

CLASS 3

ACTORS IN THE CHINESE LEGAL SYSTEM

Marc Rosenberg, *The Chinese Legal System Made Easy: A Survey of the Structure of Government, Creation of Legislation, and the Judicial System Under the Constitution and Major Statutes of the People's Republic of China*, 9 U. MIAMI INT'L & COMP. L. REV. 225 (2000)

Procuratorates

Article 130 of the Constitution of the People's Republic of China provides that the PRC establishes the Supreme People's Procuratorate and local people's procuratorates at each level of the governmental structure. The people's procuratorates are state organs for legal supervision, and act as both the prosecutor of criminal cases at each level of the court system, as well as a supervisor of the courts to make sure that the correct procedure is adhered to.

Each people's procuratorate has a procuratorial committee that is expected to institute the system of democratic centralism and, under the direction of the chief procurator, to discuss and decide important cases and other major issues, on the principle of the minority being subordinate to the majority. If the chief procurator disagrees with the majority's decision on an important matter, it is referred to the standing committee of the people's congress at the corresponding level for final decision.

The purpose of the procuratorates is to safeguard the unity of the country, the people's democratic dictatorship and the socialist legal system; to maintain public order, including order in production and other work, in education and scientific research, and in the daily life of the people; to protect the socialist property owned by the whole people and by collectives and the private property lawfully owned by individuals; to protect the citizens' rights of the person other rights; and to ensure the smooth progress of socialist modernization. The procuratorates are also supposed to educate the citizens, encouraging them to be loyal to their socialist motherland, to conscientiously observe the Constitution and the laws and to combat illegal activities.

According to Article 132 of the Constitution, the Supreme People's Procuratorate is the highest procuratorial organ of the state. It directs the work of the local people's procuratorates at the various levels. As well, it exercises procuratorial authority in major criminal cases that have an impact on the entire country and lodge a protest if some definite error is found in a verdict or sentence by a people's court at any level. The Supreme People's Procuratorate can also supervise trials of civil suits and administrative litigation.

The procuratorates review cases investigated by the public security organs and state security agencies and decide whether to approve arrest and whether to prosecute, as well, they supervise the investigation activities of public security organs and state security agencies to determine whether they conform to the law. The procuratorates also initiate and support public prosecutions of criminal cases and supervise the criminal trials, verdicts and sentencing of the people's courts to determine whether they conform to the law. In cases where the procurators find definite errors, they lodge protests in accordance with the procedure for appeal. The procurators also supervise the execution of sentences in criminal cases and the activities of prisons, houses of detention and institutions in charge of reform or rehabilitation through labor.

In exercising their supervisory functions and their procuratorial authority, the procuratorates are expected to adhere to certain principles. In the exercise of procuratorial authority by the people's procuratorates, the laws are supposed to be applied equally to all citizens and no privileges are supposed to be allowed. In dealing with cases the people's procuratorates should always make careful investigations, study the evidence and seek truth from facts. They are to lay stress on material evidence

rather than readily giving credence to oral statements, and to strictly forbid security personnel to coerce confessions. They should observe and enforce the law to the letter and investigate thoroughly the responsibility of anyone who violates it. The functionaries of the people's procuratorates at all levels are expected to pay great attention to facts and to the law, to be faithful to the socialist cause and to serve the people wholeheartedly.

The Judicial System

The PRC has approximately 30 high courts, almost 400 intermediate courts and over 3,000 basic courts. More than half of the roughly 215,000 judicial personnel who staff these institutions are judges. Currently, all courts are guided mainly by the Constitution and the Organic Law of the People's Courts of 1979, as amended in 1983. Every court in the judicial system is supposed to rely on the following constitutional principles in conducting judicial work: (1) all citizens are equal before the law; (2) the people's courts shall exercise judicial power independently and are not subject to any interference by the administrative institutions, public organizations or individuals; (3) open trials should be conducted; (4) no one is guilty before proven so before the people's courts; (5) the accused has a right to defense; (6) citizens of all nationalities have the right to use their own spoken and written languages in the court proceedings.

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China has a centralized judicial system, in which there are courts established at various levels of the state, including: (1) The Supreme People's Court (the national level); (2) Provincial High People's Courts (provincial level); (3) Intermediate People's Courts (large city level); (4) Primary People's Courts (local city, county and township level); and (5) Courts of limited jurisdiction.

The responsibility of each of these People's Courts is defined as follows:

To try criminal and civil cases, and through judicial activities to punish all criminal elements and to resolve civil disputes so that the system of democratic dictatorship of the people, and the socialist legal system and the social order can be maintained; to protect the socialist property owned by the whole of the people and the property owned collectively by the working masses; to protect the legitimate property privately owned by any citizen; to protect the property legitimately owned by joint ventures with Chinese and foreign capital; to protect the personal, democratic, and other rights of the citizen; to safeguard the socialist revolution and the socialist construction in order that the state will proceed successfully.

1. Primary People's Courts

The Primary People's Courts are the local trial courts, and deal with eighty percent of the cases of first instance in the country. There is no jury system in the trial courts, rather, there is a panel composed of three judges or of judges and people's assessors. In China, it is the responsibility of the panel to find the facts and apply the law. Either attorneys or judges can conduct questioning.

The Primary People's Court has jurisdiction over ordinary criminal cases committed by citizens of the PRC, however, crimes carrying a possible sentence of life imprisonment or the death penalty, and criminal cases in which the offenders are foreigners, are within the initial jurisdiction of the Intermediate People's Court. In some cases a Primary People's Court may choose to defer jurisdiction to a higher court.

2. Intermediate People's Courts

Intermediate People's Courts are established at the provincial level. The jurisdiction of these courts includes cases of first instance as assigned by specific laws or transferred up *sua sponte* by primary courts. Some cases in which the Intermediate Courts are assigned by statute as courts of first instance

include cases which may involve life-sentences or the death penalty, cases of counter-revolutionary crimes, cases involving foreigners and foreign civil cases. The Intermediate People's Courts also adjudicate cases that have been appealed from the Primary People's Courts.

3. High People's Courts

The High People's Courts are established at the provincial level and have original jurisdiction over what are considered to be the most important cases within the province. The determination of importance is within the discretion of the court. In addition, the High People's Courts have appellate jurisdiction over cases that originated in the Intermediate People's Courts. The High People's Courts are also charged with the supervision of the administration in their jurisdiction.

4. The Supreme People's Court

The Supreme People's Court is the highest judicial organ in China. Although there is a multitude of branches and divisions working within and under the Supreme People's Court, the four main divisions of the Court are comprised of a criminal division, a civil division, an administrative division, and an economic division.

The senior judges who work at the Supreme People's Court in Beijing spend most of their time as administrators and de facto legislators rather than adjudicators. The Supreme People's Court has over a hundred judges and a large staff "who supervise a nationally-unified court system consisting of three levels of lower courts plus military and maritime, railway and other transportation courts and who from time to time issue elaborate 'opinions' on relevant laws."

Randall Peerenboom, *Globalization, Path Dependency and the Limits of Law: Administrative Law Reform and Rule of Law in the People's Republic of China*, 19 BERKELEY J. INT'L L. 161 (2001)

[Although this excerpt focuses primarily on administrative law reform, the author's analysis illuminates our overall understanding of the Chinese courts and the legal profession in China.] The importance of judicial review in ensuring rule of law in the administrative realm is easily overstated. In fact, experienced lawyers often note that one wins the lawsuit at the agency rather than in court. Moreover, judicial review is only one means of ensuring that administrative officials act in accordance with law. Nevertheless, independent courts or tribunals are still necessary, if not sufficient, for a modern administrative law regime in that they serve as a final backstop against government arbitrariness and oppression, and they structure agency behavior and institutional politics.

The lack of independence and authority of PRC courts undermines their ability to discipline wayward administrative agencies. Article 126 of the Constitution provides independent judicial power in accordance with law and states that the courts are not subject to interference by any administrative organ, public organization or individual. Actual practice, once again, is considerably different. Particularly damaging to the autonomy of courts is their dependence on local government. There are four levels of courts in China: the Supreme People's Court, High People's Courts, Intermediate People's Courts and Basic Level People's Courts. Each is responsible to the people's congress at the equivalent level, which supervises the court's work and appoints and removes judges. Moreover, courts are financially dependent on the corresponding level of government for salaries, housing, benefits and so forth. The lack of secure tenure, combined with financial dependence, leaves judges beholden to their government counterparts. Contact between government officials and judges, many of whom have known each other for years, is frequent. Not surprisingly, local protectionism runs rampant as courts refuse to enforce judgments against local entities that have strong government support.

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The institutional autonomy of the courts is further diminished by their links to the CCP. While people's congresses are formally empowered to appoint judges, in practice, judges often are selected by the CCP Committee on the same level and the choices then ratified by the people's congresses. Most senior judges are CCP members, including the members of the adjudication committee of the court, which has considerable authority in determining the outcome of difficult or controversial cases. Further, although direct intervention by the CCP in individual cases is clearly the exception rather than the rule and is decreasing, judges still discuss important political cases or cases involving difficult legal issues with the Political-Legal Committee. More generally, the CCP exercises control over the court by setting general policies, accepted by judges implicitly, within which the courts must operate.

The authority of the judiciary is weakened not only by its institutional dependence on local government and the CCP, but also by the limited powers granted courts within the PRC governmental structure. As in many civil law systems, courts in China do not have the formal power to make law. Perhaps most surprising to lawyers from common law systems is the circumscribed interpretative authority of PRC courts. Under the Constitution, the NPCSC has the exclusive authority to interpret laws enacted by the NPC and the Standing Committee itself. Although it has delegated some of this authority to the Supreme People's Court, the Supreme People's Procuratorate and the State Council, the Supreme People's Court was only given the right to interpret laws where necessary for judicial work. Moreover, the interpretative powers of the Court in theory are limited to clarifying laws without altering their original meaning or adding to the content of such laws. The State Council and its subordinate ministries and agencies are responsible for interpreting administrative and local government regulations. When courts encounter a problem interpreting regulations, they generally defer to the issuing body. Most important for present purposes, as already noted, neither the Supreme People's Court, nor any other court has the right to annul administrative regulations that are inconsistent with superior legislation.

Answerable to the local government and CCP committees, courts traditionally have been viewed as Party/State organs and judges as government administrators or bureaucrats. Even within the bureaucracy, the stature of the judiciary and judges has been low. For the most part, judges have tended to be poorly educated; many are former military personnel without college education or any formal legal training.

Given the weak stature of the courts and their dependence on the local government for financial resources, courts naturally are reluctant at times to challenge administrative agencies. Judges sometimes refuse to accept cases for fear of insulting government officials or damaging relations with the local government. To avoid problems, judges have been known to reject a case for minor deficiencies in the complaint or to try to duck a case by suggesting to the plaintiff that he or she is not likely to win and should drop the suit. Some have even gone so far as to knowingly decide incorrectly against a plaintiff but then tell the plaintiff to appeal to a higher court less vulnerable to local protectionism.

Nevertheless, the weakness of the courts should not be overstated; to a considerable extent, they are able to perform their duties. In fact, plaintiffs in China have a much higher chance of obtaining a satisfactory result than in the United States, Taiwan or Japan. Plaintiffs prevail in whole or in part in almost forty percent of the cases in China but only twelve percent in the United States and in Taiwan and between four to eight percent in Japan. Of course, that does not mean that the courts are more effective in China than in the United States. One would need to examine the merits of the cases to make any such judgment. One explanation could be that in the United States, administrative agencies generally comply with the law and thus should be expected to prevail more often, whereas in China administrative agencies actually comply with the law even less than the 40% plaintiff victory rate would suggest. That said, clearly the courts are not just a rubber stamp; they do have some authority. But there are certain types of cases that would be difficult for a plaintiff to win, including major political cases against the government such as challenges by well-known dissidents to re-education through labor.

Legal Professionalism and Consciousness

The general level of legal awareness in China is relatively low among all sectors of state and society be it citizens, government officials, or even lawyers and judges. A recent poll revealed that almost half of the people surveyed did not know the difference between judges and prosecutors. A 1992 survey of over 1041 citizens in Harbin found that 82% had not heard of administrative reconsideration and 65% had not heard of the ALL. Other surveys have produced similar results.

The role of lawyers in administrative litigation suits is particularly crucial. Representation by legal counsel in administrative law cases is more frequent than in economic or civil cases. When asked about the key to success in administration litigation, 83% of 228 respondents to a 1997 Anhui survey thought having a good lawyer was important. In contrast, only 27% thought connections were important while 18% thought money was important. Lawyers may be particularly crucial in administrative cases because the cases tend to be complicated both legally and politically. People may be afraid to sue officials directly and may want the protection of a lawyer who not only knows the law (and thus might not be intimidated), but who also may serve as a buffer between the plaintiff and the government defendant. While the ALL does not allow mediation in administrative litigation except with respect to the issue of damages, according to a 1997 survey of administrative litigation, lawyers reportedly often end up mediating both before and during the court session. Given the low level of legal consciousness on the part of officials, at times all that is required is a clear presentation of the law by a lawyer (or the court) to persuade an official that a mistake has been made. The official will then change the decision. Such situations account in part for the extremely high percentage of cases that are withdrawn due to a change in the agency decision.

Despite the importance of lawyers to a just outcome in administrative law cases, there is good reason to be concerned that China's lawyers are not up to the task. In general, many of China's lawyers are poorly educated and trained. It is still possible to qualify as a lawyer without a college education in law, or even a college education at all, and without passing the bar exam. As of 1995, only 25% of China's lawyers had college degrees, 2.78% had masters or doctoral degrees, or overseas training, and another 46% had completed *dazhuan* degrees obtained through two or three years of study, either in full-time universities, part-time colleges or night schools or through correspondence courses and self-study. Thus, almost 30% of China's lawyers have no formal education beyond high school. A lawyer's training in administrative law may be limited to a course in preparation for the national exam. Few, if any, lawyers specialize in administrative law. Administrative law cases account for less than 2% of all lawsuits. Moreover, administrative litigation is less profitable and more burdensome than economic or civil litigation or non-litigation commercial work. Lawyers have complained of difficulties in conducting discovery on administrative agency defendants. In some cases, they may be afraid to challenge powerful administrative or government interests.

Judges may also not know much about administrative law. Prior to the Judges Law, for example, there were no objective qualifications for judges other than that one be a cadre. The new law requires at minimum a college education for new judges, while judges already in office who do not meet the educational requirements must undergo supplemental training. At the end of 1995, 80% of judges had at minimum *dazhuan* qualifications, which require at least two years of legal training at the college level. While the education and training of PRC judges is rising, the overall level remains fairly low. Moreover, few judges have an administrative background or specialized training in administrative law. China's courts are divided into specialized divisions, and the administrative law division is not considered a choice assignment. Many judges resist appointment to the administrative division because of the politically sensitive nature of the cases. As a result, the divisions are often staffed by relatively young and inexperienced judges who pay their dues for a year or two before demanding to be rotated to a more prestigious and less political division.

Sida Liu, *Beyond Global Convergence: Conflicts of Legitimacy in a Chinese Lower Court*, 31 LAW & SOC. INQUIRY 75 (2006)

The fieldwork for this research includes . . . ethnographic work in Qinghe County in summer 2000 and a comprehensive collection of quantitative and historical data at Court of Qinghe . . . in August 2001. Qinghe County is a rural county in southeast Hebei Province, a province in Northern China adjacent to Beijing. The county has a total area of 496.6 sq. km., has a population of 354,000, and it administers 20 townships, with 320 villages in total. Along with the rapid development of the wool industry, the county's economy has been growing since the early 1980s, with the most notable increases in the middle 1990s. For the jurisdiction of the judiciary, while all cases in the county town are handled by the court, civil and economic disputes in the suburban and rural areas are mainly handled by the People's Tribunals located in the townships. Overall, the jurisdiction of Court of Qinghe is of medium scope for China's basic-level courts.

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The Appearance of Institutional Conformity

One notable effort of China's judicial reform is to build professional personnel in the courts. Despite many criticisms of the low professional quality of Chinese judges, the education and professional training of the judicial personnel have been gradually improving during the past two decades. This reform is truly a process of global convergence, given the fact that traditionally China had neither specialized judges nor formal legal profession. To provide a description of the change over time, this section analyzes the composition of different types of personnel in Court of Qinghe's recruitment during four periods in 1978-2000.

Court of Qinghe was founded in 1950, at which time courts were often labeled "knife handle" (*daobazi*), that is, a weapon of the proletarian dictatorship. This label made Chinese courts, like the army and the police, a type of military instrument for striking "class enemies". It is widely recognized among Chinese legal scholars that this military legacy is an important starting point for studying the judiciary in China. During the Cultural Revolution, Court of Qinghe was demolished together with all the other courts in China until the reestablishment in 1978. The court had twenty-five judges and legal clerks at the time of the reestablishment, and four of the staff were army veterans. By 2000, the court personnel expanded to sixty judges and legal clerks. During the twenty-two years since 1978, the court recruited thirty-eight judges and legal clerks with only three leaving. The substantial increase in the number of personnel reflects a nationwide pressure of economic development and social change on the judicial system.

According to Su Li's typology, I divide the increased personnel into three categories: (1) army veterans, (2) transferred officials, and (3) college graduates. The issue of "installing army veterans in courts" (*fuzhuan junren jin fayuan*) was widely discussed among Chinese legal scholars in the late 1990s, and a newspaper article on this issue written by He Weifang, a leading legal scholar, aroused tremendous public concern. These discussions often make the assumption that this phenomenon still widely exists in Chinese courts. However, my data from Court of Qinghe indicate a strikingly different pattern.

. . . [D]uring the first period (1978-1985), army veterans and transferred officials constituted the whole new staff of the court. No college graduate was recruited in this period. Nonetheless, the number of army veterans installed in the court substantially decreased in the second period (1986-1990) and became zero after 1990. Although there were some transferred officials who had been officers in the army, their numbers also significantly declined over time. Meanwhile, college graduates, particularly law students, have become more and more favorable in the court's recruitment since the late 1980s.

The distinct strategies of the court's recruitment in different periods suggest a functional transformation of the court from a military instrument of proletarian dictatorship to a professional legal institution, or at least the image of a professional legal institution. Court of Qinghe is by no means an exceptional case in terms of this transformation—as Cai suggests, it mirrors a nationwide transformation of the role of Chinese courts.

Another important aspect of the convergent process is the evolution of the judicial organization. The structural change in Chinese courts over the two-decade period is characterized by both increasing division of labor and the functional transformation of judicial organization from criminal oriented to civil- and economic-oriented. In this process, the former socialist organization of the judiciary has been fundamentally restructured, and many new elements were established according to the Western models.

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In 1978, there were only two judicial divisions in Court of Qinghe, the Criminal Division and the Civil Division. The Criminal Division had nine judges and legal clerks, whereas the Civil Division had five. These numbers . . . clearly indicate that the focus of the judicial work was criminal work in the early years after the reestablishment. In 1981, five People's Tribunals were established in five townships to handle civil disputes in suburban and rural areas. In 1982, the Economic Division was established with three judges and legal clerks. By 1987, the Civil Division, the Economic Division, and the People's Tribunals all together had thirteen judges and seven legal clerks, whereas the staff in the Criminal Division was reduced to merely three judges. Therefore, the functional transformation from criminal work to civil and economic work already occurred in Court of Qinghe in the mid-1980s.

Since then the structural changes became even more dramatic. In 1989, the Complaint and Petition Division (*gaosu shensu ting*) was established, and, in 1990, both the Administrative Division and the Enforcement Division (*zhixing ting*) were established. In 1997, the five People's Tribunals were reorganized into two Central Tribunals. In 1998 the Complaint and Petition Division was transformed into two separate divisions: the Case Filing Division (*li'an ting*) and the Judicial Supervision Division (*shenpan jiandu ting*). The Labor Division and the Team of Judicial Police (*fajing dui*) were also established as independent institutions in 1998.

. . . [B]y 2000, a specialized judicial organization built upon the Western models was already evident in Court of Qinghe. It is a typical bureaucratic structure in the Weberian sense, in which there is a clearly defined hierarchy of offices. As Michelson argues, this outlook of the judicial organization, together with other measures in China's legal reform, serve important symbolic functions in promoting investor confidence and political legitimacy at the global level. Nevertheless, as later sections will demonstrate, the behavior of this bureaucratic judicial organization is not always legal-rational, but largely mediated by its social environment.

Over the two decades, one notable theme characterized the structural change in Court of Qinghe, i.e., it is almost a purely top-down state-led reform, and the ideas and institutions of formal law adopted from the Western countries provide the blueprint for the changes. Most institutional changes in Court of Qinghe are part of nationwide judicial reforms accompanied by the promulgations or revisions of major laws. For instance, the establishment of the Economic Division in the court in 1982 was accompanied by the revision of Article 19 of the People's Court Law in 1983, which allows basic-level courts to establish the Economic Division. The establishment of the Administrative Division in the court in 1990 was also accompanied by the promulgation of the Administrative Procedure Law in the same year. The establishment and transformation of other institutions in Court of Qinghe follow the same pattern, except for the reform of tribunals in 1997.

People's Tribunals (*renmin fating*) are subdivisions of the basic-level court that extend to suburban and rural areas and handle civil and economic disputes as well as a small portion of criminal private prosecution (*xingshi zisu*) cases. Traditionally, the main task of the People's Tribunals was to handle civil cases (e.g., divorce, neighborhood disputes, etc.), and, accordingly, the tribunals were regulated by the Civil Division of the court Furthermore, Zhao Xiaoli's study of Chinese rural basic-

level courts suggests that since the 1980s, tribunals have been largely under the control of the local township government, in terms of both finance and personnel. Therefore, how to balance the different demands of the court and the local government has become an important problem for the People's Tribunals.

In the 1980s and early 1990s, Court of Qinghe had five tribunals, each with three-four judges and legal clerks. . . . [T]he number of staff in the tribunals kept increasing since their establishment. Furthermore, the dramatic increase in the number of economic cases in the mid-1990s substantially increased the workload of the tribunals, and it led to a comprehensive reorganization of the tribunals in 1997—the five People's Tribunals were merged into two Central Tribunals (*zhongxin fating*). An important consequence of this reorganization is the centralization of judicial power, namely, the two Central Tribunals are no longer under the control of specific township governments and the judicial power moves farther from grassroots local communities. Note that this institutional reform is not a top-down state-led process and has not received any official recognition until today. Instead, it was made to deal with the unbearable workloads generated by rapid economic development. This clearly indicates the elasticity of China's institutional reform under a strong state and a flourishing economy.

In sum, the institutional changes in Court of Qinghe during 1978—2000 are largely efforts to create a formal-rational judicial system both in personnel and in organization. Combined with the massive promulgation of legal codes, this ongoing reform is a top-down transformation that is led by the state and often made to conform to global institutional norms. Facing domestic demands for modernizing the judiciary and external pressure of global recognition, the Chinese government has chosen institutional change as the primary drive for building a “modern” legal system. Nevertheless, beneath the veneer of institutional conformity, how do the global legal institutions work in this lower court? How do local actors understand them and reconstruct their meanings? With these questions in mind, we turn to the discussions on the various informal institutions and processes in the judicial practice.

Informal Institutions and Processes in the Judicial Practice

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Although the evolution of the judicial organization clearly shows the efforts of building a legal-rational judicial system, in practice this bureaucratic organization is decoupled, i.e., the actual work of the judicial staff is often different from their formal roles. The extremely uneven workload of different divisions is the crucial reason for this phenomenon.

[During 1982–1996, t]he amount of criminal cases was relatively stable every year, varying from twenty-three to fifty-one, except for the outlier of seventy in 1983, when a massive nationwide “Strike Hard” (*yan da*) campaign against crime took place. Since the establishment of the Administrative Division in 1990, the amount of administrative cases was also very stable but extremely low. The largest number is four in 1994, whereas in both 1993 and 1996, the numbers are zero. In contrast, the amount of civil cases significantly increased during the period, from 213 in 1982 to 584 in 1996. The amount of economic cases also significantly increased during the same period from a near zero starting point (one in 1982) to a notable jump of fifty-five in 1994 and 638 in 1995.

According to the interview I personally conducted with a vice-president of Court of Qinghe, the creation of new types of judicial work is the main reason for the large increase in the number of civil and economic cases during the period. The booming of the economy generated many new types of contractual disputes (e.g., purchase-and-sell (*gou xiao*) contracts, loan (*jie kuan*) contracts, etc.), and the amount of these contractual disputes substantially increased during 1982–1996. Similarly, the amount of economic-related civil disputes (e.g., loan, debt, purchase-and-sell, etc.) had increased much as well, particularly in 1994–1996. Even the amount of divorce cases significantly increased in 1994–1996 (average 275.3 per year) compared to previous years (1982–1993, average 135.1 per year). Furthermore, the creation of a new type of judicial work called “retrieving loan according to law” (*yifa shou dai*) in 1995 is a decisive

factor for the jump of the amount of economic cases in 1995. The role of the court in this type of judicial work is largely symbolic, and the legal documents are often made afterwards. The court could complete several cases in one single day, which directly leads to the increase in processing economic cases.

In contrast, the scarcity of administrative cases, a prevalent phenomenon in the Chinese judiciary, reflects the tremendous difficulty of administrative litigation. As both He and Peerenboom point out, local officials are able to pressure judges to be in favor of the government agencies in administrative litigation because of the institutional arrangement whereby the local People's Congresses appoint and remove judges and the local government funds the courts. Furthermore, this institutional control shapes the expectation of individual citizens when facing a dispute against the government and, together with the deeply rooted traditional conception of the "omnipotent government" as people's "father and mother", it leads to their avoidance of administrative litigation. Consequently, the number of administrative cases was almost neglectable in basic-level courts like Court of Qinghe.

The great disparity in the amounts of judicial work in different divisions directly leads to the decoupling of the court's formal structure. In actual practice, to even the unbalanced workloads of the civil and economic divisions, the Administrative Division in Court of Qinghe handles a large amount of civil and economic work. The Judicial Supervision Division does some civil and economic work too. In comparison, criminal cases are usually more complicated and time-consuming than civil or economic cases, and thus the amount of criminal work is quite heavy for the staff of the Criminal Division. Furthermore, as we shall see later, criminal cases are regarded as different in nature from other types of judicial work. Therefore, the Criminal Division is relatively immune from this decoupling process.

In short, the standard judicial organization is decoupled in practice due to the extremely uneven amounts of work in different divisions. This decoupling process is particularly evident in the Administrative Division, but in the judicial documents it is completely disguised. The following text on the work of the Administrative Division is from an untitled judicial document of Court of Qinghe in 1997:

The Administrative Division has received 12 cases of all types [from 1990 to 1996]. Because the conception of "citizen sues government" [*min gao guan*] still needs to be strengthened, the number of administrative cases received is relatively small. Since the establishment of the division in 1990, the average is 1.7 cases per year. Besides strengthening the study of relevant laws and administrative regulations, they [the staff of the division] also actively propagandize law, organize the legal training of government agencies, and enhance the consciousness of the government to conduct its behaviors according to the law.

Note that many activities besides case trial were created to legitimize the existence of the Administrative Division. However, those activities merely account for a tiny portion of the actual work of the staff and their major work is in fact civil and economic cases.

One might reasonably pose the question why the judicial reform bothered to establish the Administrative Division in the basic-level courts. Indeed, given the institutional constraints of administrative litigation, without considerations of legitimacy at the global level, the existence of the Administrative Division in Chinese basic-level courts would have become completely unnecessary. This clearly indicates the symbolic meaning of the judicial organization, i.e., to create the outlook of a judiciary that is capable to check and balance the power of the government offices, as the judiciaries of the Western countries usually do. Meanwhile, the demand of economic growth produces an equally important type of legitimacy for the Chinese government. When these two types of legitimacy coincide in the judicial practice, the appropriated formal structure is decoupled to accommodate the different demands from both. The decoupling of the judicial organization, therefore, shows the conflict and compromise between the two major types of legitimacy that are vital for the Chinese state.

Beneath the appearance of the formal structure, the operation of the Chinese judiciary is highly influenced by its administrative ranking system. Chinese courts are organized like a formal bureaucracy with a finely differentiated hierarchy of ranks, so that among the judges there is an underlying hierarchy

that belies the judges' supposed equality when it comes to adjudication. The organizational structure [discussed here] is not merely a structure of the judicial organization, but also the structure of the administrative system—similar to government officials, judges are designated and regulated according to their administrative ranks. This administrative system also provides a channel for other external influences (e.g., from the local government, from the police and procuratorate, etc.). I differentiate the administrative influence on the judicial process into formal and informal influences. Formal influence refers to the influence through formal devices based on the law, while informal influence refers to the influence not documented by the law but prevalent in actual practice.

According to the procedure laws, all cases, with minor exceptions, are decided by a collegiate panel (*heyi ting*) composed of three judges or, in some cases, two judges and a lay assessor. However, partly because of the heavy workload of Chinese courts, in practice there is always a specific responsible judge (*chengban faguan*) to handle a case, while other judges on the panel largely serve symbolic functions. In addition, according to the People's Court Law, for important (*zhongda*) or difficult (*yinan*) cases, there is an Adjudication Committee (*shenpan weiyuanhui*) composed of the president, vice-presidents, the division head, and other senior judges of the court, to make the final decision. With the consent of the court president, the collegiate panel has the responsibility to submit those cases to the Adjudication Committee and execute the decision of the committee.

The existence of the Adjudication Committee provides a formal channel for the administrative influence. The administrative ranks of judges become important in determining the outcome of cases. Consequently, this institution has become a focus of academic debate on China's judicial reform among both Chinese and Western legal scholars. The debate between He Weifang and Su Li, two prominent legal scholars in China, was probably the most provocative debate in Chinese jurisprudence in the 1990s. He maintains that the Adjudication Committee violates the principle of due process of law and significantly undermines judges' judicial independence, and thus it should be abolished. In contrast, Su argues that the committee is an important "indigenous resource" of the Chinese legal culture and has many indispensable functions in judicial practice. For Western scholars, Woo suggests that 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." With a comprehensive examination of the variations of judicial independence in different legal systems, Peerenboom links the Adjudication Committee to the Chinese legal culture and the imbalance of power among state organs.

In spite of their various interpretations of the Adjudication Committee, all the above discussions on judicial independence in China focus on formal institutions. However, as Selznick argues in his classic TVA [Tennessee Valley Authority] study on the external influences upon organizational structure and decision making, informal co-optation has real power and control over the decision-making process, whereas formal co-optation often results in institutions that largely serve symbolic functions. In accordance with this argument, my observation suggests that informal influence based on the administrative ranking system is pervasive in Court of Qinghe, and it undermines the due process of law much more severely than the Adjudication Committee does.

As He Weifang suggests, "Such rank of judges not only implies the difference in the so-called 'political treatment,' but also indicates a scale of obedience and a distribution of responsibilities." The law requires important or difficult cases to be submitted to the Adjudication Committee, but, in practice, even normal cases are under the informal supervision of the division head, the vice-president who has authority over the division, and often the president. For instance, I audited a real estate case in the morning on the third day of my fieldwork, and when I was interviewing the vice-president who had authority over the Civil Division at lunch time, he had already known the details of the case and "exchanged opinions" with the judges. This indicates an informal control over the decision making of the collegiate panel from actors who have higher administrative ranks. Meanwhile, private discussions of cases with judges outside the collegiate panel are also prevalent. Among all the actors who have influence on a case, the president of the court is definitely the most powerful one. Woo elaborates upon the critical

formal influence that the president has over judicial decision making, but I would add that his informal influence is at least equally powerful. I interviewed a senior lawyer who had practiced law for ten years in Qinghe since the late 1980s, when being asked how much influence the president has over judicial decision making, the lawyer replied, with some understandable reservation but no hesitation, “The authority of the president is enormous.”

Furthermore, basic-level courts often ask the intermediate-level court it belongs to for “guidance advice” (*zhidao yijian*) on cases that might be appealed, and this “guidance advice” of a higher court substantially shapes the decision of the lower courts under its authority. This common practice is often called “private consulting” (*nei qing*) by Chinese judges. I witnessed the whole course of one telephone “private consulting” by a vice-president of Court of Qinghe during my fieldwork, and he confessed to me afterward that this phenomenon is prevalent in the Chinese judicial system. The rationale behind “private consulting” is straightforward. Because the higher court has the power to change the judicial decisions of the lower courts, and the proportion of decisions being changed by the higher court is a common criterion in evaluating the quality of lower courts’ judicial work, lower courts are inclined to keep their judicial decisions consistent with the higher court above them to avoid disadvantageous consequences. Klein and Hume’s recent study suggests that similar lower court compliance is found in the United States and that fear of reversal is the primary reason for this phenomenon.

The judicial work in Court of Qinghe, therefore, often becomes a complex organizational and political process, in which several players (president, vice-presidents, division heads, other judges, higher level courts, etc.) with various sorts of power exert a variety of influences. Furthermore, as many scholars have noted, external influences from the party, local government, and other channels also significantly undermine the administration of justice. However, to a large extent it is through the internal power structure within the court that external influences are capable to control the outcome of cases.

In sum, in the judicial practice of Chinese courts, legal procedure is only loosely coupled with the actual decision making, and legal procedure is subsumed by the administrative ranking system to a large extent. In other words, local political legitimacy substantially shapes the operation of legal procedures in the judicial process. As Zhang vividly puts it, a judge becomes little more than a bureaucratic clerk, whose decision depends on layers of approval within the power pyramid in order to take legal effect.

Multiple Sources of Legitimacy: The Case of Mediation

The limits of formal law in changing the judicial process are further strengthened if we take into account the different meanings of the same legal institution in different social contexts. Although the promulgation of the procedure laws and the establishment of the court divisions (especially the Case Filing Division and the Judicial Supervision Division) have substantially standardized court proceedings in the Chinese judiciary, in basic level courts informal strategies of dispute resolution are still prevalently adopted in handling civil disputes. Among these strategies, the mediation procedure is the most important informal mode of dispute resolution. This section uses the mediation procedure and its distinct meanings in two different social settings to elaborate on the multiple sources of legitimacy at work in the judicial practice.

Mediation has two meanings in China, namely, community mediation and judicial mediation. Community mediation by the People’s Mediation Committees, the official state-run extra judicial institutions of dispute resolution located at local neighborhood committees, is a major way for resolving disputes in China. The popularity of the People’s Mediation Committees leads Wall and Blum to comment in their study of community mediation that China is the “most heavily mediated nation on earth.” In contrast to community mediation, judicial mediation in Chinese courts is a judicial *procedure* for resolving a civil case as an alternative to passing legal judgments. Michelson rightly points out that traditionally Chinese courts have mediated as many cases as possible in civil cases. This policy of dispute resolution has a history dating back to the administration of justice in communist areas before the establishment of the PRC, and it is found in both judicial mediation and community mediation.

Regardless of its specific form (community or judicial), mediation is ultimately a means of popular justice, i.e., “a process for making decisions and compelling to a compliance of rules which is relatively informal and decorum, non-professional in language and personnel, local in scope and limited in jurisdiction”. According to Article 9 in the 1991 Civil Procedure Law, People’s Courts should mediate civil cases based on open and voluntary principles, i.e., the mediation procedure should be an open procedure and with the consent of both parties in dispute. Compared with judgment, mediation does not follow the standard due process and creates a relatively independent “insulative space” for the judicial decision making, but provides a largely procedure-free open space for the communication among judges and both parties.

Different from the mediation process in Western judicial systems, the judge plays a crucial role in China’s mediation procedure. A common practice of mediation in Chinese courts is the so-called “back-to-back” (*bei kao bei*) mediation, i.e., the judge discusses the solution of the dispute with the two parties separately. It is widely recognized among Chinese judges that this method is against the open principle of mediation, but they also admit, in practice, this is often the only effective means to achieve a consensus in mediation. As Merry indicates in her discussion of the Community Boards in San Francisco, mediation agencies could create a specialized community of mediation providers with their own language, culture, and forms of organization. This is also the case for the judicial mediation in China—the skills required in mediation are no longer legal knowledge, but mostly interpersonal skills and familiarity with the customs of the local community. The reliance on the judges’ nonlegal skills in mediation makes the social reality in the judicial practice a much more flexible and unpredictable process than its formal structure and procedures appear to be.

In the present study I use judgment rate, i.e., the annual percentage of civil cases ended in judgment, [at the Court of Qinghe during the period of 1982–2000] as an indicator to measure the extent that mediation is used in civil litigation. . . . Although the average rate (0.254) during 1990–2000 is higher than that the rate (0.174) during 1982–1989, suggesting a slight decrease in the use of mediation over the two decades, the judgment rate is consistently low during the two decade period, with an average of 0.232 and the highest rate of 0.336 in 1999. In other words, more than three-fourths of all civil cases are mediated in the judicial practice.

The prevalent use of mediation indicates that the goal of civil litigation in the court is to resolve disputes rather than to establish legal rules, and the legal knowledge of the judges becomes irrelevant to the outcome in many cases. In the meantime, familiarity with local customs becomes a necessary skill for judges in basic-level courts. Accordingly, in Court of Qinghe, all judges, except for the president, are originally from Qinghe County. During the two-decade history of the court, only two out-of-town people are found, and there is no out-of-town staff in the current personnel list.

The picture gets even more complex when the mediation processes at the Civil Division and at the People’s Tribunals are differentiated. Because mediation occupies an intermediate legal and social space at the boundary of state law and non-state forms of ordering, this becomes a contested space which state law and indigenous laws and social orders struggle to establish control. Hence, in different contexts, this intermediate space would be socially constructed in different ways, i.e., the contests of legitimacy between state law and local social/legal orders would lead to different meanings of mediation. The judicial mediation in China clearly demonstrates this process—the same mediation procedure is used to serve distinct purposes at the Civil Division and the People’s Tribunals.

Despite their different ranks in the judicial organization, both the Civil Division and the tribunals handle first-trial civil cases, i.e., they cover the same level of jurisdiction. Usually cases from the county town go to the Civil Division, while cases from suburban and rural areas go to the tribunals. [My data cover] the judgment rates in civil cases in the Civil Division of Court of Qinghe, in the People’s Tribunals of Court of Qinghe, and in all levels of courts in China during the period of 1991–2000. The judgment rate at the Civil Division is consistently and substantially higher than the rate at the People’s Tribunals. The highest judgment rate at the Civil Division 0.547 in 1999, whereas the lowest rate is 0.284 in 1993. In

contrast, the highest judgment rate at the People's Tribunals is 0.302 in 1995, whereas the lowest rate is 0.093 in 1997. Furthermore, the rate at the Civil Division of Court of Qinghe is also consistently higher than the national rate except for 2000, whereas the rate at the People's Tribunals is lower than the nationwide rate in most of the years, except for 1991 and 1995.

Note that the nature of the cases handled by the Civil Division and the People's Tribunals is essentially the same. The data suggest that in both the county town and the suburban and rural areas, divorce cases account for more than half of all civil cases. Other types of cases include parental support, unlawful cohabitation, curtilage, loan, purchase-and-sale, debt, finance, etc. The percentages of different types of cases in the Civil Division and the People's Tribunals indicate no notable difference. Furthermore, because Court of Qinghe has a circulation system of judges and clerks between the court and the tribunals, the judges in the Civil Division and in the People's Tribunals are the same people over time. Therefore, neither case type nor personnel could explain the difference. Why, at the same court with similar types of cases and judges, do the Civil Division and the People's Tribunals have consistently distinct judgment rates? This surprising pattern requires careful explanation.

First, the difference in judgment rates can be partially explained by the difference in the two populations that use civil litigation. Because it is the litigants who decide whether or not the mediation procedure is used in a given case, their expectations in litigation have significant influence on the judgment rate. The expectations of litigants reflect local people's attitude toward dispute resolution through the court. As Merry suggests, the law consists of a complex repertoire of meanings and categories understood differently by people depending on their experience with and knowledge of the law. This difference in ways people understand and use law, which is termed "legal consciousness", leads to different demands in civil cases for people in various social contexts. In other words, because of the differences in legal consciousness, litigants from the suburban and rural communities are more inclined to use the informal mode of dispute resolution than are litigants from the county town. One might further argue that this difference in legal consciousness reflects different systems of social control in the two social contexts. As Black maintains, formal and informal social control exist in reverse relation: the more formal social control, the less informal social control, and vice versa. Hence the lower judgment rate in suburban and rural areas could also be seen as an indication of stronger informal social control.

A further step in interpreting the difference in judgment rates is to trace the historical origins of the judicial institutions. As previous sections have shown, the origin of courts in communist China was a type of military instrument for striking "class enemies"; thus criminal cases were the central emphasis of the judicial work. Criminal work requires detachment from the local community and leaves no space for mediation. Hence the court in the county town has no historical origin for the practice of mediation or conciliation, and the newly established mediation procedure in the Civil Division is mainly conceived as a legal procedure rather than a means of popular justice.

In contrast, mediation in PRC originated precisely from the work of the People's Tribunals in some communist areas in the 1930–40s. Similar to the experiences of People's Tribunals or People's Courts in the Soviet Union, Eastern Europe, and Cuba, these tribunals worked as informal "social organs" operating outside the formal court structure to handle disputes. The principles of "circulating hearing" (*xunhui shenli*) and "on-the-spot resolution" (*jiudi ban an*) characterize the grassroots logic of this so-called "Ma Xiwu Trial Mode" in communist China, and it still significantly influences the logic of judicial work at the tribunals. To gain access into the local community and resolve disputes according to local values and norms are the central tenets of this type of judicial work.

Divergent historical origins of the courts and the tribunals, therefore, lead to completely different meanings of mediation in the two social settings. The notable difference in judgment rates at the Civil Division and the People's Tribunals suggests that this difference still persisted during the remarkable institutional changes. The persistent influence of historical origin can be interpreted as a type of organizational inertia, though the inertia here is in contents rather than in forms; thus it is different from the widely discussed structural inertia in the organization literature. Note that different meanings of

mediation in the court and in the tribunals could shape people's different expectations in litigation. Whereas urban residents largely regard mediation as a formal legal procedure, residents in the suburban and rural communities still understand this institution as Maoist tribunals.

The outliers in [the data] indicate another factor that affects judgment rate—the immediate judicial policy. For example, in 1997, the year of the tribunal reform, the judgment rate at the People's Tribunals reached its lowest point (0.093) and the judgment rate at the Civil Division also significantly dropped. A paragraph from a 1999 judicial document from Court of Qinghe titled “Reinforcing the Construction of the People's Tribunals and Opening a New Horizon for the Tribunal Work” gives some clues as to why it is unlikely that the difference in judgment rates is a coincidence:

From the work in the last two years, the number of cases handled every year in these two Central Tribunals equals the sum of the total numbers of cases handled in the five original tribunals in three years. Besides the increase in the amount of cases, the quality of the judicial work was also substantially enhanced. Among the more than 500 cases, 85% ended in mediation, only less than 60 cases ended in judgment, only 4 cases were appealed, and no case was returned ... The accomplishment of the two Central Tribunals is prominent, and they have earned 3rd rank Honor in the city, 2nd rank Honor in the province, and were endowed the title of “All Good Tribunal” [*wuhao fating*] by the provincial high-level court in 1998.

Note that “85% ended in mediation, only less than 60 cases ended in judgment” is used as the evidence for the enhancement of the quality of judicial work to legitimize the Central Tribunals. Therefore, the abnormal low judgment rate in 1997 reflects the immediate judicial policy to justify an unrecognized institutional reform, and this policy is heavily influenced by the traditional logic of operation in tribunals, i.e., mediation is a superior means than judgment in dispute resolution. This kind of immediate policies widely exists in China's judicial system and often influences the outcome of cases. The “Strike Hard” campaign in criminal work is another case in point for such policies.

In sum, judgment rate is contingent upon legal consciousness of the local population, historical origin of the judicial institution, and immediate judicial policy. Whereas the judgment rate at the Civil Division had notable increases in the 1990s, the judgment rate at the People's Tribunals was continuously low. Nevertheless, as [the data] show[], this finding is completely concealed in the national data on judgment rate, which is a smoothly increasing curve.

The results . . . cast significant doubt on many existing arguments on Chinese courts. For instance, based on the national data on the decreasing percentage of civil and economic cases mediated by courts from 1989 to 1996, Michelson draws the conclusion that Chinese courts have become increasingly specialized and law in China is behaving increasingly law-like. Similarly, based on the national data on the decreasing percentage of civil cases appealed, Su Li argues that the trial quality in Chinese basic-level courts kept increasing in the two decades since the legal reform. [The data here] clearly demonstrate[] the methodological problem in drawing those conclusions—the national data easily conceal the subtle dynamics of the variable. Despite the ostensible nationwide decrease of both the percentage of cases mediated and the percentage of cases appealed, the judicial practice in the People's Tribunals (i.e., the most grassroots level of judicial work) has barely become any more specialized or law-like in the past two decades.

Therefore, despite its legal source as a court hearing procedure, the meaning of mediation in civil cases is socially constructed in various ways during the judicial practice. This process of social construction leads to divergent outcomes in different social settings, which reflects the dynamics of interaction between multiple sources of legitimacy, including global prescription, national judicial policy, local social order, etc. The local meanings of mediation are legitimated differently in different social contexts, either as formal legal procedure in urban areas or as socialist instrument of popular justice in rural communities.

Sida Liu, *Globalization as Boundary-Blurring: International and Local Law Firms in China's Corporate Law Market*, 42 LAW & SOC'Y REV. 771 (2008)

Foreign law firms first came to China following their clients. As early as 1978–1979, shortly after the Cultural Revolution, a few American law firms already began to represent globalizing American companies in foreign investment negotiations with Chinese enterprises. At that time, there was no concept of commercial lawyering in China, and the Chinese legal profession was only formally revived in 1980, with most lawyers doing criminal and noncommercial civil work. Until the late 1980s, all Chinese lawyers worked in “legal advisory divisions” (*faliu guwen chu*) or state-owned law firms that were affiliated with different levels of state administrative agencies and work units. Not surprisingly, none of the foreign law firms entering China was allowed to establish a formal office—they had to do their daily work in some major hotels in Beijing and Shanghai. Foreign lawyers retained by government agencies or work units were called “legal expert” instead of “legal counsel”, and their number remained limited. Nevertheless, because of the nonexistence of local corporate lawyers and the urgency of attracting foreign investment, the small number of foreign lawyers played a vitally important role in the first decade of China’s market reform and opening up.

For widely known political reasons, the steady flow of foreign capital to China halted suddenly in 1989. Most foreign law firms relocated their business to Hong Kong. Coincidentally, it was in the same year that Jun He, one of the first Chinese corporate law firms specializing in foreign-related work, was established in Beijing by a few Chinese lawyers with both government backgrounds and overseas training. This new type of “cooperative law firm” was created as an experimental form in the transition of Chinese law firms from state-owned firms to partnerships. The primary goal of this transition, as a founding partner of Jun He explained, was precisely to embrace the demands of incoming foreign investment, because few foreign investors would trust a state-owned law firm regarding their commercial secrets.

The period of the early 1990s was a difficult time for the newly born Chinese corporate law firms. By 1992, on the eve before partnership was permitted, the Beijing Bureau of Justice (BOJ) had only certified 10 cooperative law firms. These Chinese firms rarely had any foreign clients, and their primary business was to represent state-owned Chinese enterprises to deal with foreign investors in joint ventures. The firms did everything they could to survive, sometimes even having to combine high-end corporate transactions with obscure tasks such as visa work and adoption. This difficult situation continued to 1994–1995, when most of these firms were reorganized into partnerships as a way to signal their separation from the state.

In the meantime, soon after Deng Xiaoping’s southern tour in 1992, the Ministry of Justice (MOJ) made the Interim Regulation on the Establishment of Foreign Law Offices in China (hereinafter the “1992 Interim Regulation”) with the State Administration of Industry and Commerce (SAIC) and began an experiment of permitting foreign and Hong Kong law firms to establish offices in mainland China. According to a former partner of Coudert Brothers, one of the first foreign law firms entering the Chinese market, the final version of the 1992 Interim Regulation was revised by their staff. In December 1992, the MOJ certified 12 foreign law firms (including eight Hong Kong firms) to set up offices in Beijing, Shanghai, and Guangzhou. [B]y 1995, the number of foreign law offices had increased to 32 (including 11 Hong Kong firms).

The reappearance of foreign capital and foreign law firms in China turned out to be a big blessing for the development of local corporate law firms. According to Article 16 of the 1992 Interim Regulation, foreign law offices in China were not permitted to “represent Chinese legal affairs,” to “interpret Chinese law,” or to “employ Chinese lawyers.” Hence, when a legal project needed formal legal opinions or court representation, the foreign firm had no choice but to collaborate with a local law firm. Almost none of the

local firms, however, had adequate expertise in corporate projects such as foreign direct investments (FDIs) or mergers and acquisitions (M&As) at that time. Consequently, foreign law firms often chose to draft the entire legal opinions by themselves and then merely let their Chinese collaborators sign the documents. In other words, the Chinese firms were used as “rubber stamps” that did little work but assumed all the responsibilities and risks associated with the legal documents. Although the amount of billings that foreign firms transferred to their rubber-stamp local firms was quite modest, usually a few thousand dollars and sometimes as low as \$500, it was the first barrel of gold for many Chinese corporate law firms.

As the Chinese economy boomed in the 1990s, the corporate law market was developing at a stunning speed. From 1990 to 2000, China drew in more than \$300 billion in utilized FDIs and made a few hundred thousand joint ventures, which generated abundant business opportunities for both foreign and local law firms. Besides FDI and M&A deals, initial public offerings (IPOs) became another major type of business for the corporate law firms, with local stock markets opening up and large Chinese state-owned enterprises and banks starting to be listed abroad. Furthermore, the burgeoning real estate market in major Chinese cities also began to attract a large amount of foreign capital. Accordingly, a few leading Chinese law firms became relatively specialized in their practice, focusing exclusively on high-end corporate work such as FDIs, IPOs, real estate, or financial projects.

By the late 1990s, both the structure and personnel of local corporate law firms had changed dramatically. All the major firms in Beijing and Shanghai had been reorganized into partnerships, and some Chinese lawyers trained and worked abroad came back and became partners in leading local firms. These partners were generally fluent in English, and they brought back valuable experiences in complex corporate transactions. This significantly increased the expertise of local law firms in foreign-related projects. Accordingly, some leading firms refused to be the rubber stamps of their foreign collaborators anymore—they started to assume a substantive part of corporate legal projects, conducting due diligence, drafting legal opinions, etc. And some foreign firms also preferred to outsource some of their low-end work to local firms to reduce costs and minimize risks.

Therefore, by the turn of the century, the collaboration between local and foreign law firms had become more substantive and interdependent. A good symbiotic relationship was formed in this gray area of legal practice. However, the peaceful situation did not last long—China’s entry into the WTO in 2001 accelerated the globalization of the legal services market and the entrance of foreign law firms. By early 2007, 169 foreign law firms and 72 Hong Kong law firms had been permitted to practice in mainland China. In Beijing alone, there were 90 foreign law offices with 603 employees in January 2007. This rapid development has fundamentally broken the balance of competition in the Chinese corporate law market.

While foreign law firms were rushing into the Chinese market, in 2001 the State Council promulgated the Administrative Regulation on the Representative Offices of Foreign Law Firms (hereinafter the “2001 Regulation”), which ironically forbids foreign law offices to engage in “Chinese legal affairs” but at the same time permits them to “provide information concerning the impact of China’s legal environment” (Article 15). In recent years, the 2001 Regulation has generated endless debates and conflicts among practitioners on both sides of the blurred jurisdictional boundary. The following discussion, therefore, focuses on the dynamics of boundary-blurring in the corporate law market since China’s WTO entry and the 2001 Regulation, starting from the workplace and then proceeding to personnel flow and state regulation.

The Gray Area of Practicing Chinese Law

The conflict between foreign and local law firms in the workplace focuses on the issue of practicing Chinese law. While both the 1992 Interim Regulation and the 2001 Regulation explicitly leave a gray area for the foreign firms, to what extent they can go into or even beyond this area in actual legal practice is still an empirical question. In their work, foreign firms have adopted four different strategies:

(1) compliance: providing no service related to Chinese law; (2) competition: providing services of Chinese law but not collaborating with local firms; (3) symbolic collaboration: providing services of Chinese law and only using small local firms as rubber stamps; and (4) substantive collaboration: providing services of Chinese law and collaborating with major local firms.

The choices that firms make among these four strategies first depend on their areas of practice. In IPO projects, for example, there is a clear division of labor with regard to jurisdiction—foreign firms only provide services concerning Hong Kong law or New York law according to the place of listing, while the preceding reorganization part of the deal, which involves almost exclusively Chinese law, is conducted by Chinese firms. Although foreign and local firms often exchange comments regarding the legal documents, there is rarely any jurisdictional conflict between them. The compliance rate is the highest in this area of practice.

By contrast, in FDI and M&A projects, the workplace boundaries between the two types of firms are more complex and ambiguous. By definition, FDIs and M&As are inbound transactions within mainland China and are mainly concerned with Chinese law. A distinctive feature of this type of project is that sometimes no formal legal opinion is required in providing the services; instead, lawyers only need to do due diligence and contract negotiation, and then write memos for the clients. In this case, foreign firms would face a choice between competition and collaboration, i.e., they could either handle the entire project by themselves or subcontract some work to a local firm.

But what then determines the different choices of foreign firms in similar types of projects such as FDIs or M&As? My interviews suggest that the crucial factor is financial cost—whereas top-tier firms with higher billing rates tend to outsource the low-end work (e.g., due diligence) to local firms and focus on the high-end structuring designs of the project, lower-tier firms, especially newcomers that entered the Chinese market in recent years, are much more likely to handle most of the work by themselves. Compare the following four comments from lawyers working in different types of firms:

We have lots of collaborations with local firms. For example, much due diligence work needs to be done by local firms, including issues of facts, property, etc. Of course, when doing it we restrict the scope and direct their work.... Sometimes the client would consider the issue of cost. The billing rates of local firms are lower. But the work we do is of different levels, and the level of local firms is lower.... Our work is basically on big strategic issues, such as designing the investment structure, which most local firms are not capable [of] (lawyer from a premier French firm, Beijing).

Firms like ours certainly have collaborations with all famous local firms. Generally speaking, if a local firm is involved, we would not do the due diligence. Although we also send some people there, they [local lawyers] would write the due diligence report. Of course we would draft the final legal document, but some of our partners are not willing to do due diligence, because it takes a long time. We are particularly not willing to do it when the project has a restriction on the lawyer fee. Also, when it requires a legal opinion, we would also go to a local firm (lawyer from a top-tier British firm, Beijing).

We have local agents to handle filings, but we usually do not collaborate with local law firms, excepting for some technical matters in real estate projects or for evaluating litigation. We use filing companies. The reason is that the cost structure is much better than hiring local law firms. Local law firms cost much more (lawyer from a third-tier American firm, Shanghai).

We always do our own business by ourselves, never collaborating with Chinese firms, because FDI is mainly about negotiation, writing contract, and writing memos, not about [legal] opinions. ... In IPO projects collaboration with Chinese firms is required, but not for FDIs. The boundary between Chinese firms and foreign firms will gradually become blurred (lawyer from a second-tier British firm, Beijing).

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It is clear from these quotes that top-tier foreign firms are more willing to outsource their work because their high billing rates (usually above \$500/hour) make due diligence and other low-end work unpalatable, and sometimes their clients would also prefer to use local firms to reduce costs. On the other hand, for second-tier or third-tier firms whose hourly rates (\$300-400/hour) are not much higher than the rates of local firms (\$200-350/hour), subcontracting the work is economically undesirable. Another common concern among these firms is that local firms would steal their clients afterward—in other words, they perceive Chinese firms as their business competitors rather than collaborators. The managing partner of an American law office in Shanghai elaborated on this issue:

We didn't want to outsource our work to local law firms, because from 2001–2002, local firms became competitors. Before that they were not a threat to the practice of foreign firms, but with a lot of lawyers going back from abroad and from foreign firms, they've had the capability to produce high-quality legal documents. So collaboration between us and local firms is very difficult, because we would not outsource our business to a competitor. Otherwise they would take our clients.

In fact, this concern of losing clients to local firms is shared by most foreign firms practicing in China. Even the most prestigious firms tightly control the work process when they outsource work to local firms by making client information anonymous, closely coordinating work procedures, or keeping the more sophisticated part of the work for themselves. And some firms avoid collaborating with major local firms altogether—they prefer to use smaller firms or the so-called puppet firms. These puppet firms often merely sign the legal opinions prepared by foreign firms and deal with issues of government inspection without doing much substantive legal work. Some of them were even established or directly controlled by foreign firms or foreign investors. Not surprisingly, the existence of puppet firms generates a great deal of condemnation from major local law firms. A senior partner from a leading local firm in Beijing explains the situation:

Originally they [foreign firms] just threw a piece of bone for you to chew—you could not eat up the big meat anyway. Then they are afraid that the clients would become so comfortable in cooperating with us, so they go to the small firms, give you the biggest risks, but limited revenue. This is a poison for Chinese firms, a fatal lure. It appears easy, but in fact they just complete deals with many ambiguous issues under Chinese law left unresolved. When something happens, they would say, “The Chinese lawyer said there was no problem.” Although Chinese law is a gray area, as long as they have the opinions of Chinese lawyers, they can totally avoid their responsibilities The behavior of not using major Chinese firms is very narrow-minded, for although you can avoid your risks, you cannot avoid the risks of the project. ... Every foreign firm must make a balance between project interests and maintaining clients.

Many partners in local firms are frustrated by the frequent collaborations between foreign firms and puppet firms, yet they have little capacity to change the status quo. One fundamental reason is that, even today, foreign investors generally do not trust Chinese law firms when seeking legal services. This is particularly true for companies new to China—for them the comfort level in using a foreign firm is much higher than in using a local firm. Although a few leading local firms have accumulated a certain reputation and trust from foreign clients over the years, in general it is still difficult for any local firm to get abundant foreign business without the referral of foreign firms. In other words, their transformation from collaborators with to competitors of foreign law firms is far from complete.

Besides their reluctance in collaborating with local firms, some foreign firms also actively expand their practice scope. Despite the common understanding that litigation work is beyond the gray area, in practice many foreign firms still seek to closely control the litigation process by participating in file preparation and the design of courtroom strategies. The problem is even trickier in commercial arbitration. The MOJ's interpretive regulation on the 2001 Regulation defines representation in arbitration as a type of “Chinese legal affair”, which has generated many protests by foreign lawyers because

representation in commercial arbitration usually does not require any professional license. Although the MOJ never actively implemented the restriction, in 2005, right before Coudert Brothers dissolved globally, the firm's managing partner in Beijing and his assistant were sanctioned by the Beijing BOJ for representing clients in an arbitration case. The sanction had little actual effect after the firm's dissolution, but it suggests that arbitration is still considered by the government to be a sensitive area of practice.

To summarize, I have examined in this section how the gray area of practicing Chinese law has influenced the dynamics of competition and collaboration between foreign and local firms. The various strategies that foreign firms have adopted in their projects are not only passive adaptations to the ambiguous prescriptions in the law, but also an aggressive force that contests the blurred boundary. Local firms, on the other hand, have few stakes in constituting the gray area because of their inferior market positions. Yet their hope lies in the increasing localized expertise of working on corporate legal projects in China, which, as the next section will demonstrate, have become a vitally important element for success in this market.

Boundary-Work and the Production of Localized Expertise

The blurred boundary between foreign and local law firms is produced not only in their competition and collaboration at the firm level, but also in the day-to-day work of individual lawyers. When asked about their impression of the work style of lawyers in local firms, lawyers in foreign firms often display a sense of superiority. For many of them, particularly those who came to China in recent years, Chinese lawyers in local firms are not professional enough and sometimes lack creative thinking. For example, a lawyer who worked in California for many years and recently came back to China to manage an American law office in Beijing describes his impression of local lawyers:

When I work with local firms I always feel they are in the secondary position, often not proactive enough and only work passively. Also, they still have some gaps in the experience of international transactions, not standard enough. Sometimes they are obsessed with some minor issues, argue harshly on some purely legal problems, but overlook the interest of the client. They don't know what the client wants, no creative thinking, because the lawyer's job is not just to interpret the law, but to solve business problems for the client.

Interestingly, this complaint about the professional expertise of local lawyers was rarely heard for respondents who have practiced in China for a relatively long time. Although these lawyers also indicate some frustrations in dealing with local firms, they usually attribute the problem to the legal environment in which their Chinese colleagues are embedded. As one lawyer comments, "Chinese law is not complicated, but the 'conditions' of Chinese law are extremely complicated". The complexity lies in both client types and the workings of the Chinese government. On the one hand, client types in elite Chinese law firms are more diversified than those of foreign law offices: they include foreign investors, large state-owned enterprises, and private enterprises, so lawyers must use distinct strategies to accommodate different client demands. On the other hand, Chinese corporate lawyers constantly deal with government agencies in their work, and the logic of bureaucracy makes many things unpredictable. An associate working in a large local firm in Beijing provides a very good example:

I often go to a few government agencies, mainly the CSRC [China Securities Regulatory Commission], the MOFCOM [Ministry of Commerce], the SDRC [State Development and Reform Commission], and the SASAC [State-owned Assets Supervision and Administration Commission]. For example, that M&A Regulation by the MOFCOM, I did the first approval after it was implemented. ... Part of the deal was in Hubei Province, and one agency there had not approved it until the MOFCOM's system was closed on September 7th. Then I went to the MOFCOM at 8 a.m. in the morning of the 8th to wait at the door of their division chief. But they said, "We have some activity at 8 a.m., you come back at 10:30 a.m." I came back at 10:30 a.m. and [they] said, "Our 8

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a.m. activity was moved to 10:30 a.m., so you come back in the afternoon.” Then I had to go there again in the afternoon and got the thing done.

More than one interviewee emphasizes the lack of schedule in Chinese government agencies, which leads to the lack of predictability in lawyers’ own work style. In other words, the work of local lawyers appears less “standard” or “professional” in the Western sense precisely because they have to adapt to Chinese social and political contexts to a deeper degree than their colleagues in foreign law offices. Sometimes this adaptation also requires creativity. A partner in a top-tier American firm explains how his project collaborator, a prominent security lawyer in China, uses a “Chinese” way to handle a problem:

The work style of Chinese lawyers is not the same as ours. They must adapt very often and cannot make a rigid application of Chinese law. The most important thing about being a lawyer in China is not legal codes, but creativity I will give you an example. When a large state-owned bank was to be listed [in the stock exchange], it had to be separated into two companies. But according to the Corporation Law, the two companies must assume mutual responsibilities, so the listed company has to assume responsibilities for those credit unions that do not make money. At that time my collaborator thought of an idea. He found an interpretation of the Contract Law, which was in conflict with the Corporation Law, but he argued that Contract Law and Corporation Law were at the same level, so we could follow the Contract Law. But for some other issues we also followed the Corporation Law. This actually has a problem, but to list the company we had no other choice. For this issue we asked many people. Of course the best would be for the NPC [National People’s Congress] to make a legislative interpretation, but the NPC could not do it in time. Then we contacted the Supreme [People’s] Court, still could not do it. Finally we organized a symposium of legal experts through the Ministry of Finance and produced a symposium memo, so that it could become a legal basis in case there would be a problem later. Things like that American lawyers cannot do, but this is not to say my collaborator is a bad lawyer when he did it. In fact, it shows he is a very good lawyer.

This example is in sharp contrast to the earlier comment made by a less experienced foreign lawyer, that Chinese lawyers lack creative thinking. What we see here is a distinctive type of professional expertise that fits the Chinese context well and also meets the goal of the client. Because listing the state-owned bank in the stock exchange was an important part of national economic policy, the lawyer tried to mobilize several central state agencies to fix the legal obstacle and eventually made the deal. It may seem an odd solution to an American corporate lawyer, but this is precisely how professional expertise works in the social context of China, where government agencies still control much of the national economy. It is a perfect example of the localized expertise that Chinese corporate lawyers have developed in their day-to-day legal practice.

The possession of localized expertise does not make local firms content with their practice. Instead, almost all leading local firms in Beijing and Shanghai actively seek to imitate the business model of foreign firms. From minor issues such as document settings and Web site design to more substantive aspects such as billing method and management structure, these Chinese law firms want to look similar to the Anglo-American mega-law firms in almost every way, even firm size. In the past few years, all the large Beijing law firms have grown substantially: the biggest firm, King & Wood (Jin Du), has more than 600 lawyers in 11 offices, including overseas offices in Hong Kong, Tokyo, and the Silicon Valley. Even some partners in foreign law offices agree that Chinese firms are quickly catching up, though they still have reservations about the substantive effect that these formal changes would generate.

Indeed, although the outlook of local firms has changed dramatically over the years, their work style has largely remained the same. Business referrals and cooperation among partners are not common, and the majority of projects are still carried out by partner teams rather than project teams. In other words,

the growth in firm size has not brought about any fundamental change in the ways that the legal work is conducted. This decoupling between formal structure and work is particularly salient in the way legal work is organized and conducted, as an experienced managing partner of an American firm describes:

Chinese law firms are not operating as firms, but as individual partners. Just like a boutique. This would generate big problems when the transaction involves multiple offices. Even if a Chinese firm has offices in both Beijing and Shanghai, one partner would never give the business to another partner, especially in a different city. They cannot divide the money. This is not the case for us—we always put the client's needs as our first priority, and we trust the work quality of every office. If the partners in one office were not trustworthy, then that office would be closed down.

The lack of cooperation among partners leads to a distinctive way of training associates. As many partners in these Chinese firms began their practice during the economic boom of the 1990s, they were able to make partner and get rich in a relatively short time, often without solid professional training. And in their work they rarely use associates outside their own partner teams. Accordingly, when training their associates, they also tend to expose the associates to clients and government agencies at an early stage. This is in sharp contrast to the training method of foreign law firms, where associates focus on legal research for several years before meeting clients.

Many interviewees, particularly associates and junior partners in local firms, indicate that the production of their legal documents is often not as careful and fully inspected as in foreign firms. For instance, in foreign firms, memos and documents to clients usually need several rounds of inspection, from the legal assistant all the way to the managing partner, sometimes even requiring the revision of professional translators. In local firms, by contrast, it is not uncommon for an associate to send a memo directly to the client without any inspection by the partner, because Chinese clients usually do not have highly professionalized in-house counsel to evaluate lawyers' work as foreign clients do. And almost no Chinese client would take legal action against the law firm in case of negligence. Besides legal research, associates in local firms also frequently attend conference calls, meet clients, and deal with government agencies in their work. The on-site training they receive in the workplace is far more complicated than the pure legal training the senior partner refers to in the previous quote.

Paradoxically, this seemingly "unprofessional" way of training associates is crucial for the production of localized expertise in the Chinese context. Precisely because associates in local firms are exposed to clients and government agencies at an earlier stage of their career than associates in foreign firms, their experiences in the Chinese legal environment also help them mature in the firm much earlier. For example, a fifth-year associate in a prestigious Chinese firm who will become partner in a few months describes his work as the following:

I improve much faster than those people in foreign firms. They basically still do due diligence and write memos every day, but I can already handle projects independently. We have a girl just coming back from a French firm, and she doesn't even dare to write a document. She told me in her firm only Of Counsel could write that kind of document. Now I handle more than 10 projects at the same time. I almost do not do due diligence anymore. I thought about it the other day, perhaps haven't done any in two years. I like meetings, business trips, attending wine parties, dealing with people. They say I'm an air-flying man in the firm, travelling all around. Actually I can improve faster this way, because the people I'm in touch with are all high-level managers in companies, investment banks, and counsel from foreign firms. I can learn a lot from them.

This way of life is hard for a fifth-year associate in a foreign law office to imagine. Most of them are still buried in the routine legal research and due diligence work at this stage of their career. Furthermore, as most foreign firms offer no partnership track to their Chinese associates, they often pay little attention to nurturing their other professional skills besides pure legal research and English. Therefore, although many partners in foreign firms look down upon the quality of legal training in Chinese firms, their own training system is not perfect either—it is not well-directed to the complex legal

environment in China and is thus disadvantageous in producing localized expertise in comparison to the training system in Chinese firms. In recent years, some foreign firms have begun to adapt to this problem by employing more Chinese lawyers and branding the expertise in Chinese law to their clients. A third-year associate who moved from a large local firm to an American law office in Beijing gives an example:

I think sometimes our firm is doing too much. We tell our clients all our people are Chinese lawyers, not even claiming we're an international firm, but emphasizing the strength of our local practice. This is very strange. It was not like this before. I guess perhaps it is because nowadays clients understand our business better, and they know foreigners indeed do not know Chinese law. Only Chinese lawyers could work. Another reason is whether our counterpart would accept. For example, in a project the client first went to a large American firm, but the counterpart refused to cooperate with it, saying that we could not communicate with those American lawyers, and we would quit the deal if you still use American lawyers. Then [the client] came to us, the counterpart first saw us as another American firm, but then discovered that we're all Chinese and we had good communication, so the deal was made.

Arguably, branding the foreign firm as qualified in Chinese law and staffed with Chinese lawyers significantly blurs the workplace boundary between foreign and local firms. Therefore, although boundary-making exists in foreign and local lawyers' talk of each other, it is boundary-blurring that prevails in their workplaces. Moreover, beneath the firms' converging outlook, a localized expertise has grown from the workplace of local firms and has then been diffused to foreign firms with personnel flow. As the next section demonstrates, this recent trend of employing Chinese lawyers and branding localized expertise has profoundly changed the personnel and practice of both foreign and local firms.

Personnel Flow and the Diffusion of Localized Expertise

Foreign law firms' massive employment of Chinese lawyers is a relatively recent phenomenon. Before China's WTO entry in 2001, few foreign law offices in mainland China would recruit lawyers from local firms. Instead, they preferred to use either recent graduates of elite Chinese law schools or lawyers with a law degree and practice experience abroad. This is consistent with a traditional model of expansion identified by observers of international law firms elsewhere. The formal government restriction on employing licensed Chinese lawyers presented no de facto barrier in practice, because the lawyers being employed could simply return their People's Republic of China (PRC) lawyer license to the BOJ and stop registration. A more important reason is that partners in foreign firms had little trust in the professional expertise or English skills of local corporate lawyers at that time. Indeed, in the 1990s few lawyers in Chinese law firms could speak good English or write high-quality legal documents, because they merely assumed a complementary role in the collaboration with foreign firms. As a senior partner who has worked in both foreign and local firms since the 1990s vividly comments:

Let me make an analogy. Most Chinese lawyers are scholars of literature, but not writers. But foreign lawyers are both scholars and writers. What's the meaning? Usually foreign lawyers write legal documents, and Chinese lawyers make comments. But people who make comments cannot write literature themselves.

While foreign firms had no intention to employ local lawyers, local firms were desperate to attract talent from both foreign firms and abroad ever since the mid-1990s. And their efforts have gradually paid off over the years. For example, in Jun He, almost half of the partners have years of education and work experience in the United States, Great Britain, or other developed countries, and about 70 percent of their associates above third-year have at least a foreign law degree. The makeup of the personnel in King & Wood, Zhong Lun, or other leading local firms is similar. Many of these lawyers worked in the China offices of foreign law firms as associates and then returned to local firms because foreign firms offered no partnership track. In other words, in the first decade (1992–2001) of the

coexistence of foreign and local law firms, the personnel flow was basically one-directional, i.e., only senior associates returned from foreign firms to local firms and became partners, but not vice versa.

From 2001 to 2007, more than 100 new foreign and Hong Kong law offices were set up in Beijing and Shanghai. This not only increases the competition for legal projects among the firms, but also greatly intensifies their competition for legal talent. While newcomers were busy setting up their offices, the total number of lawyers in many existing foreign law offices also doubled or even tripled in less than five years. Where did all these foreign firms find so many qualified lawyers in such a short period of time? Apparently, they had to recruit a large number of lawyers from local firms in addition to expatriates, returning Chinese nationals from overseas, and new graduates.

In the meantime, with the continual flow of personnel from foreign to local firms, the professional expertise of local lawyers has been substantially improved—they have become both “scholars” and “writers” of legal documents. This is not merely an appropriation of legal technologies from foreign firms, as many foreigners believe, but the creation of a localized expertise that adapts to the unique legal environment in China. As the previous section has shown, many foreign firms recognized the importance of this localized expertise to their business and began to actively recruit experienced lawyers from local firms. One common recruiting method that foreign firms use is to find candidates through headhunting firms, and the quick expansion of foreign law offices in both Beijing and Shanghai even produced a few headhunting firms specializing in recruiting lawyers. The CEO of a Shanghai-based headhunting firm, for example, explains the criteria for selecting candidates for foreign firms:

Of all the requirements of foreign firms in recruiting Chinese lawyers, the first is good English. People with good English would have a 40–50 percent advantage. The second is good experience, in general, more than three years of experience in King & Wood or Jun He. Then we look at law school background and the Chinese and foreign bars.... Partners in foreign firms are all foreigners, so people who have bad English would never pass the interview. Although they don't normally say this, English is certainly the primary criterion.

This overwhelming emphasis on English use is confirmed by several senior partners in foreign firms, and it even causes gender imbalance in many firms, as female lawyers usually have better language skills. In some foreign firms, virtually everyone except for a few partners is female. Besides English, the most crucial criterion is the lawyer's practice experiences in mainland China, or the localized expertise. Ideally, all foreign firms would prefer senior associates or junior partners to junior associates, yet experienced lawyers are not easy to find. Because foreign law firms rarely offer a partnership track to their Chinese employees, few promising senior associates or junior partners in local firms would want to switch to a foreign firm. Consequently, in practice most foreign firms target local firm associates with three to five years of experience. The managing partner of a Shanghai-based American law office describes their recruitment strategy:

Some people say now the competition for talent is very severe, but it depends on what seniority level you're talking about. For seventh-year experienced lawyers, there are very few choices. It is unrealistic for us to get them. So our strategy is to get some very smart and highly qualified junior lawyers. When recruiting lawyers, we give them an English test to see whether their English has reached a certain level. We also pay attention to their international experience, for example, whether they have a LL.M. or J.D. degree.... But it is true that there is no hope in becoming partner in foreign law firms. It is the same thing with women and racial minority lawyers in the U.S. You're not the powerful group in the organization.

Foreign firms' concentration on recruiting middle-level associates has caused some devastating consequences to the leading local firms. For example, the Beijing office of a leading local firm lost 27 associates in 14 months around 2005–2006, all of whom had this level of experience. It significantly reduced the work quality of the firm, as a senior associate explains:

Recently our firm has been in chaos. This summer many people left, all third-year or fourth-year. Almost everybody who was capable to work left the firm, because the income in foreign firms is basically twice as much as ours. Now when lawyers in our firm chat together, we only discuss who went where. A few foreign firms stole many people from us. Our partners are also holding meetings to discuss how to solve the problem.... The impact of losing so many people is tremendous, because the newcomers could not work right away, and the partners would not interfere, so sometimes documents written by interns were directly sent out. It decreased the quality of our products, also damaged our reputation. Last year there was a client referred by a foreign firm. Just because all our capable people left, the client was very dissatisfied with the product, and they said Chinese firms were not good enough.

Another associate in the same firm also indicates that, when these experienced associates left and were replaced by associates from other local firms, it even changed the culture in the workplace—she did not feel the same collegiality among lawyers anymore. And, more seriously, when partners in local firms realize that their best associates may leave the firm in a few years, they tend to invest much less in their training.

Why would middle-level associates in local firms want to switch to a foreign firm? The obvious answer is income. According to [the results of a salary survey published by LawInn, a Shanghai-based legal consulting firm], for junior associates without a foreign law degree, the average salaries in foreign and local firms are quite similar; for middle-level “legal consultants” (no foreign bar), the average salary in foreign firms is about 1.4 times that of associates in local firms; for middle-level associates (with foreign bar), the average salary in foreign firms is more than twice that in local firms; for senior associates, the difference is even more salient. Therefore, it is very tempting for middle-level associates in local firms to go abroad to get a foreign law degree and then join a foreign firm. Or in case they do not want to study abroad, they can still directly join a foreign firm as a “legal consultant” and earn a better salary.

Besides the advantage of income, another important reason for associates to choose foreign firms is to gain a different style of legal training. However, several interviewees who switched from local to foreign firms all indicate that they were somewhat disappointed by the training system there. Yet working in a foreign firm still can bring many other worthwhile experiences, including improving language skills, business sense, and firm management. Nonetheless, the biggest disadvantage of working in foreign firms is the lack of partnership track. Until today, most American law offices in China would only promote expatriates or Chinese nationals with long-time overseas practice experience to partner. Without such experiences, the highest position that a home-grown Chinese associate could expect is Of Counsel, even if the associate obtained a U.S. law degree and passed the New York bar exam. The situation in British or European firms is similar. As a result, when Chinese associates decide to join foreign law firms, most of them are already prepared to leave the firm in a few years—the common options include partners in local firms, in-house counsel, or simply exiting the legal profession altogether.

The increasingly large number of returning associates from foreign firms has also changed the promotion patterns in local firms. Because returning lawyers usually have better English and closer connections with foreign firms and foreign clients, which would generate more business opportunities for local firms specializing in foreign-related work, these firms are more inclined to make them partner rather than promoting their own associates. Meanwhile, some leading local firms also choose to promote their best associates in a relatively short time (e.g., five years) to prevent them from being “stolen” by foreign firms. But in general, in local firms there are still more “airborne” partners from foreign firms than “home-grown” partners.

Therefore, . . . the typical career path of young Chinese corporate lawyers becomes a broken trajectory: working in a leading local firm for three or four years, getting an LL.M. from an American or British law school, and then switching to a foreign firm, with the expectation of returning to a local firm

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or becoming in-house counsel in a few years. Neither foreign nor local firms can provide them a continuous and stable career trajectory. At the partner level, exchange of personnel is not as frequent as at the associate level, though in recent years a few senior partners in leading local firms with international experiences became managing partners of new foreign law offices. This two-directional personnel flow has greatly facilitated the hybridization between local and foreign law firms, but at the same time it has made the career choices of many Chinese corporate lawyers a real dilemma.