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P B M I JUDICIAL DISCIPLINARY SYSTEMS FOR INCORRECTLY DECIDED CASES: THE IMPERIAL CHINESE HERITAGE LIVES ON

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INTRODUCTION

Local Chinese courts commonly use responsibility systems (*mubiao guanli zeren zhi*, *zeren zhuijiu zhi*) to evaluate and discipline judges. Judges receive sanctions under these systems for a wide range of behavior, such as illegal or unethical dealings with parties and lawyers, inappropriate courtroom behavior, and neglect of duty.

Many local court Chinese responsibility systems also discipline judges for simple legal error. Judges may face sanctions linked to the number of cases that are reversed on appeal, simply because the interpretation of law made by a higher court differs from that of the original trial judge. Sanctions include monetary fines and negative notations in a judge's career file. Such practices violate Chinese Supreme People's Court (SPC) judicial interpretations specifically barring the use of responsibility systems to sanction judges for simple legal error. Local Chinese courts, however, have continued to promulgate such systems.

Court responsibility systems that discipline judges for simple legal error create a perverse set of incentives for Chinese judges. In order to avoid appellate reversal, lower Chinese judges rely on an ill-defined system of advisory requests (*qingshi*) to solicit the views of higher courts and judges regarding how to decide pending cases. As Chinese judges themselves note, excessive resort to *qingshi* practices has many negative effects. It undermines appellate review, since the court or judge who reviews the case on appeal can be the same one who responded to the initial *qingshi* request regarding how to decide the case in the first place. It creates a relatively passive Chinese judiciary reliant on top-down direction. Last, it contributes to an overload of higher-level judicial authorities forced to handle a myriad of requests for guidance from lower-level courts. Unsurprisingly, the SPC has made *qingshi* reform a key component of both the 2004–2008 and the 2009–2013 plans for court reform.

So what is going on? Why do local Chinese courts continue to use internal disciplinary systems that violate Chinese law and negatively affect daily operations of the judiciary? Historically, the use of disciplinary sanctions to punish judges for cases of simple legal error reversed on appeal is deeply rooted in imperial Chinese legal practices dating back to the Qin dynasty. Politically, the disciplinary sanctions

Editor's note: The *New Mexico Law Review's* rigorous commitment to preparing footnotes in accordance with *Bluebook* standards has been set aside for this special article. The non-traditional and international sources and cites herein have, however, been formatted in a suitably consistent manner; it is intended to assure that users may readily locate this material.

* Associate Professor, Washington University in St. Louis, School of Law. I thank Margaret Woo, Mary Gallagher, and Merle Goldman for organizing the October 2007 workshop on Chinese civil dispute resolution at the Fairbank Center for Chinese Studies, and the students of the University of Michigan Law School Asia Law Society for organizing the March 2008 symposium on pressures for legal reform in China, where this piece was presented. I thank the participants in both events, particularly Don Clarke, Randy Preenboom, and Nico Howsen, for their comments on this piece, and the staff of the *New Mexico Law Review* for their work in publishing it here. Special thanks go to my family, particularly my mother, for their support.

employed by modern Chinese court responsibility systems and their imperial analogues reflect a comprehensive governance strategy employed by generations of centralized, authoritarian Chinese rulers to address pervasive principal-agent problems in a sprawling bureaucracy.** However, these policies are generating conflict with rule-of-law norms established in the post-1978 reform period, and incarnated in the 1998 SPC judicial interpretations.

Existing literature on the post-1978 Chinese legal system has devoted significant attention to formal legal norms promulgated by central institutions such as the SPC and the National People's Congress (NPC), but ignore the underlying incentive structures that can drive judicial behavior. Local court responsibility systems and the incentives they create for individual Chinese judges are "*terra incognita* in terms of published systematic studies."¹

This article presents an overview of Chinese court responsibility systems and their disciplinary treatment of incorrectly decided cases (*cuo'an*), and analyzes the important practical problems created in the Chinese legal system as a result of official use of responsibility systems to discipline judges for legal error. It also identifies the extent to which the key elements of modern People's Republic of China (PRC) court responsibility systems are firmly grounded in prior imperial precedent.

I. LEGAL FRAMEWORK OF JUDICIAL DISCIPLINARY SYSTEMS

The Chinese Constitution and the 1979 Organic Law of the Courts establish the broad contours of the Chinese judicial system, but they lack any detailed provisions as to the operation of judicial discipline. Both the Chinese Constitution and Organic Law provide that "courts shall exercise trial authority independently in accordance with the law, and shall not be subject to the interference from administrative organs, social organizations, and individuals."² This language, however, does not address the extent to which individual judges should independently exercise trial authority nor sanctions that should apply for misdeeds. By contrast, the Organic Law does contemplate some limitations on judges' independent exercise of their trial authority, as it establishes court adjudication committees, headed by court presidents, as the highest authority within each court.³

The 1995 Law on Judges sets the general outlines for the evaluation and discipline of judges. It provides that judges may not be "suspended, demoted, removed from office, or disciplined" for reasons other than those specified by law, or pursuant to procedures other than designated by law.⁴ It requires each court to

** For a more extensive discussion, see Carl Minzner, *Riots and Cover-Ups: Counterproductive Control of Local Agents in China*, 30 U. PA. J. INT'L L. (forthcoming 2009). A separate article by this author, currently in progress, links these practices to the Legalist branch of classical Chinese philosophy.

1. Donald Clarke, "Empirical Research in Chinese Law," in *Beyond Common Knowledge: Empirical Approaches to the Rule of Law*, eds. Erik G. Jensen and Thomas C. Heller (Stanford: Stanford University Press, 2003), p. 178.

2. PRC Constitution, art. 126; *Zhonghua renmin gongheguo renmin fayuan zuzhi fa* (Organic Law of the PRC Courts), art. 4 (hereinafter Organic Law).

3. Organic Law, art. 11.

4. *Zhonghua renmin gongheguo faguan fa* (PRC Law on Judges), issued February 28, 1995, amended June 30, 2001, art. 8(3).

establish regular procedures for the evaluation of individual judges.⁵ Judges who demonstrate exemplary work performance are to be rewarded.⁶ Those who engage in proscribed conduct, such as corruption, concealing evidence, obtaining forced confessions, engaging in speech that “harms the national honor,” or participating in demonstrations that oppose the government, are to be disciplined.⁷ “Dereliction of duty that results in an incorrectly decided case” is also grounds for sanction.⁸ The law states that “the results of judicial evaluations are to be used as the basis for the reward, sanctioning, training, removal from office, and expulsion of judges as well as their adjustment in rank and salary.” Precise implementation of the above directions is left to each court.⁹

Two 1998 SPC directives expand on the broad provisions of the 1995 law.¹⁰ They specify a range of cases for which court personnel must bear responsibility, including altering or fabricating court transcripts,¹¹ concealing evidence from the court panel hearing the case,¹² interfering with the work of lower courts in hearing cases,¹³ and failing to assist court personnel from other jurisdictions in the handling of cases.¹⁴ The 1998 directives enumerate a list of disciplinary sanctions that court personnel may receive, ranging from warnings to reduction in rank to expulsion from the court.¹⁵

The 1998 SPC directives also provide that court personnel who “intentionally ignore law or facts and issue an incorrect verdict” must bear responsibility.¹⁶ This is grounds for at least a severe notation (*ji daguo*) in one’s personnel file. In cases where “serious consequences” have resulted, anything from a reduction in rank to expulsion is warranted. If “negligence [on the part of court personnel] leads to the issuance of an incorrect verdict that causes serious consequences,” the responsible court official may receive anything from a warning to a severe notation in one’s personnel file.¹⁷ Court adjudication authorities are responsible for determining whether a specific case is “incorrect” (and thus the subject of disciplinary sanctions).¹⁸

Both directives specifically exempt judges from disciplinary sanctions for cases that result from simple legal error. Article 22 of the Responsibility Measures provides that court personnel do not bear responsibility in erroneous cases due to “different

5. *Ibid.*, art. 21. Articles 46–48 require each court to form a committee, headed by the court president, to oversee the evaluation process.

6. *Ibid.*, art. 30.

7. *Ibid.*, art. 32.

8. *Ibid.*, art. 32(10).

9. *Ibid.*, arts. 21, 46–48.

10. *Renmin fayuan shenpan renyuan weifa zeren zhuijiu banfa* ([Experimental] Responsibility Measures for the Illegal [Behavior] of Court Personnel), issued August 26, 1998 (hereinafter Responsibility Measures), and *Renmin fayuan shenpan jilü chufen banfa [shixing]* ([Experimental] Disciplinary Measures for Court Trials), issued September 7, 1998 (hereinafter Disciplinary Measures).

11. Responsibility Measures, art. 11.

12. *Ibid.*, art. 12.

13. *Ibid.*, art. 7.

14. Disciplinary Measures, art. 55.

15. *Ibid.*, art. 13.

16. Responsibility Measures, art. 14.

17. Disciplinary Measures, art. 40.

18. Specifically, the Responsibility Measures state that “trial organizations” (*shenpan zuzhi*) are to make the determination. Responsibility Measures, art. 27.

views or understanding” of the law, facts, or evidence, or where “new evidence” or “amendment of law” or “alteration of policy” has led to the alteration or reversal of the case. Article 4 of the Experimental Disciplinary Measures states that disciplinary sanctions shall not be applied to erroneous cases that result from lack of clarity in law or regulations, or from errors in understanding of the law or facts.

When responsibility for error is found, it rests individually with the court officials who cause the errors. Individual members of a three-judge collegiate judicial panel (or court adjudication committee) who cause the panel (or committee) to incorrectly decide a case by intentionally distorting the facts or interpretation of the law must bear individual responsibility for the collective incorrect tribunal decision.¹⁹ Court presidents and tribunal heads only bear collateral liability for errors by subordinate judges and collegiate judicial panels when their own “intentional violation of the law or serious lack of responsibility” leads them to fail to correct the errors of their subordinates.²⁰

The two 1998 SPC directives thus theoretically create the framework for a judicial disciplinary system run by the courts themselves. Further, they bar the application of disciplinary sanctions for simple legal error and restrict liability for errors to the individual judicial personnel who actually cause them.

II. DISCIPLINARY SYSTEMS IN LOCAL CHINESE COURTS

Although the 1998 SPC directives lay out a set of national judicial disciplinary standards, they do not accurately represent the myriad of systems actually used by local courts. In contrast to SPC directives, some local court disciplinary systems expressly sanction judges for accidental legal error. Other local disciplinary systems employ principles of collective liability for judicial error that apply sanctions to judges for errors that they themselves have not actually committed. Local court disciplinary systems are simply one specific example of party-led responsibility systems. These are administrative governance mechanisms that higher-level Chinese officials commonly rely on to manage a sprawling bureaucracy.

Generalizations regarding local Chinese court responsibility systems face significant practical problems, given the sensitivity of party-run management systems and their lack of systematic filing or publication. Given these limits, this article will simply sketch some of the similarities and differences of local court disciplinary systems. It will do so based on an unscientific and non-statistically representative selection of three relevant provincial-level regulations and twelve different local basic people’s court (BPC) and intermediate people’s court (IPC) systems. At the same time, it is not completely lacking in probative value. These documents represent a range of Chinese courts drawn from different geographical jurisdictions and bureaucratic rank, and aptly demonstrate the variations that exist in disciplinary systems.²¹

19. *Ibid.*, arts. 24, 25.

20. *Ibid.*, art. 26.

21. These include provincial-level rules from Guangdong, Hainan, and Jiangxi, and local rules from IPC and BPC courts in Shandong (2), Yunnan (2), Shaanxi (2), Sichuan (2), Beijing (1), Hebei (1), Hubei (1), and Ningxia (1). (Gaocheng Municipal People’s Court, Hebei; Jingshan County People’s Court, Hubei; Hainan District People’s Court, Ningxia; Pengzhou Municipal People’s Court, Sichuan; Guanghan Municipal People’s Court,

A. Judicial Responsibility Systems

Chinese Communist Party authorities use responsibility systems (*mubiao guanli zeren zhi*, *zeren zhuijiu zhi*) to evaluate, reward, and discipline a wide range of officials. These systems set specific performance targets in different fields that local cadres must meet. These may include economic development goals, birth control targets, and social order statistics. Success in meeting these goals results in financial and career rewards. Failure leads to fines and career sanctions.²²

As part of the bureaucratic apparatus, Chinese courts also adopt responsibility systems. These set out specific performance targets that individual judges and court tribunals are expected to meet. Precise targets vary from court to court, but often include the number of cases to be handled each year, successful case closure ratios, and mediation rates. Some local courts include “incorrectly decided cases” (and corresponding sanctions) as part of comprehensive annual work targets, whereas other courts have established stand-alone “responsibility systems for incorrectly decided cases” (*cuo’an zeren zhuijiu zhi*). According to Chinese judges and academics, these systems originated in the late 1980s and early 1990s as a means to check judicial corruption and reduce errors on the part of lower courts.²³

Chinese court authorities rely on a variety of information sources to evaluate judges and tribunals. These include internal court statistics regarding numbers of cases filed, reversal rates, and mediation rates. They also include external sources of information regarding particular cases. Some court systems direct adjudication committees to review a wide range of cases reversed or remanded on appeal; cases reversed through internal court retrial processes (*zaishen*); cases selected by officials in the local people’s congress (LPC), procuratorate, party committees, or other organs; and cases raised by citizen petitioners through the *xinfang* (letters and visits) system, to determine whether disciplinary sanctions should apply.²⁴

Party authorities play a key role in evaluating judges and tribunals. The 2006 Zhenping BPC system explicitly makes court party committees responsible for supervising the evaluation process.²⁵ Others establish an internal “evaluation

Sichuan; Zhenping County People’s Court, Shaanxi; Xuyang County People’s Court, Shaanxi; Tai’an Municipal Intermediate People’s Court, Shandong; Kenli County People’s Court, Shandong; Kunming Intermediate People’s Court, Yunnan; Tonghai County People’s Court, Yunnan; Beijing No. 1 Intermediate People’s Court, Beijing.).

22. Maria Edin, “State Capacity and Local Agent Control in China: CCP Cadre Management from a Township Perspective,” *The China Quarterly*, no. 173 (2003): 35, 38–40.

23. Mao Hongjuan, *Cuo’an zeren zhuijiu zhi chutan* (Preliminary Investigation into Responsibility Systems for Incorrectly Decided Cases), at <http://www.nxycy.com/llyj/html/929.html> (last visited September 22, 2008); Di Tianli, “Woguo xianxing shenpan yunxing jizhi ruogan wenti sikao” (Thoughts on Some Problems with the Operation of China’s Existing Adjudication System), *Zhengfa luncong* (Commentary on Law and Politics), no. 3 (2002): 9–12.

24. *Guangdong sheng gaoji renmin fayuan guanyu weifa shenpan zeren zhuijiu de zanxing banfa* (Temporary Measures of the Guangdong Provincial HPC Regarding Responsibility for the Illegal [Behavior] of Court Personnel), issued August 30, 2000, art. 12 (hereinafter *Guangdong Measures*); *Hainan sheng gaoji renmin fayuan guanche zhixing “renmin fayuan shenpan renyuan weifa shenpan zeren zhuijiu banfa [shixing]” he “renmin fayuan shenpan jili chufen banfa [shixing]” ruogan guiding* (Relevant Decision of the Hainan Provincial HPC Regarding the Implementation of the “[Experimental] Responsibility Measures for the Illegal [Behavior] of Court Personnel” and the “[Experimental] Disciplinary Measures for Court Trials”), issued May 9, 2000, art. 4 (hereinafter *Hainan Decision*); *Jingshan xian renmin fayuan cuo’an zeren zhuijiu banfa* (Jingshan County People’s Court Responsibility Measures for Incorrectly Decided Cases), art. 22(3) (hereinafter *Jingshan Measures*).

25. *Zhenping xian renmin fayuan 2006 nian gangwei mubiao zeren zhi ji kaoping banfa [shixing]*

leading group” to analyze and report on evaluation results,²⁶ or specify that the court adjudication committee is responsible for determining what constitutes an “incorrectly decided case.”²⁷ But court party committees enjoy extensive influence even under the latter systems. The 2002 Tonghai BPC evaluation measures, for example, provide that the court party secretary should chair the “evaluation leading group.”²⁸ Other systems charge internal court party committees with the ultimate responsibility for reviewing the reports of adjudication committees regarding incorrectly decided cases, approving the numerical evaluations of judges and tribunals, and making the final decision regarding the application of sanctions.²⁹

Local Chinese court responsibility systems link career advancement (or sanctions) to judges’ success (or failure) in avoiding incorrect decisions. Depending on the court system in question, sanctions can range from the deduction of points from a judge’s annual performance evaluation (affecting the eligibility for and amount of annual financial bonuses), to more severe fines of several hundred yuan per incorrect case, to negative personnel evaluations and other career sanctions, to removal from office.³⁰ Specific sanctions depend on the seriousness and frequency of the infraction.

In practice, the definition of “incorrectly decided case” under these systems is highly unclear. As one judge on the Changzhou Intermediate People’s Court noted:

Judging from some court regulations on responsibility systems for incorrectly decided cases, there does not yet exist a common understanding as to the conceptual extent of “incorrectly decided case.”

Some define “incorrectly decided case” as cases in which adjudication personnel should bear responsibility as a result of violations of substantive or procedural law that result in clearly erroneous cases or cases that create a negative impression.

Some include in the definition of “incorrectly decided case” situations such as errors in basic facts...that create serious unfairness in the judicial decision,

(Zhenping County People’s Court 2006 Work Target Responsibility System and Assessment Measures [Provisional]), issued Feb. 15, 2006, art. 5(c) (hereinafter Zhenping System).

26. *Kunming shi zhongji renmin fayuan shenpan ting, heyi ting gongzuo guize [shixing]* (Kunming Municipal Intermediate People’s Court Trial Tribunals, Collegiate Judicial Panels Work Principles [Provisional]), issued April 27, 2001, art. 28 (hereinafter Kunming Principles).

27. *Pengzhou shi renmin fayuan cuo’an zeren zhuijiu banfa* (Pengzhou Municipal People’s Court Responsibility System for Incorrectly Decided Cases), March 8, 2004, art. 17 (hereinafter Pengzhou System). Some systems that charge the adjudication committee with general oversight responsibilities specify that other court organizations (such as the internal court oversight authorities) carry out operational management of the evaluation process. Guangdong Measures, art. 5.

28. *Tonghai xian renmin fayuan gangwei mubiao guanli zeren zhi ban’an jiangcheng kaohe banfa* (Tonghai County People’s Court Punishment and Reward Assessment Measures for the Target Management Responsibility System), issued November 25, 2002, art. 3(1) (hereinafter Tonghai Measures).

29. *Guangdong sheng gaoji renmin fayuan guanyu weifa shenpan zeren zhuijiu de caozuo xize [shixing]* ([Experimental] Operational Details of the Guangdong Provincial HPC Regarding Responsibility for the Illegal [Behavior] of Court Personnel), issued December 26, 2003, art. 12; Pengzhou System, art. 17; *Hainanqu renmin fayuan chacao anjian zeren zhuijiu chufa shishi banfa* (Hainan District People’s Court Implementation Measures for the Erroneous or Incorrect Cases Responsibility System), issued May 23, 2006, at <http://www.whhnfy.gov.cn/news.php?id=13>, art. 38 (hereinafter Hainan District [Ningxia] Measures) (last visited September 20, 2008); Zhenping System, art. 5(d).

30. Zhenping System, art. 2(b); Hainan District (Ningxia) Measures, arts. 18–36; Hainan Decision, art. 7.

clear errors in the application of law that result in incorrect decisions, and serious violation of procedure that affect the substantive fairness of the case.

Some take “incorrectly decided case” to mean all types of judgments with unclear factual determinations, insufficient evidence, errors in the application of law, or violations of legal procedures.

Still others define “incorrectly decided case” as cases in which adjudication personnel and others involved in adjudication activities have violated substantive and procedural law in the docketing, trial, or execution process, have been overturned or corrected on appeal (*er shen*) or rehearing (*zaishen*), and should bear responsibility as a result.

As one can see from the above, local courts have extremely different definitions of an “incorrectly decided case.” This has led in practice to confusion as to the extent of the definition of “incorrectly decided cases” and the resulting responsibility.³¹

The 1998 Supreme People’s Court directives have not eliminated this lack of clarity. As one Chinese law professor has noted, the “effort [of the 1998 SPC notice] to institutionally regularize the unclear concept of ‘incorrectly decided cases’ has not had the practical effect that it should. In the face of the massive inertia of administrative management [habits], ‘responsibility systems for incorrectly decided cases’ still continue to be used, and continue to be the subject of debate.”³²

Periodic campaigns to improve judicial performance also place pressures on Chinese courts and judges to reduce the number of cases reversed on appeal. For example, in 2008, the Feidong district court in Anhui province set a goal of “four highs, four lows,” aiming to raise the number of cases disposed of through simplified procedures, disposed of through mediation, withdrawn by the parties, and closed out within one trial period, and to reduce the number of appeals, petitions, reversals on appeal, and reversals through adjudicatory supervisions. The court noted that it would expand the use of responsibility systems for incorrectly decided cases as a key means of reaching this goal.³³

B. Liability for Legal Error

Some provincial and local court systems comply with the 1998 SPC directives that exempt judges from disciplinary sanctions arising from accidental legal error. Relevant 2000 Guangdong High People’s Court (HPC) rules explicitly adopt the exculpatory clause present in the SPC measures.³⁴ Similarly, the Kunming IPC (in

31. Shi Yongcai and Jiang Jiye, *Xiandai sifa linian xia de cuo'an zeren zhuijiu* (Responsibility for Incorrectly Decided Cases Under a Modern Concept of the Judiciary), posted August 23, 2007 on the website of the Changzhou Intermediate People’s Court, at <http://www.jsczf.gov.cn/plus/view.php?aid=15938> (last visited September 20, 2008).

32. Wang Lin, *Quxiao cuo'an zhuijiu zhi yi huan yuan sifa lixing* (Eliminate Responsibility Systems for Incorrectly Decided Cases in Order to Return to Judicial Ideals), 2006, at <http://www.rdyj.com.cn/2006/rdqk-04-17.html> (last visited September 20, 2008). For similar comments from a Shandong HPC judge, see Di Tianli, “Woguo xianxing shenpan yunxing jizhi ruogan wenti sikao.”

33. “Feidong fayuan ‘sigao sidi’ gongzuo yaoqiu xianqi xin yi lun xiaoneng geming” (Feidong Court “Four Highs, Four Lows” Work Requirement Initiates New Revolution in Efficiency), *Hefei wanbao* (*Hefei Evening News*), September 7, 2008, at <http://news.qq.com/a/20080907/001471.htm> (last visited October 13, 2008).

34. The Guangdong Measures prohibit the application of disciplinary sanctions against judges where appellate reversal was the result of the lack of clarity of the laws or regulations in question or “errors caused by

2001) and the Beijing No. 1 IPC (in 1999) both adopted rules that specifically exclude those legal errors outlined in the 1998 SPC directives from disciplinary sanctions.³⁵ Still other local court systems incorporate the SPC exemptions without directly citing to the 1998 directives.³⁶

But other systems define “incorrectly decided cases” so broadly as to encompass simple legal error, openly violating the 1998 SPC directives. Jiangxi provincial regulations explicitly define “incorrectly decided case” to include any case reversed on appeal or retrial.³⁷ Local Hainan district BPC court rules provide that cases reversed on appeal, cases in which the judge has altered or tampered with evidence, and cases where illegal judicial behavior has “caused a serious social impact” all constitute “incorrectly decided cases.”³⁸

Other local court systems contravene the 1998 SPC directives by mechanically including the number of cases reversed or sent back for retrial on appeal as part of the annual work targets linked to career and financial rewards and sanctions. The Xunyang BPC, for example, requires that civil and criminal tribunals have no more than 3 percent of appealed cases either reversed or sent back for retrial by the appellate court, and each judge must handle no fewer than thirty cases per year, and at least 95 percent of the cases filed during the year must be successfully closed out.³⁹ The 2007 Kenli BPC and 2006 Zhenping BPC rules include the number of cases reversed or sent back for retrial on appeal as part of a 100-point scale used to evaluate the work performance of individual tribunals and judges.⁴⁰ Points may be deducted or added for failure or success in meeting specific targets, such as case closures and successful mediation ratios, as well as number of required political study sessions and (in the case of the Zhenping BPC) office hygiene. Cases reversed or sent back on appeal count against a tribunal or judge’s overall point total. For example, the 2006 Zhenping system awards twenty points based on the “quality and

reasons other than the objective intent or negligence of the adjudication personnel.” Guangdong Measures, art. 8(1–3).

35. *Beijing shi di yi zhongji renmin fayuan shenpan renyuan weifa shenpan zeren zhuijiu shishi xize [shixing]* ([Experimental] Implementation Details for the Responsibility System for Illegal [Behavior] of Trial Officers of the Beijing City First Intermediate People’s Court), issued April 7, 1999, art. 8 (hereinafter Beijing Details); Kunming Principles, art. 31.

36. Pengzhou System, art. 11; Jingshan Measures, art. 17. Other systems are inconsistent. Relevant 2000 Hainan provincial HPC rules specify (consistent with the 1998 SPC directives) that sanctions should apply to cases where “intentional ignorance of the facts or law leads to an incorrect decision, or where negligence leads to errors in the decision that cause serious consequences.” Confusingly, the Hainan system also delineates a range of disciplinary sanctions which may apply when negligent judicial error results in an incorrect case, but does *not* cause “serious consequences.” *Ibid.*, art. 7. But the Hainan rules lack the SPC language clearly protecting judges from sanction in cases of unintentional legal error. This appears to contradict the language of not only the SPC Measures, but the Hainan system itself.

37. *Jiangxi sheng sifa jiguan cuo’an zeren zhuijiu tiaoli* (Jiangxi Provincial Responsibility Measures for Incorrectly Decided Cases), issued August 15, 1997, amended March 29, 2007, art. 8(1).

38. Hainan District (Ningxia) Measures, art. 7.

39. *Xunyang xian renmin fayuan gangwei mubiao zeren zhi* (Xunyang County People’s Court Target Responsibility System), arts. 2(2)(4), 2(3)(5).

40. *Kenli xian renmin fayuan 2007 nian gangwei mubiao zeren zhi kaohe jiangcheng banfa* (Kenli County People’s Court 2007 Measures for Assessment of the Target Work Responsibility System), issued March 15, 2007, art. 2; see below *Zhenping xian renmin fayuan 2006 nian gangwei mubiao zeren zhi ji kaoping banfa [shixing]* (Zhenping County People’s Court 2006 Work Target Responsibility System and Assessment Measures [Provisional]), issued February 15, 2006, art. 5(c) (hereinafter Zhenping System).

efficiency” of cases handled, and will deduct points for any of the following occurrences:

1) Handling an incorrect[ly] decided case, causing serious consequences and a negative impression. Deduct 10 points per case if done intentionally, 5 points per case if done unintentionally.

2) Violations of procedural law or substantive unfairness in a case lead to repeated appeals, deduct 4 points per case. If caused by negligence, deduct 2 points per case.

Deduct 5 or 6 points for any of the following situations:

1) If it is discovered upon investigation or found by the court of second instance that the jurisdiction is clearly illegal;

2) Incorrect decisions to not accept or to turn away cases;

3) Violations of the recusal system by adjudication personnel;

4) Failing to hear cases in open court that should be heard in open court;

5) Failure of the adjudication body to comport with legal requirements regarding its composition;

6) Failing to list, or incorrectly listing, the parties to litigation in civil, commercial, and administrative decisions;

7) Conducting mediation in violation of the principles of voluntariness and legality;

8) Violating relevant requirements of the litigation laws, taking incomplete or improper measures to preserve property, causing serious consequences or a negative impression;

9) Cases with incorrect factual determinations or unclear factual determinations with inadequate evidence;

10) Failing to sentence a defendant in a criminal trial to additional punishment as required by law, or sentencing a defendant in a criminal trial to additional punishment when not required by law;

11) Preparing official documents of court decisions lacking required content;

12) Exceeding the legally required trial time limits without prior approval; [and/or]

13) Issuing official documents of court decisions with unclear description of facts, insufficient or vague presentation of evidence, incorrect or incomplete use of legal provisions, or requiring revisions or additions.

Deduct 3 or 4 points for any of the following circumstances:

1) Requiring the plaintiff to produce evidence in administrative cases, in violation of the requirements of the Administrative Litigation Law;

2) If the court of second instance finds that the civil portion of the decision in a criminal case with a joined civil suit has errors and makes large alterations to the liability for civil compensation;

3) Verdicts where the factual determination is without errors, but the application of law is in error;

4) Official documents of court decisions with unclear structure, confusing language, or incorrectly written Chinese characters;

5) Violating relevant requirements of the litigation laws, taking incomplete or improper measures to preserve property;

6) Although having conducted an open court hearing of a case, failing to issue the advance public notice required by law;

7) Requesting or granting an extension of time limits for hearing cases when the reason requested, or the procedures for granting, do not respectively comport with the legal requirements;

8) Cases determined to be inadequate during the internal court review and evaluation of cases (cases where points have already been deducted for exceeding time limits will not have points further deducted); [and/or]

9) Failure by adjudication tribunals to submit cases within the required monthly time period for review and archiving.

Deduct 1 or 2 points for any of the following circumstances:

1) If the court of second instance finds no fault with the original decision's determination of facts or use of law, but made relatively large alterations to the substance of the original decision;

2) Failing to designate a lawyer to assume legal aid responsibilities, or other representative, for a blind, deaf, mute, or minor defendant in a criminal case who has not designated a representative;

3) Official documents of a court decision with unclear explanation, insufficient presentation of evidence, lack analysis of the conflict between the parties, or are unconvincing; [and/or]

4) If careless drafting or reviewing results in official documents of court decisions needing to be redrafted, corrected, or reprinted.⁴¹

Systems that sanction judges for cases that result in “serious consequences” also risk punishing judges for unintentional legal errors. For example, the 2006 responsibility system adopted by the Tai’an Intermediate People’s Court includes a broad exculpatory clause consistent with the 1998 SPC directives, barring judicial disciplinary sanctions for incorrectly decided cases that are caused by unclear laws or regulations, or differences of opinion regarding the law or facts.⁴² But the Tai’an system also provides that “negligent violations of law or regulations that result in... a) cases where state compensation is paid, b) leads to collective petitions by parties, suicides, or other evil incidents, or c) causes a negative social impression that harms the image of the court” are to be treated as exceptionally serious incidents of “incorrectly decided cases” and punished appropriately.⁴³ This, of course, raises the question of whether practical liability for judicial decisions hinges on the *consequences* of the decision (which may be out of the actual control of judges or the court), or on the original error itself. The Tai’an IPC responsibility system arguably violates the 1998 SPC directives (and itself) in rendering judges liable for cases that are reversed either for simple, non-negligent legal error, or for correctly decided cases that simply incite public controversy.

41. *Ibid.*

42. *Tai’an shi zhongji renmin fayuan weifa shenpan zeren zhuijiu banfa [shixing]* (Tai’an Municipal Intermediate People’s Court Illegal Trial Responsibility Measures [Provisional]), art. 43, at <http://www.tacourt.gov.cn/html/gzdd/2006-11/gzdd04747304.shtml> (last visited September 20, 2008).

43. *Ibid.*, art. 8. See also Guangdong Measures, art. 7(2) (providing that the “serious consequences” for which negligent judicial error should be disciplined includes cases resulting in “negative social influence, harming the image of the court”).

Some trial courts review cases reversed or sent back on appeal before applying sanctions to the judges who drafted the original opinion. Some require court supervision tribunals to review such cases, as well as those reversed during internal rehearing procedures, and provide suggestions to court adjudication committees as to whether sanctions should apply.⁴⁴ Chinese judges note that these processes of internal review can serve in practice as channels for reducing or eliminating potential sanctions their colleagues may face for incorrectly decided cases resulting from simple legal error.⁴⁵

C. Collective Liability for Errors

Do local court responsibility systems comply with the 1998 SPC directives requiring judicial personnel to bear individualized liability for erroneous decisions? It depends. Some fully comply. Relevant 1999 Beijing rules incorporate the original SPC language word-for-word.⁴⁶ Others comport with the spirit of the 1998 directives. The 2000 Guangdong rules, for example, require all members of collegiate judicial panels and adjudication committees to bear collective liability for errors of law in incorrectly decided cases. But the rules expressly exempt from liability any individual members who firmly adhered to the “correct” answer during deliberation (but who were presumably out-voted).⁴⁷

Other local court systems violate the 1998 SPC directives by incorporating principles of collective judicial liability in setting annual numerical work targets for tribunals that collectively sanction (or reward) the entire tribunal for failure (or success) in fulfilling the targets. For example, Hainan district BPC measures provide that civil and criminal court tribunals should receive a financial sanction (or reward) of 100 yuan per person for each percentage point of reversed cases above (or below) the set annual target of 1.5 percent.⁴⁸ If the civil tribunal collectively experiences a 3.5 percent appellate reversal ratio, it is assessed a fine amounting to 200 yuan per tribunal member, regardless of whether the reversal rates of particular judges within the tribunal were below the set target.

44. *Tai'an shi zhongji renmin fayuan weifa shenpan zeren zhuijiu banfa [shixing]* (Tai'an Municipal Intermediate People's Court Illegal Trial Responsibility Measures [Provisional]), art. 6, at <http://www.tacourt.gov.cn/html/gzsd/2006-11/gzsd04747304.shtml> (last visited September 20, 2008); *Dongzhi fayuan shenpan weiyuanhui jizhong zhenzhi "wentian"* (Dongzhi Court Adjudication Committee Concentrates on Diagnosing and Curing “Problem Cases”), available at http://www.ahcourt.gov.cn/gb/ahgy_2004/fyxw/userobject1ai3253.html (last visited September 20, 2008). See also Guangdong Measures, art. 13 (requiring the collegiate three-judge panel that handled the initial [i.e., reversed] case to analyze the appellate opinion and report on the reasons for their reversal to court authorities).

45. Interview, IPC judge, on file with author.

46. Beijing Details, arts. 9–11.

47. Guangdong Measures, art. 10. See also Jingshan Measures, arts. 8–9. Pengzhou sets a default responsibility ratio for three-person collegiate panels, requiring the tribunal head to bear 60 percent of the responsibility for incorrect cases and the other two members 20 percent apiece (if the tribunal head has assumed primary responsibility for the case). But it similarly allows exculpation for those members who adhered to the “correct” opinion during deliberations. Pengzhou System, art. 13.

48. *Hainanqu renmin fayuan shenpan yewu gongzuo mubiao jijiangcheng banfa* (Hainan District People's Court Work Target and Punishment and Reward Measures for Trial Work), at <http://www.whhmfy.gov.cn/news.php?id=15> (last visited September 20, 2008), arts. 2–5, 13. For a similar principle, see Tonghai Measures, art. 3. An alternative system involves competition between different tribunals, with financial rewards (or sanctions) accruing collectively to tribunals who exceed (or fail to meet) target ratios, with additional bonuses accruing to individual tribunals and judges with the greatest success in meeting their targets. Zhenping System, art. 4(b).

Other local court systems require tribunal heads and court presidents to bear personal liability for the errors of their subordinates, in direct violation of the 1998 SPC directives. The 2002 Gaocheng court measures require that collective financial sanctions assessed against a tribunal be automatically deducted from the tribunal head personally, who then may assess sanctions against the responsible subordinate.⁴⁹ Still other local court responsibility systems designate a range of career sanctions against the heads of judicial tribunals and collegiate panels whose subordinates fail to meet designated target work ratios.⁵⁰

Some local court rules even explicitly create mechanisms for judicial officials to “pass the buck” and limit their own responsibility for their subordinates’ errors. For example, Hainan provincial rules charge presiding judges and tribunal heads with default liability for incorrect decisions issuing from subordinate judicial panels, if there were dissenting voices among the original trial judges. But the rules offer presiding judges and tribunal heads an “out.” They may reduce their liability by reporting cases “likely to result in incorrect decisions” to their immediate superiors in advance of allowing the case opinion to be issued. Once this has happened, the responsibility for any resulting case opinion deemed to be incorrectly decided falls on the heads of higher-level authorities (such as tribunal heads, court vice presidents, and presidents) to whom the case was referred.⁵¹

III. PRACTICAL EFFECTS OF RESPONSIBILITY SYSTEMS FOR INCORRECTLY DECIDED CASES

Court responsibility systems create incentive systems that affect the behavior of Chinese judges. A desire to avoid sanctions for incorrectly decided cases leads many lower court judges to rely on *qingshi* (requests for advisory opinions) from higher courts and judges regarding the disposition of particular cases. Chinese judges criticize existing local court *qingshi* practices. They assert that many are legally questionable, and create a range of practical problems for the Chinese judiciary. In response to some of these concerns, Chinese judicial authorities have included *qingshi* reform in both the 2004–2008 and 2009–2013 plans for court reform.

Qingshi requests are a common element of administrative governance throughout the sprawling Chinese bureaucracy. Lower-level governments or administrative agencies make regular *qingshi* requests of their superior organs upon encountering

49. *Gaocheng shi renmin fayuan gongzuo mubiao guanli kaohe jiangli banfa shishi xize* (Gaocheng Municipal People’s Court Implementation Details for the Management of the Work Target Assessments and Rewards), issued August 14, 2002, art. 3(6). Similarly, financial rewards for tribunal performance are directed to the tribunal head personally, who may then dispense them to the responsible subordinates.

50. *Ibid.*, art. 22(1); Zhenping System, art. 5(a); *Guanghan fayuan 2004 niandu gangwei mubiao guanli kaohe banfa* (Guanghan Court 2004 Evaluation System for the Management of Annual Work Targets), issued May 17, 2004, art. 24.

51. Hainan Decision, art. 9. Under the Hainan system it is not entirely clear that this process of “reporting up” guarantees that lower-level authorities will entirely escape from resulting liability for any resulting incorrect decisions. If presiding judges report to tribunal heads on a case likely to result in an incorrect decision and “if their proposed course of action is correct,” then the presiding judge does not bear liability. Once so reported, tribunal heads then bear “corresponding responsibility” for “incorrect actions” or “failure to act” that results in an incorrect decision. *Ibid.* “Reporting up” a case “likely to result in an incorrect decision” may thus allow lower-level judicial officials to simply “spread the responsibility around,” rather than avoid sanctions entirely.

a difficult or complex issue. These range from the banal (whether specific administrative fees are admissible under national regulations), to the exceptionally sensitive (how to respond to large-scale citizen protests).⁵² Such requests enable lower-level officials to ensure that their decisions correspond with the views and aims of their superiors, simplify decision making in complex or unclear cases, and “pass the buck” in resolving thorny issues.

Qingshi practices are also prevalent in the Chinese judiciary. In part, this reflects the fact that the Chinese judiciary has historically been quite undifferentiated from the rest of the centrally-controlled administrative Chinese government apparatus. Chinese judges and scholars note that *qingshi* practices originated in the pre-1978 reform period as a means for higher-level court party committees to supervise the work of corresponding party committees in lower-level courts, and for the latter to seek advance guidance in difficult cases where a wrong decision risks running afoul of policies set by higher-level party authorities.⁵³ The onset of legal reform in the 1980s and the rise of an increasingly professional judiciary have somewhat altered these functions. Lower courts continue to rely on *qingshi* channels to obtain direction from higher courts and officials in handling politically sensitive cases. But lower courts also depend on *qingshi* channels for guidance in deciding a range of issues that pose legal or practical difficulties.

Despite some efforts in the 1980s and 1990s by central judicial authorities to standardize *qingshi* procedures, actual *qingshi* practices of lower courts remain highly flexible and ill-defined.⁵⁴ In more formal *qingshi* proceedings, the adjudication committee of a lower court may, after internal deliberation, identify a specific case as “difficult” to decide and submit a formal written report and request for guidance to the appellate court, prior to deciding the case. Many higher court responses to such requests are openly filed and available on Chinese legal databases.⁵⁵ In less formal proceedings, lower court judges may simply contact the

52. For the former, see *Guowuyuan fazhi bangongshi dui youguan tushu, baokan, yinxiang dianzi chubanwu shenpi fei wenti de qingshi de fuhan* (State Council Legislative Affairs Office Response to the *Qingshi* Regarding Examination and Approval Fees Regarding Books, Periodicals, and Electronic Publications), issued November 23, 2004, (responding to a provincial legislative affairs office [LAO] *qingshi* request as to whether the censorship costs involved in screening books and videos for publication constituted admissible administrative fees, and stating that such fees should be included in the annual budget, rather than be charged to the author or the publisher). For the latter, see *Daqing shi Datong qu renmin zhengfu bangongshi guanyu yinfa datong qu zhongda qunxing shijian yingji yu'an de tongzhi* ([Daqing City] Datong District Government Notice Regarding Distributing the Emergency Response Plan for Large-Scale Mass Incidents), issued September 4, 2007, art. 2(2) (instructing local officials to issue requests for guidance to district party and government officials before taking “major” measures to resolve large-scale mass incidents).

53. Chongqing HPC judge Zhang Qingguo, “*Guanyu fayuan anjian qingshi de ruogan sikao*” (Thoughts Regarding the *Qingshi* System in Court Cases), *Yunnan faxue* (Yunnan Jurisprudence), no. 4 (1998): 76.

54. For examples of SPC reform efforts, see *Zuigao renmin fayuan guanyu baosong qingshi anjian ying zhuyi de wenti de tongzhi* (SPC Notice Regarding Issues to Pay Attention to in Submitting *Qingshi* Requests), issued March 24, 1986 (requiring provincial HPCs to include clear factual determinations in their *qingshi* requests), and *Zuigao renmin fayuan guanyu sifa jieshi gongzuo de ruogan guiding* (SPC Decision Regarding the Work of Judicial Interpretation), issued June 23, 1997 (standardizing the use of “*pifu*” as the correct term to refer to an SPC reply to a lower-court *qingshi* request regarding the application of law in a specific case—as opposed to the use of “*jieshi*” to refer to broad interpretations regarding the application of the law in a category of cases).

55. See, for example, the results of searching for “*qingshi*” and “*fayuan*” on <http://www.law-lib.com/law/> (last visited September 20, 2008). Responses to *qingshi* requests by higher courts bear a range of different titles, such as *fuhan*, *pifu*, and *dafu*.

relevant trial division of the appellate court (which would be responsible for handling the case on appeal), orally explain the case, and solicit advice on how to decide the case.⁵⁶

Chinese scholars identify a range of reasons motivating Chinese judges to resort to *qingshi* channels for guidance from higher courts. Some reasons reflect challenges linked to China's rapid economic development over the last thirty years. Social change generates many new issues for which existing law has no clear answer, and new laws and regulations create inconsistencies that must be resolved. Prevailing low levels of legal education exacerbate the difficulties lower-level Chinese trial judges face in applying new laws to specific situations. Other reasons reflect structural factors associated with China's legal system. Absent other mechanisms (such as a system of binding case precedent) to address issues of legal uniformity, all levels of the Chinese judiciary heavily depend on *qingshi* requests and responses. Lower courts rely on such requests to resolve unclear issues in specific cases. The SPC depends on *qingshi* requests from lower courts to identify important, unresolved issues of law on which it may be necessary to issue a binding SPC judicial interpretation (*sifa jieshi*) for the judiciary as a whole.⁵⁷

Resort to *qingshi* channels also reflects Chinese political realities. In sensitive cases, it may simply be politically prudent for a lower court judge to solicit central views regarding how a case should be decided. But *qingshi* channels can also be tactically employed by Chinese judges to defend themselves against external pressure to decide specific cases in accordance with powerful local or government interests. Under such circumstances, using *qingshi* channels to solicit higher-level support before issuing a decision may provide lower courts a convenient excuse for issuing decisions that contravene local interests—allowing them to assert that as much as they would have liked to reach a different decision, their hands were simply tied by their superiors.⁵⁸

But Chinese judges themselves identify a more direct reason for lower court judges to resort to *qingshi* requests: to avoid potential sanctions for decisions that might be overturned or remanded on appeal, or that might otherwise be deemed incorrect under court responsibility systems. Chinese judges note such use is common.⁵⁹ As one Jiangsu BPC judge phrased it:

56. Chongqing HPC judge Zhang Qinguo, "Guanyu fayuan anjian qingshi de guogan sikao," p. 79. For a description by a Shandong HPC judge, see Di Tianli, "Woguo xianxing shenpan yunxing jizhi ruogan wenti sikao."

57. Wan Yi, "Lishi yu xianshi jiaokun zhong de anjian qingshi zhidu" (The History and Practical Difficulties of the *Qingshi* Case System), *Faxue* (Jurisprudence), no. 2 (2005): 11–12. The SPC codified this role of *qingshi* requests in a 2007 decision. *Zuigao renmin fayuan guanyu sifa jieshi gongzuo de guiding* (SPC Decision Regarding the Work of Judicial Interpretation), issued March 23, 2007, art. 10(3).

58. Zhao Shuping, "Woguo fayuan zai juti anjian shang shiyong falü de qingshi yu pifu de lixing sikao" (Thoughts Regarding China's Courts *Qingshi* Requests and Responses Regarding the Application of Law in Specific Cases), *Hunan gongan gaodeng zhuanke xuexiao xuebao* (Journal of Hunan Public Security College) 16, no. 2 (1994): 36.

59. See, for example, Zhu Zhijun, "Fayuan neibu qingshi feng bu ke chang" (Internal Court *Qingshi* Practices Cannot Be Continued), *Faxue* (Jurisprudence), no. 4 (1999): 50 (Nanjing IPC judge); Ren Chengyu, "Shangxiaji fayuan jian anjian qingshi huibao de zuofa bi da yu li" (The Detriments of the *Qingshi* and Reporting Practices Between Higher and Lower Courts are Greater than the Benefits), *Renmin jiancha* (People's Procuratorate), no. 3 (1997): 48 (Henan BPC judge).

Existing responsibility systems for incorrectly decided cases provide the soil for the continued existence of *qingshi* practices... Regardless of how much a judge believes in the law, and regardless of how creative he may be in trial work, in order to avoid “incorrectly decided cases” from occurring, and in order to avoid a financial or a professional impact on himself, it is difficult to avoid certain “public relations” activities (with higher courts) from taking place.⁶⁰

Faced with the incentives created by many existing local court responsibility systems, the extent of *qingshi* requests by lower courts can become extremely varied, broad, and murky in scope. As one Chongqing HPC judge noted:

In order to decrease their numbers of reversed or remanded cases, some lower courts not only submit *qingshi* requests to higher courts regarding how to classify a case [i.e., whether criminal, civil, economic, or administrative] or how to apply the law, but what the factual determinations should be as well. The SPC, and some HPCs and IPCs, have issued rules aimed at addressing this, but their impact is not evident.⁶¹

Chinese judges identify a range of legal and practical problems stemming from existing *qingshi* practices. Legally, the basis for *qingshi* requests is highly unclear. Both the Chinese Constitution and the Organic Law of the Courts specify that higher courts are to “supervise” the trial work of lower courts, but they provide no details as to how that is to be carried out in practice apart from ordinary appellate review of lower court cases.⁶² No clear standards exist for setting out the appropriate extent, content, or procedure for lower court *qingshi* requests, or for how these should interact with ordinary trial and appellate procedures.

The unclear and somewhat secretive nature of many *qingshi* proceedings also creates concerns regarding judicial fairness and individual rights. In the words of one Chongqing HPC judge:

Because the process of handling *qingshi* requests is secret, it is “black box manipulation.” Parties do not know anything about the judges who are responding to the *qingshi* requests. They are thus unable to exercise their rights guaranteed by procedural laws with regard to the hearing that may decide their fate, such as the right to request recusal (of a judge with a conflict of interest), or the right to present a case or offer opinions.⁶³

Excessive reliance on *qingshi* practices also raises classic problems regarding court advisory opinions. It may impact the quality of court decisions, particularly

60. Ping Jialin, “*Quxiao ge'an qingshi ying yi gaige xianxing cuo'an zhuijiu zhi zhidu wei jichu*” (Eliminating *Qingshi* Requests For Individual Cases Should Focus on Reform of Existing Responsibility Systems for Incorrect Cases), *Falü shiyong* (Legal Application), no. 9 (2006). For similar comments by a Chinese scholar, see Wang Lin, *Quxiao cuo'an zhuijiu zhi yi huan yuan sifa lixing* (Eliminating Responsibility Systems for Incorrectly Decided Cases in Order to Return to Judicial Ideals).

61. Zhang Qingguo, “*Guanyu fayuan anjian qingshi de ruogan sikao*,” p. 79.

62. Chinese Constitution, art. 127; Organic Law, arts. 17 and 30.

63. Zhang Qingguo, “*Guanyu fayuan anjian qingshi de ruogan sikao*,” p. 77. Parties may also experience difficulties even learning the underlying reasons for a higher-court reply to a *qingshi* request that decides their case. As one Shandong HPC judge notes, “in practice, lower courts generally resolve cases in accordance with the opinion of the higher-level court and attach the opinion to the internal court file of the case, and do not publicly disclose it (to the parties).” Di Tianli, “*Woguo xianxing shenpan yunxing jizhi ruogan wenti sikao*,” p. 12.

when the core facts have yet to be developed at trial. Higher courts generally rely on the oral and written reports of lower courts as the basis for responding to *qingshi* requests, rather than independently collecting evidence or interviewing witnesses and parties. This can lead to higher courts issuing responses where “their grasp of the case is not complete or deep, and the foundation for the response (to the *qingshi* request) is not solid, lacking in guarantees as to its accuracy.”⁶⁴

Chinese judges also point out that reliance on *qingshi* requests can undermine the value of appellate review. China’s litigation procedure laws guarantee the parties’ right to independent appellate review of trial court decisions.⁶⁵ But if higher and lower courts use *qingshi* channels to hammer out the content of a decision prior to actually issuing it, then appellate courts can be placed in the position of reviewing on appeal a decision that they have already instructed lower courts to make. In such a situation, “parties are deprived of their right of appeal, and the legally-established distinctions of trial and appeal are effectively abolished.”⁶⁶

Chinese judges also argue that the existence of the *qingshi* system contributes to passivity and dependency on the part of lower courts, and inflates the workload of higher courts. The ready availability of *qingshi* channels breeds an inclination on the part of lower court judges to forgo careful analysis of legal issues with any degree of complexity in favor of simply referring them to higher authorities for decision. This in turn exacerbates the workload of higher court authorities, who must bear the burden of responding to not only the original *qingshi* requests but any resulting appeal of the underlying case.⁶⁷

Existing *qingshi* practices also contribute to court difficulties in resolving cases in a timely manner. Chinese judges note that the internal processes of seeking higher-level approval or advice on particular cases can significantly lengthen the time it takes for the trial courts to issue their decisions.⁶⁸ This can contribute to violations of trial and sentencing time limits. Chinese judicial officials have attempted to address some of these problems. From 2003 to 2005, for example, Chinese courts and law enforcement officials pursued a nationwide campaign aimed at clearing up instances of “illegal extended detentions” of criminal suspects without formal charges or trial.⁶⁹ As part of the campaign, the SPC and provincial HPCs issued orders barring lower courts from resorting to *qingshi* requests except

64. Zhang Qingguo, “*Guanyu fayuan anjian qingshi de ruogan sikao*,” p. 78.

65. See, for example, PRC Civil Procedure Law, amended October 28, 2007, arts. 147–59.

66. Chai Jianguo and Wang Yanxia, “*Duli shenpan yu sifa tizhi gaige*” (Independent Trial and Judicial System Reforms), *Hebei faxue* (Hebei Jurisprudence) no. 23 (2005): 85, 87 (comments by the director of the research office of the Hebei HPC). For a similar point by a vice president of the Jiangsu HPC, see Liao Disheng, “*Lun sifa gongzheng xiaoli de shixian tujing*” (Discussion on Methods to Realizing Judicial Fairness and Efficiency) *Jinling falü pinglun* (Jinling Law Review), no. 2 (2002): 127, 130.

67. Ping Jialin, “*Quxiao ge’an qingshi ying yi gaige xianxing cuo’an zhuijiu zhi zhidu wei jichu*”; Ren Chengyu, “*Shangxiaji fayuan jian anjian qingshi huibao de zuofa bi da yu li*” (Henan BPC judge).

68. Zhu Zhijun, “*Fayuan neibu qingshi feng bu ke chang*,” p. 51 (Nanjing IPC judge); Wang Yuming and Xie Shanjuan, “*Minshi shenpan zhong de yinxing chaoshenxian xianxiang chutan*” (A Preliminary Investigation Into the Phenomena of Invisible Violations of Trial Time Limits in Civil Cases), at http://www.lawbook.com.cn/lw/lw_view.asp?no=583 (last visited September 20, 2008).

69. 2005 Annual Report of the Congressional-Executive Commission on China, at <http://www.cecc.gov/pages/annualRpt/annualRpt05/index.php> (last visited September 20, 2008), p. 26; 2004 Annual Report of the Congressional-Executive Commission on China, at <http://www.cecc.gov/pages/annualRpt/annualRpt04/index.php> (last visited September 20, 2008), p. 15.

in “difficult cases involving the application of law,” in order to “prevent extended detentions from arising as a result of repeated *qingshi* requests.”⁷⁰

Recognizing this problem, the Supreme People’s Court 2004–2008 five-year court reform plan lists *qingshi* reform in “difficult cases involving the application of law” as a goal, and states that lower courts may resort to *qingshi* in cases involving “common questions of the applicability of law,” requesting that the higher court itself directly handle the case.⁷¹ Naturally, this leaves open the question of whether and how to reform the use of *qingshi* in other circumstances. At least one provincial HPC has announced its intention to go even further. In 2006, the Shaanxi HPC issued an opinion regarding the implementation of the SPC’s five-year plan in which it listed the “gradual elimination” of *qingshi* requests in individual cases as one of its long-term goals. *Qingshi* requests should be limited to questions regarding the use of the law, and must come from the adjudication committees of lower courts (as opposed to individual judges).⁷²

IV. ROOTS OF RESPONSIBILITY SYSTEMS FOR INCORRECTLY DECIDED CASES

Modern Chinese responsibility systems for incorrectly decided cases are deeply rooted in prior imperial practices. For centuries, Chinese emperors relied on fused administrative and judicial authority, the application of strict liability for judicial error, and use of collective responsibility for official mistakes as tools to govern the sprawling bureaucracy.

Imperial Chinese governance was marked by a fusion of administrative and judicial power. As one Chinese author has noted, “[u]ltimate judicial authority rested in the hands of the emperor, while all judicial organs were theoretically but consulting organs [to assist] the emperor in making the final decision.”⁷³ Local district magistrates, the lowest-level officials of the Chinese bureaucracy, bore responsibility for applying the law in particular cases. Hearing civil and criminal cases comprised but one component of the magistrate’s official responsibilities for administering the affairs of a given Chinese county, alongside the supervision of tax collection and corvée labor requirements.⁷⁴

70. [Jiangxi sheng gaoji renmin fayuan] *Guanyu jiu Zheng he yufang chaoqi jiya qingkuang de huibao* (Report of the Jiangxi HPC Regarding Addressing and Preventing Extended Detentions), issued July 29, 2004. For the relevant SPC order, see *Zuigao renmin fayuan guanyu tuixing shi xiang zhidu qieshi fangzhi chansheng xin de chaoqi jiya de tongzhi* (Opinion of the Supreme People’s Court Regarding Promoting Ten Systems to Prevent the Emergence of New Cases of Extended Detention), issued December 1, 2005, art. 4.

71. 2004–2008 *renmin fayuan dierge wunian gaige gangyao* (2004–2008 Second Five-Year People’s Court Reform Plan) (2005) (hereinafter 2004–2008 Reform Plan). The 2009–2013 five-year court reform plan also lists *qingshi* reform as a goal. 2009–2013 *renmin fayuan disange wunian gaige gangyao* (2009–2013 Third Five-Year People’s Court Reform Plan) (2009).

72. *Shaanxi sheng fayuan guan che luoshi “Renmin fayuan di’erge wunian gaige gangyao” shishi yijian* (Shaanxi Provincial Court Opinion Regarding the Implementation of the “Second Five-Year People’s Court Reform Plan”) (2006).

73. Guo Jian, Yao Rongtao, and Wang Zhiqiang, *Zhongguo fazhi shi* (A History of the Chinese Legal System) (Shanghai: Shanghai renmin chubanshe, 2000), pp. 428–29.

74. Derk Bodde and Clarence Morris, *Law in Imperial China* (Philadelphia: University of Pennsylvania Press, 1967), pp. 4–5, 114; John R. Watt, *The District Magistrate in Late Imperial China* (New York: Columbia University Press, 1972), pp. 11–21.

A complex and centralized personnel review system governed the careers of Chinese magistrates. Officials were subject to a range of disciplinary sanctions administered by an imperial civil service board, the Board of Civil Office, for specific infractions such as neglect of duty, corruption, and other malfeasances. Punishments included fines, demotion, or dismissal.⁷⁵ In addition, all officials were subject to regular performance assessments. Under the Qing dynasty (1644–1912), for example, imperial authorities held a “great reckoning” every three years, which required immediate superiors to write performance evaluations on their subordinate officials. Progressively higher-level officials reviewed these evaluations in turn, before submitting them to the Board of Civil Office. Magistrates with superior performance received promotions and audiences with the emperor himself. Magistrates found to be corrupt, incompetent, or who failed to meet centrally designated targets, such as tax quotas, could be demoted or removed from office.⁷⁶

Two principles broadly characterized the disciplinary liability of imperial officials from the Tang (618–907) to the Qing dynasties. First, “officials were liable if they made a wrong decision, the nature of the punishment depending on a variety of circumstances.”⁷⁷ Officials received more severe sanctions for “private offenses” (*si zui*), such as those committed for personal gain, than for “public offenses” (*gong zui*), including those committed inadvertently in the course of administration.⁷⁸ Second, such liability was applied collectively to officials within the same administrative unit and within the bureaucratic chain of command in which the mistake was made. The Tang code and its successors drew upon the concept of principal–accessory liability for joint crimes such as murder or robbery to apply collegiate liability to officials for errors. “The principal is defined as the person from whom the mistake originated, whether or not he was aware he was doing something wrong, and the accessories are those who have joined in the mistaken decision, even though they do not know a mistake has occurred.”⁷⁹ Such liability extended vertically through the bureaucracy as well. Imperial officials who committed an error were punished according to the offense committed. Superior officials who failed to uncover the error were disciplined in descending degrees of severity depending on their distance in the chain of command from the official who committed the error.⁸⁰

Similar to modern judicial discipline practices in China today, such imperial disciplinary practices were not exempt from criticism. Imperial governors condemned the practice of holding officials responsible for actions out of their control.⁸¹ Early nineteenth-century writers on governance criticized imperial

75. T'ung-tsu Ch'ü, *Local Government in China Under the Ch'ing*, (Cambridge: Harvard University Press, 1962), pp. 32–33.

76. *Ibid.*, pp. 34–35, 132–33.

77. Geoffrey MacCormack, *Traditional Chinese Penal Law* (Edinburgh: Edinburgh University Press, 1990), p. 91.

78. *Ibid.*, pp. 91–91, 134–35.

79. *Ibid.*, pp. 138–39.

80. *Ibid.*, p. 139. Superior officials also bore liability for private offenses of subordinates, including intentionally incorrect decisions that the originator of the error attempted to conceal.

81. Thomas A. Metzger, *The Internal Organization of Ch'ing Bureaucracy* (Cambridge: Harvard University Press, 1973), p. 291.

disciplinary regulations as responsible for reducing state effectiveness. Disciplinary regulations were faulted for reducing the independent initiative of local officials in addressing governance problems, for fear of committing an error. Similarly, disciplinary rules were faulted for creating incentives that led them to focus excessively on pleasing their superiors instead of responding to bottom-up popular pressures.⁸²

Nonetheless, as the scholar and author Thomas Metzger notes, the nature of Chinese disciplinary regulations responded to practical concerns faced by imperial rulers. Central authorities lacked effective mechanisms to independently monitor the actions of local officials.⁸³ In part, this was the result of poor communications and bookkeeping. But central officials also faced a classic principal-agent problem. Because of the centralization of power and information in the hands of the local district magistrates, central officials lacked independent mechanisms to assess the veracity of, for example, a local magistrate's report that external factors, rather than his own failings, were responsible for his inability to meet his tax collection responsibilities. "Since [the central government] could hardly tailor his responsibilities to [the local magistrate's] unverifiable account of what was within his control, it has no choice but to define his responsibility according to some standard reasonable in its own eyes, whether or not the standard conformed to the actual situation."⁸⁴ Compelling officials to bear collective responsibility for the actions of their subordinates, and assigning them broad responsibility for governance failures occurring on their watch, was one solution for central officials to overcome these problems. It also (ideally) created a deterrent that encouraged local officials to do their utmost to avoid such failures.⁸⁵

As in modern judicial responsibility systems, the general principles of disciplinary liability described above translated into sanctions for imperial magistrates who committed errors in the handling of judicial cases. Internal administrative regulations governing the bureaucracy specified sanctions for such errors.⁸⁶ Under Qing administrative regulations (*chufen zeli*), magistrates were subject to administrative disciplinary sanctions ranging from temporary loss of salary, demotion, and dismissal for errors such as the failure to determine the facts of a case.⁸⁷ Similar sanctions also applied to instances of unintentional legal error that led to appellate reversal.⁸⁸ Qing regulations also applied principles of collective

82. *Ibid.*, p. 327.

83. *Ibid.*, pp. 288–89.

84. *Ibid.*, p. 289.

85. *Ibid.*, pp. 288–89; MacCormack, *Traditional Chinese Penal Law*, p. 142. The imperial Chinese system widely used collective responsibility for misdeeds as a tool of social and political control, regardless of whether or not the individual involved had been directly concerned, involved, or even aware of the wrongdoing in question. See generally Joanna Waley-Cohen, "Collective Responsibility in Qing Criminal Law" in *The Limits of the Rule of Law in China*, eds. Karen G. Turner, James V. Feinerman, R. Kent Guy (Seattle: University of Washington Press, 2000), pp. 112–31.

86. Regarding the imperial administrative disciplinary sanctions that governed the Chinese bureaucracy, see generally Metzger, *The Internal Organization of Ch'ing Bureaucracy*, pp. 235–417. Metzger notes that such sanctions have been overlooked in the operation of the imperial Chinese bureaucracy. *Ibid.*, pp. 235–36. This parallels the neglect of this subject in the study of operations of the modern Chinese bureaucracy and judiciary.

87. Ch'ü, *Local Government in China Under the Ch'ing*, pp. 128–29.

88. *Ibid.*; Metzger, *The Internal Organization of Ch'ing Bureaucracy*, pp. 278–79. See generally *Qinding*

responsibility in the sanctions regime, decreeing disciplinary sanctions for officials in the chain of command above the official who committed the error.⁸⁹

Magistrates also faced sanctions for errors in judicial verdicts under the imperial criminal codes. As with other errors, the imperial criminal codes distinguished between “public crimes” and “private crimes.” Intentional errors committed for personal gain fell within the latter category. Under the Ming and Qing codes, magistrates who intentionally exonerated the guilty or convicted the innocent received the same punishment that they had (improperly) decreed that the accused should receive. If the magistrate deliberately applied a lesser or heavier sentence than warranted, such as fifty lashes rather than twenty, he himself would receive the difference between the sentence he issued and what was merited.⁹⁰ The imperial codes, however, allowed magistrates to convert such corporal punishments into salary fines or reductions in rank.⁹¹ Consequently, the actual sanctions faced by magistrates in practice for either public or private crimes (at least relatively minor crimes) were generally administrative in nature.

Inadvertent errors in judicial verdicts were not immune from imperial sanctions. Rather, they were viewed as a form of public crime. Article 433(3) of the Ming code stated:

If, in judging cases [officials or functionaries] negligently implicate innocent persons or increase a lighter penalty to a heavier one, in each case their penalty shall be reduced three degrees [from that for the original criminal]. If they negligently exonerate guilty persons or reduce a heavier penalty to a lighter one, in each case their penalty shall be reduced five degrees [from that of the original criminal].⁹²

The Qing code contained similar provisions and, as in the Ming code,⁹³ magistrates received lesser punishments for inadvertent errors in their verdicts than for deliberate errors committed for private gain.

Under the imperial criminal codes, Chinese magistrates also faced collective responsibility for judicial errors. The Ming code applied collective criminal liability to two groups of people: (1) relatives of criminals who committed certain serious crimes, such as rebellion, sedition, or treason, and (2) officials or functionaries who worked in the same office as those who committed “public crimes,” as well as their supervisors.⁹⁴

liu bu chufen zeli 48 (Disciplinary Regulations of the Six Bureaus) (1887). In some cases, these left open the possibility of reducing sanctions if the magistrate subsequently corrected the error after appellate reversal.

89. Ch'ü, *Local Government in China Under the Ch'ing*, p. 128, footnotes 108–109.

90. See art. 433 of the Ming code, in *The Great Ming Code*, tr. Jiang Yonglin (Seattle: University of Washington, 2005), pp. 233–34.

91. See, for example, arts. 7 and 8 of the Qing code, in *The Great Qing Code*, tr. William Jones (New York: Oxford University Press, 1994), pp. 40–41.

92. *The Great Ming Code*, tr. Jiang Yonglin, p. 234. Although Jiang translates the term *guocuo* as “negligent,” Articles 433(3) and 315 of the Ming code clearly define the term to encompass entirely unintentional judicial error. See also art. 409(3) of the Qing code, in *The Great Qing Code*, tr. Jones, p. 381 (translating the relevant term as “mistaken” rather than “negligent”). For the relevant Qing rules, see art. 409 of the Qing code, in *The Great Qing Code*, tr. Jones, p. 381.

93. Ch'ü, *Local Government in China Under the Ch'ing*, p. 129.

94. *The Great Ming Code*, tr. Jiang Yonglin, pp. lxxviii, 38 (art. 27 of the Ming code) (“[I]f lower offices

The degree to which any individual official bore collective liability for the inadvertent errors of another depended on his status in the bureaucratic chain of command. For example, Article 433 of the Ming code applied graduated degrees of collective punishment to officials for the commission of inadvertent errors in judicial verdicts:

[Functionaries who make the errors] shall be punished as principals; the staff supervisors shall have their penalty reduced one degree from that for the functionaries; the associate officials shall have their penalty reduced one degree from that for the staff supervisors; the head officials shall have their penalty reduced one degree from that for associate officials.⁹⁵

A review of Chinese legal history reveals several key points. First, all of the components of modern Chinese responsibility systems for incorrectly decided cases identified earlier in this article—the fusion of administrative and judicial authority, strict liability for judicial error, and collective responsibility for official mistakes—have deep roots in prior imperial legal practice. Second, these elements are a subset of broader governance practices that extended beyond the Chinese judicial system. Last, Chinese authorities adopted these methods in part to respond to concrete problems, namely principal–agent problems, that limited the ability of central Chinese authorities to effectively monitor their local officials.

V. ANALYSIS OF JUDICIAL DISCIPLINARY SYSTEMS

Why do local court responsibility systems continue to violate the 1998 SPC directives curtailing their use? One answer: conflicting directives from different masters. Central party policy directives emphasize the need to adopt responsibility systems to strengthen party governance, respond to citizen discontent, and address official errors.⁹⁶ Local party committee orders implementing these directives explicitly call for the strengthening of judicial responsibility systems for incorrectly decided cases.⁹⁷ When court party officials translate these instructions into the detailed systems employed within the courts to evaluate and grade judicial

send up reports to higher offices, and the higher offices do not discover the mistakes or errors in them and allow them to be carried out, then officials and functionaries in the higher offices shall have their punishment successively reduced two degrees from that for the officials and functionaries in the lower offices....”).

95. Art. 27 of the Ming code, in *The Great Ming Code*, tr. Jiang Yonglin, p. 38. art. 28 is the corollary under the Qing code. *The Great Qing Code*, tr. Jones, p. 61.

96. See, for example, *Zhonggong zhongyang guanyu jiaqiang dang de zhizheng nengli jianshe de jue ding* (Central Party Committee Decision Regarding Strengthening Party Governance Capacity), issued September 19, 2004.

97. *Zhonggong Fujian shengwei guan che “Zhonggong zhongyang guanyu jiaqiang dang de zhizheng nengli jianshe de jue ding” de shishi yijian* (Fujian Communist Party Provincial Party Committee Implementation Opinion Regarding the “Central Party Committee Decision Regarding Strengthening Party Governance Capacity”), issued December 19, 2004, art. 4(4); *Zhonggong Pingliang shiwei guanyu jin yi bu jiaqiang yifa zhi shi gongzuo de yijian* (Pingliang Municipal Communist Party Committee Opinion Regarding Strengthening the Work of Managing the City According to Law), issued August 9, 2005, art. 2(3); *Zhonggong Shennongjia lin qu weiyuanhui guanyu xuexi guan che “Zhonggong zhongyang guanyu jiaqiang dang de zhizheng nengli jianshe de jue ding” de yijian* (Shennongjia Lin District Party Committee Implementation Opinion Regarding Studying and Carrying Out the “Central Party Committee Decision Regarding Strengthening Party Governance Capacity”), issued December 30, 2004.

personnel, they do not always correspond to instructions from higher-level judicial institutions, such as the 1998 SPC measures.

Why might instructions issued by party authorities and the SPC differ? In part, it is because their institutional aims do not necessarily coincide. The 1998 SPC directives are aimed at ensuring judicial fidelity to the written law. They recognize that the law may not always be clear, and that judges should not bear liability for good faith legal error. In contrast, central party directives may emphasize other issues—such as the paramount importance of social stability and the need for local authorities to prevent the emergence of large-scale citizen protests at all costs. When these differing sets of instructions percolate down the bureaucracy, it is entirely possible for local court authorities to adopt responsibility systems that discipline judges for decisions resulting in large-scale citizen protests (consistent with party interests), even if the decision is actually legally correct or merely the result of a good faith legal error (contrary to the SPC directives).

Other conflicts exist as well. Party-run court responsibility systems manage the Chinese judiciary in a manner entirely consistent with how the rest of the bureaucracy is run. Higher authorities set targets for officials to reach and evaluate their performance based on their ability to reach the targets. Easily quantifiable statistics are attractive to this end; qualitative statistics are less so. Creating standardized “grades” for all the various conceivable shades of judicial error involved in appellate reversal is complicated. In contrast, statistics such as raw appellate reversal ratios are both simple and readily available. Using them as a direct proxy for judicial performance has a natural appeal for busy party and court administrators.⁹⁸ The interests of the party and the state bureaucratic personnel system in streamlining administrative management can thus directly conflict with (and possibly trump) SPC efforts to ensure that judges can freely decide the legal merit of cases without risking sanctions for unintentional legal error.

But deeper philosophical tensions exist as well. Local court responsibility systems that mechanically sanction judges for legal error fundamentally differ from the 1998 SPC directives in their view of what the law is and what the process of judicial application of the law involves. For the former, the law is little different from, say, widget production quotas. It is never unclear. Application involves little discretion on the part of an individual judge. For precisely this reason, it is entirely reasonable to sanction judges (just like widget production team leaders) for any failure to meet centrally-mandated standards. Judicial failure to get the law right can thus be “endogenized” as a variable for evaluating official performance.

In contrast, the 1998 SPC directives take a very different view. The law may be unclear. Judges may have to use their judgment to discern what the law “is” and to apply it to the specific situation before them. Consequently, it is unreasonable to mechanically discipline judges for every occurrence of legal error. For the 1998 SPC directives (and those of local court responsibility systems that incorporate their

98. This problem is not unlike the one facing academic faculties seeking to evaluate tenure-track professors. The difficulty of agreeing on applicable qualitative standards to evaluate academic work renders quantitative standards, such as strict numbers of publications, more attractive.

norms), the law and its interpretation must be independent of the rest of the factors that are used to evaluate official performance.

Ultimately, party governance methods reflected in local court responsibility systems are not new. They are the modern incarnation of imperial Chinese measures developed to allow the emperor to wield absolute authority over a sprawling administrative apparatus and to address pervasive principal-agent problems within the Chinese bureaucracy. To reach these goals, the Chinese imperial state fused administrative and judicial authority in the hands of the ruler, adopted extensive bureaucratic means to measure and evaluate official performance, and applied strict liability for judicial error and collective responsibility for official mistakes.

The 1998 SPC directives challenge this governance model. They view judges and the law as different from the rest of the bureaucratic structure. They grant judges a degree of individual independent judgment in deciding cases. They regard the law and its application as outside the constraints of the ordinary personnel evaluation system. In doing so, they reflect the efforts of at least some of the post-1978 Chinese legal reformers to shift the underlying governance methods of the Chinese state.

Problematically, the above conflict is a fissure extending throughout Chinese governance. Over the past several decades, Chinese authorities have enacted a large number of laws directed at society at large. But in order to actually implement them, Chinese authorities rely on internal responsibility systems that “translate” these norms into specific target goals for lower-level officials to meet. The judicial responsibility systems discussed in this article are but one example. Many others exist as well.⁹⁹ Target goals do not necessarily correspond with the requirements of formal law or regulations, nor is there any clear institutional channel for resolving conflicts between them. This can affect broader rule-of-law norms. Aims and goals expressed in national law that have not been reduced to hard targets, or are not capable of being so reduced, may fade in importance for local authorities. Local officials may learn that satisfying the specific details of their target responsibility system is all that is required, whereas higher-level legal norms can be ignored.

Further, in some cases, problematic official behavior that worries Chinese central authorities is directly attributable to the incentives created by the target responsibility systems that Chinese authorities use to control and manage lower-level officials. Court responsibility systems that apply sanctions for unintentional legal error lead judges to excessively rely on *qingshi* requests to decide cases, contrary to the wishes of higher-level judicial officials. Other examples exist as well. For example, *xinfang* responsibility systems discipline government officials based on the size and scale of citizen petitions from their jurisdiction to higher-level authorities. This prompts local authorities to rely on violence and repression to prevent petitioners from contacting central officials, despite explicit instructions

99. “Operationalizing” of central-level directives through responsibility systems takes place in a wide range of other fields. For a discussion of central norms regarding citizen petitioning and the *xinfang* (letters and visits) system, as well as the local responsibility systems that implement these norms, see Carl F. Minzner, “*Xinfang*: An Alternative to Formal Chinese Legal Institutions,” *Stanford Journal of International Law* 42 (2006): 103, 120–36, 151–58.

from national authorities barring such practices.¹⁰⁰ These reflect the efforts of local officials to “game the system,” by figuring out specific tactics to manipulate or circumvent the target incentives that they face.

Addressing these problems requires addressing the underlying behavioral incentives that fuel them. Efforts by Chinese judicial officials to carry out *qingshi* reform are unlikely to be successful unless they can alter the standards by which Chinese judges are evaluated. Trial judges who face possible disciplinary sanctions for any and all cases reversed on appeal are likely to—one way or the other—aggressively seek advance input from appellate judges regarding how they should rule. If Chinese authorities want *qingshi* channels to be used more sparingly, requests phrased more carefully, and the workload of higher-level authorities reduced, then altering the pressures facing lower-level authorities is necessary. The 1998 SPC directives appear to be a concrete step in this direction.

It is unclear whether this will take place. Some judicial officials accept the need to adjust these incentives. But it is not clear whether all party officials accept this need. At least some party authorities may be locked into the bureaucratic authoritarian mechanisms that they and their imperial predecessors have used to manage China for generations. Mechanical top-down evaluations of lower-level officials using simple numerical measurements may be administratively attractive. Passive lower-level bureaucrats, trained to respond to targets set from above and heavily dependent on *qingshi* requests and responses for direction, may meet the interests of central state authorities seeking to uniformly guide and direct the country, as well as the interests of party authorities fearful of the emergence of independent sources of political authority. In short, the issues associated with court responsibility systems may reflect a fundamental conflict between party governance interests and practical needs of judicial reform.

Scholars vary in their assessments and predictions regarding the course of Chinese legal reform. Some assert that China will (or should) parallel the developmental track of the Western countries. Under this view, gradual development of the rule of law in China will be accompanied by political liberalization, or even outright democratization.¹⁰¹ Others contest this view. They assert that China will (or should) parallel the developmental track of other East Asian countries. They argue that China will (or should) avoid significant political reforms (at least in the near future), and concentrate instead on procedural or institutional rule-of-law reforms similar to those found in other East Asian societies such as Hong Kong, Singapore, and South Korea.¹⁰²

This article calls these projections into question. It identifies modern party governance mechanisms that are direct descendants of imperial practices. At least some party authorities and institutions may be pursuing party governance strategies corresponding to a “rule of *fa*” that is entirely consistent with China’s own history

100. Minzner, “*Xinfang*: An Alternative to Formal Chinese Legal Institutions,” pp. 151–58.

101. See, for example, Larry Diamond, “The Rule of Law as Transition to Democracy in China,” in *Debating Political Reform in China: Rule of Law vs. Democratization*, ed. Suisheng Zhao (New York: M.E. Sharpe, 2006).

102. Randall Peerenboom, *China Modernizes* (New York: Oxford University Press, 2007), pp. 228–32, 287–97; Pan Wei, “Toward a Consultative Rule of Law Regime in China,” in *Debating Political Reform in China: Rule of Law vs. Democratization*, ed. Zhao, pp. 32–40.

and bureaucratic practices. China might not pursue an “East Asian” or a “Western” version of rule of law. It might pursue its own.

On the other hand, this effort is not uncontested. At least some forces are pushing for an alternative system of governance. It may be inaccurate to say that “China is pursuing...” or “China will...” Rather, it may be more accurate to say that different factions within the Chinese government and society have differing views regarding how China should be governed, and what the role of law is in Chinese governance. The future track of Chinese legal reform depends on how that struggle plays itself out.

This is not simply an abstract normative debate regarding what system of governance is “best” for China. Existing party practices are generating concrete governance difficulties. Chinese authorities themselves have identified these as significant problems they would like to address. Doing so, however, requires Chinese officials to address deep institutional issues at the core of how the Chinese state has been administered for centuries.