

RESPONSIVE JUSTICE IN CHINA DURING TRANSITIONAL TIMES: REVISITING THE JUGGLING PATH BETWEEN ADJUDICATORY AND MEDIATORY JUSTICE

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China has been discussed in international literature as a transitional state in both social and economic senses; however, scholarly literature analyzing how China's justice system responds to the country's social and economic transitions is scant. This Article studies the international "transitional justice" framework that examines justice systems in economic, societal, and political transition in post-Communism Central and Eastern European (CEE) jurisdictions. Although China is not a transitional state in a political sense, the transitional justice framework, particularly its analyses on how successor regimes in CEE countries deal with the aftermath of economic restructuring and societal reparations through the justice system, is of relevance to China's ongoing judicial reforms and its future development. By comparing the judicial situation in China to that of CEE countries during transitional times, this Article attempts to analyze China's distinctive judicial response to her massive economic and societal transformation so as to conceptualize "responsive justice" in China during transitional times.

I. INTRODUCTION

China has been discussed in international literature as a transitional state in social and economic senses;¹ however, literature analyzing how China's justice system responds to the country's social and economic transitions is scant. This Article studies Professor Teitel's "transitional justice" framework, which examines how the justice systems in post-

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1. See KEN MORITA & YUN CHEN, TRANSITION, REGIONAL DEVELOPMENT AND GLOBALIZATION: CHINA AND CENTRAL EUROPE (2010).

Communism Central and Eastern European (CEE) jurisdictions respond to massive economic, societal, and political transitions.² China is not a transitional state in the political sense wherein the state is transitioning from authoritarian rule to building a democracy; however, international studies on “transitional justice,” particularly on how successor regimes in CEE countries deal with the aftermath of economic restructuring and societal reparations during transitional times through the response of the judiciary, are pertinent to current Chinese society and governance, and will shed light on China’s ongoing judicial reforms as well as its future development.

This Article gives a comprehensive analysis of the above issues and is intended to make three contributions. First, by comparing current judicial situations in China to the international “transitional justice” framework, this Article attempts to analyze the distinctive response of China’s judiciary towards the country’s massive economic and societal transitions so as to conceptualize “responsive justice” in China during transitional times. In doing so, this Article compares China and CEE jurisdictions as transitional states in social and economic senses, and examines the judiciary’s responses to the transitions within both jurisdictions. Through comparative research, this Article concludes that China’s justice system displays salient features that distinguish it from other transitional states in responding to massive social and economic transformation. Second, as China does not fall squarely into the category of a transitional state, particularly in regard to its political system, this Article proposes the new idea of “responsive justice” and attempts to conceptualize it for China. This will also contribute to the international transitional justice literature and be relevant to judiciary and justice development discourses in jurisdictions not undergoing political transformation. Third, with respect to China’s future judicial path, this Article identifies the tensions, worries, compromises, and expectations of different currents in China’s ongoing judicial reform as the country faces deepening marketization and intensifying social movements. Facing many challenges, the author argues that the Chinese government should reconsider the path of China’s judicial reform and the importance and relevance of both Western experience (universal-value-based rule-of-law, judicial independence, etc.) and her home-grown alternatives (mediatory justice, but in proper forms) so as to turn “responsive justice” into serious judicial justice.

2. See RUTI TEITEL, *TRANSITIONAL JUSTICE* (2000).

This Article is organized into four parts. Following the Introduction, Part II discusses China's three rounds of judicial reforms from 1999 to 2013. It examines the checkered development of judicial reforms in China between adjudicatory and mediatory justice over the past one and a half decades. Comparing China's recent judicial responses to economic and societal changes with the international framework on transitional justice featuring CEE jurisdictions, Part III attempts to identify the distinctive features present in the current Chinese justice context in responding to economic and social transitions and to conceptualize "responsive justice" in China. Part III also argues that, to serve China's deepening marketization and intensifying social movements, mediation can still play an important role and has socioeconomic impact in the Chinese justice system; however, judicial mediation should be adopted legally and properly rather than for purely political motives. Part IV concludes the Article and looks at the future direction of judicial reform in China for rendering real judicial justice.

II. CHECKERED DEVELOPMENT OF JUDICIAL REFORM OVER ONE AND A HALF DECADES (1999–2013): PENDULUM SWINGS BETWEEN MEDIATORY AND ADJUDICATORY JUSTICE

A. *From Mediatorial to Adjudicatory Justice*

In the past one and a half decades, the Supreme People's Court ("SPC") initiated three rounds of reforms and measures to improve China's judicial infrastructure. The first of these reforms was the *Five-Year Reform Plan of the People's Court* (First-Five-Year-Reform-Plan) from 1999–2003,³ which focused on promoting the quality of judges through a more depoliticized judicial selection system.⁴ Subsequently, in October 2004, the SPC promulgated the *Outline of the Second-Five-Year Reform Plan of the People's Court* (Second-Five-Year-Reform-Outline) from 2004–2008.⁵

3. *Renmin Fayuan Wunian Gaige Gangyao 1999–2003* (人民法院五年改革纲要) [*Five-Year Reform Plan of the People's Court*], (Oct. 20, 1999), <http://china.findlaw.cn/info/guojiafa/xffl/124828.html>.

4. *Id.* art. 32. In the next five years, all the people's courts must gradually adopt a selection system which requires that the higher court judges be selected from the most-qualified judges of lower courts, and judges be selected from high-performance lawyers or other high-level legal professionals. Law school graduates and others who are newly recruited from the public recruitment examination should first work for the intermediate people's courts and basic people's courts. *Id.*

5. *Renmin Fayuan Di'erge Wunian Gaige Gangyao 2004–2008* (人民法院第二个五年改革纲要) [*Outline of the Second-Five-Year Reform Plan by the People's Court*], (Oct. 26, 2005),

The First-Five-Year-Reform-Plan took place against the backdrop of steady growth in the number of court cases, especially in large coastal cities. Pressure gradually increased on judges during the years prior to the First-Five-Year-Reform-Plan to decide cases quickly, relying on formal rules with little time to consider the social consequences of their judgments.⁶ With the core of these judicial changes being the promotion of judicial justice and efficiency, the emphasis on substantive justice shifted to procedural justice, which in turn indicated a shift from judge-centric justice to party-centric justice.⁷ These changes, focusing on judicial professionalism, procedural justice reform, and the introduction of adversarial proceedings, led to the steady decline of mediated cases from the mid-1990s to the mid-2000s.⁸ Chinese authorities, under the First-Five-Year-Reform-Plan, attempted to reverse some of these changes beginning in 2002 by restoring people's mediation committees administered by local villagers and residents committees, which had previously been spurned during the legal changes of the 1980s and 1990s.⁹

The Second-Five-Year-Reform-Outline set bolder reform goals, as it laid out no fewer than fifty objectives for upgrading the Chinese court system. As a whole, the provisions demonstrated a cautious awareness of the importance of greater professionalism, independence, and integrity of the judiciary. At the same time, the provisions aimed to reduce local protectionism and stamp out corruption while acknowledging the leadership by the Party and supervision by people's congresses at each level.¹⁰ On collective independence, the SPC sought, through the Second-Five-Year-Reform-Outline, to enhance the autonomy of local people's courts and began to explore the establishment of guaranteed financing for local courts by inserting provisions in central and provincial government budgets.¹¹ Perhaps the program's boldest proposal was loosening the grip of local power holders over local courts. The SPC called for, "within a certain geographic area, the implementation of a system of uniform

http://www.law-lib.com/law/law_view.asp?id=120832 [hereinafter Second-Five-Year Reform Plan].

6. Fu Hualing & Richard Cullen, *From Mediator to Adjudicator Justice: The Limits of Civil Justice Reform in China*, CHINESE JUSTICE: CIVIL DISPUTE RESOLUTION IN CONTEMPORARY CHINA 39 (Woo & Gallagher eds., 2011).

7. *Id.* at 39–40.

8. *Id.* at 42.

9. Carl Minzner, *China's Turn Against Law*, 59 AM J. COMP. L. 935, 945 (2011). See also Aaron Halegua, *Reforming the People's Mediation System in Urban China* (2005) 35 HKLJ 715, 747–50.

10. For the reassertion of the leadership under the Party and people's congress, see Second-Five-Year Reform Plan, *supra* note 5, art 7.

11. *Id.* art. 48.

recruitment and uniform assignment of local judges in basic and intermediate courts by the upper level people's courts."¹²

Judicial personnel were required to pass the national judicial exam to get qualified (which was reflected in the amended *Judges' Law* in 2001).¹³ Existing judges now needed to participate in annual judicial training to keep up-to-date on professional knowledge.¹⁴ Some other legal education programs in the area of commercial law, particularly international commercial transactions, also began in China in an attempt to respond to the country's accession to the World Trade Organization ("WTO"). For example, beginning in 1999, provincial and intermediate-court-level judges began attending the Tsinghua-Temple International Business Law program sponsored by the SPC, with more than 500 judges having since graduated from the program.¹⁵ Local judges from coastal area courts have had more chances to study abroad due to the more developed economies and more liberal administrations of those areas.¹⁶ This supports the findings of better enforcement records of both judgments and arbitral awards in coastal city courts.¹⁷ These measures are seen as important steps to improve the institutionalization and professionalization of Chinese courts.

Despite the bold objectives to cultivate the Chinese judiciary's professionalism, beginning in 2003, judicial reform projects underwent criticism for importing formal law and legal institutions that might have satisfied urban users but that completely failed to harmonize with practical realities in China's rural areas.¹⁸ There were also criticisms that, under the corrosive influence of Western legal concepts, Chinese courts and officials had been led astray from their populist roots.¹⁹ Alongside the castigation

12. *Id.* art. 37.

13. Zhonghua Renmin Gongheguo Faguan Fa (中华人民共和国法官法) Chapter V, Article 12 [Judges' Law of the People's Republic of China], (promulgated by Standing Comm. Nat'l People's Cong., Feb. 28, 1995, effective July 1, 1995), translation available at http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383686.htm.

14. Second-Five-Year Reform Plan, *supra* note 5, art. 39.

15. Interview with Huang Ying, Judge, Shanghai Higher People's Court (Jan. 12, 2010).

16. For example, the Shenzhen Intermediate People's Court provides a western legal training program to its judges. Each year since 1998, around fifteen judges have been sent to the University of Hong Kong Law Faculty to study in the Master of Common Law (MCL) program. The University of Hong Kong has a collaborative agreement for training for the Shenzhen judiciary. See Gu Weixia, *The Judiciary in Economic and Political Transformation: Quo Vadis Chinese Courts?*, 2 *Chinese J. Comp. L.* 1, 28 n.161 (2013).

17. Mei Ying Gechlik, *Judicial Reform in China: Lessons from Shanghai*, 19 *COLUM. J. ASIAN L.* 97, 122-32 (2005).

18. Minzner, *supra* note 9, at 947.

19. *Id.*

of judicial reform measures, judicial mediation gradually regained popularity.

Politically, to implement the “harmonious society” state policy promoted since 2006, Chinese authorities have placed an increasing emphasis on mediation.²⁰ Mediation is encouraged and even prioritized for being conducive to social stability and harmony.²¹ More subtly, the economic boom over the past three decades has led to massive socio-economic issues, and the courts and formal adjudication cannot resolve all such tensions and conflicts within Chinese society.²² The current Party line reiterates the Party’s control and an increase in the flexibility with which courts can decide cases emphasizing “the feeling of the masses” and social conditions as well as the Constitution and laws.²³ Corresponding to the more subtle societal change and public manifestation of discontent, judges, at the same time, have been provided with training to deal with social unrest cases through mediation.²⁴ In 2007, the SPC published *Several Opinions on the Further Development of the Positive Function of Mediation during Litigation in the Construction of a Socialist Harmonious Society*. Accordingly, in SPC’s 2008 annual work report, 59% of civil

20. See generally Zhonggong Zhongyang Guanyu Goujian Shehuizhuyi Hexieshehui Ruogan Zhongda Wenti De Jueding (中共中央关于构建社会主义和谐社会若干重大问题的决定) [*Decision of the Chinese Communist Party Central Committee Concerning Several Important Questions for Building a Harmonious Socialist Society*], (11 October 2006), <http://cpc.people.com.cn/BIG5/64162/64168/64569/72347/6347991.html> is translation available?; Maureen Fan, *China’s Party Leadership Declares New Priority: ‘Harmonious Society’*, WASH. POST, Oct. 12, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/10/11/AR2006101101610.html>. See also *Building Harmonious Society CPC’s Top Task*, CHINA DAILY (20 Feb 2005), http://www.ChinaDaily.com.cn/english/doc/2005-02/20/content_417718.htm.

21. Stanley Lubman, *Chinese Law after Sixty Years*, EAST ASIA FORUM (Oct. 2, 2009), <http://www.eastasiaforum.org/2009/10/02/chinese-law-after-sixty-years/>.

22. Qin Xudong, *Calling for Judicial Reform*, ZHONGGUO GAIGE (中国改革) [CHINA REFORM MAGAZINE], Jan. 15, 2010.

23. Jerome Cohen, *Body Blow for the Judiciary*, S. CHINA MORNING POST, Oct. 18, 2008, at A13, available at <http://www.scmp.com/article/656696/body-blow-judiciary>.

24. These social unrest cases include, for example, mass torts claims such as the reported tainted milk case, nail house demolishing case, derivative action, etc., which involves a large number of litigants. During the tainted milk incident, authorities warned lawyers to refuse lawsuits for fear of rising social unrest. See Ng Tze-wei, *Lawyers warned to shun milk suits*, S. CHINA MORNING POST, Sept. 23, 2008, available at <http://www.scmp.com/article/653669/lawyers-warned-shun-milk-suits>. In addition, land seizures by the government in the past decade are one of the causes of worsening social unrest. See Joseph Kahn, *Pace and Scope of Protest in China Accelerated in ‘05’*, N.Y. TIMES, Jan. 20, 2006, available at http://www.nytimes.com/2006/01/20/international/asia/20china.html?_r=0. Contrary to curbing the disputes, socioeconomic cases such as welfare claims and labour disputes have attracted widespread attention of people ranging from party officials to the media and the public as politically sensitive cases have. See Fu Yulin & Randall Peerenboom, *A New Analytical Framework for Understanding and Promoting Judicial Independence in China*, JUDICIAL INDEPENDENCE IN CHINA: LESSONS FOR GLOBAL RULE OF LAW PROMOTION 112 (Randall Peerenboom ed., 2010).

cases were settled by judicial mediation, as compared to the 26.7% resolved between 2004 and 2008.²⁵

B. Rise and Prioritization of Mediation

Most recently in March 2009, in response to the rise of social conflicts that came as a “by-product” of rapid economic growth, the SPC published its *Third-Five-Year Reform Plan of the People’s Court* (Third-Five-Year-Reform-Plan) (2009-2013).²⁶ With a sudden surge in the number of petitions to the central authorities in Beijing in the early 2000s due to litigants’ dissatisfaction with court decisions, the earlier judicial reforms became a scapegoat.²⁷ More importantly, it was determined that the courts had failed to make positive contributions to maintaining social stability by containing disputes. The Chinese Communist Party (“CCP” or “the Party”) had designated the courts as a “major contributor”²⁸ towards maintaining broad social order. As the number of civil court cases began steadily rising, the CCP believed that the courts had failed to prevent and end disputes in accordance with the CCP’s primary strategy of social control, and that the courts’ failure to fulfill this essential political duty had been brought about by their professionalization.²⁹ The consequent reversal from adjudicatory to mediatory justice in China is comparable to the development of “responsive law” as per the arguments of Philippe Nonet and Philip Selznick in *Law and Society in Transition*, where the authors argued:

Contemporary law was in the process of evolving to a higher legal stage of “responsive law” involving a “renewal of instrumentalism . . . for

25. Vicki Wayne & Ping Xiong, *The Relationship between Mediation and Judicial Proceedings in China*, 6 ASIAN J. COMP. L. 6 (2011).

26. *Renmin Fayuan Di’sange Wunian Gaige Gangyao 2009–2013* (《人民法院第三个五年改革纲要》) [*The Third-Five-Year Reform Plan of the People’s Court*], PEKING UNIVERSITY (Mar. 17, 2009), http://www.pkulaw.cn/fulltext_form.aspx?db=chl&gid=114912&encodingname=big5http://www.pkulaw.cn/fulltext_form.aspx?Db=chl&Gid=114912&EncodingName=big5%3E%20 accessed %20 2009 %20 August %20 2013 %20 [hereinafter Third-Five-Year-Reform Plan].

27. Fu & Cullen, *supra* note 6, at 45. The problems were aggravated by bureaucratic case handling, excessive court fees, corruption, and even enhanced expectations when people did not get substantive justice. Donald Clarke et al., *The Role of Law in China’s Economic Development* 396–97 (GWU Law Sch., Public Law Research Paper no. 187, 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=878672. See also Randall Peerenboom & He Xin, *Dispute Resolution in China: Patterns, Causes and Prognosis* 10–19 (La Trobe Univ. Sch. of Law, Legal Studies Working Paper Series Paper Number 2008/9, 2008), available at [https://www.law.upenn.edu/journals/calr/articles/Volume4/issue1/PeerenboomHe4E.AsiaL.Rev.1\(2009\).pdf](https://www.law.upenn.edu/journals/calr/articles/Volume4/issue1/PeerenboomHe4E.AsiaL.Rev.1(2009).pdf).

28. Fu & Cullen, *supra* note 6, at 46.

29. *Id.* at 45.

more objective public ends”, which signifies a breakthrough from the previous formalistic stage of “autonomous law” in which law and politics were separated and decisions were made strictly in conformity with legal rules without contemplating the consequences.³⁰

Compared to the first two reform plans, the Third-Five-Year-Reform-Plan placed more emphasis on the “mass line.” The “mass line” refers to “adjudication for the people”³¹—it encourages the use of mediation and relies on Party leadership and socio-economic conditions in decision-making processes with the law as a secondary consideration.³² This approach mandates that judicial reform must be politically correct and be “within the boundaries of socialism with Chinese characteristics.”³³ Some authors have opined that this court reform agenda will help facilitate social harmony and genuinely reflect transitional justice while many others argue that the plan is a “cautious document not touching on systematic issues under the Party leadership.”³⁴ The latter argument is propounded by Minzner, who attacks China’s turn against law through the illustration of a practice known as the “target responsibility” system,³⁵ which manipulates judges’ behavior. Minzner calls mediation an “artificial panacea for social stability.”³⁶

Widely employed by the Chinese administrative governance and bureaucracy, the “target responsibility” system referred to by Minzner is used to evaluate, reprimand, and reward Party and government officials, including judges, by linking officials’ careers and salaries with their success in attaining performance goals—which are usually numerical—including higher use of mediation and expeditious case closure.³⁷ Those who meet the targets receive salary and career rewards, whereas those who fail face sanctions.³⁸ As Chinese courts have placed greater emphasis on

30. Brian Z. Tamanaha, *The Tension between Legal Instrumentalism and the Rule of Law*, 33 SYRACUSE J. INT’L L. & COM. 131, 149 (2005), quoting PHILIPPE NONET & PHILIP SELZNICK, *LAW AND SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW* 15 (1978).

31. For a discussion of “坚持群众路线” (Adherence to the “mass line”) see Third-Five-Year-Reform-Plan, *supra* note 26, at pt 1(3).

32. Third-Five-Year-Reform Plan, *supra* note 26, art 1(3).

33. Jiangyu Wang, *China: Legal Reform in an Emerging Socialist Market Economy*, in *LAW AND LEGAL INSTITUTIONS IN ASIA: TRADITIONS, ADAPTATIONS AND INNOVATIONS* 56 (Ann Black & Gary F. Bell eds., 2011).

34. See Qin Yudong, *Judicial Reform: A New Round*, CAIJING MAG., Jan. 24, 2009, available at <http://english.caijing.com.cn/2009-01-24/110051303.html>.

35. For a discussion of “target responsibility” see Third-Five-Year-Reform-Plan, *supra* note 26, at pt 1(3).

36. Minzner, *supra* note 9, at 963.

37. *Id.* at 956.

38. *Id.* See generally Maria Edin, *State Capacity and Local Agent Control in China: CCP Cadre*

the importance of mediation since 2003, they have elevated the required mediation target rates for civil litigation. In some cases, targets can reach unbelievably high figures, ranging from sixty percent to over ninety percent.³⁹ For instance, the successful mediation rate at the Henan Provincial High People's Court is as high as sixty to eighty percent of its first instance civil disputes.⁴⁰ The implementation of this reward system, which guarantees that higher mediation rates correspond with higher incomes, has resulted in substantial increases in the number of cases resolved by mediation, and even mediation competition among many Chinese courts.⁴¹

Meanwhile, the target responsibility system promoting mediation has led to problematic judicial behavior as it puts judges' careers at stake and thus pressures judges into forcing parties to settle. For example, in order to achieve the goal of dissolving street protests organized by unpaid workers, courts have redirected their efforts away from adjudicating cases to appease workers, taking illogical measures to reach private, closed-door settlements. One example of these illogical, backroom settlements is paying workers' wages using court budgets.⁴² As this example demonstrates, heightened instrumentalism of law, where legal rules are tools to achieve desired objectives, requires judges to focus on attaining both legal justice and goal-oriented substantive policy justice. While modern judges engage in two types of analysis in accordance with law and policy goals respectively, Chinese judges have grown to be partial to the instrumentalist view and policy objective of the law, which—in Tamanaha's commentary on the tension between instrumentalism and rule of law—requires judges to manipulate legal rules to reach the desired result when the legally right outcome differs from the policy-oriented outcome.⁴³

The “redress” described above does not contribute to social stability in the long run, as it fails to solve the underlying problems of public discontentment.⁴⁴ Given that circumstances in various cases are unlikely to

Management from a Township Perspective, 173 CHINA Q. 35, 38–40 (2003).

39. Wang Hongwei, *Yichangjiufen, tiaojie haishi panjue* (一场纠纷, 调解, 还是判决) [A Dispute, Mediate or Adjudicate], LEGAL DAILY, Oct. 21, 2009 (detailing the requirement of the Henan Province High People's Court that between sixty and eighty percent of first instance civil disputes be successfully mediated).

40. *Id.*

41. Minzner, *supra* note 9, at 958.

42. Yang Su & He Xin, *Street as Courtroom: State Accommodation of Labor Protest in South China*, 44 L. & SOC'Y REV. 157, 157–70 (2010).

43. Tamanaha, *supra* note 30, at 150.

44. Minzner, *supra* note 9, at 961.

be identical, the same set of applicable rules must be reshaped to bring about specific results. Hence, legal instrumentalism in China, made manifest in the priority of mediation in judicial reform, can only lead to inconsistency and unpredictability in rule application, and it thus fails to establish essential binding legal rules.⁴⁵ As Minzner concludes, the shortsighted concessions (in the “pretense” of social harmony) are likely to result in long-term ramifications and further aggravate social problems, as they send a message to disputants that they can achieve what they want by orchestrating protests without resorting to legal channels at all.⁴⁶

C. *Analyses and Comments*

The reverse turn of judicial reform and the stress on the “mass line” can also be analyzed from the perspective of the personal backgrounds of the leaders of the Chinese judiciary.⁴⁷ When China acceded to the WTO in 2001, most of the presidents of the provincial-level high courts, if not all, had a formal, systematic legal education.⁴⁸ The then-Chief Justice and President of the SPC, Xiao Yang, had both a university legal education and practical qualification in law.⁴⁹ His successor, Wang Shengjun, who took over the office of the presidency of the SPC in late 2008, had neither a legal education background nor any judicial experience.⁵⁰ Wang, who worked previously as a Party Central-Political-Legal-Committee official, was appointed merely because of his political and administrative background.⁵¹ In association with Wang’s appointment, the newly appointed presidents of the high courts in a few provinces took their offices without any formal legal training either.⁵² These appointments were highly controversial and led to serious criticism of the judiciary for departing from its previous professionalism-building movement.⁵³

45. Tamanaha, *supra* note 30, at 150.

46. Minzner, *supra* note 9, at 962.

47. The “mass line” refers to the inclusion of “the feelings of the masses” as part of the criteria as Chinese courts deliberate cases. See Cohen, *supra* note 23.

48. Cohen, *supra* note 23.

49. *Biography of Xiao Yang*, PEOPLE’S DAILY, Mar. 16, 2003, available at http://english.peopledaily.com.cn/200303/16/eng20030316_113375.shtml.

50. *Biography of Wang Shengjun*, CHINA DAILY, Mar. 16, 2008, available at http://www.china-daily.com.cn/china/2008npc/2008-03/16/content_6540278.htm.

51. This change in judicial leadership suggests an increase in political pressure over the judiciary that conflicts with judicial autonomy. See Taisu Zhang, *The Pragmatic Court: Reinterpreting the Supreme People’s Court of China*, 25 COLUM. J. OF ASIAN L. 1, 4 (2012).

52. Gu Weixia, *The Judiciary in Economic and Political Transformation: Quo Vadis Chinese Courts*, 2 CHINESE J. COMP. L. 1, 330–31 (2013).

53. Jerome A Cohen, *The PRC Legal System at Sixty*, E. ASIA FORUM (Oct. 1, 2009),

The recent change in the tone of reform reflected by the *Third-Five-Year-Reform-Plan* also needs to be analyzed and understood in the context of Party policy on the judiciary. On November 28, 2008, the Politburo of the Party Central Committee issued the *Opinions on Deepening the Reform of the Judicial System and Its Working Mechanisms*.⁵⁴ This document did not respond to the increasing demands for major systematic reforms found in the previous two rounds of SPC reform plans, which were discussing changes to the way to fund the judiciary and appoint judges, providing greater powers of judicial review to courts, or eliminating interference with judicial independence.⁵⁵ Instead, the document placed strong emphasis on “Chinese characteristics” and “national conditions” with “popularization of law.”⁵⁶ For this purpose, the tasks of judicial reform as set out by the Party agenda are to optimize the distribution of judicial functions and powers, balance the strict execution of criminal law with clemency in certain situations, stress the function of judicial service, as well as achieve flexibility, social stability and predictability.⁵⁷ In a sense, the development trend of the Chinese judiciary has followed closely and even solidified the so-called “Three Supremes” Party theory advanced by Party leader Hu Jintao at the end of 2007.⁵⁸ According to this theory, the mission of the Chinese courts and the work of Chinese judges should always regard as supreme the leadership of the Party and people’s interests, as well as the Constitution and law.⁵⁹

To summarize the three rounds of judicial reforms from 1999 to 2013, it seems that the SPC introduced quite a few directives aimed at the

<http://www.eastasiaforum.org/2009/10/01/the-prc-legal-system-at-sixty/>.

54. See Zhongyang zhengfa weiyuanhui guanyu shenhua sifa tizhi he gongzuo jizhi gaige ruogan went de yijian (中央政法委员会关于深化司法体制和工作机制改革若干问题的意见) (Sept. 19, 2010), http://www.360doc.com/content/10/0919/21/3471365_54959240.shtml. This new trend of judicial reform and its failure to respond to systematic issues raised by the two previous rounds of SPC Five-Year reform plans sparked wide discussion by legal academics and practitioners on the same website in 2009.

55. See *supra* notes 3, 5 and accompanying text.

56. Zhongyang zhengfa weiyuanhui guanyu shenhua sifa tizhi he gongzuo jizhi gaige ruogan went de yijian, *supra* note 54.

57. *Id.*

58. *China: Events of 2009*, HUM. RTS. WATCH, <http://www.hrw.org/en/node/87491> (last visited Nov. 1, 2014). See also *Legal Daily* (Dec. 14, 2009), available at http://www.legaldaily.com.cn/index_article/content/2009-12/14/content_2004336.htm (last accessed June 17, 2015).

59. Wang Doudou, Wang Shengjun: “san ge zhi shang” shi fayuan shizhong jianchi de zhidao sixiang (王胜俊：“三个至上”是法院始终坚持的指导思想) [Wang Shengjun: “The Three Supremes” is the Guiding Ideology the Courts Must Always Uphold], *LEGAL DAILY* (June 23, 2008), http://news.xinhuanet.com/legal/2008-06/23/content_8420938.htm (examining the speech by President Wang Shengjun on the correlation between the new round of judicial reform and the “Three Supremes” theory advanced by Hu Jintao).

independence and integrity of the judiciary at an early stage. It also attempted to provide educational opportunities for lower-level judges. The improved independence and education was expected to bring about increased judicial credibility and accountability. Although an optimistic view was taken towards the implementation of the very ambitious *Second-Five-Year-Reform-Outline*, so far neither the practice of “guaranteed financing”⁶⁰ nor “uniform recruitment”⁶¹ of lower level judges has been reported.⁶² The most recent *Third-Five-Year-Reform-Plan* has failed to touch upon these implementation issues as well. As such, the real extent to which these reforms have actually been implemented is yet to be seen.

Insiders know that these meticulous changes in the course of judicial reform reflect tensions and struggles inherent to political reform.⁶³ They also tie in well with an earlier observation by Professor Jerome Cohen, who insightfully points out that the political status quo in China does not allow rapid expansion of judicial power, as the Party government may not wish to make quick changes, especially those that might threaten the primacy of administrative power.⁶⁴ This, seen from another perspective, explains the checkered path of Chinese judicial reform in the course of economic and social transitions, which is largely subject to the country’s further political and administrative liberalization. Therefore, more breakthroughs need to take place to *empower* the courts and individual judges in decision-making processes. The success of reform can only be tested according to its actual degree of implementation in practice.

III. CONCEPTUALIZING “RESPONSIVE JUSTICE” IN CHINA

In assessing the development of the judiciary and justice system in China, particularly its discourse over the past fifteen years, the international literature on “transitional justice” developed by Professor Ruti Teitel, which is concerned with rule of law development in transitional political and economic regimes in post-Communism CEE countries, is helpful. Although China is not a transitional state in a political sense, the studies on how successor regimes in CEE countries deal with the aftermath of economic restructuring and societal reparations

60. Second-Five-Year-Reform Plan, *supra* note 5, art. 48.

61. *Id.* art. 37.

62. Weixia Gu, *China’s Arbitration: Restricted Reform*, in *THE DEVELOPMENT OF THE CHINESE LEGAL SYSTEM: CHANGE AND CHALLENGES* 280–81 (Guanghua Yu ed., 2011).

63. Fu & Cullen, *supra* note 6, at 39, 55. *See also* Peerenboom & He, *supra* note 27, at 20.

64. Jerome A Cohen, *China’s Legal Reform at the Crossroads*, 2 *FAR E. ECON. REV.* 23, 26 (2006).

during transitional times through judicial responses is relevant to China's present and future society governance and judicial reform. Part III thus examines Teitel's transitional justice framework and compares it with the Chinese judicial context. This Part attempts to look into the following four questions. First, what is Teitel's transitional justice framework and what are the common issues that arise in transitional jurisdictions that require judicial response against the backdrop of a rapidly changing society? Second, with reference to Teitel's framework, what are the common features between the transitions of CEE jurisdictions and the change in governance in China such that the transitional justice theory would be of relevance to China? Third, by comparing the judicial context of China with the judicial situation of countries studied under Teitel's framework, what are the distinctive features of China's justice in the face of a rapidly transforming economy and society? Fourth, should mediation be abandoned or does it still have a role to play in China's justice system during transitional times, given the country's deepening marketization and intensifying social movements? By exploring answers to the above questions, this Part aims to develop a "responsive justice" theory adapted to Chinese judicial development in economic and societal transitional times.

A. Teitel's Transitional Justice Framework

The term "transitional justice" was coined by Ruti Teitel in 1991 at the time of the Soviet collapse and shortly after Latin American transitions to democracy in the late 1980s.⁶⁵ It aimed at accounting for the "self-conscious construction of a distinctive conception of justice associated with periods of radical political change following past oppressive rule."⁶⁶ Teitel suggests that, in the context of East European transitions following the collapse of Communism, the pre-eminent characteristic of transitional justice is that "the structure of the legal response was inevitably shaped by the circumstances and the parameters of the associated political conditions."⁶⁷ Therefore, transitional justice might not reflect the ideal, according to traditional notions of justice. In such hyper-politicized moments, the law operates differently and is often incapable of meeting all the traditional values associated with the rule of law.

65. Ruti Teitel, *Transitional Justice Globalized*, 0 INT'L J. TRANSITIONAL JUST. 1 (2008).

66. *Id.*

67. *Id.* at 1–2.

Focusing on transitions from authoritarian rule to the building of democracies, Teitel comments extensively on how successor regimes deal with the aftermath of massive economic restoration and human rights abuses, as well as how they make reparations to compensate victims and hold perpetrators accountable for their acts.⁶⁸ In times of transition, justice and accountability take on new roles that are at odds with the conventional interpretations of the terms. These new roles are a combination of a backward-looking approach to implicate the past regime and the forward-thinking transitional features that seek to restore, rehabilitate, and liberalize political change.⁶⁹ In the transitional period, the law is caught between the past and future, between retrospective and prospective, between the individual and the collective.⁷⁰ Transitional justice is, therefore, a unique combination of a past regime and the future.

In a context of political and economic flux, legal adjudication may have to struggle between settled and unsettled rules and ideologies; as a result, the judiciary's activities can only be understood as responsive towards transitional economies and politics.⁷¹ According to Teitel, the common issues that arise in transitional justice are as follows: First, it is difficult to reconcile various rule-of-law values in times of transition;⁷² second, compared to institutions in ordinary times, legislatures in transition and volatile times often lack the competence required, thus prompting judicial decision making to take place;⁷³ and third, it is common for constitutional courts to assume a significant role in the transitional period.⁷⁴

In established legal systems, rule-of-law values of prospectivity, continuity, general applicability, and equal protection are fully compatible, working together to form a cohesive legal system. In transitional periods of political flux, rule-of-law is a concept that embodies different irreconcilable values, and such values are given different weights in varying contexts of transitional justice. For example, both Hungary and Germany had to determine whether lifting the statute of limitations was constitutional and in accordance with the rule of law for serious crimes

68. TEITEL, *supra* note 2, at 1–6.

69. *Id.*

70. *Id.*

71. *Id.* at 220.

72. *Id.* at 16–17.

73. *Id.* at 24.

74. *See infra* note 75.

with both counties having different interpretations of this legal inquiry.⁷⁵ When confronted with conflicting rule-of-law values in transitional periods and formulating a transformative understanding of the rule-of-law, the decision concerning which will dominate needs to depend on distinctive historical and political legacies of respective jurisdictions.⁷⁶

Regarding the judicial role in transitional times, Teitel notes that in established democracies, activist judicial decision making is considered illegitimate, as it challenges settled law, and because, unlike the elected legislature, judges lack democratic legitimacy and accountability.⁷⁷ However, Teitel argues that this view may not be applicable to countries in periods of political and societal flux with a transitional legislature that is often not freely elected and, in any event, lacks the legitimacy of the legislature in an established democracy.⁷⁸ As desperate times call for desperate measures, controversies in transitional periods often require speedy consideration and, compared to legislative processes, judicial decision-making may be relatively faster and more competent in generating nuanced, case-by-case resolutions. Exploration of precedent in such periods suggests that the understandings of the rule of law are constructed within this transitional context.⁷⁹ It is thus inappropriate to apply theories of adjudication concerned with adherence to the rule of law in ordinary times to transitional periods, as the relative competence and capacities of judiciaries and legislatures presumed in ordinary times are not present in transitional periods.⁸⁰

Finally, with regard to constitutional courts, Teitel suggests that in transitional periods, where economic, political, and legal transformations occur simultaneously, newly established constitutional courts have borne the institutional burden of determining new understandings of the rule of

75. In Hungary, the law to lift the statute of limitations to allow the prosecution of crimes committed in the predecessor regime was held unconstitutional as the court considered that the principle of predictability encompassed in the rule of law trumped the principle of substantive justice, and that the value of “security” and the protection of individual rights were paramount in Hungary’s transition. TEITEL, *supra* note 2, at 16–17. Contrarily, in the “extreme cases” of the German border guards, in deciding whether to accept the defenses in accordance with law of the predecessor regime, the court considered that it ought to “value the principle of material justice more highly than the principle of legal certainty”, thus rejecting the predecessor law. *Id.*

76. *Id.* at 17.

77. *Id.* at 23.

78. *Id.* at 23–24.

79. *Id.* at 17.

80. *Id.* at 24–25. See also *id.* at 216 which reinforces the transitional judiciary and “entirely new institutions” such as newly formed constitutional courts as the institution with the legitimacy to carry out substantial normative transformation.

law and, hence, of the transformation to a rule-of-law system.⁸¹ In contemporary post-Communist transitions, Teitel observed that it was the judiciary that delineated state power and redefined individual rights, thus creating a culture valuing rights.⁸² She also highlights the importance of constitutional courts as new legal forums, moving away from past systems of centralized state power.⁸³ While access to constitutional courts through litigation and constitutional interpretation signifies unprecedented governmental openness, the courts' engagement in judicial review allows for promoting and upholding the rule of law.⁸⁴ Moreover, through transformative adjudication, constitutional courts deploy activist principles of judicial review towards normative change and a more liberal rule-of-law system.⁸⁵

B. Relevance of Transitional Justice Framework to China: Similarities Between CEE Countries and China in Transitions

Despite the fact that China is still a Communist country and not a democratic society in political flux, today's China still expounds some of the same features displayed by post-Communism CEE jurisdictions, such as rapid economic transformation and the associated social unrest. These common features between the transitions of CEE jurisdictions and the transition of China explains why Teitel's transitional justice theory may be relevant to China and its judicial development discourse.

1. Transitional Reform in Accordance with "Policy Goals"

Academic literature has differentiated the reforms that took place in Poland, Hungary, and China, describing the Polish transition as radical, the Hungarian as gradual, and the transitional path of China as being in accordance with "socialist market economy" principles.⁸⁶ The standardized view is that China has been attempting its transition with a *gradual* approach from a centrally-planned to a market-oriented economy despite never having displayed systemic change from a socialist system to

81. *Id.* at 22.

82. *Id.* at 23.

83. *Id.*

84. *Id.*

85. *Id.*

86. MORITA & CHEN, *supra* note 1, at 137.

a capitalist system.⁸⁷ In contrast, Poland underwent reform according to a fast strategy widely known as “shock therapy,”⁸⁸ shifting towards a market-oriented economic system. Additionally, Poland switched from a socialist to a capitalist system with its transition consisting of “a mix of radical financial measures with delayed procedures of structural reforms.”⁸⁹

Nevertheless, some scholars have warned that the differentiation between “radicalism” and “gradualism” functions is insufficient when evaluating transition.⁹⁰ The application by economists of such patterns to actual transition economies is restrictive and lacks value.⁹¹ Instead, they propose scrutinizing the *policy goals* of a transitional economy, considering the benefits and the expenses of completing the policy goals, and evaluating the appropriateness of the policy.⁹² For instance, one of the goals of the Polish economic reforms, beginning in January 1990, was to start the processes of structural and ownership transformation.⁹³

Regarding policy goals, Pomfret points out differences between China and CEE countries. According to Pomfret, reform in China is “intended to produce economic growth, not system change,”⁹⁴ whereas reform in CEE countries was system change-oriented, with countries taking “serious steps towards becoming market economies.”⁹⁵ Acting in line with stability-oriented reform principles, governments in CEE transition economies did not take steps to dissolve the centrally-planned production structure until the end of the 1990s.⁹⁶

Leszek Balcerowicz, economist and former deputy prime minister of Poland, made the following comparisons of reform policies between China and Poland when reforms first started in China in the late 1970s. At that

87. *Id.* at 135. Morita and Chen later point out that China has in fact employed more system change-oriented measures such as promoting labor mobility through measures such as the household register reform. *Id.* at 210.

88. Stephen Engelberg, *21 Months of ‘Shock Therapy’ Resuscitates Polish Economy*, N.Y. TIMES, Dec. 17, 1992, available at <http://www.nytimes.com/1992/12/17/world/21-months-of-shock-therapy-resuscitates-polish-economy.html>.

89. MORITA & CHEN, *supra* note 1, at 135–36. See also DABROWSKI, OLEKSANDR, & SINITSINA, POST ADAPTATION GROWTH RECOVERY IN POLAND AND RUSSIA—SIMILARITIES AND DIFFERENCES 4 (2004).

90. MORITA & CHEN, *supra* note 1, at 140.

91. *Id.*

92. *Id.* at 140.

93. *Id.* at 65.

94. Richard Pomfret, *Growth and Transition: Why has China’s Performance Been So Different?*, 25 J. COMP. ECON. 422, 437 (1997).

95. MORITA & CHEN, *supra* note 1, at 211.

96. *Id.* at 141.

time, China faced only a mild macroeconomic imbalance, contrary to the dire macroeconomic state that troubled Poland in mid-1989.⁹⁷ Under such circumstances, “radical stabilization” and the application of “shock therapy” were necessary in Poland but not in China.⁹⁸ As a result of choosing their specific transitional pathways, China has suffered from income disparity whereas Poland has been afflicted by huge unemployment rates.⁹⁹ According to Morita and Chen, the prediction for coming years is that China will emphasize more systematic change that will bring about a more flexible labor movement, whereas Poland will emphasize enhancing economic growth as illustrated through changes to the highly subsidized coal industry which was large and inefficient.¹⁰⁰ The different developmental directions of the two countries echo Morita and Chen’s conclusion that various ways of transition should be understood as evolutionary phenomena determined by and unique to the practices and policies of the country during transition.¹⁰¹ This, in turn, supports Teitel’s view that contextual differences lead to differences in the arranging of priorities in reconciling rule-of-law values since different countries have inherently different policy goals to achieve.

2. *First Line of Common Similarities: Ownership Diversification and State Control in Economy*

Although the initial nature of transition in CEE countries and China may differ as illustrated by their differing policy goals, there are common features in their economic transitions and the similar societal problems they have encountered. The first line of similarities concerns the economy. While there are differences in initial economic structures and policy goals, CEE countries and China are inherently similar in that both display shared heightened concerns regarding diversification of ownership and state control.

Even before transitioning, the economic structures of the CEE countries and China were different, requiring distinct strategies and policy decisions unique to the different economies. Previously, the CEE economy

97. In 1989, Poland experienced hyperinflation with the annual inflation rate at approximately 3000%. See Hartmut Lehmann, *The Polish Growth Miracle: Outcome of Persistent Reform Efforts* 9 (Inst. for the Study of Labor, IZA Policy Paper No. 40, 2012), available at <http://ftp.iza.org/pp40.pdf>.

98. MORITA & CHEN, *supra* note 1, at 142 (citing LESZEK BALCEROWICZ, *POST-COMMUNIST TRANSITION: SOME LESSONS* 30–31 (2001)).

99. *Id.* at 211.

100. *Id.* at 210–12.

101. *Id.* at 212.

was “overbuilt”¹⁰² with a heavy industry focus, but weak light industry and consumer goods and services sectors. In contrast, the abundant supply of Chinese peasants who were relinquished by the dismantled agricultural commune system turned to new labor-intensive economic sectors in the city.¹⁰³ Owing to different economic structures, 80% of the Chinese population was not engaged in state sector work prior to the economic reforms but most of the CEE population worked for the heavily-subsidized state sector.¹⁰⁴ Additionally, while the CEE population was subject to extensive social benefits, the rural Chinese workers received little social protection before 1978.¹⁰⁵ The lack of security also incentivized the Chinese peasants to scramble for the new job opportunities available in the cities.¹⁰⁶ Because of its labor history, China has successfully promoted a two-track approach of having state enterprises alongside non-state enterprises since the late 1970s.¹⁰⁷ In contrast to Eastern Europe, China did not have to bear the same burden of restructuring state enterprises to support the economy. As a result of its reforms relating to ownership diversification, China experienced rapid growth in its rural regions and coastal areas filled with non-state enterprises and foreign direct investment; whereas the performance of areas with state-owned industries continued to be weak.¹⁰⁸

In the CEE countries, property restitution did not have an exclusively reparative nature;¹⁰⁹ rather, restitution was deliberately linked with structural reform, thus taking on a mixed distributive-reparative character.¹¹⁰ Kuti suggests that most property restitution schemes aim to achieve two goals: compensating individuals for their loss of property due to unjust governmental actions and redefining property relationships in order to achieve certainty in ownership and possession, which is considered a prerequisite for the creation of an efficient market economy.¹¹¹ Clearly, the latter social goal of restitution corresponds with policy concerns, but is not in line with reparative justice, which focuses

102. Jeffery Sachs & Wing Thye Woo, *Structural Factors in the Economic Reforms*, ECON. POL’Y, Apr. 1992, at 104.

103. *Id.*

104. *Id.* at 112.

105. *Id.* at 104, 108.

106. *Id.* at 104.

107. *Id.* at 105.

108. *Id.* at 115.

109. CSONGOR KUTI, *POST-COMMUNIST RESTITUTION AND THE RULE OF LAW* (Central European University Press, 2009), at 70.

110. *Id.*

111. *Id.* at 77.

solely on the rectification of past wrongs through compensation. For instance, in the case of Poland, restitution schemes posited in the 1990s were supported by pragmatic rationales to increase business efficacy, to encourage private entrepreneurship, and to create a new middle class;¹¹² whereas in the Hungarian reform proposals lodged in 1987 aimed at developing a “socialist mixed economy” and to radicalize past market reforms, the diversification of ownership was highlighted as a key issue to tackle.¹¹³

Ultimately, despite the fact that Poland employed speedy privatization strategies and also displayed high domination of foreign ownership, its case bears more resemblance to the case of China than that of Russia in terms of state control.¹¹⁴ According to Poznanski, state control continues to have a role to play in post-communist transitions.¹¹⁵ Although the ultimate aim of the transition might be to create a market economy, the process of achieving this goal depends on the state and its involvement in making decisions, for example, the steps the state would choose in withdrawing from the state-owned sector.¹¹⁶ While Russia suffered recession due to the weakening of state control over its economy, Poland exhibited more cohesive changes as the state retained control.¹¹⁷ Similarly, Poznanski suggests that China has retained sufficient state control of production to ensure continuous growth.¹¹⁸

3. *Second Line of Similarities: Social Instability*

Furthermore, there are common similarities between China and CEE countries with respect to social instability. With the region-wide economic recession taking place in CEE countries from 1989 onwards, social problems such as declines in productivity, soaring unemployment, and escalating poverty emerged.¹¹⁹ In China, dissent and discontent today go

112. ENCYCLOPEDIA OF TRANSITIONAL JUSTICE VOL.2 386 (Lavinia Stan & Nadya Nedelsky eds. 2012).

113. KUTI, *supra* note 109, at 86. It should be noted that due to financial difficulties, these schemes were ultimately rejected by the legislature. William R. Youngblood, *Poland's Struggle for a Restitution Policy in the 1990s*, 9 EMORY INT'L L. REV. 645, 668–69 (1995).

114. Kazimierz Poznanski, *The Crisis of Transition as a State Crisis*, POST-COMMUNIST TRANSFORMATION AND THE SOCIAL SCIENCES: CROSS-DISCIPLINARY APPROACHES 67, 72 (Frank Bönker et al. eds., 2002).

115. *Id.* at 59.

116. *Id.* at 56, 59.

117. *Id.* at 65.

118. *Id.* at 76.

119. Tamás Réti, *East Central European and Economic Transition and the West*, 2 MACALESTER INT'L 53, 54–55 (1995).

beyond the establishment of opposition parties, taking the form of a larger-scale rights movement, where dissidents seek to change the system through the identification of legal rights and subsequent legal and constitutional reform.¹²⁰ These social issues have given rise to the propagation of contradicting policy goals of authorities. On the one hand, reforms aim at opening up and improving mobility. At the same time, the authorities find it paramount to retain stability and control, which makes them reluctant to reduce their insecurities. Compared to a democratic political system with separation of the three branches of state power, the authoritarian development system has a “relatively unstable structure”.¹²¹ In China’s case, the one-Party rule of the CCP faces a legitimacy crisis and, moreover, regime change is often considered a necessary step to take in order for reforms to bear genuine significance.¹²² This context rightfully gives rise to the single Party regime’s insecurity concerning political stability and thus the Party-State continues to exert control albeit in a different form. This explains the Chinese authorities’ high sensitivity and vigilance regarding the political transition that is incidental to the economic reforms.

This change in the form of control can be clarified by Morita and Chen’s distinction of wide sense and narrow sense authoritarianism. The former is considered derogatory as a system that fully controls both social economy and political life by employing violence and ideology and is characterized by an excessive concentration of power and a lack of constitutional restrictions.¹²³ In the latter case there continues to be monopolistic political power (policies of which include disallowing party politics) alongside a well-developed and independent market-oriented system.¹²⁴ In other words, the narrow sense authoritarian development model involves “low political participation” and “high economic growth.”¹²⁵ As China has now progressed to follow the narrow sense model, the form of control now deployed by the authorities has also become more covert. Given the sheer size of China, it has been crucial to maintain social stability as the transformation of the economic system

120. Fu Hualing, *Politicized Challenges, Depoliticized Responses: Political Monitoring in China’s Transitions* 3 (Univ. of H.K. Faculty of Law Legal Research Paper Series, Paper No. 14, 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2250073.

121. MORITA & CHEN, *supra* note 1, at 24.

122. Fu, *supra* note 120, at 28.

123. MORITA & CHEN, *supra* note 1, at 305–06.

124. *Id.*

125. *Id.* at 306.

takes place.¹²⁶ Indeed, Morita and Chen remark upon the social instabilities that have emerged in China since the open-door and reform-up policy according to Deng Xiaoping's development model. These social instabilities have developed as a result of the increase in social mobility and the proliferation of information.¹²⁷ In the face of politicized challenges, there is a change in the form of control exerted by the authorities—the CCP's control strategy changed from “open political repression”¹²⁸ to an apolitical social management that no longer focuses on promoting ideological values.¹²⁹ For instance, Fu notes that while the Party has depoliticized criminal law and refrained from using political trials on the one hand, it has stepped up in surveillance efforts and social management to prevent the social and political tension from further escalating.¹³⁰

This “control” mechanism is further exemplified by the authorities' constant resort to recentralization during the economic transitional process. In China, the authorities have been hesitant to expand reforms when confronted by problems arising from industrial reforms and subsequently have displayed a tendency to recentralize and to limit enterprise autonomy during ownership diversification.¹³¹ Similarly, in all the CEE countries apart from Yugoslavia, after reform measures—such as the increase in enterprise autonomy and the decrease in central planning—had been put in place, authorities constantly reverted back to recentralization.¹³² When problems such as increased indebtedness, shortages, and deficits that bring about disequilibrium flare up, they form excuses for authorities to shift away from decentralization and help legitimize governmental interventions instead.¹³³ In spite of the differences in the historical and transitional milieu, what the countries have in common are the authorities' insistence on monitoring societal, economic, and political changes and steering transition in the hope of preventing chaos.

126. The policy goal of maintaining social stability is a fundamental reason for why China employed the gradual way of transition. *Id.* at 342.

127. MORITA & CHEN, *supra* note 1, at 342.

128. Fu, *supra* note 120, at 1.

129. *Id.* at 1.

130. *Id.* at 17.

131. Susan Shirk, *The Political Economy of Chinese Industrial Reform*, REMARKING THE ECONOMIC INSTITUTIONS OF SOCIALISM: CHINA AND EASTERN EUROPE 328–29 (Victor Nee, David Stark & Mark Selden eds., 1989).

132. *Id.* at 330.

133. Janos Kornai, *The Hungarian Reform Process: Visions, Hopes, and Reality*, 24(4) J. OF ECON. LITERATURE 1687, 1721 (1986).

C. Conceptualizing “Responsive Justice” in China

Given the similarities between China and CEE countries on economic restructuring and social instability during transitions, this Article is of the view that Teitel’s studies on transitional justice featuring CEE transitions is relevant to China’s justice discourse and development. As previously outlined, according to Teitel, three common problems arise in transitional justice jurisdictions. First, it is difficult to reconcile rule-of-law values in times of transition.¹³⁴ Second, legislatures in transitional times often lack the competence required in comparison with ordinary times, thus prompting judicial decision making to take place.¹³⁵ Third, constitutional courts usually assume a significant role in the transitional period.¹³⁶ On the basis of the previous discussion of China’s recent judicial reforms from 1999 to 2013, this Part compares the judicial context of China with those countries that have been analyzed under Teitel’s framework to contextualize the distinctive features of China’s justice system in reacting and responding to a rapidly transforming economy and society. Thus, this Part attempts to conceptualize “responsive justice” in China during transitional times. It also attempts to answer whether mediation should be abandoned or if it still has a role to play in China’s justice system and prospective judicial reform, given the country’s deepening marketization and intensifying social movements.

1. *Emphasis on the Value of Stability over the Value of Rule-of-Law: The Rise and Prioritization of Mediation and the Judiciary’s Institutional Alienation*

In academic literature, the objectives of thin theories of rule of law are to “ensure stability,” to “secure the government in accordance with law by limiting its arbitrariness,” to “enhance predictability,” to “provide fair dispute resolution mechanisms,” and “to reinforce the legitimacy of the government.”¹³⁷ Despite their shared acceptance of the aforementioned broad goals, states may apportion different weight to these objectives, which in turn results in remarkable variations in legal discourses.¹³⁸ In

134. TEITEL, *supra* note 2, at 16–17

135. *Id.* at 24.

136. *See supra* note 81.

137. Randall Peerenboom, *Varieties of Rule of Law: An Introduction and Provisional Conclusion*, ASIAN DISCOURSES OF RULE OF LAW: THEORIES AND IMPLEMENTATION OF RULE OF LAW IN TWELVE ASIAN COUNTRIES, FRANCE AND THE U.S. 1, 3 (2004).

138. TEITEL, *supra* note 2, at 17.

periods of rapid economic or social transformation, as are occurring in China, the modernization project is soon challenged by the escalation of social conflicts in the transitional period.

It was reported that “public order disturbances” grew significantly in recent years from 8,700 incidents in 1993 to nearly 60,000 in 2003 and further to the range between 180,000 to 230,000 in 2010.¹³⁹ Incidents in recent years have not only demonstrated a rapid increase in occurrences, but also have increasingly intensified and turned violent.¹⁴⁰ The Rule of Law Development Report published by the Chinese Academy of Social Science in 2010 revealed that the financial crisis, high unemployment, and a polarized society have led to a grave situation of political instability with an increasing number of social unrest cases.¹⁴¹ There has also been an outpouring of group petitioning, mass demonstrations, riots and even inter-ethnic violence, with letters, visits (*xinfang*), and complaints engulfing governmental offices at all levels.¹⁴²

This influx of cases and disputes poses a serious challenge to courts’ efficiency in judging, adversely impacting access to justice. Combined with costs associated with dispute resolution and inadequate numbers of qualified judges and lawyers, the inadequacies of court proceedings has impeded China’s economic and social development. Moreover, the failure to address these disputes has pushed the excluded or dissatisfied to seek redress through other channels, such as the letters and visits system.¹⁴³ All of these have endangered political and social stability, which has been the

139. Christian Göbel and Lynette H. Ong, *Social Unrest in China* (Europe China Research and Advice Network (ECRAN) Paper, 2012), at 8, available at http://www.chathamhouse.org/sites/files/chathamhouse/public/Research/Asia/1012ecran_gobelong.pdf (last accessed June 1, 2015).

140. Fu, *supra* note 120, at 7–8.

141. See Lin Li, *Zhongguo Fazhi Fazhan Baogao* (中国法治发展报告) [China (aogaaBaogaaan Baogais proposit)] (2010).

142. Wayne & Xiong, *supra* note 25, at 11. See also Fan Yu, *Perfecting and Developing Modern China’s ADR Mechanism*, XUEHAI J., Jan. 2003, at 81. From the perspective of Chinese scholar Fan, even in situations when village cases can be accepted by the courts, parties are unable to present legally meaningful and relevant evidence and basis for argument. *Id.* Consequently, courts are forced to reject huge amount of disputes, resulting in the strong dissatisfaction of grass roots citizens who cannot file their cases with the courts. *Id.* In cases that are managed to be tried by courts, the judgments made often fail to conform with local customs and reasoning, there was a significant increase in the disgruntled parties petitioning to state organs. *Id.*

143. Article 41 of the Constitution states that Chinese citizens have the right to make complaints and to petition to state organs, and the relevant state organs must deal with such complaints. XIANFA art. 41 (1982) (China). By 2011, many Chinese courts set up a department to take in complaint letters, petitions, or visits concerning judicial grievances. See Gu, *supra* note 52, at 328. See *China*, Part 4, http://www.npc.gov.cn/npc/xinwen/jd gz/bgjy/2013-03/22/content_1789827.htm. See also *Convicts 5 Million Criminals in Five Years*, XINHUA (Mar. 10, 2013), <http://english.cntv.cn/20130310/102142.shtml>.

top priority of the Chinese Party-State.¹⁴⁴ On the other hand, despite the bold advocacy and impressive progress made in the past thirty years, the judicial system is still more a political regime than a separate professional institution.¹⁴⁵ As the judiciary has been increasingly subject to political control, the challenges facing the judiciary and judicial reform in China include not only the intense conflicts associated with full-scale social and economic transitions, but also the unpredictable struggle of political ideology to deal with pressing reality.¹⁴⁶

In this context, according to Zhang's observation, leaving aside other factors such as biased ruling, judicial corruption, and unbalanced enforcement, the entire judicial system is institutionally inaccessible and ineffective, creating an "institutional alienation."¹⁴⁷ The judiciary has been caught in between judicial justice, realized through an independent judiciary exercising impartial adjudication of disputes, and practical popularity as a means to provide the political regime with much needed legitimate support.¹⁴⁸ As a result, under the direction of political policy, some judicial mechanisms, or "judicial policy," must be deployed to settle disputes that may not be suitable for their application in a rule-of-law context at all. The adoption of mediation, apart from drawing on Chinese historical and cultural roots of harmony, is perceived more as a means to divert disputes from the overtaxed judiciary, to massage social conflicts, and to ensure that the judicial system operates in accordance with political policy.¹⁴⁹ The rise of, and even priority of, mediation in judicial proceedings is one such judicial policy and exemplifies the "institutional alienation" of the Chinese judiciary in transitional times.

Mediation has been widely used in all kinds of civil proceedings under the political policy to maintain social stability.¹⁵⁰ It has thus been concluded that after the transition from a planned economy to market economy that took over thirty years, the judicial reform on mediation has taken a full cycle—from mediation first in the 1980s, to mediation on the

144. Fu & Cullen, *supra* note 6, at 51.

145. Zhu Suli, *Political Parties in China's Judiciary*, 17 DUKE J. COMP. & INT'L L. 533, 538–41 (2007).

146. *Id.* at 547–48.

147. Xianchu Zhang, *Civil Justice Reform with Political Agendas*, THE DEVELOPMENT OF THE CHINESE LEGAL SYSTEM: CHANGE AND CHALLENGES 253, 259 (2011).

148. *Id.*

149. Waye & Xiong, *supra* note 25, at 33.

150. The application of judicial mediation before the social transition towards a market economy was primarily limited to small-scale cases, such as family, neighborhood, and labor disputes. See Xianchu Zhang, *Civil Justice Reform with Political Agendas*, in Guanghai Yu (ed), *The Development of the Chinese Legal System: Change and challenges* (London: Routledge, 2011), at 259.

basis of law and parties' consent in the 1990s, to deployment of mediation and judgment in accordance with the nature of disputes in the early 2000s, and finally, returning back to priority of mediation since 2009, however.¹⁵¹ Compared with the prevalence of mediation in the 1980s, the current judicial policy on mediation, as a distinctive Chinese response by the justice system to economic and societal transition, is largely a political arrangement to achieve stability.

2. *Inadequate Competence and Capacities of the Judiciary and Legislature: From Passive Acceptance to Active Appraisal of Mediation by Chinese Judges*

Scholars have argued that effective access to justice is fundamental to the promotion of the rule of law and that this can be accomplished by formal and informal measures.¹⁵² A combination of formal and informal access to justice can be found in most societies, as the high costs of litigation imply that there are insufficient judicial resources to deal with the community's demand for redress.¹⁵³ Such societal problems have been particularly severe during China's rapid urbanization, which is not comparable to an established economy in ordinary times.¹⁵⁴ Scarce resources aside, tough socioeconomic cases tend to raise novel issues for which courts often lack clear legislative or judicial guidance. Benchmarked against developed countries' standards, with regard to the general correlation between wealth and institutional development, governance institutions in China nonetheless remain relatively weak.¹⁵⁵

Fu and Peerenboom argued that in the case of China, given the courts' inability to provide an effective remedy in the socioeconomic cases, access to the courts should be limited.¹⁵⁶ Moreover, the dejudicialization of socioeconomic cases has become evident as the government has directed

151. Zhang, *supra* note 147, at 260.

152. Edgardo Buscaglia & Paul B. Stephen, *An Empirical Assessment of the Impact of Formal Versus Informal Dispute Resolution on Poverty: A Governance-Based Approach*, 25 INT'L REV. L. & ECON. 89 (2005).

153. UNITED NATIONS DEVELOPMENT PROGRAMME, PROGRAMMING FOR JUSTICE: ACCESS FOR ALL? ASIA-PACIFIC RIGHTS AND JUSTICE INITIATIVE 5-6, 72-74 (2005), available at http://www.unicef.org/ceecis/Programming_for_Justice.pdf; See also Christopher Hodges et al., *Costs and Funding of Civil Litigation: A Comparative Study*, ¶ 70 (U. of Oxford Legal Research Paper Series, Paper No. 55/2009, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1511714.

154. Randall Peerenboom, *Judicial Independence in China: Common Myths and Unfounded Assumptions* 10 (La Trobe L. School, Legal Studies Research Paper No. 2008/11, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1283179.

155. *Id.* at 22.

156. Fu & Peerenboom, *supra* note 24, at 115.

such disputes away from court adjudication towards alternative mechanisms such as mediation in view of the courts' lack of resources and competence to provide effective relief in such cases.¹⁵⁷ Subsequently, with the restrictions imposed on both access to the courts and the courts' role, non-judicial mechanisms such as mediation are strengthened to address citizens' concerns in such cases. Correspondingly, there has been a re-emergence and revitalization of judicial mediation among Chinese courts and the gradual acceptance of judicial mediation by Chinese judges themselves in response to the sharp increase in socially-oriented cases since 2006.¹⁵⁸ Overall, there has been a gradual transformation in the perspective of Chinese judges and a remodeling of their role from mere passive involvement to an active appraisal of mediation with flexible implementation.¹⁵⁹

The judges' initial passivity was prompted by their pursuit of professionalism. As in the first two rounds of judicial reform (1998-2008), the law proliferated and the professionalization of judges and efficacy of litigation improved.¹⁶⁰ Mediation, which was previously associated with Confucian cultural influence and Maoist attempts to impose socialist ideology,¹⁶¹ came to be viewed as inconsistent with China's aspirations for the development of the rule of law.¹⁶² Moreover, given the pressures for efficiency, mediation was further challenged by Chinese judges as being time-consuming.¹⁶³ Judicial mediation in China was also challenged by scholars in the West who viewed adjudication and mediation as two entirely separate dispute resolution processes, the blending of which without proper safeguards was deemed to destroy the sanctity of justice and impartiality.¹⁶⁴ While Western-style court-annexed mediation promotes mediation as a problem-solving process supportive of the parties' self-determination, judicial mediation in China takes a more evaluative role that is likely to involve the directing of parties.¹⁶⁵ There are also concerns about the conflicting role of mediators and judges and

157. *Id.* at 112.

158. Waye & Xiong, *supra* note 25, at 24.

159. Interview with Xian Yifan, Former Judge at the Guangzhou District People's Court (Jan. 25, 2013).

160. Fu & Cullen, *supra* note 6, at 42.

161. STANLEY LUBMAN, *BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO* ch. 3 (2002).

162. Randall Peerenboom & He Xin, *Dispute Resolution in China: Patterns, Causes and Prognosis*, 1 E. ASIA L. REV. 25 (2009).

163. *Id.*

164. Waye & Xiong, *supra* note 25, at 21-22.

165. See generally Xin He & Kwai Hang Ng, *Internal Contradictions of Judicial Mediation*, 39(2) L. & SOC. INQUIRY 285 (2014), at 285.

associated breaches of confidentiality because the mediator-judge is allowed to participate in private caucuses with parties and may inadvertently use information that he or she would not have access to in litigation.¹⁶⁶

Since the SPC engaged in a deliberate policy of revival of mediation, judges have begun to gradually accept and even actively appraise mediation for a variety of reasons.¹⁶⁷ Insofar as difficult disputes over access to resources and participation in decision making about development resulting from China's economic transformation are concerned, judicial mediation is more attractive than litigation because it obviates the need for articulation of a clear legal position and is more likely to avoid any enforcement difficulties that may follow.¹⁶⁸ In association with the escalation of socioeconomic and sociopolitical conflicts, fewer adjudicatory approaches in litigation can make Chinese judges respond more effectively to the needs of litigants, allowing them to take into account political and social considerations in decision-making and thus contribute more successfully to social stability.¹⁶⁹ To emphasize the importance of mediation and mediatory justice, in 2007, the SPC issued *Opinion on Further Increasing the Positive Role of Mediation (in Litigation) in Constructing Socialism and a Harmonious Society*.¹⁷⁰ Article 5 of this document provides a list of cases where judicial mediation should be pursued. These cases involve: community interests that require the assistance of governments; class action lawsuits; complex facts or emotional confrontation between the parties; insufficient evidence or evidence not clearly supporting the matter; sensitive socioeconomic issues; or requests for retrial.¹⁷¹

The Opinion further mandates that Chinese judges should undergo mediation training on an annual basis and that mediation should be included in the judicial performance assessment.¹⁷² Thus, the SPC has given a clear message that judicial mediation has become a target and has

166. Wave & Xiong, *supra* note 25, at 22.

167. Minzner, *supra* note 9, at 936.

168. Wave & Xiong, *supra* note 25, at 24.

169. Huang Jialiang, *How are Laws Practiced? A Sociological Analysis Based on a Judicial Case in China*, 41 CHINESE SOC. & ANTHROPOLOGY 55, 55–57 (2008).

170. Zui gao renmin fayuan guanyu jin yi bu fahui susong tiaojie zai goujian shehui zhuyi hexie shehui zhong jiji zuoyong de ruogan yijian [*Supreme People's Court Opinion on Further Increasing the Positive Role of Mediation (in Litigation) in Constructing Socialism and a Harmonious Society*], (Mar. 7, 2007), http://www.chinacourt.org/law.shtml?file_id=116688.

171. *Id.* art. 5.

172. *Id.* arts. 20, 24.

direct career consequences upon Chinese judges.¹⁷³ The message is clear as evidenced by the fact that there are incentives for Chinese judges to shift their role and appraise mediation actively.

Chinese judges' newfound support for and quick adaptation of mediation can also be analyzed using Tamanaha's theory of legal instrumentalism and rule of law.¹⁷⁴ As the practice of law reinforces the approach of utilizing law instrumentally, Chinese judges inevitably are affected and thus view law in instrumental terms.¹⁷⁵ With the rise in priority of mediation, Chinese judges have changed from expert (*zhuanjiafaguan* 专家法官) and elite judges (*jingyingfaguan* 精英法官) to more populist (*pingminfaguan* 平民法官) and stability-minded judges (*weiwenfaguan* 维稳法官). Moreover, the strategy of handling cases by involving mediation has become increasingly innovative and flexible. Chinese judges are altering their initial approach as neutral middlemen (*juzhongtiaojie* 居中调解) who only mediate on the basis of facts and evidence they are directly exposed to, to the current adoption of "mediation all around" (*quanmiantiaojie* 全面调解), wherein judges make use of all information they can procure from disputants.¹⁷⁶ Additionally, the venue and scope of judicial mediation has moved from discussions in in-court trial rooms (*zuotangwen'an* 坐堂问案) to on-site investigations (*tianjianditou* 田间地头), such as organizing in-the-farm discussions in disputes relating to collective ownership of farm land.¹⁷⁷

3. *Distinction from Teitel's Framework: China's "Grand Mediation" Model to Resolve Constitutional Disputes*

Differentiating the Chinese responsive justice model in economic and societal transitions from other countries involved in the transitional justice framework, Teitel stresses the importance of a constitutional court to take up the role of determining the understanding of the rule of law in a transitional period while China does not have such a court.¹⁷⁸ Instead, "grand mediation" (*datiaojie* 大调解) has been argued as a Chinese home-

173. See *supra* notes 35–39 and accompanying text.

174. See Tamanaha, *supra* note 30.

175. *Id.* at 149.

176. Interview with Judge Xian Yifan, *supra* note 159.

177. *Id.*

178. Keith Hand, *Resolving Constitutional Disputes in Contemporary China*, 7 U. PA. E. ASIA L. REV. 51, 61 (2011).

grown alternative and a transitional constitutional dispute resolution mechanism.¹⁷⁹

Introduced in 2002, “grand mediation” is a comprehensive stability maintenance and dispute resolution mechanism that involves a top-down joint effort of the government, Party, and social institutions.¹⁸⁰ Grand mediation was designed to resolve complex disputes at the basic level and ensure social stability by synthesizing various types of mediation¹⁸¹ and has been increasingly used in the past decade to handle complex disputes that might generate mass citizen discontent or social unrest, including land expropriation, corporate reorganizations of failed enterprises, and collective grievances against local officials.¹⁸² Most recently, in April 2011, the Central Party Committee for Comprehensive Management composed of Public Security, the SPC, and other agencies at the central level jointly issued the *Guiding Opinion on Deepening and Pushing Forward Grand Mediation Work for Contradictions and Disputes* (“Guiding Opinion”).¹⁸³ An interesting feature of the grand mediation move under the 2011 Guiding Opinion is that different stakeholders are represented in the process of mediation and hear what should otherwise be under the auspices of the constitutional court. Mediator teams are formed by representatives of local Party committees, people’s congresses, people’s political consultative conferences, and administrative units at the local level.¹⁸⁴ Local Party committees and government leaders thus provide unified leadership and guidance on grand mediation work.¹⁸⁵ Stability management offices at each level are responsible for the organization of grand mediation platforms and the investigation of disputes.¹⁸⁶ Meanwhile, people’s courts are to focus on solving regular

179. *Id.* at 147.

180. Zhu Suli, *Guanyu Nengdong Sifa yu Datiaojie* (NEEDS CHARACTERS) [*On Judicial Activism and Grand Mediation*], 1 ZHONGGUO FAXUE (中国法学) [CHINA LEGAL SCIENCE] 5 (2010) (discussing the Party demands on courts to realize goals of harmonious development and the judicial activism necessary to address such demands).

181. Hand, *supra* note 178, at 132.

182. Zhu, *supra* note 180, at 1; *See also* Minzner, *supra* note 9, at 945.

183. *Guanyu shenru tuijin maodun jiu fen da tiaojie gongozuo de zhidao yijian* (关于深入推进矛盾纠纷大调解工作的指导意见) [*Guiding Opinion on Grand Mediation Work*], (Apr. 22, 2011), <http://www.tpan.cn/html/7938.htm> [hereinafter *Guiding Opinion on Grand Mediation Work*]. As listed at the top of the Guiding Opinion, other agencies at the central level involved in issuing the document include the Supreme People’s Procuratorate, the Legislative Affairs Office of the State Council, the Ministry of Justice and the All-China Federation of Trade Unions. *See* Article 1 of the *Guiding Opinion*.

184. *Id.* ¶ 6.

185. *Id.* ¶ 19.

186. *Id.* ¶ 20.

civil cases as well as minor criminal cases and they can provide legal opinions in the dispute resolution.¹⁸⁷

Although grand mediation is designed to contain disputes at the local level, Hand suggests that the tensions and dynamics that the mechanism is designed to address are present in the context of constitutional disputes, thus making grand mediation a suitable transitional constitutional dispute resolution mechanism.¹⁸⁸ Grand mediation involves consultation among multiple stakeholders such as the Party, state, and social institutions with intersecting interests.¹⁸⁹ It also gives judges roles as legal advisors, creates limited space for citizen bargaining, and facilitates the integrated consideration of legal, political, and social interests in settlement outcomes.¹⁹⁰ Because of the abstract nature of China's constitutional context, tensions between provisions about rights and duties, tension between citizens' rights and Party leadership, and the weakness of judicial institutions are all difficult to translate into principled "black and white" constitutional interpretations. To replicate the grand mediation framework to deal with constitutional disputes, Hand further suggests that there could be a faction composed of Party, administrative, legislative, and judicial figures at the leadership level which would decide whether to take up constitutional disputes originating from the lower levels and to proceed with consultations with Party-State institutions equipped with the expertise in the dispute resolution area.¹⁹¹ The central Political-Legal Committee is in charge of coordinating matters with the aid of National People's Congress leaders who are formally responsible for constitutional supervision; whereas the SPC acts as a legal advisor and offers interpretations of the constitutional provisions for Party-State leaders to deliberate.

While Hand retains an optimistic view of grand mediation as a transitional model of constitutional dispute resolution, grand mediation practices have been criticized by other commentators as mere political conferences, which attempt to curb protests.¹⁹² The model has been criticized since discussions can be conducted with limited reference to legal norms, outside of legal channels at any stage before or after the litigation process, and without the actual participation of the nominal

187. *Id.* ¶ 6.

188. Hand, *supra* note 178, at 147.

189. *Id.*

190. *Id.*

191. *Id.* at 148–49.

192. Minzner, *supra* note 9, at 946.

parties.¹⁹³ During the bargaining process amongst officials, political pressure is asserted on uncooperative bureaus, forcing them to compromise.¹⁹⁴ Ultimately, judges are only one of the many parties at the political bargaining table and since their career evaluations are at stake, they have pressure not to act in a neutral fashion.¹⁹⁵ Furthermore, commentators find the government bureaus' participation at the leadership level problematic, remarking that these agencies may be inclined to satisfy governmental policy interests instead of citizens' needs.¹⁹⁶

Nevertheless, China's current political context does not allow for the establishment of a constitutional court, and vesting the power of judicial review with the SPC is not a viable option given parliamentary supremacy in China.¹⁹⁷ Under the grand mediation framework, since legal opinions presented by judges are not formal rulings, they do not constitute formal challenges to the constitutional authority of the National People's Congress or lead to tensions between Party-State institutions.¹⁹⁸ As judicial institutions do not currently play a formal role in constitutional interpretation, there would be an elevation in judicial participation under the new proposed framework as judicial officials serve as legal advisors in the multiparty political negotiations. Courts are given an unprecedented and meaningful (albeit limited) role in molding official understandings of the Constitution.¹⁹⁹ Moreover, the grand mediation model helps increase government legitimacy. Despite providing only limited space for citizen bargaining, it facilitates the integrated analysis of legal, political, and social interests in settlement outcomes, blending interests of the Party, state institutions, and society and thus providing a more sustainable dispute resolution mechanism as opposed to short-term solutions of repression and concessions.²⁰⁰ Hence, grand mediation may arguably be identified as a Chinese home-grown alternative to respond to constitutional justice in transition.

To serve China's economic and political transitions when "supremacy of law" in social management is still constrained, grand mediation might serve the transitional rule-of-law purpose by introducing a flexible method

193. *Id.*

194. *Id.*

195. *Id.*

196. Hu Jieren, *Grand Mediation in China: Mechanism and Application*, 51(6) *ASIAN SURV.* 1065, 1074 (2011).

197. See XIANFA, art. 3 (1982) (China) on the application of democratic centralism.

198. Hand, *supra* note 178, at 150.

199. *Id.*

200. *Id.* at 147, 152, 158.

for parties which lessens the rigidity of the law. As elaborated above, the proposed bargaining process is influenced by both law and political-legal personnel, who are responsible for ensuring that mediation outcomes are consistent with the Party's political interests and the objective of maintaining stability through the persuasion or even the pressuring of parties.²⁰¹ Accordingly, the functioning of the grand mediation model could be seen in a different light than Teitel's theory of requisite constitutional courts in justice system in periods of transitional times. As the latter focuses on the importance of constitutional courts to break free from the past system, the Chinese transitional grand mediation model seems to bring the centralized state power closer by allowing, if not magnifying, its continuing influence in the application of law. Nonetheless, this is arguably in line with the Party-State's emphasis on social stability (which incorporates the emphasis on all rounds of mediatory justice), the importance of which trumps various rule of law values in times of flux.

D. Conclusion on China's "Responsive Justice" During Transitional Times: Mediatorial Justice, What Road Ahead?

China's justice during transitional times places the task of maintaining social stability in the hands of the judiciary, which deploys various layers of mediation so that decisions are made to balance political and social consequences.²⁰² Comparing and contrasting the countries under Teitel's framework with China, the unique features of China's justice in transitional periods are identified as justice responding to economic and social stability, or the "stability-driven responsive justice," where mediation is prioritized. The mediatory justice can be seen as a dejudicialization of the courts at all levels and in all types of disputes. However, the increasing emphasis upon mediation has been challenged as a government attempt to undermine the rule of law and prevent the development of a strong independent judiciary.²⁰³ Among these views is Minzner's critique, which argues that China is making a "turn against law."²⁰⁴

Is China's surge in mediation a turn against law? What will the road ahead be for China's mediatory justice, the revitalization of which is

201. Minzner, *supra* note 9, at 946.

202. *Id.* at 944.

203. *Id.* at 960.

204. *Id.*

thought to blend China's own traditions and historical legacy? Should mediation be completely abandoned? Scholars have argued that mediation in itself is not an evil.²⁰⁵ China's shift away from trials and towards mediation is not entirely unique. Beginning in the West, and now spread to the developing world, parties in many countries face prohibitive litigation costs.²⁰⁶ National judiciaries are overloaded and are increasingly challenged by insufficient access to justice or lengthy trial delays.²⁰⁷ Many jurisdictions in the world are actively incorporating mediation into court adjudication for achieving justice.²⁰⁸

Does mediation have a proper role to play in the justice system during China's transitional times? As the prevailing economic, historical, and sociological contexts determine a country's legal framework, the structure of its legal institutions, and its society's pathways to justice, the balance between formal and informal dispute resolution will inevitably be path dependent.²⁰⁹ Scholars have argued that the architecture of one justice system should not be transposed to another since, in practice, the outcome of such transplantation is that the imported Western rule-of-law reforms mesh poorly with local realities.²¹⁰ Such failure results in "backlash" consisting of experiments with traditional or community mediation institutions that respond better to local conditions.²¹¹ It is acknowledged that China's own traditions and historical legacy will continue to play a significant role in determining the future course of its judicial reform. Nevertheless, shift of dispute resolution patterns such as advocacy of mediatory justice, and the pressurizing target responsibility system to achieve political objectives should not be applied by Chinese authorities to curb rule of law and judiciary autonomy.²¹² In short, mediation and its associated mediatory justice should not be abused or over-used as a means for exercising political will. On the contrary, mediation should be treated

205. *Id.* at 974.

206. *See generally* Hodges et al., *supra* note 153, ¶ 70.

207. He & Ng, *supra* note 165, at 35.

208. For example, the Civil Justice Reform in Hong Kong. *See Civil Justice Reform-Home*, CIV. JUST. (last updated Apr. 2, 2009), <http://www.civiljustice.gov.hk/eng/home.html>. *See also* Timothy K. Kuhner, *Court-annexed Mediation Compared: The Cases of Argentina and the United States*, 11 ILSA J. OF INT'L & COMP. L. 519 (2005); Hiram Chodosh, Stephen A. Mayo, A.M. Ahmadi & Abhishek M. Singhvi, *Indian Civil Justice System Reform: Limitation and Preservation of the Adversarial Process*, 30 N.Y.U. J. INT'L L. & POL. 1 (1997/1998).

209. Waye & Xiong, *supra* note 25, at 2.

210. *Id.* at 3.

211. Ethan Michelson, *Popular Attitudes Towards Dispute Processing in Urban and Rural China*, OXFORD U. 7-8 (2008), http://www.fljs.org/sites/www.fljs.org/files/publications/FLJ%20BS%20Michelson%20pb_b.pdf.

212. Minzner, *supra* note 9, at 978.

as a dispute resolution method for channeling judicial caseload and achieving a societally better outcome.

Carefully drafted mediation policies would help solve imminent problems in China. In light of China's social situation and its prevalent economic and social conflicts, mediation can produce a socially acceptable result, reducing protests and letters and visits. This is evident in judges' growing acceptance of employing judicial mediation in resolving disputes.²¹³ The grand mediation model that has developed in the past decade as a transitional constitutional dispute resolution mechanism is another example of an attempt to achieve both justice and societal expectations. In a huge developing country like China, insufficient resources, developing legal institutions, and an enduring legal culture will all impact the manner of performance of Chinese justice and the pace and means of its future reform. During this process, the Chinese Party-State faces the pressure of maintaining both social order and regime legitimacy. The Chinese government needs to re-consider the relevance of its home-grown alternatives of justice during transitional times, i.e. mediatory justice; most importantly, how mediatory justice should be properly adopted under the rule-of-law.

IV. CONCLUDING REMARKS AND EVALUATIONS

This Article has discussed many facets of the justice system in China. The encumbered Chinese court system has been seriously addressed for over more than a decade, especially in the two rounds of SPC reforms of the people's courts, in response to rising international pressures to establish an independent judiciary in China. Local protectionism and corruption may be mitigated by SPC directives. The *Second-Five-Year-Reform-Outline* (2004–2008) appears to be particularly bold in exploring a number of goals for upgrading the Chinese judicial system. The professionalism-building reform of the Chinese courts and judges has been hampered recently, and the publication of the *Third-Five-Year-Reform-Plan* (2009–2013) has disappointed many legal scholars and judicial practitioners.

To assess the development of the Chinese justice system during the country's economic and societal transitions, particularly its discourse over the past fifteen years, the international literature on transitional justice coined by Teitel featuring CEE countries is relevant. The CEE countries

213. Waye & Xiong, *supra* note 25, at 24.

have a lot in common with China in terms of economic restructuring, such as the dilemma between ownership diversification and state control, and societal transformation, such as the problems of social instability. As Teitel observed, in such transitional periods, the law is caught between the past and future, retrospective and prospective, the individual and the collective. Accordingly, transitional justice is justice associated with this context;²¹⁴ however, after examination of China's judicial context, it seems Teitel's framework cannot apply squarely to the case of China. It is not completely suitable to China as the Party continues to be unwilling to give up socialism and totalitarianism in its governance. This echoes with the fact that China is not a transitional state in the political sense. The purpose of China's justice reform during economic and societal transitions is neither to affect the political discourse nor to advance democratization.²¹⁵ By revitalization of mediatory justice, the justice reform in China is more of a "responsive justice" to achieve "social stability" objectives.

Instead of allowing the gradual emergence of independent legal institutions to handle disputes, the Party authorities impose controls on the court system in the name of social stability. Hence, shifts in dispute resolution patterns in China, juggling the path of judicial reform during the transitional period, as it now demonstrates (emphasis and priority of mediation) differ from justice reform developments elsewhere. While officials and scholars in other countries search for effective alternatives to litigation to respond to challenges of high costs of access to justice and adjudicative efficiency, justice patterns in China in transitional times (particularly its recent reforms), have featured an authoritarian political reaction to the growing levels of social protest and conflict in the Chinese society.²¹⁶ In other words, reforms are not made for the benefit of citizens, but rather as a mechanism to contain conflicts and curb complaints to higher authorities. The Chinese government should re-evaluate the relevance of its home-grown alternatives, particularly mediatory justice, but should think wisely about their proper forms from a legal mindset. Mediation policies should be carefully drafted to help relieve judicial caseload, enhance access to justice, and achieve a societally better outcome, all of which are imminent problems in China's deepening marketization and intensifying social movements.

Unlike other transitional economies and societies where the judicial justice has developed to facilitate economic development and political

214. TEITEL, *supra* note 2, at 1–6.

215. *See* Teitel, *supra* note 65, at 2.

216. Minzner, *supra* note 9, at 937–38.

reorientation, in China, the task of maintaining social stability has been assigned to the judiciary. With the rule of law as a developing concept, the judiciary in China as part of the authoritarian regime cannot make their decisions without first considering political and social consequences. In this context, any future judicial reform needs to take into account social reality. Pragmatic compromise may have to be required to skillfully handle the complexity of economic, societal, and prospective political transitions in China.

It is fair to say that China is still struggling for its optimal justice framework as the Party leadership is in a dilemma with respect to the role of the judiciary in Chinese society and governance during transitions. Although it has been strenuously argued that people's courts and individual judges should be significantly empowered to play a more active role in adjudication of cases, fundamentally reforming Chinese courts will be a very difficult and complex task which requires that an entire rule-of-law system be put into practice. The rule-of-law process, including the future reform of the Chinese judiciary, is increasingly pushed forward by more civilized Chinese society to orient the judicial system towards the real safeguarding of justice. In the long run, the trend of judicial reform to support judicial professionalism, independence, and efficiency is irreversible. During this process, the Chinese government should reconsider the path of China's judicial reform and the importance and relevance of both Western experience (universal-value-based rule-of-law, judicial independence) and home-grown alternatives (mediatory justice, but in legal forms) so as to render "responsive justice" into serious judicial justice.