularization does not mean that judges should blindly follow public opinion, but that judges should bear the

people's interests in mind and implement the mass line in judicial activities. It is worth noting that since the official explanation has stated that popularization does not require judges to blindly follow the view of the public, current popularization policy does not pursue the so called concept of "populism", alternatively, judges are simply required to take public views into account so as to gain the support of the public community.<sup>77</sup> Also, comments regarding the judicial popularization policy have pointed out that judges often only focus on the application of law and have neglected the mass line for a long period of time; some people do not trust judiciary any more and the terrible trend is that this kind of phenomenon has become more and more common.<sup>78</sup> Therefore, in some official opinions, judges should uphold mass line in judicial activities and combine judicial work with people's needs. For example, first, the judicial system should be designed to fit the needs of the general public, which means that the judicial system should be more accessible; second, judges should communicate with parties and make judicial documents in keeping with common public knowledge, language and style so that the parties are able to understand judicial activities; third, judges should hear cases based on investigations within the mass and consider public opinions so that they can make a "proper" and recognized judgment; fourth, judges should mobilize people to participate in trial activities and try best to mediate cases successfully; fifth, the evaluation of the people should be the final standard to assess whether judicial work is successful or not.<sup>79</sup>

In this context, it follows that such a judicial popularization policy can adequately fill the gap between professionalization justice and the actual needs of the people with a degree of flexibility. This is to say that judicial popularization policy has the same function as the judicial activism policy mentioned above, which means that both policies legitimize the multiple obligations of judges in respect of satisfying the requirements of all people.

There is some evidence to suggest that judicial popularization policy can be helpful to solve some of the problems experienced by the judiciary in recent years. For example, as a result of a sharp increase in the number of cases over the past few years,<sup>80</sup> the people often complain about the low efficiency of the court.<sup>81</sup> Another problem is that people in some cases do not understand and recog-

<sup>71</sup> Benjamin L. Liebman (supra note 40), pp. 165-200.

<sup>72</sup> To promote judges' professionalization reform process has been confirmed and stated by recent judicial policy of Opinions of the People's Supreme Court on further strengthening team construction for judges (关于当前进一步加强人民法院队伍建设的意见), <[http://www.gmw.cn/content/2008-08/25/content\\_827940.htm](http://www.gmw.cn/content/2008-08/25/content_827940.htm)> visited August 31st, 2011.

<sup>73</sup> This complicated unique situation in China has been analyzed by some scholars, see Benjamin L. Liebman (supra note 40), p. 184.

<sup>74</sup> See (supra note 72).

<sup>75</sup> 大众化.

<sup>76</sup> XIAO Yang (supra note 66).

<sup>77</sup> SHEN Deyong (supra note 27), pp. 8-13.

<sup>78</sup> SHEN Deyong (沈德咏), Non-confidence for judiciary by people has become more and more universe (不信任司法渐成社会普遍心理), in: People's Daily (人民日报) on August 19th, 2009.

<sup>79</sup> SHEN Deyong (supra note 9).



nize the official application of law.<sup>82</sup> Additionally, some recent cases have been criticized as involving some degree of corruption, which has resulted in losing public faith in the judiciary.<sup>83</sup> Logically, it seems that all of the problems that are mentioned above create suspicion regarding the judges' professionalization process. One commentator has suggested that the reason why people complain and mistrust the judiciary is that Chinese judicial tradition, represented by popularization and mass line, were abandoned for a long time after the reform of professionalization, which has in turn separated the judges from the people and this is why judges are easily misunderstood by the general public<sup>84</sup> in spite of judges' great efforts on trial work.<sup>85</sup> Meanwhile, it is also claimed that although many judges have been highly educated in law schools, they do not have the ability to meet people's satisfaction because trials are not based on people's opinions and expectations but simply on rigid legal application. Therefore, the image of judges built around the professionalization reform process is regarded as a cold, arrogant and unacceptable monster that is not able to satisfy the people.<sup>86</sup>

In accordance with official opinion, the specific measures of judge's popularization require judges to offer convenient conditions for parties involved in actions, take public views into account when making judgments, settle disputes in proper ways based on drawing from the wisdom of the people, mobilize people to participate in the trials, encourage people to supervise judicial activities, bear mass line in mind and prepare to be assessed by the evaluation of the people.<sup>87</sup> Under the guide of "popularization" policy, many Chinese courts have

played an active role to put such a policy into practice, and many kinds of methods besides official trials have been created in accordance with judicial popularization policy, like strengthening case mediation involving the participation of all kinds of social subjects, appointing specific judges for specific areas in charge of dispute mediation, provide legal advice to people if they ask for help at any time, etc.<sup>88</sup> The most noteworthy matter worth mentioning is that the traditional Ma Xiwu trial mode has been deemed as a positive way of implementing such a popularization policy, as this kind of mode does not involve the application of official legal procedures alternatively advocating the settlement of disputes mainly by mediation based on people's participation and taking public views into account.<sup>89</sup> Since the Ma Xiwu trial mode is in line with the popularization policy, it has recently been adopted in many Chinese courts and is now gaining more and more popularity.

The re-claim of popularization policy has imposed multiple extra duties on Chinese judges. As a result, some opinions suggest that the "children judges" that have graduated from law schools should pay more attention to learn the important meaning of mass line, as they could adversely influence the development of China because they are often inexperienced, self-opinionated and isolated from the people at work.<sup>90</sup> Some judges also claim that these young judges must be encouraged to settle down in local areas as soon as possible so that they are better able to serve local people, and that they should particularly learn to enhance economic development and social stability within local areas.<sup>91</sup> Meanwhile, the entire Chinese court system has carried out an active discussion regarding the fundamental standard of judicial work in 2008,<sup>92</sup> which has been followed with an intense debate both by Chinese and western scholars.<sup>93</sup>

<sup>80</sup> LIU Lan/YING Qiming (刘岚/应启明), How much psychological pressure are imposed on local judges? (基层法官心理压力有多大?), in: People's Court Daily (人民法院报) on August 22nd, 2011.

<sup>81</sup> JIA Chuanxi (贾传喜), The vice president of People's Supreme Court has emphasized to solve the outstanding issue of Litigation petition effectively (最高人民法院副院长: 切实解决涉诉信访突出问题), in: People's Court Daily (人民法院报) on April 18th, 2011.

<sup>82</sup> For solving this problem, the Chinese courts leaders emphasize that the courts must make great efforts in keeping with people's opinion so as to get people's support for judicial activities. See CHEN Yonghui (陈永辉), WANG Shengjun has emphasized that people's courts must serve people and try best to get people's recognition (王胜俊在全国大法官研讨班上强调坚持人民法院的人民性切实增强理论认同感情认同实践认同), in: People's Court Daily (人民法院报) on August 11th, 2009.

<sup>83</sup> YANG Hanping (杨汉平), The governance on judicial corruption (司法腐败的规范治理), in: People's Court Daily (人民法院报) on July 27th, 2011.

<sup>84</sup> FENG Jiangju (冯江菊), The interpretation and promotion of judicial popularization: the return of people's justice (司法大众化的解读与提倡——人民司法的本意回归), in: Journal of China National School of Administration (国家行政学院学报) 2009, No. 5, p. 50.

<sup>85</sup> SHEN Deyong (supra note 27), p. 8.

<sup>86</sup> TIAN Chengyou (田成有), The judicial credibility relies on people's trust (司法公信力有赖群众的信任), in: People's Court Daily (人民法院报) on December 1st, 2009.

<sup>87</sup> SHEN Deyong (supra note 27), pp. 8-13.

<sup>88</sup> DOU Yumei (窦玉梅), The breakthrough for judicial popularization—investigation on judicial activism mode in people's tribunal of Jiangxi Shangrao middle class court (司法大众化的基层新突破——对江西上饶中院人民法庭能动司法工作模式的调查), in: People's Court Daily (人民法院报) on November 25th, 2010.

<sup>89</sup> CHEN Haifa/JI Tianfu (陈海发/冀天福), The MA Xiwu trial mode has been promoted in the whole He Nan province to settle disputes in local places (河南全面推行马锡五审判方式, 走出法院把矛盾解决在当地), in: People's Court Daily (人民法院报) on June 18th, 2008.

<sup>90</sup> TIAN Chengyou (supra note 86).

<sup>91</sup> RONG Yanping (荣延平), The fulfillment of the duties on promoting wealth and peace to enhance judges' credibility (恪尽“帮富促和”天职提高法官信服力), <<http://www.chinacourt.org/html/article/201106/02/453274.shtml>> visited July 24th, 2011.

<sup>92</sup> ZHANG Kuanming (张宽明), The broad learning and discussion activities are started in whole national court system (全国法院系统“大学习 大讨论”活动全面展开), in: People's Court Daily (人民法院报) on March 31st, 2008.

### 3. The Meeting of Two Opposite Opinions

Ever since the Chinese strategy of socialism based on the rule of law was established in 1997 by the fifteenth National Congress of the Communist Party of China<sup>93</sup> the rule of law has been identified as a specific goal of Chinese judicial reform in recent years.<sup>94</sup> To comply with the rule of law, judges' professionalization can be said to enhance the quality of the trial, establish judicial authority and promote the recognition of the judges' professional community. Additionally, as previously mentioned, the process of judges' professionalization has already gained some positive recognition, since the professional requirements of judges have been formed, a professional access system has been established, the standardization of the requirements of judges as a neutral dispute resolver has gradually improved, the independence of judges has been enhanced and the professional ethics of judges has also been defined.<sup>95</sup> In spite of these results, the professionalization process is far from complete, because the goal to shape professional judges has not been achieved yet as a result of the political system, social transition actuality and also other related reasons.<sup>96</sup> Moreover, according to the theory of career illustration, the formation of different strands of the legal profession will depend upon long term efforts, such as the continuity of

professional traditions, a long term study of law, good quality legal training and legal practice.<sup>97</sup> However, an independent group of judges has not yet been formed in the history of the Chinese judiciary because traditionally the judges' powers have been held by local administrative organs;<sup>98</sup> furthermore, the legal education system has never been able to prepare a sufficient body of qualified students to form a professional judicial group.<sup>99</sup> Accordingly, it is very difficult to overcome such historic obstacles so soon when travelling down the professionalization reform highway. Although the reform process has already achieved some satisfactory results, the ultimate goal of professionalization is far from completion.

Despite such obstacles, current judicial policy does not seem to rely upon a complete model professionalization, alternatively, judicial popularization policy has been incorporated to promote mass line policy and meeting the needs of the people.<sup>100</sup> One issue to be aware of is that, the return of popularization could potentially damage legal certainty and judges' independence and authority because judges would be influenced by many uncertain factors. It is foreseeable that laws could be replaced by other standards during the process of dispute resolution following the judicial popularization policy. Indeed, professionalization and popularization policies conflict with each other essentially as the former requires that judges should be professional, independent, neutral and undisturbed, while the latter requires that judges must take other factors in addition to laws into account when they dealing with cases.

The current situation is particularly confusing because the professionalization of judges is theoretically legitimized according to current political policy however the popularization policy is practically applicable in accordance with its practical function within present day China.<sup>101</sup> Current judicial policy does not wish to surrender the fruits of judges' professionalization process but seeks to combine aspects of professionalization and popularization.<sup>102</sup> Indeed, the practice of combining the two policies has resulted in the judges adopting a pragmatic attitude regarding their own function,<sup>103</sup>

<sup>93</sup> Some representative articles can be found around the debate, see: *HE Weifang* (贺卫方), Never turn back (不回头路), in: *The Economic Observer Newspaper* (经济观察报) on July 14th, 2008; *CHEN Zhonglin* (陈忠林), How should China move forward the rule of law (中国法治应该怎样向前走), in: *The Economic Observer Newspaper* (经济观察报) on July 21st, 2008; *HE Weifang* (贺卫方), There is no end of the judicial reform (司法改革未有穷期), in: *Nan Fang Daily* (南方日报) on December 24th, 2008; *GAO Yifei* (高一飞), The direction of judicial reform should be newly adjusted (司法改革方向应当重新调整), in: *The Economic Observer Newspaper* (经济观察报) on August 4th, 2008; *WANG Jianxun* (王建勋), Where should the judicial reform go? (司法改革究竟应向何处去?), in: *The Economic Observer Newspaper* (经济观察报) on August 25th, 2008; *GAO Yifei* (高一飞), The judiciary's times and democracy (司法的时代性和民主性), in: *People's Court Daily* (人民法院报) on September 18th, 2008; *GAO Yifei* (高一飞), The people-oriented logic of the judiciary's mass line (司法走群众路线的民本逻辑), in: *China Business newspaper* (华商报) on March 11th, 2009; *ZHANG Qianfan* (张千帆), The judicial popularization is a fake issue (司法大众化是一个伪命题), in: *The Economic Observer Newspaper* (经济观察报) on July 28th, 2008; *HE Bing* (何兵), Is the judicial popularization a fake issue? (司法民主化是个伪命题吗?), in: *The Economic Observer Newspaper* (经济观察报) on August 25th, 2008; *ZHANG Qianfan* (张千帆), The judicial position and the reform direction (司法定位与改革走向), in: *China Economic Times* (中国经济时报) on November 7th, 2008, and so on.

<sup>94</sup> There are many internal and external factors for establishing the rule of law in China. See *Stanley B. Lubman* (supra note 4), pp. 102-137 and pp. 314-319. See also *Randall Peerenboom* (supra note 18), pp. 19-20. Some western literatures hold these judicial measures in China as turning to an opposite moving direction for Chinese judiciary. See *Carl Minzner*, China's Turn against the Law, <<http://comparativelaw.metapress.com/index/L862U5785NG68PJQ.pdf>> visited August 31st, 2011; see also *Susan Trevaskes*, Political Ideology, the Party, and Politicking: Justice System Reform in China, *Modern China*, Vol. 37 (2011), No. 3, pp. 315-344.

<sup>95</sup> See *Randall Peerenboom* (supra note 18), p. 13.

<sup>96</sup> Some scholars have made deep research on this topic, see *Randall Peerenboom* (supra note 18), pp. 13-14 and pp. 280-342. Also see *Benjamin L. Liebman* (supra note 70).

<sup>97</sup> *ZHANG Zhiming* (supra note 67).

<sup>98</sup> In ancient China, there was no specific judicial power or administrative power, as all kinds of power had been combined together. The local administrative officer owned the power and duty to settle disputes.

<sup>99</sup> *WANG Chenguang* (supra note 62).

<sup>100</sup> *SHEN Deyong* (supra note 9).

<sup>101</sup> Western scholars often argue that as the popularization policy can serve political goals, the rule of law can't be established completely. See *Benjamin L. Liebman* (supra note 40), pp. 165-200. However, the conflict between imported modern law and Chinese social tradition should be regarded as the direct reason for which the judicial policies agree and even encourage judges to blend the law with social tradition factors.

which creates a huge dilemma for Chinese judges because they do not know whether they should apply the rule of law or simply solve disputes.

An additional question needed to be answered at this point is whether the current judicial problems such as the vast increase in the number of cases, the decline of judicial authority and increase in incidents of corruption should be attributed to the reform surrounding the professionalization of judges, or just precisely the fact that the process of judicial professionalization remains unfinished. However, it seems that Chinese judicial policy does not wish to pursue such a thorough reformation of professionalization, but intends to use a hybrid model by merging the two existing diametrically opposed policies. Furthermore, not only does the legitimacy of the return of the judges' popularization policy require further exploration, but also the issue of conflict which arises in the judges' role as a result of combining these judicial policies calls for a clear examination and suitable solution.

#### IV. Judgment vs. Management

The neutrality nature of the judges' role is quite clearly different from the characteristics of normal administrative officers and other kinds of social managers who are required to be active and promote social order and welfare. In other words, the main function of judges is to make neutral judgments based on the application of law, while the administrative officers are responsible for managing social order actively following management goals in response to specific social situations mainly by applying policies. Comparing the two roles, it is clear that judges should maintain a necessary distance from the outside community to ensure their independence and authority. Their duties and manners should be focused strictly on cases which have already been submitted to the courts, while administrative officers should impose active intervention on social relationships and promote social stability. Quite clearly, the goal of judicial work is not akin to that of social management.<sup>104</sup> However, in present China, the situation is not so simple.

#### 1. Harmonizing Judgment and Management

In order to resolve social conflicts and maintain social stability, some duties which belong within the scope of social management have been imposed upon judges. This would include for example, law propaganda activities, participating in daily social order governance within local areas, and providing legal services for people. Especially with respect to judges of local courts, in pursuance of promoting social stability, they are required by current judicial policy to take part in regional management and to prevent disputes actively because they are deemed to be in a position of being able to keep in close contact with local people.<sup>105</sup> Such a policy requires these judges to be responsible for not only resolving disputes but also preventing future disputes by social management.<sup>106</sup>

Many aspects of judicial activism and popularization policies, already promote duties which belong to the scope of social management, particularly those roles which impose measures of controlling and preventing social contradictions. However, these formal requirements imposing social management duties upon judges within current judicial policy aim to provide further justification for judges' multiple duties beyond original trial work.<sup>107</sup> Current policies confirming social management duty of judges, also suggest ways in which judges can combine their own daily work with the daily life of the people.<sup>108</sup> The ways of solving disputes mainly by mediation is expected to prevent disputes from becoming more serious or developing into violent social events, helping parties to recover damaged social relationships and prevent potential disputes by offering legal advice and promoting legal propaganda activities are suggested to be suitable for a judge to fulfill the duty of social management.<sup>109</sup> Under such guidance, many Chinese courts, especially the local courts have placed a large emphasis on the performance of this so called duty of social management, which has also been confirmed by the People's Supreme Court.<sup>110</sup> Therefore, local judges are regarded as not only judges, but also as the providers of legal advice and investigators of local social situations.<sup>111</sup>

<sup>102</sup> SHEN Deyong (supra note 27), p. 8. Also see ZHANG Shouzheng (张守增), The courts should combine professionalization and popularization together based on present Chinese situation emphasized by SHEN Deyong in the Long county court meeting on judges' activism (沈德咏在陇县法院“能动主义八四司法模式”研讨会上强调 人民法院要立足国情能动司法 走专业化与大众化相结合道路), in: People's Court Daily (人民法院报) on September 11th, 2009.

<sup>103</sup> Some scholar holds this kind of pragmatic mixture way as a kind of "adaptive legality", see Benjamin L. Liebman (supra note 40), pp. 166-173.

<sup>104</sup> LIU Xuezai/HU Zhenling (刘学在/胡振玲), Ten differences between judicial and administrative powers (论司法权与行政权的十大区别), in: Training and Research Journal of Hubei College of Education (培训与研究 湖北教育学院学报), Vol. 19 (2002), No. 4, pp. 37-42.

<sup>105</sup> See The Notice of The Supreme People's Court on Further Promotion of the People's Tribunal Work in 2009 (supra note 12).

<sup>106</sup> ZHU Yunfeng (朱云峰), One judge has been arranged to settle down in one village allying with other powers to promote the social harmony (一村一法官, 借力促和谐), in: People's Court Daily (人民法院报) on August 17th, 2009.

<sup>107</sup> See ZHOU Yongkang (supra note 6).

<sup>108</sup> Like the model of "one judges for one village", see supra note 106.

<sup>109</sup> LUO Shuzhen (supra note 57).

The traditional judicial role and the role of administrative officer have to some extent been mixed together.<sup>112</sup> Accordingly, local Chinese judges are assessed according to a mixed standard in terms of their performance, which not only considers the number of trials, but also the mediation rate, the amount of propaganda activities, the amount of judicial suggestions sent to administrative organs, the number of people who are invited to trials and the frequency of preventing potential disputes.<sup>113</sup> In order to meet the needs of the public and to promote social stability, many Chinese judges are asked to become involved in public affairs. Further, to settle and prevent social contradictions, judges are often required to maintain close contact with local administrative organs, because local administrative organs can normally play a very important role in encouraging parties to compromise so as to prevent social conflicts.<sup>114</sup>

## 2. The Mixing of Judgment and Management

It is suggested by some commentators that the judicial work should be regarded as one part of social management<sup>115</sup>, and accordingly, the role of the judge is positioned as both a “legal worker” and a “social worker”.<sup>116</sup> However, according to current practice in many Chinese courts, it is observed that judges are required to perform many extra tasks beyond performing the duties required in conducting a trial. This not only makes judges exhausted but also leads to a loss of self-identification.

Some commentators argue that one important reason for imposing multiple role duties upon Chi-

nese judges is that many lawsuits arise as a result of the transitional nature of China’s political and judicial system, and because of the increasing number and complexity of cases, judicial policy is forced to extend the role of judges from pure judicial work to a wider scope of duties so as to maintain social stability.<sup>117</sup> However, such an argument raises a further question which concerns the legal and legitimate scope of judicial power and duty. It is widely known that social management can be extensive, uncertain and fluctuating according to the stage of development of society, and this could damage the neutrality and independence of judges. Therefore, the question of how to prevent this from happening needs to be addressed. Some skeptics suggest that the courts should withdraw from the participation of public affairs and judges should keep a necessary distance from administrative organs as well as the public community. It is further argued that the government must also realize the importance of respecting the judge’s neutral status as the society does need a real neutral dispute solver to maintain a good social order.<sup>118</sup>

It is difficult for Chinese judges to plan a proper direction for their career in current situation, because the professional nature of their career requires them to perform professional work while the system of judicial evaluation is not only based on professional judicial work and the proper application of laws, but also on some other aspects, like meeting people’s needs, recovering damaged social relationships and preventing future potential disputes.<sup>119</sup> The standard of “meeting people’s satisfaction”<sup>120</sup> has provided justification to the courts to impose social management duties upon judges, which affects the proper identity of judges.

## V. Conclusion: The Ongoing Puzzle for Chinese Judges

It can be seen that judicial policies including judicial activism, judicial popularization and participating in social management are intended to give legitimacy and justification to the multiple roles and duties of judges. The mixture of such multiple roles according to present judicial policy has

<sup>110</sup> The Dong Ying court experience in Shandong has been set as a successful model for judges to serve the people. See WANG Yinsheng (王银胜), The People’s Supreme Court asks the whole courts system to study the Dongying experience (最高法院要求全国法院开展学习宣传“东营经验”活动) in: People’s Court Daily (人民法院报) on September 28th, 2008; Also see HAN Chengfeng/ZHANG Jiangtao (韩成峰 / 张江涛), The People’s Supreme Court: Maintaining the advanced function of Dong Ying Court Model (最高人民法院: 保持发展“东营经验”发挥典型引领作用), in: People’s Court Daily (人民法院报) on August 25th, 2010.

<sup>111</sup> XUE Hongxi (薛红喜), The professionalization and popularization of the judiciary (司法的职业化与大众化), in: People’s Court Daily (人民法院报) on October 14th, 2009.

<sup>112</sup> See ZHU Yunfeng (supra note 106).

<sup>113</sup> REN Hupeng (任虎鹏), A lively practice of social management methods innovation: an investigation on the judicial activism model in Long County Court (社会管理创新的生动实践: 陇县法院能动司法模式调查), in: Shan Xi Daily (山西日报) on April 26th, 2011.

<sup>114</sup> This ways of disputes solving system has been criticized not only by Chinese scholars, but also been regarded as the obstacle for judges’ independence and authority. See Randall Peerenboom (supra note 18), pp. 280-342.

<sup>115</sup> WANG Shengjun (supra note 10).

<sup>116</sup> WU Jing (吴兢), A speech given by WANG Shengjun: Do not engage in judicial mystification (王胜俊 司法不要搞神秘化), in: People’s Daily (人民日报) on August 28th, 2008. The mention of “social worker” (社会工作者) refers that judges shouldn’t isolate themselves from the masses in judicial work.

<sup>117</sup> FENG Wensheng/LIN Weixing (冯文生 / 林卫星), The summary of statements on the “three key work” discussed by Judges and other experts in 2010 Annual Meeting (大法官、专家学者畅谈“三项重点工作”——“人民法院深入推进三项重点工作理论与实践研讨会暨中国法学会审判理论研究会 2010 年年会”发言摘要), in: People’s Court Daily (人民法院报) on November 24th, 2010.

<sup>118</sup> FAN Zhengwei (范正伟), Both of the government and court should realize their limited power (政府法院都要树立有限思维), in: Beijing Times (京华时报) on April 22nd, 2011.

<sup>119</sup> LI Chuansong (李传松), The mass line must run through the whole process of the trial (把群众路线贯穿于审判工作全过程), in: People’s Court Daily (人民法院报) on June 15th, 2011.

<sup>120</sup> 让人民群众满意, see SHEN Deyong (supra note 27), pp. 8-13.

proved that both modern law and Chinese dispute resolution methods are mixed together today,<sup>121</sup> and that the gap between the rule of modern law and social needs has not yet been addressed in spite of continuous legal development in China.<sup>122</sup> Since China is committed to the application of the rule of law,<sup>123</sup> how can judges fill the gap between the rule of law and social actuality? Maybe current judicial policies can be regarded as some strategies which can offer legitimacy for the flexible application of law and other compromised solutions when judges are settling disputes. Additionally, since there are some social contradictions which may harm social stability and hinder economic development in present China, current judicial policies encourage judges to involve in social management affairs beyond their original duties.

Some scholars argue that judges can only play a limited function in present China as Chinese legal tradition will not be replaced by the rule of modern law in near future.<sup>124</sup> Actually, two main reasons should be emphasized to describe the limited function of judges in contemporary China. One is that in order to guarantee justice and judicial authority, judges should only perform their duties in a neutral and independent way according to the law and the judges' professionalization policy. This means that the judges ought to play a specific role as a neutral dispute solver by applying the law according to a limited scope and procedure of judicial power. An alternative proposal is that the gap between more developed and less developed areas in present China has hindered the ability of judges to conduct consistent professional trial work under the rule of law in all cases. While many scholars argue that political purpose is the reason for which current judicial policy is operating as a mixture of different policies, it should be pointed out that such inconsistency and uncertainty could be the direct reason for a change in judicial policy. Today, there is still a big difference between the levels of social development in urban areas and rural areas in China, which also brings about inconsistencies in the development and application of the rule of law within different areas. In many rural and poor areas, many people

normally lack a sense of the rule of law, and they often regard the principal of customary justice as the applicable standard.<sup>125</sup> The gap between the law and real life in such rural areas will limit the practical application of the rule of law by judges. As it is very difficult for judges to settle disputes by purely applying the rule of law, such society may only promote the rule of law gradually.<sup>126</sup> It is precisely for this reason that current judicial policies insist that judges should not forget to follow Chinese legal tradition.<sup>127</sup> Indeed, the Ma Xiwu trial mode demonstrated that "mass line" or judicial popularization can be used to blend the rule of modern law with traditional social governance. Accordingly, some scholars have suggested that Chinese legal tradition should not necessarily be ignored and that both modern law and Chinese legal tradition are actually different legal styles that can be applied within different social situations at the same time in current China.<sup>128</sup>

It seems that as the gap between cities and rural areas is still quite far apart and will remain so in the near future, it is not possible to establish the rule of law absolutely and judicial policies which aim to ease the conflict between the rule of law and real life will still play a very important role in judicial activities. It is clear that current judicial policies have promoted pragmatic thinking in order to support social stability and economic development. However, this kind of guidance has created a dilemma for judges in respect of the development of professionalization development and the expectation of applying two conflict policies which is considered to be both cumbersome and tiresome.<sup>129</sup>

First, it must be appreciated that an absolute application of the rule of law in China is far away and this process is still in a period of transition. The importance of establishing rule of law is to promote neutrality, independence and authority connected with judicial professionalization. If the role of judges is considered to involve active participation in public affairs, the legitimacy of judicial power will be questionable.<sup>130</sup> Moreover, if multiple

<sup>121</sup> YU Zhong/WU Jingxiong/MA Xiwu (喻中/吴经熊与/马锡五), Symbols of two Modern Chinese legal traditions (现代中国两种法律传统的象征), in: *Studies in Law and Business* (法商研究) 2007, No. 1, pp. 134-139. In this article, the author holds that the Chinese legal tradition should be regarded as "modern Chinese legal tradition" after the Qing Dynasty and divided into two wings, in which one is the Westward legal tradition represented by Wu Jing xiong and the other is the native legal tradition represented by Ma Xiwu.

<sup>122</sup> LONG Zongzhi (龙宗智), The rule of law and judicial policy in social transition (转型期的法治与司法政策), *Studies in Law and Business* (法商研究) 2007, No. 1, pp. 58-60.

<sup>123</sup> See Randall Peerenboom (supra note 18), pp. 19-20; see also Stanley B. Lubman (supra note 4), pp. 102-137 and pp. 314-319.

<sup>124</sup> LONG Zongzhi (supra note 122), pp. 58-60.

<sup>125</sup> As result of this, the vice president of the People's Supreme Court ZHANG Jun emphasized that the judgments should not only comply with the law, but also should be in line with the people's customary justice. See ZHANG Jun, To meet higher standards and more stringent requirements, in order to promote scientific development for local judicial work (以更高标准和更严格要求, 推动基层工作科学发展), <[http://www.court.gov.cn/xwzx/yw/201107/t20110721\\_143115.htm](http://www.court.gov.cn/xwzx/yw/201107/t20110721_143115.htm)> visited September 1st, 2011.

<sup>126</sup> LONG Zongzhi (supra note 122), pp. 60-61.

<sup>127</sup> SHEN Deyong (supra note 10).

<sup>128</sup> YU Zhong (supra note 121), pp. 138-139.

<sup>129</sup> DONG Maoyun (董茂云), The analysis on the judicial reform direction from abolishing the approval on DONG Yulin case (从废止齐案“批复”看司法改革的方向), in: *Faxue* (法学) 2009, No. 3, p. 39.

<sup>130</sup> WU Yingzi (supra note 55), p. 129.

duties are imposed upon judges, the role of conflict will become a very serious problem for them, and maybe this has been the reason why so many judges have decided to resign over the past few years.<sup>131</sup> Particularly in relation to local and young judges, who form the majority within the judiciary, such issues of conflict have created immense pressure and have consequently had an adverse impact on the future of judiciary.

The ultimate question is what should the role of judges be in the current period of transition in China? This is a question that is still hotly debated at the moment. However, in practice, judicial practice is moving forward on a pragmatic level by imposing numerous mixed duties upon judges under the pretention of promoting social stability whilst meeting people's satisfaction. Unfortunately, the question of how to combine the reform of judges' professionalization with popularization measures has not been addressed properly. To enable the wider Chinese community both to understand and support social reform in present day China,<sup>132</sup> current judicial policy has placed emphasis upon the practical social function of the judiciary but it lacks long-term vision, which could damage the basis and legitimacy of judiciary in the long run.

Since legal provisions are not able to completely match the needs of society as a whole during this period of transition, achieving the ideal role for a Chinese judge can not be concluded in the short term. However, to promote social stability and economic development multiple duties have been imposed upon the judiciary which extend beyond legal judicial power. Achieving social stability in the long run requires a neutral, independent, and

restrained but authoritative judicial power and accordingly, current Chinese judicial policies need further exploration to legitimize imposing a mixed role upon judges.

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<sup>131</sup> There are lots of reports on the loss of judges especially local judges, see: LUO Xingguo ( 罗兴国 ), A Serious loss of local judge in Xiang Fan intermediate People's court calls for timely resolutions ( 基层法院法官流失现象严重 襄樊中院建议应及时采取措施予以解决 ), in: People's Court Daily ( 人民法院报 ) on November 2nd, 2004; HU Xinqiao ( 胡新桥 ), A loss of more than a thousand judges in Hubei province in just 4 year and Wu Jiayou suggested to promote the talents recruitment ( 湖北四年流失千余法官 吴家友大法官呼吁拓宽人才引进渠道 ) in: Legal Daily ( 法制日报 ) on January 4th, 2006; CAO Xiaohui ( 曹晓辉 ), The loss of the judges: an urgent problem ( 法院人才流失 一个亟须解决的问题 ), in: People's Court Daily ( 人民法院报 ) on November 12th, 2008; WANG Doudou ( 王斗斗 ), The Judge are under great physical and mental pressure: more than 290 judges lost in just 2 years in Beijing courts system and a analysis on the "internal injuries" problem of the judge ( 法官承受巨大身心压力 北京法院两年流失 290 多人 大法官剖析法官 "内伤" 形成原因 ), in: Legal Daily ( 法制日报 ) on May 10th, 2010; WANG Yiyin ( 王逸吟 ), The loss dilemma of local courts in Western part of china ( 西部基层法官流失困局 ), in: Guangming Daily ( 光明日报 ) on December 2nd, 2010. Of course, the role confusion is just one of the reasons for the loss of judges. Besides, political status, career expectation, economic benefits as well as occupational risks should also be taken into consideration.

<sup>132</sup> Editorial department of People's Court Daily ( 人民法院报社编辑部 ), The mass line is the key for success based on experience from history ( 鉴古知今, 群众路线是制胜法宝 ), in: People's Court Daily ( 人民法院报 ) on July 18th, 2011.