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## Chinese Courts as Embedded Institutions

## SCENE ONE

In an economically backward hinterland of northern China, a woman in her forties arrived at the court building early in the morning. She was ranting to every member of the court staff. She requested that the court's president come out and see her. She said she filed her divorce petition five months ago but the judge responsible had been ignoring her. The judge stalked her petition, she complained. She wanted a different judge to handle her case. After making a scene for an hour, the court agreed to the woman's request and sent in a new judge.

A few days later, we talked to the new judge, a middle-aged "old-hand" at the court, who admitted that this was a tough assignment. She said:

There is no way we'll approve her divorce petition. This woman is better off than her husband economically and socially. Her husband has just been laid off from a local state enterprise. He's hurt emotionally. And they have a son attending college now. We can't allow her to divorce the husband. It'd be too big of a blow to the man. All I can do is to keep talking to her, to calm her down. I'm in for many meetings with this woman.<sup>1</sup>

## SCENE TWO

It was the second day of our fieldwork in a grassroots court located in a big city in southern China. We were sitting in on the second divorce trial of the morning in Civil Court Number 1. The presiding judge was an old hand who has worked in the courts for over a decade. The defendant (the plaintiff's wife) did not show up. The presiding judge asked the husband a few questions. The man, in his late fifties and wearing a grey suit, was accompanied by a lawyer. He said there was no love lost between him and his wife. This was his second time of filing for divorce. Not long ago he agreed to withdraw his first petition after the court indicated to him that his petition would not be approved. He told Judge Wang that he had left his family in

2008 and had been separated from his wife since then. The judge said very few words. In fact, she remained silent most of the time. She went through pages in the case file to double check if what the husband said conformed to the written records. Toward the end of this short trial (which lasted for about half an hour), the man said to the judge:

[Plaintiff] In fact, I don't want to divorce. We once both dreamed of a wonderful future together. Throughout all these years of conflict, we've talked and tried to iron things out. Now, there is really *no road for me to walk* [emphasis added].

[Judge] So do you want a divorce or not?

[Plaintiff] I insist on a divorce.

The formulaic expression “no road to walk” (无路可走 *wu lu ke zou*) was used by the applicant to convey how reluctant and regretful he was to decide to divorce. He could not go on (no road ahead) even if he wanted to. He tried to avoid any remaining moral stigma against divorcees by suggesting that it was not his fault that the marriage had to end. The litigant in this case was greeted coldly by the judge: “So do you want a divorce or not?” She was probably thinking about if she could finish her third divorce trial in the morning. Realizing that the judge was not in the mood to moralize, the man responded: “I insist on a divorce.”

## HOMOGENEOUS COURTS?

Ever since the opening up of China's economy in the 1980s, both domestic and foreign attention to China's judiciary has increased in tandem with the country's growing international presence. This is so even though Westerners generally view its socialist legal development with skepticism. Major news outlets such as *The New York Times* and *The Economist* now commonly report the major trials of China, from the televised trial of former Chongqing party chief Bo Xilai to multi-billion-dollar civil trials targeting transnational Fortune 500 giants like Apple and Qualcomm.

The courts' veil seems to have been gradually lifted. Among the Western audience, there is now a vague sense of familiarity, as changes since the 1990s have produced apparent similarities between the Chinese courts and their Western counterparts. Gone are the makeshift courtrooms in old, rundown government buildings. In the big cities, courthouses are grandiose and modern; many feature a set of wide stairs leading up to the entrance, literally elevating courts to a higher level; some with added steel gates to protect the safety of judges, but also to create a sense of intimidation that mimics traditional Chinese courts, or yamen [衙门] (Jones 2013). Newer and younger judges are educated in law and trained in procedure, palpably different from the autocratic cadres of the Maoist era. They also look different. Right until the onset of the reform era in 1978, judges not only acted like military officers but dressed like them as well. It was not until 2001 that judges, when hearing cases, traded their old green military-style uniforms for Western-style pitch-black judicial robes, decorated with a

red stripe down the front (People's Daily 2000). Nowadays, they also wield and bang their gavels authoritatively, just like judges in the United States.

The growing literature of the past two decades studied the Chinese courts from a wide array of perspectives. A good deal of the works continue to be dominated by overviews of the law on the books rather than on how law is practiced. This legalistic approach treats the courts as no different from courts in Western democracies. One problem with this approach is that it takes the law on the books too seriously. It sounds heretical for us – academics who study the legal system as our careers – to make this claim. While the law on the books seems predictable and clear, the law in practice is flickering when the court runs up against the limit of its power. No reputable scholar would dispute that the written law was often not strictly followed in China. This sort of gap is not exclusive to China, of course, but China's gap is remarkable. Without keeping this in mind, any grounded understanding of how law works in China would be impossible.

There are also some empirically oriented studies. Yet, these works share an approach that treats all Chinese courts as parts of a homogeneous system. It is a top-down, monistic approach that focuses on the major policies of the Supreme People's Court (SPC). This approach finds support in successive SPC presidents' adoption of shifting policies during their reigns. For example, the 1990s witnessed the emergence of adversarial trial, but then the pendulum swung to the other end as mediation was prioritized in the 2000s, and now we are in the decade that promotes the use of law in governance. The Xiao court, named after SPC President Xiao Yang (1998–2008), was the court of professionalism, privileging the import of Western jurisprudential ideas and practices. The Wang court, presided over by Wang Shengjun (2008–2013), was the court of traditionalism, privileging social harmony and stability over the legal rights of individuals. And now the Zhou court, since Zhou Qiang's appointment in 2013, while still evolving, seems to be a hybrid, but with more Xiao than Wang so far.

Such an approach is appealing in its simplicity and clarity, an appeal similar to the “great man” narratives in history books. The approach makes sense in some contexts. It offers an easy way to intuitively make sense of the maelstrom of forces that influence the courts. However, this simplicity comes at a cost. It adopts a methodological premise that takes for granted the Chinese courts as a coherent unity. The approach treats the many Chinese courts as a highly coordinated, homogeneous organ at the command of the party-state. China, however, has the largest establishment of judges in the world (Zhu 2011). The total number of judges in China, by a recent estimate, has reached 195,000. The number should not come as a surprise, given the size of China and its status as the most populous country of the world. What is surprising is that for a country not known for its strong rule of law, China features one of the highest numbers of judges per capita. According to one calculation, China has 18.8 judges per 100,000 people. In comparison, the corresponding figure in the United States is 5, in England, 1.8, in France, 8.1 and in Japan, 1.7.

Among developed countries, only Germany recorded a higher number: 22.2 judges per 100,000 people (Zhu 2007:196). The contrast is even bigger when compared to other developing countries of similar size. India, for example, has 1.4 judges per 100,000 people (Government of India 2008). Of course, not all judges judge, a problem that the latest judicial reform is attempting to rectify.<sup>2</sup> But the sheer size of the judicial establishment does show one thing: the court system of China is a huge, complex bureaucracy.

In an unintentional but consequential way, this methodological premise of treating the courts as a unity coincides with the political premise promoted by the Chinese central government. It portrays the court system as constituted by a powerful central court with tentacles running into different corners of the country. But it is important not to conflate the ideology promoted by the party-state with the reality on the ground. From the standpoint of the former, the reach of the central state is never challenged or questioned. This is, of course, an implausible picture. Not even the Supreme Court of the United States, arguably the most powerful central court of Western jurisdictions, commands this degree of control of the everyday operations of its district courts. This also flies in the face of a long tradition of research that sees China as decentralized and “cellular.” Central policies promulgated downward certainly shape the institutional activities of local courts, but as has been shown by scholars, other sectors in China evince weak policy implementation, even fragmentation (Lieberthal 1992, 2004; Shirk 1993). It is unrealistic to assume that the vast court system is immune from diversity and fragmentation.<sup>3</sup> A top-down perspective inevitably offers little in terms of an analytical framework to account for the great variance across frontline courts situated in different locales of China. Implicitly, courts are seen to operate more or less in the same way, and that any differences, if existed, are secondary for formulating a clear-eyed understanding of the Chinese courts. This is most obvious in works that focus on analyses of the legal reforms and transitions (see Diamant, Lubman, and O’Brien 2005; Lubman 1999; Peerenboom 2002; Potter 2004; Zou 2006). It is also obvious among works that study specific sectors of the Chinese courts – for example, works that analyze how divorce cases have been handled in China (Alford and Shen 2003; Huang 2010; Woo 2003). In his otherwise-sophisticated treatment of the development of civil justice in China, Huang (2010) subscribes to a periodization analysis that sees the development of divorce law practices from a coercive reconciliation system to a formalized system of mediated settlement. While the work offers a nuanced and insightful treatment of the changing moral overtones of the Chinese civil justice system since 1949, it does not address the issue of synchronic heterogeneity within the Chinese courts, which is becoming more pronounced as the legal system evolves.

The overreached case of homogeneity also persists in works that study the Chinese court as a legal institution. For example, in his critical review of the question of judicial independence of China, Peerenboom (2010) adopts the similarity thesis and argues that Chinese courts are more similar to Western courts than many pundits

have argued. Peerenboom (2010:75–77) further argues that the critique of the lack of judicial independence in China is often overstated and based on vague, shaky assumptions. For example, Chinese judges decide most of their routine cases, and increasingly so, on their own. There is evidently growing independence and authority of the court. The public has become more reliant on the courts for dispute settlement. National regulations have sought to strengthen the personal independence of judges by limiting the practice of penalizing judges for reversals on appeal. And appointments and promotions are now also more merit-based. The general trend has been toward increased emphasis on professional skills and a greater role for judges in the same level and higher courts in decision-making.

Peerenboom is right that the developing trends identified above are happening in *some* courts in China, and his points are important, since Western scholars often ignore these developments when it comes to Chinese courts. The question, however, is whether changes are happening uniformly across the country. Here, treating the Chinese court system as a homogeneous institution overlooks important internal variations. Beyond their surface homogeneity, courts in China differ greatly from each other.

The two examples in the opening pages show the contrasting behavior patterns of the litigants and the courts' responses. Both were divorce cases. And yet, they display, in a clear, albeit simplified manner, an internal complexity often ignored if one looks at the Chinese court system on paper, or from a top-down view. Regional differences of judicial practice within China are plainly remarkable (see e.g., He 2009b, Woo and Wang 2005, Saich 2015, Su 2000),<sup>4</sup> so much so that it is more misleading than useful to conceive of the Chinese courts as parts of a unified, homogeneous institution. The *social* organization of the Chinese courts is varied. On the surface, it adopts a unitary, four-tier system that resembles unitary court systems of some European countries, such as that of Italy or of France. However, the vast size of the country and the “cellular” nature of local governments mean that, horizontally, this simple structure is fragmented. Among the unitary (non-federal) judiciary systems in Europe (e.g., Italy, France, Spain) and in East Asia (Japan, South Korea, Taiwan), the Chinese system is institutionally the most fragmented and diverse (Chen 2008; Keith et al. 2014).

In theory, basic-level courts are the local extension of the state's unified judicial authority. The SPC is supposed to exercise control over subordinate courts, as it has the broad power to promulgate judicial interpretations and directives, and sometimes to hear appellate cases on questions of both fact and law. In practice, however, the SPC does not command unquestioned allegiance from its lower, grassroots courts. The extent of its actual control varies socio-spatially. Indeed, grassroots courts are often an arena for both symbiotic cooperation and power struggles between the central and local governments. True, the central government has greater (but not complete) control over the “software” of the system – the law. But on the “hardware” of the system – personnel and finance – its control is iffy at best. Regional differences

are a result of the dynamic interplay between the central and the local and the adaptation of the latter (Zhou 2010; Nee and Mozingo 1983). Variations across the 3,500 different courts in China should not and cannot be overlooked. Consider the mosaic of snapshots of judges and their courts that we gathered:

- A judge in Shanghai works in her office until 11 PM in December. It is the umpteenth time she has worked overtime this month. She still needs to close a dozen more cases to make sure that her numbers this year beat those of last year.
- A young judge in Hulunbuir, Inner Mongolia, spends her December quietly. In fact, her court is closed most of the time during the harsh winter there. Sometimes she holds mobile court sessions in the neighborhoods of the litigants. It is too difficult for them to get to the courthouse.
- In a public hygiene campaign initiated by the local government, the president of a grassroots court in a poor inland province requires that all his judges stop working on cases for half a day to participate in the campaign, literally to help clean up the streets. Judges take off their robes, roll up their sleeves, pick up the brooms and sweep the streets and alleys.
- A grassroots court in Dongguan, Guangdong, thumbs its nose at the local government. The township government chided the court for being uncooperative. For two consecutive days, the government published a stern warning in a local semi-official newspaper, criticizing the court's decision to "unilaterally auction a piece of local land."
- A judge from the Pearl River Delta closed about 500 cases a year. He adjudicated over 80 percent of the cases he presided over. When asked if he would like to mediate more, he said: "Not really. I don't have much time for mediation but I'm OK. My court has ways to boost my mediation rate."
- An inexperienced judge from Yunnan closes the year with a tally of around 100 cases. By his own assessment, he works too slowly. He mediates over 80 percent of his cases, yet he still considers himself pedestrian. Some of his colleagues boast a near-perfect mediation rate of over 90 percent.

## THE TWO HEMISPHERES: WORK-UNITS AND FIRMS

This book accounts for these variations. We argue that the variations of court behaviors are primarily the outcomes of the changing environment that the courts face. This changing environment of judging is shaped by four types of forces: administrative, political, social and economic. The interplay between external and internal developments creates courts with palpable differences. Beyond offering a train-window view of Chinese courts, we will offer an analytical account. We are interested in not just describing but also explaining the recurring variations. The challenge is to make sense of the pattern underneath the surface of chaos, the "patterned contingency" of the practices of the Chinese courts.

We argue that these variations can be analytically understood as the differences between two types of courts: “work-units” and “firms.” We use the terms to signify two distinct bureaucratic types. The two differ in many aspects. Some differences are legal. They differ in how they interpret, and at times supplement, the laws passed by the central government, particularly in the civil and commercial areas of the law (deLisle 2014:243). They also differ in their sentencing practices (Trevaskes 2010). Most important, though, they differ in how much of the law is used. Some courts use more law; some use less.

At first sight, it is baffling that Chinese courts display different *propensity* to use the law. Some courts prefer to adjudicate; some, however, prefer to mediate. These variances are buried in official statistics that report the national averages.<sup>5</sup> Even within the same court, not all cases receive the same treatment. Some cases are quickly dispensed of, some are stalked; some cases are highly sought after, while some are avoided at all costs (see Clarke 2003). Sometimes, the courts embrace cases like sunflowers turning toward the sun. Other times, they retreat from cases like shy, shrinking violets.

Firms and work-units are characterized by their distinct clusters of institutional characteristics concerning organization, control, logistics, and communication – that is, the capacity to organize and control judges and other personnel and also to obtain material resources. They organize in ways that are practically preferable and feasible in some settings, but not in others. Their priorities in performance are also different. Firms prioritize on output. Work-units prioritize on outcome.<sup>6</sup>

The institutional distinction between the two types is in part a consequence of the deepening urban-rural divide that the Chinese society has experienced in the past few decades. It is no coincidence that courts that are most firm-like reside in big cities while courts resembling work-units are mostly located in the rural regions. In our view, the process of urbanization since the 1980s remains the most fateful force shaping the environment in which courts operate.<sup>7</sup> Indeed, China is at a critical point of urbanization. The picture of a small but concentrated urban China and a vast rural hinterland is outdated. In 2011, for the first time in its history, over half of its population lived in urban areas (Saich 2015:224). Other labels have been used to distinguish the external environment in which courts reside, including, for example, coastal vs. inland (central and western regions), developed vs. less developed. But there are “hybrid” distinctions locatable on the urban-rural continuum. The urban-rural divide bespeaks an internally differentiated court system that is now made of two hemispheres – firms and work-units.

As analytical concepts, the firm and the work-unit serve to make sense of the internal variances within the Chinese judicial system. They are ideal types in the Weberian sense. Any court in China today exhibits traits of both. In reality, the distinction across the courts in China is neither all-firm nor all-work-unit. The terms are used to denote “firm-ness” and “work-unit-ness” that specific courts display to a

greater or lesser extent. They are tools to get at the structural patterns that are otherwise unavailable for inspection. We will explore the institutional character of the Chinese courts by illustrating how the two types behave differently from one another. In so doing, we will draw from our interviews and observations conducted in courts of both types, from the Supreme People's Court to rural dispatched tribunals.

Admittedly, the distinction between firms and work-units is just one way, albeit a powerful way, to make sense of the variations within the court system. Courts may be distinguished, for example, by the extent to which they accommodate to local legal customs. Erie (2015), for example, suggests a strong presence of legal pluralism among Chinese Muslim minorities (the Hui) in Northwest China, which in turn points to a harmonious relationship between state law and local practices. We make the conscious decision to leave aside the ethnic-cum-cultural distinction. Since most courts reside in areas dominated by Hans majority, sticking with the firm vs. work-unit dichotomy allows us to articulate most sharply the structural patterns that affect grassroots courts on the broadest scale.

## THE WORK-UNIT COURT

Work-unit courts are organized and operated within the framework of the system of employment typical of the collectivist and socialist legacy: the *danwei*. We use the term “work-unit,” or *danwei* (单位) in Chinese, with great caution. It is a term steeped in history, and much contested among scholars of China (Lü and Perry 1997; Whyte and Parish 1984; Walder 1986).<sup>8</sup> For our purpose, the term underlines an institutional form with four key attributes: vertical hierarchy, administrative nature of the decision-making process, an organization-oriented model of promotion that values political assets over legal assets, and the role of the court not merely as an employer, but as a nexus of valuable resources for its judges.

Work-units prioritize tight vertical control over efficiency. One of the original functions of the *danwei* was to allow the Chinese party-state to track the political loyalty of its citizens. Citizens who worked for a *danwei* were monitored by the *danwei* (Belcher and White 1979). For each individual, the *danwei* maintained a dossier that personified the individual in the state bureaucratic system (Yeh 1997). This controlling nature of the *danwei* continues in the work-unit court. A strong vertical administrative hierarchy makes up the humming heart of the work-unit court. It serves as a “patrolling” system of political supervision (Shirk 1993) and as a means through which the balancing of interests within the local party-state is factored into the decision-making process of the court. For court leaders, tight hierarchical control minimizes risks and uncertainties. At the top of the hierarchy is a highly oligarchic decision-making body made up of senior judges and officials of the local party-state. Through the control of the administrative hierarchy, the court becomes an integral part of the local coalition of governance. Hierarchical



organization and associated controls lead to the limited capacities of frontline judges to cope with the complexity and uncertainty with which they are confronted. This limitedness is most visible when the court internally reviews cases that are considered potentially controversial. Explaining the root structure of hierarchical organizations, Reinhard Bendix refers to the epilogue of Leo Tolstoy's *War and Peace* to describe the hierarchical organization as a perfectly shaped cone: "As men unite for common action, the largest number of them take a direct share in the action, while a smaller number takes a less direct share. The commander-in-chief never takes part directly, but instead makes general arrangements for the combined action" (Bendix 1977:139). The Chinese work-unit court is more supervisory and controlling than the typical hierarchical organization that Bendix describes. Its operation requires that the most senior officials be *sometimes* "hands-on" in the decisions of individual cases. But this occasional "hands-on" nature means that internal controls are quite erratic and are not rule-based. Noncontroversial matters remain loosely controlled.

Since erratic control is a consequence of the *administrative* nature of the court's decision-making process, the system needs a mechanism to prevent it from going wild. As a result, the second feature of the work-unit court is the central role played by the vertical hierarchy as a replacement for the formal judicial process. Tight hierarchal control ensures that a judicial decision, when required, has adequate opportunities to allow for the input of political savvy and privileged information by the leaders of the court.

The decisions that Chinese courts make can be divided into three categories: (1) decisions too trivial to cover with legal rules; (2) decisions covered by legal rules; and (3) decisions too important to make without being reviewed by the vertical hierarchy.<sup>9</sup> Compared with firms, work-units make more decisions in categories (1) and (3). Decisions that fall within category (1) are family and neighborhood disputes that are too personal or just too trivial to be dealt with by law. It is best left to frontline judges to placate the parties involved and settle the conflicts. But work-unit courts also entertain a more expansive category (3). Work-unit courts tend to adopt a broad definition of "reviewable" cases – they would rather err on the side of caution. These criteria are developed locally and administratively by the court president and his group of senior judges. As such, whether a case is to be reviewed or not is more an act of political discernment than an application of legal rules. The boundary separating non-routine from routine cases is nebulous and ever evolving. Cases are reviewed not so much because they constitute *de novo* legal puzzles or because of procedural rigor (i.e., the legal sub-decisions leading to final decisions appear to contradict themselves), but because they constitute real-life conundrums that courts cannot resolve by following the law.

Some of these courts operate in the most uncertain and adverse environment for judging – a public with less knowledge and little trust of the law, a lack of quality frontline judges, an undeveloped economy that leads to an outsized proportion of

disputes for litigants engaged in multiplex relationship (family disputes and divorce), and, in some multi-ethnic regions away from the coastal area, a community divided by languages and ethnic cultures. For these courts, a high percentage of daily cases – in some cases almost all cases of an entire category (e.g., criminal) – are fed into the administrative hierarchy for review. It is clear that decisions on controversial cases are not motivated solely, and often not even primarily, by legal consideration. Political consideration, be it the welfare of the local party and government, or the interest of a major state-owned enterprise, or the repercussions of a certain decision on the public, looms large (Peerenboom 2002:280–343; Fu 2003). In Chapter 4, we account for the setup of the administrative hierarchy that concentrates the power to decide in the hands of the president and his lieutenants.

This brings us to the third point – the valuing of social and interpersonal skills over legal expertise in personnel decisions. Once they are recruited into the court, judges are rewarded and promoted according to their “people skills” and political acumen rather than their legal expertise and judicial experience. Within the work-unit court, judges are, in an important sense, no different from bureaucrats working in other state bureaus. They face the same problem as other political actors face: an institutional environment that is highly fluid and rule-deficient. Judges, from court presidents down to new assistant judges, are aware of the precariousness of their careers. Their power could be taken away, their budgets reduced, their standing among peers undercut, and in the most severe situation, their careers ruined. To make things worse, the judiciary is traditionally a weak player. Its function, from the standpoint of the party-state, is preventive. It averts social unrest. It consumes rather than generates resources (Lieberthal 1992:17). It lacks financial clout. Traditionally, it was also the weakest of the three public security bureaus. Chinese bureaucrats talk about the bureaucracies of the police, the procuratorate, and the court as *gong* (公), *jian* (检), *fa* (法), with the court (*fa*) routinely coming last.

Senior judges of China exhibit a different disposition from the low-key, aloof personality one usually associates with Anglo-American and European judges (this is, of course, a stereotype, which is an exaggeration of some typical traits). As leaders of a weak bureaucracy, they devote their energy in cultivating and nurturing personal ties with equal- or higher-ranked officials, not just in the police and the procuratorate, but also among other local government and party officials. This is particularly true for leaders of work-unit courts (see, for example, Balme 2010; Xiong 2014a). In an interesting empirical study, Zuo Weimin (2014) found that among the 200 judges surveyed in Province S, an inland province in southwest China, less than one-fifth of them ranked the role of a legal expert as being important for their presidents. By comparison, over half of them considered it important for their court presidents to act as a manager (56.5 percent) and politician (53 percent)! Most judges we interviewed referred to their presidents as the “number one leader,” or *yibashou* (一把手) in Chinese, rather than the most senior judge of the court.