

**Civil Justice in China:  
An Empirical Study of Courts in Three Provinces**

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INTRODUCTION

Through its rules of court, a system of civil justice regulates how disputes are to be resolved; but these rules are also messages about what we think is just and fair. As observed by C.J. Hamson,

it is in its legal institutions that the characteristics of a civilized country are most clearly revealed, 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.<sup>1</sup>

Legal procedure is not simply the practical method of securing the rule of law and ensuring the enforcement of substantive rights. Legal procedure also reflects our collective sense of justice.

Since 1978, China has made substantial strides in formalizing its civil justice system. China's twenty-five year program of legal construction has grown at an even greater rate as China entered the World Trade Organization, whose membership is contingent on greater transparency in the lawmaking process, more effective and formal procedure for challenging administrative action, and greater judicial independence.<sup>2</sup> As a country that has traditionally eschewed legal formality, China's experience in its construction of a formal, legal system is informative of the assumed effectiveness of legal transformation, and of the widespread predictions of

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<sup>1</sup> C.J. Hamson, *In Court in Two Countries: Civil Procedure in England and France*, TIMES (London), Nov. 15, 1949.

<sup>2</sup> Report to Congressional Committees, World Trade Organization, *Analysis of China's Commitments to Other Members*, GAO-03-4 (Oct. 2002).

globalization and harmonization of legal systems.

In recent years, Chinese courts, with a mandate from the Supreme People's Court, have implemented a variety of reforms in the civil litigation system. These experiments will culminate in a revision of the 1991 civil procedure code.<sup>3</sup> Some of these experiments reflect adaptations from civil law countries, others from the common law tradition, and still others, from traditional Chinese legal culture.<sup>4</sup> Yet, formal changes will not necessarily mean that the practice or the cultural norms of litigation and adjudication will also change. Nor does more formality necessarily mean greater justice. While formal procedures can increase consistency and predictability and serve as the cornerstones of rule of law, overly technical procedures can decrease rather than increase access to the courts, barring inexperienced litigants from ever reaching the merits of their cases.

To scholars and practitioners alike, how a civil case is actually litigated in the Chinese courts remains a mystery. Foreign lawyers continue to be baffled by proceedings within the courts, often preferring arbitration to litigation rather than taking their chances in the courts.<sup>5</sup> The number of civil cases, however, is escalating.<sup>6</sup> Who then is using the courts to resolve disputes? How are these cases being adjudicated? What is the interaction between the courts and those who use the courts? What kinds of procedural barriers or weapons do litigants have in the courts and how are they faring with them? Complaints about Chinese courts have long included judicial incompetence, long delays, inefficiencies, and costs. Formal procedure can add to or subtract from these problems.

This is one of the first systematic investigations of the reforms in the civil

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<sup>3</sup> The Standing Committee of the National People's Congress has announced a plan to revise all major procedural codes (criminal, civil and administrative). The revision theoretically aims to make procedure more just and protect the rights of citizens involved in litigation – be they plaintiff, defendant, or witness. Hu Cong, *Procedural Laws Need Improvement*, CHINA DAILY, Oct. 15, 2004, available at [http://222.chinadaily.com.cn/english/doc/2004-10/12/content\\_381548.htm](http://222.chinadaily.com.cn/english/doc/2004-10/12/content_381548.htm) (last visited Jan. 8, 2005).

<sup>4</sup> For example, the Several Provisions of the Supreme People's Court Relating to Civil Litigation Evidence, which entered into force in April 2001, maintained a formal evidentiary system that was based on the German civil litigation regime but borrowed elements from the adversary system. Thus, these Provisions provide for adjudication on the basis of burden of proof, and make court investigation secondary and exceptional. The Provisions confirm that parties in a case can pose constraints on the court, draw from U.S. law for pretrial evidence exchange, and impose limitations on the judicial powers in regards to time limits for presenting evidence.

<sup>5</sup> Andrew Jeffries & James Kwan, *Making a Case for Arbitration*, FINANCIAL TIMES.COM, July 27, 2004.

<sup>6</sup> STANLEY LUBMAN, BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO 255 (1999).

litigation process in China. Despite numerous reform efforts, little is known about them as there are few systematic studies conducted on the actual proceedings of civil cases in the Chinese courts. This article offers a comparative study of civil procedure reforms among three different provinces. China is an enormous country, and it is often easy to generalize about the status of its legal system without taking into account the economic and social variations among provinces. A case brought in Beijing may not be litigated in the same way as a case brought over a thousand miles away in Guangzhou. This study takes a systematic look at three provinces to assess the extent of differences and similarities between them.

It is important to note that this paper does not deal with the widespread allegation of corruption within Chinese courts.<sup>7</sup> In part, this is due to the recognition that even though corruption exists, it does not necessarily mean that there are no ground level judges honestly implementing and distributing civil justice in China, and who could benefit from an understanding of what procedures have been utilized and to what success. Additionally, this study is not trying to assess outcomes (the variable most likely to be affected by corruption). Rather, it documents what procedures are implemented by the various courts, how they are utilized, and by whom. It is an effort to assess the correlation between rules on the books and practical application.

To the extent that greater procedural constraints can limit judicial discretion (and indirectly, corruption), it is important to get a sense of what and how effective certain experimental procedures have been. Given the upcoming revision of the civil procedure code, this is an opportune time to explore what can be accomplished structurally. What reforms have been implemented by the courts, how, and to what success would be important in the ongoing restructuring of a legal system seeking to balance both formality and discretion.

## I. RESEARCH METHODOLOGY

Our research focused on civil and economic cases of first instance handled by intermediate courts in China.<sup>8</sup> Until recently, Chinese courts were separated into criminal, civil and economic tribunals. Theoretically, civil cases involved disputes between individual litigants or "natural persons," while economic cases involved disputes among state-owned enterprises and a variety of new economic actors such as companies and joint ventures, recognized as "legal persons." The complexities of economic reforms have led to such complicated legal disputes that Chinese courts began to merge the civil/economic distinction indiscriminately. Consequently, in

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<sup>7</sup> RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARD RULE OF LAW 281 (2002).

<sup>8</sup> Since the beginning of 2001, the Supreme Court has instituted the "grand civil pattern," in which economic tribunals of the courts throughout China are renamed as civil tribunals. Although the cases we studied are mostly divided into civil and economic cases, they are all referred to as "civil cases," in the following sections of this report.

2001, the Supreme People's Court combined both economic and civil tribunals. At the time of the cases under study, however, Chinese courts still retained their formal civil and economic divisions.

We chose three intermediate courts for our study for two reasons. First, there are more than 3,000 basic level courts, including over 300 intermediate and more than 30 higher courts in China, which receive and adjudicate civil cases of first instance.<sup>9</sup> However, civil and economic cases of first instance handled by the Chinese intermediate courts are more likely to relate to market activities. If a predictable legal regime were needed to ensure a market economy, then a detailed understanding of the workings of the intermediate courts would be a good place to begin.

Second, civil procedure reforms adopted in China are also more likely to be implemented by courts at the intermediate level and above. Compared to basic level courts, intermediate courts are generally based in urban centers with good communication, transportation facilities, and staffed by more qualified judges. Chinese intermediate courts have played a leading role in the development of experimental regulations and in the formation of the market economy. As such, these courts are more conducive to adopting dispute resolution methods different from traditional civil litigation methods in China. For these reasons, intermediate courts presented a good initial site for understanding the ideals and realities of Chinese legal reforms.<sup>10</sup>

We chose as our representative courts intermediate courts from three different regions—one in the economically developed coastal eastern region, one in the economically less developed inland western region, and one in the central region of China.<sup>11</sup> These three courts are not "model" Chinese courts chosen for their outstanding achievements or bold reform measures, nor are they entities with "piled-up problems for solution." These courts were chosen for study because they are "ordinary" or "typical" courts, and hence, may be most representative of courts in China.

The three intermediate courts are located in the provinces of Guangdong, Hubei

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<sup>9</sup> The Chinese legal system is a three-tiered system with the basic court being the first level trial courts. Intermediate Courts hear appeals from the basic courts as well as trials of large or "important" civil cases of the first instance. In turn, the High People's Court hears appeals from the Intermediate Court, and also, certain limited cases of the first instance.

<sup>10</sup> For a review of the empirical studies in the field of civil procedure, see Michael Lind, *Empirical Study of Civil Justice Systems: A Look at the Literature*, 42 ALBERTA L. REV. 887 (2005).

<sup>11</sup> To achieve the goals of this study, we applied what Professor Wang Yaxin called a "micro but total" methodology. For a description of this method, see Wang Yaxin, *The Rule of Law, Norms and Orders*, 2 TSINGHUA L. REV. 31 (1999) (P.R.C.).

and Guizhou. Between the months of mid-May and early July of 2002, we traveled to these three courts and collected data over the course of approximately seven to ten days. We used a combination of documentary study, participant observation, interviews and questionnaires for a more comprehensive picture.<sup>12</sup>

Before our arrival at the field and during the investigation, we made efforts to obtain access, as much as possible, to the relevant internal documents and publications of these courts. We supplemented our research with other relevant written information, including published judicial statistics, court publications, and news reports on the economy, society, and culture of the target regions.

With the cooperation of these courts, we reviewed randomly selected cases of first instance that were closed between the years 1999 and 2001. We used a sampling methodology. A total of 386 case files were consulted from all three intermediate courts—140 from Guangdong Province (hereinafter referred to as "Intermediate Court A"), 177 from Hubei Province (hereinafter referred to as "Intermediate Court B") and 69 from Guizhou Province (hereinafter referred to as "Intermediate Court C"). These 386 sample case files accounted for approximately one tenth to one third of the total files kept in these three intermediate courts.

We then observed selected court trials of civil cases and interviewed judges and attorneys practicing in these courts. In addition, we distributed survey questionnaires to the judges from these courts to gather a more in-depth, first hand report of how they preside over first-instance civil proceedings, as well as their awareness of recent legal reform measures. A total of 53 questionnaires were collected—18 from Intermediate Court A, and 35 from Intermediate Court B (including 6 from the basic-level courts nearby), but none from Intermediate Court C.

Finally, for our reference and comparison, we visited the basic level courts within the vicinity of the intermediate courts, audited their court sessions, and held discussions with the judges thereof.

## II. BACKGROUND INFORMATION OF THE THREE INTERMEDIATE COURTS

Intermediate Court A is situated in Guangdong, a province that has undergone rapid economic development since China began its economic reforms. Located in the northeastern part of the Zhujiang River Delta, Intermediate Court A has, under its jurisdiction, an area of 2,465 square kilometers, with a population of 6.5 million (1.5 million with Guangzhou residency or "hukou," and a transient population reaching 5 million).

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<sup>12</sup> We applied a triad of investigation methods consisting of documentary study, participant observation, interviews and questionnaires. See PETER H. MANN, *METHODS OF SOCIOLOGICAL INQUIRY* (1968); GARY EASTHOPE, *A HISTORY OF SOCIAL RESEARCH METHODS* (1974).

In 2002, the Economic Tribunal was dissolved and merged with the Civil Tribunal. However, from 1999 to 2001, Intermediate Court A accepted 659 economic cases and closed 610; accepted 104 civil cases and closed 97.<sup>13</sup> From Intermediate Court A, we collected one out of four, a total of 103 closed economic cases from 1999 to 2000, and consulted the files of 16 cases from 2001. In order of frequency, these cases involved disputes over bank loans, trade contract loans, and defaults on payment for building projects. Of these sample cases, the largest sum involved was 59.73 million RMB (about 7.4 million USD at 8 RMB to 1 USD), while the smallest dispute was over 1.52 million RMB.

From the civil tribunal of Intermediate Court A, we collected about one out of five civil cases, or 15 in total, and consulted the files of 6 cases from 2001. These cases involved disputes over real estate, leasing, and loans. The largest sum involved in the sample cases was 17 million RMB, the smallest was 1.50 million RMB.

TABLE 1: INTERMEDIATE COURT A (CIVIL AND ECONOMIC CASES)

Year	Civil Cases		Economic Cases	
	accepted	closed	accepted	closed
1999	44	32	271	212
2000	35	41	186	198
2001	25	25	202	200

Intermediate Court B, located in Hubei Province and the eastern part of the Plain between the Yangtze River and Han River, has an area of 8,467 square kilometers under its jurisdiction, with a population of 7.56 million. It is also a relatively developed area and the majority of its population are urban residents.

We collected one in ten, altogether 90, economic cases of first instance closed in 1999 and 2000 from Intermediate Court B. Files of the cases closed in 2001 were not consulted. In addition to disputes over bank loans and defaults on payment for building projects, the common category of cases ranged from those involving retirement of bonds to loans and debts between enterprises. The largest amount at issue involved in the sample cases was 28.31 million RMB and the smallest amount was 68,000 Singapore Dollars (or 42,862 USD at 1 SGD to 0.63 USD).<sup>14</sup>

<sup>13</sup> At the time, in the cases that Intermediate Court A accepted for trial, the amount in controversy ranged from three million to one hundred million RMB. Foreign-related and Hong Kong, Macao and Taiwan-related cases with disputed amounts of 1.5 million RMB or more also fell under the jurisdiction of Intermediate Court A.

<sup>14</sup> There were 3 cases involving a party from Hong Kong, Macao or Taiwan.

About one out of nine, or 76, civil cases were collected from Intermediate Court B, and the files of 11 cases in 2001 were consulted. These civil cases involved a wide range of issues including disputes over intellectual property, foreign-related marriage disputes, resident lawsuits against the district government, and disputes involving demolition, removal, and rebuilding of residential houses. The largest amount in controversy in these cases was 19 million RMB, while the smallest amount was about 10,000 RMB.<sup>15</sup>

TABLE 2: INTERMEDIATE COURT B (CIVIL AND ECONOMIC CASES)

Year	Civil Cases		Economic Cases	
	accepted	closed	accepted	closed
1999	319	341	699	700
2000	281	290	482	490
2001	268	279	519	539

Located in the southern part of the Yunnan-Guizhou Plateau in Guizhou Province, Intermediate Court C has an area of 16,480 square kilometers under its jurisdiction, but a population of only 2.96 million, of which over 90% are rural dwellers. The jurisdiction of Intermediate Court C covers 7 counties and one city, and some of the poorest areas in China. In addition to the city where the Intermediate Court is located, there is a State-designated poverty-stricken county and 6 province-designated poverty-stricken counties.

Because fewer cases were filed, the random sample for Intermediate Court C actually contains only 44 economic cases and 18 civil cases from 1999 and 2000, accounting for a third and a quarter of the statistical total of the two respective case categories. From 2001, files of 3 economic cases and 4 civil cases were consulted. Common categories of economic cases were disputes over bank loans, default on payment for goods received, building projects, as well as disputes over land use, infringement of personal rights, and division of property. The largest amount in controversy was 500,000 RMB, and smallest was 6,800 RMB.<sup>16</sup>

TABLE 3: INTERMEDIATE COURT C (CIVIL AND ECONOMIC CASES)

Year	Civil Cases		Economic Cases	
	accepted	closed	accepted	closed
1999	43	39	96	83

<sup>15</sup> There were 8 cases involving a party from a foreign country, Hong Kong, Macao or Taiwan.

<sup>16</sup> There was one case involving Hong Kong litigants.

2000	19	17	59	57
2001	10	8	44	42

### III. SOME PRELIMINARY OBSERVATIONS

Some preliminary observations can be drawn from the data. Perhaps unsurprisingly, our initial data revealed that differences in geography and economic development have led to differences between these Intermediate Courts in prescribed division of jurisdiction, in size of cases, as well as in the nature of the disputes involved in these cases. Yet, a few overall commonalities can be discerned.

#### A. *Who Brings Cases to the Intermediate Courts?*

As a general matter, more legal persons than natural persons used the intermediate civil courts. In Intermediate Court A, about 98% of the sample economic cases were those in which the plaintiffs were legal persons or other organizations (e.g. villagers committees), as distinct from individual litigants or natural persons.<sup>17</sup> That is understandable since the economic division was originally established for economic disputes involving legal persons. However, legal persons dominated cases in the civil divisions as well.

In economically developed areas such as where Intermediate Court B is located, the vast majority of civil cases involved legal persons as parties, (89.4% plaintiffs and 94.5% defendants). In both Intermediate Courts A and B, the majority (61% and 94%) of civil cases involved legal persons or other organizations as defendants. It would appear, then, it is not the everyday person who is using the intermediate courts (civil or economic) in the more economically developed areas.

TABLE 4: INTERMEDIATE COURT A (LITIGANT PROFILES)

	Legal Person	Natural Person	Missing Data	Total Cases
Plaintiffs (economic)	98 (83.1%)	20 (16.9%)	1	119
Defendants (economic)	95 (92.3%)	8 (7.8%)	16	119
Plaintiffs (civil)	7 (33.3%)	14 (66.7%)	0	21
Defendants	11 (61.1%)	7 (38.9%)	3	21

<sup>17</sup> There were 37 cases involving a party from foreign countries, Hong Kong, Macao, or Taiwan.

(civil)				
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Note: percentage is calculated against the total valid sample cases, not including the cases with missing data.

TABLE 5: INTERMEDIATE COURT B (LITIGANT PROFILES)

	Legal Person	Natural Person	Missing Data	Total Cases
Plaintiffs (economic)	86 (97.7%)	2 (2.3%)	2	90
Defendants (economic)	79 (100%)	0 (0%)	11	90
Plaintiffs (civil)	73 (89.4%)	13 (15.1%)	1	87
Defendants (civil)	68 (94.5%)	4 (5.6%)	15	87

In the less economically developed area covered by Intermediate Court C, there was generally less litigation, but, percentage wise, a greater number of natural persons in the court system. For example, in the civil division of Intermediate Court C, only 22% of the civil plaintiffs were legal persons or other organizations, while 77% of the civil plaintiffs were natural persons. Similarly, 27.3% of the civil defendants were legal persons or other organizations, but 72.7% of the civil defendants were natural persons. In the economic courts, however, legal persons dominated both as plaintiffs (67.3%) and as defendants (88.6%).

TABLE 6: INTERMEDIATE COURT C (LITIGANT PROFILES)

	Legal Person	Natural Person	Missing Data	Total Cases
Plaintiffs (economic)	31(67.3%)	15(32.6%)	1	47
Defendants (economic)	39(88.6%)	5(11.4%)	3	47
Plaintiffs (civil)	5 (22.7%)	17 (77.3%)	0	22
Defendants (civil)	6 (27.3%)	16 (72.7%)	0	22

The dominance of legal persons as parties may be attributable to the fact that more legal persons are using the courts in these areas, but also to the fact that the

jurisdictional amount for these courts is set at a higher level with a higher cap.<sup>18</sup> Intermediate courts A and B hear cases of the first instance involving larger sums than the lower courts. Legal persons, more than natural persons, are likely to engage in larger business transactions. In economically depressed areas such as Intermediate Court C, meanwhile, the jurisdictional cap is lower. In that court, we found that civil cases in which the plaintiffs and defendants were natural persons outnumbered those in which the plaintiffs and defendants were legal persons or organizations.

To the extent that intermediate courts are receiving more resources, legal persons rather than natural persons are reaping the benefits of legal reform, as they are the more likely users of the intermediate courts. In part, then, jurisdictional amount limits must be carefully considered in conjunction with other legal reforms. Jurisdictional amounts determine the kinds of cases as well as the kinds of parties that are brought before the court. Too high an amount would limit access in intermediate courts for ordinary cases as well as ordinary citizens.

### *B. Limited Attorney Representation*

Overall, the rate of attorney representation is still not universal in China and this appears to be true even in our three intermediate courts. This result is somewhat surprising since one would have expected higher attorney involvement in the cases of greater monetary value. Nevertheless, the highest percentage of attorney representation was in Intermediate Court A with 90% of the plaintiffs in civil cases receiving legal representation. We would expect that basic level courts would command even less attorney presence.

Again, economic development seemed to be a determinant of whether lawyers were involved. In Intermediate Courts A and B (located in economically prosperous provinces), the majority of all civil and economic cases of first instance had at least one party with legal representation. By contrast, less than 50% of the economic cases and 30 % of the civil cases of Intermediate Court C (located in a poverty-stricken province) had represented parties. In the civil division of Intermediate Court C, there were only 7 cases in which the plaintiffs were represented by counsel, and 6 cases in which the defendants had legal counsel.<sup>19</sup>

Interestingly, in cases where lawyers are involved, plaintiffs seem to garner more attorney representation than defendants. In all three courts, cases in which plaintiffs

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<sup>18</sup> For example, in 2003, the jurisdictional amount for Guangzhou Intermediate Court is 6 mil RMB for civil and economic cases of the first instance Wuhan 1.5 to 30 mil RMB for economic and 1 mil to 50 mil RMB for civil cases, and Guizhou 1.5 to 10 mil RMB for both economic and civil cases. See. [www.lawchina.com.cn](http://www.lawchina.com.cn)

<sup>19</sup> There was no case involving a party from any foreign country, Hong Kong, Macao and Taiwan.

had attorney representation far outnumbered those in which the defendants were represented. There could be several reasons for this: plaintiffs could be more motivated to get a lawyer because they feel more aggrieved and need to take affirmative (rather than defensive) steps, and/or plaintiffs have a harder time getting into court.

Legal reforms should not focus only on efficiency, but also on courthouse accessibility. One concern our data highlighted was that the filing process or the initial requirements for sustaining a case have become unduly restrictive for Chinese plaintiffs. Indeed, any legal procedure is an allocation of power between parties. Further legal reforms, in imposing greater formality, should consider if and how that reform measure could disparately impact particular litigants.

TABLE 7: INTERMEDIATE COURT A (ATTORNEY REPRESENTATION)

	Attorney representation	Missing Data	Total Cases
Plaintiffs (economic)	74 (64%)	1	119
Defendants (economic)	56 (48%)	16	119
Plaintiffs (civil)	20 (95%)	0	21
Defendants (civil)	14 (67%)	3	21

TABLE 8: INTERMEDIATE COURT B (ATTORNEY REPRESENTATION)

	Attorney representation	Missing data	Total Cases
Plaintiffs (economic)	52 (61%)	2	90
Defendants (economic)	48 (57%)	11	90
Plaintiffs (civil)	63 (66%)	1	87
Defendants (civil)	44 (52%)	15	87

TABLE 9: INTERMEDIATE COURT C (ATTORNEY REPRESENTATION)

	Attorney representation	Missing data	Total Cases
Plaintiffs	21 (45%)	1	47

(economic)			
Defendants (economic)	15 (32%)	3	47
Plaintiffs (civil)	7 (33%)	0	22
Defendants (civil)	6 (30%)	0	22

The latest focus on the adversary process and placing responsibility on litigants has resulted in litigants needing lawyers more than ever. Yet, despite dramatic growth in the number of lawyers in China, many cases are still litigated without the assistance of counsel.<sup>20</sup> As of 2000, China boasts some 150,000 lawyers, a small number by comparison to its 1.3 billion population. More problematic is the uneven distribution of legal services over China's vast geography including the subject areas noted here as requiring representation. While a lawyer in China was previously a worker of the state subject to central government distribution of her services, recent privatization of the profession has meant greater mobility and has also resulted in an unequal concentration of lawyers in profitable subject areas and economically vibrant geographic areas. Even with substantial growth in the legal profession, there remains a tremendous dearth of lawyers for litigants in need.

For example, some cases, such as marriage and family law disputes, are not as profitable as commercial cases. Therefore, lawyers are reluctant to practice in this area.<sup>21</sup> Additionally, while a sizable number of lawyers can be found in cities, such as Shanghai, a lawyer is a scarce commodity in the rural areas. There are 3,522 full time lawyers in the city of Shanghai alone, but a mere 1,220 in the entire province of Guizhou.<sup>22</sup> It is therefore not surprising that some courts, such as Intermediate Court C, garner such little attorney participation. This was also true in Hubei Province where lawyers also appear only in a small percentage of civil cases of first instance, only 10% in 1999.<sup>23</sup> Allowing the market then to determine the distribution of legal services has meant inequity in the distribution of justice.

<sup>20</sup> In 1995, of the 4,889,353 cases filed, lawyers reportedly participated in just 863,574. See ZHONGGUO FALU NIAN JIAN [LAW YEARBOOK OF CHINA] 957, 975 (1996).

<sup>21</sup> Margaret Y.K. Woo, *Shaping Citizenship: Chinese Family Law and Women*, 15 YALE J.L. & FEMINISM 99 (2003).

<sup>22</sup> ZHONGGUO XI FA XIN ZHENG NIANJIAN [CHINA JUDICIAL ADMINISTRATION YEARBOOK] 85 (2001). See also LAW YEARBOOK OF CHINA, *supra* note 20, at 896.

<sup>23</sup> Lawyers handled 20,173 of the 190,502 civil cases of the first instance. See ZHONGGUO FALU NIANJIAN [LAW YEARBOOK OF CHINA] 856, 862 (2000).

To improve access to justice, the Supreme People's Court in 1999 set up a procedure for waiving filing fees and other litigation costs. There have also been efforts to develop a nationwide legal aid system with the establishment of a “148” hotline. However, comprehensive legal aid programs have so far been in economically developed areas, such as Guangdong Province, leaving the rural poor still in need.<sup>24</sup>

To the extent that court reforms are formalizing procedure, one must bear in mind the problem of limited legal representation for poor litigants. More formality in the absence of legal representation creates barriers to litigants, serving injustice rather than justice. If indeed, in the majority of the cases in China attorney representation is still lacking, or only the more economically empowered party has attorney representation, then the push for formality needs to be revisited and/or coordinated to provide for greater legal assistance.

### *C. Who are the Decision Makers?*

In addition to legal representation, who the decision makers are and the ratio of judges to the number of cases are apparently major factors in how cases are handled. In Intermediate Court A, there has been a longstanding shortage of judges, although the judges as a whole were well trained. At the time of our data collection, there were more than 100 staff members in the Intermediate Court A—but only 8 judges in the Economic Tribunal and 4 or 5 judges in the Civil Tribunal. The shortage of judges and increased caseload resulted in Intermediate Court A facing difficulty in meeting statutory time limits for handling cases.

On the other hand, almost all the judges in Intermediate Court A were university trained in law. Both a busy docket and well-trained judges meant that Intermediate Court A was well-poised to adopt a procedural change from panels to hearings by a single presiding judge, or responsible judge. With well-trained judges, Intermediate Court A was more comfortable in enforcing a redistribution of work which enabled single judges to have greater responsibility and independence in hearing cases.

The opposite was true for Intermediate Courts B and C, where there were more staff members than cases accepted. There were 560 staff personnel in Intermediate Court B, with over 30 judges in its First Economic Tribunal, First Civil Tribunal devoted to cases of first instance, and Third Economic Tribunal for foreign-related or intellectual property cases. A minority of its judges have university law degrees,

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<sup>24</sup> In 1994, the Ministry of Justice announced plans to establish a nationwide legal aid system and formally established the Ministry's Legal Aid Center in 1996 to oversee the development of such programs. In 2000, the Ministry of Justice issued a circular urging the development of legal aid at the local level. *See* CHINA JUDICIAL ADMINISTRATION YEARBOOK *supra* note 22, at 47.

while the majority received their legal training at judicial training schools.<sup>25</sup> With a surplus in staff, Intermediate Court B actually cut 40 staff members in the last few years.

In Intermediate Court C, meanwhile, there were over 90 staff members. Originally, Intermediate Court C consisted of more than 10 judges in the Civil Tribunal and 6 in the Economic Tribunal. This year, the Economic Tribunal merged with the First and Second Civil Tribunals, with 6 judges for each division. Only a few of its judges hold a law degree.<sup>26</sup> Intermediate Court C, meanwhile, has seen a yearly drop in the number of civil and economic cases. Because the financial status of a court often depends on the fees from the cases it accepts, Intermediate Court C, at times, had to take the unusual step of accepting cases in which the amount in controversy was not within the court's jurisdictional limit.<sup>27</sup> This difference in staffing, and the educational level of the judges, perhaps, allowed more experimental reforms to take place in Intermediate Court A than in Intermediate Courts B and C.

#### IV. OPERATION OF CASES IN THE FIRST INSTANCE

From questionnaires collected from these courts, as well as from higher court directives, we received more specific information about how particular legal reforms were implemented in the three courts. These questionnaires revealed that court procedure differed between provinces, depending not only upon the resources of the courts, but also on the various efforts each provincial court made, with varying degrees of success, to improve the efficiency and fairness of their courts. Most interestingly, these differences contest the general criticisms lodged against Chinese reforms, implying they serve only the interests of the Chinese state, as clearly no uniform policy is being implemented.

We examined four stages of the litigation process in detail: case acceptance and pre-hearing preparations, hearings, collection and use of evidence, and ways of closing the case. Within these stages, we asked questions relating to party responsibility, judicial impartiality, formal hearings, and finality of judgments.<sup>28</sup>

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<sup>25</sup> 1.5 mil RMB marks the dividing line separating the jurisdiction of Intermediate Court B from its basic level courts over civil cases of first instance.

<sup>26</sup> At the time, the Intermediate Court C heard cases of first instance with an amount in controversy exceeding 300,000 RMB.

<sup>27</sup> This was often in response to the basic level court's practice of keeping cases with an amount in controversy above its jurisdictional level by splitting them into cases of smaller sums. The severity of this problem was alleviated somewhat last year when the Central Government took the measure of providing a special fund to courts in poverty-stricken regions such as Guizhou Province.

<sup>28</sup> These stages are part of a litigation model which Professor Wang Yaxin refers to as a "confrontational - adjudication structure." See generally, WANG YAXIN, CONFRONTATION AND

Briefly stated, our questionnaires probed variables representing the effort to ensure procedural guarantees and to place responsibility on the parties in the litigation process. Our questions reflected our belief that there are common norms for market-based legal systems and that these norms developed through the process of indigenous legal drafting and political debate may give these rules a distinctly local flavor.

#### *A. Case Filings and Pre-Trial Procedure*

Determining case acceptance and establishing a distinct pre-hearing phase of litigation are some of the most recent adjudication reforms in China. Among legal reformers, the debate is whether to go directly to a discontinuous trial (as in other civil law countries) or to hold a separate preparation phase prior to a single continuous trial (as in common law countries such as the U.S.). This reform was in response to the persistent critique lodged against the Chinese court that it does not actually hold a “true” trial of the evidence. In response, Chinese courts have experimented with separating out a preparation stage from the hearings, and establishing a single, continuous and more formal trial.

We examined this issue in the context of the three intermediate courts. For the period of 1999 to 2001, most Chinese courts instituted a case filing tribunal separate from the adjudication tribunal. All three Intermediate Courts also began to separate case filings. Intermediate Court A was the first to establish a separate case filing division in 1996, and last year, focused on establishing a separate pre-hearing procedure. Intermediate Court B established a separate case filing division in 1998, and Intermediate Court C was the last to establish the separate case filing division, after 1999.

The idea is to streamline filing and alleviate the workload of judges hearing substantive claims. Under this new system, the procedure for filing a case is pretty similar in all three Intermediate Courts. A staff member receives a complaint at the window of her respective case filing tribunal, conducts a preliminary examination for legal sufficiency, and fills in the case-filing examination and approval form. The staff member then passes the forms to the court president for signature and approval of the acceptance of the case. The complaint and accompanying evidence are forwarded to the head of the adjudication tribunal who then designates the lead judge, secretary and other members of the collegial panel. The lead judge will be responsible for delivery of the complaint to the defendant as well as for setting the first hearing date.

We observed the time between case acceptances and first hearings as indicators of differences in the pre-hearing procedures of the three Intermediate Courts. Each

Court differed markedly from one another in the time it took to hold the first hearing, reflecting not only different pre-trial reform procedures, but more importantly, different judicial attitudes toward going directly to a hearing.

Intermediate Court B took the shortest amount of time, followed by Intermediate Court A, then Intermediate Court C. Of the 145 sample cases from Intermediate Court B in which hearings were held, 81 cases (56%) held a first hearing within 35 days after being placed on file, 41 (28%) had a first hearing within two months, and only 23 (16%) had a first hearing more than two months after being placed on file. By contrast, of the 112 sample cases from Intermediate Court A in which hearings were held, only 21 (19%) had a first hearing within 35 days after being placed on file, 57 (51%) had a first hearing within two months, and 34 (30%) had a first hearing more than two months after being placed on file.

Of the 32 sample cases from Intermediate Court C in which hearings were held,<sup>29</sup> 11 (34%) had a first hearing within 35 days after being placed on file, 5 (16%) had a first hearing within two months, and 16 (50%) had a first hearing more than two months after being placed on file. The cases from Intermediate Court C that went to trial account for less than 50% of all the sample cases. The remainder did not meet the amount in controversy and were disposed of through mediation, rather than through formal court sessions.

The reason Intermediate Court A took longer to hold a first hearing was because Intermediate Court A had been experimenting with pre-trial preparation since 1998. As a result, Intermediate Court A judges would bring litigants together to exchange evidence in court before fixing the hearing date. An additional procedure, such as this evidence exchange, can result in a longer time between the filing and the hearing. Indeed, the procedure for evidence exchange is clearly documented in Intermediate Court A files. Of all the cases sampled from that court, 43 have specific records of some pretrial evidence exchange. In three cases, parties even exchanged evidence twice, and in one case each, parties exchanged evidence three and five times. Because of the time taken for this exchange of evidence, Intermediate Court A is more likely to delay its court hearings until well over two months after receiving its cases.

Intermediate Court C also took longer (over two months) to hold its first hearings, however, its delay was attributable more to a resistance than to an adaptation of reform measures. Our interviews with judges from Intermediate Court C revealed that they were more apt to follow the traditional method of Chinese courts in conducting investigation themselves and ascertaining the facts of a case prior to a hearing. By contrast, Intermediate Court B judges are more apt to "directly open the

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<sup>29</sup> The sample cases of Intermediate Court C that went to trial account for less than 50% of all the sample cases. The remainder did not meet the amount in controversy and were disposed of through mediation. The records showed that they have not been put into formal court sessions.

court session" or "take a step to open the first court session," and reducing preparation.<sup>30</sup> Indeed, on the question of whether "to directly hold a court hearing" or to make some pre-hearing preparations before holding a court session, judges from Intermediate Court B noted that if a case is not very complicated, they will simply "go over the file twenty or thirty minutes before the court is in session."

Judges apparently get their understanding of the case at the hearing itself. This was confirmed by answers to the question: "At what stage of the procedure do you feel you understand a case well?" 41 of the judges from Intermediate Court B answered "when they are about to hold the court hearing or after the hearing begins"; only 16 judges answered "during pre-hearing preparations." About the same number of judges from each of the two Intermediate Courts, A and B, chose the same answer. If there was an exchange of evidence, interested parties went to the court secretary's office to conduct this exchange which the secretary then recorded. Only a few other judges said that they often carefully read the files, summon both interested parties to court, and preside over the evidence exchange, so as to know the facts of the case before the hearing officially begins.

Despite the efforts to establish pre-trial procedures, judges continued to rely on the hearing rather than "pretrial" procedures as the main source of information. Answers to these sets of questions reflected not only the reality that procedure varies from one judge to the next and may be fact dependent, but also the residual but pervasive preference of "directly holding court sessions" rather than a separate pretrial phase as the main method of understanding the facts of the case. Pre-trial procedures have yet to serve as the main mechanism for judges and parties to understand and narrow the dispute.

Certainly, these answers reveal the difficulty of transporting legal culture. Different philosophical preferences on how best to obtain information about a case probably underlie the variations in legal culture and judicial practice. In civil law countries such as Japan and China, setting a time for an immediate hearing date is a means by which to commence a discontinuous hearing process that will assist in clarifying the matter under dispute. By contrast, common law systems, such as the U.S. and Great Britain, depend on a single trial as the culmination of a long period of preparation. With a single continuous trial as the prominent feature of the adversary system, a separate pre-trial phase is therefore necessary to narrow the subject matter in dispute to ensure an efficient and focused trial.

China, historically a civil law country, continues to view the hearing as the place from which information is obtained and issues are narrowed, despite efforts to

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<sup>30</sup> The three courts, like many courts in China, had a period of reform in which they used the approach of "direct court trial" on an experimental basis; but, as the samples show, only Intermediate Court B tended to go directly to trial.

separate "case filings" from "case hearings," and hearings from pre-trial. Chinese court reformers have, since our study, further established what is called "grand case filing." Under "grand case filing," the separate case filing tribunal, in addition to accepting cases, would also undertake the work of delivering the complaint and other litigation documents, appointing a presiding or responsible judge and other members of a collegial panel, fixing the date of court sessions, issuing notices, guiding interested parties in presenting their evidence, and presiding over the exchange of evidence before court and other preparatory work.

Yet, for any reform to take root in actual practice, it will require some additional adjustment of legal culture on the part of Chinese judges. Our data shows continuing resistance on the part of Chinese judges, as they persistently go directly to trial or view discontinuous hearings rather than implementing a separate pre-hearing phase as a means of understanding a case. As such, the addition of a pre-hearing preparation stage without some attention to the legal culture may be artificial.

### *B. Increasing the Formality in Court Hearings*

One of the consistent emphases of Chinese legal reforms is the centrality of a formal court hearing. Increasing formality at hearings goes part and parcel with the emphasis that formal pre-hearing preparation and hearings are the only occasions for a judge to obtain information. These reforms hope to ensure that judges are not influenced by information received out of court where the opposite party is not given an opportunity to respond.

As an initial matter, we need to define what constitutes a formal "court hearing." By statute, a hearing is formally convened when (1) the hearing notification and complaint has been delivered in advance according to statutory procedures; (2) each member of the collegial panel is present to preside over the court session; (3) the secretary makes "formal record" of the hearing; (4) the hearing is held in a formal court session; (5) the hearing proceeds according to statutory procedures; and (6) the judges are in uniform or in a judge's robe. Using the above criteria, most of the sample cases we reviewed had undergone at least one formal court hearing.

Our investigation of the three Intermediate Courts revealed that substantial efforts were made to emphasize the importance of a "formal hearing." In each court, every case resolved by court judgment or court mediation had at least one standard court hearing record. Also, in the court sessions we observed, we saw substantive confrontations between interested parties and litigants. However, from reading case files and interviews, we also concluded that judges do not always rely solely on the formal hearings to obtain the information they use to resolve cases. Despite the emphasis on "formal hearings," there were still many informal meetings.

Besides formal "court hearings," there were also instances where a responsible

judge simply summoned both parties to exchange information or to seek dispute resolution. Generally, these were not the pretrial evidentiary exchange proceedings. Instead of the entire collegial panel, one responsible judge, usually not formally dressed, presided. On some occasions, interested parties themselves were summoned and, at other times, their attorneys were. Parties were often summoned by telephone instead of by formal written notice. The venue for these sessions was not always the courtroom, but rather a judge's office or location outside the courtroom.

According to our interviews, notes were recorded at these sessions, but they were variously called "inquiry notes," "investigation notes," "evidence-cross-examination notes," "notes of talks," "notes of account comparison," or "mediation notes." As these titles suggest, the functions of the informal sessions were quite varied. They were used for exchanges of claims by the parties, consultation on the procedure by which the case was to proceed, presenting and checking evidence, debates by the parties, mediation by the judge, or a combination of all these functions.

From our review of sample case files, there were fewer "informal" court sessions in the files from Intermediate Court A, while there were many such informal sessions in the case files from Intermediate Court B and C. However, where informal court sessions were held after the formal court session in Intermediate Court B, instead, they took place before the formal court hearing in Intermediate Court C.

There were fewer informal court sessions in Intermediate Court A than in the other two courts perhaps because of the stronger presence of formal pretrial evidence exchange. Many of the functions carried out in informal sessions were carried out in formal pretrial evidence exchange proceedings. In addition, in our sample cases, there were slightly more cases in Intermediate Court A for which two or more formal court sessions were held than in the other two Intermediate Courts.<sup>31</sup> This may explain why Intermediate Court A held fewer informal court sessions.

By contrast, Intermediate Court B often held informal court sessions after the formal one. This practice may be related to its preference for going directly to hearing. After initial court sessions are held and the statutory procedural requirements satisfied, the work to further ascertain the facts of a case appears to be done in informal sessions that are less draining on resources. Finally, sample cases from Intermediate Court C revealed that the facts of the cases continued to be obtained from informal court sessions even before a formal court hearing was held. This may be a residual of past adjudication patterns, in which the judge conducted the investigation and reached conclusions before the hearing. In sum, although it has no

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<sup>31</sup> Of the 112 sample cases that went to trial in Intermediate Court A, 17 had two formal court sessions, 2 had three formal court sessions, and 4 had four formal court sessions. By contrast, of the 145 sample cases that went to trial in Intermediate Court B, 18 had two formal court sessions, 3 had three formal court sessions, and 1 had four formal court sessions. Only 1 case in the sample cases of Intermediate Court C had two formal court sessions.

express basis in law, holding informal meetings remains a widespread practice in some courts. This can be problematic as it presents judges an unchecked method of gathering information.

Certainly, some form of less formal court sessions may be necessary. While a formal court hearing gives interested parties the fullest procedural guarantee of due process, one or two formal court hearings may not be sufficient to provide the court enough information for the fair resolution of a dispute, and repeated formal court hearings can be costly. Other countries provide simplified procedures and more informal occasions for information exchange and dialogue between parties and judges without compromising minimum due process guarantees. The " case arrangement session" (手续协议期日), "the trial preparation session " (准备期日) , and "the settlement session " (和解期日) in countries like Germany and Japan, as well as the "pretrial conference" in the United States, all serve this need. A similar procedure, less formal than full trial, is needed in the Chinese courts so long as it carries minimum procedural protections, and indeed, China is attempting to put in place a pretrial phase along these lines.

The question then is whether these informal sessions conducted by Chinese judges meet minimum procedural requirements. Generally speaking, having both parties present before the court renders it possible to have confrontational oral debate, and the presence of a responsible judge in a session satisfies the principle that a decision-maker should adjudicate by listening to debates between the parties. In other words, if an informal court session is a venue in which substantive information is shared, and this informal session has a judge and provides an opportunity for opposing parties to respond, then minimum procedural requirements are met even if the session is not public, and even if the note taking, venue, and the judicial dress are all informal.

However, a considerable percentage of the "informal court sessions" in our sample cases did not meet these minimal requirements. If materials presented to a judge were later shown to the absent party with the opportunity to voice objections, this might meet the minimum. But our sample cases indicate that the judge sometimes only notified one party to appear for a court session and filed these notes as the "notes of the inquiry," "notes of investigation" and even "notes of evidence of cross-examination."<sup>32</sup> Obviously, this cannot be called a "court hearing" or "pretrial

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<sup>32</sup> For example, from the sample cases of Intermediate Court B, there are cases in which the first formal court session was held (on average) 54 days after the cases were filed, and the court had already summoned one party twice for court inquiry, and searched for witnesses outside the court to obtain evidence. After second court sessions, talks were held again with one interested party outside the court, and the two parties were summoned to the court for "cross-examination of evidence." These cases were ultimately closed through mediation. There are also cases from Intermediate Court C in which the judges questioned the defendants immediately after the case was filed and then "talked" to third persons. After investigations in the relevant organizations, both parties were then brought together for reconciliation, and

session” in any sense of the word because the absent party was not given minimum procedural protection. From our interviews with judges and attorneys, however, few felt that such occasions were problematic.

In summary, judicial consensus remains centered around the importance of court hearings in China. Our sample files showed that at least one formal court session was held in most cases. However, the Chinese judicial community has not as yet delineated a satisfactory division between formal and informal court sessions, nor reached a consensus about the propriety of informal meetings as a means to collect the facts of a case without depriving parties of their minimum procedural guarantees. Coupled with the potential that a judge may have other more questionable methods of accessing the facts in a case, this lack of division and the lack of awareness of the minimum procedural guarantees must be addressed and treated with care.

### *C. Collection, Presentation, and Use of Evidence*

#### 1. The Changing Role of Courts in Collecting Evidence

Another recent Chinese legal reform is the introduction of party responsibility for collecting and presenting evidence, and a movement away from the inquisitorial system of judicial inquiry. In a party responsibility system, each party bears the duty to find and introduce evidence while the court's role in collecting evidence is secondary. One rationale for introducing a party responsibility system in China is that it relieves the court workload, so that judges can focus primarily on managing and adjudicating, rather than, litigating cases. Ideally, a party responsibility system ensures greater judicial impartiality and protects against judicial corruption. The argument is that, if a judge is involved in the investigation of the facts, he or she may become predisposed to one side and will not have an open mind to all the available evidence when deciding the case.

Beginning in the early 1990s, Intermediate Courts A and B transitioned to a party responsibility system. Intermediate Court C began this reform in the second half of the 1990s. While all of the courts indicated that the transition has taken place, there remain instances where judges are still collecting evidence, with varying frequencies and intensity.

The sample files of Intermediate Court A showed that there were 16 cases (12% of the total) in which the court officially conducted investigations within its capacity. In two of these cases, the court conducted the investigation twice within its official

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failing reconciliation, a formal court trial was held on the 69th day after the cases were filed. These cases were then closed with a judgment. Similar examples can also be found in Intermediate Court A, however, fewer of them.

power.<sup>33</sup> As for Intermediate Court B, there were 23 cases (accounting for 13%) in which the court conducted official investigations. In seven of these cases, the court conducted official investigations twice. As for Intermediate Court C, there were 16 cases in which the court conducted official investigations (accounting for 20%). Of this number, there were 6 cases in which the court conducted official investigations twice.

Thus, it appears it is an accepted practice for interested parties to present evidence in all three intermediate courts, but court investigations have not entirely disappeared. Within each court, judges themselves still collect evidence to varying degrees, depending on judicial temperament, philosophy, and ability. In response to the question on how to handle evidence collection within one's official power, 8 of the 18 judges from Intermediate Court A said they investigate only "upon the application by an interested party," 9 choose "depending on practical circumstances", and only one selected "he may do so of his own accord if he thinks it is necessary." Of the 35 questionnaires collected from Intermediate Court B, 11 judges said they do not investigate of their own accord, 6 chose "depending on practical circumstances," and 15 chose the last answer. We estimated that the responses of the judges from Intermediate Court C would be similar, if not more so, to those of Intermediate Court B.

The difference might also be a practical one. In addition to varying regional cultures, case categories, and economic development, one of the very important factors accounting for differences in judicial approach is workload. Judges in Intermediate Court A have long faced an overburdened docket, and being short-handed, have no time to actively investigate and obtain evidence. By contrast, judges in Intermediate Court C had time to undertake the task of investigation and are likely to continue to do so.

## 2. Burden of Proof

Associated with a party responsibility system is, of course, the concept of burden of proof—that is, established rules defining which party bears the burden of producing sufficient evidence to win or defend her case. Our questionnaire indicates that judges generally accept this concept of burden of proof. As to the question of "how you view and use the distribution of burden of proof to decide who wins or loses a litigation," 13 of the 18 questionnaires collected from Intermediate Court A chose "if the interested party bearing the burden of proof is unable to go on with his presentation of evidence, it should be judged that the interested party under the burden

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<sup>33</sup> For our purposes, we defined an "official investigation" as those investigations conducted before any record that an interested party had requested it, where the interested party is not present on site, where court workers looked for witnesses outside the court or summoned a witness to be questioned before the court or were entrusted with appraising the information gained from a witness through a visit or telephone call.

of proof loses the case even if the critical facts of the case are not clear." Next, 4 judges chose the answer "the method of deciding a case based on the distribution of burden of proof should be avoided as much as possible." Under the category "methods to be avoided," one judge listed conducting active investigations within the court's official power, engaging in more mediation, encouraging withdrawal, and other measures. Interestingly, no one chose as the answer, "the burden of proof should not decide which party wins or lose."

Of the 35 questionnaires collected from Intermediate Court B, 24 chose the first answer, 5 the second answer, three of whom listed the same methods to be avoided, and 2 chose the third answer (that burden of proof should not decide which party wins or loses) indicating that instead, "the decision should be based on facts according to law."<sup>34</sup> As to whether the burden of proof was actually used in deciding a case, our interviews indicated that some cases, although not many, had been decided by this method. Several judges interviewed indicated that while they did apply the burden of proof, this was something they have done only in recent years.

Such judicial awareness of the "burden of proof" means that the party initiated, party responsibility system, along with its "burden of proof," is widely acknowledged by judges. Intellectually, Chinese judges support the idea that burdens of proof are decisive in close decisions. However, as discussed earlier, whether judges in practice are allocating this burden on litigants is a different matter. Other parts of China's adjudication system may conflict with the underlying logic of the party initiated, party responsibility principle.

### 3. Forms of Evidence in the Intermediate Courts.

By and large, documentary evidence remains overwhelmingly important in Chinese civil courts, while witnesses and oral testimony continue to play a more limited role. From the sample files reviewed, documentary evidence was presented and used extensively in all cases from the three Intermediate Courts. In many sample files, documentary evidence even appeared to be the only form of evidence presented, with cases resolved on that basis.

Specifically, oral evidence was presented in only 16 cases from Intermediate Court A, with only one sample in which there was a specific record of oral testimony given by witnesses in court.<sup>35</sup> Similarly, in Intermediate Court B, witnesses and oral

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<sup>34</sup> There was some indication in the questionnaire responses that not all respondents understood the concept of "burden of proof." In addition, one limitation of information collected from questionnaires is the tendency of nearly all respondents to give the "model answer."

<sup>35</sup> For our purposes, we defined "witnesses and oral evidence" as those circumstances in which statements were put before the court by any person other than an interested party and his attorney, or any witness recorded as having appeared at trial. The former included notes

evidence were presented in only 16 cases, of which only two cases contained a specific record of in court oral testimony. Interestingly, witnesses and oral evidence were most frequently seen in the sample cases from Intermediate Court C. There were 18 such cases, of which two contained records of witnesses in court. As for other forms of evidence, appraisals were found in 28 cases, material evidence (mainly photographs) in 7 cases, and records of on-site investigation, examination, and audio-visual material, each in one case..

In our interviews, judges pointed out that almost all civil and economic cases were decided based primarily on documentary evidence. These judges found oral evidence and witness testimony to be unreliable. They believe that witnesses do not always speak the truth as they often have an interest in the disputes or are closely related to one interested party or the other. In answer to the question: "Have you ever taken a witness or any oral evidence as evidence in a case?", 18 judges from Intermediate Court A selected "yes, but not often," and one answered "very seldom." Not one judge chose "very often" as the answer. Similarly, in the 35 questionnaires from Intermediate Court B, 27 judges selected "yes, but not often", two answered "very seldom." Six judges did choose "very often," but two of them were judges from the basic level courts.

The reluctance to accept witnesses and oral evidence seems to be connected with the manner in which they are presented. A party or his attorney generally would not request that a witness be present in court (apparently because it is difficult and costly to do so), but instead asked these witnesses to produce a written statement, or talked to the witness and submitted a record of the conversation as oral evidence. Without the witness' presence in court, however, it is difficult for the court to assess the credibility of the testimony being presented. Having only a document of "oral testimony" will inevitably cause a judge to question accepting such "oral evidence." Equally problematic, to further his understanding of such testimony, a judge is likely to proceed to question the witness directly, often without the parties present. This sometimes actually replaced testimony by a witness in court. In sum, because of the way witnesses and oral evidence are presented, they are still not actively used in the Chinese courts.<sup>36</sup>

Before oral testimony is to be given greater weight in Chinese civil litigation,

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taken during questioning of witnesses by judges and also written statements submitted to the court by an interested party after speaking with a witness (often entitled "investigation records"). We termed all written materials acquired prior to the proceedings as "documentary evidence."

<sup>36</sup> For an interesting comparison of the manner in which witnesses and documentary evidence are used at trials in the United States, on the one hand, and in Germany and Japan, on the other hand, see TANIGUCHI YASUHEI, BETWEEN VERHANDLUNGSMAXIME AND ADVERSARY SYSTEM-IN SEARCH FOR PLACE OF JAPANESE CIVIL PROCEDURE 487-501 (1990)(F.R.G.).

more thought is needed to structure the manner in which it is presented. It is not enough to advocate for the use of witness testimony or for improving the way witnesses are questioned in court. It is also necessary to give thought to the mechanisms for summoning witnesses to court, to ensure that "oral testimony" is given in court, and the conditions under which witnesses are encouraged to go to court.

#### *D. Case Resolution*

Another major change in the Chinese civil process is the manner in which cases are resolved. While statistically, mediation seems to be on the decline, our research shows that judicial culture has not kept pace. Judges still believe in the importance of mediation and are ambivalent about rejecting its role in civil justice.

Statistically, mediation-centered adjudication seems to be on the wane in civil litigation in the intermediate courts. Of our sample cases, the percentage of cases closed by judgment from Intermediate Court A was 61% (including 11 closed with default judgments), cases closed by mediation were 16%, cases withdrawn were 16%, and cases dismissed were 9%. Similarly, the percentage of cases closed by judgment from Intermediate Court B was 76% (including 8 closed with default judgments), cases closed by mediation were 16%, and cases withdrawn were 10%. There were only 3 cases dismissed. The remaining cases were terminated by transfer jurisdiction. These statistics were pretty consistent in other years for these two Intermediate Courts.<sup>37</sup> In Intermediate Court C, the percentage of cases closed by judgment was low, but those through mediation was high. Except for cases that "could only be mediated for non-compliance with the prescribed jurisdiction," the percentage of cases closed by judgment was 54% (including 7 by default judgment), cases closed through mediation were 34%, and cases withdrawn were 9%.

In response to our question: "What is the percentage by which you close cases in the various manners?" 13 responses from Intermediate Court A chose "80% or above for cases closed by judgment" and "20% or lower by mediation." 12 responses from Intermediate Court B chose the same percentage, but more judges chose "50-70% by judgment and 30-40% by mediation," with only 4 choosing "the percentage of cases closed through mediation is higher than by judgment."

But in response to the question: "How do you view and use the method of

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<sup>37</sup> For example, in 1999, the average percentage of all civil and economic cases of first instance closed by judgment in Intermediate Court A was about 61%, while the percentage of cases closed through mediation was 14%; in 2000, the former was about 74%, and the latter 9%; in 2001, the former was 62%, and the latter 11%; and the percentage of the cases withdrawn were 8%, 4%, and 11% respectively. For Intermediate Court B, we only have the statistics for 2000, which show that the average percentage of cases closed by judgment was 68%, cases closed through mediation was 11%, and cases withdrawn was 13%.

mediation?", judges expressed more ambiguity. From Intermediate Court A, 3 of the 18 responses chose "I think it is important and effective, and use it often," 4 chose "I think it is not important in proceedings, and do not often use it," but 10 chose "It should not be generalized, and depends on specific circumstances." In the 35 questionnaires collected from Intermediate Court B, 8 (two were judges from basic level courts) responded with "I think it's important and effective, and use it often," only 5 (including one judge from a basic level court) chose "I think it is not important in proceedings, and do not often use it," and 21 chose "It should not be generalized, and depends on specific circumstances."

As a whole, cases closed by judgment far outnumbered the cases closed through mediation. All three intermediate courts attached importance to the process of reaching judgment in the proceedings. However, a higher percentage of cases closed by judgment does not necessarily reflect a judicial preference for adjudication as the chosen method for dispute resolution. Judges themselves expressed preference for mediation. If the goal of reforms is to move toward greater numbers of adjudicated judgments, then much work must be done with judges to change the culture of preference for mediation, and to ensure that they accept the adjudicated process by which judgments are reached.

#### IV. CONCLUSION

China is reforming its civil litigation system and its progress is indicative of the role of law and courts in China today. Procedural rules can ensure greater consistency, predictability and transparency, all said to be features fundamental to "rule of law." Furthermore, how civil litigation is structured and processed in the court system reflects not only the desire for consistency, but also power dynamics between judge, litigant and lawyer, and ultimately, the relationship between the citizens and the state.<sup>38</sup>

Our initial data indicates that as expected, reform efforts are mixed. There are successes as well as weaknesses. For one, Chinese intermediate courts are being used overwhelmingly for commercial and business disputes. Unlike courts in the U.S., civil litigation has not yet been used in the Chinese intermediate courts to settle competing social norms. Courts remain primarily the arbiter of individual disputes rather than a means to resolve controversial social issues or to police illegal corporate conduct. And, since the subject matter of cases in the Chinese intermediate courts is primarily business related, it is perhaps unsurprising that legal persons more than natural persons seem to be taking advantage of the intermediate courts. To the extent that the intermediate courts are getting the greater bulk of resources and better judges, there is then the concern that ordinary citizens may not be benefiting from Chinese legal reforms.

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<sup>38</sup> MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS 25-26 (1983).

It is also quite clear that the direction of procedural reforms is to move towards the establishment of a two-phase litigation structure along the common law model. Yet, this structure has yet to firmly take shape in actual court practice. In all three of our sample courts, judges grappled with their role in the collection of evidence, when to set a court hearing date, when to mediate, and the role of a separate phase of pre-hearing procedure. While there is an increasing separation of formal hearings from pre-hearing procedures, judges are still inclined to do informal investigations and collect evidence. While there is a concept of parties bearing the burden of proof, judges are somewhat reluctant to allow failure to bear that burden to be decisive in cases.

Finally, even beyond the level of evidence, judges are still shaping the issues and subject matter of the controversy. In the terminology of the civil law system, *verhandlungsmaxime* (the idea that the court must abide by the parties' decision on what should be the subject of trial) has been met with mixed results. This presents a dilemma, because absent full participation, parties will be more apt to challenge the finality of decisions. It is perhaps not unsurprising that enforcement of civil judgments proved to be one of the major challenges in the Chinese legal system.<sup>39</sup>

A number of important lessons may be drawn from these conclusions. For one, the persistence of legal culture is not to be underestimated. The resistance to new procedures can be traced to the tenacity of the inquisitorial system and even traditional Chinese legal culture. In many civil law countries, including China, there is a sense that the objective of litigation is to discover and unveil an objective rather than a legal truth, and the judicial system should not be called upon until the evidence is clear. With that in mind, there is a greater tendency to restrict what cases come into court (hence, more restrictive filing procedures) and a stronger belief in judicial involvement in unearthing the truth.

There is the further sense that adjudication of civil cases is not purely the private business of the disputing parties, but a social duty of the state to resolve disputes.<sup>40</sup> But this does not mean that courts are to shape social norms and resolve broad social issues as brought by the parties before the courts. Rather, as in countries like Germany, the culture of a state's social duty means continued reliance on judges in shaping complaints, and less on party autonomy. By contrast, in the U.S., trust in the legal system but mistrust of excessive governmental powers has meant greater reliance on lawyers to shape the disputes that are being taken to the courts.

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<sup>39</sup> Donald C. Clarke, *Power and Politics in the Chinese Court System: The Enforcement of Civil Judgments*, 10 COLUM. J. ASIAN L. 1 (1996).

<sup>40</sup> Peter Gottwald, *Civil Justice Reform: Access, Cost, and Expedition. The German Perspective*, in CIVIL JUSTICE IN CRISIS 207 (Adrian A.S. Zuckerman ed., 1999).

Second, reforms must also take into consideration local and practical realities. Ultimately, there may be a disjuncture between policy goals and local and practical needs in China. For example, the party responsibility system is highly dependent on attorney participation. The more formal the legal system and the more responsibility placed on parties in unearthing evidence and shaping complaints, the more lawyers are needed. Yet as our cases indicate, attorneys are still absent from most cases in China. Despite top-down preferences for establishing a party responsibility system,, the reality and practicality are that judges must remain involved in shaping and investigating cases in the absence of legal representation. Much more is needed, then, to reconcile top-down reforms with bottom-up realities, both externally and internally within the legal system.

Finally, reforms cannot be imposed piecemeal without acknowledging the interrelatedness of the various elements of civil procedure. For example, encouraging oral testimony without providing for methods to compel the appearance of witnesses means that oral testimony is unlikely to be adopted. Changes in one area could also have unintended effects in others.

As an example, to ensure efficiency in proceedings, the Chinese Civil Procedure Law provides that a civil case should be closed within six months, extendable to another six months for special cases with the approval of the president of the court. Our investigation indicates that all courts attached importance to this requirement and measures were taken to ensure compliance with this requirement, such as intensified inspection and aligning the number of timely closed cases with rewards and punishment of judges. Seeking to protect their rewards, Chinese judges responded by continuing to retain control of cases in order to avoid delay. Time limits on judges and party responsibility thus acted in contradiction to each other. Changes must be imposed in recognition of the interrelated and overlapping aspects of civil procedure.

Most importantly, we conclude that reform measures must be paced in accordance and in recognition of differences in economic development and availability of competent legal professionals in various provinces. While Intermediate Court A was well poised to implement the reforms pressed by foreign observers, the same may not be the case for Intermediate Court C. An undifferentiated clamor for change may well result in greater problems and lesser justice in the Chinese legal system. Foreign assistance to Chinese legal reforms may be most useful when it is in conjunction with working with individual provinces and prescribing more specific advice rather than “one size fits all” solutions.

Needless to say, greater numbers of empirical studies are necessary to further clarify the picture of legal reforms in China. Absent this important data, reforms will continue to be based on unrealistic expectations or worse, questionable assumptions and preferences. Rather than a “one size fits all” approach, this article

urges reforms to consider the local and practical contexts of any rule of law initiative.