Introduction

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> *[I]t is in its legal institutions that the characteristics of a civilized society are most clearly reflected, not only, and not so much, in its substantive law as in the practice and procedure of its courts. Legal procedure is a . . . ritual of extreme social significance.*[1]

If how a society decides its disputes is "a ritual of extreme social significance," then China's thirty years of legal reform can inform our understanding of how the Chinese state relates to its society and how Chinese citizens relate to one another. Since 1978, China has embarked on legal reforms to promote law as a main mode of dispute resolution. But critics argue that China is establishing legal institutions more to promote economic development and coalesce state power and less to empower ordinary citizens.[2] It is said that ordinary citizens shy away from formal legal mechanisms to resolve disputes because of an historical distrust of the law that is reinforced by recent experiences with Chinese courts. At the same time, the state's distrust of civil society institutions renders bottom-up initiatives unpromising.

This volume takes an on-the ground look at how civil disputes of ordinary citizens are being resolved in China today. In identifying what is going on at the ground level, this volume "disaggregates the Chinese state and society" to focus on the hows and whys – that is, the *process* of "law in action." This approach includes analyses of the process of ideas transmission and the dissemination of law in the Chinese context, discussions of legal institutional dynamics as they affect Chinese legal development,

[1] C. J. Hamson, "In Court in Two Countries: Civil Procedure in England and France," *The Times*, November 15, 1949, p. 5.
[2] *See* e.g., Donald C. Clarke, "The Chinese Legal System Since 1995," *The China Quarterly*, no. 191 (2007): 555–566.

and descriptions of the contours of legal mobilization by different social actors. As a whole, the chapters focus on "law in action" rather than on "law on the books," as well as on legal institutions from the "bottom up" – that is, those at the implementation level who are using and working in the legal system.

The authors take advantage of the growing body of "law and society" literature as well as the body of work on comparative judicial politics. In *Engaging the Law in China*, Neil Diamant, Stanley Lubman, and Kevin O'Brien challenge scholars to recognize the relevance of interdisciplinary research on legal developments in China.[3] In recent years, the growth of scholarship on law and society has meant an increasing number of Sinologists exploring the terrains of Chinese law. At the same time, those in the legal academy have steadily incorporated social science research and methodology into their pedagogy and scholarship. Legal scholars and social scientists are no longer constrained by the belief that law and adjudication are sui generis subjects that can be understood only through specialized legal training.

Yet there is still far too little collaboration among law scholars and social scientists in the area of Chinese law. This volume evolved from a workshop we held at the Fairbank Center for Chinese Studies at Harvard University in the fall of 2007. It was a conversation between those traditionally recognized as legal scholars and social scientists on the growth of law and legality in China and the challenge of rule of law reforms. The workshop brought together leading legal scholars from China, Taiwan, and the United States who have gained unusual access to mainland Chinese courts and other legal institutions. Rather than talking across disciplines, this volume encourages conversations among disciplines to add to our current understanding of these Chinese legal reforms.

This inquiry is particularly timely as China marks its thirty-year anniversary of legal reforms. By sharing existing findings about Chinese legal reforms across disciplines (law and the social sciences) and across regions (the United States, Taiwan, and China), we hope to explore contemporary Chinese notions of justice that seek to balance Chinese traditions, socialist legacies, foreign adaptations, social realities, and the needs of the global market. By providing a state-of-the-field report based on empirical data, we present a retrospective assessment of the thirty

[3] Neil J. Diamant, Stanley B. Lubman, and Kevin J. O'Brien, eds., *Engaging the Law in China: State, Society, and Possibilities for Justice* (Stanford: Stanford University Press, 2005).

years of legal reforms and identify connections that may not have been obvious in the past.

The focus of this volume is on civil dispute resolution – in particular, how once defined as legal, disputes are resolved in China. Civil disputes, along with commercial disputes, are those with which ordinary citizens are most involved. The authors examine what social scientists call "third party (triad) dispute resolution" – that is, when parties delegate a dispute to a third party for resolution. As Alec Stone Sweet has pointed out, triad dispute resolution – two contracting parties and a dispute "decider" – constitutes a primal social institution, a microcosm of governance.[4] By organizing disputes about a community's normative structure, triad dispute resolution performs an important governance function by adapting general rules to the specific experiences and exigencies of those who live under them. In turn, those who initiate the triad learn something about the rules governing their exchange and the normative structure that sustains it. This dynamic of change is observable at both the micro level – the behavior of individual actors – and at the macro level – the institutional environment or social structure in which the dispute is situated. In other words, the individual dispute in China and the manner of its resolution can be reflective of individual identities and motivations as well as a statement of macro-level interactions of power and contestation.

More importantly, under certain circumstances, triad dispute resolutions can be a powerful engine for social change, as the dispute resolution can either reinforce existing structures or adapt or reinterpret existing rules. In the latter scenario, if the agent of dispute resolution has authoritative value and the resolution is taken as the legitimate restructuring of social norms for future cases, triadic decision resolution will be a powerful mechanism of social cohesion and political change.[5] Disputants, in turn, will adapt their own behavior to increasingly differentiated sets of rules, thus (re)making themselves and their community. Systemic change, then, implies the transformation of collective and individual entity and can be observed at the micro level, that is, at the level of individual disputants in seeking resolution.

There are multiple civil dispute resolution methods in China, ranging from formal court adjudication to arbitration (as in labor disputes), mediation, petitions (or "letters and visits"), and even protests in the streets.

[4] Martin Shapiro and Alec Stone Sweet, *On Law, Politics and Judicialization* (New York: Oxford University Press, 2002), pp. 15, 57–60.
[5] Ibid.

Although recognizing that a vast majority of disputes are resolved before their recognition as formal "lawsuits," this volume nevertheless takes as a starting point the view that, increasingly, the "rules of the game" are in fact legal rules. We ask how legal doctrine is shaping the strategies of those who pursue their interests within or without the courts and look at how law has or has not infiltrated and shaped triad dispute resolution in China. We recognize that law is only one set of normative structures in dispute resolution, but we are interested in how law intersects, integrates, and competes with the variety of triadic dispute resolution methods from adjudication to nonadjudicatory methods of resolution, such as petitions, mediation, and arbitration. In each method, parties fight by raising alternative views of the facts and relevant legal norms, with the outcome determining entitlements, governing the power to own and control property, and conferring the right to marry, divorce, work, and live in various places. Even in the recent protest movements in China, we see how concepts of legal rights and entitlements can inform and shape contentious behavior as the legal language leaves the courtroom and appears on the streets and in the media.

We apply what Martin Shapiro calls "political jurisprudence," or "sociological jurisprudence" – that is, recognizing that those working in law are political actors – and apply the same modes of analysis that are applied to other political actors and institutions.[6] We ask the same questions that are asked of other political actors. How do these legal institutions make policy decisions, and how do they relate to other institutional actors? We know that legal institutions, once created, often take on an independent dynamic of their own, including both political self-preservation and institutional competition for expansion. In the Chinese context, we explore legal institutions for public redress – how they have developed and evolved. What are the dynamics among legal institutional players, and how do their organization and work style affect efficacy? But our lens is from the perspective of how Chinese citizens are accessing "justice" mechanisms and how the changes and dynamics in legal institutions impact the daily lives of ordinary Chinese citizens.[7]

In the last decade, scholars have questioned the link of law, markets, and development as key to improved governance. Observers of China's legal reform have long noted that Chinese leaders embrace the economic

[6] Ibid.

[7] The identity of a citizen has been defined as "a personal status consisting of a body of universal rights and duties held equally by all legal members of a nation-state." T. H. Marshall, *Class, Citizenship, and Social Development* (New York: Anchor, 1964).

growth-enhancing effects of "rule by law," but not the "rule of law" reforms that can challenge Communist Party power and authority. As Sally Merry pointed out in her opening remarks at our workshop, law is connected to relations of power. It allocates power through the construction of identities that have consequences, such as citizens/aliens, criminals, urban dwellers/rural migrants, licensed/nonlicensed. In its ability to distribute power, law can be a double-edged sword (used for or against the people). When combined with state and economic power, law can concentrate on oppression as it is used by the state to govern the people (rule by law) rather than used by the people to check the state (rule of law).

"Rule of law" means that law distributes power to ordinary citizens as against the state in subjecting state authority to legal rules and norms as any other citizen. In practice, a system of rule of law must feature independent and impartial decision makers, transparent and open rules that apply uniformly to all (including governmental powers), and a process that ensures the protection of fundamental rights and interests. This means that attention must be paid not only to bolstering institutions such as the legislature, the judiciary, and the legal profession, but also to promoting a legal consciousness and acceptance of the law on the part of ordinary citizens and nongovernmental organizations to whom these laws apply. In other words, "rule of law" requires the use of legal triad dispute resolution by ordinary citizens in ways that directly or indirectly challenge state authority.

We know from law and society scholars that at a minimum, the power of law lies in its discourse and in serving to provide a narrative frame. In other words, law's power lies not only in its ability to settle disputes or to establish social norms, but also in its power to give a name to moral and ethical claims. The law label "legitimizes" an otherwise contentious claim, imbuing it with greater social significance and lessening its political dimension. In other words, law provides a framework within which a victim can connect an injury with a normative violation, blame a violator, and claim relief.[8] Legal process provides a platform on which substantive issues can be contested and debated. A "rule of law" state develops when the law gives context, legitimacy, a name, and a framework to disputes, even when the disputes involve powerful state actors.

[8] William L. F. Felstiner, Richard L. Abel, and Austin Sarat, "The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . . ," *Law & Society Review* 15, no. 3–4 (1980–1981): 631–654; Lynn Mather and Barbara Yngvesson, "Language, Audience, and the Transformation of Disputes," *Law & Society Review* 15, no. 3–4 (1980–1981): 775–821.

In this volume, we seek to identify when the law works as a narrative frame rather than as an oppressive command – as a platform for debate rather than as a hurdle to overcome. In the ongoing conversation about the nature of the Chinese legal system, we have given much attention to the intentions and desires of leaders with a utilitarian approach to "rule of law" – those who take law to be a new tool for social control and effective governance. But to more fully understand the societal effects of legal development, we also need to investigate the unintended consequences on the actors below, be they the judges who enforce the law, the lawyers who use the law, or the ordinary citizens who rely on the law. This requires analysis of the historical and cultural attitudes toward legal phenomena in China. Rules are not self-enforcing, but rather require internalization of the norms by those to whom they are directed as well as the sanctioning of mechanisms for noncompliance. Thus, an integral aspect of understanding the effectiveness of legal systems requires an investigation into the similarities between rules and norms and the knowledge (misinformation) that laypeople and legal professionals possess about rules, as well as the incentives and disincentives facing them in the use of these rules. This involves a better understanding of the popular attitudes ordinary Chinese citizens have toward legal institutions and legal norms, the origins of such attitudes, and their variation across time, geography, and individual attributes.

We separate the chapters in this volume into three themes. Yet, reflective of how integrally intertwined these questions are and how important it is to bridge disciplines, one or more of these themes flow in and out of every chapter. First, we focus on the dynamics and tensions between the institutions in legal triad dispute resolution. We examine the adjudicatory and mediation systems, with a focus on the judiciary in some detail and its incentives and interactions with other institutions. We also examine the intermediaries of the law, such as lawyers and other quasilegal professionals – what they do, how they developed, and how they compete, interact, and otherwise undermine or sustain the legal system.

Second, we focus on *pu fa* (the dissemination of law) – that is, how legal culture and legal consciousness are developed in contemporary China among Chinese citizens. What are the popular attitudes toward contemporary legal processes and institutions? How do historical traditions and individual attributes affect popular attitudes toward legal institutions? How is the legal consciousness of ordinary citizens changing and coalescing as the use of law to settle disputes increases?

Third, how has law been used to provide a narrative frame for ordinary citizens? If law is invoked by private citizens, does it have the power to challenge the state? Is there an evolving concept of the "private attorney general," that is, enforcement of legal norms through private litigation, to bolster application of the administrative state? Are courts being used as a "democratic" vehicle for ordinary citizens to shape and adjust, if not directly challenge, state-imposed norms?

LEGAL DEVELOPMENT AND INSTITUTIONAL TENSIONS

Legal institutions serve as the mediators of the law and as the site for the "performances of law." Yet, as social scientists have long pointed out, after legal institutions are put in place, the forces of institutional dynamics follow, adding texture to the picture. In several chapters, our authors explore legal institutions according to not only how they are designed, but also how they have meaningfully evolved through use in ways that were unintended. They also look at the institutional dynamics and competition that have added to or detracted from the development of law. In recent years, the Chinese state has implemented and encouraged the development of a wide array of competing legal institutions, ranging from the judiciary, the justice offices, and the legal affairs office to legal journals and periodicals – as well as a wide array of legal actors including judges, private lawyers, legal-service workers, and legal-affairs workers. Authors in this volume assess whether these institutions enforce rights or simply diffuse the bubbling dissatisfaction of public discord, or both. How do these legal institutions adjust state-society relations? In some ways, these institutions may be working at cross-purposes, even as they are reaffirming one another's legitimacy.

In Chapter 1, Fu Hualing and Richard Cullen trace the course of legal reforms from mediatory to adjudicatory justice and back to what they term "neo-mediation." Through this development, Fu and Cullen reveal the growing strength of the Supreme People's Court (SPC) as an institution in determining how civil disputes are to be handled when brought before the courts. Because civil matters historically did not rise to central government attention, the SPC has had unusual liberty in interpreting civil legislation and controlling the form and method of civil litigation in the courts. It is here, according to Fu and Cullen, that a limited form of "civil society" might operate within the parameters of China's current one-party state.

With this limited autonomy, through a series of five-year plans, it was the SPC that moved the civil courts away from "coercive" mediation to adjudication, from Communist Party–centric justice to judge-centric justice. By 1997, the quantity of mediated cases had decreased both in terms of real numbers and percentages. Under adjudication, the burden is placed on the parties to find and present evidence, and the judges, now relieved from time-consuming fact investigation and mediation, can simply decide the facts according to the law.

Yet, as Fu and Cullen point out, more formality has not led to greater satisfaction. Higher expectations and more formal but complex procedures have meant that litigants are less inclined to accept the legitimacy of court decisions. As a result, by the early 2000s, public discontent had led to a dramatic increase in petitions to the central authorities. Concerned with growing unrest, the Chinese Communist Party (CCP) turned its attention to the courts to demand that they fulfill the essential political duty of preventing disputes from occurring or ending them where they occurred – in other words, demanding that the courts refocus attention from the legal aspect to the political and social contexts of disputes and "mediate" toward a "harmonious society." Judges are pushed back from a "public and general role of norm-finding and norm-application to settling private disputes."

But a more interesting observation is the SPC's measured and slow response to this new dictate. As Fu and Cullen note, because judicial reform has taken place only within the judiciary, one would assume that the judiciary is particularly vulnerable to changing party policies. Yet today's more professionalized Chinese judiciary may be more defiant toward political incursions than expected. Hence, to date, while giving lip service to mediation, the SPC has limited this enhanced mediation to specified categories of cases and has reemphasized the importance of court processes and the voluntariness of parties. How this resistance plays out may well foretell important directions of future Chinese judicial reforms and will lend insight into how an institution, once established, may create dynamics of its own.

Whereas Fu and Cullen focus on the interplay between mediation and adjudication and the evolving role of the SPC, Carl Minzner examines the delicate process of discipline and rewards within the judiciary. Of course, "rule of law" requires an independent and competent judiciary on the ground level. Yet Chinese judges are often criticized for their lack of judicial independence and, on the flip side, lack of judicial accountability. In Chapter 2, Carl Minzner examines the constraints on lower

court judges in China today. Going beyond the accepted assumptions of the Chinese judiciary as under the political control of the Chinese state, Minzner examines how the internal institutional structure of incentives and promotions can work to inhibit the everyday workings of individual judges. Minzner reveals how the layered hierarchy of judicial discipline is a disincentive to judicial independence and how historical legacies compete with foreign ideas of legality.

Chapter 2 focuses on the Chinese court responsibility system, which promotes and disciplines judges based on a range of factors, including reversals by higher courts for legal errors. Meticulously researched, Minzner's surveys of various provincial regulations uncover an elaborate point system that is used to hold judges both individually and collectively responsible. This has led to lower courts evading responsibility in deciding cases and instead seeking informal advisory opinions from higher courts prior to decision making to avoid reversals. Importantly, Minzner traces this system to the imperial court system, in which Chinese judges are more a part of the bureaucracy than independent professional actors separate from the state. The chapter then supports the argument that Chinese legal reforms are path dependent and not divorced from its historical past. Although it notes the importance of changing legal culture, the chapter also emphasizes the importance of changing structural and institutional incentives in the development of an independent judiciary.

Chapter 3, meanwhile, returns to the theme of bureaucratic competition. Moving away from a focus on courts, Douglas Grob presents a study of the dynamics between China's administrative institutions that preside at the "large city" (*jiaoda de shi*) level and above and China's "legalized local states" below: the legal affairs offices at the county and city level.

Grob's analysis on the legal affairs offices (*fazhiban* or FZBs) of local governments is a much-needed study of a nonjudicial institution that is playing a growing but yet unnoticed role in reconciling local policy with central law dictates. FZBs do not have any legislative capabilities of their own, but they draw their power and influence from their roles in coordinating rule making among competing government departments and hearing grievances against local administrative offices under the Administrative Reconsideration process. As Grob finds, the importance of FZBs grows in settled ways, because in interpreting higher-up laws, the FZB is a gatekeeper in the administrative rule-making process and a gateway to redress for ordinary citizens. Furthermore, tracing each institution's strategic use of legal procedures to enhance its standing and

local reputation, Grob concludes that the resultant competition between FZBs and the Justice department offices, such as the *sifa ting* (SFT), can, under some circumstances, actually be beneficial to the rule of law project as each strives to best the other in establishing legality.

Given that lawyers often are the first intermediaries between rules and norms, a number of chapters in this volume focus on the legal profession, its development and growth over time, and the changing relationship between lawyers and their clients. Rule of law requires empowered legal professionals who are accessible to ordinary citizens. Historically, lawyers were viewed with distrust as "litigation tricksters," with Chinese citizens resolving their disputes without any professional assistance. But even as the numbers of lawyers, as well as the use of lawyers, have grown in recent years, the question of whether and how the legal profession can empower ordinary citizens remains.

Chapter 4 provides a useful and timely overview of the legal profession in China as it has developed during the past thirty years. Rejecting the premise that lawyers must be idealized as noble statesmen or vilified as "self-interested actors" or "deeply embedded politically or dependent on social networks," Randall Peerenboom disaggregates the Chinese legal profession, from the professional and newly privatized lawyer in elite law firms to the nonelite, legal-service workers in rural areas to the "barefoot lawyer" activists who have no formal legal training whatsoever. He is optimistic as he traces the development of the legal profession according to economic growth patterns, noting that the development of the legal profession in China by and large has been similar to its development in many other countries. Hence, Peerenboom predicts that a competitive legal market will lead to greater professionalism at every level, that a more robust economy will support more lawyers, and that as the market for legal services matures, individual consumers will become more sophisticated, leading to greater checks on lawyer misconduct. Ultimately, the general modernization story of economic growth, according to Peerenboom, will continue to fuel legal reforms for a long time.

PU FA AND THE DISSEMINATION OF LAW IN THE CHINESE CONTEXT

Institutions (even competing ones) are meaningless without a legal consciousness on the part of ordinary citizens and those whom these institutions address. What are the experiences of ordinary citizens with the legal system? In what ways is law synchronized with local dynamics, culture,