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*Judicial Decision-Making in an Authoritarian Regime:  
Piercing the Veil of the Adjudication Committee in a Chinese  
Court*

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# **Judicial Decision-Making in an Authoritarian Regime: Piercing the Veil of the Adjudication Committee in a Chinese Court**

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Abstract:

How courts and judges in authoritarian regimes decide cases behind closed doors are rarely studied but critically important in comparative judicial studies. Drawing on the minutes of the adjudication committee in a Chinese court, this article explores its operational patterns and decision-making process. The data suggest that among the criminal cases reviewed by the committee, very few were difficult or significant, but relatively high percent of the suggested opinions of the adjudicating judges were modified. In contrast, many civil cases reviewed were difficult to find a solution but the committee offered little help. Overall the operation and decision-making of the committee were subsumed by the administrative ranking system inside the court and the authority of the court president was enormous. The analysis also demonstrates the limited role of the committee in both promoting legal consistency and resisting external influences. Instead of achieving its declared goals, the committee has largely degenerated into a device for both individual judges and committee members to shelter liability. The findings compel researchers to rethink the appropriate role of the adjudication committee in Chinese courts, and the relationship between the power, accountability, and independence in the courts of authoritarian regimes.

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How judges and courts make decisions is undoubtedly central to legal studies. While forms of political control of the judiciary and of individual judges exist in every country in the world, the specific dynamics differs drastically. But the institutional designs have nonetheless been a crucial factor in judicial decision making process, both in liberal democracies and in authoritarian states. In the United States, for example, depending whether the judges are elected or appointed, there are various forms of judicial politics (Friedman 2009). In authoritarian regimes, the institutional arrangements overwhelmingly affect judicial decision-making process, as demonstrated by a burgeoning literature on such courts around the world (see generally Ginsburg and Moustafa 2008).

China is no exception in that the institutional environment in which Chinese courts and judges are embedded is a key to understanding their decision-making. The financial reliance of Chinese courts on local governments, for example, has generated incentives for local protectionism, and judicial independence is limited because the appointments of senior court officials are controlled by local political elite (Peerenboom 2002; Lubman 1999). More recently, studies have found that institutional constraints, especially the measures on individual judges' performance, markedly affect their decision-making (He 2009a). For yet another example, Stern depicts the institutional environment of judges, so to understand the room for Chinese judges to make autonomous decisions (2010).

While this institutional approach has a lot to offer in understanding the judicial decision-making process, it suffers from a paramount difficulty: some core judicial decision-making institutions in authoritarian regimes are seldom accessible for direct examination. It is well known, for example, that the adjudication committee (审判委员会) is the highest decision-

making body in Chinese courts. We also know that the committee, without hearing cases, reviews and rules on the most complicated, controversial, and significant cases behind closed doors (Cohen 2006). But more than six decades after the establishment of the People's Republic, and three decades after China's reforms, it is still fair to say that our understanding on this core decision-making body is rudimentary. Since the meetings are not open, and the minutes are not available to the public or even to the relevant parties, the details of the committee's operation remain mysterious. Earlier works thus have to rely on legal regulations, sporadic interviews, published judgments, media reports, speculations, and anecdotal accounts (Woo 1991; Wu 2006; Zhu 2000; He 1998; Chen 1998). Although these works are capable of providing insights, they work through the interpretative lens of academic or legal professionals. The objectivity of these studies would be greatly augmented by direct examination of the systematic data on how the adjudication committee operates.

This lack of systematic data also makes it hard to assess important academic debates. Since the 1990s, the committee has been the focus of what is possibly the most provocative debate on judicial reforms in Chinese jurisprudence. The committee has been criticized for lacking transparency, for violating due process, and for undermining judges' judicial independence (Lubman 1999; Chen 1998; He 1998; Wu 2006; Cohen 2006). While many critics urge its reform or even its abolition, some scholars, most notably, Zhu Suli, the former dean of Beijing University Law School and a pivotal legal theorist, argue that the committee performs many indispensable functions in the local context (Zhu 2000; cf Upham 2005).

The debates center on three aspects, all of which are at the heart of China's judicial reforms: legal consistency, judicial independence, and corruption (See Peerenboom 2010: 77-78). First, the defenders claim that the committee contributes to consistency in adjudication within a

jurisdiction by bringing the specialized knowledge and experience of the committee members to bear on difficult cases. The reformers, however, argue that the committee has become an institutional haven for judges who are uncomfortable in ruling on difficult cases, thus discouraging judges from improving their judicial skills (Wu 2006). Second, the reformers argue that because the committee imposes decisions on the judges hearing the case, judges have little latitude to issue their own rulings (He 1998). The defenders, however, argue that it indeed creates a united front against external demands and thus preserves the independence of the judiciary as an institution (Zhu 2000). Finally, according to its defenders, the committee institutionalizes supervision, which can limit corruption—it is easier to bribe a judge or two than it is to bribe nine or ten members of the committee. The reformers counter that to influence the decision, one only needs to work on the more powerful members.

Without a systematic empirical inquiry that can open this black box, however, it is hard to evaluate these arguments. Critics and defenders of the committee alike base their arguments on institutional description and analysis with, at best, some sporadic interviews with judges. Given their different perspectives and individualistic impressions, it is natural that the two sides make opposite points. When anecdotal and attitudinal evidence is used as the basis of the debates, either side can easily prove that the other is completely wrong.

Drawing on the archival minutes of the committee in a lower-level court in Shaanxi province for 2009, and supplemented with interviews with relevant judges, this article not only contributes to the understanding of the decision-making process in Chinese courts, but also sheds light on the above debate. Given the vast size of the country and its great regional variations (Zhu 2007), the data from one court and within one year would certainly not be enough, if one wants a comprehensive and accurate picture of the committee in China. But it shall help answer

several questions about the functioning of the committee, its operational patterns and the underlying logic behind. Are the cases reviewed really complicated, controversial, and significant? What percentage of suggested opinions of the adjudicating judges are changed, and why? Whose opinions count? Does the committee make better decisions in terms of evidence admission, fact discerning, and application of the law? How is the operation of the committee related to the socio-economic conditions of the region? The data and analysis shall provide further fuel for the on-going debates on legal consistency, judicial independence, and judicial corruption.

This article will also contribute to the studies of comparative judicial politics and especially on the relationship between power, accountability and independence of courts and judges. In an effort to understand the tension between the need of authoritarian regimes to use the judiciary instrumentally to achieving their goals and that to maintain control simultaneously, scholars have suggested a trade-off between the independence, power and accountability (Shapiro 1981: 32-35; Russell 2001). “[T]he more power judges acquire, the greater the demands for accountability, many forms of which impinge upon the independence of judges.” (Solomon 2007: 123) This article will engage in this line of literature by exploring the following questions: What role has the adjudication committee played in controlling the rank and file judges and what are the implications?

## **Data and Methods**

The court is located in southern Shaanxi Province, western China. Among its 430,000 citizens, 150,000 live in the countryside. The economy of the region grew during the initial stage of the reform period, but by 2008, the income per capita for rural and urban residents had reached only

around 4000 and 14000 yuan, respectively (CNY).<sup>1</sup> Since 2006, the courts have received slightly less than 3000 cases annually, most of which were civil, criminal, and enforcement. Overall, the jurisdiction of the court is of medium scope for China's lower-level courts (see Zhu 2007: 218).

Through a collaborative research project between a local law school and the court, the archival minutes of the adjudication committee became accessible. As a visiting professor of the law school, I was invited as an advisor for improving the research quality of the court staff. One of the research projects of the court then was to examine the functioning of the adjudication committee and I was thus granted access to the minutes. Since under Chinese law, the minutes are not publically accessible, I was only allowed to read the minutes in a court office. While I could take notes, no photocopy was permitted. To avoid potential impact on cases that had been decided, the major concern of the court, I am required to use the materials without disclosing any case or individual identification. To understand the stories behind the minutes, I interviewed five judges who have been involved in reporting some of the cases. Due to the sensitive nature of the topic discussed, I did not record the interviews. Instead, I took notes of the interviews and compiled them immediately after the interviews.

Two handwritten volumes from 2009 contain the minutes of deliberations on all the reviewed cases. This is the most recent year in which most of the cases had already been settled, even if the appeal process was initiated. With all the pages running continuously and consistent with the content at the beginning, it is clear that no cases are removed because of their sensitivity or other concerns. Compiled manually and threaded together through punched holes, the minutes are supposed to be kept indefinitely. For each case, there is a standardized cover page, the upper half of which records the time, venue, attending members, reporting judge, and recorder. It is

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<sup>1</sup> All socio-economic information comes from local annals.

followed by letter paper of the court if the other half of the cover page cannot accommodate the discussion content. The poor quality of the letter paper is indicative of the court's limited financial resources.

It is surprising that none of the minutes have been signed. Should not the committee members sign their names for what they said and decided? This can only be explained by the function of the meetings. In most situations, the meetings are held mainly for the purpose of making a decision or finding a solution. Since the decision is made collectively, no single committee member is held personally responsible. It is therefore less important who makes the decision. It is, therefore, in nobody's personal interests to check the accuracy of his remarks (all the members of this court were male). Indeed, according to my interviews, the committee members never bothered to read the minutes. In other words, as long as the final decisions are not incorrectly recorded, a missing sentence or two is nobody's business.

Nor were voting records included in the minutes. According to Article 10 of the Organic Law of People's Courts, the decision of the committee shall follow the majority rule, so one would expect to see voting records. The fact, however, is that the committee rarely formally voted. As shown in the minutes, in the situations where there was a decision, it had been reached by consensus, no matter whether or not there were debates. When expressed opinions were impossible to reconcile, the president's words were final: either to seek further opinions from the higher-level courts, or to ask the adjudicating judges to continue their investigation. As will be shown below, the hierarchical structure in which the members are embedded leaves little room for formal voting.

What then can we learn from the minutes? Because these minutes are not intended for the eyes of the litigation parties or their lawyers, the recorders have no reason to hide something that

is the routine practice, even if an outsider would see such a practice as inappropriate. For example, in many cases, the minutes clearly state that the court needed to avoid political trouble by looking for an out-of-court ‘political solution’ to a dispute whose pure legal resolution might have caused embarrassment. In numerous situations, the decisions of the committee were to seek instructions from the higher level courts. This indicates that the decisions of the committee, politically sensitive or not, were loyally recorded.

More directly for the purpose of this article, the minutes record the subject matter of the cases, the suggested opinions of the adjudicating judges, and whether the committee supported or overruled the opinions. They also clearly state the sequences of the discussion, and more importantly who had the final word. Recording what happen at the most decisive moment for the case outcome, the minutes speak volumes on how the law, power, politics interacted. I know of no other work that the data offer such a close look at the decision-making process in Chinese or other authoritarian judicial systems.

## **The Committee**

The emergence of the adjudication committee can be traced to the early 1930s, in the communist settlements in rural China during the revolutionary period. According to historical records, the committee was set up because adjudicators at the time had little professional training, and because policies, guidelines, directives, statutes were difficult to apply. To ensure justice, it was better for a committee to make a collective decision based on majority rule (Wu 2005: 19). It was later been incorporated into the judiciary of the PRC,<sup>2</sup> as the highest decision-making body

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<sup>2</sup> Art. 10 of the Organic Law of People’s Courts (amended in 1983).

in adjudication (SPC 1999 Art. 22). Although many reforms and improvements have been made since then, the organic structures remain largely unchanged.<sup>3</sup>

As Chinese courts are now organized more like a bureaucracy with a finely differentiated hierarchy of ranks, the adjudication committee, as an internal institution of the courts, from its composition to operation, is heavily influenced by the administrative ranking system. While the procedure laws make it clear that the major function of the adjudication committee is to adjudicate significant and difficult cases and to summarize adjudicative experiences,<sup>4</sup> in reality the administrative ranking is the predominant factor in determining the appointment of its members. It usually consists of officials with the highest administrative rankings in a court (Zhu 2000). This Shaanxi court is no exception. The committee was composed of not only the president, the vice presidents and the heads of the major adjudicative and enforcement divisions, but also the disciplinary inspector (纪检组长). They were appointed simply because they were the members of the Party leadership (党组成员), who were the de facto court leaders. Moreover, the terms of these judges are for life, and replacements have been rare. Once appointed, a judge would not be removed except for illness, retirement, or leaving the court. One original head of the No. 1 civil division, for example, kept the appointment when he was transferred to the enforcement bureau as the vice director, a position not necessarily associated with the membership. Another original head of the No. 1 division had kept the appointment after retiring as division head. In short, membership has become a symbol of power and status.

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<sup>3</sup> These reforms have streamlined the working rules (SPC 2005: Arts 23-24; SPC 2009: Art. 5; SPC 2010). The set-up of specialized subcommittees and recruitment of veteran judges as members are also mentioned (SPC 2005 Art. 23), but as far as this Shaanxi court is concerned, these reform measures have not been implemented.

<sup>4</sup> Article 177 of the Civil Procedure Law, Article 63 of the Administrative Procedure Law, and Article 103 of the Criminal Procedure Law.

While to review significant or complicated cases is the major task of the adjudication committee, there are no legislative definitions on what is considered “significant” or “complicated.” This arrangement leaves individual courts to have their own detailed definitions. While the working rules of the adjudication committee on the reviewing scope in many courts include a rather limited amount of cases, this Shaanxi court’s are quite extensive.<sup>5</sup> The followings are only more related to the purpose of this article: a case that a judge or panel cannot resolve through consultation with immediate superiors (item 2), the cases the president or the vice presidents regard necessary (item 3), cases involving local institutions or powerful figures (item 11); bankruptcy cases (item 8); administrative adjudication cases (item 9). In addition, the following criminal cases shall be reviewed: cases involving suspended sentencing, exemption of punishment, acquittals, monetary fines, institutional crimes, corruption, and serious criminal cases which may invoke ten years or more of imprisonment (item 5). For civil cases, it covers those involving government agencies, mid and large-sized enterprises, foreign invested enterprises, class action, migrant workers, newly emerged cases, or disputed amount of money in excess of three million yuan (items 9-10). The rules ends with “other cases or questions the adjudication committee regards necessary.”(item 17)

Procedurally, there are two possibilities that a case will be reviewed: one is directly determined by the court leaders, including the division heads and the (vice) presidents, when they regard so doing as necessary; the other is initiated by the collegial panel (合议庭) or the

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<sup>5</sup> A basic-level court in Sichuan province puts up its working rules of the adjudication committee on the Internet, showcasing its reform measures on reducing the reviewed cases. For details, see Pengzhou Court Net 2004. As a result, the percentage of cases reviewed by the committee varied greatly across different regions and different levels of courts in China. As Yang reported from a basic-level court in Chongqing, for example, only 10-20% of criminal cases were reviewed by the committee (2010). Guan reports that during 1999-2003, several basic-level courts in Shandong Province, eastern China, only reviewed 1.26% of the received cases (2004: 27).

adjudicating judge. According to procedure laws, all cases are either decided by the normal procedure (普通程序) by a collegial panel usually composed of three judges or the summary procedure (简易程序) with only one adjudicating judge. In practice, there is always a designated responsible judge (承办或主审法官) to preside over a case, while other judges on the panel largely serve symbolic functions. The responsible judge, or the adjudicating judge when the summary procedure is employed is the reporting judge.

Starting from 2008, the court has required that the reporting judge submits a written report prior to the meeting, describing the basic facts and the suggested positions of hers or the panel's.<sup>6</sup> When the turn for her case comes, she is summoned to the meeting to orally explain the facts and proposed positions, and answers questions, but not to participate in the discussion. She leaves the meeting venue once the discussion of her case is over. Once the meeting is over, the reporting judge will photocopy the minutes and place the copy into the case file as an inaccessible appendix. As the judge responsible for the case, she incorporates the decision of the committee into the judgments, beginning with the standardized sentence "according to the decision of the adjudication committee of this Court." As an entrenched practice in Chinese courts, no reasons are provided for the committee's decision. Nor is the composition of the committee disclosed.

## **Cases Reviewed**

In 2009, the committee held 47 meetings, almost one each week, of which 46 discussed cases. In total, it reviewed 430 cases. In most situations, the meetings lasted for a whole morning. Many or most cases were handled relatively quickly because the committee discussed, on

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<sup>6</sup> The information in this paragraph comes from author's interviews with judges of the court, March 1-4, 2011.

average, more than nine cases in each meeting, so each case was discussed only for approximately 20 minutes.<sup>7</sup>

Table 1 about here

As shown in Table 1, the vast majority of cases reviewed were criminal, with a modest amount of civil cases. Of course the committee also reviewed all the administrative adjudication cases and some enforcement cases. But similar to what Liu documents in another lower-level court in northern China (2006), only a few administrative cases were filed, reflecting the tremendous difficulty of administrative litigation in China (Pei 1997; Peerenboom 2003). Even fewer cases could survive the stage of formal adjudication, because many ended as withdrawals or reconciliation, due to the pressures of the government agencies and the “harmonious” efforts of the court in persuading both parties to compromise (Palmer 2006). When some of them (five in the year) eventually entered into the meeting of the committee, the issues were more procedural than substantive. It usually involved the approval of the committee, for example, on the government decision on compulsory housing demolition, which invoked little discussion. Similarly, most enforcement cases were reviewed merely because the committee needed to fulfill the procedural requirements. It is the criminal and civil cases on which I will focus.

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<sup>7</sup> According to Yang’s report from another basic-level court in Chongqing, central China, the adjudication committee spent, on average, 29-54 minutes on one case from 2004-2008. But for criminal cases, the average time spent for each was only 10 minutes. According to her observation, the duration of time for each case is closely related to the personal working style of the president (2010).

## ***Criminal Cases***

Several patterns are clearly seen in the above table. First, almost all the criminal cases (96.8%) were reviewed by the committee, as a result of the rules on the jurisdiction of the committee. Put differently, among all the cases reviewed by the committee, 84.4% were criminal. Second and more important, in these criminal cases, the committee modified almost 41% of the suggested opinions of the adjudicating judges, much higher than the equivalent of civil cases (8.3%). Third, the committee tended to increase the penalty, and especially the fines of the defendants (Table 2). Among the 51 cases in which only supplementary penalties were changed, all of the fines were increased (by 1000 to 10,000 yuan). This pattern could also be found in the cases that ended with suspended sentences. Among 103 cases suggested for suspended sentencing, the committee upheld 96% of the suggestions on suspended sentencing itself, but changed 42% of the cases on supplementary penalties, including the probation period, suspended duration, and fine. Once again, the changes for fines were generally unidirectional—more often than not, they increased.

Table 2 about here

These patterns indicate, first of all, that the committee spent most of its energy not in streamlining legal criteria or developing general legal rules, but in discussing specific cases, most of which were routine, or even trivial.<sup>8</sup> As almost all the criminal cases were reviewed, this point seems only too obvious because it is impossible for a basic-level court to have so many significant and difficult cases. This can also be inferred from the duration of discussion on each

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<sup>8</sup> Yang's report also suggests that in the basic-level court that she observed, 99.43% of the agendas of the committee involved a case discussion (2010).

case: after all, how can the committee make an informed decision on a controversial and difficult case within 20 minutes? The criteria of “significant and difficult” are not just stretched very far in this court, but are almost non-existent. Second, among criminal cases that were modified, the committee has usually changed for lengthened suspended sentence and especially increased monetary fines. In one injury case, for example, the collegial panel suggested a three year sentence, but suspended for four years. Three members agreed with the suggested opinion, but another three believed that since the injury caused “serious damage,” (a legal standard) suspended sentence should not be adopted. The final decision followed the suggestion of the president: “In my subjective view, it is OK to award suspended sentence. For this sort of cases, settlement (between the defendant and the victim) shall be encouraged. In this case, the defendant already compensated the victim, and it just reaches the standard of the serious damage. It is fine to lengthen the suspended sentence to five years.”

One obvious reason for this unidirectional change is that the court is underfunded therefore has an interest in increasing the monetary penalties. Inadequate funding has been a chronic problem for courts in less developed areas (He 2009b). The problem was exacerbated after the central government lowered the litigation fees so that more people would have access to court (State Council 2006). Even after the central government started to provide partial support in 2009 (Sichuan Online 2008), the financial situation of the court has not changed much. When litigation fees as the main income source were cut off, the court has had to rely on criminal monetary fines. In one case, the minutes recorded what the president said: “The defendant gets a penalty below the stipulated sentencing level, so he shall pay some fines. If he does not pay, eight years will be imposed; otherwise six years.”

One may ask: why did such a change have to be made by the committee, the highest adjudicating institution which is supposed to deal with difficult and significant cases? In other words, if the court wants to impose heavier monetary penalties to increase its income, it can simply make it clear in its internal instruction to the adjudicating judges; there is no need to change all these cases through the adjudication committee. Inadequate funding of the court thus is only part of the story.

Two explanations based on interviews might be useful for this abnormal pattern. One is that the committee needs to justify interfering in the reviewed cases. As shown, it is a policy of the court that almost all the criminal cases be reviewed by the committee. If the committee does not make any changes, there is no reason for the existence of such a policy. When the committee makes changes, it wants to be sure that those changes are safe to make. Then to increase the monetary fines or nominally heavier penalties becomes a nice choice, because they are within the stipulated level will never be regarded as a wrongful decision.<sup>9</sup>

The other is more fundamental and systemic. The criminal trial is, arguably, the most sensitive areas involving judicial corruption. The defendants are more willing to offer bribes because of the high stakes involved. The requests from the defendants in criminal cases are easier to grant because the resistance is weaker than in civil cases. In civil cases, each penny requested has to come from the other party; but a shorter term of imprisonment, an suspended sentence, lower monetary penalty, would encounter much weaker resistance either from the victims or from the prosecutors (Li 2010: 218). As a result, an effort that tends to exonerate the defendants is suggestive of contamination or even corruption. On the contrary, any effort to increase the penalty of the defendants is seen as aboveboard. Consequently, all the members are

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<sup>9</sup> Author's interviews with judges of the court, March 1-4, 2011.

willing to show that they have no connection whatsoever with the defendants by suggesting heavier penalties.

### ***Civil Cases***

In contrast, the committee reviewed 48 civil cases in 2009, among which only four suggested opinions were changed. The committee decided to seek written instructions from upper-level courts for seven cases. In other words, the committee upheld the majority of the suggested opinions of the adjudicating judges (58%). Again, few of these cases were doctrinally difficult.

Why were 41% of the suggested opinions in criminal cases modified while only 8% of civil cases were? Why did not the committee also make some changes to justify its existence? The dynamics here differs from those of criminal cases in many aspects, from the reasons for reviewing, nature of the cases, to the relationship between the judges/courts and the litigants.

The reviewed cases could be divided into two categories: significant, and difficult to resolve. It was significant in that the cases usually involved external influences. In one case that was a straightforward contractual dispute on breach damages, the plaintiff, a local enterprise, obviously with the support of prominent political figures, refused to compromise with the defendant, a company based in X province. The plaintiff was so arrogant that it did not even attend several hearings, and the responsible judge had to go to the plaintiff's business site and plead him to sign the delivered documents. The court leaders, apparently under heavy external pressures, only instructed the adjudicating judges to try their best to render a decision favoring the plaintiff. But the plaintiff was still unhappy for the proposed decisions. The second time

when the case was reviewed by the committee, the decision was simply to change the composition of the collegial panel.<sup>10</sup>

For the second category, usually it was the adjudicating judges who requested a review. The reason for review is simply that, as reported by Yang, “the facts are complicated, the litigants are emotional, which may lead to adverse social consequences” (2010). They did so not because they held different opinions from their immediate superior, and not because the legal issues were too complex for them, but because it was hard to find an appropriate solution in the local context. Submission to the committee simply provided a way out.

A divorce case illustrates this point. A wife filed a petition for divorce, but her husband contested it. The marriage had been extremely tense: the wife left home and the husband searched for her throughout the city. As a result of this broken relationship, he became mentally unstable. While the wife insisted on a divorce (死也要离), the husband threatened to kill the whole family if divorced (离了就死). In addition, the two sets of in-laws and especially the wife’s mother had been deeply involved in the couple’s relationship. Although the law is clear on the issue—to grant divorce or not depends on whether the emotional relationship between the two parties is disrupted, it is not helpful at all for solving the dilemma. The adjudicating judge decided for adjudicated denial for the first-time petition but the wife filed the petition again six months later. While an adjudicated divorce would customarily have been granted in the second-time petition (He 2009a), the adjudicating judge felt uncomfortable doing so.<sup>11</sup> Under the circumstances, submitting the case to the adjudication committee was to be a feasible option and

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<sup>10</sup> Author’s interviews with the responsible judge after the composition change, March 5, 2011.

<sup>11</sup> Author’s interviews with the responsible judge, March 3, 2011.

so she did, suggesting another adjudicated denial. Needless to say, the committee upheld the suggested opinion. After all, nobody wanted to bear the blame if the husband did commit suicide.

This case shares several characteristics with many civil cases submitted to the committee by the adjudicating judges: legally and factually straightforward, monetarily trivial, confrontational between the two litigation parties, difficult to enforce, likely to trigger violence, and unlikely to benefit from the litigation parties. All these explain why there are no equivalent compulsory reviewing requirements for civil cases, as for criminal cases. The adjudicating judges, however, have every reason to take the initiative to submit. In submitting the case for review, the adjudicating judges may hope that the committee could provide a better solution. But in most situations, they are aware that it is almost impossible. Imagine, if the adjudicating judges, having deliberated on the cases during the whole process, still could not find a viable solution. How can the committee members have a better idea, given the fact that most members are not specialists in the field and are not even familiar with the pros and cons of the case?

The real reason for submission lies in that the committee is a good shelter for avoiding risk: having sought the committee for decision, the adjudicating judges can exempt themselves from potential responsibility even if the decision indeed triggered violence. After all, the decision is the committee's. As the very least, the responsibility has been diluted. An interviewed judge said: "If a decision is made by a single judge, he or she is 100% liable for the decision. If made by the collegial panel with three judges, then only one third for each." The reality is that, in the past two decades, not a single committee member has ever been penalized for what he said in the adjudication committee.<sup>12</sup>

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<sup>12</sup> Author's interviews with the responsible judge, March 3, 2011.

When a difficult civil case (difficult in non-legal sense) such as this is submitted, rarely has the committee changed the suggested opinions. The hot potato would be kicked about: the committee would either uphold the proposed opinions, or seek instructions from the upper-level court—another tactic to avoid risk. The committee upholds the suggested opinions not just because it does not have better solutions, but also because proposing new solution is not sensible: if a committee member proposes a new solution which turns out to be bad later, the member only sets himself on fire, or loses face among colleagues at the very least. In contrast, upholding the proposed opinions involve little risk: even if the solution suggested by the adjudicating judges is later proven bad or wrong, it is the judges who shall be blamed: after all, the judges are the ones who handle the cases in person and shall thus understand the case more thoroughly. Furthermore, unlike most criminal cases, this type of civil cases involves much less opportunity to benefit from the litigation parties, a fact well-understood by everyone in the court. Subsequently, the committee members do not need to “prove” they are clean.

## **Whose Opinions Count?**

Existing studies suggest that the discussion of the committee follows a set pattern: usually with the judge adjudicating the case reporting first, then members raising questions, and the president remaining silent until the end (Wu 2006; Zhu 2000). This sequence has also been stated in some court documents (e.g., SPC 2010). The rationale for the president to keep silent until the end is straightforward: it allows him to evaluate the discussion without prejudicing it or influencing the views of individual members.

The minutes, however, indicate that this pattern was far from clear-cut. For many of the cases, there was virtually no discussion: the cases were so straightforward that there was no need

for discussion; the president just made the decision. For cases with some discussions, the director of the relevant division spoke first, followed the vice president. It was also true that in many other cases, the president or vice presidents spoke first. Overall, once the president or the vice president of the division proposed a solution, the discussion ended because other members usually concurred. As one interviewed judge said: “The rule is that the president shall keep silent until the end, but there is no way to enforce such a rule. When the president wants to have control, he can simply speak first to set the tone. Can any other member stop him from speaking? Of course not.” The point is concurred by another interviewed judge who has more than ten-year experience reporting cases to the committee: “Even if the president speaks at the last, but when other members realize that his opinions differ from theirs, they would try to amend their original positions so to stay with him.”

If Woo elaborates upon the critical influence that the president has over judicial decision making by analyzing the legal regulations (1991: 102-03), the data here provide statistics that indicate the extent to which the president controls the final decisions of the committee. Take the criminal cases as an example,<sup>13</sup> among the 148 criminal cases in which the suggested opinions of the adjudicating judges were changed, 135 (91%) were changed largely according to the suggestions of the president, 11 (7%) were changed according to the director of the criminal division. Only 1.3% were changed based on the suggestions of other members. Although other members with various sorts of power can exert a variety of influences, the authority of the president in decision-making is just staggeringly enormous.

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<sup>13</sup> For cases in which suggested opinions were not changed, the discussions were usually very short and in most situations, all the members agreed with the opinions. They were less able to show the decision-making position of the president.

While the law states that it shall follow the majority rule and every member has an equal vote in the committee, the reality is that this equality has been inundated by the entrenched administrative hierarchy. Symbolically, the adjudication committee holds roundtable meetings, a design suggesting that the members are of equal status. But the so-called equality has no way to be insulated from the members' unequal administrative status which permeates their daily lives. The unequal administrative status of the members does not vanish in the committee meetings simply because they sit at a roundtable. In reality, every member has his fixed seat, usually with the president sitting directly opposite to the reporting judge. Of course the reporting judge knows to whom he or she is reporting. In other words, the equal status of committee members exists only on the paper of the committee rules.

It is in this context that the above results can be understood. The president, as the political boss in the court, has tremendous control over other judges and officials, from career development to a variety of resources. No other members would afford to forget their administrative rankings in the committee discussion. After all, most members want to keep a good relation with the president in the interest of an earlier promotion, a better position, or simply a pleasant working condition. At the very least, there is no reason to offend him. Subsequently, even if they disagree with him, it is difficult for them to present their opinions and have a genuine exchange of views. Indeed, a reading of the minutes suggests that the members with lower administrative rankings are always eager to toe the line with the president.

The discussion pattern reflected just one way that the president exercised his control. Other means were also detected from the minutes and interviews. In a property dispute, the plaintiff sold her right to buy a work-unit sponsored apartment to her colleague for 10,000 yuan in 2000,

which was more or less the market price.<sup>14</sup> But housing prices had, unexpectedly, tripled over the decade after the transaction. Relying on a law forbidding such transactions, the plaintiff sued to invalidate the transaction. Both parties, however, agreed that they had voluntarily engaged in the transaction. By then there were no clear rules on how should such a dispute be decided. Both parties had found connections to the committee members. The plaintiff, working part-time as a lay assessor and obviously well-connected in the court, managed to have the support of all members of the committee except the president. When the committee reviewed the case, all these members expressed their support for the plaintiff before the president had a chance to utter a word. Under majority rule, the discussion should have ended there. The president, who was connected to the defendant, realizing what was going on, refuted their position, stating that invalidating such a transaction that was harmless to others and that had been completed a decade earlier was pointless and would have serious negative social consequences. He then suggested seeking instructions from the intermediate level court. That was the committee's final decision.

If invoking social consequences against a literal application of law could be regarded as a difference of opinion, seeking instructions from the intermediate court was a polite way for this president to assert control. A prevalent practice in Chinese lower courts to avoid decisions being reversed by higher courts (Liu 2006: 93-94), the frequent use of seeking instructions by this committee during the year had specific connotations. As I was told, this is because this president had worked in the criminal division head of the intermediate court before assuming the presidency in this lower level court. He thus had quite good control over the responses of the intermediate court. When he made such suggestions, it meant not only that this decision should

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<sup>14</sup> The minutes only provided the proposed decisions of the collegial panel, the discussion, and the final decision. All other information came from author's interviews with the responsible judge, March 3, 2011.

be made cautiously. In a less blunt way, the underlying message was that “I want to take control.”<sup>15</sup> As shown in the Table 1, the percentage of cases ending up with seeking instructions was not insignificant. This working style, as I was told, differed from that of his successor, the current president, whose background was completely different. With no formal legal training and few connections in the court system, the current president preferred to have more decisions made inside the court. Beneath the two different working styles is the same logic: the president has ways to control the decision-making of the committee.

Outdated laws, inconsistent applications, vaguely defined social policy, and more recently, the “social effect” of the legal decisions all provided the president with vast room to make decisions. This is not to say that he will exercise his power arbitrarily: in most circumstances, he will not and cannot. But the institution does allow him cover his own agendas and concerns in a legitimate mantle. In the property case cited above, for example, the decision could have been made for or against the plaintiff. There was no correct or wrong,<sup>16</sup> and it seems that whoever was in power had the final say.

When several members collectively make a decision in a committee, as argued by Gigerenzer, members often face psychological pressures, and moral judgments are based on simple decision rules, such as “do what the majority of your peers do” or “follow the default rule.” (2007: 182, 191) Judge Harry Edwards of the D.C. Circuit Court of Appeals admits that he instills collegiality among all the judges in his court and discourages dissenting opinions (2006:

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<sup>15</sup> This case’s subsequent development verifies the point: the intermediate court regarded the transaction as valid. The second time that the case was discussed by the committee, all other members changed their views and supported the president.

<sup>16</sup> To be fair, as argued by Friedman (2006), it is also difficult to know whether a decision on cases that reach the appellate level in the United States is correct or wrong.

237-38; 2003). In line with these arguments, I would add that, with the enormous authority of the president, the fact that many members in the adjudication committee lack time and capability to comment meaningfully on the cases only makes the situation worse. As mentioned, although some members have been adjudicating cases for years, they usually specialize in a single field. In most situations, they are not even familiar with the facts and the subtleties of the issues. For all these members, as the senior officials in the court, busy with multiple duties, to study the case files meticulously beforehand was unrealistic (c.f. Yang 2010). As a result, they have to rely on the written and (mostly) oral reports of the adjudicating judges. As long as the stories presented by the reporting judges make sense, they have few reasons not to concur with the proposed decisions of the president. Speaking first or initiating a debate would simply betray their ignorance.

## **The Reporting Process**

When many members have to rely on the oral report, the reporting process may tilt the balance. The decision of the committee, to some extent, is made through the lens of the reporting judges. The judges' own interpretations and tendencies inevitably become part of the basis of the committee's decision. What and how the judges report will then significantly affect the outcome of the case. According to my interviews, most reporting judges prepare diligently before the meeting because they know they are going to be grilled. Even though they cannot control the discussion and decision-making process, for many reasons they want to defend their suggested positions. Since most of the committee members are the leaders of the court, the reporting judges want to leave a positive impression. They hope to show that they thoroughly study the cases, make meaningful suggestions, and answer the questions professionally. Needless to say, if their suggested opinions are frequently reversed, their professional capabilities might come into

question. In other words, the committee process compels the reporting judges to think more of the cases and to speculate the expected outcome of the powerful members.

Despite the efforts made by judges generally, many problems of communication exist. Some of the judges might not be able to articulate the issues and facts clearly, especially when the case is complicated. Some important facts might be missing, due to the negligence of the reporting judges. Some emotional but legally irrelevant details may be injected. As observed by Wu (2006) and Yang (2010), even decisions of the committee may not be accurately reflected in the judgments.<sup>17</sup> On the one hand, this should not be surprising, given the fact that no members will bother to look at the minutes. On the other hand, some judges complained that the questions raised by some members, especially those who never hear or adjudicate cases, were not professional. In the exaggerated words of one of the interviewed judges: “The only function of reporting is to educate some members.” Another judge who often reports cases said: “I always hope that my case is placed at the end of the sessions. By then the minds of the members are unclear because they have been discussing cases for hours. So they cannot raise many questions on my case and my suggested opinions are more likely to be upheld.” Some reporting judges thus have taken advantage of this arrangement to manipulate the outcome (Yang 2010, Wu 2006: 198-199).

## **The Debates Reconsidered**

### ***Promoting Legal Consistency or Avoiding Responsibility?***

In his influential book “Bring the Law to the Countryside,” Zhu contends that “the committee has improved or will further improve the quality of average judges in some places” because it

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<sup>17</sup> I did not have access to the judgments, so no comparison was made.

compensates for the lack of professional sophistication of many judges by bringing the specialized knowledge and experience of the committee members to bear on difficult cases (2000:112). Furthermore, the committee contributes to consistency in adjudication within a jurisdiction, a role that may be particularly important in China, where cases are rarely published and legislation is often broadly programmatic (2000).

The data, however, provide little support for these assertions. First of all, it is unclear that the committee makes better decisions than the adjudicating judges. (It is, of course, very difficult to define “better.”) But the fact is that the committee upholds the majority of suggested opinions, in criminal and civil cases alike (54.52% and 58.33% respectively, as shown in Table 1). Even for criminal cases, in which the committee modifies many suggested opinions, the changes are only increases in monetary penalties; as to cases suggested for suspended sentencing, most changes involve minor changes such as the duration of probation. The changes imposed by the committee have little to do with the key question—whether the suspended sentencing is appropriate or not.

Why do the changes often occur in one direction— increase? If the committee is making a better decision, one would expect that it should go on both directions, depending on the facts and the law. The tendency to increase the fines in most cases suggests other reasons. As mentioned, other non-legal considerations such as exoneration from corruption or justifications for systematic interference have been in play. It is therefore hard to assert that the committee is making better decisions.

In contrast, one might well argue that since the adjudicating judges have gone through the whole process including hearings, they are in a far better position to pinpoint the exact amount of fines than are the committee members who usually do not have enough time to read the file in

advance.<sup>18</sup> One can also argue that adjudicating judges are more cautious in proposing the amount of fines because they know their decisions will be reviewed by the committee and they have to defend their suggested opinions. But since the committee's decisions are not subject to any further supervision inside the court, more likely the decisions are to be discretionarily made.<sup>19</sup>

Moreover, despite the generally poor professional quality of this court,<sup>20</sup> the alleged function of promoting legal consistency is hardly seen. The data suggest that the committee does not or cannot fulfill this duty. First, the committee spends most of its time discussing individual cases. Second, the training and background of the committee members indicate that the committee is not well-equipped for this job. The heads of the adjudicative divisions are experienced adjudicators, but may not necessarily be the best in the court, because there is no guarantee that the best adjudicators are appointed as the division heads. Some of them, after becoming division heads, may not remain abreast with the latest laws and cases. In addition, some presidents and the disciplinary inspector may not have any adjudicative experience at all. More specifically, among the eleven members of the committee, only four continued adjudicating cases as regular judges. It is difficult for the committee to set good examples for other judges when the majority of its members neither hear nor adjudicate cases. Finally, the decisions of the committee, as shown in the data, are not much better than the ones suggested by

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<sup>18</sup> The governing law in this regard does not provide detailed regulations for applying the exact number of monetary fines except for theft (Art. 264, the Criminal Law). It only states that monetary fines are imposed in proportion with the criminal offenses.

<sup>19</sup> Of course the appeal process would serve as a way of supervision. But due to the practice of guidance seeking from the appeal court and the respect that the appeal court pays to the decision made by the adjudication committee in the lower court, the function of appeal in supervision is significantly diminished.

<sup>20</sup> As of 2010, only 54% of the staff in the court obtained the qualification of judgeship, and fewer have passed the national judicial exam.

the adjudicating judges. The discussion, if any, has rarely to do with the legality of the disputes or the application of the laws, but mostly with the amount of the punishment or the appropriateness of a given solution in terms of its social and political effects. Seeking instructions from the intermediate court or communicating with the local government and the Party are frequent, but legal debates are hardly seen, and the final decisions are made mostly by the president. If the discussion may play some educational role, it is the reporting judges who educate those members who have little adjudication experience or have not closely followed the legal development. Even when there are some laudable decisions, there are no institutional mechanisms to disseminate the experiences. The minutes are created solely for the purpose of record: nobody would check them once the file is closed. For the last two decades, not a single document has been issued by the committee in promoting judicial craft.<sup>21</sup>

On the other hand, the responsibility dilution function of the committee has significant impact on the judges' behavior. Once a case has been reviewed by the committee, the potential responsibility for the adjudicating judges for making a wrongful decision is significantly reduced; sometimes it disappears. Consequently, the committee has become a responsibility avoidance haven. As observed by Wu (2006: 196), when asked when a case will be submitted for review, many judges responded: "When I need it to share the responsibility with me." As mentioned, even if the committee upholds the suggested opinion of the adjudicating judges and that decision is later proven to have been wrong, the responsibility of the adjudicating judges will be minimized because it has become the committee's decision (Yang 2010). A shared and thus reduced responsibility in the collective decision-making process certainly gives judges an incentive not to decide difficult cases by themselves (Balme 2010: 156). Furthermore, when the

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<sup>21</sup> Author's interview with judges of the court, March 3, 2011.

litigation loser faces the bureaucratic and faceless adjudication committee, which seems both hard to oppose and more communally based, conflicts would be dampened or lumped. As a result, whenever adjudicating judges encounter cases that they cannot think through, they simply ask the committee to review them, instead of applying themselves on the cases and the laws. Contrary to the intended function of improving the judicial skills of the adjudicating judges, the existence of the committee has discouraged judges from improving themselves, or at least discouraged them from taking responsibility.

### ***Judicial Independence***

Is the committee in a better position to resist external influences, such as political instruction, personal connection and corruption? The minutes do not allow for a direct answer, but they do offer abundant circumstantial evidence. Among all the reviewed cases, not a single one indicates that the committee had attempted to resist external pressures. On the contrary, the minutes show that in many cases the committee succumbed to external influences, or even went out of its way to cater to the government and the Party. As a legal requirement, a court approval is needed before the government can conduct compulsory enforcement on housing demolition. In discussing such a request by the local government, the president said: “The compulsory enforcement is granted; prepare the decision, but wait for further instructions from the district Party Committee before delivering to the parties.” An interviewed judge explained that “this is to see if the Party Committee has a different opinion over the issue.” Together with many requests to the intermediate court for instructions, all these indicate that the president simply tried to avoid responsibility, and simultaneously maintained a good relationship with, if not made effort to please, the local government and the Party.

Since the committee, as a collective decision-making body, can be used to dilute responsibility, one may reasonably raise the question why the resistance against external influences is not found. In other words, if no one would bear responsibility for whatever decisions made, why do not some members stand up for the law? The reason may lie in the decision-making structure. Since the president is almost the sole decision-maker in the committee, it does not carry much weight in using the committee to resist external pressures. Other political elites could simply call the president, knowing that he can get things done. While one might argue whether to resist the pressure would hinge on the attitude or behavioral patterns of the president, in the local context, the president has little incentive not to cooperate. As an experienced bureaucratic, every president, having been appointed to that position, must be an expert in scratching each other backs in the club of the local political elite. Indeed, when there are illegitimate pressures, the president can simply use the committee as a legitimate cover for illegitimate decisions. Under these circumstances, the committee has become a convenient option for the president to justify such decisions. As aptly put by Liu (2006: 94), “[i]t is through the internal power structure within the court that external influences are capable to control the outcome of cases.”

Even if the committee may resist some external interference, the role of the committee in this regard remains minor because many, and more illegitimate influences often circumvent the formal institutions to work through informal channels. As Selznick (1966) argues, unlike formal ones, informal influences have real power and control over the decision-making process. Liu’s ethnographic work (2006) also suggests that in Chinese courts, informal influence on the decision-making process based on the administrative ranking system undermines the due process of law much more severely than the formal adjudication committee does. In line with these

points, my observations suggest that the committee, as a formal institution, has been sidelined in many cases facing external influence. When political elite make calls, they usually contact the top court leaders who have discretion as to whether or not to place the cases in question on the agenda of the committee. In many circumstances, as I was told, the adjudicating judges are simply asked to follow the instructions of the court leaders, when they are under intense pressure. A judge with twenty years of working experience in the court said: “The most outrageous situation that I have encountered involved local protectionism, where I was asked by the court leaders to release the assets of a local enterprise already frozen by the court, upon the request of a Shanghai petitioner in an enforcement case. Such behavior was outright illicit, but the president, vice president in charge of our division, and the division head had all signed the release order and I had to follow suit.” When asked why the issue had not been reviewed by the committee, the judge replied: “Those illicit requests are not appropriate for formal discussion.”

How about internal independence, which means judges’ ability to decide cases without interference from senior court officials (Peerenboom 2010: 77)? Woo (1999) suggests that supervision is the main way to limit judges’ discretion and the adjudication committee is an institutional check on individual judges and it reflects the Chinese concept of judicial independence as the “independence of the court as an organic whole.” (Woo 1991) Indeed, the control inside the court itself may not be a drawback for judicial independence at all. Ginsburg(2010) even argues that China shall strengthen this aspect, learning from the experience of Japan. The key question, however, is whether the control of the judges through the committee is efficient or fair, two stated goals of the judiciary. From the data and analysis, the committee is not at all efficient, if it means to handle the cases quickly without unnecessary delay. As to criminal cases, almost all the cases are reviewed by the committee and the decisions of a

significant proportion of cases are changed. More cosmetic than substantial, these changes are not equal to decisions with better quality. As for the more difficult and complicated civil cases that are reviewed by the committee, the committee is not capable of providing better solutions. Comparing the decisions of the committee with those made by adjudicating judges, appeal rates or remand rates of the committee decisions are often higher (Wu 2006; Yang 2010).<sup>22</sup> The review of the committee, by and large, only adds another level of bureaucracy by depriving the adjudicating judges of their decision-making authority.

Nor is the internal control through the committee fair. The reporting process allows for numerous miscommunications between the adjudicating judges and the committee. Facts might be twisted or missed, legally irrelevant points exaggerated, and the process manipulated. Without participating in the hearing, the committee members rule on cases with which they themselves are not familiar. The litigation parties have no ideas about who makes the decisions affecting their property and freedom. That is also why throughout the last two decades, not a single member had even been asked to recuse himself.<sup>23</sup> The existence of the committee has completely destroyed the recusal institution (回避制度).

### ***Judicial corruption***

While Zhu Suli maintains that it is more difficult to bribe nine members of the committee (2000: 112), He Weifang argues that the amount of corruption is a function of the quality of the decision-makers and the institutional environment, not of the number of decision-makers (1998).

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<sup>22</sup> But one shall be cautious in jumping to any conclusions with these rates because a variety of reasons may affect the appeal rate of decisions made by the committee.

<sup>23</sup> This is consistent with other reports. According to Yang, this is also the case for the court she observed for the last decade (2010).

To what extent can the data be used to assess the debate? In other words, is the committee in a better position to limit judicial corruption than the adjudicating judges or the collegial panel are? Not a single trace of corruption can be directly detected from the minutes. After all, no member would be so thoughtless as to leave written evidence of corruption. But the decision-making structure does offer hint at an answer. If the members of the committee have equal status and the process is relatively transparent, the answer might be yes. But the data show that the reality is far from this assumption. There are more people on the committee than on a collegial panel, but fewer real decision-makers. Power is highly disproportionate among the members. When the president makes more than 90% of the modified decisions and he does not hesitate to speak first, one only need to work on him, as shown in the property case. For mundane criminal cases, the adjudicating judge, the director of the criminal division, and the (vice) president in charge of the division are the key. Once all these people reach a consensus, there is little that the other members say. A decision-making body with ten members, therefore, does not necessarily raise the threshold of corruption or of external interference. As an interviewed judge said: “Judging the level of corruption based on the number of people is just laughable.”

At the same time, this secretive process can easily be corrupted. Without effective supervision, the key members of the committee can inject their prejudice into the decisions. Even the reporting judges can guide or misguide the committee in making the decisions that he wants. Other types of connections also permeate the committee: the lay assessor, who contacted most of the committee members in advance in the property case, is only the tip of an iceberg. In such institutional arrangement, what outcome would one expect in the litigation between an average citizen and a powerful one?

The data on suspended sentencing provide further evidence on the limited role of the committee in controlling corruption. A highly sensitive area of judicial corruption, a suspended sentence must be reviewed by the committee. Several interviewed judges admitted that the corruption ran rampant in this area. But the data indicate that the committee has done very little to limit the applications of the suspended sentencing—it changed less than 4% of the suggested opinions.

In a way, the committee has become a safety device to protect the adjudicating judges and the committee members from being accused of corruption. When a case is reviewed by the committee, the decision becomes the committee's. The adjudicating judge significantly lowers the possibility of being punished for corruption since it is no longer her decision. For the committee members, a collectively responsible decision means no responsibility for anyone. The insignificant changes, often by adding more monetary penalties, are well within the discretion of the law: there is no way to show which decisions are being bought or paid for. Reviewing most criminal cases simply means that the committee has participated in both the decision-making process and more importantly, in sharing the opportunities of bribery-taking. That is why the internal documents requiring almost all the criminal cases be reviewed have been well-implemented. That is also why “criminal judges are always busy with banquets,” as a saying goes, and why many judges prefer working in the criminal division.<sup>24</sup>

## **Control and Accountability**

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<sup>24</sup> Author's interview with judges of the court, March 3, 2011.

In his classic study of courts and politics, Shapiro suggests that as the court exercises political power, the political leader may “create systems of judicial recruitment, training, organization, and promotion that ensure that the judges will be relatively neutral as between two purely private parties but will be the absolutely faithful servant of the regime on all legal matters touching its interests.”(1981: 32) Implied in this insight is what Solomon (2007: 123) terms “a universal tradeoff” between the independence, power, and accountability of courts since accountability measures may impinge on independence. Moustafa and Ginsburg (2008: 14-21) further collate the various means of control of authoritarian regimes on the courts and judges. Less explored, however, is the relationship between the control and accountability.

This article suggests that the adjudication committee in Chinese courts represents a unique form of control over the judges and thus provides a vintage perspective to explore the relationship between the two. During the reform period, Chinese courts have been assigned an increasingly important role in social control, legitimation, and providing a credible investment environment, as evidenced by the increased caseloads and expanded jurisdictions. On the other hand, the state, similar to most authoritarian regimes, has been extremely cautious in loosening the firm control over the courts. Among multiple dimensions and layers of control mechanisms to which Chinese judges are subject, the adjudication committee has played a crucial role in controlling the minds and behaviors of the Chinese judges.

Unlike the sporadic practice of “telephone law,” the adjudication committee provides an institutionalized avenue which allows a systematic control. For senior court officials, the adjudication committee provides a safety valve preventing any possibly unexpected decisions. Although the data indicate that in many cases the adjudication committee affirms the proposed solutions of the judges and in most situations it reviews trivial and simple cases, the lack of such

cases in the data does not suggest the control is not firm. To the contrary, the data and analysis demonstrate that such an institution is well in place and allows it to intervene when needed. It is also true that the reporting judges have a role to play in the process of decision making, but the final decision-making power is clearly vested in the committee and the authority of the president is enormous. Compared to judicial bureaucracies—encouraging conformity with regime expectations through a system of recruitment, training, evaluation, promotion, and discipline—which has already been established and strengthened in China, the adjudication committee is more formal, direct and outright. If some authoritarian regimes such as Singapore (Silverstein 2008) or Putin’s Russia (Solomon 2008) have to rely on informal practices or institutions to achieve the goal of conformity, the adjudication committee ensures that Chinese judges do the bidding of powerful persons formally and conveniently. Compared to the Spanish solution, in which the state places all matters of interest to the government to a special set of tribunals that the state has controlled, thus allowing for a fairly independent judiciary handling ordinary cases (Toharia 1973), the adjudication committee deal with the important cases within the same court system, but with different procedures.

Exactly because it does not channel the more difficult and important cases into a separate system but refers them to the adjudication committee, a build-in institution of the court, this arrangement cultivates a culture or norm of loyalty and reproduces self-restraint, conservatism, and conformity. For average judges, the committee’s function as a risk or responsibility avoiding device creates incentive for them to submit any unusual cases to the committee for review, including but not limited to the politically sensitive, doctrinally difficult, and the influential. The result, as a rule, is a judicial passivity on all those more important matters and a tendency to defer to the interests or expectation of the senior court officials and local political elite. When

this judicial passivity is reinforced by the bureaucratization of the judiciary, the hierarchy of administration, the authoritarian mentality, and the Party domination, it is no less than the “institutional ideology” described by Hilbink in *Chilean Judiciary* (2007).

Taken together, the adjudication committee is one of the most effective institutions, in terms of both the scope and depth, in controlling the minds and behaviors of judges. Only with the adjudication committee in mind can one understand how the state has managed to control so many judges at the grassroots, given China’s fragmented political structure (Lieberthal and Oksenberg 1990). Under this institutional arrangement, judicial independence of Chinese judges is doomed to be severely limited.

But the firm control derived from the adjudication committee has taken tolls on the accountability of judicial decisions. In an effort to capitalize on the regime-supporting roles that the courts perform, many judicial reform measures on enhancing accountability have been launched. Among these measures are procedural justice and the transparency of adjudication process in particular, and the incorporation of clearly reasoned analysis in judgments (SPC 1999). But the functions of these measures are severely discounted due to the existence of the adjudication committee. As mentioned, the operation and discussion of the committee remains non-transparent. And no reasons are given for the decisions of the adjudication committee. The litigation parties are not even informed of who the members are, who actually attend the meeting, let alone who make what decisions. When a decision is made contrary to the common sense or the expectation of the general public, even though it is well-intended, it engenders public cynicism and mistrust of the courts, which might defeat the regime’s own purposes. As this study demonstrates, more likely than not, the adjudication committee serves as a worm bed for judicial corruption and other illegitimate and extra-legal pressures, and becomes an obstacle

instead of a facilitator toward professionalism. Notwithstanding the efforts of judicial reforms, nowadays China has witnessed rampant judicial corruption; external interference on court decision-making processes and local favoritism is anything but surprising. Systematic empirical studies already find extremely unbalanced case outcomes favoring the “haves” and especially the government, or government-related litigants, and one of the reasons is the lack of judicial independence (He and Su manuscript). Partly because of this, extra-judicial petitions and collective protests have been drastically increased.

Viewed from the prism of the adjudication committee in China, one will see more complicated dynamics between the power, accountability, and independence of the courts. To reap the regime-supporting functions that courts perform, the regime must allow certain the courts to enjoy certain power and autonomy. To check or regulate the exercise of the power, liberal democratic countries may simply hold the judges accountable for the law or the public. But authoritarian regimes are uncomfortable with an empowered judiciary, so they impose various means of control, including accountability measures. The irony is that the control over the judges does not just curtail judicial independence. More important, it counteracts the accountability measures. Without accountability, however, extra-legal interference and corruption could go out of control, and consequently, the public trust toward the judiciary and the regime declines. When the control is overwhelmingly tight, or put different, when the control is overdone, it would result in negative consequences which undermine, if not devastate, the functions that the regime expects the courts to achieve. Since the judges cannot be held accountable simultaneously for both the political leaders and the law or the public, most authoritarian states have to strike a balance between these two competing needs. Indeed, most authoritarian states would rather allow the judiciary to be held accountable to the law and the

public except a few issues that are core to the government interests. This was true in the former USSR, for example, in which the courts and judges retained jurisdictions over criminal and civil disputes and at times “were given considerable discretion.” (Solomon 2008: 268)<sup>25</sup> Such a contrast between China and other authoritarian regimes prompts further questions: what is the optimal balance for an authoritarian regime? What are the variables determining the balance? Since accountability is a distinct issue from independence, its relationship with the power and control in the courts of authoritarian regimes needs special attention.

## **Conclusions**

Primarily relying on the minutes of the adjudication committee in a basic level court of one year, and interviews with some judges involved, this study does not aspire to meet the highest standards of objectivity. While the types of cases reviewed, the average discussion time for each case, the percentage of suggested opinions being modified, the sequence of discussion, and who make the final decisions are just a matter of fact, the judges being interviewed might overgeneralize on the basis of their own experiences. Accounts from these varying sources may not always be inconsistent. Yet in their essential details, they are more complementary than contradictory. Despite the varying approaches, some fundamental agreements have emerged from these sources: the disproportionate power among committee members, miscommunication between the committee and adjudicating judges, bureaucratized decision-making process, violation of due process of law, and more fundamentally, its role as a protective device to avoid responsibility.

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<sup>25</sup> Singapore (Silverstein 2008) and Chile (Hilbink 2007) are just two obvious examples. For more examples, see generally, Ginsburg and Moustafa 2008.

One reason why the adjudication committee in this Shaanxi court reviews so many cases is because the court leaders are less resourceful, partially because of relative economic underdevelopment of the region and the light caseload of the court. The court leaders are still capable of controlling the decision-making of all these cases. Their relatively lower income also creates more incentive for them to control and thus they are less willing to delegate authority to individual judges (He 2011). Reports from some areas already suggest that the committees may review significantly fewer cases (Yang 2010; Guan 2004: 27), either as a result of the efforts toward judicial transparency or because the heavy caseloads preclude a comprehensive review. Further research thus should focus on the extent to which the reduced number of reviewed cases will change the operation pattern and decision-making process of the committee.<sup>26</sup> Many courts have followed the directives of the SPC in decentralizing the power of the adjudication committee, setting up specialized subcommittees, incorporating committee members from veteran judges, and streamlining discussion rules (SPC 2005, 2010). While these reforms have reduced the discretion of the committee, they are not necessarily compatible with judicial independence and accountability (Li 2011).

As a remnant of the Chinese communist revolution, the adjudication committee is quite unique in the contemporary world and history. The market force and the development of staff professionalism seem unable to wash away this remnant of the Chinese revolution. And this remnant, bearing the mixed characteristics of substantial irrationality and substantial rationality, has become incompatible with a system moving toward formal rationality (Weber 1954). With a lot of other multiple dimensions and layers of control in place, is such a firm control really worth

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<sup>26</sup> A recent study based on a lower court in southwestern China suggests that with the committee reviewing fewer cases, other types of control over the judges by the senior court officials are enhanced. See Xiao 2007.

the legitimacy undermined? As comparative experiences indicate, an authoritarian regime can control the judges without such an extreme institution. If a firm control is not necessary, it might well be the vested interests that have countenanced or even strengthened its enduring existence. If the committee did serve positive functions a decade ago when Zhu Suli's book was written, now it is time to have a reevaluation in the changing context. As far as this small case study can tell, if China really wants its judiciary to deliver justice in a fair and efficient way, as it alleges, it should be more resolute in launching meaningful reforms if not the elimination of the committee. It is no less important to eliminate the rigid hierarchy within the courts, separate administration from adjudication, and grant courts more autonomy from local governments.

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Table 1: All Cases Reviewed by the Adjudication Committee in the Shaanxi Court (2009)

Types of Cases	No. of Cases Handled by the Court	No. of Cases Reviewed by the Committee	Upholding Rate	Modified Rate	Opinions Sought from Higher Courts	Others	Ratio of the Type of Cases to All Reviewed Cases
Criminal	375	363	54.52%	40.77%	0.55%	4.13%	84.42%
Civil	1401	48	58.33%	8.33%	14.58%	18.75%	11.16%
Admin.	8	5	60%	20%	20%	0%	1.16%
Enforcement	716	14	57.14%	0%	42.85%	0%	3.26%

Note: Upholding means the committee upheld the suggested (majority) opinions of the adjudicating judges or the collegial panel.

Table 2: Suggested Opinions Modified by the Committee in Criminal Cases.

Cases Changed	Main Penalty Changed	Supplementary Penalty Changed	Both Changed
148	30 (24 increased)	51 (monetary; all increased)	67 (46 increased)