

Suing Dragons? Taking the Chinese State to Court

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Abstract

This dissertation analyses the ability of Chinese lawyers to use administrative litigation to protect individuals and groups from an authoritarian state that frequently infringes on their rights. These plaintiffs fill administrative courts in China, opposing the overzealous tactics of police, challenging the expropriation of their land, and disputing the seizure and demolition of their homes. Empirically, it relies on several unique data sources in a mixed-methodological approach. Qualitative and small-n quantitative data from 126 interviews with a random sample of Chinese lawyers and 52 additional interviews are supplemented by documentary sources. These findings are then tested against official data and a large survey of Chinese lawyers.

This research demonstrates that administrative litigation is part of a polycentric authoritarian system that helps the Chinese state to monitor its agents, allows limited political participation, and facilitates economic development (Chapter One). By giving ordinary Chinese a chance to hold their local governments accountable in court, administrative litigation represents a significant step towards rule of law, but its limited scope means that it has not been accompanied by dramatic liberalisation (Chapter Three). In part, this is because the most prolific and successful administrative litigators are politically embedded lawyers, insiders who challenge the state in court but eschew the most radical cases and tactics (Chapter Four). The tactics that allow politically embedded lawyers to successfully litigate administrative cases rely on and contribute to China's polycentric authoritarianism by drawing in other state, quasi-state, and non-state actors (Chapter Five). Multinationals in China are largely failing to contribute to the development of China's legal system because they readily accept preferential treatment from the Chinese state as an alternative to litigation (Chapter Six). While administrative litigation bolsters China's polycentric authoritarianism in the short term, it offers tremendous potential for rationalisation, liberalisation, and even democratisation in the long term.

For My Parents and My Wife

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Abbreviations

| | |
|--------|--|
| ACEF | All-China Environment Federation |
| ACFIC | All-China Federation of Industry and Commerce |
| ACFTU | All-China Federation of Trade Unions |
| ACLA | All-China Lawyer's Association |
| ALL | Administrative Litigation Law |
| ACPAA | All-China Patent Attorney's Federation |
| ACWF | All-China Women's Federation |
| ACYF | All-China Youth Federation |
| CCP | Chinese Communist Party |
| CECC | Congressional-Executive Commission on the People's Republic of China |
| CIETAC | China International Economic and Trade Arbitration Commission |
| GDP | Gross Domestic Product |
| GONGO | Government Organized Non-Governmental Organisation |
| IP | Intellectual Property |
| NAACP | National Association for the Advancement of Colored People |
| NPC | National People's Congress |
| NGO | Non-Governmental Organization |
| PRAB | China's Patent Review and Adjudication Board |
| PRC | People's Republic of China |
| PSB | Public Security Bureau |
| RMB | <i>Renminbi</i> |
| SOE | State-Owned Enterprise |
| SPC | Supreme People's Court |
| TRAB | Trademark Review and Adjudication Board |
| TRIPS | Trade Related Aspects of Intellectual Property Rights |
| TVE | Town and Village Enterprise |
| VIE | Variable Interest Entity |
| WFOE | Wholly Foreign Owned Enterprise |
| WTO | World Trade Organization |

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Introduction

On the 6th of February 2010, a gang of 30 men appeared at Yang Deyou's (杨友德) farm in eastern Hubei. These men were intent on demolishing Yang's home and farm to make way for a new development on the outskirts of Wuhan, but Yang sent them running with a barrage from his homemade rocket launcher. Unfortunately for Yang, when he stopped to reload the men returned and he was badly beaten.

Nevertheless, four months later, Yang was still there, still holding out for greater compensation for the land. This time dozens of demolition workers armed with hardhats, shields, and bulldozers arrived at his home,¹ and found Yang standing vigil in a homemade guard tower. From this post he repeatedly fired warning shots to keep the crowd at bay until the police were compelled to put an end to the standoff.² They forced a negotiated settlement in which Yang received nearly a 75 per cent increase in compensation for his land, although he believed this to be a fraction of the amount to which he was entitled.³

While this dissertation is about challenging the Chinese state in and around the courtroom, striking similarities to Yang's case emerge throughout my research. Land expropriation conflicts are among the most common causes of administrative litigation

¹ 张寒 Zhang Han, "Wuhan Farmer That Resisted Demolition with Rocket Launcher Signs an Agreement 武汉以土炮抗拆迁农民剩余礼炮被收 签不违法协议," *Beijing News 新京报*, 9-Jun-10, <http://unn.people.com.cn/GB/14748/11821630.html>.

² "Wuhan Farmer Uses Homemade Cannon to Twice Repel a Demolition Squad, Undertakes to Guard His Land 24 Hours a Day 武汉农民杨友德自制火炮两次打退强拆队 24小时保卫承包土地," *163 News 网易首页*, June 8, 2010, <http://news.163.com/10/0608/15/68LQ73BK000146BD.html>.

³ Zhang Han, "Wuhan Farmer Signs an Agreement."

and the goal of most plaintiffs in such cases is to increase their bargaining power in order to receive more compensation. This is often best achieved by getting part of the state to support a claim, even if only grudgingly, as when Yang's antics forced the police to resolve the issue. Success may also require tactical innovation, perhaps by bringing in a lawyer from Beijing rather than by building a guard tower. Finally, when challenging the Chinese state it is helpful to have a powerful weapon, be it a homemade rocket launcher, or an administrative case supported by compelling evidence. That an administrative plaintiff and Yang would have so much in common speaks to the potential of administrative litigation and shows that it plays a role in addressing some of contemporary China's most significant problems.

This dissertation examines the reality of challenging an authoritarian regime using its own legal system and, in particular, the role of legal professionals in such action. In other words, it is about people who sue the Chinese state and the lawyers who represent them. It examines the contribution that administrative litigation and lawyers make in terms of advancing rule of law, limiting the power of the state, and protecting basic rights, including more distant goals like political liberalism and democracy. This is a careful and detailed empirical account of administrative litigation in China which makes a serious effort to present a representative view of these topics. It focuses on lawyers who advocate for clients with a grievance against part of China's government, and considers how they fit into the wider legal profession. Most commonly, plaintiffs in administrative litigation are individuals who have lost land and/or homes to government expropriation or have

suffered unduly or unfairly at the hands of China's police.⁴ In this sense, administrative litigation not only reflects some of the most important political, social, and economic problems in the contemporary People's Republic of China (PRC), but also offers a rare, formal path of redress for individuals and groups with a wide variety of grievances against the Chinese state.

What is Administrative Law and Why Study It?

In his classic text on the subject, Davis defines administrative law as "...the law concerning the powers and procedures of administrative agencies, including especially the law governing judicial review of administrative action."⁵ In other words, administrative law governs what the government can, cannot, and must do, just as traffic law governs what drivers can, cannot, and must do. And, just as traffic courts hear cases that involve the possible violation of traffic laws, administrative courts hear cases in which parts of the government may have violated administrative laws.

The focus of my research is overwhelmingly the judicial review of administrative action in China and, though some might find it surprising, Davis' definition applies reasonably well to the Chinese case. Indeed, upon learning of China's administrative legal system, surprise is a common response among many people in China and most outside it.⁶ Some are surprised that China has a system of administrative law that allows citizens to sue the state at all and more are surprised to learn of the relative frequency and

⁴ These are some of the common grievances leading to litigation in the three most frequent types of administrative litigation in China: Land, City Construction and Public Security. See: Figure 6.

⁵ Kenneth Culp Davis, *Administrative Law and Government* (West Pub. Co., 1975), 6.

⁶ Rachel Stern encountered a similar reaction in regards to her study of Chinese Environmental Litigation. See: Rachel E. Stern, *A Study in Political Ambivalence: Environmental Litigation in China* (New York: Cambridge University Press, 2013), 13.

success of administrative litigation. As is discussed extensively in Chapter Three, for over a decade, the number of administrative cases in China has numbered around one hundred thousand, and many result in reasonable success for those suing the state.⁷ Additionally, Chapter Four shows that some Chinese lawyers regularly litigate such cases without fear of serious harm to their career or persons. That these facts should be surprising tells us something about why a detailed, thorough, and representative study of the topic is so necessary.

From media to legislatures, there is a tendency in developed countries to demonize China.⁸ This is especially true in regards to rule of law in China and even experts and scholarly articles tend to focus on the most radically dissident lawyers and the most egregious human rights cases. In 2011, Jerome Cohen, “the godfather of Chinese legal studies,”⁹ suggested that “[i]t’s open season on... those [lawyers] unwise enough to become involved in human rights, criminal justice, and controversial public-interest cases.”¹⁰ Elsewhere, he says that: “[t]hese people are the only source of legal resistance... [i]t’s a small group, and if you can disable them, people can’t defend their rights.”¹¹ Similarly, efforts by organizations such as Amnesty International¹² and the

⁷ See Figure 8.

⁸ Stanley B. Lubman, “The Dragon as Demon: Images of China on Capitol Hill,” *Journal of Contemporary China* 13, no. 40 (2004): 541–565, doi:10.1080/1067056042000213391.

⁹ Daniel de Vise and William Wan, “Prominent Legal Scholar and China Expert Comes to Aid of Chen Guangcheng,” *The Washington Post*, May 4, 2012, sec. Local, http://www.washingtonpost.com/local/education/prominent-legal-scholar-and-china-expert-comes-to-aid-of-chen-guangcheng/2012/05/04/gIQANDD61T_story.html.

¹⁰ Jerome A Cohen, “First, They Came for the Lawyers,” *Foreign Policy*, July 12, 2011, http://www.foreignpolicy.com/articles/2011/07/12/first_they_came_for_the_lawyers?page=0,0.

¹¹ Paul Mooney, “Silence of the Dissidents,” *South China Morning Post*, July 4, 2011, sec. News.

¹² Amnesty International, *Against the Law: Crackdown on China’s Human Rights Lawyers Deepens* (London, 2011), <http://www.amnesty.org/en/library/asset/ASA17/018/2011/en/20ed6bf3-aaa9-4da5-8220-6c07615e531b/asa170182011en.pdf>.

China Human Rights Lawyers Concern Group¹³ concentrate on a relatively small list of prominent lawyers. Such efforts to monitor and report on the worst violations of both Chinese law and human rights are admirable and important. However, because many people see the Chinese legal system in terms of these types of cases and individuals, views of the work of its two hundred thousand lawyers tend to be very narrow. Providing a more representative picture is crucial because, despite their lack of representativeness, media, NGO, government, and scholarly attention to China's legal system demonstrate its importance. Moreover, examining the Chinese administrative law apparatus is ideal for addressing issues related to rule of law and human rights while still providing a representative view of China's overall politico-legal establishment.

First, because administrative law makes the state the defendant,¹⁴ it is *the* best test of rule of law and an excellent starting point for evaluating the legal system's contribution to limiting an authoritarian state.¹⁵ In part, this is because the state is much more likely to have an interest in cases in which it is the defendant. By contrast, civil cases often do not prompt state interference in the judicial system simply because the state rarely has an interest in the outcome. While not all administrative law cases are politically sensitive and not all politically sensitive cases are administrative,¹⁶ concentrating on politically sensitive cases is tantamount to selecting on the dependent variable. In any regime, cases politically sensitive or controversial enough to betray

¹³ "China Human Rights Lawyers Concern Group," 2012, <http://www.chrlawyers.hk/>.

¹⁴ I recognize that the state is not a monolith and at several points, especially in Chapter Five, I examine the implications of suing different parts of the state.

¹⁵ William Wade and Christopher Forsyth, *Administrative Law* (Oxford, UK: Oxford University Press, 2009).

¹⁶ Fu and Peerenboom propose a schema for classifying cases in China that makes this distinction very clear: Yulin Fu and Randall Peerenboom, "A New Analytic Framework for Understanding and Promoting Judicial Independence in China," *SSRN eLibrary* (2009): , <http://ssrn.com/abstract=1336069>.

political influence on the legal system may be found. Such instances give us a better idea of what kinds of cases are likely to pose problems for a legal system, but even then, they need to be situated in a more representative understanding of the wider politico-legal establishment. Administrative law tends to include a higher percentage of politically sensitive cases than other kinds of law, but it is precisely this range of cases, from everyday to highly controversial, that makes administrative law such a useful category. Additionally, everyday cases may be more sensitive to minor forms of interference by the state because the stakes are low. This means that minor forms of harassment and resistance might deter plaintiffs with more mundane grievances and less to gain from suing the state, whereas they might be taken in stride by activists pursuing higher profile cases.

Second, administrative litigation does not suffer from the same definitional problems as many other categories in Chinese law. Administrative cases are clearly and easily recognized as those in which some part of the Chinese state is the defendant. Administrative law has remained a stable category throughout the reform era and has the advantages of being both an emic and etic category.¹⁷ Like emic categories, administrative law is clearly defined and meaningful to lawyers and officials in China. Additionally, as with etic description, the category of administrative law is comparable across contexts. The definition of administrative law may differ slightly by country, but due largely to the widespread influence of Roman law, administrative law is a sub-

¹⁷ Kenneth Pike coined these terms in the 1960s. An emic description of behaviour is one that is given in terms that are meaningful to the actors engaged in the behaviour. Emic categories are often culturally specific. Etic refers to description that may not be meaningful to the actors involved, but uses technical terminology that describes similar phenomena in other contexts. Kenneth L. Pike, *Language in Relation to a Unified Theory of the Structure of Human Behavior* (The Hague: Mouton & Co., 1971).

category of public law that is broadly comparable across most legal systems.¹⁸ This facilitates comparison with work on administrative law in other countries and helps make this dissertation accessible to those familiar with legal systems other than that of the PRC. In contrast to administrative law, the area of law that would be termed civil law in most systems has undergone reclassification during the PRC's reform era; the previously separate category of "economic law" has been integrated into civil law and civil law has recently been divided into categories of family law, torts, and contract law.¹⁹ This can make civil law a difficult category to analyse over time, especially in terms of official statistics. Other popular categories that are closely related to this dissertation and may describe types of litigation or the lawyers that practice them include "public interest (公益)" and "rights protection (维权)". While these categories may be supposed to describe the most politically interesting litigation in China, any research limited to these categories would be heavily biased by how they were defined and identified and, therefore, far less representative.

Third, administrative law is a particularly useful point of comparison between legal systems "because the nature of the leading problems, and in particular the question of how government can be controlled in the interests of both state and citizen, is common to all the developed nations of the West, and also present in many developing countries in the third world."²⁰ While this dissertation makes a limited attempt, where possible, to compare the contemporary Chinese case to other contexts, its main focus is providing a

¹⁸ L. Neville Brown, John S. Bell, and Jean-Michel Galabert, *French Administrative Law* (Oxford, UK: Oxford University Press, 1998), 1.

¹⁹ See, for example: 中国法律年鉴编辑部 China Legal Yearbook Editorial Board, *China Legal Yearbook 中国法律年鉴 Various Years* (China Legal Press 法律出版社, Various Years).

²⁰ Brown, Bell, and Galabert, *French Administrative Law*, 1.

picture of China's administrative legal system that is comprehensive and representative enough to serve as a basis for comparison in future works.

Fourth, administrative law often sets the tone for litigation in an entire nation, especially in a country like China where the state is still so central to the of working of the economy, and society more generally. For example, a recent pair of important, though unsuccessful, HIV/AIDS discrimination cases in Anhui and Sichuan were administrative cases because they revolved around employment in the public sector and "Civil Servant Employment Physical Standards" regulations.²¹ This stands in contrast to landmark civil HIV/AIDS discrimination cases in the US, such as *Bragdon v. Abbott*²² and the Geoffrey F. Bowers hearing that inspired the film *Philadelphia*.²³ My research aim is a thorough examination of administrative litigation in China that will cast light on the political role of courts and the legal profession as a whole.

Fifth, this dissertation is well situated in a wider trend of greater specialization in the scholarly study of Chinese law. Classic books that provided broad overviews of China's legal system such as Stanley Lubman's *Bird in a Cage*²⁴ and Randall Peerenboom's *China's Long March toward Rule of Law*²⁵ are beginning to give way to more specialized works that concentrate on specific areas of Chinese law such as

²¹ Fangqiang Yu, "China's First Lawsuit on Discrimination Against a Person Living with HIV/AIDS," *Economic & Social Rights in Asia*, October 25, 2011, <http://asiacatalyst.org/blog/2011/10/chinas-first-lawsuit-on-discrimination-against-a-person-living-with-hiv-aids.html>.

²² Kennedy, *Bragdon v. Abbott*, U.S. (U.S. Supreme Court 1998).

²³ "Philadelphia Makers Settle Suit," *New York Times*, March 20, 1996,

<http://www.nytimes.com/1996/03/20/nyregion/philadelphia-makers-settle-suit.html>.

²⁴ Stanley B. Lubman, *Bird in a Cage: Legal Reform in China After Mao* (Stanford, CA: Stanford University Press, 1999).

²⁵ Randall Peerenboom, *China's Long March Toward Rule of Law* (Cambridge: Cambridge University Press, 2002).

Environmental Litigation in China,²⁶ *Internet Law in China*,²⁷ and *Obligations and Property Rights in China*²⁸. This reflects both a growing interest in the Chinese legal system and a body of knowledge and available data that now allows for greater specialization. Like these other more specialized works, this dissertation fills a vital gap by providing the field with a detailed, expansive, empirical, and representative account of an extremely important, but understudied and often misunderstood, part of China's legal and political system. To date, several scholars of Chinese law or politics have addressed the administrative law regime. Their studies, however, have generally been limited to single articles or chapters,²⁹ and no one has investigated the role of lawyers in administrative law. Although there is a good deal of official quantitative data on administrative law available, not since Pei's groundbreaking work 15 years ago³⁰ has there been a rigorous attempt to analyse it. Additionally, for the first time, I am able to provide a more representative view by applying data from a major survey of Chinese lawyers to the subject. Administrative law in China has never received the in-depth empirical investigation necessary to understand lawyers' relationship with it, its roles in state-society relations, or what the Chinese case can tell us about rule of law.

Finally and most importantly, “[i]f fully enforced,” China's administrative legal system “would afford Chinese citizens an important legal instrument with which to defend themselves against the abuse of state power by government agencies and

²⁶ Stern, *Environmental Litigation in China*.

²⁷ Guosong Shao, *Internet Law in China* (Woodhead Publishing, 2012).

²⁸ Perry Keller, *Obligations and Property Rights in China* (Ashgate Publishing Company, 2011).

²⁹ Fifteen years ago when China's administrative law regime was just getting started, a Hong Kong based Chinese legal scholar did publish a book on the subject. It has a procedural legal focus rather than a social scientific one. Feng Lin, *Administrative Law Procedures and Remedies in China* (Sweet & Maxwell, 1996).

³⁰ Minxin Pei, “Citizens V. Mandarins: Administrative Litigation in China,” *The China Quarterly* 152 (1997): 832–862.

officials”³¹. In a country where the freedom of speech is severely limited³² and fair and free elections are essentially non-existent,³³ the fact that the Chinese state has been held accountable to its own laws in approximately four hundred thousand cases over the past two decades stands out in dramatic contrast. The administrative legal system, therefore, could be used to facilitate progress in many other areas related to human rights, including freedom of speech, and elections. In short, “the theoretical significance of the ALL [administrative litigation law] can hardly be exaggerated.”³⁴

Why Lawyers?

In approaching the study of China’s administrative law, my focus on lawyers arises out of both practical and theoretical concerns. First, lawyers are by far the most accessible out of all the participants in administrative litigation: plaintiffs, lawyers, judges, officials, and third parties. It was possible to draw a random sample of lawyers without the huge scale that would be necessary for plaintiffs, and lawyers are generally more willing and able to speak freely with researchers than are judges or officials. Second, as opposed to most administrative plaintiffs who are one-shot players with little legal knowledge, lawyers are often able to provide clear, detailed explanations of the

³¹ Jonathan Kinkel and William Hurst, “Review Essay-Access to Justice in Post-Mao China: Assessing the Politics of Criminal and Administrative Law,” *Journal of East Asian Studies* 11, no. 3 (2011): 479.

³² On freedom of speech, the Internet and the press see: Shauna Emmons, “Freedom of Speech in China: A Possibility or a Prohibition,” *Loyola of Los Angeles International and Comparative Law Review* 23 (2001): 249; Jason P Abbott, “Democracy@internet.asia? The Challenges to the Emancipatory Potential of the Net: Lessons from China and Malaysia,” *Third World Quarterly* 22, no. 1 (2001): 99–114, doi:10.1080/01436590020022600; Jon Hassid, “Controlling the Chinese Media: An Uncertain Business,” *Asian Survey* 48 (2008): 414–430.

³³ On elections in China see: Jie Chen and Yang Zhong, “Why Do People Vote in Semicompetitive Elections in China?,” *The Journal of Politics* 64, no. 1 (2002): pp. 178–197; Kevin J. O’Brien and Lianjiang Li, “Accommodating ‘Democracy’ in a One-Party State: Introducing Village Elections in China,” *The China Quarterly* (2000): 465–489.

³⁴ Kinkel and Hurst, “Access to Justice in Post-Mao China,” 479.

facts and outcomes of their administrative cases.³⁵ Third, lawyers, especially the vast majority of non-elite lawyers that are the focus of this study, are part of an overlooked middle ground in studies of contention in China. They are sometimes missed between studies of high profile dissidents and lawyers³⁶ on one hand, and of large categories of ordinary Chinese peasants³⁷ and workers³⁸ on the other. Fourth, lawyers act as gatekeepers³⁹ or justice brokers⁴⁰ that play a substantial role in facilitating or denying access to justice.⁴¹ Fifth, as Epp found in his classic book, the *Rights Revolution*, the ascendancy of civil rights in much of the common law world was the product of expanding institutional support for advocacy lawyering rather than the proclivity of the courts.⁴² This suggests that the actions and organization of, and support for, Chinese lawyers might be the right place to look for the origins of China's own rights revolution,

³⁵ In contrast to my interviews with lawyers, I sometimes found plaintiffs to be unclear on basic legal details of their cases. Interview: CS01-PL.

³⁶ Eva Pils, "The Practice of Law as Conscientious Resistance: Chinese Weiquan Lawyers' Experience," *SSRN eLibrary* (2009), <http://ssrn.com/abstract=1564447>; Eva Pils, "Asking the Tiger for His Skin: Rights Activism in China," *Fordham International Law Journal* 30, no. 4 (2006): 1209–1287; Amnesty International, *Against the Law*; Cohen, "First, They Came for the Lawyers."

³⁷ Thomas P. Bernstein and Xiaobo Lü, "Taxation Without Representation: Peasants, the Central and the Local States in Reform China," *The China Quarterly* 163 (2000): 742–763; L. Li and K. J. O'Brien, "Villagers and Popular Resistance in Contemporary China," *Modern China* 22 (1996): 28–61.

³⁸ William Hurst and Kevin J. O'Brien, "China's Contentious Pensioners," *The China Quarterly* 170 (2002): 345–360; Mary E. Gallagher, "China's Older Workers: Between Law and Policy, Between Laid-Off and Unemployed," *Working Paper* (2008); Isabelle Thireau and Linshan Hua, "The Moral Universe of Aggrieved Chinese Workers: Workers' Appeals to Arbitration Committees and Letters and Visits Offices," *The China Journal* no. 50 (2003); William Hurst, "Mass Frames and Worker Protest," in *Popular Protest In China*, ed. Kevin J. O'Brien (Harvard University Press, 2008), 71–87.

³⁹ Herbert M. Kritzer, "Contingency Fee Lawyers as Gatekeepers in the American Civil Justice System," *Judicature* (1997): 22–9.

⁴⁰ Herbert M. Kritzer, *The Justice Broker: Lawyers and Ordinary Litigation* (New York: Oxford University Press, USA, 1990).

⁴¹ Ethan Michelson, "The Practice of Law as an Obstacle to Justice: Chinese Lawyers at Work," *Law & Society Review* 40, no. 1 (2006): 1–38.

⁴² Charles R. Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (Chicago: University of Chicago Press, 1998).

if there is to be one. Finally, from Robespierre to *Brown vs. the Board of Education* to recent events in Libya⁴³ and Pakistan⁴⁴, lawyers are often at the forefront of liberalization.

Historically, lawyers have been important both in limiting government and in enacting political and social change. In Shakespeare's *Henry VI*, Dick the Butcher and John Cade famously agree that when the latter is king, "[t]he first thing we do, let's kill all the lawyers."⁴⁵ Although this recommendation arises out of a general resentment for education and high social status, it is also intended to enable Cade the free exercise of his power as King. For that most astute observer of political culture, Alexis De Tocqueville, lawyers have a dual personality. When allied with the ruling power, they are a strong conservative force, yet one that can also temper the harshest elements of despotism. Excluded from power and "...that high rank in society which is naturally their due," however, the bar, or at least parts of it, can be at the forefront of revolution.⁴⁶ In 1954, the lawyers of The National Association for the Advancement of Colored People (NAACP), for example, were successful in overturning segregation in the US Supreme Court case, *Brown vs. the Board of Education of Topeka, Kansas*, before the better part of the collective action of the civil rights movement had occurred. However, lawyers have often had to resort to extra-judicial measures to achieve radical change. Robespierre, Gandhi and Abraham Lincoln were all lawyers who helped create dramatic change in their

⁴³ "Libya's Fledgling Alternative Government: Who's in Charge?," *The Economist*, March 10, 2011, <http://www.economist.com/node/18342983>.

⁴⁴ Zahid Shahab Ahmed and Maria J. Stephan, "Fighting for the Rule of Law: Civil Resistance and the Lawyers' Movement in Pakistan," *Democratization* 17, no. 3 (2010): 492–513, doi:10.1080/13510341003700360.

⁴⁵ Joseph Fewsmith, "An 'Anger-Venting' Mass Incident Catches the Attention of China's Leadership," *China Leadership Monitor* no. 26 (2008).

⁴⁶ Alexis De Tocqueville, *Democracy in America*, ed. J.P. Mayer, trans. George Lawrence (New York: Harper Collins, 1988), 265–6.

political and social systems, but their most important contributions were made outside the courtroom.

While my research is focused on lawyers' involvement in administrative litigation, it also sheds some light on how, when, why, and which lawyers might contribute to political change outside of courtrooms. In particular, my finding that lawyers who sue the state are those with close relations to it suggests their potential importance. Lawyers who sue the state today are likely to be candidates in some future democratic election, leaders in a people power revolution, or simply influential in a gradually reforming Communist Party. Naturally, the opposite is also possible; politically embedded lawyers could be some of the regime's staunchest and most capable defenders. Indeed, from the Tocquevillian perspective, rather than lawyers in China being entirely excluded from power or rank, my research shows that many are embedded in the state. While it is unlikely that the impact of any one of the lawyers in my sample will ever be as politically and socially powerful as that of Lincoln, Robespierre, or Gandhi, I argue that lawyers will be critical to future political and social developments in China.

Why China?

China's size, increasing prominence on the world stage, and miraculous economic growth coupled with a conspicuous lack of political liberalisation make it an exceptionally important case. The PRC is a crucial example for anyone interested in the developing world because it has achieved almost three decades of economic growth at unprecedented rates. This has made China something of a model, with some arguing that

a new Beijing Consensus⁴⁷ provides developing countries with an attractive authoritarian alternative to the once dominant Washington Consensus.⁴⁸ China is now the world's second biggest economy,⁴⁹ and with its central position in global supply chains, its legal system has major implications for the world's economy. China's prominence also means that it receives a great deal of international scrutiny. The expropriation and demolition of homes to make way for sports venues was an issue closely tied up with administrative litigation that achieved international prominence leading up to the Beijing Olympics.⁵⁰ Its sheer size means that even when findings apply only to the PRC, they still explain a system and reality that affects the lives of more people than live in the entire developed world. Finally, China's size and the unevenness of its growth and reform mean that it is not necessarily a single case. Comparing Shanghai and rural Hunan, for example, is not unlike comparing a developed country to a developing one.

Outline

This outline of upcoming chapters is intended to give readers an idea of what to expect and also provide a brief summary of my dissertation.

Chapter One addresses relevant theoretical concerns, establishing what the existing literature tells us about the project and why it is theoretically important. It investigates existing conceptions of state-society relations in China including:

⁴⁷ Joshua Cooper Ramo, *The Beijing Consensus: Notes on the New Physics of Chinese Power* (London, U.K.: Foreign Policy Centre, 2004).

⁴⁸ For doubts about this see: Scott Kennedy, "The Myth of the Beijing Consensus," *Journal of Contemporary China* 19, no. 65 (2010): 461–477, doi:10.1080/10670561003666087; John Wagner Givens, "The Beijing Consensus Is Neither: China as a Non-Ideological Challenge to International Norms," *St Antony's International Review* 6, no. 2 (2011): 10–26.

⁴⁹ "China's Economy Overtakes Japan," *BBC*, February 14, 2011, sec. Business, <http://www.bbc.co.uk/news/business-12427321>.

⁵⁰ Ben Blanchard, "Forced Evictions Sour Olympic Dream for Some," *Reuters*, July 16, 2008, <http://www.reuters.com/article/2008/07/16/us-olympics-evictions-idUSPEK16114620080716>.

authoritarian resilience, fragmentation, participation and input institutions, and embeddedness. It introduces, explains, and justifies my concept of authoritarian polycentrism. Finally, I enumerate the functions of administrative litigation in an authoritarian regime.

Chapter Two explains my methodology, data sources, and data collection. Most important is the discussion of how my interview subjects were selected and how the interviews were conducted and coded. It also explains the rationale for field site selection. It discusses my use of survey data and of official Chinese government statistics with special consideration given to their deficiencies. I also address my use of a variety of written sources including media accounts, official documents issued by courts and other organs of the party-state, administrative law text books, law school curricula, and a variety of literature from legal and scholarly sources within China. While this chapter presents the information necessary to replicate my research, ensure the reliability of my data, and understand its limitations, it might also prove instructive for future researchers who may learn from my experiences and mistakes.

Chapter Three provides an overview of administrative litigation in China. It considers its history and present standing. The chapter begins with background on China's courts, the legal profession, and administrative litigation. It then considers a wide variety of issues including: alternatives to litigation, filing cases, abstract administrative acts, evidence, the statute of limitations, corruption, government responses, outcomes, mediations, and the enforcement of verdicts. While this chapter's primary purpose is to provide the necessary context for subsequent chapters, it also breaks considerable new

ground by bringing unexplored issues to light, correcting misconceptions in the literature, and providing a more representative picture.

Chapter Four raises and answers the question: “why do lawyers sue the state?” It analyses and categorizes the motives and characteristics that lead lawyers to take administrative cases. It constructs a statistical model built on data from a survey of Chinese lawyers and uses independent variables reflecting lawyers’ connections and background to predict the likelihood that a lawyer will take administrative cases. This chapter will provide a cogent picture not only of which lawyers litigate administrative cases and why, but of the political impact of China’s legal professionals.

Chapter Five provides the empirical basis for my concept of authoritarian polycentrism through a detailed study that explains the strategies that lawyers use when handling administrative litigation in the PRC. The variety of strategies includes: levelling up and over, using political connections, the shotgun strategy, the cross jurisdictional strategy, using the media, and strategically withdrawing cases. Finally, it looks at the counterstrategies that local governments may employ to resist being sued. Chapter Five concludes that administrative litigation greatly contributes to the polycentrism of the Chinese system by providing the means and opportunity for a greater number of state, quasi-state, and non- state actors to participate in the creation of policy outcomes.

Chapter Six examines foreign plaintiffs in Chinese administrative court. While multinationals frequently sue the Patent and Trademark Review and Adjudication Boards in Beijing’s specialized intellectual property court,⁵¹ most disagreements between foreign multinationals and other parts of the Chinese state are settled in direct meetings with

⁵¹ Technically, this is not a separate IP court but a specialized chamber in Beijing’s First Intermediate Court. In places, however, I will refer to it as IP court for the sake of convenience.

officials. I argue that this is part of a compromise between the Chinese state and multinationals operating in China. Instead of using a foreign presence to motivate reform and improve the administrative legal system, the Chinese state has created an effective but *ad hoc* solution to address problems affecting foreigners. I demonstrate that although foreign firms may have difficulty litigating against the Chinese government, it is on balance no more difficult for them than most other classes of plaintiffs. I conclude that while the reluctance of multinationals to engage the Chinese state in litigation is understandable, their failure to make use of administrative courts and a preference for extra-legal special treatment severely limits their potential contribution to China's rule of law.

The conclusion begins with a summary of my findings. I then consider the most significant obstacles to the continued development of administrative law in China. I make some modest recommendations about how these obstacles could be overcome and the PRC's administrative law regime could be improved. I engage in some careful speculation about the development of administrative law including its significance for the future of the PRC and what it might tell us about the role of law in democratisation and authoritarian regimes.

Different chapters in this dissertation relate to different strands of literature in political science, socio-legal studies, and law and, therefore, are likely to be of interest to disparate groups. Chapter Four, for example, should appeal to students of the legal profession, while Chapter Three would have more to offer someone interested in the practice of administrative law. Scholars of contentious politics, and, in particular, the

tactics thereof, will find Chapter Five of interest and Chapter Six provides food for thought to those concerned with business, globalization, and legal convergence.

Because there has been little in the way of expansive and empirical studies of administrative litigation in China, my study is able to break new ground in a number of places. Working in a field where much of the basic outline is still being sketched, one cannot hope to be completely comprehensive so I do not consider this the final word. If my dissertation raises more questions than it answers, it will still have done its job, not only by pointing the way forward, but by providing a well-grounded starting point.

Chapter One: Theoretical Considerations

Following the Tiananmen incident in 1989, there was a widespread belief among academics and the public, Chinese and foreigners, that the PRC was on its last legs⁵² and would soon join democratization's third wave⁵³. Whether or not one believes modern authoritarian regimes to be inherently unstable,⁵⁴ there are many reasons that one might find the resilience of the PRC surprising. Those who continue to predict its collapse often cite the fall of the Soviet bloc, the abandonment of most of the substance of communist ideology,⁵⁵ the internationally condemned Tiananmen incident⁵⁶ as well as continuing human rights abuses,⁵⁷ environmental degradation,⁵⁸ corruption,⁵⁹ and rising inequality

⁵² For a review of predictions of China's eminent collapse see the introduction of Barry Naughton and Dali L. Yang, *Holding China Together: Diversity and National Integration in the Post-Deng Era* (Cambridge, UK: Cambridge University Press, 2004).

⁵³ Samuel P. Huntington, "Democracy's Third Wave," *Journal of Democracy* 2 (1991): 12–34; Samuel P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (Oklahoma City: University of Oklahoma Press, 1993); Samuel P. Huntington, "After Twenty Years: The Future of the Third Wave," *Journal of Democracy* 8 (1997): 3–12.

⁵⁴ Nathan, for example, claims that "[r]egime theory holds that authoritarian systems are inherently fragile because of weak legitimacy, overreliance on coercion, overcentralization of decision making, and the predominance of personal power over institutional norms." Andrew J. Nathan, "Authoritarian Resilience," *Journal of Democracy* 14 (2003): 6.

⁵⁵ On the abandonment of ideology see: Givens, "The Beijing Consensus Is Neither." Although some may see this as a weakness, Huntington, argues that "[t]he erosion of ideology... goes hand in hand with the acceptance, stability and long-term vitality of the system." Samuel P. Huntington, "Social and Institutional Dynamics of One-Party Systems," in *Authoritarian Politics in Modern Society: The Dynamics of Established One-party Systems* (New York, London: Basic Books, 1970), 3–47.

⁵⁶ Liang Zhang et al., *The Tiananmen Papers* (PublicAffairs, 2002).

⁵⁷ For a thoughtful discussion on this topic see: Randall Peerenboom, "Assessing Human Rights in China: Why the Double Standard," *Cornell International Law Journal* 71 (2005): 172.

⁵⁸ Elizabeth Economy, *The River Runs Black: The Environmental Challenge to China's Future* (Cornell University Press, 2010); Benjamin van Rooij, *Regulating Land and Pollution in China, Lawmaking, Compliance and Enforcement: Theory and Cases* (Leiden University Press, 2006); Benjamin van Rooij, "The People Vs. Pollution: Understanding Citizen Action Against Pollution in China," *Journal of Contemporary China* 19, no. 63 (2010): 55–77, doi:10.1080/10670560903335777; Stern, *Environmental Litigation in China*; For a more optimistic analysis see: Debra Lam, "The Reality of Environmental Sustainability in China," *City: Analysis of Urban Trends, Culture, Theory, Policy, Action* 12 (2008): 245–254.

⁵⁹ I feel compelled to include corruption in this list as it is often mentioned as a problem for the PRC. There does not seem to be, however, strong evidence to support the claim that corruption is particularly bad in

among other concerns.⁶⁰ Yet the regime seems stable. It joined the World Trade Organization (WTO),⁶¹ managed the return of Hong Kong and Macao, and has met its twelfth US President. In response, a significant amount of recent social science research has been devoted to showing how the PRC has defied expectations of collapse by transforming, institutionalizing, and strengthening its regime since the death of Mao.⁶² This literature could generally be described as asking, “how does the Chinese system work?” with the implicit recognition that the system does seem to be working.

Many countries have failed to democratize until they were significantly wealthier per capita than contemporary China, perhaps most relevantly Korea and Taiwan. Yet the continued prosperity of the CCP is particularly remarkable for a number of reasons. The PRC has managed to achieve “orderly, peaceful, timely, and stable successions”⁶³ a rare, if not unique, feat among modern authoritarian regimes.⁶⁴ Beijing’s 2008 Olympics were generally considered a success⁶⁵ and apparently lacked the democratizing influence that

China considering its level of development. In Transparency International’s 2008 Corruption Perceptions Index 2008, the PRC ranks as the 72nd least corrupt country, which is disproportionately high for its per capita GDP. It ranks above several more democratic nations with much higher GDPs including: Mexico, Brazil and Thailand. Transparency International, “Corruption Perceptions Index,” 2008, http://www.transparency.org/policy_research/surveys_indices/cpi/2008.

⁶⁰ Shirk has recently reviewed many of these arguments to support her view of China as a fragile superpower: Susan L. Shirk, *China: Fragile Superpower* (Oxford University Press, USA, 2007).

⁶¹ For more on the legal implications of China’s WTO Accession see: Karen Halverson, “China’s WTO Accession: Economic, Legal, and Political Implications,” *Boston College International and Comparative Law Review* 27 (2004): 319; Veron Mei-Ying Hung, “China’s WTO Commitment on Independent Judicial Review: Impact on Legal and Political Reform,” *American Journal of Comparative Law* 52, no. 1 (2004): 77–132; Pitman B. Potter, “The Legal Implications of China’s Accession to the WTO,” *The China Quarterly* no. 167 (2001): 592–609.

⁶² For an excellent recent example that also reviews much of the other work on this subject see: Dali Yang, *Remaking the Chinese Leviathan: Market Transition and the Politics of Governance in China* (Stanford: Stanford University Press, 2005). Also: Pierre F. Landry, *Decentralized Authoritarianism in China: The Communist Party’s Control of Local Elites in the Post-Mao Era* (Cambridge, UK: Cambridge University Press, 2008), 1–2.

⁶³ Nathan, “Authoritarian Resilience,” 7.

⁶⁴ *Ibid.*, 7–9.

⁶⁵ Katie Thomas, “I.O.C. Issues Glowing Review of Beijing Games,” *The New York Times*, November 27, 2008, sec. Sports / Olympics, <http://www.nytimes.com/2008/11/27/sports/olympics/27olympics.html>.

the 1988 games had on South Korea.⁶⁶ Perhaps most importantly, China's economic miracle is truly unprecedented, sustaining nearly a 10 per cent growth rate for over three decades and lifting more than 600 million people out of poverty.⁶⁷ Recently, the CCP has weathered the Arab Spring, the global economic downturn, the Bo Xilai scandal,⁶⁸ and managed its fifth major leadership transition without showing obvious signs of strain.⁶⁹ Finally, all of this has been accomplished in the most populous nation on earth.⁷⁰ Considering therefore, the longevity, success, and prominence of the contemporary PRC in the face of daunting challenges, it is surely worth asking: "*How has China's authoritarian regime not only endured for over six decades, but also prospered?*"

Authoritarian Resilience

First proposed in 2003, Andrew Nathan's concept of authoritarian resilience is probably the most commonly cited explanation of why and how the Chinese state continues to enjoy widespread legitimacy and prosperity.⁷¹ The article in which Nathan outlines his theory was a response to the persistent success of the Chinese regime despite

⁶⁶ Jeffrey N. Wasserstrom, "Using History to Think About the Beijing Olympics: The Use and Abuse of the Seoul 1988 Analogy," *The Harvard International Journal of Press/Politics* 7, no. 1 (January 1, 2002): 126–129, doi:10.1177/1081180X0200700109.

⁶⁷ "The Uncomfortable Reality of Development," *The Guardian*, June 29, 2011, <http://www.guardian.co.uk/global-development/poverty-matters/2011/jun/29/authoritarian-model-development>.

⁶⁸ "Bo Xilai Scandal: Timeline," *BBC*, September 24, 2012, sec. China, <http://www.bbc.co.uk/news/world-asia-china-17673505>.

⁶⁹ "Changing Guard," *The Economist*, November 17, 2012, <http://www.economist.com/news/china/21566685-china-shuffles-its-leadership-putting-princeling-command-changing-guard>.

⁷⁰ In some ways China's size may have been an advantage. For example, it may have compelled investors to tolerate problems that would have caused them to abandon a smaller market. Nevertheless, governing a continent of a country like China is a challenge under any circumstances.

⁷¹ Nathan, "Authoritarian Resilience."

his and his colleagues' predictions of an imminent collapse.⁷² The concept relies heavily, both implicitly and explicitly, on Samuel Huntington's theories of regime types for its theoretical basis, and contemporary China closely resembles Huntington's conception of a stable established one-party state. Indeed, Huntington had already anticipated many of the sources of authoritarian resilience identified by Nathan as elements of the process of consolidation and adaptation that creates such a regime.⁷³

While acknowledging the complexity of the situation, Nathan suggests that Huntington's concept of institutionalization⁷⁴ can be used to summarize the reform-era changes that have contributed to the stability of the PRC. Nathan "focuses on four aspects of the CCP regime's institutionalization: 1) the increasingly norm-bound nature of its succession politics; 2) the increase in meritocratic as opposed to factional considerations in the promotion of political elites; 3) the differentiation and functional specialization of institutions within the regime; and 4) the establishment of institutions for political participation and appeal that strengthens the CCP's legitimacy among the public at large."⁷⁵

While the first of Nathan's criteria deals exclusively with the realm of elite politics, I argue that the latter three, as well as a number of other important factors that have contributed to the success of the CCP, all fall under the rubric of state-society relations, a field of inquiry which "focuses on the interactions and interdependency

⁷² For a review of predictions of China's imminent collapse see: Naughton and Yang, *Holding China Together*, 2–4.

⁷³ Huntington, "Social and Institutional Dynamics of One-Party Systems"; Samuel P. Huntington, *Political Order in Changing Societies* (New Haven and London: Yale University Press, 1968).

⁷⁴ Nathan believes his meaning is adequately captured both by the contemporary definition of institutions as formal and informal rules that constrain behaviour, and Huntington's older definition of institutionalization as "...the process by which organization and procedures acquire value and stability." Huntington, *Political Order*, 12.

⁷⁵ Nathan, "Authoritarian Resilience," 6–7.

between the state and society.”⁷⁶ In short, I argue that what is unique, interesting, and important about contemporary China lies primarily in the manner in which state institutions interact with Chinese society. I also argue that administrative litigation in China is not only an important part of these interactions, but that it serves as an excellent demonstration of the types of institutional and societal reforms that have helped to sustain authoritarian China and perhaps other authoritarian regimes.

Theories of State and Society in China

Almost as soon as China emerged from the chaos of the Cultural Revolution, it began to become clear that views of China as monolithic, centralized and totalitarian were quickly becoming out of date (if they had ever been accurate).⁷⁷ This naturally led scholars of China towards the realization that “...struggles for domination in society are not simply over the question of who controls the top leadership positions of the state (as is so often the assumption in journalistic and academic writing). Nor are such battles always among large-scale social forces (entire states, social classes, civil society, and the like) operating on some grand level.”⁷⁸ Since then, scholars have attempted to conceptualize a more nuanced understanding of state-society relations in China that better captured this highly complex system. I suggest that the fragmentation of power in China has led to increasing opportunities for non-state, quasi-state, and peripheral state actors to participate in policy and has reinforced the importance of being embedded in some part

⁷⁶ Jefferey M. Sellers, “Litigation as a Local Political Resource: Courts in Controversies over Land Use in France, Germany, and the United States,” *Law & Society Review* 29, no. 3 (1995): 2.

⁷⁷ Vivienne Shue, *The Reach of the State: Sketches of the Chinese Body Politic* (Stanford University Press, 1990).

⁷⁸ Joel S. Migdal, *State in Society: Studying How States and Societies Transform and Constitute One Another* (Cambridge University Press, 2001), 100.

of the Chinese state. This idea is firmly grounded in the literature on Chinese state-society relations from which I identify those three broad themes: fragmentation, participation, and embeddedness.

Fragmentation

The Chinese state is not monolithic, but highly fragmented. Writing in the early 1980s, Shue suggested that while China's polity had a cellular honeycomb structure under Mao, the reform era had witnessed a transition to a web-like network.⁷⁹ A little later, Lieberthal *et. al.* developed "[t]he fragmented authoritarianism model [which] argues that authority below the very peak of the Chinese political system is fragmented and disjointed"⁸⁰. The *Tiao-Kuai* model of Chinese politics is concerned with the tension between authority of higher level functional departments and local governments at the same administrative level.⁸¹ Landry shows us that China's state is exceptionally decentralized in many ways, though the personnel management system has allowed for a degree of CCP political control.⁸² Baogang He argued that "limited pluralism is present in economic, social and cultural areas in China" and that "[e]ven in the political arena, nascent elements of political pluralism can be identified"⁸³. Others have emphasised the importance of factional divisions in Chinese politics.⁸⁴ Even the successes of protest

⁷⁹ Shue, *The Reach of the State*, 130–1.

⁸⁰ Kenneth Lieberthal and David M. Lampton, *Bureaucracy, Politics, and Decision Making in Post-Mao China* (University of California Press, 1992), 8.

⁸¹ Andrew C. Mertha, "China's 'Soft' Centralization: Shifting Tiao/Kuai Authority Relations," *The China Quarterly* (2005): 797–8; Kenneth Lieberthal and Michel Oksenberg, *Policy Making in China: Leaders, Structures, and Processes* (Princeton University Press, 1990), 141.

⁸² Landry, *Decentralized Authoritarianism*.

⁸³ Baogang He, "Dilemmas of Pluralist Development and Democratization in China," *Democratization* 3, no. 3 (September 1996): 289, doi:10.1080/13510349608403480.

⁸⁴ Andrew J. Nathan and Kellee S. Tsai, "Factionalism: A New Institutionalist Restatement," *The China Journal* no. 34 (1995): 157–192; Lowell Dittmer, "Informal Politics Among the Chinese Communist Party

studied by O'Brien and Li "hinges on locating and exploiting divisions within the state" and "uses influential allies".⁸⁵ All these viewpoints articulate the idea that "the Chinese state is less a monolith than a hodgepodge of disparate actors many of whom have conflicting interests and multiple identities."⁸⁶ I argue that all these theories reflect the reality that the Chinese state is composed of a large number of actors or centres of power whose relationships may be cooperative, conflictual and/or indifferent, and determined by formal structures and/or informal processes.

Participation and Input Institutions

Participation in the PRC rarely takes the forms most familiar to students of democratic politics such as voting, political contributions, or joining special interest groups. As scholarship on Chinese politics widens and deepens, our understanding of the number and variety of participatory acts and institutions through which they are channelled has grown tremendously. As early as the 1980s, Shi identified twenty-eight different varieties of participatory political acts among residents of Beijing.⁸⁷ Village elections in rural areas have offered a uniquely direct channel for input into village level governance.⁸⁸ Harding described China as a consultative authoritarian regime that "increasingly recognizes the need to obtain information, advice, and support from the key

Elite," in *Informal Politics in East Asia*, ed. Lowell Dittmer, Haruhiro Fukui, and Peter N. S. Lee (Cambridge: Cambridge University Press, 2000), 106–140, <http://ebooks.cambridge.org/chapter.jsf?bid=CBO9780511629495&cid=CBO9780511629495A016>; Victor Shih, "Factions Matter: Personal Networks and the Distribution of Bank Loans in China," *Journal of Contemporary China* 13, no. 38 (February 2004): 3–19, doi:10.1080/1067056032000151319.

⁸⁵ Kevin J. O'Brien and Lianjiang Li, *Rightful Resistance in Rural China* (Cambridge: Cambridge University Press, 2006), 16.

⁸⁶ *Ibid.*, 102.

⁸⁷ Tianjian Shi, *Political Participation in Beijing* (Harvard University Press, 1997).

⁸⁸ Melanie Manion, "The Electoral Connection in the Chinese Countryside," *American Political Science Review* (1996): 736–748; O'Brien and Li, "Accommodating 'Democracy' in a One-Party State: Introducing Village Elections in China."

sectors of the population, but insists on suppressing dissent, cultivating its vision of public morality and maintaining ultimate political control in the hands of the party.”⁸⁹ Nathan suggests that “[t]he regime has developed a series of input institutions (that is, institutions that people can use to apprise the state of their concerns) that allow Chinese to believe that they have some influence on policy decisions and personnel choices at the local level.”⁹⁰ Kennedy has shown that companies working in China have learned how to lobby the state.⁹¹ Letters and Visits (信访) offices help provide an institution through which Chinese can register their grievances with the state.⁹² Similarly, the possibility of litigation, especially administrative litigation, literally allows Chinese to “have their day in court”.⁹³ Lorentzen has suggested that, to a certain extent, even riots are permitted by

⁸⁹ Harry Harding, *China's Second Revolution: Reform After Mao* (Brookings Institution Press, 1987), 200.

⁹⁰ Nathan, “Authoritarian Resilience,” 14.

⁹¹ Scott Kennedy, *The Business of Lobbying in China* (Harvard University Press, 2005).

⁹² Carl F. Minzner, “Xinfang: An Alternative to Formal Chinese Legal Institutions,” *Stanford Journal of International Law* 42 (2006): 103; Taisu Zhang, “The Xinfang Phenomenon: Why the Chinese Prefer Administrative Petitioning over Litigation,” *SSRN eLibrary* (2008), <http://ssrn.com/abstract=1098417>; Isabelle and Hua Thireau, “One Law, Two Interpretations: Mobilizing the Labor Law in Arbitration Committees and in Letters and Visits Offices,” in *Engaging the Law in China: State, Society and Possibilities for Justice* (Stanford, CA: Stanford: Stanford University Press, 2005); Thireau and Hua, “The Moral Universe of Aggrieved Chinese Workers.”

⁹³ Kevin J. O'Brien and Lianjiang Li, “Suing the Local State: Administrative Litigation in Rural China,” in *Engaging the Law in China: State, Society and Possibilities for Justice* (Stanford: Stanford University Press, 2005), 31–53; Xin He, “Administrative Law as a Mechanism for Political Control in Contemporary China,” in *Constitutionalism and Judicial Power in China*, ed. Stéphanie Balme, CERI Series in International Relations and Political Economy (New York: Palgrave Macmillan, 2010); Lin, *Administrative Law Procedures and Remedies in China*; 卢振华 Lu Zhen-hua, “On Peasants' Psychological Types in Administrative Litigation 农民‘民告官’心理类型化研究,” *Administrative Litigation Research 行政法学研究* 56, no. 4 (2006): 76–81; 罗豪才 Luo Haocai, *The Balancing Theory of Modern Administrative Law 现代行政法的平衡理论* (Beijing: Beijing University Press 北京大学出版社, 1997); 包万超 Bao Wanchao, “Comparative Research on The Balancing Theory of Administrative Law 行政法平衡理论比较研究,” *China Legal Science 中国法学* (1999): 58–74; Hengfu Ruan, “Politics of Administrative Litigation in Contemporary China” (MA Thesis, National University of Singapore, 2006), <http://scholarbank.nus.edu.sg/handle/10635/15257>; Randall Peerenboom, “Globalization, Path Dependency and the Limits of Law: Administrative Law Reform and Rule of Law in the People's Republic of China,” *Berkeley Journal of International Law* 19 (2001): 161; Pei, “Citizens V. Mandarins”; Randall Peerenboom, “A Government of Laws: Democracy, Rule of Law and Administrative Law Reform in the PRC,” *Journal of Contemporary China* 12 (2003): 45 – 67; Susan Finder, “Like Throwing an Egg Against a Stone? Administration Litigation in the People's Republic of China,” *Journal of Chinese Law* 3 (1989): 1–28;

the Chinese state as a kind of input institution.⁹⁴ What these concepts all show is that parts of the Chinese state are open to input and influence by a range of non-state and quasi-state actors, but that such input is often strictly limited and controlled.

The literature suggests that it is the very fragmentation or polycentricity of the Chinese state that has led to the increased need and/or opportunity for input institutions. Warren and He argue that the PRC has taken a more deliberative approach to governance in order to adjust to the fact that “sources (and resources) of power in China are rapidly pluralizing.”⁹⁵ Mertha’s analysis of what he refers to as ‘Fragmented Authoritarianism 2.0’ not only demonstrates that “previously-excluded members of the policy-making process in China – officials only peripherally connected to the policy in question, the media, non-governmental organizations and individual activists – have successfully entered the political process”⁹⁶ but suggest that it is the very fragmentation of the state that allows for this input.

Embeddedness

A wide variety of the empirical literature on China has shown that enjoying close ties with the state is important for most of the players in a standard conception of state-society relations. “For Chinese NGOs, resources and influence often come about not because they are removed from the state, but because they enjoy close ties with the

Robyn Marshall, “Administrative Law in the People’s Republic of China: A Process of Justice” (Doctoral Dissertation, Australian National University, 2002); Mei Ying Hung, “Administrative Litigation and Court Reform in the People’s Republic of China” (Thesis, Stanford University Law School, 2001); Hung, “China’s WTO Commitment.”

⁹⁴ Peter L. Lorentzen, “Regularizing Rioting: Permitting Public Protest in an Authoritarian Regime,” *Social Science Research Network* (2010), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=995330.

⁹⁵ Baogang He and Mark E. Warren, “Authoritarian Deliberation: The Deliberative Turn in Chinese Political Development,” *Perspectives on Politics* 9, no. 2 (2011): 280.

⁹⁶ Andrew C. Mertha, “‘Fragmented Authoritarianism 2.0’: Political Pluralization in the Chinese Policy Process,” *The China Quarterly* 200, no. 1 (2009): 996.

state.”⁹⁷ Michaelson, Liu and Halliday, as well as this dissertation, show that having a close relationship with parts of the state is often necessary, or at least extremely helpful, for lawyers to pursue their work including challenging the state in criminal or administrative court.⁹⁸ For Chinese journalists, ties to the state help provide access to information and protection from retribution for unflattering stories.⁹⁹ Tying embeddedness back to the idea of the fragmented state, O’Brien has found that even China’s legislatures pursue a strategy of embeddedness.¹⁰⁰

The tripartite insights of fragmentation, participation, and embeddedness are vital for understanding the most interesting and important issues in modern China including those addressed by administrative litigation. My concept of authoritarian polycentrism, therefore, is an effort to capture all three of these themes in a coherent whole that give us a new and more complete framework for analysing state-society relations.

⁹⁷ Shawn Shieh quoted in: May Farid, “China’s Grassroots NGOs and the Local State: Mechanisms of Influence and the Expansion of Rights,” *SSRN eLibrary* (2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1899937; See also: Michael Büsgen, “NGOs and the Search for Chinese Civil Society Environmental Non-governmental Organisations in the Nujiang Campaign,” *ISS Working Paper Series/General Series* 422 (2006): 1–61; Kenneth Foster, “Associations in the Embrace of an Authoritarian State: State Domination of Society?,” *Studies in Comparative International Development (SCID)* 35, no. 4 (2001): 84–109, doi:10.1007/BF02732709.

⁹⁸ Ethan Michelson, “Lawyers, Political Embeddedness, and Institutional Continuity in China’s Transition from Socialism,” *American Journal of Sociology* 113 (2007): 352–414; Sida Liu and Terence C. Halliday, “Political Liberalism and Political Embeddedness: Understanding Politics in the Work of Chinese Criminal Defense Lawyers,” *Law & Society Review* (2011); John Wagner Givens and Maria Repnikova, “Advocates of Change in Authoritarian Regimes: How Chinese Lawyers and Chinese and Russian Journalists Stay Out of Trouble,” *SSRN eLibrary* (2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1911590.

⁹⁹ Givens and Repnikova, “Advocates of Change in Authoritarian Regimes.”

¹⁰⁰ Kevin J. O’Brien, “Chinese People’s Congresses and Legislative Embeddedness: Understanding Early Organizational Development,” *Comparative Political Studies* 27 (1994): 80.

Authoritarian Polycentrism

Although models of Chinese politics and state-society relations have advanced tremendously since totalitarian conceptions¹⁰¹ of the 60s and 70s,¹⁰² none of the current models fully integrates the three vital ideas of fragmentation, participation, and embeddedness or offers an adequate conceptualization of the empirical reality that my research has uncovered. I therefore suggest the adaptation of the concept of “polycentrism” which has become an important one for the study of public administration, policy, and political science in the United States and in an increasingly integrated Europe.¹⁰³ An idea that embraces complexity, “polycentricity is a general concept that encapsulates a distinctive way of looking at political, economic, and social order. A sharp contrast is drawn against the standard view of sovereignty as connoting a single source of political power and authority that has exclusive responsibility for determining public policy.”¹⁰⁴ In a polycentric system, there are “many centers of decision-making which are formally independent of each other... take each other into account in competitive

¹⁰¹ Some scholars, however, have long questioned the penetration of the “totalitarian” Chinese state. For the classic work on the subject see: Shue, *The Reach of the State*. For the opposing view see: Jonathan Unger, “State and Peasant in Post- Revolution China,” *Journal of Peasant Studies* 17, no. 1 (1989): 114–136, doi:10.1080/03066158908438414.

¹⁰² Lubman’s classic work on Mao-era mediation demonstrates the totalitarian extremes of social control, but also the seeds of post-Mao polycentrism in the multiplicity of representatives of the state that compose “basic level organization”. Stanley B. Lubman, “Mao and Mediation: Politics and Dispute Resolution in Communist China,” *California Law Review* 55 (1967): 1312–3.

¹⁰³ Michael D McGinnis and Elinor Ostrom, “Reflections on Vincent Ostrom, Public Administration, and Polycentricity,” *Public Administration Review* 72, no. 1 (November 11, 2011): 15 & 18, doi:10.1111/j.1540-6210.2011.02488.x.

¹⁰⁴ Michael D. McGinnis, “Introduction: From Resource Management to Constitutional Order,” in *Polycentric Governance and Development: Readings from the Workshop in Political Theory and Policy Analysis*, ed. Michael D. McGinnis, 1998, <http://www.indiana.edu/~workshop/publications/materials/volume1.html>.

relationships, enter into various contractual and cooperative undertakings or have recourse to central mechanisms to solve conflicts.”¹⁰⁵

Adapting a model largely grounded on the Tocquevillian democratic local politics of the United States for use in China is not as strange as it initially might seem. Both are continent sized countries, the federalism of the US is paralleled by China’s decentralization and China’s fiscal decentralization exceeds even that of the US¹⁰⁶. These similarities give rise to analogous situations. Just as federal agencies and departments may have difficulty in forcing state compliance with federal rules, Chinese central government ministries have the same formal rank as provincial governments and therefore do not have the authority to command them. Despite similarities that might explain why a concept born from the study of public service provision in the US would help us understand the PRC, the contexts are clearly very different. I therefore propose the idea of polycentric authoritarianism.

I define polycentric authoritarianism as a system in which policy outcomes are determined by the formal and informal relationships between a number of state, quasi-state and non-state actors with state and quasi-state actors generally maintaining a central, if not necessarily dominant, role. While the basic outline of polycentric systems in China resemble those found elsewhere, four closely related factors give it its authoritarian flavour. These characteristics are: 1) the prominence of informal relationships, 2) the central role of the state, and 3) a lack of civil society organisations in favour of 4)

¹⁰⁵ Vincent Ostrom, Charles M. Tiebout, and Robert Warren, “The Organization of Government in Metropolitan Areas: a Theoretical Inquiry,” *The American Political Science Review* 55, no. 4 (1961): 831.

¹⁰⁶ Landry, *Decentralized Authoritarianism*, 4.

prominent quasi-state organisations. The subsequent paragraphs will consider these characteristics in turn.

First, in China, informal connections are extremely important and the outcomes of many disputes are more likely to be determined by bargaining and backroom deals than court decisions, votes, or other formal processes. In large part this is the result of a lack of rule of law, functional formal institutions and channels, and the polycentricity of the Chinese state. This is particularly true when different parts of the state that may not be closely related by formal ties find themselves involved in a dispute. While strong scholarship exists on the immediate horizontal and vertical relationships between parts of the state,¹⁰⁷ it is not obvious what kinds of relationships link a county level land management department (县国土资源局) and a prefectural level court (中级法院), to say nothing of a county land department and a judicial bureau (司法局) in another province. Yet, it is precisely the relationship between these parts of the state that are at issue in many of the administrative cases analysed here. This lack of clarity may be compounded by the reluctance of other parts of the state, especially higher levels, to get involved. Indeed, higher levels of the state often prove unable or unwilling to resolve issues that would seem to fall within their remit.¹⁰⁸ Often, formal procedures such as administrative litigation are invoked principally with an eye to influencing the informal bargaining that will actually determine outcomes. Finally, informality is closely tied with

¹⁰⁷ Mertha, "China's 'Soft' Centralization."

¹⁰⁸ An excellent example of this comes in the form of Chinese local laws, rules and regulations that frequently contradict each other and national laws, but which the central state has been reluctant, unwilling, or unable to address. See: Stanley B. Lubman, "Looking for Law in China," *Columbia Journal of Asian Law* 20 (2006): 34–36.

the idea of embeddedness, as the relationships that embed lawyers in the state's legal apparatus or allow reporters access to scoops from ministries are often informal ones.

Second, the state still plays a central role in Chinese society. Elite lawyers, top journalists, and large companies have expertise, power and money, but they must also seek a greater degree of embeddedness within the state than is generally necessary in a liberal democracy. Indeed, their power and influence is often contingent on their ability to influence some parts of the state to help their cause and others to stay on the sidelines. Lawyers involved in litigation against the state must convince courts to take their cases and judicial bureaus to allow their firms to stay in business. Journalists keen on exposing corruption must convince officials to provide them with scoops and censors to allow them to keep their presses running.¹⁰⁹

Third, as authoritarian regimes often try to limit alternative sources of power outside the state, polycentric authoritarianism discourages “private corporations, voluntary associations, and community-based organizations [from] play[ing] critical supporting roles in a polycentric system of governance”.¹¹⁰ In Europe, Australia, and the United States, neighbourhood associations regularly resist redevelopment.¹¹¹ By contrast, the formation of formal voluntary organisations in China may only trigger additional trouble.¹¹² Even when grievance holders pool their resources to seek legal representation,

¹⁰⁹ Givens and Repnikova, “Advocates of Change in Authoritarian Regimes,” 31–34.

¹¹⁰ McGinnis and Ostrom, “Reflections on Vincent Ostrom, Public Administration, and Polycentricity,” 15.

¹¹¹ George Lefcoe, “Neighborhood Defenders, The,” *UCLA Law Review* 23 (1976 1975): 833.

¹¹² The fate of protestors in Wukan offers a hopeful suggestion that this may be beginning to change, although one protest leader died and the village was blockaded before officials relented: Jamil Anderlini, “Beijing Appoints Wukan Protest Leader as Official,” *Financial Times*, January 16, 2012, <http://www.ft.com/cms/s/0/f5e8ffa8-4055-11e1-82f6-00144feab49a.html#axzz1zZhXNVSy>; “China’s Wukan Experiment,” *Wall Street Journal*, February 3, 2012, sec. Review & Outlook, <http://online.wsj.com/article/SB10001424052970203889904577198433883098856.html>.

courts often deal with each case individually¹¹³ in an effort to divide and rule. Therefore, in polycentric authoritarian regimes we expect to find fewer associations and more individuals, groups of individuals, and informal civil society organizations¹¹⁴.

This leads naturally to the fourth characteristic of polycentric authoritarianism. As an alternative to both the private and voluntary organizations of democratic polycentrism, or the state dominated institutions of a more totalitarian regime, an alphabet soup of quasi-state organizations feature prominently in Chinese polycentric authoritarianism. These include but are not limited to: state-owned enterprises (SOEs), village governments, town and village enterprises (TVEs), government organized non-governmental organisations (GONGOs), All-China Federation of Trade Unions (ACFTU), All-China Youth Federation (ACYF), All-China Women's Federation (ACWF), professional associations such as the All China Lawyer's Association (ACLA), All-China Patent Agent's Federation (ACPAA), All-China Federation of Industry and Commerce (ACFIC), All-China Environment Federation (ACEF), and a largely state owned media. While their exact relationship to the state varies by organization, they are alike in that they are not formally part of the state, but are sufficiently closely related to it to be considered quasi-state organizations.¹¹⁵

These institutions in and of themselves embody the themes I identify in Chinese state-society relations. They are deeply embedded in the state in a way that has long been

¹¹³ For Example in Wang Lin's case in Tianjin: Human Rights Watch, *Walking on Thin Ice: Control, Intimidation and Harassment of Lawyers in China*, 2008, 7, <http://www.hrw.org/reports/2008/04/28/walking-thin-ice>.

¹¹⁴ These include: Chinese non-governmental organizations (NGOs) that are unregistered or register themselves as businesses and informal groups of grievance holders united by a common cause.

¹¹⁵ Even for lawyers, these organisations are often considered part of the state. For example, when asked if he did consulting for a government department one informant replied that he consulted for the Hunan Senior's Association. Interview: CS05S.

recognized by the literature on corporatism in China and East Asia.¹¹⁶ They also perform a vital function as input institutions. For example, villagers to varying degrees elect village governments, and professional, union, and social associations give members of these groups a carefully controlled venue to participate in policy. The website of the All-China Bakery Association, a nationwide trade association under the leadership of the ACFIC, neatly sums up both the embedded and participatory aspects of quasi-state institutions: “[w]e direct our members to follow the directives and regulations of the government. Meanwhile, we transmit the voices of our members to the higher level and assist the government to solve problems that have occurred in our development.”¹¹⁷

To a significant extent the existence of many of these organizations is the legacy of a more totalitarian system in which all organizations had to be closely linked to the state. Yet even in countries without China’s totalitarian history, mass associations and media outlets closely associated with dominant political parties are a staple of less than fully democratic regimes.

This leads to the question of whether polycentric authoritarianism is unique to the Chinese context. Although further evidence on this front is needed, I suspect that China is an extreme rather than a unique case – that is, although polycentric authoritarian systems exist elsewhere, the Chinese case is particularly prominent as China is both very

¹¹⁶ Jonathan Unger and Anita Chan, “China, Corporatism, and the East Asian Model,” *The Australian Journal of Chinese Affairs* no. 33 (January 1, 1995): 29–53, doi:10.2307/2950087; Anita Chan, “Revolution or Corporatism? Workers and Trade Unions in Post-Mao China,” *The Australian Journal of Chinese Affairs* no. 29 (January 1, 1993): 31–61, doi:10.2307/2949951; Bruce J. Dickson, “Cooptation and Corporatism in China: The Logic of Party Adaptation,” *Political Science Quarterly* 115, no. 4 (2000): 517–540; Nan Lin, “Local Market Socialism: Local Corporatism in Action in Rural China,” *Theory and Society* 24, no. 3 (June 1, 1995): 301–354, doi:10.1007/BF00993350; Jean C. Oi, “Fiscal Reform and the Economic Foundations of Local State Corporatism in China,” *World Politics* 45, no. 1 (October 1, 1992): 99–126, doi:10.2307/2010520.

¹¹⁷ “About ACBA,” *All-China Bakery Association Webpage*, 2005, <http://www.baking-china.com/en/11.asp>.

authoritarian and very polycentric. Though authoritarian regimes tend to be centralized, China is one of the most decentralized countries in the world,¹¹⁸ and this is a major contributor to China's polycentrism. Smaller and more centralized states are therefore less likely to exhibit polycentrism as dramatic as China's.¹¹⁹ Additionally, China falls on the extreme authoritarian end of almost any scale of political freedoms¹²⁰ which makes its polycentricity more conspicuous. In hybrid authoritarian regimes¹²¹ existing polycentrism might be explained as a product of the liberal and/or democratic part of the hybrid. In a regime such as China, it is more obvious that its polycentrism is an authoritarian variety distinct from familiar democratic polycentrism. For example, the fact that China's courts offer an alternative centre of power in a system which formally "rejects separation of powers and checks and balances"¹²² is more obviously in need of explanation than it would be in a regime that at least pays lip service to these ideas.

It is tempting to view any authoritarian regime as a unified "big brother" in which each department willingly works with every other to ensure smoothly functioning repression. Polycentric authoritarianism, however, shows us that politics in China look much like politics elsewhere, in that, while parts of the state are sometimes supportive of each other, in many cases officials are indifferent or even hostile towards each other. Indeed, the default attitude between two departments is often one of indifference and a

¹¹⁸ Landry, *Decentralized Authoritarianism*.

¹¹⁹ Indeed, one of the important strategies considered in Chapter Five, the jurisdictional strategy, appears not to work in Russia due to its higher level of centralization: Givens and Repnikova, "Advocates of Change in Authoritarian Regimes," 20–1.

¹²⁰ See for example: Freedom House, "Freedom in the World Report," 2011, <http://www.freedomhouse.org/template.cfm?page=363&year=2011>.

¹²¹ For more on hybrid regimes see: Steven Levitsky and Lucan A. Way, *Competitive Authoritarianism: Hybrid Regimes After the Cold War* (Cambridge University Press, 2010).

¹²² John Ohnesorge, "Chinese Administrative Law in the Northeast Asian Mirror," *Transnational Law & Contemporary Problems* 16 (2007 2006): 105.

familiar list of factors may sour the relationship between two state actors. Personal dislike, or fights over jurisdiction or resources may make it difficult for different state actors to work together. Additionally, a “not in my backyard” mentality means that while officials may take drastic action to repress dissent in their jurisdiction, they are often indifferent if actors from their jurisdictions make trouble for other local officials.¹²³ Indeed, officials may have a general incentive to allow actors to cause problems for officials in other jurisdictions as they may someday compete against those officials for the same promotion, and “social order” problems,¹²⁴ local petitioners coming to Beijing,¹²⁵ and/or administrative litigation¹²⁶ can hurt a cadre’s chances of promotion.

Those who might question the necessity or explanatory power of authoritarian polycentrism might consider the following scenarios. In 2009, the “All-China Environmental Federation, a group backed by the government, filed suit on behalf of residents against the local land resources bureau in Qingzhen city in Guizhou province”¹²⁷. Effectively, this is the Chinese state suing itself, a situation that makes it look remarkably like the archetypically polycentric United States.¹²⁸ Or, consider the fact that “*Southern Weekend (Nanfang Zhoumo)*, which is published by the *Nanfang Daily* group under the Guangdong Communist Party Committee, [is] considered one of the most critical and politically influential commercial newspapers”¹²⁹ and that reporters for

¹²³ Givens and Repnikova, “Advocates of Change in Authoritarian Regimes,” 12–8.

¹²⁴ Maria Edin, “State Capacity and Local Agent Control in China: CCP Cadre Management from a Township Perspective,” *The China Quarterly* 173 (2003): 40.

¹²⁵ Interview: BJ09-L.

¹²⁶ Interview: BJ08L.

¹²⁷ “China Accepts 1st Environment Lawsuit Against Govt,” *Associated Press Online*, July 31, 2009, sec. International News.

¹²⁸ Michael Herz, “United States V. United States: When Can the Federal Government Sue Itself,” *William and Mary Law Review* 32 (1991): 893.

¹²⁹ Susan L. Shirk, *Changing Media, Changing China* (Oxford University Press, 2010), 10.

Southern Weekend and other more or less state-owned papers like it made reporting on the misdeeds of local government in other provinces so common that the central government attempted, with only limited success, to ban it.¹³⁰ Authoritarian polycentrism even means that parts of the state seek support from quasi-state and non-state actors, much as they would in more democratic states. People's Congresses which have both the formal right to, and powerful tools for, supervising courts, still find sometimes that in challenging courts it is useful to try to gain media support "in an effort to gain the backing of the local population and to attract support from the Party."¹³¹ Additionally the movement seems to be towards great polycentrism, as was recently demonstrated when the Shanghai and Shenzhen sub-commissions of China International Economic and Trade Arbitration Commission (CIETAC) broke away from the Beijing headquarters,¹³² further fracturing an institution that was already an excellent example of polycentrism. Finally, this dissertation extensively documents the manner in which successful administrative plaintiffs and their lawyers attempt to muster support from a variety of state and quasi-state actors and that defendants do likewise. Polycentric authoritarianism is then, not only apparent in many aspects of Chinese state-society relations, but useful in explaining otherwise paradoxical phenomena observed in the modern PRC.

It might be surprising that I propose a polycentric conception of state-society relations in a system in which "the centre", the central government, tends to loom so large. Yet, to an extent, this apparent contradiction is an artefact of our need to translate

¹³⁰ Givens and Repnikova, "Advocates of Change in Authoritarian Regimes," 18.

¹³¹ Young Nam Cho, "Symbiotic Neighbour or Extra-Court Judge? The Supervision Over Courts by Chinese Local People's Congresses," *The China Quarterly* 176 (2003): 1080, doi:10.1017/S0305741003000626.

¹³² Nickie Yeung, "2012 Review: Dispute Resolution All Eyes on CIETAC," *China Law & Practice*, February 2013, <http://www.chinalawandpractice.com/Article/3136916/Channel/9951/2012-Review-Dispute-Resolution-all-eyes-on-CIETAC.html>.

into English, and one that does not exist in Chinese. The Chinese term for polycentrism is “*duozhongxin* (多中心),” literally, many “*duo* (多)” centres “*zhongxin* (中心)”. But *the* centre is generally referred to as “*zhongyang* 中央,” as in Chinese Central Television *zhongyangdianshitai* (中央电视台) or the Central Government of the People’s Republic of China *Zhonghuarenmin Gongheguo Zhongyangzhengfu* (中华人民共和国中央人民政府). Therefore in China, the idea that there are many *zhongxin* (中心) does not conflict with the undeniable truth that there is only one *zhongyang* (中央).

This chapter gives little consideration to the standard literature on courts. In part this is for the sake of brevity. More importantly, however, it is because in this context I am sceptical of the utility of Shapiro’s well-established conception of courts as a third party that two disputants turn to “for achieving a resolution.”¹³³ Instead, I suggest that the idea of administrative courts as one player in a polycentric struggle between plaintiff and defendant will serve as a more useful and accurate theoretical framework.

Puzzling Problems

As we shall see in Chapter Three, the total number of administrative cases has grown dramatically over the last two decades. This suggests that administrative law serves some political, social or other function, but the literature on Chinese administrative law¹³⁴ tells us that it does not perform the functions most commonly ascribed to it in developed world legal systems, that of limiting government actions to those consistent

¹³³ Martin Shapiro, *Courts: A Comparative and Political Analysis* (Chicago and London: The University of Chicago Press, 1981), 1.

¹³⁴ He, “Administrative Law as a Mechanism for Political Control”; Hung, “China’s WTO Commitment,” 77; O’Brien and Li, “Suing the Local State,” 2005.

with the law and protecting individual rights.¹³⁵ In his paper “Puzzling Observations in Chinese Law,” noted scholar of Chinese law, Don Clarke, helps address this dilemma. The use of what he calls the “Ideal Western Legal Order” as a standard against which to evaluate the Chinese legal system means that “...many observations about the Chinese legal system can be explained only as errors or aberrations.”¹³⁶ Clarke recognizes that any attempt to explain a system inevitably uses some kind of a model either implicitly or explicitly, but fears that the tendency to use an ideal western model without reflection or explanation prevents more meaningful analysis of the special characteristics of China’s legal system. Instead of producing coherent explanations of how the system works, analyses of the Chinese legal system tend to enumerate the ways in which it falls short of an ideal. As an alternative, Clarke proposes giving more serious thought to what kind of models we use in evaluating the Chinese legal system. Comparing the Chinese case either to theoretical ideals or to empirical assessment of other cases can still be useful, but should be done self-consciously and must be justified.

Scholarly work on administrative law tends to compare the PRC’s system against an idealized version of how administrative law should work and thereby falls into the trap described by Clarke.¹³⁷ In order to avoid this trap, I do not begin my investigation from the perspective of an ideal conception of administrative law. Instead, starting with a concept of authoritarian polycentrism assists us in understanding how administrative litigation is an important institution that exemplifies state society relations in the PRC, rather than a dysfunctional aberration. Additionally, rather than comparing aspects of

¹³⁵ For example see: P.P. Craig, *Administrative Law* (London: Sweet & Maxwell, 1994), 3–40.

¹³⁶ Donald C Clarke, “Puzzling Observations in Chinese Law: When Is a Riddle Just a Mistake?,” *SSRN eLibrary* (2001): 4, doi:10.2139/ssrn.293627.

¹³⁷ He, “Administrative Law as a Mechanism for Political Control” footnote 1.

administrative litigation to their corollaries in other legal systems, several of the chapters to come consider puzzles arising from empirical observations about administrative law in China: Chapter Four asks why lawyers participate in administrative law despite its deficiencies. Chapter Five asks how lawyers go about suing the state. Chapter Six asks if, when, and how foreign parties engage in administrative litigation in China. I use these puzzles, which are internal to the Chinese system itself, to help us in addressing the broader question of what function administrative law actually plays in the PRC today.

Rule of Law and Democratisation

While mindful of Clarke's argument, some basic notion of what we mean when we refer to 'the rule of law' still has an important role to play in this project and I define it by explicating its three components. First, laws must be general, clear, capable of being followed, publicly available, relatively stable, and uniformly applicable. Second, the law must be applied in a relatively predictable and impartial way, usually by independent judicial bodies. Third, there must exist a general and reasonable belief that judgments will be abided by, and that if they are not there will be consequences. Rule of law is an ideal that is neither desirable nor possible in its most perfect manifestation.¹³⁸ Therefore, it is important that achievements and failures in the rule of law be compared to realistic standards, perhaps drawn from empirical literature on other East Asian¹³⁹ or developing

¹³⁸ See: Frank K. Upham, "Mythmaking in the Rule of Law Orthodoxy," *Rule of Law Series, Democracy and Rule of Law Project, Carnegie Working Papers*, September 30 (2002): 7.

¹³⁹ One-party-dominated East Asian developmental states like Singapore, Korea, and Japan have a fairly good record of providing rule of law in everyday situations, but a fraught history of political influence on the judiciary. See: J. M. Ramseyer, "The Puzzling (In) Dependence of Courts: A Comparative Approach," *The Journal of Legal Studies* 23 (1994): 721–747; J. M. Ramseyer, "Why Are Japanese Judges So Conservative in Politically Charged Cases?," *American Political Science Review* 95 (2005): 331–344; J. M. Ramseyer and E. Rasmusen, *Measuring Judicial Independence: The Political Economy of Judging in Japan* (University Of Chicago Press, 2003); Ian Neary, *Human Rights in Japan, South Korea and Taiwan*

nations rather than an unreachable ideal. Additionally, for rule of law to be a useful concept in analysing countries like the PRC, it must be treated as a continuous rather than a dichotomous variable. While a dichotomous view would compel the conclusion that China lacks the rule of law, I argue instead that it has a low degree of rule of law, that rule of law in the PRC has increased in substantial and meaningful ways over the past thirty years, and that this is important for understanding the future of the Chinese state and legal system.

An investigation of administrative litigation is particularly useful for casting light on rule of law, because it effectively *the* dividing line between rule *of* law and rule *by* law. In a rule by law system, the state uses law instrumentally, applying it to others but not allowing the law to restrict its own actions. As Chinese legal scholar, Li Shuguang explains: “Chinese leaders want rule by law, not rule of law... the difference... is that under the rule of law, the law is preeminent and can serve as a check against the abuse of state power. Under rule by law, the law can serve as a mere tool for government that suppresses in a legalistic fashion.”¹⁴⁰ In an ideal type rule *by* law regime, law would impartially govern the actions of all parties, except the state. Therefore, the ultimate test of rule of law is the extent to which the state allows its actions to be limited by its own laws. Under most legal systems, this restriction occurs through administrative law and courts that enforce it.

(Psychology Press, 2012); Ross Worthington, “Between Hermes and Themis: An Empirical Study of the Contemporary Judiciary in Singapore,” *Journal of Law and Society* 28, no. 4 (2001): 490–519; Frank K. Upham, “Political Lackeys or Faithful Public Servants? Two Views of the Japanese Judiciary,” *Law & Social Inquiry* 30 (2005): 421–455, doi:10.1111/j.1747-4469.2005.tb01018.x; Tom Ginsburg, “Dismantling the Developmental State-Administrative Procedure Reform in Japan and Korea,” *American Journal of Comparative Law* 49 (2001): 585.

¹⁴⁰ Quoted in: Brian Z. Tamanaha, *On The Rule of Law: History, Politics, Theory* (Cambridge, UK: Cambridge University Press, 2004), 3.

Although the focus of this project is not on the wider ramifications of rule of law, it is worth noting the tremendous importance that is attributed to it. Rule of law has been identified as important for promoting economic growth¹⁴¹ as well as for protecting human and civil rights,¹⁴² the environment,¹⁴³ political freedoms, and even democracy.¹⁴⁴ Indeed, “[t]he relationship between democracy and rule of law is profound”¹⁴⁵ and Habermas argues that “from a normative perspective there is a conceptual relation - and not simply an historically accidental relation - between law and democracy, between legal and democratic theory.”¹⁴⁶ While a degree of rule of law is possible without democracy¹⁴⁷ and democracy, at least illiberal democracy, may exist without rule of law,¹⁴⁸ large multi-country empirical studies have suggested not only that “rule of law increases as countries become democratic”¹⁴⁹ and “that democratization does, indeed, positively influence the rule of law,”¹⁵⁰ but that “rule of law and democracy are generally mutually reinforcing and they tend to feed on each other. Greater rule of law produces more democracy, and vice versa.”¹⁵¹ Additionally, and of particular interest to China watchers, Larkin has suggested that “judicial independence will be important to the proper operation of any

¹⁴¹ Lars P. Feld and Stefan Voigt, “Economic Growth and Judicial Independence: Cross-country Evidence Using a New Set of Indicators,” *European Journal of Political Economy* 19 (2003): 947–527.

¹⁴² Thomas Carothers, “The Rule of Law Revival,” *Foreign Affairs* 77 (1998): 95.

¹⁴³ Per G. Fredriksson and Muthukumara Mani, “The Rule of Law and the Pattern of Environmental Protection” (2002).

¹⁴⁴ Christopher M. Larkins, “Judicial Independence and Democratization: A Theoretical and Conceptual Analysis,” *The American Journal of Comparative Law* 44 (1996): 605–626.

¹⁴⁵ Carothers, “The Rule of Law Revival,” 96.

¹⁴⁶ Larkins, “Judicial Independence and Democratization: A Theoretical and Conceptual Analysis,” 625–6.

¹⁴⁷ Carothers, “The Rule of Law Revival,” 96.

¹⁴⁸ Fareed Zakaria, “Rise of Illiberal Democracy, The,” *Foreign Affairs* 76 (1997): 22.

¹⁴⁹ Andreas Assiotis and Kevin Sylwester, “Does Democracy Promote the Rule of Law?” (2011): 21, <http://www.economics.siuc.edu/facultyandstaff/documents/DP2011RuleofLawASSIOTISSYLWESTER.pdf>.

¹⁵⁰ *Ibid.*

¹⁵¹ Roberto Rigobon and Dani Rodrik, “Rule of Law, Democracy, Openness, and Income,” *Economics of Transition* 13, no. 3 (2005): 538.

constitutional democracy... [and that this] is especially the case for those countries undergoing processes of democratization, where institutionalizing respect for the rule of law is of utmost importance.”¹⁵² There are those that cast doubt on this relationship. Barro found that “for given measures of the standard of living, there is a lot of independence in the ways electoral rights and the rule of law evolve.”¹⁵³ Yet he also acknowledges that “rule of law can stimulate electoral rights indirectly by promoting economic growth.”¹⁵⁴ Whatever the exact nature of the relationship and causation, there is good reason to believe that a strong legal system, especially an administrative legal system, could be important for the creation and maintenance of democracy in China.

Why Allow Rule of Law?

Thus far, this chapter has shown how China’s administrative courts fit in with Nathan’s concept of authoritarian resilience (and hence Huntington’s theories) as well as with a wide body of literature on Chinese state-society relations through my concept of authoritarian polycentrism. This section ties these ideas to the broader literature on the function of rule of law, by asking why and how states implement rule of law. The question is an extremely important one in authoritarian contexts where it seems unlikely that leaders would want to limit their power by constraining it through law or allow it to contribute to reforms that could ultimately cost them their position. It is a question important to the billions who live under such regimes, yet the academic literature on

¹⁵² Larkins, “Judicial Independence and Democratization: A Theoretical and Conceptual Analysis,” 625–6.

¹⁵³ Robert J. Barro, “Determinants of Democracy,” *Journal of Political Economy* 107, no. S6 (1999): 158–183.

¹⁵⁴ Robert J. Barro, *Determinants of Economic Growth: A Cross-Country Empirical Study*, Working Paper (Cambridge, MA: The National Bureau of Economic Research, 1997), S173.

these subjects has dealt primarily¹⁵⁵ with democratic states that enjoy separation of powers and a high degree of rule of law.¹⁵⁶

I identify ten distinct explanations of why states allow or facilitate the rule of law in the social science literature. First, Landes and Posner propose that by acting as promise enforcers, an independent judiciary that bases its decisions on law rather than on instructions from the current legislature helps maintain the value of legislation which the legislature sells to interest groups.¹⁵⁷ Second, several scholars have argued,¹⁵⁸ and Moustafa has found supporting evidence in Egypt,¹⁵⁹ that “independent judicial review is useful to governments because it allows them to deflect blame for unpopular policies

¹⁵⁵ Some excellent work has been done on judicial independence and rule of law in transitional democratic regimes. See: J. Correa Sutil, “The Judiciary and the Political System in Chile: The Dilemmas of Judicial Independence During the Transition to Democracy,” *Transition to Democracy in Latin America: The Role of the Judiciary* (1993): 89–106; Gretchen Helmke, “The Logic of Strategic Defection: Court-Executive Relations in Argentina Under Dictatorship and Democracy,” *The American Political Science Review* 96 (2002): 291–303; Erik S. Herron and Kirk A. Randazzo, “The Relationship Between Independence and Judicial Review in Post-Communist Courts,” *The Journal of Politics* 65 (2003): 422–438; Matías Iaryczower, Pablo T. Spiller, and Mariano Tommasi, “Judicial Independence in Unstable Environments, Argentina 1935-1998,” *American Journal of Political Science* 46 (2002): 699–716; Jack Knight and Lee Epstein, “On the Struggle for Judicial Supremacy,” *Law & Society Review* 30 (1996): 87–120; Lawrence Shao-Liang Liu, “Judicial Review and Emerging Constitutionalism: The Uneasy Case for the Republic of China on Taiwan,” *The American Journal of Comparative Law* 39 (1991): 509–558; Pedro C. Magalhaes, “The Politics of Judicial Reform in Eastern Europe,” *Comparative Politics* 32 (1999): 43–62.

¹⁵⁶ There is an extremely extensive literature on this subject. For examples see: Robert Lowry Clinton, “Game Theory, Legal History, and the Origins of Judicial Review: A Revisionist Analysis of Marbury V. Madison,” *American Journal of Political Science* 38 (1994): 285–302; Matthew C. Stephenson, “‘When the Devil Turns...’: The Political Foundations of Independent Judicial Review,” *The Journal of Legal Studies* 32 (2003): 59–89, doi:10.1086/342038; F. A. Hanssen, “Is There a Politically Optimal Level of Judicial Independence?,” *The American Economic Review* 94 (2004): 712–729; Lee Epstein and Jack Knight, “Toward a Strategic Revolution in Judicial Politics: A Look Back, A Look Ahead,” *Political Research Quarterly* 53 (2000): 625–661; William M. Landes and Richard A. Posner, “The Independent Judiciary in an Interest-Group Perspective,” *Journal of Law and Economics* 18 (1975): 875–901; Eli M. Salzberger, “A Positive Analysis of the Doctrine of Separation of Powers, or: Why Do We Have an Independent Judiciary,” *International Review of Law and Economics* 13 (1993): 349–79; Ramseyer, “Why Are Japanese Judges So Conservative in Politically Charged Cases?”; Ramseyer and Rasmusen, *Measuring Judicial Independence: The Political Economy of Judging in Japan*; Ramseyer, “The Puzzling (In) Dependence of Courts: A Comparative Approach”; Upham, “Political Lackeys or Faithful Public Servants?”.

¹⁵⁷ Landes and Posner, “The Independent Judiciary in an Interest-Group Perspective.”

¹⁵⁸ Salzberger, “Analysis of the Doctrine of Separation of Powers”; Tom Ginsburg and Tamir Moustafa, *Rule By Law: The Politics of Courts in Authoritarian Regimes* (Cambridge University Press, 2008).

¹⁵⁹ Tamir Moustafa, “Law Versus the State: The Judicialization of Politics in Egypt,” *Law & Social Inquiry* (2003): 883–930.

onto the courts.”¹⁶⁰ Third, Rogers proposes that a judicial veto allows legislatures to pass riskier legislation knowing that the courts will stop any law that later proves misguided.¹⁶¹ Fourth, Ginsburg and Moustafa identify rule of law as important for “establishing social control”.¹⁶² Fifth, Ramseyer and Rasmusen,¹⁶³ Hanssen,¹⁶⁴ and Stephenson¹⁶⁵ have supported an alternating party theory, suggesting that politicians allow independent judiciaries in order to protect themselves when they are out of office, with evidence that regimes with more competitive elections tend towards higher levels of judicial independence. Sixth, Caldeira provides evidence suggesting that strong public opinion in its favour protects the independence of judiciaries.¹⁶⁶ Seventh, Shapiro and others point to the triadic logic of dispute resolution, in which two disputing parties appeal to a third, often more powerful party such as the state, to resolve their dispute.¹⁶⁷ Eighth, Feld and Voigt¹⁶⁸ as well as Ginsburg and Moustafa¹⁶⁹ suggest that independent judiciaries are created in order to facilitate economic growth by giving credibility to state promises not to interfere with capital. Ninth, a legal system can bolster the legitimacy of

¹⁶⁰ Stephenson, “When the Devil Turns...”

¹⁶¹ James R. Rogers, “Information and Judicial Review: A Signaling Game of Legislative-Judicial Interaction,” *American Journal of Political Science* 45 (2001): 84.

¹⁶² Ginsburg and Moustafa, *Rule By Law*, 4–5.

¹⁶³ Ramseyer, “The Puzzling (In) Dependence of Courts: A Comparative Approach”; Ramseyer, “Why Are Japanese Judges So Conservative in Politically Charged Cases?”; Ramseyer and Rasmusen, *Measuring Judicial Independence: The Political Economy of Judging in Japan*.

¹⁶⁴ Hanssen, “Is There a Politically Optimal Level of Judicial Independence?”

¹⁶⁵ Stephenson, “When the Devil Turns...”

¹⁶⁶ Gregory A. Caldeira, “Neither the Purse Nor the Sword: Dynamics of Public Confidence in the Supreme Court,” *The American Political Science Review* 80 (1986): 1209–1226; Gregory A. Caldeira, “Public Opinion and The U.S. Supreme Court: FDR’s Court-Packing Plan,” *The American Political Science Review* 81 (1987): 1139–1153; Gregory A. Caldeira and James L. Gibson, “The Etiology of Public Support for the Supreme Court,” *American Journal of Political Science* 36 (1992): 635–664.

¹⁶⁷ Shapiro, *Courts*, Chapter One; A. Stone Sweet and T. Brunell, “Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community,” *American Political Science Review* 92 (1998): 2–4.

¹⁶⁸ Feld and Voigt, “Economic Growth and Judicial Independence: Cross-country Evidence Using a New Set of Indicators.”

¹⁶⁹ Ginsburg and Moustafa, *Rule By Law*, 8–9.

a regime, especially insofar as it acts as an input institution,¹⁷⁰ not only allowing citizens to have their day in court, but at least occasionally allowing them to “expose the shortcomings of the government”¹⁷¹. Finally, McCubbins and Schwartz,¹⁷² as well as Ginsburg and Moustafa¹⁷³ argue that courts help politicians monitor other state actors at a lower cost to themselves by allowing citizens to bring up problems through the court system.

It should not be too surprising that several of the preceding explanations which focus on specific governance functions fulfilled by courts in liberal democracies do a poor job of elucidating the Chinese legal system.¹⁷⁴ The first three largely lack explanatory power in a country where the legal system is too weak to credibly enforce legislative promises,¹⁷⁵ have blame deflected onto it,¹⁷⁶ and where there is no power of constitutional review to make major policy decisions or overturn laws.¹⁷⁷ The fourth

¹⁷⁰ Gal Dor and Menachem Hofnung, “Litigation as Political Participation,” *Israel Studies* 11 (2006): 131–157; Frances Kahn Zemans, “Legal Mobilization: The Neglected Role of the Law in the Political System,” *American Political Science Review* 77 (1983): 690–703; Epp, *The Rights Revolution*.

¹⁷¹ Ginsburg and Moustafa, *Rule By Law*, 7.

¹⁷² Mathew D. McCubbins and Thomas Schwartz, “Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms,” *American Journal of Political Science* 28 (1984): 165–179.

¹⁷³ Ginsburg and Moustafa, *Rule By Law*, 7–8.

¹⁷⁴ It should be noted that the creators of these models may not necessarily see their models as failing to explain the Chinese case. For example, the proponents of the alternating parties model might believe that their model perfectly explains the lack of judicial independence in China, a state where one party has been in power for over half a century. This is a fair point if one is interested only in explaining regimes that have an already established rule of law. We are interested, however, in explaining much lower levels of rule of law and its ebbs and flows.

¹⁷⁵ Even if it could, in many cases the Chinese legislature itself does not have sufficient control of the lawmaking process to be worth lobbying. See: M. Scot Tanner, “How a Bill Becomes a Law in China: Stages and Processes in Lawmaking,” *The China Quarterly* no. 141 (1995): 39–65; M. Scot Tanner, *The Politics of Lawmaking in Post-Mao China: Institutions, Processes and Democratic Prospects* (Oxford, UK: Oxford University Press, 1999). Therefore interest groups in China often aim their lobbying efforts at ministries and other parts of the bureaucracy. See: Kennedy, *The Business of Lobbying in China*.

¹⁷⁶ For more on the Chinese public’s refusal to accept unpopular court decisions see: Benjamin L. Liebman, “Watchdog or Demagogue? The Media in the Chinese Legal System,” *Columbia Law Review* 105 (2005): 1.

¹⁷⁷ Research on the Chinese legal system seems to suggest that rather than allowing the government to deflect unpopular decisions onto them, the courts avoid controversial cases actively and apparently with the government’s blessing. See: Xin He, “Why Did They Not Take on the Disputes? Law, Power and Politics in the Decision-Making of Chinese Courts,” *International Journal of Law in Context* 3 (2007): 203–225.

function of rule of law, a tool of social control, is alive and well in the PRC's criminal courts,¹⁷⁸ but casts little light on administrative cases. The fifth, the alternating parties explanation, is inadequate because the CCP has been firmly entrenched since 1949. Indeed, there is every reason to believe that changes in the legal system are being made to keep the CCP in power, rather than in anticipation of a time when it is out of power. The sixth explanation lacks force because the CCP does not need to be particularly sensitive to public opinion that does not threaten social unrest, and there does not seem to be particularly strong popular support for an independent judiciary in China.¹⁷⁹ While the seventh explanation, triadic dispute resolution, has some relevance for administrative litigation, China's courts' lack of even formal judicial independence breaks down the triad too much in an area of law for which this model is already weak.¹⁸⁰

The last three explanations, that rule of law facilitates economic development, bolsters legitimacy by acting as an input institution, and helps the state control its officials are the best match for the case of Chinese administrative law and help us to connect this case to the wider literature. Administrative law's contribution to China's remarkable economic growth is considered at length in Chapter Six. The role of the administrative law regime in controlling the state and as an input institution are outlined below.

¹⁷⁸ Kinkel and Hurst, "Access to Justice in Post-Mao China"; Sida Liu and Terence C. Halliday, "Recursivity in Legal Change: Lawyers and Reforms of China's Criminal Procedure Law," *Law & Social Inquiry* 34 (2009): 911–950.

¹⁷⁹ Liebman, "Watchdog or Demagogue? The Media in the Chinese Legal System."

¹⁸⁰ Shapiro, *Courts*, 27–8.

Functional Specialization and Controlling the Polycentric State

Citing Huntington,¹⁸¹ Nathan argues that the institutionalization, especially of decision making, is important for authoritarian resilience because it helps counteract authoritarian tendencies towards a “predominance of personal power over institutional norms.”¹⁸² And, the creation of an administrative legal system can be seen as an attempt at functional specialization and institutionalization along classic Weberian lines.¹⁸³ Institutionalized decision making requires that state agencies operate according to administrative rules, regulations, and laws to which administrative courts can hold them accountable. Functional specialization means that different parts of the state develop expertise in, and restrict themselves to, their specific functions. To take an example from China’s recent past, it is helpful to the state’s legitimacy and the smooth running of affairs that the military establishment engages and specializes in maintaining a country’s armed forces rather than dabbling in politics or running sideline enterprises for profit.¹⁸⁴

To the extent that administrative litigation serves to limit the actions of parts of the state, it should be contributing to the functional specialization and institutionalization of decision making beyond the court itself. To expand an example, the fact that the military restricts itself to military affairs and has institutionalized its operations may be a good thing, but it does not contribute to the functional specialization or institutionalization of a local land department. For administrative courts, however,

¹⁸¹ Huntington, *Political Order*.

¹⁸² Nathan, “Authoritarian Resilience,” 6.

¹⁸³ Max Weber, *On Law in Economy and Society*, trans. Edward Shils and Max Rheinstein (Cambridge, MA: Harvard University Press, 1954); Max Weber, *Economy and Society: An Outline of Interpretive Sociology*, ed. Guenther Roth and Claus Wittich (Berkeley and Los Angeles, CA: University of California Press, 1978).

¹⁸⁴ James C. Mulvenon, *Soldiers of Fortune: The Rise and Fall of the Chinese Military-Business Complex, 1978-1998* (ME Sharpe, 2001).

performing their function could mean ruling on whether the action of a local land department was in accordance with the law. Because the administrative law regime contributes to the functional specialization and institutionalization of other parts of the state, its contribution to authoritarian resilience should be disproportionate to its size in terms of budget, personnel, and cases handled.

The reality of the administrative courts' role in the PRC, however, is not as neat as the theoretical version implies. The ability of administrative courts to limit the actions of other parts of the state to their functional specializations and institutionalized decision making processes is limited. The decision making process of the courts themselves is increasingly institutionalized, but is still a long way from enjoying the independence of their developed world counterparts. Courts' rulings can still be subject to *ad hoc* interference from other actors. Although administrative litigation can challenge local governments' concrete actions¹⁸⁵ so that the courts may monitor and provide a check on subordinate parts of the state apparatus,¹⁸⁶ courts are not always necessarily monitoring and limiting the state's actions according to law; the courts are, rather, one node in a polycentric system within which the various nodes are interconnected through both formal structures and informal processes.

Given theoretical and practical importance of administrative law and how far its implementation in China can diverge from the theoretical conception of institutionalization and functional specialization, it is not surprising that scholars who study the PRC's administrative law regime have come up with somewhat different

¹⁸⁵ *Administrative Litigation Law of the People's Republic of China*, 1989, <http://en.chinacourt.org/public/detail.php?id=2695>.

¹⁸⁶ Benjamin L. Liebman, "China's Courts: Restricted Reform," *China Quarterly* 191 (2007): 635–6.

theoretical conceptions for explaining it. Indeed, Chinese legal scholar, Jianfu Chen, identifies at least five different theories of the PRC's administrative law as current among Chinese legal scholars.¹⁸⁷ Rather than functional specialization and institutionalized decision-making, some Chinese scholars explained the current situation with a theory of power balancing.¹⁸⁸ Under the balancing theory developed by law professor and Vice-President of the Supreme court, Luo Haocai, Chinese administrative law balances the party-state's need to use administrative law as a tool to monitor and control the state and citizens' right to be protected from illegal state action.¹⁸⁹ In a sense this could be understood as a balance or hybrid between rule of law and rule by law. A full explanation of all of the different theoretical conceptions of administrative law that have been produced by Chinese scholars need not detain us at this point, especially because many of them are more prescriptive than descriptive.

Participation and Input Institutions

Among the three themes in state-society relations that I identify, that of participation and input institutions is the least immediately evident in my empirical chapters. Chapter Four closely considers the manner in which lawyers are embedded in the state, and Chapter Five details the fragmentation of the Chinese state at great length. In contrast, the participatory role of administrative litigation is an overarching theme that does not have its own chapter. Therefore, I will address it specifically here.

¹⁸⁷ Jianfu Chen, "The Development and Conception of Administrative Law in the PRC," *Law in Context* 16, no. 2 (1999): 135.

¹⁸⁸ For example, see: Bao Wanchao, "Comparative Research on the Balancing Theory"; Luo Haocai, *Balancing Theory of Modern Administrative Law*.

¹⁸⁹ Jianfu Chen, "The Development and Conception of Administrative Law in the PRC," *Law in Context* 16, no. 2 (1999): 136–9.

Although courts have often been left out of theoretical discussions of political participation,¹⁹⁰ the idea that they serve as important input institutions is hardly unprecedented. De Toqueville, for example, recognized the potential contribution of courts to the democratic process in the nineteenth century.¹⁹¹ More contemporary scholars, including some studying China, have also turned their attention to the role courts play as forums for public participation.¹⁹² Their work has tended to espouse the view that “participation via courts is considered to be a preferred option for groups who were traditionally disenfranchised and lacking an effective voice in (and access to) political institutions.”¹⁹³ Developed in democratic contexts, the idea that courts offer a venue for political participation to the disenfranchised is even more important in an authoritarian regime like the PRC where nearly all Chinese are literally disenfranchised. Administrative courts in particular, offer an established channel that people can use to voice limited criticism of and to the government.

This accords with Huntington’s work on established one-party systems which holds that “[g]roups must be allowed to express their conflicting views in the appropriate arenas in the state structure...” but that “[t]he party, of course, remains the exclusive guardian of the interests of society as a whole.”¹⁹⁴ In the Chinese case, administrative courts are one appropriate arena for people to express limited criticism of the state, but

¹⁹⁰ Zemans, “Legal Mobilization.”

¹⁹¹ De Tocqueville, *Democracy in America*, 269–76.

¹⁹² Dor and Hofnung, “Litigation as Political Participation”; Liebman, “China’s Courts: Restricted Reform”; O’Brien and Li, “Suing the Local State,” 2005.

¹⁹³ Dor and Hofnung, “Litigation as Political Participation,” 132; See also: Epp, *The Rights Revolution*.

¹⁹⁴ Huntington, “Social and Institutional Dynamics of One-Party Systems.”

this freedom does not extend to criticism of the party whose actions may not be challenged in court.¹⁹⁵

Going to court, even if the state is the defendant, is a fundamentally pro-regime, inside-the-system, and non-transgressive¹⁹⁶ action. Pre-modern judicial organs often put tremendous emphasis on persuading parties to consent to judicial proceedings because it is more difficult for the loser to deny the justice of a verdict if he or she has implicitly acknowledged the court's legitimacy by showing up in court and following its procedures.¹⁹⁷ Simply filing a suit implies that the plaintiff acknowledges a certain legitimacy of the court and the regime behind it. Although, this can be undermined if a party to a lawsuit perceives the procedures of the court to be dramatically unfair. The idea that administrative suits are fundamentally a pro-regime method of political participation fits well with the idea of politically embedded lawyers that pervades Chapter Four because it maintains that these lawyers are deeply embedded in the political and legal system and that their limited challenges to it may reinforce rather than threaten it. In some instances, they act as reformers aggressively challenging the regime and limiting the local government's scope of action. In others, they may facilitate repression by discouraging clients from pursuing legally dubious cases, or even representing the state in court. Either way, as long as they are operating primarily within the legal system they are insiders who support the regime's claim to legitimacy based on rule of law, even though its actions frequently fail to support this claim.

¹⁹⁵ This distinction does not seem to be very important in practice. See: Kevin J. O'Brien and Lianjiang Li, "Suing the Local State: Administrative Litigation in Rural China," *The China Journal* no. 51 (2004): 80.

¹⁹⁶ On the distinction between transgressive and contained action see: Kevin J. O'Brien, "Neither Transgressive Nor Contained: Boundary-Spanning Contention In China," *Mobilization: An International Quarterly* 8 (2002): 51–64.

¹⁹⁷ Shapiro, *Courts*.

Administrative suits may sometimes provide nothing more than a safety valve for disgruntled Chinese to let off some steam. Plaintiffs may feel that they have said their piece and been heard by someone official. Unlike the lower cost and more popular letters and visits system of petitions (*xinfang* 信访),¹⁹⁸ administrative lawsuits allow plaintiffs or their lawyers to present their cases directly to representatives of the Chinese state, a panel of judges, through a specific juridical process. In a system with few outlets for participating in politics or attracting the attention of the state, plaintiffs may be gratified to have their day in court, even if they lose. Government organs frequently send only a legal representative, an underling, or no one at all to represent them in administrative court. This is a cause of frequent complaint, in large part because it is significantly less gratifying to chastise an absentee defendant.¹⁹⁹

The extent to which the actions of administrative courts correspond to theory and genuinely provide a forum for public participation in China is still limited. Protest and contentious violence in China is commonplace and seems to be on the rise.²⁰⁰ Many of those who protest may do so because they find formal means of redressing their grievances, especially the courts, to be insufficient. A prominent example of such a case made international news when Yang Jia, a man who had unsuccessfully sued the

¹⁹⁸ For more on the Xinfang system, see: Minzner, "Xinfang: An Alternative to Formal Chinese Legal Institutions"; Zhang, "The Xinfang Phenomenon."

¹⁹⁹ Chinese Lawyer Net 中国律师网, "Speaking on the Need for the Defendant's Legal Representative in Administrative Litigation to Come to Court 谈行政诉讼被告法定代表人出庭应诉的必要性," 2011, http://www.chinalawyer.cc/zhishi/20100309134244_78447.html.

²⁰⁰ For examples, see: Fewsmith, "An 'Anger-Venting' Mass Incident"; Anderlini, "Beijing Appoints Wukan Protest Leader as Official"; Barbara Demick, "Protests in China over Local Grievances Surge, and Get a Hearing," *Los Angeles Times*, October 8, 2011, <http://articles.latimes.com/2011/oct/08/world/la-fg-china-protests-20111009>; Ian Johnson, "China Sees Protest Surge By Workers," *Wall Street Journal*, July 10, 2009, sec. Law, <http://online.wsj.com/article/SB124713050245617293.html>; Will Freeman, "The Accuracy of China's 'Mass Incidents'," *Financial Times*, March 2, 2010, <http://www.ft.com/cms/s/0/9ee6fa64-25b5-11df-9bd3-00144feab49a.html#axzz1ncbUbHq4>.

Shanghai police for abuse suffered during interrogation, burst into a Shanghai police station and stabbed six police officers to death.²⁰¹ The fact that Yang Jia received tremendous public sympathy demonstrates that the deficiencies of judicial remedies against government abuses of power are widely recognized.

Contemporary patterns of protest and contentious action have received much more attention than administrative lawsuits in China. This literature has suggested that, like administrative litigation, the party-state strategically permits protest as a method of monitoring local governments and allowing public participation, or at least the venting of anger.²⁰² Literature on the *xinfang* petitioning system has made similar claims.²⁰³ When “seeing like a state,”²⁰⁴ however, administrative litigation has several obvious advantages over protest or *xinfang* for monitoring bureaucrats: 1) lawsuits operate within the official system and are much less likely to get out of hand and spill out onto the streets 2) training judges and funding courts may initially be costly, but considering the damage and disruption that can result from protests, especially if they turn violent, administrative lawsuits appear to be a bargain 3) although officials may often be at a loss to discern the

²⁰¹ Malcolm Moore, “Chinese Cop-killer Becomes Internet Hero,” *Telegraph*, August 26, 2008, sec. worldnews, <http://www.telegraph.co.uk/news/worldnews/asia/china/2627001/Chinese-cop-killer-becomes-internet-hero.html>.

²⁰² Lorentzen, “Regularized Rioting”; Ching Kwan Lee, “The Revenge of History’: Collective Memories and Labor Protests in North-Eastern China,” *Ethnography* 1, no. 2 (2000): 217; Elizabeth J. Perry, “Challenging the Mandate of Heaven: Popular Protest in Modern China,” *Critical Asian Studies* 33 (2001): 163–180; Hurst, “Mass Frames and Worker Protest”; O’Brien, “Neither Transgressive Nor Contained: Boundary-Spanning Contention In China”; O’Brien and Li, *Rightful Resistance*; Hurst and O’Brien, “China’s Contentious Pensioners”; Kevin J. O’Brien and Rachel E. Stern, “Studying Contention in Contemporary China,” in *Popular Protest in China*, ed. Kevin J. O’Brien (Harvard University Press, 2008), 11–25; Fayong Shi and Yongshun Cai, “Disaggregating the State: Networks and Collective Resistance in Shanghai,” *The China Quarterly* 186 (2006): 314–332; William Hurst, Mingxing Liu, and Ran Tao, “Reassessing Collective Petitioning in Rural China: Civic Engagement, Extra-State Violence, and Regional Variation,” *SSRN eLibrary* (2009), http://papers.ssrn.com/Sol3/papers.cfm?abstract_id=1448983.

²⁰³ For example, see: Minzner, “Xinfang: An Alternative to Formal Chinese Legal Institutions”; Zhang, “The Xinfang Phenomenon”; Thireau and Hua, “The Moral Universe of Aggrieved Chinese Workers.”

²⁰⁴ James C. Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (Yale University Press, 1999).

truth behind grievances that lead to protest, in administrative cases plaintiffs and defendants present evidence which is evaluated, documented and supplemented by judges.²⁰⁵ Therefore, there seems to be good reasons to believe that the CCP would turn to administrative law as a preferred input institution.

While administrative law's function as venue for public participation may be less immediately obvious in the empirical chapters of this dissertation than the other theoretical themes discussed here, its relevance is demonstrated by the high and increasing number of administrative cases despite their relatively low impact. As I argue in my third chapter, single administrative cases rarely result in large compensation awards or major changes in government behaviour. Instead, the desire simply to be heard and hopefully acknowledged is one of the most powerful forces that drive individuals to administrative litigation.

The Story of Bian He's Jade

Given the myriad ways in which administrative litigation serves the party-state: monitoring its agents, contributing to functional specialization, allowing for controlled public participation, and supporting economic growth, one might wonder why the CCP does not strengthen administrative litigation by expanding its scope and allowing greater independence to administrative courts. Part of the answer is that they do not wish to tie the hands of the local governments they have charged with tasks such as promoting economic development and enforcing the one child policy. But, I believe another part of the answer is illustrated by a story related in the third century BCE by Han Feizi, the

²⁰⁵ Public protests sometimes result from public misconceptions rooted in a distrust of officialdom. See: Fewsmith, "An 'Anger-Venting' Mass Incident."

founder of legalism, one of the great schools of Chinese political thought. The story is of Bian He, a commoner who discovers a piece of uncut jade which he brings to King Li of Chu. The King incredulous of Bian's claims that the rough stone is precious jade, calls him a liar and has his left foot cut off. After King Wu inherits the throne, Bian attempts to offer the stone to the new king, only to meet with the same result, this time losing his right foot. After the passing of King Wu, Bian He's sorrow compels the new King to order the stone cut and polished, whereupon it is discovered to be a piece of jade of unparalleled value.²⁰⁶ Modern readers naturally view the actions of Kings Wu and Li as tyrannical and unfair. Yet the intended meaning of the story seems to be that if one is convinced of the truth of one's claims one should be willing to suffer to bring them to the attention of the ruler.

I propose that China's leadership sees administrative cases in much the same way as Bian He's jade. The Chinese state desires the benefits of administrative litigation, just as the Kings of Chu sought precious jade. Yet, they are unwilling or unable to sift through countless complaints, of which the millions received through the letters and visits system annually²⁰⁷ are a just a fraction,²⁰⁸ to find those most deserving of their attention. That the bar for administrative litigation is set so high makes it an effective sorting tool. Only those willing to suffer for the righteousness of their complaints, or perhaps better yet, hire a lawyer to cut and polish them, will be able to receive the recognition of the state. This point of view should help readers connect the theoretical functions of

²⁰⁶ Fei Han and Burton Watson, *Han Feizi: Basic Writings* (Columbia University Press, 2003), 82–4.

²⁰⁷ Minzner, "Xinfang: An Alternative to Formal Chinese Legal Institutions"; Zhang, "The Xinfang Phenomenon."

²⁰⁸ E. Michelson, "Climbing the Dispute Pagoda: Grievances and Appeals to the Official Justice System in Rural China," *American Sociological Review* 72 (2007): 459.

administrative litigation considered here with the difficult realities that are detailed in the subsequent empirical chapters.

Conclusion

Studies of well-documented political phenomena and institutions may rely on one body of literature, one theoretical construct, and make one straightforward point, perhaps a modest amendment to previous thinking on a subject.²⁰⁹ As behoves a subject in which a great deal is still unknown, however, this dissertation draws on a number of literatures and attempts to speak to all of them. Specifically, this chapter speaks to Nathan's idea of authoritarian resilience, and through it Huntington's thoughts on institutionalization and one-party regimes. It goes on to engage the wider literature on state-society relations in China, and introduces and explicates the idea of authoritarian polycentrism. Then, it attempts to connect these to ideas of the function of rule of law, especially in authoritarian regimes. The role of administrative litigation in institutionalizing the decision making and contributing to the functional specialization of the state is outlined. Administrative law's often overlooked role as an input institution for political participation is then explained. Finally, I relate the story of Bian He which demonstrates why the party-state makes administrative litigation so difficult, despite its many contributions to the current regime.

The underlying multi-part question that I hope emerges from this dissertation is: "is administrative law contributing to the rationalization, liberalization, or even democratisation of the Chinese regime or do its many imperfections mean that it is

²⁰⁹ See, for example: Robert Lowry Clinton, "Game Theory, Legal History, and the Origins of Judicial Review: A Revisionist Analysis of *Marbury V. Madison*," *American Journal of Political Science* 38 (1994): 285–302.

simply contributing to the maintenance of authoritarian power?” To draw on this work’s most important example, does the fact that lawyers close to the state are frequently the ones who sue it mean that they are under the thumb of the state, or are they more effective at holding it to account? At the risk of giving away the ending, I will suggest that the answer to this question is both. Relying on lawyers with close connections to the state to conduct the bulk of administrative litigation means that such cases are trusted to those who have an investment in the system, but the very reason these lawyers accept such cases is that officials find it much harder to control and intimidate these well connected litigators.

Chapter Two: Methods and Data Sources

This chapter describes the research methods and data sources used in this dissertation. As such, it supplies the information necessary to replicate my research, ensure the reliability of my data, and understand its limitations. As it represents the means to the ends of my findings in the four subsequent chapters, I have endeavoured to keep it succinct. In conducting my research, especially my fieldwork, I often found that I was navigating unknown waters and I have designed this chapter to serve as a guide for future researchers to learn something from my experience, and also, my mistakes.

Data Sources

In addition to a considerable scholarly discourse in English and Chinese, my study is chiefly informed by four categories of primary data. First and foremost, from January 2010 to February 2011, I conducted semi-structured interviews with 126 lawyers from randomly selected law firms in Beijing, Shanghai, Ningbo, Changsha, Guilin and a prefecture in rural Hunan.²¹⁰ These randomly sampled interviews were supplemented by an additional 52 interviews with former government officials, former judges, legal scholars, legal workers, foreign lawyers, and actual, as well as potential, plaintiffs. Additionally, I received notes from a Beijing University law student on one lawyer and client interaction regarding administrative litigation that he observed while interning in a

²¹⁰ Because of the relatively small number of firms in this prefecture, I purposely suppress its name in order to better protect the anonymity of my informants.

law firm.²¹¹ By any standard this is a substantial number of interviews,²¹² and combined with my sampling, is one of the reasons that I consider this dissertation to be empirically grounded and an original contribution to the field. The sampling, conduct, and coding of these interviews is discussed at greater length in the subsequent sections of this chapter.

Second, this dissertation makes extensive use of a survey of 1,337 Chinese lawyers in three major cities and five provinces. The survey was conducted by mail and e-mail between February-April 2007 by the All-China Lawyers Association. The details, origins, strengths, and limitations of this survey are considered at greater length in Chapter Four where my principle analysis of that data is presented.

Third, while many articles and books on the Chinese legal system make some use of official data from China's statistical and legal yearbooks, this dissertation makes much more extensive use of such sources. My access to the National Library in Beijing, the libraries of the School of Oriental and African Studies in London, University of Oxford, University of California, Berkeley, and especially the Universities Service Centre at the Chinese University of Hong Kong has allowed me to supplement data from the more

²¹¹ In emulation of a technique used by Ethan Michelson, I recruited several undergraduate law students from Beijing University to observe client lawyer interactions in law firms in Beijing. These students had enrolled in internships as part of their program, and so were already observing how lawyers interact with clients. Michelson was interested in the general practices of lawyers, and was able to make use of the wide variety of interactions regarding civil and criminal cases that the students recorded. Because administrative cases make up only a tiny percentage of total litigation in the PRC, the students I recruited managed to record only one interaction regarding an administrative case. While only a single case, these notes nevertheless provide valuable and direct insight into lawyer client interaction. Michelson, "The Practice of Law as an Obstacle to Justice," 5-6; Ethan Michelson, "Unhooking from the State: Chinese Lawyers in Transition" (PhD Dissertation, Department of Sociology, University of Chicago, 2003), 53-4.

²¹² Stern conducted 160 interviews for a similar project: Stern, *Environmental Litigation in China*, 17. O'Brien and Lee conducted hundreds of interviews, although they only cite 80 in their book: O'Brien and Li, *Rightful Resistance*, 198. While Michelson conducted a larger survey of Chinese lawyers, he and his graduate students interviewed 67 lawyers: Michelson, "Unhooking from the State: Chinese Lawyers in Transition," 373. I was, however, unable to match the remarkable number of interviews, 202, conducted for Genia Kostka, "Private Sector Development in Central China: Patterns, Causes, and the Role of Local Governments" (Doctoral Dissertation, University of Oxford, 2009).

commonly cited National Statistical Yearbook²¹³ and Legal Yearbook²¹⁴ with data from harder to find sources such as provincial statistical²¹⁵, legal²¹⁶, and court²¹⁷ yearbooks as well as national lawyers²¹⁸, legal aid²¹⁹, and court²²⁰ yearbooks. Official data published by organs of the Chinese state are justifiably treated with scepticism, and data used in this dissertation are no exception. For example, empirical research has suggested that Chinese courts exaggerate the true number of cases to make themselves look more productive and that is primarily true of less busy courts in poorer areas.²²¹ For several reasons, however, it is doubtful that most of the trends and relationships that I identify in the statistics are the product of intentional manipulation. Unlike headline grabbing economic numbers, statistics on China's legal system generally attract little attention and it seems unlikely that anyone would bother to massage them. This is especially true of the data that I managed to dredge out of the more obscure yearbooks, much of which, to my knowledge, has never been published or analysed elsewhere. Additionally, many of the trends I identify as most important, falling success rates for plaintiffs and fewer plaintiffs

²¹³ 中国统计年鉴编委会 China Statistical Yearbook Editorial Committee, ed., *China Statistical Yearbook 中国统计年鉴 Various Years* (Statistical Press 统计出版社, Various Years).

²¹⁴ China Legal Yearbook Editorial Board, *China Legal Yearbook Various Years*.

²¹⁵ 安徽省统计局 Anhui Province Statistical Bureau, ed., *Anhui Statistical Yearbook 安徽统计年鉴 Various Years* (Statistical Press 统计出版社, Various Years).

²¹⁶ Hebei Legal System Year Book Editorial Committee, *Hebei Legal System Year Book 河北法制年鉴 Various Years* (China Legal Publishing House 中国法制出版社, Various Years).

²¹⁷ 广东省高级人民法院编 Guangdong High Court, *Guangdong Court Yearbook 广东法院年鉴 Various Years* (Guangdong: Guangdong People's Press 广东人民出版社, Various Years).

²¹⁸ 年检编辑委员会 China Lawyers Yearbook Editorial Committee, ed., *China Lawyers Yearbook 中国律师年检 Various Years* (Beijing: Renminfayuan Chubanshe 人民法院出版社, Various Years).

²¹⁹ 司法部法律援助中心 Civil Law Department of the Legal Aid Center, *Yearbook of Legal Aid in China 中国法律援助年鉴 Various Years* (Beijing: China People's Legal Press 中国民主法制出版社, Various Years).

²²⁰ 最高人民法院研究室编 Supreme People's Court Research Office, ed., *China People's Court Justice Statistics History Resource Collection 全国人民法院司法统计历史资料汇编 1949-1998* (People's Court Press 人民法院出版社, 2000).

²²¹ Xin He, "The Recent Decline in Economic Caseloads in Chinese Courts: Exploration of a Surprising Puzzle," *The China Quarterly* 190 (2007): 370.

represented by lawyers, do not seem to cast the Chinese legal system in a particularly positive light and it is difficult to imagine why numbers would purposely be falsified to create these impressions. Nevertheless, wherever official data is used, I try to point out possible problems and biases that might be contained therein.

Fourth, I make use of a variety of textual primary sources. Front and centre, of course, are the laws, rules, and regulations on which administrative cases are based, especially the Administrative Litigation Law itself. These are supplemented by media accounts, official documents issued by courts and other organs of the party-state, books on the practice of administrative law, law school curricula, reports from NGOs,²²² material from the Congressional-Executive Commission on China,²²³ and a wide variety of literature by legal professionals and scholarly sources from within China. Many of these sources, and media accounts in particular, are important not only for collecting information on administrative suits, but also for getting a sense of what kinds and aspects of cases tend to attract attention.

While published judicial opinions are a staple of legal analysis the world over, such sources are highly problematic in the PRC. Problems include the fact that “published opinions are heavily edited, that they are not allowed to be cited in lower

²²² Amnesty International, *Against the Law*; “Chen Guangcheng: Amnesty Urgent Action,” *The Observer*, November 12, 2011, <http://www.guardian.co.uk/world/2011/nov/13/amnesty-urgent-action-chen-guangcheng>; Human Rights Watch, *Walking on Thin Ice*; Human Rights Watch, *Reeducation Through Labor in China*, June 1998, <http://www.hrw.org/legacy/campaigns/china-98/laojiao.htm>.

²²³ Congressional-Executive Commission on China, *What Will Drive China’s Future Legal Development? Reports from the Field* (Washington DC, 2008), <http://www.cecc.gov/pages/hearings/2008/20080618/CECCHearing06182008.pdf>; Jerome A Cohen, *Examination into the Abuse and Extralegal Detention of Legal Advocate Chen Guangcheng and His Family* (Washington, D.C., 2011).

court decisions, and that they usually include little or no legal reasoning”.²²⁴ Another concern is that which cases are published or not published tends to be carefully chosen, meaning that not only are they not representative, but also likely to be biased in specific, important, and intentional ways.²²⁵ These problems notwithstanding, published decisions “may shape the development of the law by providing ‘guidance’ to lower courts in adjudicating cases with similar factual situations or with similar issues of law.”²²⁶ They also tell us something about how the legal establishment wants to portray administrative law and are the principle materials available to Chinese legal professionals. I reference sample cases found both online and in administrative law books purchased in Mainland Chinese bookstores. I obtained a syllabus and course materials for an administrative law course which has assisted me greatly in understanding the general picture of the average Chinese lawyer’s education in administrative law.

Case Study or Comparison?

Viewed from the broadest possible level, this dissertation is the study of a single case, administrative litigation in the contemporary PRC. As I argue in the subsequent chapter, the picture of administrative litigation painted by the existent literature is unrepresentative, uniformly bleak for lack of nuance, and full of holes. A detailed, descriptive, and non-comparative study of this system is thus absolutely necessary to further our understanding of contemporary China and authoritarian regimes in general. It is vital to ensure that our data and understanding of a case is sufficient before we try to

²²⁴ Nanping Liu, “Legal Precedents with Chinese Characteristics: Published Cases in the Gazette of the Supreme People’s Court,” *Journal of Chinese Law* 5 (1991): 108.

²²⁵ Stern, *Environmental Litigation in China*, 157–8.

²²⁶ Liu, “Legal Precedents with Chinese Characteristics,” 108.

compare it to other cases and there is no surer way to draw an incorrect conclusion than to try to compare cases for which we do not have sufficient data. Nevertheless, throughout this dissertation, where I think it possible or useful, I will draw comparisons, especially in order to demonstrate that in many places the Chinese system is not as different from other legal systems as much of the literature might have us believe.

Additionally, there is no reason that the tools of a comparativist should work between countries, but not within them,²²⁷ especially in a country as big as China. Within the single case of administrative litigation in China, there is tremendous variation across lawyers, tactics, cities, and regions. Chapter Four compares types of lawyers, while Chapter Five makes some headway in contrasting tactics and regions, and Chapter Six shows how multinationals and their legal representation differ from domestic administrative plaintiffs.

Mixed Methods

Combining multiple methodologies in a single research project has its detractors²²⁸ yet the advantages of including a greater variety of types of data and approaches means that mixed-methodological research is becoming increasingly popular.²²⁹ This section briefly reviews the research methodology used in this dissertation with an emphasis on the manner in which these different methods work together.

²²⁷ Richard Rose and W. J. M. Mackenzie, “Comparing Forms of Comparative Analysis,” *Political Studies* 39, no. 3 (1991): 446–7, doi:10.1111/j.1467-9248.1991.tb01622.x.

²²⁸ Alan Bryman, *Social Research Methods* (Oxford University Press, 2012), 629.

²²⁹ *Ibid.*, 651.

Especially in Chapter Four, this dissertation makes use of a classic division of labour between qualitative and quantitative methods²³⁰ in which data gathered in my semi-structured interviews helped me to develop ideas about types and motives of administrative litigators, and then regression analysis of survey data allowed me to clarify the impact of different independent variables and demonstrate that my findings were generalizable to China's two hundred thousand lawyers²³¹. My interviews uncovered important aspects of administrative litigation that, although present in the data, never would have been identified without interviews, for example the impact of personal relationships on lawyers accepting administrative cases. Mixing methods also helped to make my findings stronger by allowing me to follow King et al.'s first rule for constructing causal theories: constructing falsifiable claims.²³² Based on my interviews, I was able to produce claims about administrative litigation that I was then able to test against official and survey data. This occurs most notably in Chapter Four where I test my ideas about the kind of lawyers who sue the Chinese state. Indeed, that chapter contains a section in which I briefly identify several variables which I thought would be important for determining if lawyers accept administrative cases, but did not turn out to be supported by survey data. In Chapter Five, I test the generalizability of the cross jurisdictional strategy against survey data and in Chapter Six, I use official data to test the idea that foreigners use China's administrative chambers relatively less than civil ones.

²³⁰ Ibid., 634.

²³¹ Cheng Li, "The Trial of Bo Xilai and What It Means for the Rule of Law in China," *The Brookings Institution, East Asia Forum*, November 4, 2012, <http://www.brookings.edu/research/opinions/2012/11/04-bo-xilai-china-li>.

²³² Gary King, Robert O. Keohane, and Sidney Verba, *Designing Social Inquiry: Scientific Inference in Qualitative Research* (Princeton University Press, 2001), 100–5.

My mixed methods approach also allowed me to follow another one of King et al.'s rules of theory construction: maximize concreteness.²³³ My interviews helped me to connect motives to actors' concrete behaviour. For example, connecting lawyers' motives for accepting administrative cases with instances when they actually accepted cases, or linking multinationals' motives for pursuing other means of redress with their avoidance of administrative litigation. This in turn allowed me to evaluate the importance and impact of these motives in my quantitative data which generally consists of highly concrete actions such as numbers of different types of cases litigated.

In other parts of my dissertation, especially in Chapter Three, my mixed methodological approach serves the more basic function of allowing me to paint a fuller picture of administrative litigation by correcting misconceptions and plugging holes, or as Bryman frames it, completeness.²³⁴ My quantitative data were helpful in allowing me to demonstrate that the literature presents an unrepresentative view of administrative litigation. Qualitative analysis of documents and my interviews allowed me to plug a few of the many gaps that exist in our understanding of administrative litigation. Because we know relatively little about this system and primary sources are not easily accessible, reliable or even existent, casting as wide a net as possible was exceptionally important for painting an accurate picture of administrative litigation.

This dissertation makes use of existing analyses of landmark cases and a few that I conduct myself. For example, in Chapter Four I investigate the highly atypical but well-publicized case of Chen Guangcheng, mostly to contrast it to the more common situation

²³³ Ibid., 109–12.

²³⁴ Alan Bryman, "Integrating Quantitative and Qualitative Research: How Is It Done?," *Qualitative Research* 6, no. 1 (February 1, 2006): 106, doi:10.1177/1468794106058877.

of politically embedded litigators. This approach has been advocated by Vanberg who argues that although these are by definition atypical cases, and therefore of limited use in generalizing, they are important for two reasons: “[f]irst, if the hypotheses cannot adequately explain landmark events, we have strong reason to think that we need to revise them. Second, landmark events occupy a special position as precedents from which actors learn... [l]andmark events are therefore disproportionately important.”²³⁵ In general, however, I feel that landmark cases already play far too large a role in studies of Chinese politics and legal system.²³⁶ I consider such incidents primarily in order to contrast them with more representative findings from interviews, survey, and official data.

A variety of statistical techniques are used in this dissertation and these are described in the sections in which these analyses are conducted, for instance, the zero inflated negative binomial regression in Chapter Four. I hope that because I use interviews and other more qualitative sources to help provide context for, and illustrations of, the phenomenon that my quantitative sections investigate,²³⁷ those who prefer qualitative approaches will still find these accessible. Likewise, I intend that my efforts to test and assess the generalizability of my qualitative findings will improve the reception of my work by those more accustomed to quantitative work. In Bryman’s terms, this might be categorized as using multiple methodologies to offset the weakness of various methodologies and improving the credibility of findings.²³⁸

²³⁵ Gary King, Robert O. Keohane, and Sidney Verba, *Designing Social Inquiry: Scientific Inference in Qualitative Research* (Princeton University Press, 2001).

²³⁶ See for example: Keith J. Hand, “Using Law for a Righteous Purpose: The Sun Zhigang Incident and Evolving Forms of Citizen Action in the People’s Republic of China,” *Columbia Journal of Transnational Law* 45 (2006): 114–195.

²³⁷ Bryman, “Integrating Quantitative and Qualitative Research,” 105–7.

²³⁸ Bryman, “Integrating Quantitative and Qualitative Research.”

The advantages of mixed methodology are legion, and while I consider those I have just outlined to be the major reasons or advantages of my mixed methodological approach in this dissertation, a variety of other rationales described by Bryman also apply here. These include: triangulation, process, explanation, unexpected results, diversity of views, and enhancement.²³⁹

Representativeness

This dissertation repeatedly insists on the importance of representativeness and perhaps some readers, especially those with a preference for qualitative work, will find it overblown. Additionally, for specialist interviews²⁴⁰ and especially in studies of Chinese politics,²⁴¹ convenience,²⁴² snowball,²⁴³ and other non-probability sampling²⁴⁴ is extremely common. Yet it was my experience that, if anything, working from a random sample was even more important for my more qualitative interviews than survey data. This is because qualitative methods tend to require prolonged contact with sources and this inevitably influences researchers. For example, even before beginning my analysis of

²³⁹ Ibid., 105–7.

²⁴⁰ On nonprobability sampling in elite interviewing see: Tansey, "Process Tracing and Elite Interviewing: A Case for Non-Probability Sampling," *PS: Political Science and Politics*, Vol. 40, No. 4 (2007).

²⁴¹ Heimer and Thøgersen (eds.), *Doing Fieldwork in China* (Honolulu: University of Hawai'i Press, 2006).

²⁴² Yuanting Zhang and Franklin W. Goza, "Who Will Care for the Elderly in China?: A Review of the Problems Caused by China's One-child Policy and Their Potential Solutions," *Journal of Aging Studies* 20, no. 2 (April 2006): 11, doi:10.1016/j.jaging.2005.07.002; Lianjiang Li, "Political Trust and Petitioning in the Chinese Countryside," *Comparative Politics* 40, no. 2 (2008): 210–1, doi:10.5129/001041508X12911362382832; Suzanne J. Piotrowski et al., "Key Issues for Implementation of Chinese Open Government Information Regulations," *Public Administration Review* 69 (2009): 131, doi:10.1111/j.1540-6210.2009.02100.x.

²⁴³ Kostka, "Private Sector Development in Central China," 33; Philip Wright, W.F. Szeto, and Louis T.W. Cheng, "Guanxi and Professional Conduct in China: a Management Development Perspective," *The International Journal of Human Resource Management* 13, no. 1 (2002): 164–5, doi:10.1080/09585190110083839; Jon Hassid, "Pressing Back: The Struggle for Control over China's Journalists" (UC Berkeley, 2010), 20.

²⁴⁴ Melanie Manion, "Survey Research in the Study of Contemporary China: Learning from Local Samples," *The China Quarterly* (1994): 747–51.

them, conducting more than a hundred interviews with Chinese lawyers heavily influenced my thinking about administrative litigation. Even if one recognizes the atypical nature of any given set of informants, it is almost impossible for a researcher to control for the influence of such direct, prolonged, and repeated contact. I began my research by interviewing lawyers who advertised themselves as administrative litigators. But, it was not until I began drawing a random sample that I realized that a large percentage of administrative cases were accepted by lawyers only because of the lawyers' personal connections to clients. Also, it is much more difficult to control for an independent variable in qualitative analysis. For example, lawyers who take more cases in general also take more administrative classes, but controlling for this qualitatively is almost impossible, while it is relatively easy, though by no means perfect, in regression analysis.

Field Sites

In consideration of the emphasis I put on representativeness, this section considers my choice of field sites, while the next two consider my sampling of interview subjects. My randomly sampled interviews were conducted at six primary field sites. These sites were as follows: two province-level cities (直辖市), Shanghai and Beijing; three prefecture-level cities, Changsha, Guilin, and Ningbo; and one rural prefecture in Hunan. All of my sites were chosen in an effort to balance concerns about representativeness and practicality. I preferred sites where I had local connections which could help me set up supplementary interviews and provide other support and advice. Additionally, I tried to select sites that could lead to natural and useful comparisons.

My primary field sites, those at which I drew random samples of law firms, are geographically varied (North, South, East and Central China), are at different levels of development, and reflect different administrative arrangements (provincial capital, rural prefecture, prefectural, and province-level city). On several levels, Beijing and Shanghai were simply too important not to choose as field sites; in 2010 these cities boasted 12.2 per cent²⁴⁵ and 6.7 per cent²⁴⁶ of all full time lawyers in China²⁴⁷. My choices of Ningbo, Guilin, and a prefecture in rural Hunan allowed me to include one wealthy coastal prefecture and compare it to middle and lower income prefectures, respectively. These last two prefectures also had significant ethnic minority populations facilitating an assessment of the position of minorities in administrative litigation, although I ultimately found this had little salience. Since I had time to include only one provincial capital among my field sites, I chose Changsha as a fairly typical middle-income provincial capital in central China. It was also reasonably close to my field sites in Guilin and rural Hunan and I had some connection with the university there. Overall, my six sites do a reasonable job of balancing diversity, practicality, and representativeness.

Random Sample

My samples were drawn from official registries of law firms which are published on the websites of provincial or prefectural-level judicial bureaus. Because a license from the judicial bureau is a prerequisite for opening a firm, the list can be considered

²⁴⁵ Beijing City Statistical Bureau 北京市统计局, *Beijing Statistical Yearbook 北京统计年鉴 2010* (Beijing People's Press 中国统计出版社, 2011).

²⁴⁶ 上海市统计局 Shanghai City Statistical Bureau, *Shanghai Statistical Yearbook 上海统计年鉴 2010* (Shanghai People's Press 上海人民出版社, 2011).

²⁴⁷ 中国统计年鉴编委会 China Statistical Yearbook Editorial Committee, ed., *China Statistical Yearbook 中国统计年鉴 2010* (Statistical Press 统计出版社, 2011).

complete and the registers I used were never more than a year and a half old.²⁴⁸ Once on the list, however, a firm's address and phone number were not necessarily kept up to date, and there did appear to be a tendency for firms to remain on the list even after the firm had closed, merged, spilt, or changed its name. Every effort was made to track down every firm sampled. In some cases, visits to several addresses and as many as five attempts were necessary to secure an interview. Despite my best efforts, I was not able to track down some sampled firms. This was especially true in Beijing where the life span of less established firms seems to be particularly short.²⁴⁹

In four of the sites where I conducted random samples, twenty firms were selected at random²⁵⁰ from these official registers of all local law firms in the area. In Beijing, thirty firms were chosen and in rural Hunan every firm was included in the sample since there were fewer than twenty law firms in the entire prefecture. If a sampled firm shared a building with other firms, additional interviews were sought with up to three of those firms, chosen using a random number generator application on my smartphone if more than three were present. Eighty-eight of my interviews, therefore, were with lawyers at firms drawn in the original random sample with the additional 33 selected through this additional sampling. This additional sampling served two valuable functions. First, in many sites it increased the number of interviews I could conduct in a fixed period of time. Second, the inclusion of these firms had the advantage of allowing me to encounter a few

²⁴⁸ Because these websites are updated fairly regularly, many of the lists I used may no longer be available. However, an example may be found here: 桂林市司法局 Guilin Judicial Bureau, "Guilin 2011 Annual Inspections of Law Firms and Lawyers 桂林市 2011 通过年度检查考核的律师事务所及律师公告信息," *Guilin Rights Awareness Website 桂林普法网*, accessed December 19, 2012, <http://www.glpf.gov.cn/Article/ArticleShow.asp?ArticleID=1090>.

²⁴⁹ "The predicted average life expectancy of a law firm in Beijing is 21 years. But among firms that do not grow in size since their first observation, is only 7 years. Similarly, among small firms, life expectancy is only 11 years."

²⁵⁰ Using a random number generator.

firms too new to be on the register.²⁵¹ In order to confirm that this additional sampling did not disrupt the representativeness of my data, I conducted statistical tests to confirm that these additionally sampled firms are not statistically different than those drawn from my original sample. Because the two variables most relevant to lawyers' experience with administrative litigation, "number of administrative cases taken in the last year" and "number of administrative cases taken in career", are not normally distributed, I conducted a rank sum Mann-Whitney-Wilcoxon test²⁵² to confirm that the original sample and additional sample were not statistically different. Mindful of the large number of zeros contained in these variables, I also conducted two simple zero-inflated negative binomial regressions with these variables as the dependent variables and presence in the original versus additional sample as the dependent variable.²⁵³ Both methods confirm that my additionally sampled interviews are not significantly different from my original sample.

Nonprobability Sample

My randomly sampled interviews were supplemented by an additional 52 nonprobability sampled interviews that were conducted at my primary sites, as well as at my secondary field sites of Qingdao, Lanzhou, Tianjin, and Hong Kong. These informants were lawyers specializing in administrative law, former government officials, former judges, legal scholars, legal workers, foreign lawyers, and actual, as well as potential, plaintiffs. Just as quantitative and qualitative techniques complement each other,

²⁵¹ Interview: BJ03L.

²⁵² A significance test similar to a t-test, but for which the samples do not need to be normally distributed: Jean D. Gibbons, *Nonparametric Statistics: An Introduction* (SAGE Publications, Inc, 1992).

²⁵³ Fiona McElduff et al., "When T-tests or Wilcoxon-Mann-Whitney Tests Won't Do," *Advances in Physiology Education* 34, no. 3 (September 1, 2010): 128–133, doi:10.1152/advan.00017.2010.

supplementing a large random sample of lawyers with other perspectives helped to fill in holes, triangulate facts, and add depth. For the sake of comparison, I even interviewed the City Attorney for a small municipality in California, who, like my politically embedded lawyers in China, had worked both suing and defending local governments.²⁵⁴

Of the supplementary interviews, 29 were with foreign or Chinese lawyers or occasionally other staff at prestigious law firms in Beijing and Shanghai. These international and more elite domestic Chinese firms were the most likely to have contact with multinational companies. The interviews were achieved by attempting to initiate interviews with all of the firms present in the prestigious buildings and districts in which such firms are clustered. While this was certainly a form of convenience sampling²⁵⁵ and I make no assumptions about representativeness, it is still likely representative of the more elite firms. Additionally, the interviews, remote interviews, and e-mail interactions I conducted in Hong Kong and abroad were with lawyers who had special insight into foreign involvement, or lack thereof, in Chinese administrative litigation.²⁵⁶ I also sent e-mails seeking information to at least one lawyer at each of 50 foreign law firms in Hong Kong that deal with PRC law. I received 13 responses, none of which implied significant experience with administrative litigation so no interviews were warranted. Because these interviews primarily address the issues raised in Chapter Six, additional discussion of them may be found there.

My other supplementary interviews fall into a number of different categories. On my pilot research trips to Qingdao and Lanzhou, I primarily conducted key informant

²⁵⁴ Interview: WG03-L.

²⁵⁵ Neil J. Salkind, *Encyclopedia of Measurement and Statistics* (SAGE Publications, 2007), 186–7.

²⁵⁶ Interviews: HK01-L, HK02-L, HK03-L WG01-L, WG02-L.

interviews²⁵⁷ by contacting lawyers advertising themselves as having expertise in administrative litigation on websites such as *china.findlaw.cn*.²⁵⁸ While this proved an effective way of speaking to lawyers with experience in administrative litigation, I only relied on this method before I developed my technique for randomly sampling informants. The latter method was superior in nearly every respect as long as I sampled enough lawyers to ensure that some experienced administrative litigators were included. In many of my field sites, I also engaged in some snowball sampling,²⁵⁹ interviewing anyone and everyone that connections or other informants suggested had any special experience or expertise in administrative cases. This allowed me to interview a few professors²⁶⁰ one of whom had the invaluable perspective of a retired judge who had worked in an administrative chamber.²⁶¹ I was also fortunate enough to conduct a key informant interview with a lawyer who was brought to my attention by the national renown his prowess in administrative litigation had brought him.²⁶²

Because legal workers (法律工作者) may also represent clients in administrative cases, I felt it was important to get their perspective. I could not, however, conduct a random sample of legal workers for lack of a comprehensive listing of the offices in

²⁵⁷ Lynn W. Phillips, "Assessing Measurement Error in Key Informant Reports: A Methodological Note on Organizational Analysis in Marketing," *Journal of Marketing Research* 18, no. 4 (November 1, 1981): 395–415, doi:10.2307/3151333; John Poggie, "Toward Quality Control in Key Informant Data," *Human Organization* 31, no. 1 (March 1, 1972): 23–30; Marc-Adelard Tremblay, "The Key Informant Technique: A Nonethnographic Application," *American Anthropologist* 59, no. 4 (August 1, 1957): 688–701, doi:10.2307/666104.

²⁵⁸ Interviews: LZ01-L, LZ02-L, LZ03-L, LZ04-L, QD02-L, QD03-L, QD04-L.

²⁵⁹ Rowland Atkinson and John Flint, "Accessing Hidden and Hard-to-Reach Populations: Snowball Research Strategies," *Social Research Update* 33 (2001); Wojtek J. Krzanowski, *Statistical Principles and Techniques in Scientific and Social Research* (Oxford, UK: Oxford University Press, 2007), 28; For snowball sampling under similar circumstances: Stuart A. Scheingold and Anne Bloom, "Transgressive Cause Lawyering: Practice Sites and the Politicization of the Professional," *International Journal of the Legal Profession* 5, no. 2–3 (1998): 209–253, doi:10.1080/09695958.1998.9960449.

²⁶⁰ Interview: QD01-L/O,

²⁶¹ Interview: TJ04-P/J.

²⁶² Interview: AL01-L.

which they work (they face much less strict licensing and regulatory requirements than lawyers). I therefore solicited a convenience sample of legal workers in a cluster of their offices around a district court in Beijing.²⁶³ This technique also led me to interview a retired judge who provided legal advice at a local legal worker office, but who had never worked in an administrative chamber.²⁶⁴

While a random sample of the general population large enough to include a reasonable number of administrative plaintiffs would have been prohibitively large, I did have the good fortune to be introduced to one potential administrative plaintiff,²⁶⁵ encounter one actual plaintiff in a law firm,²⁶⁶ one potential plaintiff in a donut shop,²⁶⁷ and randomly sample one lawyer who had also attempted to initiate an administrative suit as a plaintiff.²⁶⁸ Interviews with these actual and potential plaintiffs helped me to better understand this very different and crucial perspective, although, as I intimated in the introduction, I often found that a deficit of legal comprehension meant that their narratives lacked crucial details. A complete list of my interviews can be found in the appendixes.

Interviews

With the exception of foreign lawyers and a few elite Chinese lawyers, all of my interviews were conducted primarily in Mandarin. To facilitate more honest conversation and to protect the anonymity of informants, no recordings were made for any of these

²⁶³ Interview: BJ03-LW, BJ04-LW, BJ05-LW.

²⁶⁴ Interview: BJ02-J.

²⁶⁵ Interview: GL01-PL.

²⁶⁶ Interview: CS01-PL.

²⁶⁷ Interview: CS02-PL.

²⁶⁸ Interview: SH21S.

interviews. The quotations of interviews found in this dissertation are from my notes or the notes of my research assistants and every effort was made to capture both the tone and substance of the informants' responses. As no recordings were made and notes were generally taken in English from Chinese conversations, quotations should be taken as a translated paraphrase, rather than a word for word recreation. Interviews ranged in length from 20 minutes to 4 hours depending on the experience and availability of the informant.

For all of my first 21 interviews which were conducted during one trip to Beijing, I was accompanied by one of two research assistants, both of whom were Chinese law students. While this assistance was invaluable in the beginning, I found that for several reasons I no longer needed such assistance after this initial round of interviews. First, having gained confidence and vocabulary in these initial interviews, I simply did not need the help. Second, I felt that the more people who were in the room, the less likely informants were to speak frankly. I also believe they may have been more comfortable discussing the deficiencies of the Chinese politico-legal system with a foreigner. Third, I found that my informants often tended to speak to my research assistants instead of me. This was problematic because it detracted from my ability to guide the semi-structured interviews, and because when speaking to my research assistants, informants tended to omit useful details and assumptions that they felt my assistants would naturally understand. When speaking only with me, informants would not only include these details and explain these assumptions, but were more likely to question assumptions or cite concrete examples. Finally, issues of the costs and logistical complications of finding research assistants and transporting them to all my interview locations were too onerous.

In accordance with the departmental research ethics research committee checklist I submitted to the Central University Research Ethics Committee (CUREC), I did not use written consent forms. My research was within the limits of topics acceptable to the Chinese state, but in the unlikely event that some representative of the Chinese state had taken an undue interest in my work, having no written documentation of my informants' participation helped ensure that my informants could not suffer any negative repercussions. Furthermore, my interviews were conducted with strict anonymity. Nowhere are their real names recorded and instead interviews are identified with a coding system, which is explained in Appendix A.

Before beginning each interview, I gave the potential informant a copy of the following interview consent request²⁶⁹ and interview questions, which I asked them to review.

My research consent request in Chinese:

“我是来自英国牛津大学的博士生，我为准备我的博士论文而到中国进行学术访问。我的研究方向是中国律师的诉讼经验。我的访问大约需要三十分钟。对于这些问题，您可以做选择性的回答，可以发表自己的看法，当然也可以拒绝回答，或者中止我们的谈话。这次访问是匿名的，对于访问中记录的所有信息我们都会严格保密。这些访问的材料只是作为我的博士论文的参考，不会涉及任何对您不利的情况。基于以上情况的介绍，您愿意接受我们的采访吗？”

My research consent request in English:

“I am a doctoral student from the University of Oxford, and in preparation for writing my doctoral dissertation have come to China to conduct academic interviews. My research regards the litigation experience of Chinese lawyers. My interview requires approximately 30 minutes. In regard to these questions, you may answer selectively, provide your own opinion and, of course, refuse to answer and or break off our conversation.

²⁶⁹ In writing this request, I borrowed some of the language from: Bard College Institutional Review Board, “Example Interview Consent Form,” accessed December 17, 2012, <http://inside.bard.edu/irb/consent/ExampleInterviewConsentForm.shtml>.

This interview is anonymous, and all information recorded will be kept strictly confidential. The material for this interview is to be used for reference in my doctoral dissertation and should not involve you in a detrimental situation. On the basis of the above explanation, are willing to accept my interview?"

While no informant who had initially consented to the interview declined after reading my consent request, many did decline to answer specific questions and several broke off our interview at various points.

When working with firms from my random sample (and many of the supplementary interviews), instead of calling to make an appointment for an interview, I found that simply showing up at their office resulted in a much higher response rate for several reasons. Firms were much less likely to turn me down when I had taken the time and effort to come to their firm. This was especially true as the first hurdle was convincing receptionists, who were generally more dubious about my request than the informants themselves, to let me speak to a lawyer. My appearance, a bearded foreigner in a blazer, probably helped in soliciting interviews. For example, one informant suggested that she would not normally give interviews to a student, but claimed that I appeared “old enough (有一定的年齡)”.²⁷⁰ Some younger informants took pity on me because either they or their classmates had recently had to conduct interviews of their own as graduate students. The fact that I was from Oxford University (牛津大学), a school nearly every Chinese is familiar with, clearly was a tremendous advantage. Showing up unannounced at firms also meant that I was likely to get an interview simply because some lawyers happened to have a little time on their hands. Even the lawyers who I encountered in prestigious international firms often proved happy to speak with me

²⁷⁰ Interview: SH03S.

if they, for example, were about to go on a lunch break. On the other hand, conducting interviews the week after Chinese New Year, I discovered most law firms in Guilin were still closed. Finally, “walk-in” business makes up a reasonably sizeable portion of casework for many Chinese law firms.²⁷¹ Lawyers are accustomed to meeting with potential clients who happen to wander into their offices and, since many of these do not result in fees and they rarely bill by the hour, they did not balk at the non-billable time spent speaking with me.

Showing up at a law firm without an appointment does, however, create its own problems. Obviously, traveling repeatedly to a firm only to find that all the lawyers are busy can be a large time drain. Nevertheless, it demonstrates commitment and in some instances firms finally gave me an appointment to interview a lawyer after I visited the firm repeatedly.

Finding firms could be difficult as many were poorly signed or not signed at all. Addresses in China, especially in Beijing, are often hard to find and not terribly useful. In this regard Google maps and a smartphone were vital tools for fieldwork. Triangulation was important for determining where a firm was located. If the official government register, the firm’s website (if it had one), and Google maps all agreed that a firm was in the same location, that was likely where it was. If not, there was substantial room for doubt. Calling to find directions could be problematic for the same reasons as calling to schedule an appointment. Therefore, I called firms for directions only as a last resort, and even then, I found it was more effective to ask my taxi driver to call for directions if I happened to be in a taxi since this postponed awkward questions about why I was coming

²⁷¹ For example, in the 2007 Jiaotong University survey, just over 40 per cent of lawyers accepted at least one case from a total stranger.

and whether I had an appointment until I could address the lawyers face to face. Considering that some lawyers were simply unwilling to speak with me, and the fact that some firms on the list no longer exist, I am quite pleased that my response rate for the randomly sampled interviews was 68.5 per cent.

Naturally, this discussion about which lawyers consented to be interviewed brings up questions about representativeness of lawyers within firms. While I selected firms from my list with a random number generator, it simply was not practical to randomly select lawyers within a firm because at many firms I was lucky just to find one lawyer who was willing and able to meet with me. Nevertheless, I believe that my sample of informants within firms did not suffer from any particular bias, especially because I visited firms at a variety of times of day and received widely varying receptions. So, while I might show up at one firm to find them extremely busy and only a young inexperienced lawyer could be spared to speak with me, at other firms I was welcomed as an important guest and met with senior lawyers or even the head of the firm. Considering the very real constraints of fieldwork on a relatively sensitive topic in the PRC, I believe the methodological rigor of my interviews to be more than sufficient and to surpass that of the vast majority of work on China's political and legal systems.

Coding and Analysing Interviews

In order to better analyse and sort the data collected from my interviews I enlisted the assistance of one graduate student and four undergraduate students to help me code my interviews.²⁷² Using a variety of students who were unfamiliar with my hypotheses,

²⁷² My supplementary interviews varied too much in content and character for coding to be effective.

helped alleviate potential biases in the coding. Because my notes were primarily in English with a healthy smattering of Chinese, all of the students I recruited were native English speakers who had a reasonable grasp of Chinese. My student coders agreed not to attempt to learn the identity of any of the interviewees, not to reveal any of the information contained in these interview notes or coding to anyone in any form, and confirmed that they had deleted all record of them when they finished coding. Paying careful attention to the actual responses I received, I developed a schema for coding my interviews and refined these based on my own coding of test interviews and feedback from my student coders.

My coding proved useful for analysing and organizing my interviews and I make use of quantitative breakdowns of my informants' responses to specific questions. My most substantial analysis of my interviews came in the simple but time-consuming form of painstakingly reading and reviewing each of my interviews.²⁷³ Additionally, keyword searches helped me locate discussions of specific topics and recognize certain trends. For most quantitative analysis, however, I turned to my survey data, not only because it provided me with a much larger sample, but also because it added to the diversity of my data sources.

Designing Research

The best research designs will play to the strengths of researchers and make use of the tools and resources available to them. There are three groups of researchers that have abilities and resources that I was not able to match and I have generally avoided their

²⁷³ Mario Small makes a similar observation about some of his interview data: Mario Luis Small, *Unanticipated Gains: Origins of Network Inequality in Everyday Life: Origins of Network Inequality in Everyday Life* (Oxford University Press, 2009), 261.

methods. Some of these techniques suffer from serious drawbacks and I feel that my research benefits greatly from methods that are more rigorous and, especially in studies of China, less common.

First, the work of many of the most eminent Western researchers on Chinese law and politics rely on small numbers of interviews and less formal communication with a handful of elite actors, especially with professors and officials. When many distinguished scholars began research in China, this was one of the only methods available for collecting data. While this technique has its merits and I have interviewed professors when the opportunity presented itself, there are several reasons I have chosen to pursue other data sources. Data from elite interviews tends to be unrepresentative, difficult to verify, and comes through the lens of the elite informant's own perspective, interests, and agenda²⁷⁴. Additionally, research in Chinese academia does not always meet the methodological standards I hope to achieve and elites' impression of the reality on the ground may be unrepresentative or mistaken. On the other hand, as Chinese academia becomes better developed and integrated, there is no reason for a western scholar to simply repeat what Chinese academics could and often have published themselves. I also believe that, considering its weaknesses, data from elite interviews are already relied on too heavily in the literature.²⁷⁵ Finally, I could not hope to compete with the access to elites that the connections and reputations of eminent scholars helps to ensure, and, therefore did not try.

²⁷⁴ All informants, of course, bring their own perspective, but elite informants are much more likely to have a stake in and understanding of the discourses and debates involved in research. Additionally, they are often relied on for their impressions of general situations and trends, whereas my informants were almost always discussing their own concrete experiences. Steinar Kvale, *Doing Interviews* (SAGE, 2008), 12, 44.

²⁷⁵ See for example: Liebman, "China's Courts: Restricted Reform"; Lubman, *Bird in a Cage*.

Second, some academics who study the Chinese legal system are also products of Chinese legal education and may have worked in the Chinese legal system. These researchers are able to gain access, not necessarily to elites, but to ordinary court records and judges that I could not hope to emulate.²⁷⁶ This dissertation therefore relies relatively little on strategies and data sources that require direct access to courts, judges, and their records.

Probably the most popular form of legal research in almost any context is the close reading and interpretation of text. As I have already discussed, such research in China is problematic due to the lack of availability and the inaccuracy of many court records, and the editing and selection of court documents that are made available. Researchers who have special access to court records and other texts may be able to ameliorate the problem of unrepresentative and edited text. Additionally, those with formal legal training in Chinese, and especially those with experience in Chinese courts, are in a much better position to pursue this kind of work. Nanping Liu, for example, claims that “[i]n analyzing the content and wording of judgments, one can often sense or even confirm when corruption has taken place through a judge’s lack of reasoning or evasion of discussing key issues.”²⁷⁷ Whatever one thinks of the reliability of such methods, scholars such as Nanping Liu and He Xin are in a much better position than I to pursue them.

Third, while I am extremely grateful for the research funding I did receive, and consider it more than adequate, I did not have sufficient resources to run a large survey.

²⁷⁶ I believe this is one of the major factors for He Xin’s remarkable access to parts of the Chinese legal system and therefore excellent and prolific research. See, for example: He, “Administrative Law as a Mechanism for Political Control”; Xin He and Yang Su, “Do the ‘Haves’ Come Out Ahead in Shanghai Courts?,” *SSRN eLibrary* (April 30, 2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2048320; He, “The Recent Decline in Economic Caseloads.”

²⁷⁷ Nanping Liu, “Trick or Treat: Legal Reasoning in the Shadow of Corruption in the People’s Republic of China,” *North Carolina Journal of International Law and Commercial Regulation* 34 (2008): 260.

Such surveys are extremely useful, especially for gaining a random sample of plaintiffs,²⁷⁸ and as I mentioned in my introduction, lack of such a large dataset was a major factor in my decision to concentrate on lawyers. Thankfully, due to the diligence and generosity of Ethan Michelson and Ji Weidong I was still able to make use of an existing large survey of Chinese lawyers. This allowed me to take advantage of one of my relative strengths, that is, my knowledge of statistical analysis.

My research design worked around obstacles to certain data sources and research techniques in favour of my relative strengths: my knowledge of how to draw a random sample of Chinese law firms;²⁷⁹ my willingness to put in the long hours scouring Chinese cities in an effort to track down and interview the entire sample; and, as a research assistant said, my main advantage was my “thick facial skin (面皮很厚),” or, ability to face and respond to repeated rejection.

²⁷⁸ Michelson, “Climbing the Dispute Pagoda: Grievances and Appeals to the Official Justice System in Rural China”; Keliang Zhu et al., “The Rural Land Question in China: Analysis and Recommendations Based on a Seventeen-Province Survey,” *New York University Journal of International Law and Politics* 38 (2005): 761–839.

²⁷⁹ For advice and encouragement on this topic I am eternally indebted to Pierre Landry.

Chapter Three: Administrative Litigation in China

Various Anglophone sources, from scholarly journals to newspaper stories, describe the task of suing the Chinese state as part Herculean, part Pyrrhic, and part Sisyphean. According to this literature, even ensuring that an administrative case is accepted can be exceptionally difficult as “courts may refuse to hear actions brought under the ALL”²⁸⁰ and “[p]arty committees may issue internal orders forbidding courts to accept suits on sensitive matters.”²⁸¹ Alternatively, “courts often try to avoid accepting administrative cases because fees are low in comparison to civil and economic cases, and they also take a long time to complete, which could be a black mark on the judge’s record.”²⁸² Additionally, the CCP, the Procuracy, state-owned enterprises, and quasi administrative units (state universities for example) are not subject to administrative litigation.²⁸³ “Local authorities sometimes try to use... the Party’s immunity to deflect law suits.”²⁸⁴ Furthermore, courts sometimes undermine plaintiffs’ right to sue by questioning whether they constitute directly affected parties and in collective suits courts may deny that a group of plaintiffs constitutes a legal person²⁸⁵.

Even if a case is accepted, courts can be reluctant to upset the local governments that control their budgets or the local People’s Congresses that are largely responsible for appointing and dismissing judges.²⁸⁶ Legal consciousness among officials is low and

²⁸⁰ Lubman, *Bird in a Cage*, 207.

²⁸¹ O’Brien and Li, “Suing the Local State,” 2005, 35.

²⁸² Peerenboom, *China’s Long March*, 440 footnote 19.

²⁸³ *Ibid.*, 420.

²⁸⁴ O’Brien and Li, “Suing the Local State,” 2005, 35.

²⁸⁵ *Ibid.*, 36.

²⁸⁶ Lubman, *Bird in a Cage*, 256.

“many officials refuse to cooperate with the courts. They refuse to accept the summons, appear in court, respond to the complaint, provide evidence, or comply with the court decision”²⁸⁷ and do “everything possible to pre-empt, derail or undermine administrative litigation”²⁸⁸ Additionally, “the system of judicial mediation in administrative cases which has developed in the PRC is one in which the plaintiff may well be subject to significant coercion”²⁸⁹ and the vast majority of administrative cases involve little or no compensation.²⁹⁰ Even if plaintiffs manage to receive a favourable verdict, receiving compensation²⁹¹ or ensuring that the state complies with an administrative court’s verdict can sometimes prove problematic.²⁹² “Finally, in some cases where villagers prevail and the verdict is duly executed, their gains are soon lost when officials retaliate.”²⁹³

The literature draws an almost universally dark picture of Chinese administrative litigation, but this dissertation seeks to provide nuance by bringing out its shades of grey. In particular, it asks three questions that put China’s legal system in context. First, how does the Chinese system compare to analogous systems elsewhere? Considering its recent history and level of development, the PRC’s legal system is generally doing well if it looks roughly similar to a more developed legal system, but inevitably fails when

²⁸⁷ Peerenboom, *China’s Long March*, 403.

²⁸⁸ O’Brien and Li, “Suing the Local State,” 2005, 78.

²⁸⁹ Michael Palmer, “Compromising Courts and Harmonizing Ideologies: Mediation in the Administrative Chambers of the People’s Courts of the People’s Republic of China,” in *New Courts in Asia*, ed. Andrew Harding and Penelope Nicholson (New York: Routledge, 2007), 266, <http://capiconf.uvic.ca/viewpaper.php?id=18&print=1&cf=2>.

²⁹⁰ Raymond Li, “State May Pay for Causing Distress,” *South China Morning Post*, October 24, 2008, sec. News.

²⁹¹ Mingxuan Xu, “Translation & Commentary: ‘To Refuse Compensation Is to Turn a Blind Eye to Torture’,” *Dui Hua Foundation: Human Rights Journal*, 2010, <http://www.duihuahrjournal.org/2010/11/translation-to-refuse-compensation-is.html>; 徐明轩 Xu Mingxuan, “To Refuse Compensation Is to Turn a Blind Eye to Torture 拒不赔偿是对刑讯逼供的纵容,” *Beijing News 新京报*, November 17, 2010, http://epaper.bjnews.com.cn/html/2010-11/17/content_170194.htm?div=-1.

²⁹² Ruan, “Politics of Administrative Litigation,” 54.

²⁹³ O’Brien and Li, “Suing the Local State,” 2005, 41.

compared to an “Ideal Western Legal Order.”²⁹⁴ Second, is there progress towards rule of law in this area? It must be kept in mind that rule of law in China is being built from a very low base, and therefore less than ideal current circumstances may obscure significant progress. Third, is our view representative? As I argue repeatedly in this dissertation, Anglophone views of China’s legal system are strongly biased by a focus on sensitive cases, negative outcomes, and problem areas. Finally, since much of the best-known research on administrative litigation in China was done in the early days of the system²⁹⁵ it is also important to evaluate how the reality has changed.

Objects in the Literature May Be Less Dangerous Than They Appear

“Since the National People’s Congress (NPC) comprehensively formalized the legislative basis for suing government agencies and officials by passing the Administrative Litigation Law (ALL) in 1989, administrative law scholarship has exploded.”²⁹⁶ While this dissertation builds on that literature, far too little scholarship on China’s legal system in general, and on administrative litigation in particular, has been genuinely empirical or broadly representative.²⁹⁷ Articles and chapters that rely on black letter law, government documents, and other academic work dominate the field. Some bring Chinese material to an Anglophone audience.²⁹⁸ A few case studies have provided a

²⁹⁴ Clarke, “Puzzling Observations in Chinese Law,” 4.

²⁹⁵ Finder, “Like Throwing an Egg Against a Stone?”; Pei, “Citizens V. Mandarins”; And to a lesser extent: O’Brien and Li, “Suing the Local State,” 2004.

²⁹⁶ Kinkel and Hurst, “Access to Justice in Post-Mao China,” 479.

²⁹⁷ Pei’s early work on the subject is a notable exception that includes empirical analysis with thought to representativeness and generalizability. Despite its age it is therefore still central in the field. Pei, “Citizens V. Mandarins.”

²⁹⁸ Peerenboom, *China’s Long March* Chapter 9; Hung, “China’s WTO Commitment”; Chen, “The Development and Conception of Administrative Law in the PRC”; Michael Palmer, “Controlling the State: Mediation in Administrative Litigation in the People’s Republic of China,” *Transnational Law & Contemporary Problems* 16 (2007 2006): 165; Ohnesorge, “Chinese Administrative Law in the Northeast

good empirical first step but should not be used to draw generalizations.²⁹⁹ Other work has tended to focus on the most extreme cases.³⁰⁰ This has produced a fairly wide body of literature balanced precariously on a small and unrepresentative base of empirical data, leaving misconceptions unaddressed and questions unanswered. The general view of administrative litigation as presented in the legal and social science literature, as well as media, government, and NGO accounts, while not inaccurate, is highly unrepresentative, vastly overemphasising the most sensitive cases and negative outcomes. By conducting the first program of interviews with a random sample of lawyers on the topic of administrative litigation and drawing on representative official and survey data, I am able to address this bias. My findings show that administrative litigation in China, while often fascinating and “relatively more difficult (难度比较大)”³⁰¹ than other types of litigation, is rarely as hopeless or dangerous as is depicted.

This chapter provides the background on China’s legal system, legal profession and administrative litigation necessary for the subsequent chapters which will investigate who the lawyers are who sue the Chinese state (Chapter Four), how they go about it (Chapter Five), and whether and how foreign multinationals involve themselves in administrative litigation (Chapter Six). It discusses China’s courts, judges, and lawyers but, for the sake of brevity, will focus primarily on how they relate to administrative

Asian Mirror”; Peerenboom, “Globalization, Path Dependency and the Limits of Law”; Palmer, “Compromising Courts and Harmonizing Ideologies.”

²⁹⁹ He, “Administrative Law as a Mechanism for Political Control”; Susan Finder, “The OK Company Case,” *Asia Pacific Law Review* 3 (1994): 47; Thomas E. Kellogg, “‘Courageous Explorers’?: Education Litigation and Judicial Innovation in China,” *Harvard Human Rights Journal* 20 (2007): 141; Sida Liu, “Beyond Global Convergence: Conflicts of Legitimacy in a Chinese Lower Court,” *Law & Social Inquiry* 31 (2006): 75–106; Tang mixes a case study with some basic analysis of statistics: Yuenyuen Tang, “When Peasants Sue En Masse,” *China: An International Journal* 3, no. 1 (2005): 24–49.

³⁰⁰ O’Brien and Li, “Suing the Local State,” 2005.

³⁰¹ Interview: BJ01N.

litigation. The chapter will then elucidate the practice of administrative litigation, treating a variety of issues including: the substantive content of administrative cases, the acceptance of cases, the inability to challenge abstract administrative acts, evidence, the statute of limitations, corruption, retaliation from officials, the possibilities for a successful outcome for plaintiffs, mediation, compensation, and the enforcement of verdicts.

While this chapter provides the necessary background, which is substantial, I attempt to limit my overview of China's politico-legal system to a minimum for several reasons. Perhaps for fear that readers are unfamiliar with China's legal system, scholarly works often spend too much space reviewing the existing literature, leaving too little room for presentation of new data and analysis that could move our understanding forward.³⁰² I do not wish to merely repeat the received wisdom on topics not elucidated by my data, especially when I believe the empirical basis on which they rest is insufficient. Where the previous literature is relevant and based on solid empirics, this dissertation makes use of it. In other places, I will attempt to correct or argue against pre-existing notions. Most importantly, I give consideration to a number of topics that are vital to the reality of administrative litigation, but have been given little or no consideration in the literature. For example, I analyse the impact of the statute of limitations on Chinese administrative litigation. The similarly overlooked issue³⁰³ of the financial incentives and fees of Chinese lawyers is addressed in the next chapter. These problems are of vital practical importance but have been largely overlooked because of

³⁰² For an example see: Palmer, "Compromising Courts and Harmonizing Ideologies."

³⁰³ Though mentioned in passing in: Marshall, "A Process of Justice," 212; O'Brien and Li, "Suing the Local State," 2005, 47.

the overly theoretical and unempirical nature of most work on administrative litigation and Chinese law in general.³⁰⁴ Therefore, while this chapter provides background, much of the information presented here will be new and hence the general picture of administrative litigation is one that will look substantially different than may be found elsewhere. For those interested in a full background and history of China's politico-legal system or related issues, a variety of works on those subjects is available and many may be found in the bibliography.

China's Courts

The pre-20th century history of China's courts is both fraught and fascinating. Basic justice in Imperial China was conducted by the county "magistrate as merely one of his several administrative functions" and "[a]lthough he usually lacked formal legal training, he was obliged to act as detective, prosecutor, judge, and jury rolled into one."³⁰⁵ While substantial efforts were made to reform the legal system in the Republican Era,³⁰⁶ constant interruptions, divisions, and distractions blunted its success and ultimately its impact on subsequent developments. In the Mao-era, the legal system was modelled after that of the Soviet Union, and though its origin has important implications for China's current system of criminal law,³⁰⁷ its legacy in terms of administrative litigation is limited. Considerations of space preclude a detailed exploration of Chinese

³⁰⁴ For an excellent exception see: Michelson, "The Practice of Law as an Obstacle to Justice."

³⁰⁵ Derk Bodde and Clarence Morris, *Law in Imperial China* (University of Pennsylvania Press, 1967), 5.

³⁰⁶ Philip Huang, *Code, Custom, and Legal Practice in China: The Qing and the Republic Compared* (Stanford University Press, 2002); Kathryn Bernhardt, Philip C Huang, and Mark A Allee, *Civil Law in Qing and Republican China* (Stanford, CA: Stanford University Press, 1994).

³⁰⁷ Chinese criminal law, for example, still features a Procuratorate, an institution largely imported from the Soviets. See: Jerome A Cohen, "The Criminal Process in the People's Republic of China: An Introduction," *Harvard Law Review* 79, no. 3 (January 1966): 469, doi:10.2307/1339082.

legal history, but, in part because the legal system was essentially rebuilt from ruin following the Cultural Revolution, it is largely possible to understand administrative litigation in China without delving too deeply into history.³⁰⁸

China's courts are organized in the same manner as an administrative bureaucracy. At the top is the Supreme People's Court in Beijing which is "involved in interpreting law, adjudicating, legislating, as well as administering the judiciary."³⁰⁹ Below this are the high courts at the provincial level, the intermediate courts at the prefectural level and the basic courts at the county or district level. Basic courts handle approximately 80 per cent of cases³¹⁰ and employ a similar percentage of judicial personnel³¹¹. Figure 1 demonstrates the general hierarchy of China's courts using the example of Changsha, the capital of Hunan Province and one of my field sites.

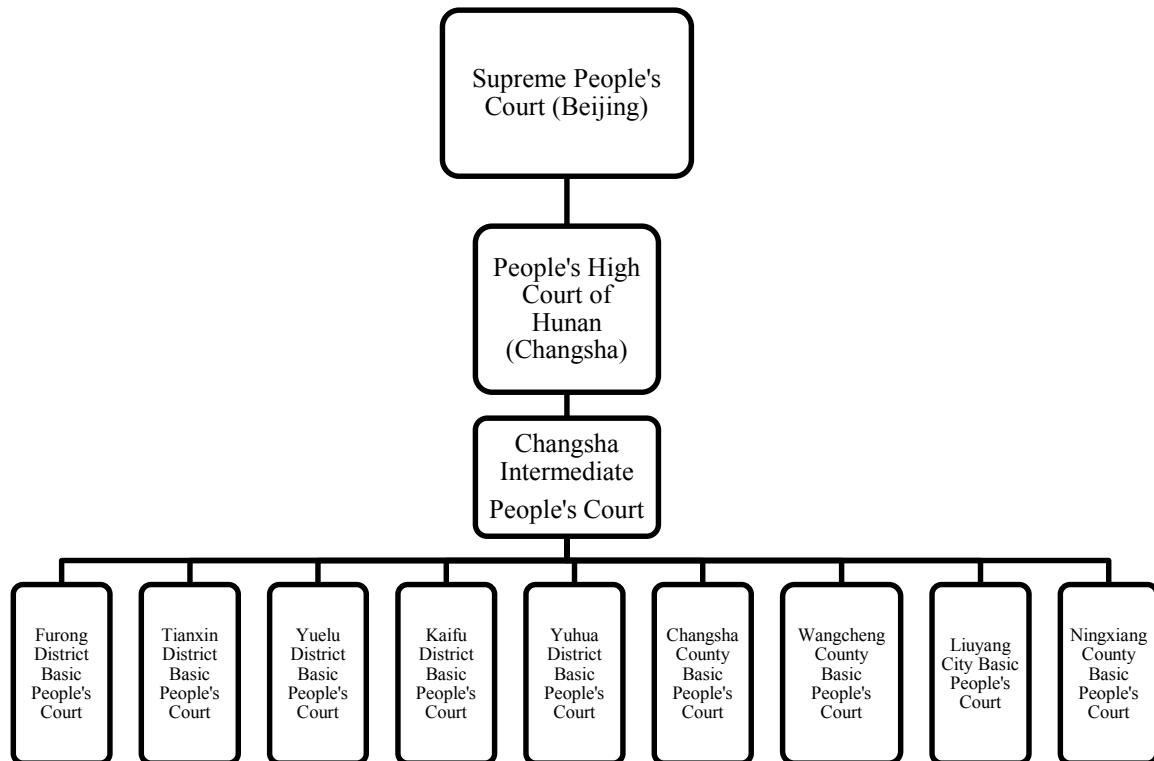
³⁰⁸ For example, the most experienced lawyers I interviewed had practiced from 25 to 27 years, which means they began their careers in the early 80s. The lack of continuity in China's legal system therefore is largely attributable to the fact that it was essentially impossible to practice law for much of the Maoist period and that few legal professionals in the reform-era had practiced in the Maoist or Republican eras. Interviews: BJ20N, BJ31N, SH04S, XX02S, CS05S, CS24S.

³⁰⁹ Susan Finder, "Supreme People's Court of the People's Republic of China, The," *Journal of Chinese Law* 7 (1993): 145.

³¹⁰ Mei Ying Gechlik, "Judicial Reform in China: Lessons from Shanghai," *Columbia Journal of Asian Law* 19 (2006 2005): 114.

³¹¹ Peerenboom, *China's Long March*, 283.

Figure 1: Hierarchy of People's Court in Changsha, Hunan



Each court is divided into three chambers: Civil, Criminal, and Administrative. Administrative chambers tend to be the smallest and least busy by a wide margin. Some courts also have specialist chambers dealing with environmental,³¹² and, as we shall see in Chapter Six, intellectual property cases. There are also courts of special jurisdiction for military, railway transport, and maritime³¹³ cases.

One of the most consistent criticisms of China's courts is that they lack independence: "individual judges generally do not have the right to decide cases on their

³¹² Alex Wang and Jie Gao, "Environmental Courts and the Development of Environmental Public Interest Litigation in China," *SSRN eLibrary* (2010), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2126780.

³¹³ Curtis E. Pew, Robert M. Jarvis, and Mark Sidel, "Maritime Courts in the Middle Kingdom: China's Great Leap Seaward," *Maritime Lawyer* 11 (1986): 237.

own. Most cases are heard by a collegiate panel of three judges”³¹⁴ which in turn are supervised by the court President, Vice-Presidents, and other senior judges who make up their court’s adjudication committee.³¹⁵ As the often repeated quotation on judicial independence in China puts it:

*“The presidents of the local people’s courts at various levels are elected and removed by the people’s congresses at the corresponding levels. Appointment and removal of other judges of those courts, none of whom enjoy security of tenure, is handled by the standing committee of the corresponding level of people’s congress upon the nomination of the president of the relevant court. Moreover, court budgets and the salaries and welfare benefits of judges are determined by the local government, not by the Supreme Court or central government. In practice, of course, the local Party Committee controls each local people’s congress, its standing committee and the local government of that level, and thus indirectly the local courts.”*³¹⁶

As I demonstrate throughout this dissertation, the actual situation is a great deal more complicated than is suggested by this passage and much of the literature. Thankfully, emerging research appreciates that the accepted conception “misstates, and overstates, the role of the Party, and ignores more common sources of pressure on the courts. The likely *source* of interference, the *risk* of interference, and the *impact* of interference all differ depending on the *type of case*.”³¹⁷ It shows courts to be strategic actors that resist and submit to outside pressure depending on a wide variety of

³¹⁴ Peerenboom, *China’s Long March*, 281.

³¹⁵ Mavis Chng, “The Adjudication Committee Debate and the Challenges Faced By Courts in China When Striving for Substantive Justice and Efficiency” (National University of Singapore School of Law, 2011).

³¹⁶ Jerome A Cohen, “Reforming China’s Civil Procedure: Judging the Courts,” *American Journal of Comparative Law* 45 (1997): 793. In a reflection of how narrowly supported the literature on China’s legal system is, this passage, unsupported by any clear empirical evidence, is quoted in: Michelson, “Unhooking from the State: Chinese Lawyers in Transition,” 264. Michelson is in turn quoted in: Ching Kwan Lee, *Livelihood Struggles and Market Reform: (Un)making Chinese Labour after State Socialism* (United Nations Research Institute for Social Development, 2005), 23, http://kms1.isn.ethz.ch/serviceengine/Files/ISN/38741/ipublicationdocument_singledocument/9033571c-4fe4-42bc-9547-f5a605464f11/en/OP+002.pdf; Ching Kwan Lee, “Workers and the Quest for Citizenship,” in *Reclaiming Chinese Society: The New Social Activism* (Taylor & Francis, 2010), 52, <http://books.google.com/books?hl=en&lr=&id=HSqR8XcyIz0C&oi=fnd&pg=PA42&dq=workers+and+the+quest+for+citizenship&ots=NRWM7QEUtc&sig=cUWGXt8r4je14IOI3Jo-A6z55uo>.

³¹⁷ Fu and Peerenboom, “A New Analytic Framework,” 1 (emphasis original).

circumstances,³¹⁸ use mediation to “promote their professionalized independence”³¹⁹ and sometimes strategically avoid confrontations with an eye to preserving and increasing their own power, status, and independence³²⁰. Nevertheless, even highly negative conceptions of China’s legal system are generally based in reality and when considering courts in China it is vital to keep in mind that a far greater number of players and factors are likely to impact the behaviour of a court than in more developed and independent legal systems. Courts, for example, do sometimes receive orders from the party-state not to accept certain types of cases which should otherwise be litigable.³²¹

Not all of the problems with Chinese courts are structural. Despite significant improvements over the past two or three decades, the quality of China’s judiciary is still inconsistent at best; this is both a reason and excuse for not allowing judges more independence. A lack of education and training is one of the biggest problems as “[t]hroughout the 1980s most of China’s judges came to their positions through transfer from Party and military posts. Most lacked a university education, and very few had received formal legal instruction.”³²² Building a modern legal system from scratch has meant that the number of laws, rules, and regulations in China has increased dramatically over the past couple decades and judges too frequently find themselves in the uncomfortable situation of needing to hear a case that revolves around new and

³¹⁸ Cho, “Symbiotic Neighbour or Extra-Court Judge?”

³¹⁹ Stéphanie Balme, “Local Courts in Gansu and Shaanxi: Quest for Independence and Dignity,” in *Judicial Independence in China*, ed. Randall Peerenboom (Cambridge, UK: Cambridge University Press, 2010), 171.

³²⁰ Randall Peerenboom, “Introduction,” in *Judicial Independence in China*, ed. Randall Peerenboom, 1st ed. (Cambridge, UK: Cambridge University Press, 2009), 15; Kinkel and Hurst, “Access to Justice in Post-Mao China,” 486–7.

³²¹ Ruan, “Politics of Administrative Litigation,” 78.

³²² Lubman, *Bird in a Cage*, 253.

unfamiliar laws.³²³ Although the education and training of judges has improved dramatically,³²⁴ many poorly trained judges are still in the system.³²⁵ Additionally, a lingering, or revived, emphasis on revolutionary principles such as mediation³²⁶ and the “mass line”³²⁷ may undermine legal reasoning and distract judges from their role as law-based adjudicators. In a weak echo of Mao-era campaigns and the Great Leap Forward, for example, judges were required to plant “trees as part of a greenification campaign.”³²⁸

Courts may also have a hard time retaining qualified personnel as judges’ salaries are relatively low, and serving in the courts may require living in undesirable and/or remote areas where courts are often run on shoe-string budgets³²⁹ and their salaries might even be contingent on their ability to raise money through fees and fines.³³⁰ Indeed, there may be a trend by which the most entrepreneurial judges are leaving the judiciary in order to enter private practice³³¹ where they are likely to earn far more. According to the 2007 survey of Chinese lawyers,³³² the median income of a lawyer who had previously been a judge was approximately 140,000 RMB a year. This compares favourably to judges whose salary in the same period would be somewhere in the 20,000-50,000

³²³ Interview: SH15S.

³²⁴ Liebman, “China’s Courts: Restricted Reform,” 625–6.

³²⁵ Lubman, *Bird in a Cage*, 253–257.

³²⁶ Palmer, “Controlling the State”; Palmer, “Compromising Courts and Harmonizing Ideologies”; Lubman, “Mao and Mediation.”

³²⁷ Qin Yang, “Judges’ Dilemma in China : Perspectives from Local People’s Courts,” in *The Chinese Judiciary in Practice* (presented at the The European China Law Studies Association Annual Conference, Sciences Po, Paris, 2011).

³²⁸ Peerenboom, *China’s Long March*, 331 endnote 6.

³²⁹ He, “Why Did They Not Take on the Disputes?,” 57.

³³⁰ Hung, “China’s WTO Commitment,” 96.

³³¹ Interview: XX10S.

³³² 2007 All-China Lawyers Association Survey, designed and administered by Ji Weidong a Professor at Shanghai Jiaotong University’s KoGuan Law School.

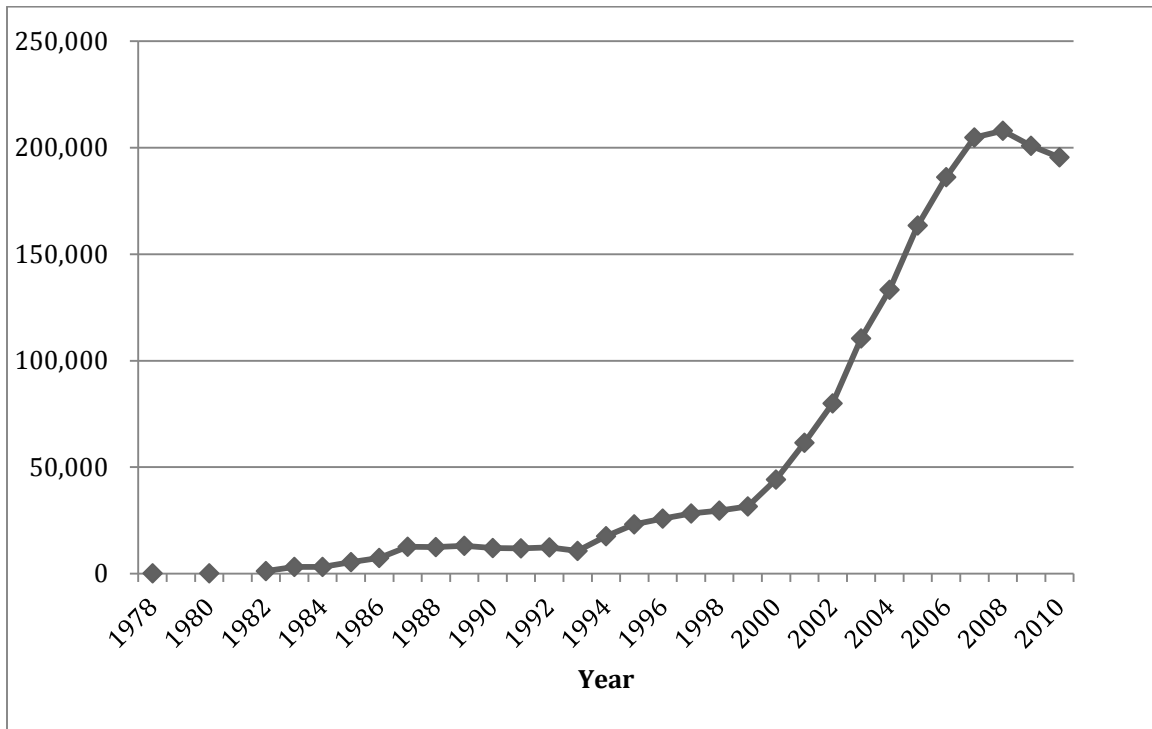
range³³³ and even to the median lawyer in that survey whose income was 100,000 RMB. In theory, judges who leave the court have to wait two years before they can practice as lawyers, but since judges tend to be well connected they are sometimes able to skirt this restriction.³³⁴ There also seems to be a tendency for officials in law-related departments such as judicial bureaus, procuratorates, and public security bureaus to become lawyers; my informants often cited the greater freedom this option granted.³³⁵ In this way vital parts of the legal system may be similarly drained of particularly talented and motivated officials.

³³³ These figures come from a former judge in Tianjin. Judges in more remote areas may earn significantly less. Interview: TJ-04P/J.

³³⁴ Interview: XX10S.

³³⁵ Interviews: BJ20S, NB09S, NB12N, NB15N.

Figure 2: Number of Students Completing Undergraduate Degrees in Law³³⁶



Educating competent judges is not only important for ensuring correct legal procedure and reasoning, but aids in the independence of the judiciary because “greater competence in the judiciary increases the ability of courts to resist external pressure by relying on legal arguments.”³³⁷ There are several good reasons to believe that the professionalism of judges has improved generally and substantially over the last three decades. Both in terms of quality and, as Figure 2 and Figure 3 demonstrate, quantity, legal education in China has increased dramatically over the past three decades and has begun to make up for the profound deficit in legal expertise that existed at the beginning

³³⁶ This excludes degrees granted by adult institutions of higher education and internet-based courses. China Statistical Yearbook Editorial Committee, *China Statistical Yearbook Various Years*.

³³⁷ Liebman, “China’s Courts: Restricted Reform,” 626.

of the reform era.³³⁸ State policies have increased education and training requirements³³⁹ and created early retirement opportunities for older generally less qualified judges in order to, in the euphemistic words of a retired judge who had never received a college degree “give some new graduates jobs”.³⁴⁰ Additionally, communication and networking between judges “may lead to more consistent application of the law”³⁴¹ and the development of a professional identity that assists judges “as they seek to combat interference from both within and outside the courts.”³⁴² In short, the quality of the Chinese judiciary has increased significantly during the reform era, though from an extremely low base.

³³⁸ Carl F. Minzner, “The Rise and Fall of Chinese Legal Education,” *Fordham International Law Journal* (2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2128151.

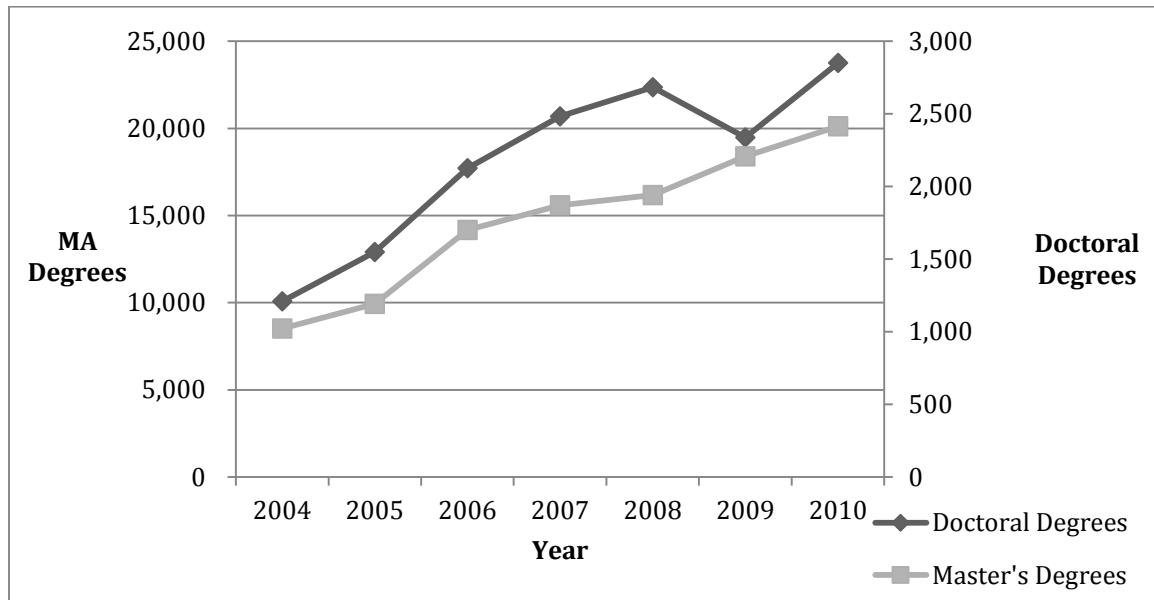
³³⁹ Liebman, “China’s Courts: Restricted Reform,” 625–6.

³⁴⁰ Interview: BJ02-J.

³⁴¹ Liebman, “China’s Courts: Restricted Reform,” 631.

³⁴² *Ibid.*

Figure 3: Number of Students Completing Graduate Degrees in Law³⁴³



Lawyers

Lawyers play a vital role by making legal systems legible to ordinary people. For this reason and others outlined in the introduction, this dissertation uses lawyers as a lens through which to understand when and how individuals and groups use legal institutions to challenge the Chinese state. While suing the state is problematic for ordinary Chinese, the situation would seem to be even worse for the lawyers who represent them. As the next two chapters show, administrative litigation can threaten the career, safety, and personal freedom of Chinese lawyers while offering little in terms of reward. Yet over the past two decades, Chinese lawyers have represented plaintiffs against the government in increasing numbers. Understanding the precarious but promising position of lawyers in contemporary China is vital for understanding not only the findings of this dissertation, but also for understanding the Chinese legal system and contemporary China as a whole.

³⁴³ China Statistical Yearbook Editorial Committee, *China Statistical Yearbook Various Years*.

Though they sometimes could serve the important function of helping average Chinese to access the justice of the state, Imperial China banned legal practitioners,³⁴⁴ treating them “...as scapegoats, unjustly blaming them for the high incidence of litigation that the understaffed Imperial judiciary was incapable of handling.”³⁴⁵ It is worth noting the contrast with the Roman Empire where, by the fifth century, lawyers were already well established, highly esteemed professionals with special privileges to plead cases before the courts.³⁴⁶ As with the legal system more generally, serious efforts to create a competent professional modern bar in the late Qing³⁴⁷ and Republican era³⁴⁸ had trouble taking hold in such chaotic and uncertain environments and there were probably no more than ten thousand lawyers in all of China before 1949.³⁴⁹ Lawyers enjoyed a brief honeymoon period in the beginning of the Communist era, but the anti-rightist campaign in 1957³⁵⁰ marked the beginning of lawyers being “degraded, frustrated, and trivialized for nearly three decades due to political campaigns.”³⁵¹ The legal profession began to revive in 1979 with the trial of the Gang of Four, but until new regulations on lawyers were passed in 1987, they were treated as administrative cadres little different than a

³⁴⁴ Melissa Macauley, *Social Power and Legal Culture: Litigation Masters in Late Imperial China* (Stanford University Press, 1998).

³⁴⁵ Peerenboom, *China's Long March*, 345.

³⁴⁶ A. H. M. Jones, *The Later Roman Empire, 284-602: A Social, Economic, and Administrative Survey. 2 Vol. Set* (The Johns Hopkins University Press, 1986), 507.

³⁴⁷ Huang, *Code, Custom, and Legal Practice in China*, 33, 38–39.

³⁴⁸ Alison W. Conner, “Lawyers and the Legal Profession During the Republican Period,” in *Civil Law in Qing and Republican China* (Stanford, CA: Stanford University Press, 1994), 215–48; Huang, *Code, Custom, and Legal Practice in China*, 43–6.

³⁴⁹ Huang, *Code, Custom, and Legal Practice in China*, 44.

³⁵⁰ Peerenboom, *China's Long March*, 347.

³⁵¹ Qizhi Luo, “Autonomy, Qualification and Professionalism of the PRC Bar,” *Columbia Journal of Asian Law* 12 (1998): 1.

court clerk or procurator.³⁵² Partly as a consequence of this fraught history, “lawyers in China struggle against a rather unsavoury reputation”³⁵³.

Since 1987, lawyers and law firms have gradually unhooked from the state,³⁵⁴ but China’s most experienced lawyers often have close ties with officials and departments that go back to the era in which law firms were owned and controlled by local judicial bureaus. Especially in less developed areas, some lawyers have had difficulty unhooking from the state. In many cities and towns the oldest law firms (sometimes the only law firm)³⁵⁵ still have their offices inside or adjacent to the judicial bureau that was the law firm’s direct superior in the era when it was state owned.³⁵⁶ In a vivid example, a law firm I visited in rural Hunan had never been able to follow the common path of privatising and adopting a partnership structure. Instead, the local judicial bureau kept it in a quasi-state-owned limbo and charges the firm 15,000 RMB to rent a closet in the judicial bureau that was neither needed nor used. Yet close connections do not always mean control. While the judicial bureau in this county clearly saw the firm as a source of rents, a lawyer at the firm told me that: “the judicial bureau does not pay any attention to us (司法局完全不管我们)”³⁵⁷.

³⁵² Ibid., 2.

³⁵³ Michelson, “Unhooking from the State: Chinese Lawyers in Transition,” 16.

³⁵⁴ Michelson, “Unhooking from the State: Chinese Lawyers in Transition.”

³⁵⁵ Interview: XX05S.

³⁵⁶ Interviews: XX07S, CS06S.

³⁵⁷ Interview: XX05s.

Figure 4: Law Firms and Full-Time Lawyers in China³⁵⁸

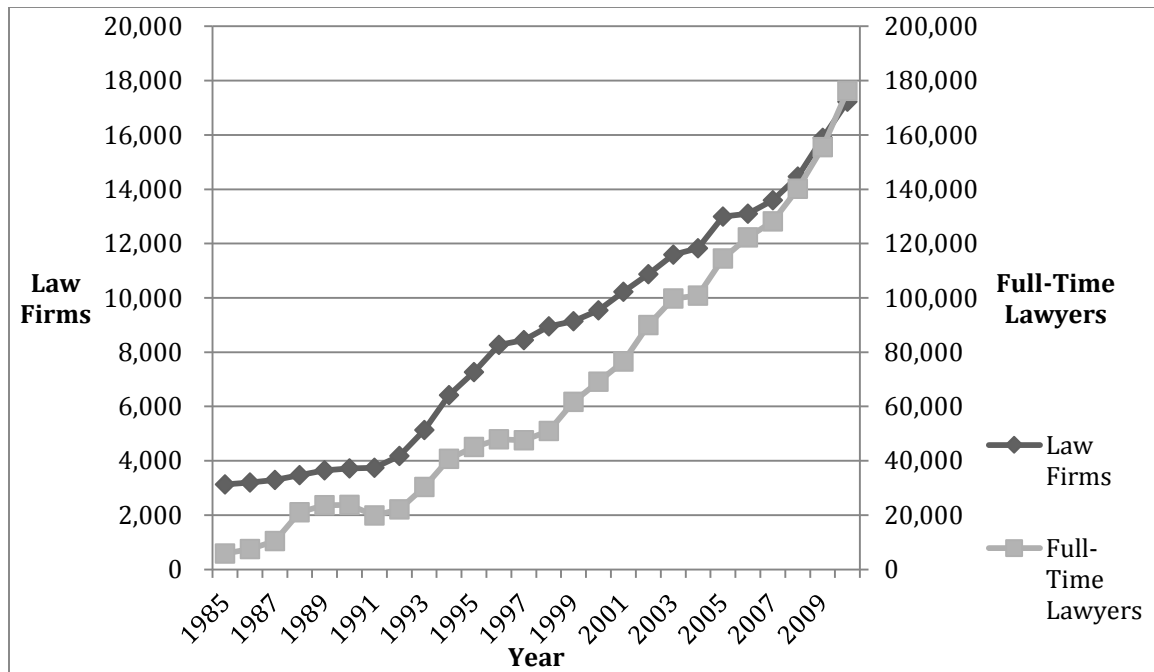


Figure 4 shows the dramatic increase in the number of law firms and full-time lawyers in China over the past 24 years. It also demonstrates that the average number of lawyers per law firm has stayed relatively steady at around ten, a number that is corroborated by the 2007 survey. Yet despite, or perhaps because of, this impressive increase, excellent sociological research paints a vivid picture in which many lawyers have difficulty scraping out a living and “failure to meet minimum billings quotas in any given year may contribute to high attrition and high lateral mobility between firms.”³⁵⁹

³⁵⁸ China Statistical Yearbook Editorial Committee, *China Statistical Yearbook Various Years*.

³⁵⁹ Michelson, “Unhooking from the State: Chinese Lawyers in Transition,” 248.

While a class of large prestigious Chinese firms are slowly emerging to meet the needs of foreign and domestic corporations,³⁶⁰ the vast majority of Chinese lawyers continue to work at relatively small and undistinguished firms. In dramatic contrast to their white shoe counterparts in the United States,³⁶¹ Chinese law firms are generally unimpressive affairs that tend to “have fewer desks than lawyers, and the desks that are available for lawyers tend to be shared”.³⁶² A lawyer who had been practicing for over two decades complained of lawyers so desperate they would “wait on the steps of the courthouse to solicit clients” and that the glut of lawyers had driven down prices and marred the reputation of the profession.³⁶³ While this six-fold increase in the number of lawyers in China has potential for plaintiffs, the market appears to be flooded with lawyers who are not necessarily well-trained, experienced, or needed in a country in which the legal system is still underdeveloped.

It is often said that he who represents himself has a fool for a client. As the next two chapters demonstrate, there is good reason to believe that lawyers are vital to plaintiffs in their efforts to challenge the Chinese state in court.³⁶⁴ “In one survey, having a good lawyer was rated a very important determinant of success by 83 percent of ALL plaintiffs.”³⁶⁵ Additionally, Table 1 suggests that my informants achieved a satisfactory

³⁶⁰ Sida Liu, “Globalization as Boundary-Blurring: International and Local Law Firms in China’s Corporate Law Market,” *Law & Society Review* 42, no. 4 (2008): 771–804, doi:10.1111/j.1540-5893.2008.00358.x.

³⁶¹ Elizabeth Chambliss, “The Shoe Still Fits: The White Buck Is Gone from Elite Law Firms, but the Snobbery It Represented Lives On,” *Legal Affairs*, 2005.

³⁶² Michelson, “Unhooking from the State: Chinese Lawyers in Transition,” 190.

³⁶³ Interview: BJ06N.

³⁶⁴ Though the only administrative court judge I was able to interview had a different opinion: “when most lawyers bring an administrative case they don’t really know what they are doing. They have never seen an administrative case before.” Interview: TJ04-P/J.

³⁶⁵ O’Brien and Li, “Suing the Local State,” 2005, 47.

outcome for plaintiffs in 45 per cent of their cases. As we shall see, this looks favourable compared to overall win rates, which averaged 23.8 per since 1993.³⁶⁶

Table 1: How Likely Are Lawyers to Win Administrative Cases?³⁶⁷

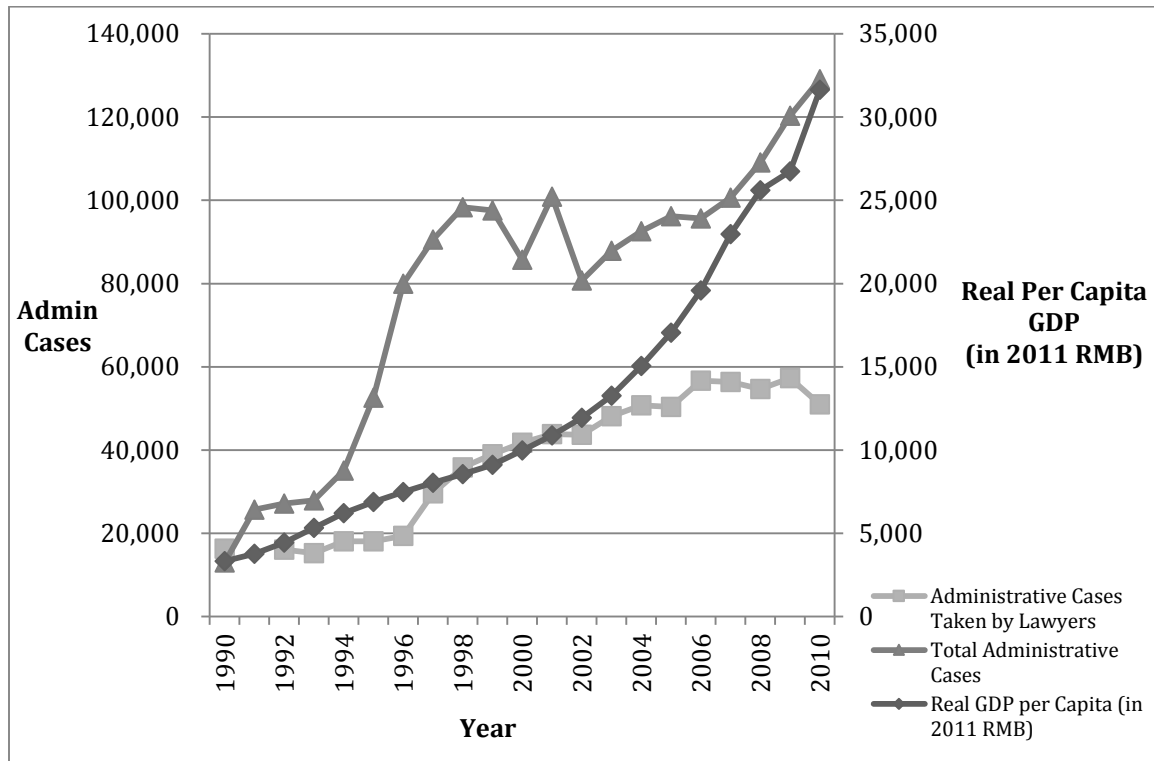
| In the last administrative case I represented... | # of Responses | % of Responses |
|---|-----------------------|-----------------------|
| the plaintiff achieved a satisfactory outcome | 20 | 45% |
| the government won | 24 | 55% |

Yet while being represented by a lawyer seems to improve one's chances of winning, Figure 5 shows that the number of administrative cases taken by lawyers has not kept pace with economic growth, the dramatic increase in the growth in administrative litigation, or the number of lawyers in China.

³⁶⁶ See Figure 8.

³⁶⁷ Throughout this dissertation I present tables such as this one, which present the number and percentage of responses provided by my randomly sampled informants. These tables include only those informants that gave a clear answer, and it should not be surprising that many tables reflect responses from fewer than half of my informants since many of them, like Chinese lawyers in general, have little or no experience with administrative litigation.

Figure 5: Administrative Cases and Economic Growth³⁶⁸



Since lawyers may represent the plaintiff, the defendant, or a third party in administrative litigation, Figure 5 reveals that lawyers represent well under half of all administrative plaintiffs. In some ways the situation is not as dire as this suggests. The first year the ALL was in effect, lawyers' participation in administrative litigation was already over sixteen thousand cases and has increased over threefold since then. Expecting these numbers to keep up with the nine-fold increase visible in both China's GDP per capita and overall administrative litigation is a tall order, especially considering that growth in administrative litigation actually outstripped the prodigious growth in the number of lawyers during this period.³⁶⁹ While lawyers' participation has failed to keep up with growth in the total number of lawyers, it takes years for a novice lawyer to become

³⁶⁸ China Statistical Yearbook Editorial Committee, *China Statistical Yearbook Various Years*.

³⁶⁹ *Ibid.*

proficient enough to litigate any reasonable number of cases, especially in a field as difficult and specialized as administrative litigation. Perhaps most tellingly, lawyers still participate in a higher percentage of administrative than civil,³⁷⁰ or criminal cases.³⁷¹ While many plaintiffs do without lawyers in administrative cases, the situation may improve over time as the recent surge of law graduates develop the skills and experience necessary to handle administrative cases.

Michelson has demonstrated significant gender inequality in the Chinese legal profession and traced this back to a gender gap in work experience.³⁷² Yet gender, or at least the gender of lawyers, does not have much of a role to play in Chinese administrative litigation. There does not seem to be a significant difference in male and female lawyers' relative participation in administrative cases. Similarly, ethnicity did not appear to be a significant issue. While it might be a more important in Xinjiang or areas with large Tibetan populations, even in my two field sites in areas with substantial minority populations, ethnicity had little relevance. Perhaps divisions of gender and ethnicity lose some of their salience in the face of the overwhelming division between the Chinese state and its citizens. With respect to their ability to influence the state, all ordinary Chinese are disenfranchised, regardless of gender or race.

Administrative Law in China

The Administrative Litigation Law of the People's Republic of China (中华人民共和国行政诉讼法) was passed on April 4, 1989, separated from the beginning of the

³⁷⁰ See Figure 11.

³⁷¹ China Statistical Yearbook Editorial Committee, *China Statistical Yearbook Various Years*.

³⁷² Ethan Michelson, "Gender Inequality in the Chinese Legal Profession," *Research in the Sociology of Work* 19 (2009): 337–76.

famous Tiananmen protests by just 11 days and two hundred meters.³⁷³ The law had been foreshadowed by Article 3 of the Civil Procedure Law of 1982 which opened the door for litigation against the state³⁷⁴ and by 1988 there were “more than 130 laws and regulations that allowed citizens and organisations that refused to accept the handling of administrative organs to sue in court”³⁷⁵. Perhaps due to an increased need to create the appearance of “governing according to the law (*yifazhiguo* 依法治国)”³⁷⁶ following the Tiananmen massacre, those events did not derail its progress and the ALL came into effect in 1990. The Law and its predecessors meant that for the first time in decades, the Chinese state was acknowledging formal restrictions on its power.

Perhaps even more importantly, the law gives individuals and groups in society a significant if still fairly limited power to hold the state to the restrictions it has placed on itself in the form of laws and administrative regulations, and to legally challenge state actions that violate them. A classic principle in Anglo-American law sometimes goes by the shorthand “no remedy no right”³⁷⁷ and Blackstone’s famous iteration of the concept is repeated in *Madison v. Marbury*³⁷⁸: “it is a settled and invariable principle in the laws of England, that every right when withheld must have a remedy, and every injury its proper redress.”³⁷⁹ From this point of view, until the PRC not only passed laws but set up administrative courts with the power to provide remedies, Chinese citizens had no meaningful rights.

³⁷³ Marshall, “A Process of Justice,” 1.

³⁷⁴ Pei, “Citizens V. Mandarins,” 833.

³⁷⁵ 甘重斗 Gan Chongdou, ed., *China Legal Yearbook 中国法律年鉴 1989* (China Legal Press 法律出版社, 1989), 9.

³⁷⁶ See Chapter Four in: Peerenboom, *China’s Long March*.

³⁷⁷ Frederick Pollock, “The Continuity of the Common Law,” *Harvard Law Review* 11, no. 7 (1898): 424.

³⁷⁸ John Marshall, *Marbury v. Madison* (Opinion of the Court), 100 U.S. 1 (U.S. Supreme Court 1803).

³⁷⁹ William Blackstone, *Commentaries On The Laws Of England* (Clarendon Press, 1768), 109.

The existing scholarship suggests that there are “amazingly few [ALL] cases relative to the total number of specific administrative acts.”³⁸⁰ As a supporting example Peerenboom, cited by O’Brien and Li, point to 1991 Harbin in which 0.1 per cent of 88,319 fines and penalties were challenged in court.³⁸¹ Leaving aside that this was only one year after the ALL was implemented, it is unclear if the percentage of cases is low relative to other contexts or if this is a truly useful way to gauge the appropriate level of litigation and the health of the system. Over 100 million people in the United States pay federal income tax every year, but the number of tax cases filed with the US Federal Courts is in the low ten thousands.³⁸² This means that less than .05 per cent of those taxed by the US Internal Revenue Service bother to challenge their taxes in court. By contrast, in 1998 China accepted 879 administrative cases related to re-education through labour,³⁸³ which amounts to administrative litigation challenges of somewhere over .5 per cent of the more than 100,000 people sentenced to re-education through labour that year.³⁸⁴ Finally, Figure 5 demonstrates that the total number of administrative cases has actually managed to narrowly outpace growth in per capita GDP, a staggering accomplishment in an economy growing as fast as China’s.

The supposedly low number of administrative cases is surprising to scholars partially because it is in a context where other legal and formal options for challenging the state, such as aggressive press coverage, activist organising, or voting leaders out of office, tend to be difficult or non-existent. In almost any context, system or culture, going

³⁸⁰ Peerenboom, *China’s Long March*, 404.

³⁸¹ Ibid.; O’Brien and Li, “Suing the Local State,” 2005, 46.

³⁸² Leandra Lederman, “Equity and the Article I Court: Is the Tax Court’s Exercise of Equitable Powers Constitutional,” *Florida Tax Review* 5 (2002 2001): 366.

³⁸³ Supreme People’s Court Research Office, *People’s Court Justice Statistics*, 342.

³⁸⁴ Human Rights Watch, *Reeducation Through Labor in China*.

to court is, and should be, a last resort³⁸⁵ and even though it is one of the only viable formal options for redress against the state, it cannot possibly hope to make up for all the insufficiencies of China's politico-legal system.

The PRC publishes official statistics on administrative litigation in China divided by which department is the defendant in the case. This gives us a useful, if less than complete, picture of the substantive issues behind administrative litigation. As Figure 6 clearly shows, the three departments sued most frequently are Public Security, Land, and City Planning. Together these three types of cases make up just over 50 per cent of Administrative litigation since 1998 with the "Other" category making up about 38 per cent. Combined, cases in Figure 7 against the departments of Industry and Commerce, Traffic and Transportation, Tax, Environmental Protection barely make up 10 per cent of cases.³⁸⁶

³⁸⁵ Laura Nader and Harry F. Jr. Todd, *The Disputing Process - Law in Ten Societies* (New York: Columbia University Press, 1978).

³⁸⁶ Although statistics for environmental and health cases are only available starting in 1999.

Figure 6: More Common Categories of Administrative Cases³⁸⁷

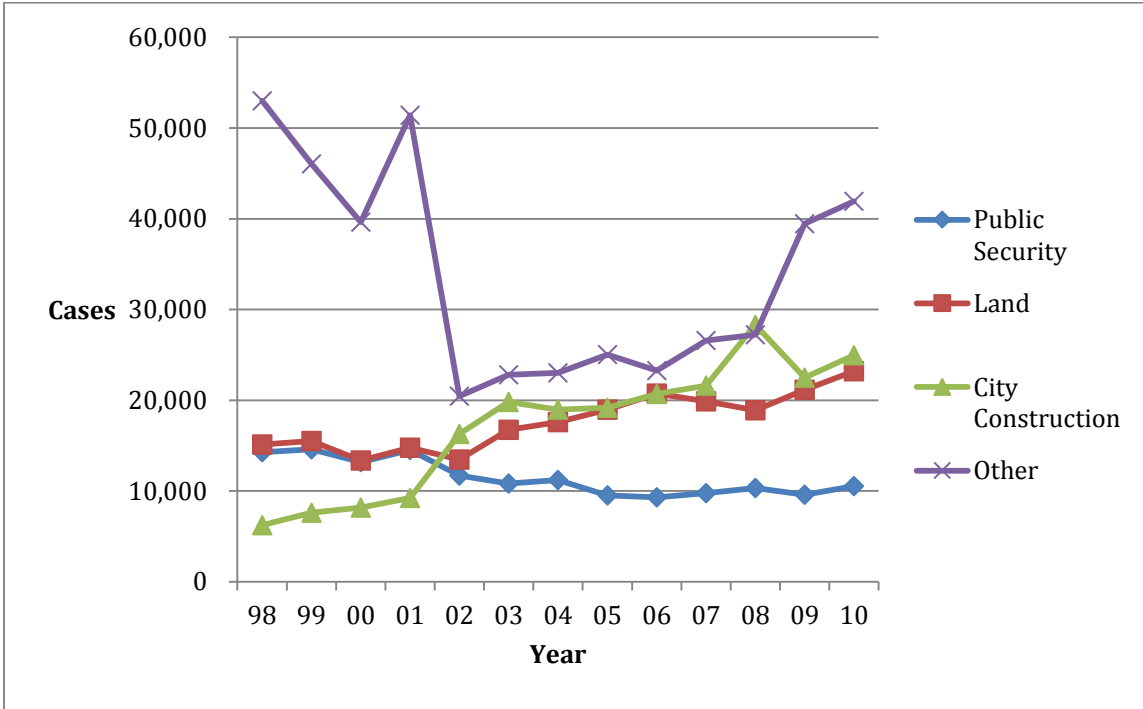
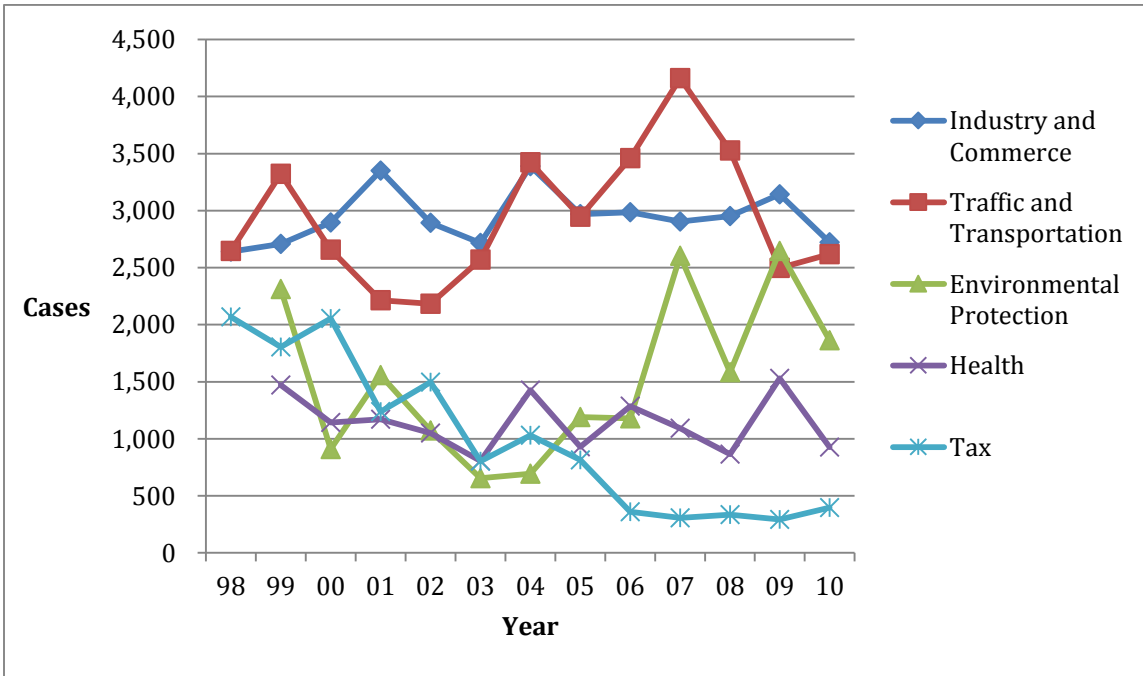


Figure 7: Less Common Categories of Administrative Cases³⁸⁸



³⁸⁷ China Statistical Yearbook Editorial Committee, *China Statistical Yearbook Various Years*.

³⁸⁸ Ibid.

While the “Other” category is vague, it is not as opaque as it might appear. By 1997, administrative cases were divided into over 50 categories and involved almost every type of department.³⁸⁹ While some of these may be cases that the government would like to keep out of public view, there are two good reasons to believe that the large “Other” category is not the result of an authoritarian desire to obscure sensitive data. First, the most sensitive types of cases are already listed, especially land, public security, city construction and, at least in some places, family planning. Second, even in much less sensitive fields, official statistics published by the Chinese state tend to be incomplete and the categories can vary from year to year. It is therefore not surprising that they do not consistently publish over 50 categories.

Nor can one assume that all cases in a sensitive category are particularly controversial. Even litigation against China’s feared Public Security Bureau (PSB) can be mundane rather than disastrous. In an example recalled by an experienced Lanzhou lawyer, a mother wanted to change the surname of her child of whom she had sole custody. The local PSB refused, explaining that this required the permission of both parents; the child’s father would not consent to the change. She found a friend to connect her with a law firm in the provincial capital, 100 kilometres away. This lawyer explained to the mother that the regulation was very clear and that she probably would not win a suit challenging the PSB, but she wanted to litigate anyway. The socially obligated lawyer represented her for 2,000 RMB (US\$240), a fee that might have been significant to the plaintiff, but, considering that the case took about twenty hours of the lawyer’s

³⁸⁹ 罗锋 Luo Feng, *China Legal Yearbook 中国法律年鉴 2007* (China Legal Press 法律出版社, 2007), 134.

time, his effective hourly rate would have been a meagre 100RMB (US\$12) before costs. The courts and PSB accepted the suit without incident. The case took about 4 months, 4 hours in court and the plaintiff lost, yet did not appeal.³⁹⁰ This case demonstrates many common but underreported characteristics of administrative litigation that are addressed in this dissertation: the use of social connections to find and hire a lawyer, unprofitable lawyer's fees, a lack of strong legal understanding on the part of the plaintiff, the relative indifference of an administrative organ to being sued, a decision against a plaintiff on valid legal grounds, and a plaintiff more or less satisfied, even with a loss. Of course, there are reasons that such cases attract little attention – it is unremarkable that a plaintiff in administrative litigation, “the weaker party (弱势群体) in 99% of cases”³⁹¹, should lose a weak case. Yet, such cases are important for developing a complete and representative picture of administrative litigation in China.

Another important aspect of administrative litigation is a widespread lack of expertise in administrative law. This is in large part due to a more general lack of specialisation in the Chinese legal system and, in the case of lawyers, a result of how little money there is in taking on administrative cases. A particularly pithy iteration of a sentiment often repeated by my informants held that: “a lawyer specializing in administrative law would quickly starve to death (专门搞行政诉讼的律师快会饿死了).”³⁹² While administrative law is a required course in Chinese law school, neither

³⁹⁰ Interview: LZ03-L.

³⁹¹ Interview: BJ21S.

³⁹² Interview: TJ04-P/J. As we shall see in the next chapter, this is not precisely true as at least one lawyer in China makes a very impressive living only representing plaintiffs in administrative cases and such administrative cases produce substantial profits for a small number of other lawyers throughout China, especially when they represent the state. Nevertheless, the sentiment that administrative cases are unprofitable and therefore few lawyers specialize in them is, generally speaking, correct.

lawyers nor judges are “terribly well educated in administrative law. Although you could get your master’s degree in administrative law, very few judges or lawyers do.”³⁹³

Additional difficulty comes from the fact that, although the ALL itself is straightforward and reasonably familiar to most lawyers, the next chapter will show that administrative cases are generally argued and won or lost on the grounds of administrative rules or regulations that are not taught in law schools, and are completely foreign to the majority of legal professionals. The next chapter describes the lawyers who have developed expertise in administrative law and demonstrates that they are a small minority. Similarly, when they are appointed to an administrative chamber, judges often have little or no experience in administrative law and are likely to be transferred to a civil or criminal chamber after just a couple of years.³⁹⁴ Whether or not that is the intention, rotating judges in and out of administrative courts may make it easier for the state to influence them since judges with more rather than less experience and expertise in administrative law would be in a better position to construct and elaborate the legal reasoning required to resist political pressure.³⁹⁵ Even if a plaintiff is savvy enough to seek an experienced administrative litigator, the technical competence of administrative judges is very uneven.

“[S]ince administrative agencies alone may interpret and determine the inherent validity of their own regulation, the courts may declare administrative action invalid only when the agency has violated its own rules”.³⁹⁶ This is both one of the most significant opportunities and obstacles for administrative litigation. Chinese administrative agencies

³⁹³ Interview: TJ04-P/J.

³⁹⁴ Interview: TJ04-P/J.

³⁹⁵ Liebman, “China’s Courts: Restricted Reform,” 626, 631.

³⁹⁶ Lubman, *Bird in a Cage*, 207.

often fail to comply with their own rules, regulations, and interpretations, and even if they do, “different departments all have their own regulations, there are a lot of regulations (法规比较多), and different levels have different rules that contradict [one another].”³⁹⁷ For a savvy administrative litigator this “disorder (乱)”³⁹⁸ of overlapping regulations means “you only have to find a loophole in the government action.”³⁹⁹ On the other hand, if administrative departments make a careful effort in drafting and abiding by their rules, they are able to give even radically authoritarian actions a veneer of legality, since courts tend to give the state the benefit of the doubt⁴⁰⁰ and “may inquire into only the legality of administrative actions, not the appropriateness within the discretion of the agency involved”⁴⁰¹. The situation may be indeed moving in that direction, away from officials ignoring administrative litigation or using extra-legal means to resist it and towards using the law itself to avoid litigation or winning through legal argument and evidence (though they may not be above hiding or forging evidence).⁴⁰² While this may prove a big gain for the rule of law, I will suggest that it has negatively impacted plaintiffs’ chances of winning cases.

Alternatives to Litigation

There are two major formal alternatives to administrative litigation, the letters and visits system (*xinfang* 信访) and administrative reconsideration (a.k.a. administrative review, *xingzhengfuyi* 行政复议). Administrative review, which is compared with

³⁹⁷ Interview: NB16S.

³⁹⁸ Interview: NB15N.

³⁹⁹ Interview: SH08S.

⁴⁰⁰ Interview: SH08S.

⁴⁰¹ Lubman, *Bird in a Cage*, 207.

⁴⁰² Interview: TJ02/3-L.

administrative litigation in Chapter Five, is a system by which an administrative action is evaluated by the direct superior of the issuing department. So, for example, a rural villager unhappy with a decision from his county land bureau would file for administrative review with the prefectural land bureau. Adopted in the wake of the ALL in an effort to stave off litigation,⁴⁰³ my informants generally suggested that administrative review was less effective than litigation, unless “your request happens to fall on the ears of a particularly enlightened official, then it saves you the trouble of litigating.”⁴⁰⁴ Its perceived lack of effectiveness is demonstrated by the fact that even though “it is cheaper,”⁴⁰⁵ “faster,”⁴⁰⁶ “easier,”⁴⁰⁷ less confrontational,⁴⁰⁸ and has a greater scope than administrative litigation, it is less popular.⁴⁰⁹

There are a few factors that appear to undermine the effectiveness of administrative review. First, “officials protect each other (官官相护),” so that “the upper level just protects the lower level,”⁴¹⁰ instead of impartially evaluating the action. Second, if a reviewing department does modify a subordinate department’s decision then it would become the defendant in any subsequent litigation. In the words of one litigator, “usually administrative reconsideration is not useful (一般没用). The higher level of government usually is not willing to correct its subordinates because if it does and the plaintiff is not

⁴⁰³ Marshall, “A Process of Justice,” 87.

⁴⁰⁴ Interview: BJ08S.

⁴⁰⁵ Interview: NB13S, XX01S.

⁴⁰⁶ Interview: CS12S.

⁴⁰⁷ Interview: CS17S.

⁴⁰⁸ Marshall, “A Process of Justice,” 88.

⁴⁰⁹ Zhang, “The Xinfang Phenomenon,” 9–10.

⁴¹⁰ Interview: NB20S.

satisfied then it will be the defendant in the lawsuit. So they usually maintain the decision. This way the higher level of government won't become the defendant.”⁴¹¹

Lawyers often assist clients in filing administrative review requests, although in many instances only because in certain types of cases it is a prerequisite for administrative litigation.⁴¹² A slim majority of my informants recommend clients go through the process before litigating, if only to exhaust all options⁴¹³ or make a good faith show of having done so⁴¹⁴. While my informants seemed to confirm the general impression of administrative review as reasonably ineffective, especially in comparison to litigation, many lawyers felt that administrative review had its place and advantages. One lawyer explained that “the higher level of government reviewing understands its own subordinates’ procedures better than the court,”⁴¹⁵ while a lawyer from a much less developed region suggested the opposite: “with administrative review you do not get the most ideal outcome (理想效果) because the administrative departments do not understand the law as well [as the courts].”⁴¹⁶ Another view was that it “may be faster, simpler, and more reasonable (比较合理). In administrative review, the government may well be willing to correct very obvious mistakes.”⁴¹⁷ One lawyer I spoke with had used administrative review to recover 700,000 RMB (approximately US\$100,000)⁴¹⁸ for a company in a tax dispute.⁴¹⁹

⁴¹¹ Interview: BJ21S.

⁴¹² Interview: BJ04S, BJ24S, NB22S.

⁴¹³ Interviews: BJ15N, SH06S, SH08S, CS04S.

⁴¹⁴ Interviews: BJ03N, BJ08, BJ25N.

⁴¹⁵ Interview: NB03N.

⁴¹⁶ Interviews: XX04S.

⁴¹⁷ Interview: NB07S.

⁴¹⁸ Throughout this dissertation, I will attempt to provide US dollar approximations of RMB amounts, which take into account the exchange rate during the relevant period.

⁴¹⁹ Interview: SH03S.

Compared to both administrative reconsideration and litigation, the system known as “letters and visits” *xinfang* (信访) is fantastically popular and very frequently employed with annual petitions filed numbering in the millions.⁴²⁰ This direct comparison is somewhat misleading as *xinfang* is a highly informal process by which complaints of all kinds may be brought to any department at any level, in person, over the phone, or by letter. Many *xinfang* cases are private disputes that would be more accurately compared to civil litigation. Others simply would not be litigable. Finally, in many cases the stakes may be too low or complainants may not care enough to proceed beyond filing a petition.

While actually submitting a complaint to a *xinfang* department is free, some petitioners invest huge amounts of time and effort in their petitions, traveling thousands of miles to personally submit their complaints in Beijing.⁴²¹ In part due to its informality and in part because the process is very costly in terms of time and effort, lawyers rarely assist clients with petitions, although they sometimes provide basic advice and guidance.⁴²²

Table 2: Recommending *Xinfang*

| Would you recommend clients pursue <i>xinfang</i>? | # of Responses | % of Responses |
|--|-----------------------|-----------------------|
| no opinion | 9 | 8% |
| would not recommend it | 22 | 18% |
| leave it up to the clients to decide | 19 | 16% |
| only if litigation has failed or the case isn't litigable | 17 | 14% |
| would recommend it | 31 | 26% |

⁴²⁰ Minzner, “Xinfang: An Alternative to Formal Chinese Legal Institutions,” 104; Zhang, “The Xinfang Phenomenon,” 4.

⁴²¹ “Petitioners’ Village in Beijing Razed as China’s Communists Vow Harmony,” *Google News*, accessed October 28, 2012, <http://afp.google.com/article/ALeqM5je5BHTLeUsGN7GVUAWF92C2Ma9A>.

⁴²² Interview: SH03S.

As Table 2 demonstrates *Xinfang* is not generally recommended by lawyers, or is recommended in cases in which the administrative litigation and review are exhausted, expired, or do not apply. In the words of one Beijing lawyer: “people pursue legal channels first, then try *xinfang*; so it is a marker of hopeless cases.”⁴²³ While this dissertation is focused on the procedures and practices of administrative litigation itself, it is worth noting that administrative litigation often occurs only after administrative reconsideration, and that plaintiffs may engage in *xinfang* before, during and long after many administrative cases have been lost.

Filing Cases

The literature on administrative litigation paints a particularly grim picture when it comes to the filing of administrative cases. Nevertheless, administrative cases are, as the statistics plainly show, regularly accepted by China’s courts.

In China’s legal system, civil, administrative, and some criminal cases must be submitted to the court through the case filing division (*li’anting* 立案庭), the pivotal gate-keeping role of which has finally been addressed in a recent article.⁴²⁴ Physically, the *li’anting* is usually a waiting room with windows where judges sit and receive cases, very much like Social Security Offices in the US, visa offices in Hong Kong, or any type of government office where citizens tend to feel neglected or abused at the hands of capricious bureaucrats. Anyone wishing to have a case heard by the court must come to the *li’anting* with all the necessary documentation, take a number, wait for it to be called,

⁴²³ Interview: BJ03N.

⁴²⁴ Nanping Liu and Michelle Liu, “Justice Without Judges: The Case Filing Division in the People’s Republic of China,” *U.C. Davis Journal of International Law & Policy* 17 (2011): 283–345.

and then present the documents and forms to one of the filing judges. The judges may accept or reject it on the spot with or without an explanation, or tell the applicant they will have to wait for a response. To an extent, it is simply this painfully bureaucratic style of case filing in China that gives it such a bad reputation. One very experienced lawyer, said that she did not like the *li'anting* due to its unnecessarily strict requirements. She gave the example of civil suits, where one must provide a copy of the *defendant's* ID card, an onerous and seemingly unnecessary requirement.⁴²⁵ Additionally, some lawyers felt that the *li'anting* “is a lower quality department of the courts (法院部门素质比较差的部门) where they tend to send older or less professional judges.”⁴²⁶

Although the literature overstates the difficulties of getting an administrative case accepted,⁴²⁷ the case filing phase is a convenient bottleneck where particularly controversial cases may be stopped. Both this and the frustratingly arbitrary and unprofessional manner in which case filings may be handled are illustrated by a well-reported incident:

“On March 28, 2006, [Beijing Lawyer] Wang Lin went to file a collective administrative lawsuit against the government construction bureau at the Tianjin Nankai District court. He was accompanied by 11 plaintiffs who were challenging a decision from the Tianjin Construction Bureau to evict them, arguing that the scope of an eviction order granted two years ago had been broadened without permission to encompass their homes. The vice-head of the administrative court refused to accept the filing of the case, asserting that the plaintiffs needed to file individual cases, not a collective one. Wang suggested that he would do so, but the court official replied, ‘Even if you file plaintiff by plaintiff we won’t lodge this case.’ Wang asked for a written court document to that effect, which the official refused as well. ‘I am the court and the court is me. If I say no filing, that means no filing,’ the official told Wang. In the heated discussion that followed, the official tried to punch Wang, and then shoved him outside the court, grabbing him by the back of the neck and warning him: ‘Be careful when walking in the street at night.’”⁴²⁸

⁴²⁵ Interview CS05S.

⁴²⁶ Interview: BJ10N.

⁴²⁷ For example, see: Lubman, *Bird in a Cage*, 207; O’Brien and Li, “Suing the Local State,” 2005, 35–6; Peerenboom, *China’s Long March*, 420, 440.

⁴²⁸ Human Rights Watch, *Walking on Thin Ice*, 42.

While incidents this dramatic are rare, my research corroborates the idea that administrative litigation can be stymied by “internal orders forbidding courts to accept suits on sensitive matters.”⁴²⁹ Law firms may be similarly warned not to accept certain kinds of cases.⁴³⁰

There is tremendous variability in terms of getting administrative cases accepted. Some *li'anting* “are pretty strict, sometimes they pre-judge cases, saying ‘you are going to lose don’t bother’. Sometimes they are very casual (随便), and just take a case without really looking at it.”⁴³¹ In general, however, “they take longer and are more careful with administrative cases.”⁴³² One lawyer complained to me that “we were supposed to receive a *li'anting* decision within a week but it has been three.”⁴³³ Whereas civil cases are often accepted on the spot, administrative cases may be delayed so that the accepting judge has time to clear the case with the court President, Vice-President, adjudication committee, and/or some power outside the court.

Yet other lawyers, especially those with good connections to the court, tend to find the *li'anting* to be a simple formality, as case filing is in most developed legal systems. This fits into a larger trend in China’s legal system,⁴³⁴ in which “connections (关系) may not significantly affect the outcome of the case, but they dramatically affect the convenience of handling the case,” something a well connected lawyer explained to me as he casually handed five cases to his secretary to file with the *li'anting*.⁴³⁵ Another

⁴²⁹ O’Brien and Li, “Suing the Local State,” 2005, 35.

⁴³⁰ Interview: BJ01-P.

⁴³¹ Interview: NB17S.

⁴³² Interview: NB17S.

⁴³³ Interview: CS19N.

⁴³⁴ Interview: SH11N.

⁴³⁵ Interview: NB22S.

lawyer told me that “in [my hometown in] Anhui no judge would ever not accept my case, since I knew the judges.”⁴³⁶

Many of the supposed difficulties of case filing outlined in the literature do not seem to have a significant impact on the ground. Peerenboom, for example, claims that “the CCP, the Procuracy, state-owned enterprises, and quasi administrative units (*shiye-danwei* – such as state universities and various departments of agencies that do not have independent accounting) are not considered administrative entities under the ALL and hence are not subject to administrative litigation.”⁴³⁷ Yet, administrative litigation against universities has not only proved possible, but “less problematic than suing local governments,” with universities becoming important targets for pioneering administrative litigation.⁴³⁸ And state-owned enterprises may, depending on the circumstances, be sued by either civil or administrative action.⁴³⁹ While the CCP does appear to be immune to administrative litigation, O’Brien and Li’s assertion that “[l]ocal authorities sometimes try to use this overlap and the Party’s immunity to deflect lawsuits,” appears unfounded. Not a single informant with whom I spoke mentioned the inability to sue the party as a significant problem. Even O’Brien and Li recognize that “since Party officials must formally act through government organs when, for instance, they detain a person, this loophole may not be as large as it appears.”⁴⁴⁰ Despite this, their assertion that the Party’s immunity from litigation is a problem is reflexively repeated in academic work on

⁴³⁶ Interview: BJ21S.

⁴³⁷ Peerenboom, *China’s Long March*, 420.

⁴³⁸ Kellogg, “‘Courageous Explorers?’”.

⁴³⁹ 姜明安 Jiang Mingan, “Implementing Policy-Based Closure of State-Owned Enterprises and How to Protect Workers Rights and Interests 对国有企业实施政策性关闭如何保障企业职工权益?,” *Peking University Law Information Web 北大法律信息网*, accessed November 27, 2012, http://article.chinalawinfo.com/Article_Detail.asp?ArticleId=28096.

⁴⁴⁰ O’Brien and Li, “Suing the Local State,” 2005 footnote 21.

administrative litigation⁴⁴¹ and other subjects⁴⁴². Nor does it make much sense to argue that “courts often try to avoid accepting administrative cases because fees are low in comparison to civil and economic cases, and they also take a long time to complete, which could be a black mark on the judge’s record.”⁴⁴³ Judges typically deal exclusively with administrative cases while assigned to an administrative chamber,⁴⁴⁴ whether civil cases would generate more fees or take less time, therefore, would seem to be irrelevant. In fact, judges assigned to administrative courts may well feel pressure to take more administrative cases in order to look productive and generate fees in generally less busy administrative chambers.⁴⁴⁵

In the words of a retired administrative court judge: “it is not as hard as people think to get cases accepted, but when most lawyers bring a case they don’t really know what they are doing. They have never seen an administrative case before. About 90% of cases are probably accepted. If they are rejected it is because they are outside of the purview of administrative litigation, or outside of the judges’ understanding.”⁴⁴⁶ Overall, as compared to civil cases, successfully filing an administrative case is relatively more difficult, but hardly an uncommon occurrence.

Abstract Administrative Acts

In a case against a district Labour and Social Security Bureau (劳动社会保障局), a Beijing administrative court found that a migrant labourer was ineligible for social

⁴⁴¹ Ohnesorge, “Chinese Administrative Law in the Northeast Asian Mirror,” 147.

⁴⁴² Benjamin Read, *Roots of the State: Neighborhood Organization and Social Networks in Beijing and Taipei* (Stanford University Press, 2012), 35.

⁴⁴³ Peerenboom, *China’s Long March*, 440 footnote 19.

⁴⁴⁴ Interview: TJ04-P/J.

⁴⁴⁵ He, “The Recent Decline in Economic Caseloads,” 370.

⁴⁴⁶ Interview: TJ04-P/J.

security because the employer had not registered him during the allowed period. Despite media scrutiny, an admission from the courts that the underlying rule was unreasonable, and the fact that the case was “hotly debated (辩论的很厉害),” the verdict was that the administrative action had correctly applied the relevant regulation.⁴⁴⁷ This case demonstrates one of administrative litigation’s greatest weaknesses, its inability to challenge the regulations, rules, or laws that underlie an administrative decision. To a degree, this limits the effectiveness of administrative law as a tool for enacting sweeping change in the manner of *Brown vs. Board of Education*.

There are three reasons that the inability to challenge administrative actions in the abstract is not as problematic as it might first appear. First, “China is not unique in providing inherent authority to the executive branch or local governments or in denying the courts the authority to review abstract administrative acts.”⁴⁴⁸ Second, Chinese lawyers only occasionally cited lack of abstract review as a serious impediment to administrative litigation. In the most common types of administrative cases, land and housing expropriation, the issue in dispute is generally not an abstract one, but how the property was valued. As one lawyer put it: “people *will* not oppose the government’s right to expropriate land (拆迁) in the abstract.”⁴⁴⁹ Finally, even without formal precedent or the ability to declare certain laws invalid, administrative cases can still have wide ranging implications for the way a law will be interpreted.

An excellent example of the possible impact of administrative litigation despite its limitations comes from a public interest minded lawyer in Beijing. A local labour

⁴⁴⁷ Interview: BJ15N.

⁴⁴⁸ Peerenboom, “Globalization, Path Dependency and the Limits of Law,” 212.

⁴⁴⁹ Interview: NB02S.

department had denied the workers' compensation claim of a plaintiff who had been injured by an electric bicycle on his way to work even though the insurance would have covered the injuries had he been hit by a car. This issue was hotly debated because of the obvious danger posed by the rapidly increasing number of electric bicycles on the road. Despite what looked like long odds, the lawyer was able to win the case with the assistance of media scrutiny and a lacklustre performance from the defence. The result meant that electric bicycle injury claims are apparently readily accepted throughout China.⁴⁵⁰ This demonstrates the "soft precedential" nature of China's legal system. In future cases, courts are not required to rule the same way as this Beijing court did, but they are very likely to do so. More importantly, labour departments are unlikely to deny such claims, lest they, too, be sued and lose.⁴⁵¹ While this may be a far cry from *Brown vs. the Board of Education*, it does show that a single fiercely argued long-shot court case, at least when accompanied by media coverage, can have a significant impact.

Evidence

Another significant, but underreported impediment faced by lawyers and plaintiffs is the difficulty of obtaining evidence. Technically, in administrative cases the burden of proof is borne by the defendant.⁴⁵² This makes sense as government departments are in a much better position to provide evidence and should be able to prove that their actions were in compliance with the relevant laws and regulations. The reality is much more

⁴⁵⁰ Interview: BJ03N.

⁴⁵¹ As an official, getting sued and, especially, losing is generally considered to give a bad impression and may even hurt one's career. Interview: HK02-L. Also: Pei, "Citizens V. Mandarins," 844.

⁴⁵² Interview: BJ05S. Benjamin van Rooij, "People's Regulation: Citizens and Implementation of Law in China, The," *Columbia Journal of Asian Law* 25 (2012): 161.

problematic because “judges will protect the government if it is a grey area”⁴⁵³ and will not find against the state unless the plaintiff is able to bring a strong case. In the view of one Chinese lawyer, the problem with administrative litigation is not the state’s superior connections and influence, but that “you cannot get the evidence because the administrative department always presents you with very perfect looking evidence in their defence.”⁴⁵⁴ It is relatively easy for officials to produce a backdated or fabricated paper trail making the action look legal, and since officials are generally reluctant to allow access to any evidence that might reveal wrongdoing, it is extremely difficult to poke holes in the government’s defence or prove the illegality of their actions. Another Beijing lawyer with some experience in administrative litigation told me that “the government always has power and evidence that clients [plaintiffs] don’t have.”⁴⁵⁵ This is another area where a lawyer with experience in administrative litigation and close connections to the government is essential. Savvy administrative litigators do their best to collect evidence themselves before going to court rather than counting on the defendant to supply it.⁴⁵⁶ One very experienced lawyer was able to coach his client on how to sneak relevant documents out of a PSB office.⁴⁵⁷ Many less experienced lawyers and plaintiffs, however, find themselves unable to get cases off the ground due to lack of evidence.

One potential housing appropriation case from Shanghai illustrates the difficulties of collecting sufficient evidence. When residents of a condemned Shanghai apartment building refused to move after their utilities were illegally turned off, thugs showed up to

⁴⁵³ Interview: SH08S.

⁴⁵⁴ Interview: BJ10N.

⁴⁵⁵ Interview: BJ05S.

⁴⁵⁶ Interview: BJ15N, SH21S.

⁴⁵⁷ Interview: BJ28S.

assault residents who were holding out for more compensation. The disconnection of utilities and/or the beatings should have provided a powerful cause of action for administrative litigation, but since such actions are commonly carried out by unnamed thugs hired under the table (possibly by a third party) or non-uniformed and unidentified officials or police, it is often impossible to build a case. The resident who told me this story was a lawyer herself, and had sought an experienced administrative litigator to take her case. The administrative litigator was able to explain what kind of proof was necessary to litigate, in this case photographs of the people turning off the utilities. Since such photographs did not exist and because unidentified thugs had carried out all the illegal actions, he advised his clients that it was extremely unlikely that their case would meet with a successful outcome.⁴⁵⁸

Statute of Limitations

Nowhere is the gap between reality and academic literature on administrative litigation more evident than in the failure to address the importance of the statute of limitations in administrative litigation. Much of this dissertation suggests that the picture of administrative litigation in China is not as bleak as is presented in the literature. Yet despite its general tone of pessimism, the literature fails to address probably the most common obstacle to administrative litigation. Article 39 of the ALL states that, unless otherwise provided for by law, administrative litigation must be initiated “within three months from the day when the plaintiff comes to know that a specific administrative act

⁴⁵⁸ Interview: SH21S.

has been taken”⁴⁵⁹. Therefore, many potential plaintiffs do not seriously consider litigation until it is too late. This may be the most common reason for administrative cases to be dropped. As an extremely prolific administrative litigator explained, he “turns down several [administrative cases] *a day*. Most are too old, they spent a long time appealing to the higher authorities for help [*xinfang*] and the statute of limitations expires.”⁴⁶⁰ The statute of limitations was the central issue in a case where the plaintiff had attempted to file an administrative suit without the benefit of a lawyer and had apparently received no response. By the time the plaintiff had made his way to a law firm, the statute of limitations had long since passed.⁴⁶¹ This example shows how failure to hire a lawyer, the obstacle of case filing, and the short statute of limitations combine to derail many administrative cases.

Literature on administrative litigation and rule of law tends to focus on the failure of the Chinese state to pass adequate laws, allow judicial independence, and build strong legal institutions. On the other hand, defenders of rule of law in China tend to argue that many of the problems with China’s legal system are the result of environmental factors, such as a lack of “legal consciousness”, less directly under the control of the state and that these may be improving slowly.⁴⁶² That the statute of limitations is arguably the biggest obstacle to administrative justice in China actually supports the arguments of China’s defenders. Many developed countries and American states have similar or even shorter periods for filing administrative litigation or for suing the state. For example,

⁴⁵⁹ *Administrative Litigation Law*.

⁴⁶⁰ Interview: AL01-L.

⁴⁶¹ Interaction between a potential client and lawyer in Beijing, December 2010; the only client lawyer interaction regarding administrative litigation I managed to receive notes on from students interning at Beijing law firms.

⁴⁶² Peerenboom, *China’s Long March*.

New York State law requires notice to be filed within 90 days of an incident in order to sue a municipality or public agency,⁴⁶³ and under normal circumstances in the perennially punctual Federal Republic of Germany the time is 30 days.⁴⁶⁴ It would be difficult to argue, therefore, that China's statute of limitations is unreasonable.

Whether it is attributed to culturally Confucian emphasis on harmony⁴⁶⁵ or structural factors such as a lack of familiarity, litigation is often one of the last options considered by most Chinese.⁴⁶⁶ It is this reluctance that makes the short, but not unreasonable, statute of limitations so problematic. Many potential administrative cases become inadmissible while potential plaintiffs pursue other means of redress. The tendency of Chinese to first appeal to bilateral negotiation, informal relationships, village leaders, and/or state officials⁴⁶⁷ tends to let the statute of limitations expire long before a potential plaintiff ever sets foot in a lawyer's office or courthouse. In particular, the *xinfang* system, is both extremely popular and extremely time consuming. It seems likely that at least some Chinese officials understand this situation, but to date they seem satisfied to allow the situation to persist.

That the statute of limitations is such a major obstacle to administrative litigation in China should give hope to those who would see it become a widespread tool for challenging the Chinese state. Compared to major changes such as making the judiciary

⁴⁶³ "Filing a Notice of Claim Against a City, Town or Municipal Agency in New York," *New York Law Thoughts*, n.d., <http://nylawthoughts.com/2010/11/17/filing-a-notice-of-claim-against-a-city-town-or-municipal-agency-in-new-york/>.

⁴⁶⁴ Neil Mussett, *Code of Administrative Court Procedure of the Federal Republic of Germany*, 1991, http://www.gesetze-im-internet.de/englisch_vwgo/englisch_vwgo.html#p0329 Sections 58 and 70.

⁴⁶⁵ Several informants did make this argument. Interview: SH14-L, BJ28S.

⁴⁶⁶ Michelson, "Climbing the Dispute Pagoda: Grievances and Appeals to the Official Justice System in Rural China."

⁴⁶⁷ *Ibid.*

more independent or the constitution directly justiciable,⁴⁶⁸ extending the statute of limitations might prove a relatively uncontroversial change. Even without a change in the law, it may be hoped that a spreading “legal consciousness” and the rapidly increasing size of the Chinese bar will inspire more Chinese to consult a lawyer before it is too late.

Corruption

Corruption is often mentioned as serious problem in discussions of China’s legal system and my interviews corroborate the idea that this can be a significant factor in civil litigation.⁴⁶⁹ Yet corruption is rarely a significant factor in administrative cases, not because administrative judges are less corrupt or more independent, but rather because political concerns trump these issues. In other words, if the local state wins an administrative case, it is generally not because it bribed the court, but because it is so much more powerful. It is also important to keep in mind that China does not appear to be particularly corrupt for its level of development.⁴⁷⁰

My research findings largely accord with Hung’s assertion that in administrative cases “plaintiffs – the aggrieved parties – dare not bribe judges into ruling against administrative organs; whereas defendants – the administrative organs – need not bribe judges into declining administrative cases or ruling in favor of them because they may

⁴⁶⁸ Peerenboom, *China’s Long March*, 89.

⁴⁶⁹ One experienced litigator suggested, for example, that it is difficult to ensure pre-trial preservation of evidence if one lacks a close connection to the court and that he lost one big client as a result of his unwillingness to cultivate these connections. Interview: BJ09-L.

⁴⁷⁰ See for example: Transparency International, “Corruption Perceptions Index”; Daniel Kaufmann, Aart Kraay, and Massimo Mastruzzi, *Governance Matters IV: Governance Indicators for 1996-2004*, Policy Research Working Paper No. 3630 (World Bank, 2005); Daniel Kaufmann, Aart Kraay, and Massimo Mastruzzi, *Governance Matters VI: Governance Indicators for 1996-2006*, Policy Research Working Paper No. 4280 (World Bank, 2007).

attain this goal through interference.”⁴⁷¹ Yet, Hung also suggests that third parties⁴⁷² with a strong interest in an administrative case might bribe judges. I would agree that this is the most likely source of corruption, yet there are several good reasons to believe that even this is relatively uncommon. First, this was never suggested to me in any of my 178 interviews or other primary sources. Second, Hung’s suggestion is based on only one incident⁴⁷³ in which the bribe from a third party was cigarettes and 10 RMB (for taxi fare), and the judges refused.⁴⁷⁴ Third, third parties to administrative litigation are almost always on the side of the state. If the state feels the issue is important enough then it may exert political pressure on courts and third parties would have no need to throw money away on bribes. If the issue is not important enough, then there also seems to be little need for bribes. This is especially true because bribing Chinese judges has become an increasingly expensive and complex ordeal, very different from the incident Hung witnessed and perhaps more expensive than simply settling with the plaintiffs.⁴⁷⁵ None of this is to say that corruption is never a factor in administrative litigation in China, only that it takes a backseat to other considerations and is relatively less important than in civil cases.

Government Responses

It is undeniable that parts of the Chinese state may pursue a wide variety of legal, illegal, and extra-legal measures in order to ensure that an administrative case is not

⁴⁷¹ Hung, “China’s WTO Commitment,” 107.

⁴⁷² The role of third parties is examined more thoroughly in Chapter Five.

⁴⁷³ Hung, “China’s WTO Commitment,” 107.

⁴⁷⁴ There is a difference between small gifts that may be culturally appropriate and bribes sufficient to actually impact the outcome of a case. Additionally, parties to litigation in China often attempt to give and assume the need and effectiveness of bribes even when this is not the case. Interview: BJ15-FL.

⁴⁷⁵ Interview: BJ15-FL.

accepted, won, and/or publicised. Chapter Five outlines a variety of these counterstrategies, but generally provides examples from the most sensitive cases where the state goes to extreme lengths. It is worth noting that in the majority of administrative cases officials do not make any serious effort to derail litigation, if only because they simply do not care enough to bother.

Even when officials attempt to prevent administrative litigation from going forward their efforts are not always as dramatic as might be expected. In a “we are all friends here” gesture, officials will sometimes ask a mutual acquaintance to try to negotiate a settlement.⁴⁷⁶ In a case one lawyer described as resulting in “a lot of pressure” on him, the official in charge of the government’s defence called him twice, asking him not to take the case and threatening that it would hurt their future relations. The lawyer responded, “I’m a lawyer. I have to represent my client”. Asked if such a simple evasion was effective, the lawyer replied, “What were they going to do?” The case did have a short-term negative impact on the lawyer’s relationship with the department, but eventually the offended official moved on and things returned to normal.⁴⁷⁷

Nor are officials always successful in their efforts to influence courts. The lawyer in the electric bicycle workers’ compensation case, said that the defence “answered the wrong question from the judge,” which she felt “seemed to reveal that he already knew the questions that the judge was going to ask, suggesting out of court communication.”⁴⁷⁸ Yet despite apparent collusion with the court, the government still lost the case. While certainly disheartening, such behaviour is an order of magnitude short of doing

⁴⁷⁶ Interview: SH15S.

⁴⁷⁷ Interview: CS04S.

⁴⁷⁸ Interview: BJ03N.

“everything possible to pre-empt, derail or undermine administrative litigation”.⁴⁷⁹ All in all, only a relatively small fraction of administrative suits are “politically sensitive”. A retired administrative judge told me that out of the 30 cases she heard in her two years in an administrative chamber, she only once felt any explicit political pressure.⁴⁸⁰

Outcomes

A natural question that arises when we discuss suing the state in China is how likely are plaintiffs to win? Although the answer to this question varies by year, type of case and what counts as victory, the short answer is less than half but more than 10 per cent of the time.

Outlining trends in plaintiffs’ success rates in administrative cases is important for clarifying lawyers’ incentives, establishing the effectiveness of litigation as a tool for challenging the state and is a substantial contribution to the study of Chinese law in its own right. Some scholarly work has addressed this issue. Pei and Peerenboom cite figures of 35 to 40 per cent of cases ending in a satisfactory result for plaintiffs,⁴⁸¹ however, since both were writing at the high point for administrative success rates, their conclusions now seem out of date and therefore overly positive. While official statistics must be taken with a grain of salt, Figure 8 shows that the apparent win rate of plaintiffs in administrative cases has dropped considerably over the past two decades, falling from around 40 per cent in the early 1990s to the low teens by the late 2000s. As with many other aspects of Chinese law, when put in context the situation does not look so bleak. In

⁴⁷⁹ O’Brien and Li, “Suing the Local State,” 2005, 78.

⁴⁸⁰ Interview: TJ04-J/P.

⁴⁸¹ Pei, “Citizens V. Mandarins,” 843; Peerenboom, *China’s Long March*, 400, 440.

Japan the government loses a mere 4-8 per cent of cases⁴⁸² and in cases where a part of the US federal government is the defendant, “the agency wins almost 90% of the time, while challengers win a little over 10% of the time.”⁴⁸³ As it is likely less law-abiding than these developed democracies, perhaps the Chinese state should win less often, but the comparison does show that a high government win rate is not self-evident proof of administrative litigation’s inadequacy. The absolute number of wins, after shooting up dramatically in the late 1990s, has now fallen, but is still slightly higher than in the early 90s.⁴⁸⁴

The most common outcome of administrative litigation in China is for a plaintiff to withdraw the suit. While this can mean that plaintiffs have been intimidated into dropping the suit, given up out of frustration, or realized they would lose,⁴⁸⁵ it can also signify that the relevant government department has relented and will make concessions that are at least marginally acceptable to the plaintiff. These two distinct results should be approximated by the official statistics which in most years⁴⁸⁶ include categories for cases in which plaintiffs have “withdrawn on their own initiative (原告主动撤诉)” or “withdrawn after the defendant changed the decision (被告改变撤诉)”.⁴⁸⁷ It is the

⁴⁸² Peerenboom, *China’s Long March*, 400.

⁴⁸³ Peter H. Schuck and E. Donald Elliott, “To the Chevron Station: An Empirical Study of Federal Administrative Law,” *Duke Law Journal* 1990 (1990): 1011.

⁴⁸⁴ Naturally, because plaintiffs and/or their lawyers do not believe they can win, or because the court will not accept their cases, many potential plaintiffs’ suits never make it to trial and this may bias the win rate upward. On the other hand, the state is more likely to concede and settle the strongest cases before they reach litigation. The idea that these two trends more or less balance each other out is the basis for Priest and Klein’s well-known theory that success rates in litigation will tend towards 50 per cent: George L. Priest and Benjamin Klein, “The Selection of Disputes for Litigation,” *The Journal of Legal Studies* 13, no. 1 (January 1, 1984): 1–55, doi:10.2307/724341.

⁴⁸⁵ Interviews: SH14S, XX04S.

⁴⁸⁶ The fact that this distinction was not drawn in the 2008 data means that the numbers for that year understate positive outcomes for plaintiffs.

⁴⁸⁷ China Legal Yearbook Editorial Board, *China Legal Yearbook Various Years*.

dramatic fall in this second category, from a high of 22,025 in 1998 to a low of 2,172 in 2007,⁴⁸⁸ that accounts for most of the dramatic drop in plaintiffs' success rates.⁴⁸⁹

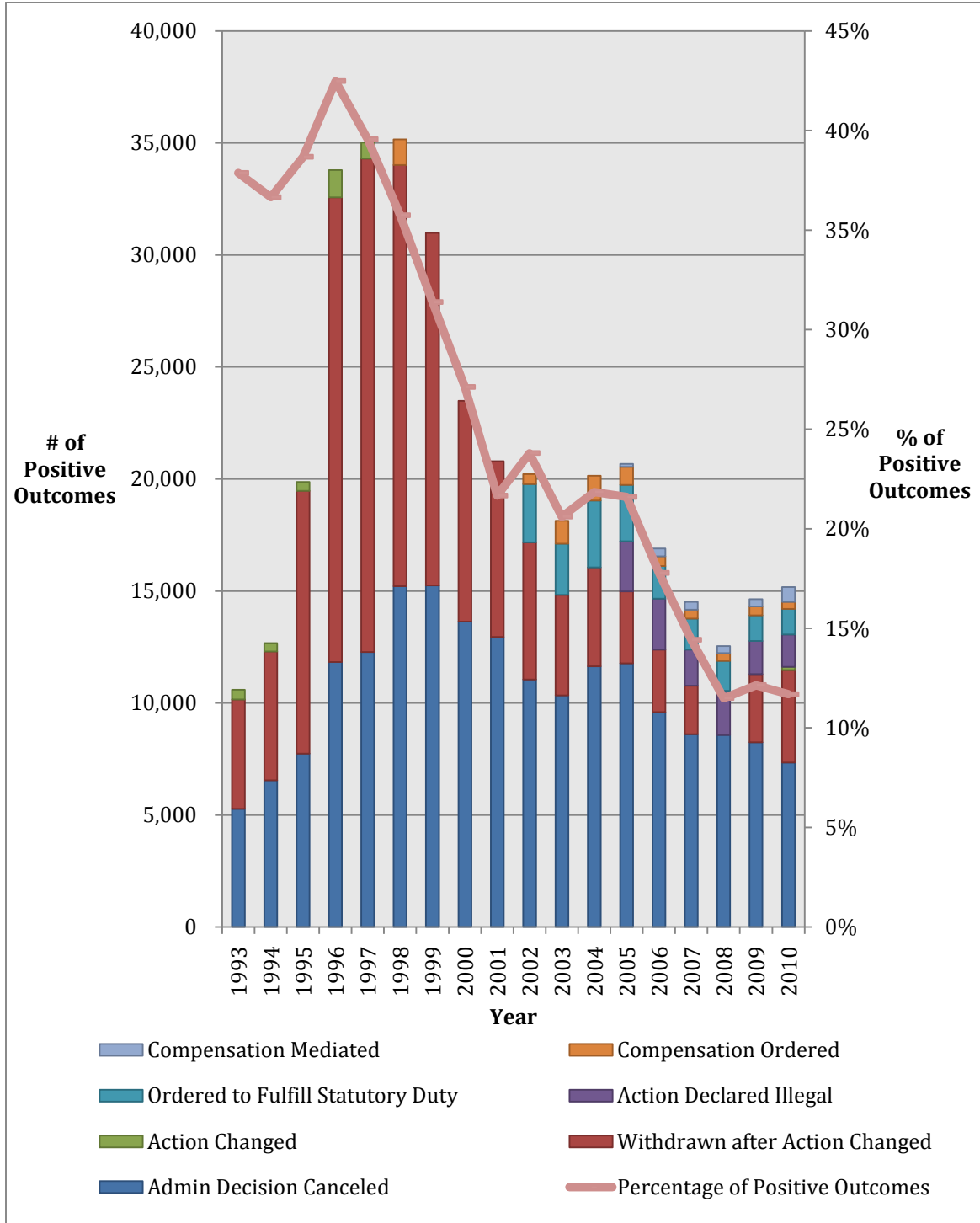
Figure 8 assesses plaintiffs' chances of winning conservatively assuming anything not listed as a clear victory for the plaintiff represents a loss. It is possible that effective victory rates are considerably higher than indicated in the graph for several reasons. Plaintiffs may "win" some cases classified as having "other outcomes". Cases classified as ending in a withdrawn on the plaintiff's initiative may actually belie some concession on the part of the state or the fact that an issue has been resolved outside of administrative court. In a case from Ningbo, for example, a plaintiff suing the local Industry and Commerce Department (工商局) withdrew his case trying to compel enforcement after mediation in the related civil suit resolved the matter.⁴⁹⁰ This would not be counted as a victory in administrative litigation, and yet the plaintiff was more or less able to achieve his objective.

⁴⁸⁸ These two categories of withdrawal statistics are not available in 2008, which is the primary reason the numbers for 2008 look particularly low.

⁴⁸⁹ China Legal Yearbook Editorial Board, *China Legal Yearbook Various Years*.

⁴⁹⁰ Interview: NB01S.

Figure 8: Administrative Cases with Positive Outcomes for Plaintiffs⁴⁹¹



⁴⁹¹ China Statistical Yearbook Editorial Committee, *China Statistical Yearbook Various Years*; China Legal Yearbook Editorial Board, *China Legal Yearbook Various Years*.

On the other hand, even if plaintiffs receive an outcome that we would classify as favourable, whether or not they are satisfied with the result is another issue. As we shall see, few cases result in big payoffs and one experienced administrative litigator suggested that “clients cannot be happy with the results of administrative litigation when it was just a waste of time and money to make the government do what they were supposed to do in the first place.”⁴⁹² In a 2005 survey, while only 1 per cent of villagers whose land had been expropriated filed suit, 40 per cent of those that did received an increase in compensation that they found satisfactory. This represented the highest rate of satisfaction of any means of attempting redress⁴⁹³ and suggests that the satisfaction rate of plaintiffs in administrative litigation, while not high in absolute terms, seems to be relatively high compared to the other available options.

As I have already shown in this chapter, administrative litigation is substantial and growing. Nevertheless, the fact that only 1 per cent of villagers in the 2005 survey went to court⁴⁹⁴ despite the relative effectiveness of administrative litigation as compared to other options, raises the question of why more people do not make use of it. Whether one cites a Confucian, cultural, and/or historic preference for mediation, a recent history that lacks strong rule of law, a general lack of legal education, or the continued popularity of petitioning and the letters and visits system (*xinfang* 信访), litigation and seeking a lawyer tend to be near the bottom of options that Chinese consider when attempting to redress grievances against the state.⁴⁹⁵ On administrative litigation more specifically, a

⁴⁹² Interview: BJ09-L.

⁴⁹³ Zhu et al., “Rural Land Question in China,” 783.

⁴⁹⁴ Zhu et al., “Rural Land Question in China.”

⁴⁹⁵ Michelson, “Climbing the Dispute Pagoda: Grievances and Appeals to the Official Justice System in Rural China.”

different 2005 survey, in Hebei, found that over 56% of peasants' primary reasons for not considering administrative litigation to address a problem with the government was "because of a lack of understanding of law (因为不懂法律)".⁴⁹⁶

While this dissertation rejects cultural essentialism and orientalism⁴⁹⁷ that would suggest that China's culture is antithetical to rule of law, the claim that both ordinary Chinese and officials tend to "lack legal consciousness" is repeated too often by both sources and informants to be completely ignored. In the words of one Shanghai lawyer: "generally speaking, I wouldn't say you can't sue the government, but this is not the best way to resolve a problem. In China suing is not in the culture, Confucian culture. If you can solve it another way, Chinese people would prefer you do."⁴⁹⁸ Yet, culture is never static and a cultural reluctance to litigate can just as easily be attributed to learned experience as ancient culture. The history of law in modern China has alternated between problematic and non-existent, and this is especially true for lawyers and administrative litigation. It should not be surprising, that these institutions are not the first recourse of many Chinese when encountering a problem with the state. While there is probably little in terms of reforms or policies that can directly impact the norms and culture that encourages Chinese to shrink from litigation, any changes that encourage more administrative litigation may result in a trend towards greater legal consciousness and willingness to litigate.

⁴⁹⁶ Lu Zhen-hua, "Peasants' Psychological Types in Administrative Litigation," 77–8.

⁴⁹⁷ Edward W. Said, "Orientalism Reconsidered," *Cultural Critique* no. 1 (October 1, 1985): 89–107, doi:10.2307/1354282; Teemu Ruskola, "Legal Orientalism," *Michigan Law Review* 101, no. 1 (October 1, 2002): 179–234, doi:10.2307/1290419.

⁴⁹⁸ Interview: SH14-L.

Mediation

Michael Palmer has raised concerns about mediation in administrative cases, pointing out that it contravenes Article 50 of the ALL. Many of the high number of administrative cases that end in withdrawals do reflect modes of mediated outcome, yet Palmer's critique does not appear strongly empirically founded and he may be falling into the trap of comparing the Chinese system to the "Ideal Western Legal Order."⁴⁹⁹ Palmer's central point is that "the lack of procedural safeguards in the ALL means that a mediated case can degenerate into an arbitrary process in which the judge exercises his authority informally."⁵⁰⁰ This point and his recommendation that mediation in administrative cases be formalized are well taken. However, in a system in which the freedom,⁵⁰¹ livelihood⁵⁰² and personal safety⁵⁰³ of plaintiffs and lawyers⁵⁰⁴ as well as their families⁵⁰⁵ may be threatened,⁵⁰⁶ worrying about plaintiffs who "are often satisfied with the outcome"⁵⁰⁷ simply because they went through a "mediatory phase that was in effect compulsory and sometimes coercive,"⁵⁰⁸ seems like not seeing the forest for the trees. Because this dissertation relies primarily on the point of view of lawyers, it is admittedly weak in speaking to cases in which lawyers do not participate and it must be conceded that plaintiffs without lawyers might be more likely to be coerced or tricked in mediated

⁴⁹⁹ Clarke, "Puzzling Observations in Chinese Law," 4.

⁵⁰⁰ Palmer, "Controlling the State," 184.

⁵⁰¹ Interview: BJ04S.

⁵⁰² Interview: CS24S.

⁵⁰³ Interview: SH21S.

⁵⁰⁴ Interview: BJ28S.

⁵⁰⁵ Interview: BJ28S.

⁵⁰⁶ Human Rights Watch, *Walking on Thin Ice*; Amnesty International, *Against the Law*.

⁵⁰⁷ Palmer, "Controlling the State," 184.

⁵⁰⁸ Palmer, "Compromising Courts and Harmonizing Ideologies," 266.

outcomes, as Palmer implies.⁵⁰⁹ Nevertheless, the system simply does not look much different than New York City's new approach to parking tickets⁵¹⁰ or "[e]thnographic materials including those on American trial courts, [which] give us numerous examples of judges proposing one solution after another and, by threat, persuasion, and the application of social pressure brought by the audience, moving both parties to at least profess satisfaction with one of them."⁵¹¹

Lawyers, far from decrying mediation, generally emphasised the superiority of mediated outcomes,⁵¹² pointing out that it helped preserve a good relationship with the defendant department.⁵¹³ Other research has suggested that judges use mediation to "promote their professionalized independence."⁵¹⁴ Courts may not have the necessary power and independence to directly challenge administrative agencies even with the law on their side. Mediation may be a second-best institution⁵¹⁵ that allows judges to provide a reasonably satisfactory outcome to plaintiffs while avoiding confrontations in an effort to maintain their power, status, and independence.⁵¹⁶ Mediation is particularly effective for helping plaintiffs without upsetting the state because granting concessions is not a terrible outcome for officials. Instead, "departments do not like to lose in a decision –

⁵⁰⁹ Ibid.

⁵¹⁰ Jo Craven McGinty and Ralph Blumenthal, "Fighting Parking Tickets Gets Tougher," *The New York Times*, January 25, 2009, sec. New York Region, <http://www.nytimes.com/2009/01/25/nyregion/25tickets.html>.

⁵¹¹ Shapiro, *Courts*, 12.

⁵¹² Interview: BJ31N.

⁵¹³ Interview: SH11N.

⁵¹⁴ Balme, "Local Courts in Gansu and Shaanxi: Quest for Independence and Dignity," 171.

⁵¹⁵ "Second Best" institutions are considered at length in Chapter Six. Also, see: Dani Rodrik, *Second-Best Institutions*, Working Paper No. 14050 (National Bureau of Economic Research, 2008), <http://www.nber.org/papers/w14050>; Simeon Djankov et al., "Appropriate Institutions," in *Annual World Bank Conference on Development Economics 2003: The New Reform Agenda*, (World Bank and Oxford University Press, 2003), 283–298, <http://rru.worldbank.org/Documents/DoingBusiness/Overview.doc>; Yingyi Qian, "How Reform Worked in China," *William Davidson Institute Working Paper* no. 473 (2002), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=317460.

⁵¹⁶ Peerenboom, "Introduction," 15; Kinkel and Hurst, "Access to Justice in Post-Mao China," 486–7.

they lose face.”⁵¹⁷ One former official told me, “I did feel some pressure to mediate. As an official you don’t want to be sued and it is even worse if you lose. I don’t think there was any specific policy about how getting sued would affect your career, but it gives a bad impression.”⁵¹⁸ Another lawyer who frequently represented the state explained that “usually if the plaintiff’s demands were reasonable (合理要求) I would mediate. About 70% of the administrative cases where I represented the state were mediated.”⁵¹⁹

A parallel might be drawn with the classic interpretation of the actions of the US Supreme Court in *Madison vs. Marbury* where “the Court’s refusal on constitutional grounds to issue a writ of mandamus requested by Marbury” worked by “establishing the authority of the Court to overturn acts of Congress; yet... avoiding outright conflict with the executive branch.”⁵²⁰ Mediated solutions allow Chinese courts to assist plaintiffs in attaining justice while avoiding confrontation with more powerful agencies, establishing a precedent, and allowing officials to become accustomed to the idea that courts may hold them accountable.

Explaining the Trend in Outcomes

Official statistics do not capture the wide variation in experiences and perceptions of administrative litigation. Lawyers who take fewer administrative cases tend to have a pessimistic view of the chances of success. For example, a lawyer who had taken only a few administrative cases in 2003-4 said “losing is unsurprising, not losing is unexpected

⁵¹⁷ Interview: NB20S.

⁵¹⁸ Interview: HK02-L.

⁵¹⁹ Interview: BJ21-L.

⁵²⁰ Clinton, “Game Theory, Legal History, and the Origins of Judicial Review: A Revisionist Analysis of *Marbury V. Madison*,” 268.

(输不出意外，不输出乎意料)”⁵²¹. There are several reasons for this. First, without experience with administrative litigation, the chances of winning are probably smaller. Second, there is a selection bias in which lawyers more pessimistic about administrative law are less likely to become experienced with such cases. I also believe this echoes a wider pessimism about administrative litigation in China; while 97% of respondents to a Jiangsu survey, for example, had heard of people suing officials, 22% had not heard of plaintiffs actually winning.⁵²² Or, in the words of one experienced administrative litigator: “they [the public] think the plaintiff always loses.”⁵²³

More experienced administrative lawyers had varying perspectives on the odds of winning an administrative case. A lawyer experienced at representing administrative plaintiffs in Guilin explained that the “rate of winning is pretty low, an experienced lawyer knows not to set the plaintiff’s hopes too high.”⁵²⁴ Prolific administrative litigators in Changsha⁵²⁵ and Shanghai⁵²⁶ said that plaintiffs lose about half the time, suggesting that their expertise unsurprisingly resulted in a higher than average success rate. A particularly elite and well-connected lawyer and former official in Qingdao, had apparently never lost a case, administrative or otherwise.⁵²⁷ All of this points to variation across types of administrative litigation, locations, and the skill of individual lawyers. Although tracking how success rates vary across locations and types of cases might be a fruitful field for future investigation, it need not detain us here. The importance of being

⁵²¹ Interview: BJ04S.

⁵²² Peerenboom, *China’s Long March*, 405.

⁵²³ Interview: BJ21S.

⁵²⁴ Interview: GL03S.

⁵²⁵ Interview: CS02S.

⁵²⁶ Interview: SH16S.

⁵²⁷ Interview: QD01-L/O.

represented by an experienced administrative litigator, on the other hand, is a major theme in this dissertation and helps explain victory trends in administrative cases.

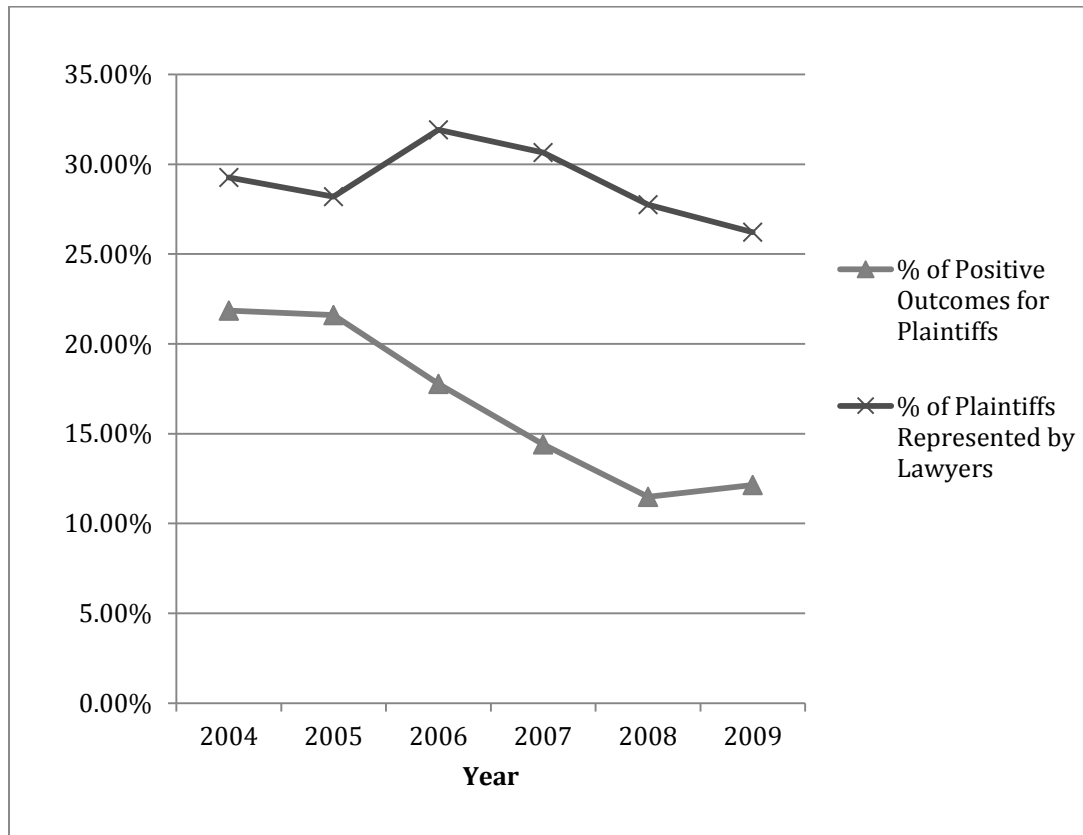
It may be tempting to attribute the decline in plaintiffs' victories to a reversal in rule of law and/or political freedom, especially due to the understandable cynicism that often pervades views of the Chinese state. But as I argue throughout this dissertation, the Chinese state is far from a unified monolithic actor, and ascribing these overarching trends to the "decision of Chinese officials to turn against their own reforms of the last several decades"⁵²⁸ is a vast oversimplification that masks significant progress towards rule of law and a complex social, political, and economic reality of which government policies are only a part. I argue that two trends are largely responsible for the falling success rates.

First, despite an increase in 2006, the percentage of administrative plaintiffs represented by lawyers decreased slightly from 2004 to 2009. As Figure 9 shows, the general picture is of falling rates of representation and plaintiff success rates and other data⁵²⁹ suggests that this is part of a longer-term trend. In general, it is not surprising that parties represented by lawyers could be expected to do better, and lawyers appear to be especially important in administrative litigation. A decline in representation then, may be part of the story of declining success rates.

⁵²⁸ Carl F. Minzner, "China Turns Against Law," *Wall Street Journal*, July 4, 2012, sec. Opinion Asia, <http://online.wsj.com/article/SB10001424052702304141204577506241921058360.html>.

⁵²⁹ Compare, for example, Figure 8: Administrative Cases with Positive Outcomes for Plaintiffs and Figure 11: Total Administrative and Civil Cases Handled by Lawyers. 陈健 Chen Jian, ed., *China Lawyers Yearbook 中国律师年检 2001* (Beijing: People's Court Press 人民法院出版社, 2003); China Statistical Yearbook Editorial Committee, *China Statistical Yearbook Various Years*.

Figure 9: Positive Outcomes and Plaintiffs Represented by Lawyers⁵³⁰



But, why are fewer plaintiffs coming to court represented by lawyers? In many cases, clients go unrepresented because “people often aren't willing to spend the money to hire a lawyer.”⁵³¹ But this fails to explain the drop in representation as it seems unlikely that the willingness of Chinese to hire a lawyer has declined even as average incomes have increased dramatically. Also, the Internet has made finding a lawyer easier than ever. A simple search on *google.com* or *baidu.com* is likely to produce a list of reasonably experienced administrative litigators in almost any part of China.

⁵³⁰ China Statistical Yearbook Editorial Committee, *China Statistical Yearbook Various Years*; China Lawyers Yearbook Editorial Committee, *China Lawyer's Yearbook Various Years*.

⁵³¹ Interview: LZ03-L.

I argue that the decline in plaintiffs represented by lawyers is primarily the product of a mismatch between supply and demand. As we saw earlier, the number of administrative cases increases sharply over this period, meaning that in order for plaintiffs to find lawyers, more lawyers would have to take more administrative cases. While the number of lawyers has increased dramatically over the last two decades, administrative litigation requires specific expertise and experience that most Chinese lawyers lack.⁵³² Most lawyers are understandably reluctant to take already unprofitable administrative cases because, for those unfamiliar with administrative litigation, they are especially time consuming, “extremely difficult (难度非常大)”⁵³³, and Lawyers may feel they would not do their clients justice.⁵³⁴

As we shall see in the next chapter, success in administrative cases often hinges on administrative rules and regulations written by departments. While some lawyers may become familiar with these regulations through representing plaintiffs, the least painful way for lawyers to develop competence in administrative litigation is to work for the Chinese state, especially as outside counsel. This experience also has the advantage of facilitating connections within the state that are useful in administrative cases and may even offer some protection or cover when litigating extremely sensitive cases. In the early days of administrative litigation, a higher percentage of lawyers probably had this kind of experience and connections as a result of having worked with, for, or in the local

⁵³² Legal workers, who face less stringent professional requirements than lawyers but may represent plaintiffs in administrative cases, may pick up some of the extra demand for administrative lawyers. There is no reason to believe that they are any more successful than lawyers at acquiring experience with administrative cases and, at any rate, they are being phased out in favour of lawyers: Benjamin L. Liebman, *Access to Justice in China* (Washington DC, 2004), <http://www.cecc.gov/pages/hearings/2008/20080618/CECCHearing06182008.pdf>.

⁵³³ Interview: BJ26S.

⁵³⁴ Interviews: BJ02S, BJ31N, NB14S, NB21S,

government.⁵³⁵ Now opportunities for lawyers to work for the state are relatively rare and are not keeping pace with the growth in the number of lawyers and administrative litigation.

The second reason that administrative success rates are falling is that the local state is starting to take administrative litigation more seriously. At best, this represents two steps towards rule of law, but one step back in terms of providing a remedy to citizens wronged by the state. Once, “the legal representative of administrative organs showing up in court was as rare as phoenix feathers and unicorn horns (但作为行政机关的法定代表人出庭应诉的案件可谓凤毛麟角)”⁵³⁶. Now local governments publish reports bragging about the high rates at which their senior officials show up in court (应诉速率).⁵³⁷ Persuading defendants to appear in court represents important progress. There has long been a general recognition of “the need to have both parties present before the judge if he is to have any chance of creating a resolution to which both parties will consent.”⁵³⁸ Being attentive to administrative litigation also means that the state is much more likely to mount a vigorous defence. The result is that “in the 1990s the government often lost cases. The reason was that the government often made illegal procedural mistakes (在程序方面违法), but later the government became better at following procedure. Now, every administrative action looks at least superficially correct (表面上

⁵³⁵ Michelson, “Unhooking from the State: Chinese Lawyers in Transition.”

⁵³⁶ Chinese Lawyer Net 中国律师网, “On the Need for the Defendant’s Legal Representative to Come to Court.”

⁵³⁷ 新昌县人民法院网 Xinchang County People’s Court Web, “Report Regarding Senior Officials Appearing in Court 关于行政机关首长出庭应诉情况的调研报告,” September 13, 2012, http://xinchang.zjcourt.cn:88/art/2012/9/13/art_1117_42552.html.

⁵³⁸ Shapiro, *Courts*, 13.

没有问题), so people suing officials rarely win (民高官很少胜诉).”⁵³⁹ The difficulty for plaintiffs is that the government only needs to ensure that its actions are technically legal under its own regulations and courts are generally willing to give it the benefit of any ambiguity. With the odds stacked so far in their favour,⁵⁴⁰ local governments may do little in terms of restricting their “authoritarian zeal”⁵⁴¹ or making substantive changes to their behaviour, and yet have confidence that they have little to fear from administrative litigation, not because of their political influence on courts, but because their behaviour is technically legal, or at least could be made to appear so in court.

Even when plaintiffs are able to mount a strong case, the fact that administrative departments may themselves be represented by an experienced administrative litigator can further tip the odds in the defendant’s favour. Whether they are outside counsel, the department’s in-house lawyers, or simply a legally knowledgeable official, an experienced litigator can help defendants to build a persuasive case. Additionally, defendants hiring outside counsel can impact the supply of lawyers available to plaintiffs. Administrative departments tend to employ lawyers on a consulting basis and use them more or less exclusively when litigation arises.⁵⁴² The experience of working for and with the local state tends to make these lawyers excellent administrative litigators, and they are often the best option for plaintiffs suing other departments or other local governments. Especially in more remote areas, however, locally prominent and experienced administrative litigators will have represented a number of the most litigated-against

⁵³⁹ Interview: BJ21S.

⁵⁴⁰ He and Su, “Do the ‘Haves’ Come Out Ahead in Shanghai Courts?”.

⁵⁴¹ Marc Blecher and Vivienne Shue, “Into Leather: State-Led Development and the Private Sector in Xinji,” *The China Quarterly* 166 (2001): 381.

⁵⁴² Interview: BJ21S.

departments.⁵⁴³ Conflict of interest requirements prevent them from litigating against their government clients, thereby constraining the number and type of cases they can take. Additionally, if these lawyers' time is being used in representing defendants, this means they have less time to devote to plaintiffs and "if you are working as a consulting lawyer for the government you *have to* represent them in administrative cases."⁵⁴⁴ Finally, because administrative departments tend to use the same lawyers consistently, more instances of defendants hiring lawyers does not necessarily mean more lawyers being exposed to administrative law.

Compensation

Despite a reasonable chance of winning, compensation is granted relatively infrequently in administrative suits. While national data on administrative compensation is difficult to come by, Table 3 shows us that even in China's wealthiest and generally most progressive province, Guangdong, total compensation over a ten-year period was modest at best. The issue attracted nationwide attention when: "Ma Dandan, from Jingyang county in Shaanxi province, demanded 5 million yuan [approximately US\$600,000] in compensation after she was locked up for 15 days in January 2001 for 'prostitution' - an ensuing check-up showed that the 19-year-old woman was still a virgin. Later, she was given 74.66 yuan [less than US\$10] as compensation, but her claim for mental distress was rejected by a district court, triggering a national outcry over the disregard for the law."⁵⁴⁵ While the State Compensation Law was amended in 2010 to

⁵⁴³ Interview: BJ21S.

⁵⁴⁴ Interview: BJ21S (emphasis added).

⁵⁴⁵ Li, "State May Pay for Causing Distress."

allow for compensation for mental anguish and suffering,⁵⁴⁶ partially in response to this incident, the impact of this change was not clearly visible at the time of my research.

Table 3: Compensation Paid in Guangdong⁵⁴⁷

| Department | Total Compensation 1998-2009 |
|-----------------------------|-------------------------------------|
| Public Security | ¥3,805,300 |
| Natural Resources | ¥213,300 |
| Industry and Commerce | ¥72,500 |
| Technology Supervision | ¥98,000 |
| Forestry | ¥29,000 |
| Family Planning | ¥53,300 |
| Health | ¥77,800 |
| City Construction | ¥6,138,000 |
| Environment | ¥7,000 |
| Transportation | ¥51,000 |
| Tax | ¥80,000 |
| Labour and Social Insurance | ¥14,000 |
| Administration of Justice | ¥217,000 |
| Finance | ¥35,000 |
| Customs | ¥1,079,900 |
| County Government | ¥701,500 |
| Other | ¥7,130,800 |
| Total | ¥19,825,900 |

The small amounts of compensation typical in administrative cases affirm Pei's prescient observation that "the primary motive for plaintiffs was to revoke an injurious and unjust administrative action."⁵⁴⁸ But this should not obscure the fact that administrative litigation can have significant financial repercussions. A successful administrative suit may result in the cancelation of considerable fines levied against companies or individuals, such as when a Xinjiang high court overturned two fines for

⁵⁴⁶ A amendment to the State Compensation law allowed compensation for mental anguish and suffering: Xinhua, "China Adopts Amended State Liability Compensation Law," 2010, http://news.xinhuanet.com/english2010/china/2010-04/29/c_13272905.htm. Li, "State May Pay for Causing Distress."

⁵⁴⁷ Excluding 1999, as data from this year is not available. Guangdong High Court, *Guangdong Court Yearbook Various Years*.

⁵⁴⁸ Pei, "Citizens V. Mandarins," 858.

illegally exploiting woodlands (非法开采林地) worth 1.3 million RMB and .9 million RMB (approximately US\$200,000 and \$135,000 respectively).⁵⁴⁹

Litigation resulting from land and home expropriation which make up a plurality of cases can result in large increases in compensation paid for land, as can be seen in the City Construction category of Table 3. Often the change in an administrative action will require a third party, usually a development company, to pay substantial compensation. The second largest category of compensation in Table 3 is public security compensation. This is often payment for wrongful detention, imprisonment, or death, which “is calculated in accordance with the daily average wages of employees of the state in the preceding year.”⁵⁵⁰ A wrongful death is compensated at around 580,000 RMB (approximately US\$80,000).⁵⁵¹ Nevertheless, in wrongful detention⁵⁵² and other cases, what might seem like a small sum to Westerners, lawyers, or even local governments, such as 50,000 RMB (approximately US\$7,000) from local traffic police,⁵⁵³ or 300,000 RMB (approximately US\$50,000) received as compensation by a janitor injured while cleaning a government office, may be considerable to a plaintiff.⁵⁵⁴ Additionally, as is visible in Figure 10, the amount of compensation paid, at least in Guangdong, has increased substantially, if sporadically, over the past decade.

⁵⁴⁹ 上海律师协会 Shanghai Lawyers Association, “Xinzhang Maralbexi County ‘Astronomical Administrative Punishment Case’ Results in Cancellation of Million RMB Fine 新疆巴楚‘天价行政处罚案’终审撤销亿元罚单,” *Eastern Lawyer Net 东方律师网*, July 26, 2010, <http://www.lawyers.com.cn/info/12a0c8147693f12e8bce21954f665004>.

⁵⁵⁰ *State Compensation Law of the People’s Republic of China*, 1994, <http://www.lehmanlaw.com/resource-centre/laws-and-regulations/general/state-compensation-law-of-the-peoples-republic-of-china-1994.html> Article 26.

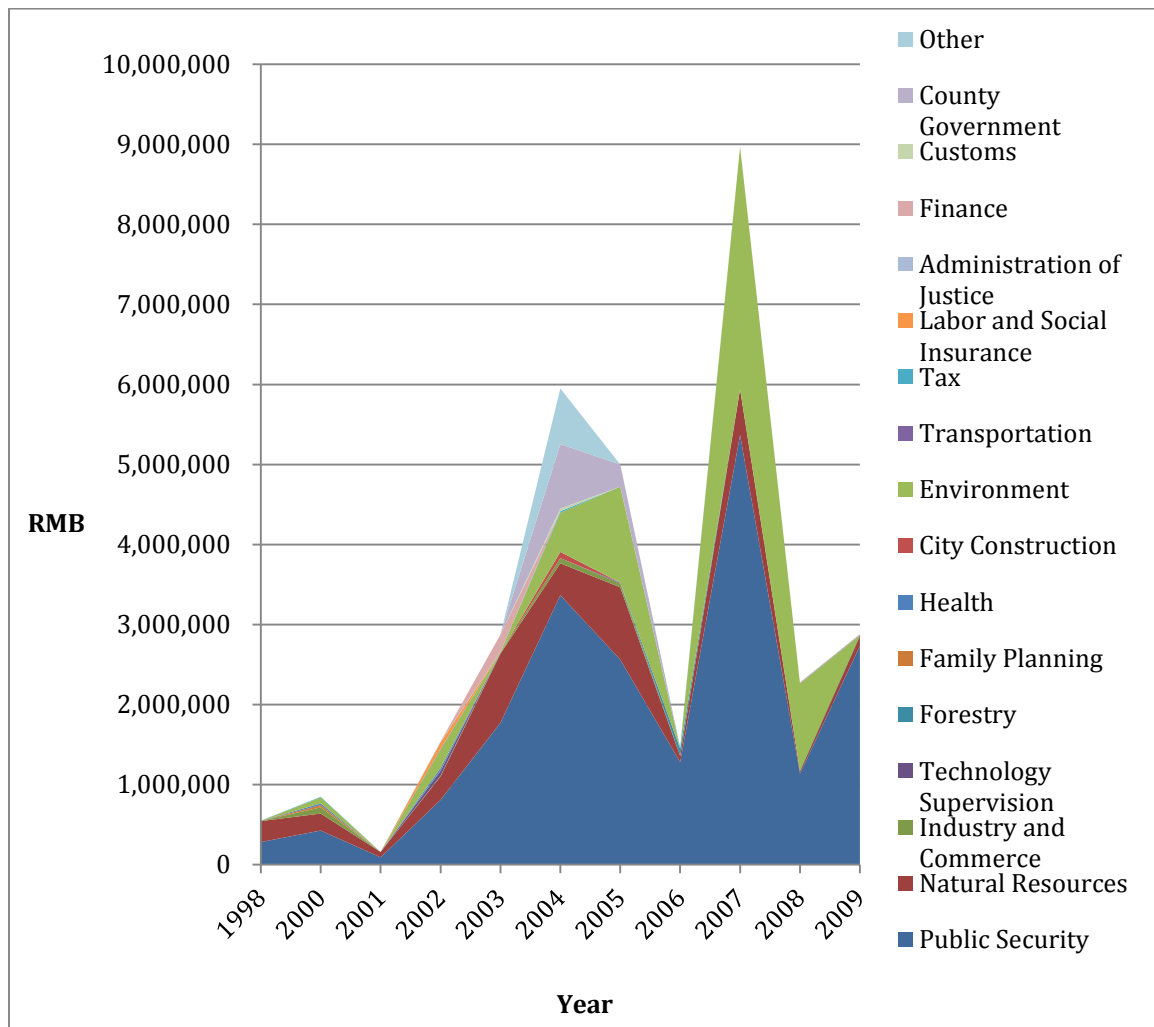
⁵⁵¹ Xu, “To Refuse Compensation Is to Turn a Blind Eye.”

⁵⁵² Interview: BJ09-L.

⁵⁵³ Interview: NB20S.

⁵⁵⁴ Interview: NB19S.

Figure 10: Compensation Paid In Guangdong⁵⁵⁵



Additionally, actually winning cases and receiving compensation is not necessarily correlated. “In the most sensitive cases, the plaintiff will most likely lose, but these are also the most likely cases for them to get good compensation. That is, the government needs to save face, but since it is so important they are willing to pay the plaintiffs relatively well to keep them quiet.”⁵⁵⁶ This explains “a strangely mixed

⁵⁵⁵ Excluding 1999, as data from this year is not available.

⁵⁵⁶ Interview: NB02S.

verdict”⁵⁵⁷ from Hainan in which the court “ruled against the villagers, but nonetheless it ordered the county to pay them compensation of 170,000 yuan.”⁵⁵⁸

In many cases, the rather modest compensation regime means that it is simply not possible for plaintiffs to achieve a satisfactory outcome. For example, for middle class Chinese the modest compensation offered for wrongful detention, death, or other loss of income seems unlikely to prove satisfactory. Second, the lack of large monetary payoffs from administrative litigation makes it difficult to induce a more sizable population of lawyers to pay significant attention to administrative cases. As we will see in the next chapter, small awards plus the added difficulty and time required means that administrative cases are unprofitable for lawyers.

Enforcement of Verdicts

It has become received wisdom that one of the most significant problems in the Chinese legal system is the difficulty of getting verdicts enforced.⁵⁵⁹ These sources, corroborated by my own interviews, give us every reason to believe that the enforcement of civil decisions is a major problem for the Chinese legal system. Yet as with corruption, what is true of civil cases is not necessarily true of administrative ones.

⁵⁵⁷ O’Brien and Li, “Suing the Local State,” 2004, 88.

⁵⁵⁸ Ibid.

⁵⁵⁹ Lubman, *Bird in a Cage*, 266–69; Donald C Clarke, “Power and Politics in the Chinese Court System: The Enforcement of Civil Judgments,” *Columbia Journal of Asian Law* 10 (1996): 1; Donald C Clarke, “The Execution of Civil Judgments in China,” *The China Quarterly* 141 (1995): 65–81, doi:10.1017/S0305741000032914; Randall Peerenboom, “Seek Truth from Facts: An Empirical Study of Enforcement of Arbitral Awards in the PRC,” *American Journal of Comparative Law* 49 (2001): 249.

There can be no doubt that in some administrative cases, enforcement is a problem.⁵⁶⁰ Yet fewer than 20 per cent of my informants reported ever encountering such an issue, with the vast majority telling me that enforcement in administrative cases was not nearly the problem it was in civil cases. One informant went so far as saying that there was: “no judgment enforcement problem with administrative law. If the government is ordered to pay compensation it generally pays. With other kinds of cases these problems exist.”⁵⁶¹

The point is not that the enforcement of administrative judgments in China is excellent, but that relative to the enforcement of civil judgments, or to the other difficulties of administrative litigation, it is not a particular cause for concern. There are probably several major causes for this, none of them particularly positive. First, if the local governments were powerful enough and/or cared about the case enough to resist the court, they would not wait until the case was over to do so. Second, as we have just seen, compensation is often small or non-existent, so complying with the court’s decision is rarely very costly. Indeed, it is probably in the instances in which local governments, especially poorer ones, are ordered to pay considerable compensation that enforcement problems arise.⁵⁶² Finally, once the decision against an administrative agency has been made, the damage to officials’ careers has already been done, and there is no need to draw more attention to the embarrassment by not complying with the ruling. This finding

⁵⁶⁰ See for example: Xu Mingxuan, “To Refuse Compensation Is to Turn a Blind Eye to Torture 拒不赔偿是对刑讯逼供的纵容.”

⁵⁶¹ Interview: NB02S.

⁵⁶² Xu, “To Refuse Compensation Is to Turn a Blind Eye”; Xu Mingxuan, “To Refuse Compensation Is to Turn a Blind Eye to Torture 拒不赔偿是对刑讯逼供的纵容.”

echoes a consistent theme in this dissertation, administrative litigation is often less problematic than assumed, but not always for positive reasons.

Conclusion

As we have seen in this chapter, administrative litigation is a substantial tool for challenging the authoritarian Chinese state. Peerenboom has eloquently and urgently argued⁵⁶³ that rule of law, at least the thin variety, does not necessarily come embedded with liberal democratic values. This dissertation will show that it also does not necessarily come with the types of outcomes that liberal democrats would desire or expect. Optimists hoped that administrative litigation would empower people against the state, pessimists “have painted the ALL as almost a sham.”⁵⁶⁴ I argue that a third outcome has emerged.

Administrative litigation has forced the state to be more law abiding, yet administrative laws, rules, and regulations are often written with few constraints by the agencies that implement them and are generally so strongly tilted in their favour that they are easily able to work within them. At the same time, administrative defendants are increasingly likely to show up in court with lawyers to defend them, and departments are probably acquiring better expertise and taking more care in writing the rules they must follow. As a consequence, the chances of favourable outcomes for plaintiffs grew dramatically and then began to shrink. Additionally, administrative defendants often win cases because they are more powerful than plaintiffs. In other words, the state is increasingly playing by rules that it writes, and is winning most of the time. Despite

⁵⁶³ Peerenboom, *China's Long March*, 67–74.

⁵⁶⁴ Kinkel and Hurst, “Access to Justice in Post-Mao China,” 484.

much higher legal standards in the United States, a parallel can be drawn. Money and power not only hugely influence the outcome of court cases in the US,⁵⁶⁵ but lobbyists help industries write the very laws that regulate them and politicians pick their voters through gerrymandering.

It is undeniable that in cases like those of Ai Weiwei,⁵⁶⁶ Li Zhuang⁵⁶⁷ and Chen Guangcheng,⁵⁶⁸ parts of the Chinese state have continued to flout the law. Yet these high profile cases are, by definition, outliers and in these instances it was primarily criminal law that the state violated.⁵⁶⁹ By any reasonable standard then, administrative litigation must be considered a qualified success. The number of administrative cases has increased almost tenfold over the past two decades, and empirical evidence consistently supports the idea that the ALL has compelled officials to take more care in complying with the law.⁵⁷⁰ And while administrative litigation has thus far fallen short of its full potential, it has proved a much more robust tool for challenging the Chinese state than village elections, or any other political reform, formal process, or institution. China's administrative litigation system was never going to be a panacea that cured the PRC of all its authoritarian ills, but it can be judged as having taken China two steps in the right direction, and one back.

⁵⁶⁵ Marc Galanter, "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change," *Law & Society Review* 9, no. 1 (October 1, 1974): 95–160, doi:10.2307/3053023.

⁵⁶⁶ Jerome A Cohen, "China's Shame Over Ai Weiwei," *Wall Street Journal*, June 23, 2011, sec. Opinion Asia, <http://online.wsj.com/article/SB10001424052702304569504576403283504511902.html>.

⁵⁶⁷ Jeremy Page, "China Drops Charges Against Lawyer," *Wall Street Journal*, April 23, 2011, <http://online.wsj.com/article/SB10001424052748703907004576278593528313616.html>.

⁵⁶⁸ Cohen, *Examination into the Abuse of Chen Guangcheng*; Vise and Wan, "Prominent Legal Scholar and China Expert Comes to Aid of Chen Guangcheng."

⁵⁶⁹ A variety of state actions in criminal cases can be challenged through administrative litigation and it seems likely that the criminal legal system in China is much less developed than its administrative counterpart. It is, however, beyond the scope of my dissertation and data to draw conclusions about the state of Chinese criminal law.

⁵⁷⁰ Peerenboom, *China's Long March*, 404; O'Brien and Li, "Suing the Local State," 2005, 43.

Chapter Four: Why Lawyers Sue the State

In late April of 2012, unlicensed activist lawyer Chen Guangcheng, “escaped through the prison-like cordon surrounding his home and ended up hundreds of kilometres away in Beijing under American protection”.⁵⁷¹ The incident drew international attention and, with US Secretary of State Hilary Clinton negotiating on his behalf, Chen and his immediate family were allowed to immigrate to the United States.⁵⁷² Chen had been imprisoned in 2006 on charges of “intentionally damaging property and gathering a crowd to disrupt traffic (故意毁坏财物罪以及聚众扰乱交通罪)”.⁵⁷³ Prior to his daring escape, he had been under house arrest since his release in 2010.⁵⁷⁴ The charges came in retaliation for suing overzealous officials in Shandong’s Linyi prefecture on behalf of “thousands of local women who had been the victims of an aggressive family planning campaign that included forced sterilizations and abortions.”⁵⁷⁵ Perhaps more importantly, Chen continued to publicize the case when the courts ignored his appeal,⁵⁷⁶ including interviews with *Time* magazine⁵⁷⁷ and the *Washington Post*⁵⁷⁸, and

⁵⁷¹ “Human Rights: Blind Justice,” *The Economist*, May 5, 2012,

<http://www.economist.com/node/21554257>.

⁵⁷² Cheryl Isaac, “Checkmark For Hillary Clinton: Chen Guangcheng Lands In America,” *Forbes*, May 20, 2012, <http://www.forbes.com/sites/worldviews/2012/05/20/checkmark-for-hillary-clinton-chen-guangcheng-lands-in-america/>.

⁵⁷³ “Shandong Blind Human Rights Activist Chen Guangcheng Receives Sentence of 4 Years and 3 Months 山东盲人维权人士陈光诚被判 4 年 3 个月,” *Radio Free Asia*, August 24, 2006, http://www.rfa.org/mandarin/yataibaodao/chen_guangcheng2-20060824.html.

⁵⁷⁴ Andrew Jacobs, “Christian Bale Attacked by Chinese Guards,” *The New York Times*, December 15, 2011, sec. World / Asia Pacific, <http://www.nytimes.com/2011/12/16/world/asia/christian-bale-attacked-by-chinese-guards.html>.

⁵⁷⁵ *Ibid.*

⁵⁷⁶ 李柏光 Li Baiguang, “Chen Guangcheng and Li Qun’s ‘Battle of Mt. Mengliang’ 陈光诚与李群之间的‘孟良崮战役’,” *Epoch Times*, July 24, 2006, <http://www.epochtimes.com/gb/6/7/24/n1397305.htm>.

⁵⁷⁷ Hannah Beech, “Enemies Of the State?,” *Time*, September 12, 2005, <http://www.time.com/time/magazine/article/0,9171,1103579,00.html>.

public protests⁵⁷⁹ by his supporters⁵⁸⁰. Chen's case exemplifies a common conception of Chinese lawyers⁵⁸¹ as activists who "use legal institutions and other platforms to challenge China's authoritarian system"⁵⁸².

Chen has garnered such international attention because he is extraordinary. As we shall see, the Chinese bar actually has a more ambiguous relationship with political liberalism. Most Chinese lawyers are not willing to take such risks and those who oppose authoritarianism too directly, like Chen, are often arrested or disbarred. Instead, the lawyers who do challenge the state tend to have the political savvy and connections to stay out of trouble. In the words of one administrative litigator, a lawyer "should know what role to play (应该搞清楚自己的角色)."⁵⁸³ They are unwilling to challenge the state as directly or aggressively as Chen and his ilk.

Initially, the conception of China's lawyers as advocates of political liberalism seems to have a firm foundation in history and theory. At least since the unsettling example of Robespierre, the legal profession, both directly through their support for political liberalization and indirectly through their efforts to improve rule of law, were closely associated with political liberalism and even democracy.⁵⁸⁴ For that great

⁵⁷⁸ Philip P. Pan, "Rural Activist Seized in Beijing," *The Washington Post*, September 7, 2005, sec. World, <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/06/AR2005090600921.html>.

⁵⁷⁹ "Shandong Blind Human Rights Activist."

⁵⁸⁰ It seems likely that Chen did not organize any protests himself and that no protests actually occurred until after he was arrested: Cohen, *Examination into the Abuse of Chen Guangcheng*.

⁵⁸¹ Because Chinese law is relatively permissive about who can act as legal representation in court, Chen and several other well-known Chinese human rights "lawyers", including several law professors, are not licensed lawyers. While my data primarily reflects licensed lawyers, I have also conducted interviews with legal workers and law professors to address this deficit.

⁵⁸² Hualing Fu and Richard Cullen, "Climbing the Weiquan Ladder: A Radicalizing Process for Rights-Protection Lawyers," *The China Quarterly* 205, no. 1 (2011): 41.

⁵⁸³ Interview: BJ21S.

⁵⁸⁴ Austin Sarat and Stuart A. Scheingold, *Cause Lawyering and the State in a Global Era* (Oxford University Press, USA, 2001), 25, 382–441; Terence C. Halliday, Lucien Karpik, and Malcolm M. Feeley,

democratic thinker, Alexis De Tocqueville, an independent bar or least parts of it, can be at the forefront of revolution and when the ruling class “closes its ranks against the lawyers, it finds them to be enemies all the more dangerous, because although beneath it in wealth and power, their work makes them independent”.⁵⁸⁵ This fits in neatly with the current discourse about China, where the privatization of the legal profession has led to “the emergence of the growing group of private lawyers who are developing profiles as rights protection lawyers-activists”.⁵⁸⁶

Yet there should be reasons for doubt. De Tocqueville also recognized that “in a community in which lawyers hold without question that high rank in society which is their due, their temper will be eminently conservative and will prove antidemocratic”⁵⁸⁷ and “having intrusted to them a despotism taking its shape from violence, perhaps he [the prince] might receive it back from their hands with features of justice and law”⁵⁸⁸. Halliday *et al.* seems to confirm this view, pointing out that lawyers are “both very particular kinds of liberals, for they defined their causes narrowly, and conditional liberals, because on notable occasions they failed altogether to pursue the liberal agenda.”⁵⁸⁹ And indeed, some studies of Chinese lawyers have recognized that lawyers

eds., *Fighting for Political Freedom: Comparative Studies of the Legal Complex for Political Change* (Oxford, UK: Hart, 2007); Terence C. Halliday and Lucien Karpik, *Lawyers and the Rise of Western Political Liberalism: Europe and North America from the Eighteenth to Twentieth Centuries* (Oxford University Press, USA, 1997).

⁵⁸⁵ De Tocqueville, *Democracy in America*, 265.

⁵⁸⁶ Hualing Fu and Richard Cullen, “Weiwan (Rights Protection) Lawyering in an Authoritarian State: Building a Culture of Public-Interest Lawyering,” *The China Journal* 59 (2008): 2.

⁵⁸⁷ De Tocqueville, *Democracy in America*, 265.

⁵⁸⁸ *Ibid.*, 266.

⁵⁸⁹ Halliday, Karpik, and Feeley, *Fighting for Political Freedom*, 3.

may “serve authoritarianism as well as subvert it”⁵⁹⁰. This chapter therefore asks the question:

Is China’s newly privatized and increasingly large legal profession a force for political liberalism or one that reinforces authoritarianism even as it softens its rough edges?

Obviously, a single answer to this question will not suffice to describe the entire legal profession. There is ample evidence of a group of Chinese human rights lawyers dedicated to substantial liberalization. But how big is this group? What is its impact? And what about other Chinese lawyers? Unfortunately, the existent literature on lawyers in China is poorly equipped to help us answer this question. Studies have tended to focus only on the most radical lawyers.⁵⁹¹ A few scholars have taken the step of categorizing Chinese lawyers and showing some “rights protection” lawyers to be more moderate⁵⁹² or even considering ordinary lawyers and others not “motivated by political liberalism”⁵⁹³, but we know little about the representativeness of these different groups. So while Stern recognizes that “...the spectrum of Chinese cause lawyers extends far beyond a narrow swath of politically inclined critics”⁵⁹⁴ the literature tells us little about the size of the swath or the lawyers outside it.

In order to produce an empirical answer to my question that takes a representative view of the entire legal profession, I propose the following question:

⁵⁹⁰ Rachel E. Stern, “Navigating the Boundaries of Political Tolerance: Environmental Litigation in China” (Doctoral Dissertation, UC Berkeley, 2009), 113.

⁵⁹¹ Pils, “Asking the Tiger for His Skin”; Pils, “The Practice of Law as Conscientious Resistance”; Xiaoping Chen, “The Difficult Road for Rights Advocacy-An Unpredictable Future for the Development of the Rule of Law in China,” *Transnational Law & Contemporary Problems* 16 (2006): 221; Jerome A. Cohen, “China Trips Up Its Barefoot Lawyers,” *Far Eastern Economic Review* 168, no. 10 (2005): 17; Hand, “Using Law for a Righteous Purpose.”

⁵⁹² Fu and Cullen, “Weiquan Lawyering in an Authoritarian State”; Fu and Cullen, “Climbing the WeiQuan Ladder.”

⁵⁹³ Liu and Halliday, “Political Liberalism and Political Embeddedness,” 6.

⁵⁹⁴ Stern, “Navigating the Boundaries,” 122; See also: Fu and Cullen, “Weiquan Lawyering in an Authoritarian State.”

What are the types and motivations of lawyers involved in administrative litigation?

In 1990, the People's Republic of China (PRC) implemented the Administrative Litigation Law which allows some of the state's actions to be challenged in court. While not all administrative cases are particularly political and not all political cases are administrative, I am primarily concerned with the political role of lawyers and it makes sense to focus on administrative law as the most political class of cases. Concentrating only on the most politically sensitive cases, by contrast, is essentially what previous studies of rights protection lawyers have done, and for my purposes is tantamount to selecting on the dependent variable.

If a significant portion of administrative cases prove to be handled by the rights protection lawyers described in the literature, then it seems likely that the Chinese legal profession is making a substantial contribution to advancing a liberal agenda. But there are two good reasons to doubt whether this is the case. First, it seems unlikely that the small number of well-known rights protection lawyers in China could be responsible for the tens of thousands of suits against the state that lawyers handle every year. Second, more representative work on China's legal profession tells us that in order to ensure a successful practice, many Chinese lawyers find it necessary to stay politically embedded, i.e. to maintain close connections to the state,⁵⁹⁵ and that "there is an inverse relationship between lawyers' political embeddedness with the justice system and their liberal political values and motivations to pursue the core elements of political liberalism."⁵⁹⁶ If administrative litigators look more embedded and less liberal, then we will have to

⁵⁹⁵ Michelson, "Lawyers, Political Embeddedness"; Liu and Halliday, "Political Liberalism and Political Embeddedness."

⁵⁹⁶ Liu and Halliday, "Political Liberalism and Political Embeddedness," 7.

reconceptualize a new, more ambiguous, relationship between the legal profession and political liberalism in China.

In order to answer my questions, I personally conducted semi-structured interviews with 126 lawyers at randomly selected firms in Beijing, Shanghai, Ningbo, Changsha, Guilin and a prefecture in rural Hunan. These, as well as my supplemental interviews with are described in detail in Chapter Two. On the basis of these interviews, I am able to describe the two types of lawyers who take the vast majority of administrative cases. I also create a statistical model based on a large survey of Chinese lawyers that confirms the representativeness of the findings from my interviews.

This chapter will adhere to the following format. First, I look briefly at theoretical concepts relevant to this chapter and its possible contributions towards theory. Second, I consider some statistics on administrative litigation in order to help establish a more representative picture. Third, I examine what the literature tells us about the risks of administrative litigation. Fourth, I present a more balanced understanding of the realities of administrative litigation for Chinese lawyers. Fifth, I introduce the two types of lawyers who handle administrative cases. Sixth, I present survey data, run my regression, and explain my variables. Seventh, I interpret the results of my regression. Finally, I conclude that while Chinese lawyers as a whole have, at best, a problematic relationship with political liberalism, their contribution to rule of law in China is both important and may still lead, indirectly, towards liberal outcomes.

Theory

While this is an empirical chapter that addresses the question of what kind of lawyers take administrative cases and why they do, it does have important theoretical

implications echoing those that I have already detailed in my first chapter. I will, therefore, briefly review where this work fits into my theoretical construct.

In my theory chapter, I demonstrated the close relationship between rule of law and democracy and liberalism. So, why have not China's legal reforms, among other developments, led to political liberalisation? I propose the idea of authoritarian polycentrism to answer this question and argue that China's administrative legal system makes an important contribution to several aspects of authoritarian polycentrism. In particular, authoritarian polycentrism contributes to the functional specialization of the Chinese state, opens opportunities for public participation, helps ensure economic growth and investment, all while keeping many of the players in a standard conception of state-society relations embedded in the state.

While administrative litigation has made a real contribution to the reform of the Chinese state, officials are loath to allow for truly independent courts that would substantially check their power and provide a venue for people to air any legal grievance, no matter how sensitive or damaging to the CCP. The most theoretically interesting part of the concept of polycentric authoritarianism, therefore, is not how China has managed to develop institutions such as less politicized courts and media (these are common after all) but how it has managed to use them in an authoritarian context without losing control. As I argue throughout this dissertation, this has been achieved through a series of half measures and a strategy that gives with one hand and takes back with the other. In other words, the Chinese state is trying to have its cake and eat it too. While it needs the contributions a more independent legal system can make towards the efficiency of governance, stability, legitimacy, and economic growth, it frequently makes rather

dramatic efforts to maintain its power in the face of administrative litigation. I argue that it is this effort to gain the benefits of these liberalizations without paying the costs in lost control that is visible in the current state of administrative litigation and is responsible for the predominance of politically embedded lawyers in such litigation.

This chapter shows that the potential liberalizing influence of administrative litigation in China is tempered by a variety of measures and outcomes that limit its effectiveness. As I will show, lawyers with close connections to the state are by far the most likely to take administrative cases. While the status of these lawyers helps them avoid the retribution experienced by Chen Guangcheng and his colleagues, it also tends to moderate their behaviour. This type of lawyer, for example, is highly unlikely to take the extreme steps pursued by Chen such as giving an interview to a foreign journalist.⁵⁹⁷ These lawyers are part of the politico-legal establishment and see themselves primarily as trying to improve or temper the rule of the CCP rather than challenging it. As I will show, the most important variable for determining how likely a lawyer is to take a case against the state is how likely that lawyer is to represent the state in a different case. While, to some degree, this simply represents evidence of progress towards the specialization of Chinese legal professionals, it also shows that Chinese officials are intent on, and capable of, using the law for their benefit. This is especially worrying for two reasons. First, as we saw in the last chapter, Chinese administrative law is permissive enough that a legally minded Chinese official with a good legal advisor can often use dramatically authoritarian tactics while still staying within the bounds of the law. Second, lawyers are increasingly representing the state rather than plaintiffs in administrative litigation. This

⁵⁹⁷ Indeed, many of my informants made it clear that they would be unwilling to talk to me if I were a journalist.

suggests that the law and its practitioners are working to protect the state's freedoms rather than limit them.

In addition to revising our conception of Chinese lawyers, this chapter makes a contribution to the literature about the legal profession more generally, and especially regarding the socio-political activism and impact of lawyers. This literature is well-developed, but also complex, divided and sometimes contradictory. Indeed, a wide range of overlapping but non-synonymous terms are used to identify lawyers' socio-political activism. Scheingold and Sarat have created a cottage industry in the study of cause lawyering⁵⁹⁸ while Halliday and his associates sometimes use the narrower category of political lawyering⁵⁹⁹. Additionally, some academic works prefer terms that jibe more closely with popular usage such as public interest lawyer⁶⁰⁰ or human rights lawyer⁶⁰¹. Finally, in the Chinese context the category of *weiquan* (维权) lawyer or its translations "rights defence lawyer"⁶⁰² or "rights protection lawyer"⁶⁰³ are also frequently employed. While I lean towards the term human rights lawyer as it is the most commonly used,⁶⁰⁴ I

⁵⁹⁸ Sarat and Scheingold, *Cause Lawyering and the State in a Global Era*; Stuart A. Scheingold and Austin Sarat, *Something to Believe In: Politics, Professionalism, and Cause Lawyering* (Stanford University Press, 2004); Scheingold and Bloom, "Transgressive Cause Lawyering"; Steven K. Berenson, "Government Lawyer as Cause Lawyer: A Study of Three High Profile Government Lawsuits," *Denver University Law Review* 86 (2009): 457–89; Austin Sarat and Stuart A. Scheingold, *Cause Lawyering: Political Commitments and Professional Responsibilities* (Oxford University Press, USA, 1998); Thomas M. Hilbink, "You Know the Type...: Categories of Cause Lawyering," *Law & Social Inquiry* 29 (2004): 657–698; Terence C. Halliday, "Politics and Civic Professionalism: Legal Elites and Cause Lawyers," *Law & Social Inquiry* 24 (1999): 1013–1060.

⁵⁹⁹ Halliday, Karpik, and Feeley, *Fighting for Political Freedom*, 3–4.

⁶⁰⁰ David Luban, "Taking Out the Adversary: The Assault on Progressive Public-Interest Lawyers," *California Law Review* 91, no. 1 (2003): 209–246.

⁶⁰¹ Deena R Hurwitz, "Lawyering for Justice and the Inevitability of International Human Rights Clinics," *Yale Journal of International Law* 28 (2003): 505.

⁶⁰² Pils, "The Practice of Law as Conscientious Resistance."

⁶⁰³ Fu and Cullen, "Weiquan Lawyering in an Authoritarian State"; Fu and Cullen, "Climbing the Weiquan Ladder."

⁶⁰⁴ I established this through the total number of hits for the term on google.com.

use these terms more or less interchangeably and try to stay true to the term used by the relevant source.

This chapter contributes to the literature on human rights lawyers in several ways. It tells us something about lawyers in an authoritarian context where the risks of political lawyering extend unusually far. In contrast to much of the literature that tends to focus on overtly political collective tactics that operate via institutions such as legislatures and constitutional courts, this study focuses on the political implications of the everyday work of lawyers, a tactic Chinese lawyers favour perhaps because of the less open political environment. This research also adds to the too small body of work that shows us how and why lawyers fail to advance liberalism⁶⁰⁵. While none of these contributions are entirely novel, this work contributes to the less explored areas of the literature on the political impact of lawyers.

Administrative Litigation by the Numbers

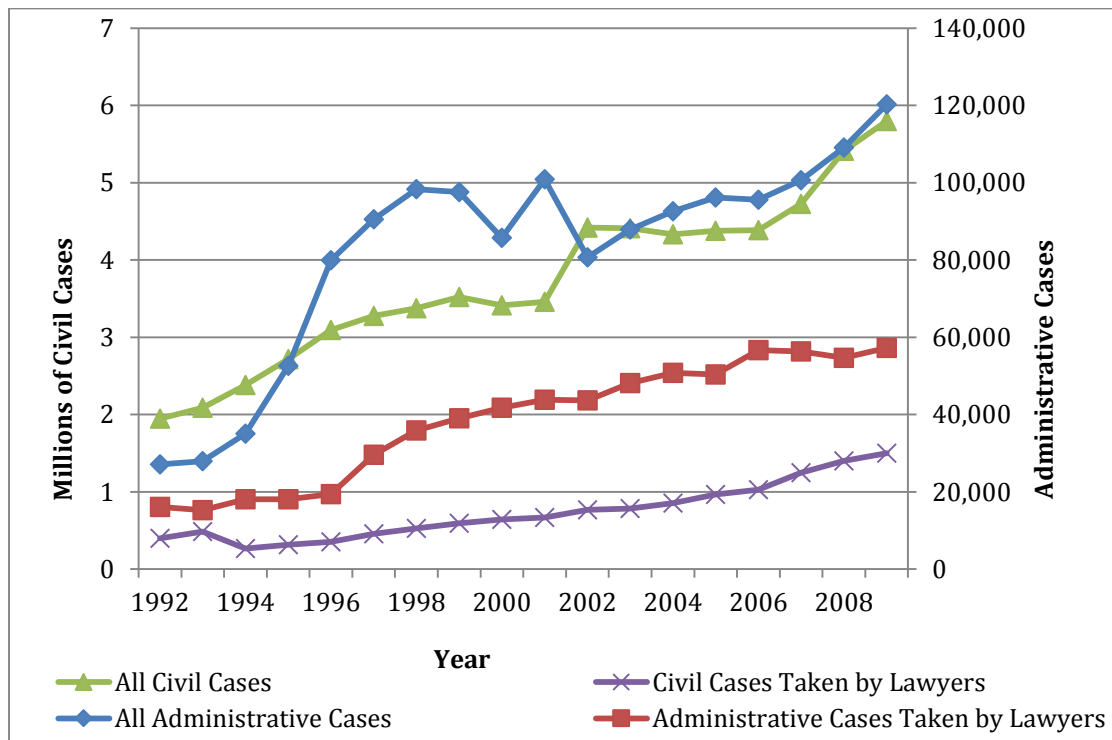
In order to develop a representative picture, this section reviews some basic statistical information on administrative litigation and the involvement of lawyers therein. As is clearly demonstrated by Figure 11 and discussed in more detail in the previous chapter, official statistics show that, despite occasional slumps, both the total number of administrative cases and the number of these cases handled by lawyers has increased dramatically over time.

Noting that the scale in Figure 11 for civil cases is 50 times larger than that for administrative ones, we see that administrative cases are heard in much lower absolute

⁶⁰⁵ Kenneth F. Ledford, "German Lawyers and the State in the Weimar Republic," *Law and History Review* 13 (1995): 317–349.

numbers than civil cases. The growth of administrative cases in this period, however, has been even more dramatic than that of civil cases and parties to administrative cases have been more likely to have legal representation than those in civil cases.

Figure 11: Total Administrative and Civil Cases Handled by Lawyers⁶⁰⁶



As we see from Figure 11, many parties participate in administrative litigation without the benefit of a lawyer. In administrative litigation plaintiffs often represent themselves in court (perhaps because they could not afford a lawyer or could not find one willing to represent them) and the state may send in-house counsel or a legally knowledgeable official,⁶⁰⁷ or it may simply not bother to defend itself at all. The question of which side lawyers are on is obviously vital for understanding their role in administrative litigation and their impact on the Chinese state.

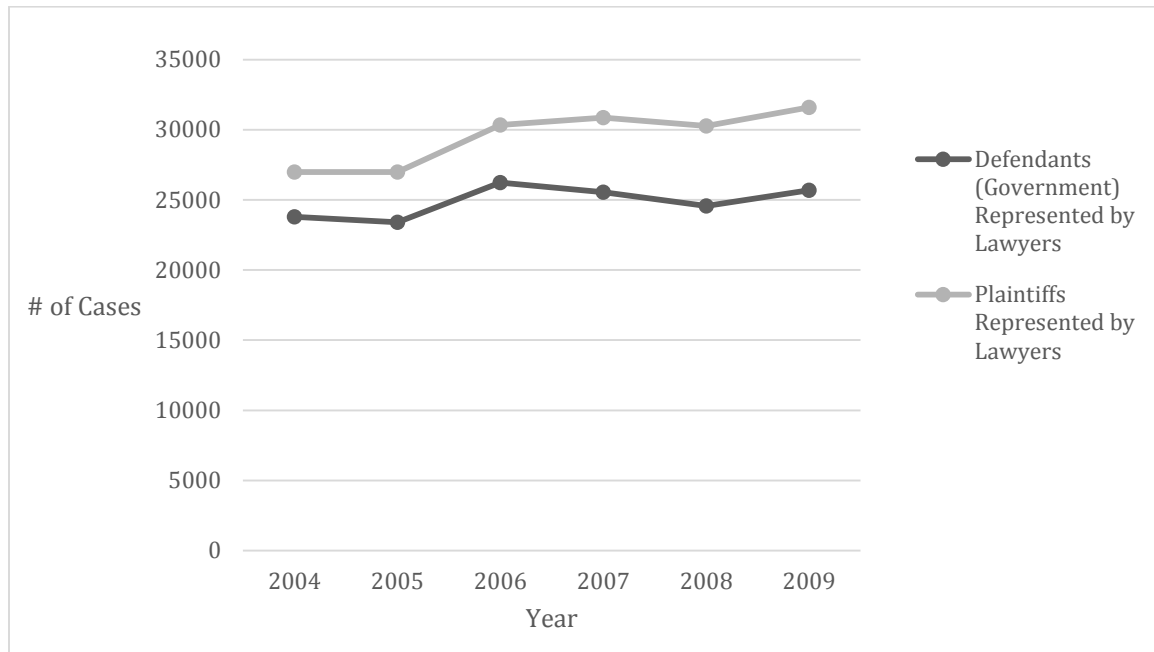
⁶⁰⁶ China Statistical Yearbook Editorial Committee, *China Statistical Yearbook Various Years*.

⁶⁰⁷ In intellectual property administrative cases, for example, representatives of the patent or trademark offices generally represent themselves.

As Figure 12 shows us, from 2004-2009 lawyers' participation in administrative cases is fairly evenly split between representing plaintiffs and defendants. Data from 17 provinces, however, suggests that in the year 2000 lawyers were representing plaintiffs in almost 45 per cent more cases.⁶⁰⁸ This suggests that defendants are hiring relatively more lawyers and plaintiffs relatively fewer. Since the state may also be represented by various types of in-house legal experts, defendants are probably significantly better represented in court in most administrative cases. As I argue in the previous chapter, officials "lawyering up" is probably related to government organs taking administrative litigation increasingly seriously and a decline in the percentage of cases that end in a satisfactory outcome for plaintiffs.

⁶⁰⁸ Chen Jian, *China Lawyer's Yearbook*.

Figure 12: Administrative Cases Handled by Lawyers⁶⁰⁹



Fees

Possibly the single most apparent finding to come from my interviews with Chinese lawyers is the idea that administrative cases are unprofitable. This has long been supported by previous research,⁶¹⁰ but is so central to understanding lawyers' role vis-à-vis administrative litigation that is worth further consideration.

While fees have been considered in more general sociological literature,⁶¹¹ the issue is largely absent from the literature on rights protection lawyers in China. Yet, even for dedicated rights protection lawyers: "if there is no income then there is no food to eat (如果没有收入没有饭吃)"⁶¹² and the literature outside China recognizes that "small firm attorneys do not ordinarily have the luxury of turning their backs on paying clients

⁶⁰⁹ China Lawyers Yearbook Editorial Committee, *China Lawyer's Yearbook Various Years*.

⁶¹⁰ Marshall, "A Process of Justice," 212.

⁶¹¹ Michelson, "The Practice of Law as an Obstacle to Justice."

⁶¹² Interview: BJ06N.

or cases that are without political significance”⁶¹³ and that “these paying but non-political clients often subsidize transgressive cause lawyering.”⁶¹⁴ Additionally, fees are important because larger fees could help persuade less altruistic lawyers to develop practices in administrative litigation and thereby expand its use and effectiveness.

The fees that administrative litigation generates for lawyers are generally modest and Michelson has shown that Chinese lawyers are often under tremendous financial pressure just to meet their firms’ minimum billing requirements.⁶¹⁵ Since administrative cases can be taken on a contingency fee basis, they could be very lucrative for lawyers if large compensation payments are possible. But as we saw last chapter, despite recent amendments to the State Compensation Law, awards in the past have often been extremely small ⁶¹⁶ and the vast majority of administrative cases involve no compensation.⁶¹⁷

Table 4 shows the total number of cases and average fees for a variety of legal services from 2007 to 2009. Unfortunately, the fees are only mean averages computed by dividing the total income by number of cases. Since lawyers’ fees are probably skewed right, like most income statistics, these numbers most likely overstate the fees received in average cases. Nevertheless, they show two interesting phenomenon. First, fees in

⁶¹³ Scheingold and Bloom, “Transgressive Cause Lawyering,” 246.

⁶¹⁴ Ibid.

⁶¹⁵ Michelson, “The Practice of Law as an Obstacle to Justice.”

⁶¹⁶ A amendment to the State Compensation law allowed compensation for mental anguish and suffering: Xinhua, “China Adopts Amended State Liability Compensation Law.” This was prompted in part by a well-publicized example of how small awards can be: “Ma Dandan, from Jingyang county in Shaanxi province, demanded 5 million yuan (HK\$5.68 million) in compensation after she was locked up for 15 days in January 2001 for “prostitution” - an ensuing check-up showed that the 19-year-old woman was still a virgin. Later, she was given 74.66 yuan [about \$10] as compensation, but her claim for mental distress was rejected by a district court, triggering a national outcry over the disregard for the law.” Li, “State May Pay for Causing Distress.”

⁶¹⁷ Guangdong High Court, *Guangdong Court Yearbook Various Years*.

administrative cases, while substantially less than those in IP, contract, or other civil cases, are still higher than those for labour or family cases. And indeed, while lawyers tended to stress the small fees earned in administrative cases,⁶¹⁸ some admitted that considering their less than thriving practices, they were “not really small (也不少).”⁶¹⁹

Second, while three years is too short a period to assess a long term trend, not only are the average fees for administrative cases increasing, it appears that they are increasing substantially faster than most other types of cases. While the mean fees for non-administrative cases increased by only 11 per cent, fees for representing administrative plaintiffs rose an impressive 57 per cent. While it is too early to be certain of the result, this offers the hope that the market is addressing the shortage of administrative litigators by offering increasing rewards for accepting administrative cases.

⁶¹⁸ Interviews: BJ26S, XX12S, CS06S.

⁶¹⁹ Interview: NB04S.

Table 4: Cases and Mean Fees for Lawyers for Various Legal Services⁶²⁰

| | Type of Service | Number of Cases | Mean Fees | Change in Fees from 2007 to 2009 |
|------------|-----------------------|-----------------|-----------|----------------------------------|
| Consulting | Total Consulting | 949,036 | 17,996 | 17% |
| | Government | 55,000 | 14,228 | 12% |
| | Industry | 660,967 | 20,464 | 19% |
| | Institutional | 89,621 | 12,394 | 2% |
| | Society Group | 30,462 | 11,385 | -17% |
| | Citizen | 48,450 | 6,920 | 56% |
| | Other | 64,536 | 15,150 | 6% |
| Criminal | Total Criminal | 1,571,999 | 4,385 | 8% |
| | Public Charges | 404,002 | 5,231 | 4% |
| | Private Charges | 73,526 | 4,294 | 49% |
| | Advice on Appeals | 230,628 | 1,733 | 4% |
| | Bail Applications | 56,085 | 3,695 | 0% |
| | Death Penalty Defense | 29,717 | 5,828 | -16% |
| | Defendant | 433,317 | 6,699 | 12% |
| | Legal Aid | 180,460 | 402 | -69% |
| | Public Prosecution | 86,584 | 4,467 | -12% |
| | Other Criminal | 48,730 | 6,611 | 153% |
| Civil | Total Civil | 4,148,129 | 7,972 | 11% |
| | Contract | 1,548,408 | 11,611 | -5% |
| | Tort | 566,909 | 5,470 | 20% |
| | Family | 568,015 | 3,555 | 1% |
| | Inheritance | 145,931 | 5,059 | 17% |
| | Labor | 386,383 | 3,606 | 1% |
| | Other | 798,799 | 8,513 | 64% |
| | Migrant Workers | 91,908 | 1,658 | -46% |
| | IP | 41,776 | 19,057 | -7% |
| Admin. | Admin Total | 168,294 | 5,338 | 45% |
| | Admin Plaintiff | 92,724 | 6,038 | 57% |
| | Admin Defendant | 75,804 | 4,465 | 27% |
| | Total | 6,808,742 | 8,497 | 13% |

Yet despite this, my informants consistently stressed the unprofitability of administrative litigation, a fact that Table 5 vividly illustrates. Seventy-four per cent of

⁶²⁰ China Lawyers Yearbook Editorial Committee, *China Lawyer's Yearbook Various Years*.

informants felt that administrative cases were less profitable than most other cases, or not profitable at all. Only nine per cent thought that administrative cases were about as profitable as most other case not a single respondent felt that they were more profitable.

Table 5: How Profitable Are Administrative Cases?

| Administrative cases are... | # of Responses | % of Responses |
|---|-----------------------|-----------------------|
| no opinion | 14 | 17% |
| not profitable at all | 24 | 30% |
| less profitable than most other cases | 36 | 44% |
| about as profitable as most other cases | 7 | 9% |
| more profitable than most other cases | 0 | 0% |

Initially, this might seem contradictory. We have just seen that administrative cases bring in fees that are modest rather than totally insubstantial. So why are they considered so unprofitable? The answer is that while administrative cases generally bring in modest fees, they tend to be difficult and time consuming, making them a losing proposition even when compared to cases that bring in less money, but make up for that by being quick, easy, and handled in greater quantity. Table 6 and Table 7 demonstrate that a majority of my randomly sampled informants felt that their most recent administrative case was more difficult and time consuming than average.

Table 6: How Difficult Are Administrative Cases?

| The last administrative case I represented was... | # of Responses | % of Responses |
|--|-----------------------|-----------------------|
| less difficult than my average case | 12 | 29% |
| about as difficult as my average case | 8 | 20% |
| more difficult than my average case | 21 | 51% |

Table 7: How Time Consuming are Administrative Cases?

| The last administrative case I represented was... | # of Responses | % of Responses |
|--|-----------------------|-----------------------|
| less time consuming than my average case | 8 | 24% |
| about as time consuming as my average case | 6 | 18% |
| more time consuming than my average case | 20 | 59% |

None of this is particularly controversial, but it is important to empirically verify what we think we know, something that is done far too infrequently in the literature. Showing that administrative cases are generally unprofitable because they are time consuming and onerous helps us understand why most lawyers shy away from them. At the same time, the understanding that administrative cases can still bring in reasonable fees gives us some insight into why lawyers with the expertise, connections, and experience to make them easier and quicker to handle might be willing to take administrative cases.

Administrative Litigators

No previous Anglophone scholarship has focused on the role of Chinese lawyers in administrative litigation. The lawyers who have attracted attention for their participation in administrative cases have generally fared extremely poorly. Academic,⁶²¹ NGO⁶²² and media⁶²³ sources report cases of lawyers being disbarred, not having their licenses renewed, receiving threats against themselves and their families, and even being beaten and/or jailed. Additionally, they must worry about developing reputations as troublemakers, incurring disfavour with courts and officials that will negatively impact

⁶²¹ Pils, “Asking the Tiger for His Skin”; Pils, “The Practice of Law as Conscientious Resistance.”

⁶²² Amnesty International recently published a report detailing the plight of China’s human rights lawyers, many of whose most important cases were administrative. Amnesty International, *Against the Law*.

⁶²³ Associated Foreign Press, “Police Beat up Activist’s Wife: Report,” *Taipei Times*, December 3, 2006, sec. World News.

their practices.⁶²⁴ This view fits nicely with the more extreme understandings of rights protection lawyers. Surely only a serious ideological commitment could induce lawyers to risk their careers, livelihoods, freedom, and families, by taking on the Chinese state. Yet, like so much research on China, it suffers from a bias caused by selecting on the dependent variable. Even when researchers are not specifically looking for the most controversial cases and the most outrageous instances of injustice, which they often are, they tend to find them. Large collective cases, extremely sensitive cases and cases in which lawyers are beaten or arrested tend to attract more attention and, therefore, these kinds of cases and the lawyers who litigate them feature far more prominently in both media accounts and academic work.

Because my interviews on administrative litigation were conducted with a random sample of lawyers I am able to improve on the biased and partial understanding of administrative litigators that is found in the literature. My findings show that lawyers generally view administrative cases as “relatively more difficult (难度比较大)”⁶²⁵, unprofitable, and time consuming⁶²⁶ rather than impossible or dangerous.

In the most sensitive cases, suits often fail, but lawyers rarely get in trouble as long as they stay within the bounds of the legal system. If a case is too sensitive to litigate, a lower-level court may refuse to accept it and then a higher-level court may refuse again on appeal.⁶²⁷ In extreme cases, law firms may receive notices that certain categories of

⁶²⁴ Ethan Michelson has found that many lawyers find maintaining connection with the courts vital to professional success: Michelson, “Lawyers, Political Embeddedness.”

⁶²⁵ Interview: BJ01N.

⁶²⁶ Interviews: BJ08-L, BJ15N, CS23N, NB19S, SH12S, SH14S, SH15S.

⁶²⁷ The court’s ability to refuse to hear a case is an important aspect of the Chinese legal system that differentiates it from most developed world legal systems. Although it is beyond our scope here, the subject has finally begun to receive the attention it deserves. See: Liu and Liu, “Justice Without Judges.”

cases will not be accepted.⁶²⁸ Alternatively, the plaintiff may lose in both the first and second instance. Weak legal reasoning can be invented to justify a loss or rejection⁶²⁹ or no reason may be given.⁶³⁰ Lawyers, especially those with close connections to the state, may be told in private by apologetic judges that political pressure will not allow them to accept this case or to find in favour of the plaintiff.⁶³¹ An official who can pressure courts to find in his favour or reject a case against him has no need to retaliate against plaintiffs or their lawyers. While this proves a disappointing outcome for plaintiffs, it may prove in the long run to be a positive for China's legal system as it reduces the risk to lawyers. Having exhausted all legal options, most lawyers prefer to call it quits and live to litigate another day. Even if they, like cause lawyers, pursue "ends and ideals that transcend client service"⁶³², nearly all of my informants saw themselves primarily as lawyers whose role is to work through the legal system, not outside it.

In administrative cases, it is generally only contentious extra-legal activities, such as going to the media, organizing activists and outright protest that results in lawyers landing themselves in trouble.⁶³³ "For example, [explained an administrative litigator who usually represented the government,] a lawyer in Shenzhen who represented the plaintiffs in a expropriation/demolition (拆迁) case went with his clients to physically interfere with the demolition. I disapprove of this and that lawyer was imprisoned for half

⁶²⁸ Interview: BJ01-P.

⁶²⁹ Liu, "Trick or Treat."

⁶³⁰ Interview: XX09S.

⁶³¹ Interview: BJ09-L.

⁶³² Scheingold and Sarat, *Something to Believe In*, 3.

⁶³³ This may be in contrast to criminal cases; perhaps because, as opposed to civil or administrative cases, there is no simple legal way to keep a criminal case and a defence lawyer out of the court if the government wants a conviction.

a year.”⁶³⁴ Yet, as we will see in the next chapter, the most successful administrative litigators are able to use some of these tactics to their advantage. Domestic media attention⁶³⁵ or plaintiffs making a ruckus in the streets or online⁶³⁶ can help put pressure on officials to concede to plaintiffs’ demands.

Chen Guangcheng’s problems probably arose because his courage and conviction drove him to take actions which, especially in combination, made him a target: 1) his case touched on a nationally sensitive issue (the one-child policy) 2) he included over a thousand plaintiffs and attempted to open the door for over a hundred thousand more⁶³⁷ 3) he lacked close connections to the state 4) he spoke with and was well publicized in the *foreign* media⁶³⁸ 5) public protest was involved⁶³⁹ 6) he was continuing to pursue a case that he had lost at the lower level and was being ignored by the intermediate court⁶⁴⁰. Most administrative litigators would probably have avoided serious reprisals by giving up after the appeal was ignored, or by choosing less aggressive tactics, for example, by bringing a much smaller group of plaintiffs (even one of China’s most successful administrative litigators had never filed a case with over 700 plaintiffs)⁶⁴¹. It is difficult to assess whether less aggressive tactics would ultimately have been more successful, but it seems likely that they would have kept Chen out of trouble. In the words of that extremely successful and prolific administrative litigator: “there are very few cases that

⁶³⁴ Interview: BJ21S.

⁶³⁵ Interviews: BJ28S, BJ03N, AL01-L.

⁶³⁶ Interview: AL01-L.

⁶³⁷ Congressional-Executive Commission on China, *What Will Drive China’s Future Legal Development? Reports from the Field*, 7; Jacobs, “Christian Bale Attacked.”

⁶³⁸ Beech, “Enemies Of the State?”; Pan, “Rural Activist Seized in Beijing.”

⁶³⁹ See *supra* note 7.

⁶⁴⁰ Li Baiguang, “Battle of Mt. Mengliang.”

⁶⁴¹ Interview: AL01-L. Although O’Brien and Li do identify a case in Hainan involving over 2,000 villagers: O’Brien and Li, “Suing the Local State,” 2004, 82.

are too sensitive, but some of the most sensitive cases that the Beijing rights protection (维权) lawyers take, I will not represent.”⁶⁴² Chen’s case is one of these extreme incidents that fall outside of the purview of all but the most radical Chinese lawyers. The more representative view of administrative litigation that I presented in this section will help us understand the lawyers who accept the vast majority of administrative cases and why they do.

Reluctant Administrative Litigators and Politically Embedded Lawyers

In this section, I introduce the two types of lawyers that take the vast majority of administrative cases. I outline the basic characteristics of each type and then test them against my statistical data. As an interesting but small additional category, one could add more radical *weiquan* lawyers, such as Chen Guangcheng. I will not do so here because they have already received a disproportionately extensive treatment in the literature⁶⁴³ and, as we shall see, there is no statistically significant evidence of their involvement in administrative litigation.

Hypothesis 1: Politically Embedded Lawyers

Most administrative cases handled by lawyers are taken by a relatively small number of lawyers with close connections to the state.

⁶⁴² Interview: AL01-L.

⁶⁴³ Eva Pils, for example, published an 80-page piece focusing on a single radical Chinese lawyer, Gao Zhisheng. See: Pils, “Asking the Tiger for His Skin.”

The motivations of politically embedded lawyers⁶⁴⁴ for taking cases against the state are familiar to students of cause lawyering.⁶⁴⁵ They are as follows: a commitment to rule of law,⁶⁴⁶ professional responsibility,⁶⁴⁷ a sense of justice (especially procedural justice)⁶⁴⁸ and public interestedness,⁶⁴⁹ sympathy for average people (老百姓),⁶⁵⁰ a desire to be challenged,⁶⁵¹ and/or a strong contentious streak⁶⁵². One lawyer had taken on an administrative review case pro bono; she described the client's situation as being "very difficult (很困难)" and explained that since she did not play mah-jong and did not like cards, she had time to "help people out".⁶⁵³ Another politically embedded lawyer showed me books about Hayek and civil rights that seemed to have made a significant impression on him.⁶⁵⁴

It was not just administrative litigators, however, that expressed these same convictions. A wide variety of Chinese lawyers told me about their sense of justice⁶⁵⁵, commitment to rule of law,⁶⁵⁶ admiration for the US constitution, and lawyers in the West⁶⁵⁷. In one case, a highly commercial and largely non-litigious lawyer who had

⁶⁴⁴ I gratefully borrow this term from Ethan Michelson, although my politically embedded lawyers may be more explicitly political and better embedded than his. Michelson, "Lawyers, Political Embeddedness"; See also Liu and Halliday, "Political Liberalism and Political Embeddedness"; Stern, "Navigating the Boundaries," 46.

⁶⁴⁵ These motivations look very similar to those Rachel Stern has found among environmental cause lawyers. See: Stern, "Navigating the Boundaries," 135.

⁶⁴⁶ Interview: CS24S.

⁶⁴⁷ Interviews: LZ03-L/J, SH12S.

⁶⁴⁸ Interviews: XX02S, BJ15N.

⁶⁴⁹ Interview: LZ03-L/J.

⁶⁵⁰ Interviews: NB19S, CS4S.

⁶⁵¹ Interview: SH16S.

⁶⁵² Interview: AL01-L.

⁶⁵³ Interview: CS05S.

⁶⁵⁴ Interview: NB20S.

⁶⁵⁵ Interview: SH21S.

⁶⁵⁶ Interview: NB16S.

⁶⁵⁷ Interview: BJ01N.

“never encountered (没碰到)” an administrative case⁶⁵⁸ showed me his copy of Alan Dershowitz’s *Letters to a Young Lawyer*, a book that advises: “Love liberty. Love justice. Love the good that law can produce.”⁶⁵⁹ Indeed, as Table 7 shows, my informants, in the abstract, were more willing to represent plaintiffs than the state in an administrative suit and generally named motives related to altruism or the challenge of representing an underdog.

Table 8: Prefer to Represent a Plaintiff or the State

| In an administrative case I would... | # of Responses | % of Responses |
|---|-----------------------|-----------------------|
| rather not represent either side | 6 | 5% |
| prefer to represent an administrative plaintiff | 36 | 31% |
| be willing to represent either the state or a plaintiff | 48 | 41% |
| prefer to represent an administrative defendant (the state) | 26 | 22% |

I suggest, therefore, that what sets politically embedded lawyers apart is not their motives but their means. Most Chinese lawyers feel that administrative cases are outside their expertise and are too difficult, time consuming, and unprofitable. In large part this is because they lack the connections and experience to successfully litigate administrative cases. Politically embedded lawyers, however, have the capacity to litigate administrative cases relatively successfully and safely; they have confidence in their powers and they like to flex their muscles.

Politically embedded lawyers are typically very experienced, financially comfortable, and well respected. They have all the markers of upstanding citizens, for

⁶⁵⁸ Interview: SH08-L.

⁶⁵⁹ Alan M. Dershowitz, *Letters to a Young Lawyer* (Basic Books, 2001).

example, having a wife in the local People's Congress.⁶⁶⁰ Being at least reasonably well off frees them to take often unprofitable administrative cases. In the words of one lawyer: "I don't need to make a bunch of money – I have enough money – I don't want to live 500 years."⁶⁶¹ Politically embedded lawyers usually do not take administrative cases on a strictly pro-bono basis, but the cases are often far from profitable. However, having a reputation for bringing in income and significant numbers of clients, helps protect politically embedded lawyers if profit minded partners pressure them to avoid more sensitive cases.⁶⁶²

While most embedded lawyers are able to absorb the relative loss of administrative litigation,⁶⁶³ at least one extremely prolific administrative lawyer charges thirty thousand RMB for a case in his home city and a hundred thousand in the 70 per cent of his cases that are outside it. This means that his fees are generally only affordable for larger collective cases. Most of his cases are indeed collective, with numbers of plaintiffs ranging from the teens to over 600.⁶⁶⁴ These fees generate significant income for him and his firm. While some other lawyers feel his fees are too high,⁶⁶⁵ what separates this lawyer from other politically embedded lawyers is that he accepts only administrative cases (always representing plaintiffs), and is probably the only lawyer in China who does so. At any rate, this proficient administrative litigator seems

⁶⁶⁰ Interview: NB20S.

⁶⁶¹ Interview: BJ28S.

⁶⁶² Interview: AL01-L.

⁶⁶³ This is similar to the behaviour of small firm cause lawyers in the US: Scheingold and Bloom, "Transgressive Cause Lawyering."

⁶⁶⁴ Interview: AL01-L.

⁶⁶⁵ Interview: NB20S.

unconcerned about his high fees saying simply “ordinary people [老百姓] have lots of money.”⁶⁶⁶

What sets politically embedded lawyers apart are their connections, especially with government officials and/or departments. Most commonly, these are lawyers who previously worked for the government, either as an official or as outside counsel. Because lawyers and law firms have slowly unhooked from the state over the last two decades, China’s most experienced lawyers often have close ties with the state that date back to the pre-privatisation era. While this means that many of China’s older lawyers have the government connections necessary to be politically embedded lawyers, it may be difficult for younger lawyers to establish such connections. Additionally, close relationships with the state tend to differentiate politically embedded lawyers from other well established but more commercially oriented lawyers (especially specialists in non-litigious, commercial and/or international work) who prefer to cultivate relationships with clients rather than connections with officials or even judges.⁶⁶⁷

My informants agreed nearly unanimously that, whatever the effectiveness of connections, in civil suits a lawyer cannot rely on them to win when litigating against the state. In a civil case, if a judge favours one side because of corruption or connections, he is treating a private party unfairly, if he gives special treatment to a plaintiff in an administrative case, he is treating a part of the Chinese state unfairly and few, if any judges are foolhardy enough to take that risk. In the words of one informant: “connections (关系) are probably least important in administrative cases because even if

⁶⁶⁶ Interview: AL01-L.

⁶⁶⁷ Interviews: BJ14-L, SH01-L.

you had good connections with the government, it is the government that you are suing.”⁶⁶⁸ Or, in a more metaphorical iteration: “a father can sue his son, but if the son sues the father he had better be right.”⁶⁶⁹ Connections to the state, however, still help politically embedded lawyers in a number of ways.

It is usually regulations written by the relevant government departments, not actual laws that are at issue in administrative litigation. As one experienced lawyer advised: “You do need to understand the laws. But you need a really good understanding of the government rules, policies and regulations.”⁶⁷⁰ Administrative cases are won or lost based on the whether the state followed the correct procedure. “For example, you need to know if a specific administrative action required a hearing (听证), because failing to hold such a hearing could be a cause of action.”⁶⁷¹ Although administrative law is a mandatory class in Chinese legal education, these regulations are completely foreign to most lawyers. Having previously worked with the state can create a familiarity with such regulations that would be difficult to achieve in any other way. Better still, many politically embedded lawyers will have actually represented government departments in administrative litigation either in the role of a legally knowledgeable official or, more likely, as the external counsel for a department. One such lawyer described himself as “indifferent (无所谓)” to the difficulty of administrative cases saying “I became so experienced [with administrative litigation] I don’t have any trouble.”⁶⁷² Like many U.S. prosecutors who become criminal defence attorneys, having worked on the other side

⁶⁶⁸ Interview: BJ18N.

⁶⁶⁹ Interview: CS04S.

⁶⁷⁰ Interview: BJ08.

⁶⁷¹ Interview: BJ16N.

⁶⁷² Interview: BJ21S.

tends to give these lawyers an expertise that is difficult for others to match. Representing the state in administrative litigation is also a profitable and noncontroversial way for lawyers to develop the expertise in administrative litigation that they may eventually turn against the state.⁶⁷³ “I was a legal consultant for the government, so I had a better understanding of the government, this meant I was a better administrative lawyer.”⁶⁷⁴

Yet only those who already have close connections with the state are generally hired to represent it in court⁶⁷⁵ and local governments tend to favour a handful of local lawyers. For example, before he moved to Beijing, one lawyer from Anhui had previously consulted for the local Land (土地局), Industry and Commerce (工商局), Public Security (公安局), and Labour (劳动局) bureaus. “I represented the government in between ten and twenty cases a year.”⁶⁷⁶ The fact that this lawyer had a near monopoly on representing the local state shows how difficult it would be for other lawyers to develop such experience and reinforces the importance of connections with the state.

Even representing the government in administrative cases has its problems. Administrative cases, especially collective land or housing cases, have a tendency to turn ugly or violent. When local governments hire lawyers to defend them, the lawyers are usually local, hence, litigating the government’s side of a sensitive case is likely to leave a lawyer living in the same county as a large number of former plaintiffs. One lawyer recounted having to be escorted to and from court in the prefectural seat when

⁶⁷³ Interview: AL01-L.

⁶⁷⁴ Interview: QD04-L.

⁶⁷⁵ Many of the informants responding to my question about whether they would rather represent the plaintiff or defendant in administrative litigation (Table 8) began their answer by explaining that there was no chance they could represent the state since they did not have the necessary connections.

⁶⁷⁶ Interview: BJ21S.

representing the government in a controversial case.⁶⁷⁷ This demonstrates that these embedded lawyers are a special breed, and that they are driven more by a commitment to the rule of law than to protecting individual rights.

Perhaps even more important than the experience or expertise that state connections help provide is the protection they can afford from official harassment. Primarily, political connections give lawyers the confidence to take sensitive cases: “What could a county level official do to me? I used to be a intermediate court judge.”⁶⁷⁸ Political connections like this usually provide a deterrent since officials would rarely act against a politically connected lawyer. Lawyers in my sample rarely had to use their political connections to protect themselves, so it is somewhat unclear how these connections could actually be used beyond making a phone call to relevant contacts. As private professionals, unless officials can muster the influence to prevent lawyers’ licenses from being renewed, they may have a hard time undermining their livelihood.⁶⁷⁹ Like the prominent citizens of any community, politically embedded lawyers are more difficult for officials to threaten and punish with impunity. While officials who are at the sharp end of administrative litigation may dislike politically embedded lawyers, they seem to have a grudging respect for them. “If people hate you – you just make them fear you,”⁶⁸⁰ concluded one experienced lawyer with a flair for the dramatic.

Other connections, especially with the media, are also important and helpful to embedded lawyers. Like connections with the state, having influence with the media

⁶⁷⁷ Interview: NB20S.

⁶⁷⁸ Interview: LZ03-L/J.

⁶⁷⁹ This is a tactic sometimes employed by officials against plaintiffs, lawyers and even their extended families, but seems to be effective primarily when their livelihood depends on the state. Interview: CS24S.

⁶⁸⁰ Interview: BJ28S.

serves the vital function of helping to protect lawyer, from the fallout from administrative litigation. They can use contacts in the media to browbeat officials and even match uncooperative officials threat for threat: “You screw with me, I’ll screw with you, I’ll call my friends in the media!”⁶⁸¹ This aggressive and confrontational attitude demonstrates that there is a range of radicalness within the category of politically embedded lawyers. Lawyers at the extreme end of the spectrum might also be accurately classified as *weiquan* lawyers resembling those described in the literature. Yet even this prolific administrative litigator owes his origins to representing the state in administrative cases.⁶⁸²

Embedded cause lawyers, then, have a dual nature. Their involvement on behalf of plaintiffs is driven primarily by the kinds of motivations we expect to see in cause lawyers, including a desire to improve the state’s adherence to law. They are like Liu and Halliday’s progressive elite criminal defence lawyers in that “they seek to enact incremental reform from the inside”⁶⁸³ or perhaps like Fu and Cullen’s moderate *weiquan* lawyers in that they avoid the most sensitive cases and confrontational tactics⁶⁸⁴. If this were the whole story, then politically embedded lawyers would already have a somewhat ambiguous relationship to political liberalism, that is, while they certainly push for incremental reform and win individual victories against the state, their actions may ultimately be tempering and supporting China’s authoritarianism. But these lawyers often take an active role in supporting the regime since the same lawyers that are most likely to litigate against the state in one case are actually the most likely to represent it in

⁶⁸¹ Interview: AL01-L.

⁶⁸² Interview: AL01-L.

⁶⁸³ Liu and Halliday, “Political Liberalism and Political Embeddedness,” 46.

⁶⁸⁴ Fu and Cullen, “Weiquan Lawyering in an Authoritarian State.”

another.⁶⁸⁵ To a certain extent, this is merely the product of the specialization that we expect to accompany a growing and maturing legal services market. Yet, the practices of most Chinese lawyers remain remarkably general and, at any rate, their readiness to defend the actions of an authoritarian state surely does much to blunt any liberalising impact. There are administrative cases in which even the most liberal cause lawyer would be happy to see the state well represented in court, for example, when the environmental bureau is sued by polluters disputing fines. Administrative litigation in China, however, is very often the result of the state's authoritarian attitude and methods – most commonly land grabs and overzealous policing. Finally, some politically embedded lawyers may grow out of representing the state, as the most prolific administrative litigator did, though he says they still ask for him.⁶⁸⁶

While the relationship between politically embedded lawyers and political liberalism may be problematic, these lawyers are generally stalwart advocates of rule of law. They may, in fact, have a larger impact on improving rule of law than more radical lawyers because they are able to litigate relatively large numbers of administrative cases and because they are respected and consulted by officials. One frequent administrative litigator (usually on the side of the state) said that he was not willing to represent the government when he thinks they are completely wrong. “I will tell them how to resolve it but I will not represent them.” If you “...can't win and don't have any argument to make, I don't want to help the government screw someone, it isn't honest.”⁶⁸⁷ As rule of law has

⁶⁸⁵ Though conflict of interest requirements do not allow lawyers to sue the government organs they have represented or consulted for, they often sue different departments or may sue the same department in another jurisdiction. Interview: CS20S.

⁶⁸⁶ Interview: AL01-L.

⁶⁸⁷ Interview: NB09S.

long been considered both empirically and theoretically important to establishing and maintaining a democracy, embedded lawyers may yet do their part for political liberalism through their contributions to improving rule of law in China.

Hypothesis 2: Reluctant Administrative Litigators

A smaller number of administrative cases are handled by relatively ordinary lawyers who are reluctant, but feel obligated due to pre-existing relationships or sympathy.

Although most lawyers are not willing to take administrative cases, many lawyers will take an occasional administrative case because they feel as though they must: “I had to (必须)” or “it can’t be helped (没办法)” are common refrains. I characterize these lawyers as reluctant administrative litigators. Ordinary lawyers do not like administrative cases because they are likely to be more difficult, controversial and time consuming, and tend to produce only meagre financial returns. It is difficult to make a generalization about these lawyers since any lawyer is a potential reluctant administrative litigator, though it is possible that they are more sympathetic, liberal or otherwise altruistic than average. Within this group I identify two different situations in which they handle administrative cases:

Hypothesis 2a: A Friend in Need

A reluctant administrative litigator’s pre-existing relationship with the plaintiff can oblige him or her to take an administrative case. Sometimes this is a familial relationship, but often these plaintiffs are friends, acquaintances, classmates, or friends of friends. These plaintiffs rely on their connection (*guanxi* 关系) with the lawyer to create a sense of obligation and refusing the case would often mean a loss of face (*mianzi* 面子)

to lawyers. In smaller cities and towns, many, if not most, locals can find some kind of connection to one of the few local lawyers, and even lawyers who now practice in big cities find it difficult to reject clients from their hometowns.⁶⁸⁸

Hypothesis 2b: Professional Responsibility and Sympathy

While ordinary lawyers rarely accept administrative cases from people with whom they are unconnected, they will sometimes accept cases out of sympathy⁶⁸⁹ or out of a sense of professional responsibility (*zhiyedaode* 职业道德).⁶⁹⁰ As one lawyer declared: “We are professionals. We are willing to take administrative cases. Lawyers must do this [accept any viable case that comes in]. Lawyers must help people.”⁶⁹¹ This is often true when the client is pitiable, desperate and/or the wrong they have suffered is particularly obvious and egregious.⁶⁹² As one lawyer put it: “in some cases the lawyer’s fee cannot even cover the cost of transportation. But, I will still take the case because the clients are either too poor, or too wronged, or too in need.”⁶⁹³

While it might be tempting to exclude reluctant administrative litigators from an analysis of administrative litigation in China, it would be wrong to do so. Such lawyers still account for a substantial portion of administrative cases (I estimate around 20 per cent). For many Chinese who would not know how to find a politically embedded lawyer, relying on connections to hire a lawyer may be their only chance at legal representation.

⁶⁸⁸ Stern has found some environmental lawyers in China take cases for similar reasons: Stern, *Environmental Litigation in China*, 196.

⁶⁸⁹ This appears to be unique neither to administrative litigation nor to China: Stern, “Navigating the Boundaries,” 129. Herbert M. Kritzer, “Lawyer Fees and Lawyer Behavior in Litigation: What Does the Empirical Literature Really Say,” *Texas Law Review* 80 (2002): 1945.

⁶⁹⁰ Interviews: BJ05S, NB20S.

⁶⁹¹ Interview: BJ27S.

⁶⁹² Interviews: BJ03N, BJ08, BJ20N.

⁶⁹³ Interview: BJ03N.

In many areas of life in modern China, connections help society function by filling in deficiencies in formal institutions, notable examples include: lending and borrowing capital,⁶⁹⁴ employment,⁶⁹⁵ ensuring a good relationship with the state (especially in terms of property rights),⁶⁹⁶ and, more generally, in enforcing contracts and overcoming the uncertainties of a weak judicial system⁶⁹⁷. If administrative litigation is insufficiently developed for ordinary lawyers to take cases on their own merits, it is neither bad nor unimportant that some lawyers are compelled to take cases on the basis of their connections. Even if lawyers are motivated to take administrative cases by feelings of guilt and obligation, the pool of lawyers with some administrative litigation experience is expanded. This could result in previously uninterested lawyers becoming dedicated to using law to challenge the state. Since reluctant administrative litigators lack the connections to the state that help moderate politically embedded lawyers and give them opportunities to represent the state, they may provide the most likely source of more radical lawyer activists. Indeed, recent research has suggested that this is how the careers of many radical *weiquan* lawyers began, including Chen Guangcheng.⁶⁹⁸

⁶⁹⁴ See: Y. Peng, "Kinship Networks and Entrepreneurs in China's Transitional Economy," *American Journal of Sociology* 109, no. 5 (2004): 1045–1074; Kellee S. Tsai, *Back-Alley Banking: Private Entrepreneurs in China* (Cornell University Press, 2002); Kellee S. Tsai, "Curbed Markets?: Financial Innovation and Policy Involution in China's Coastal South," *Weatherhead Center for International Affairs, Harvard University, Working Paper Series 98-06* (1998).

⁶⁹⁵ See the chapters by Yanjie Bian and Amy Hanser in: Thomas Gold and Doug Guthrie, *Social Connections in China: Institutions, Culture, and the Changing Nature of Guanxi* (Cambridge, UK: Cambridge University Press, 2002).

⁶⁹⁶ See many of the chapters, especially first and last, in: Jean C. Oi and Andrew G. Walder, *Property Rights and Economic Reform in China* (Stanford, CA: Stanford University Press, 1999).

⁶⁹⁷ David L. Wank, *Commodifying Communism: Business, Trust, and Politics in a Chinese City*, *Structural Analysis in the Social Sciences* 14 (Cambridge, UK: Cambridge University Press, 2001), 110–1; Pitman B. Potter, "Guanxi and the PRC Legal System: From Contradiction to Complementarity," in *Social Connections in China: Institutions, Culture, and the Changing Nature of Guanxi*, by Thomas Gold and Doug Guthrie (Cambridge, UK: Cambridge University Press, 2002), 179–195.

⁶⁹⁸ Fu and Cullen, "Climbing the Weiquan Ladder."

Survey Data

In order to test the hypotheses I developed from my interviews, I will use data from a 2007 survey. “During February-April 2007, the All-China Lawyers Association administered a mail and email survey of lawyers (N = 1,337) in three major cities (Beijing, Shanghai, and Guangzhou) and five provinces (Jilin, Zhejiang, Qinghai, Jiangsu, and Shandong)... The survey instrument was designed by Shanghai Jiaotong University Koguan Law School's Professor, Ji Weidong, who generously shared the data. Because it was administered through official channels, the response rate - in the 80-85% range – was unusually high for a survey of its kind. With only a few exceptions, one lawyer in each sampled law firm was selected to participate in the survey. I have no additional information about how law firms were selected or about how individuals were selected within firms. However, judging by the proportion of partners in the two surveys (61 % in the 2007 survey compared to 20% in [a different] 2000 survey), the 2007 survey appears to overrepresent law firm leaders. I also have no additional information about the geographical distribution of law firms within provinces.”⁶⁹⁹ For variables recording the number of cases a lawyer has taken, the specified time period is between when the survey was given and 31 January 2006, or approximately one year.

This was a fairly messy dataset and for many variables the coding failed to distinguish between missing data and zeros. Thankfully, for the dependent variable and most important independent variables I was able to identify which variables should be coded as zero and which were truly missing (since these were sub groups of variables for which zeros had been coded). The survey asked partners to code the number of various

⁶⁹⁹ Michelson, “Gender Inequality in the Chinese Legal Profession,” 345.

kinds of cases (including my dependent variable) they litigated in a different way than non-partners. Specifically, partners are meant to enter the total number of cases their firms accepted, divided by the total number of partners. This is meant to reflect the management role of partners and the fact that they generally share in the fees generated by non-partners. I have therefore included a dummy variable to control for the effect of being a partner.

The Technical Details

My model predicts two occurrences. First, the negative binomial regression predicts the number of cases lawyers, who might take administrative cases, would litigate. Second, the logistic regression predicts the likelihood that a lawyer falls into the group that would never take administrative cases. In other words, this regression separates those lawyers that are unwilling, unable, or for some other reason would never take an administrative case, from those who simply happened not to this year, perhaps because they did not encounter any or were too busy. This is not only statistically necessary, but conceptually matches and supports the finding from my interviews.

The model I have used is the result of compensating for the constraints of the data. First, I cannot use a standard linear regression model because the dependent variable is a "count variable", that is, it is not continuous (lawyers either take one or two or three cases - they don't take 2.5). This would normally call for a Poisson regression, but that is not an option here because the dependent variable is highly overdispersed, i.e. the variance is greater than the mean (most lawyers take very few cases against the state but a few take considerable numbers). For overdispersed count variables, a negative binomial regression is appropriate, but the vast majority of lawyers did not take any cases against the state, so

almost 70 per cent of the observations for my dependent variable are zeros. I therefore use a zero inflated negative binomial regression. This means using two regressions combined: a negative binomial regression that predicts how many cases against the state would be taken by lawyers who actually might take such cases and a logit regression that predicts the likelihood of a lawyer being among those who would never sue the state (the always zero group).⁷⁰⁰ In order to test my hypothesis I use the following variables:

Cases Representing the Plaintiff: This is my dependent variable. It is the number of cases lawyers handled in which they represented a plaintiff in an administrative suit against the government.

Cases Representing the Government: This is the number of cases lawyers handled in which they represented the government in an administrative suit. I expect this to be the most important independent variable and highly positively correlated with my dependent variable as it closely reflects both the quality of a lawyer's connection to the government and knowledge of and experience with administrative law (hypothesis 1). As I have suggested, this is because only lawyers with close connections to the state are generally hired to represent the state in administrative cases and because these cases generally provide a profitable and noncontroversial way for a lawyer to gain experience with administrative law and litigation.

Cases Introduced by Clients: This is the number of civil cases lawyers handled for clients that were referred to them through other clients. This acts as a proxy for the strength and quantity of lawyer's connections more generally (hypothesis 1). Embedded

⁷⁰⁰ For more on all of these types of regression see: J. Scott Long, *Regression Models for Categorical Dependent Variables Using Stata* (College Station Texas: Stata Press, 2001), Chapter Eight.

cause lawyers are experienced and respected litigators who are likely to be highly recommended by a substantial network of clients. I expect this variable to be positively correlated with my dependent variable.

Economic Law Cases: This is the number of economic civil cases that a lawyer handled. Lawyers that practice generally lucrative economic law are more likely to be interested in making money and less interested and experienced in less profitable administrative law (hypothesis 1). Additionally, the greater lawyers' involvement in economic law, the less likely they are to be involved with the kinds of disadvantaged citizens who are most likely to sue the state. The large companies that are likely to be clients in an economic case are much less likely to litigate against the state, preferring to use their clout and connections to solve problems with the government outside of the courtroom (see Chapter Six).

Total Cases Litigated: This is a control variable, lawyers that litigate more cases are more likely to take more cases of all kinds, including administrative cases against the state.

Partner Dummy Variable: This is a dummy variable representing whether the respondent is a partner in a firm with more than one lawyer. It is a control variable that I have included to account for the way the survey questions were framed. The survey asked partners to code the number of various kinds of cases they litigated (including my dependent variable) in a different way than non-partners.

Beijing, Guangzhou, Jilin, Zhejiang, Qinghai, Jiangsu, Shandong: These are dummy variables representing the province in which the respondent's law firm is located. Because the dummy variable for Shanghai was the one I chose to exclude, the effect of

these variables can be thought of as the impact of the law firm being in that province rather than Shanghai.

Cases Introduced through Personal Connections: This is the number of civil cases lawyers took for clients referred to them by individuals with whom they had a personal relationship including family, friends, acquaintances, friends of friends and classmates. This acts as a proxy for the strength and quantity of a lawyer's network of personal relationships. The stronger and more numerous a lawyer's personal relationships the more likely a personally connected client will request counsel for an administrative case, and the more likely the lawyer will feel obliged to take the case (hypothesis 2a). I expect personal connections to be negatively correlated with never taking administrative cases.

Cases for Strangers: This is the number of civil cases in which lawyers had no previous connection with clients. Strangers are less likely to make lawyers feel obliged to accept an administrative case, so lawyers who take more cases for strangers are less likely to take administrative cases (hypothesis 2a). Additionally, embedded lawyers who take most administrative cases are so well connected that many rarely or never accept any cases from strangers.⁷⁰¹ I expect this variable to be positively correlated with presence in the always zero group.

Cases for Large Companies: This is the number of civil cases lawyers took for clients that were large companies. Lawyers who represent large companies are less likely to rely on personal connections for cases (hypothesis 2a) and are extremely unlikely to be

⁷⁰¹ Interview: QD01-L.

desperate enough to take administrative cases out of financial necessity. Large companies tend to be reluctant to sue the state and have other means of resolving their problems with local governments (see Chapter Six). I expect this variable to be positively correlated with never taking administrative cases.

Labour Law Cases: This is the number of civil cases related to labour. Labour cases in which lawyers represent employees tend to be unprofitable and provide an excellent opportunity for lawyers to protect the rights of an underdog.⁷⁰² Larger numbers of labour cases indicate lawyers sympathetic to the plight of the disadvantaged (hypothesis 2b). I expect this variable to be negatively correlated with presence in the always zero group.

⁷⁰² Interview: BJ08. Unfortunately, this survey does not differentiate between cases in which the lawyer represented employees and cases in which the lawyers represented employers. This makes it a much less precise, but I still believe it to be useful.

Regression Results

**Table 9: Lawyers Who Might Take Cases Against the State
(Politically Embedded Lawyers) Negative Binomial Regression**

| Variable | Coefficient | Per Unit increase (Multiply by a factor of:) | Per standard deviation increase (Multiply by a factor of:) | Size of Standard Deviation |
|-----------------------------------|-------------|--|--|----------------------------------|
| Cases Representing the Government | 0.23600* | 1.2662 | 2.6430 | 4.1183 |
| Cases Introduced by Clients | 0.02167* | 1.0219 | 1.1870 | 7.9118 |
| Economic Law Cases | -0.01043* | 0.9896 | 0.8761 | 12.6823 |
| Total Cases of all types | 0.00159* | 1.0016 | 1.1587 | 92.4816 |
| Partner Dummy Variable | 0.18309 | 1.2009 | 1.0951 | 0.4960 |
| Shandong | 0.15765 | 1.1708 | 1.0673 | 0.4132 |
| Guangzhou | 0.29711 | 1.3460 | 1.1095 | 0.3497 |
| Jilin | 0.27644 | 1.3184 | 1.0746 | 0.2603 |
| Zhejiang | 0.06286 | 1.0649 | 1.0189 | 0.2978 |
| Qinghai | 0.29689 | 1.3457 | 1.0270 | 0.0898 |
| Jiangsu | -0.09234 | 0.9118 | 0.9844 | 0.1700 |
| Beijing | -0.02159 | 0.9786 | 0.9912 | 0.4095 |
| Constant | -.4756988* | 0.6214** | | |

* = Significant at 0.05 level. ** = This number denotes the predicted number of cases a lawyer would take if all of the predictor variables in the model were evaluated at zero. Increases and decreases are as multiplicative factors, so, for example, one standard deviation increase in cases defending the government results in cases against the state a lawyer would be predicted to take being multiplied by a factor of 264.3%.

Table 10: Lawyers Who Will Never Take Cases Against the State (Always Zero) Logistic Regression

| Variable | Coefficient | Per Unit increase (multiply by a factor of) | Per standard deviation increase (multiply by a factor of) | Size of Standard Deviation |
|---|-------------|---|--|----------------------------------|
| Cases introduced through personal connections | -0.10867* | 0.8970 | 0.1823 | 15.6604 |
| Cases for strangers | 0.31593* | 1.3715 | 177.3592 | 16.3904 |
| Cases for large companies | 0.34018* | 1.4052 | 388.0372 | 17.5235 |
| Labour law cases | -0.92872* | 0.3951 | 0.0130 | 4.6737 |
| Total cases of all types | -0.33728* | 0.7137 | 0.0000 | 92.4816 |
| Partner dummy variable | 0.50534 | 1.6576 | 1.2849 | 0.4960 |
| Shandong | -2.44520* | 0.0867 | 0.3641 | 0.4132 |
| Guangzhou | -1.17191 | 0.3098 | 0.6638 | 0.3497 |
| Jilin | -1.92135 | 0.1464 | 0.6064 | 0.2603 |
| Zhejiang | -0.16793 | 0.8454 | 0.9512 | 0.2978 |
| Qinghai | -20.91553 | 0.0000 | 0.1530 | 0.0898 |
| Jiangsu | 0.26485 | 1.3032 | 1.0461 | 0.1700 |
| Beijing | -2.25272* | 0.1051 | 0.3976 | 0.4095 |
| Constant | 4.001273* | 54.6676** | | |

* = Significant at 0.05 level. ** = This number denotes the predicted probability of a lawyer being in the always zero group (being unwilling to take administrative cases) if all of the predictor variables in the model are evaluated at zero.

Log likelihood = -1179.063

Number of observations = 1109

Nonzero observations = 346

Zero observations = 763

Likelihood Ratio Chi-Square test = 242.12 (degrees of freedom = 12, p-value = 0.0000)

Natural Log of Alpha (over dispersion test) = 6.10 (p-value = 0.0000)

Vuong Test = 5.66 (p-value = 0.0000)

Regression Interpretation

In general, the results of the regression show substantial support for my hypotheses. As I had expected, the most important variable for predicting lawyers' participation in administrative litigation against the state was how many cases they accepted representing the state. This lends credence to my understanding that lawyers who sue the Chinese state tend to be closely connected to the state. While my "cases introduced by clients" variable also suggests that these politically embedded lawyers are generally well connected and respected, this result had both a relatively weak effect and proved not to be very robust. These lawyers seek to use their position to mediate between aggrieved parties and the state. They attempt to temper the worst excesses of state power

and perhaps to push forward reforms, but do not challenge the state outright. This challenges conventional ideas of *weiquan* lawyers as radical and/or transgressive outsiders. At the same time, however, the regression showed that politically embedded lawyers are less interested in more profitable commercial litigation.

How common politically embedded lawyers are in China is obviously an important question for this research to address. In the data, lawyers who represented plaintiffs in 3 or more administrative cases make up about 8 per cent of the lawyers surveyed and accounted for 80 per cent of administrative litigation plaintiffs in the survey. However, there are good reasons to believe that this is far too high. In the survey data, there were approximately 1.3 administrative cases per lawyer, while the national average in that same year should be only 0.46.⁷⁰³ This is probably because the survey overrepresented senior lawyers (61 per cent of respondents were partners as compared to 20 per cent in a different survey of Chinese lawyers)⁷⁰⁴ who are far more likely to be politically embedded lawyers. Since the survey appears to have overrepresented law firm leaders and cases per lawyer by factors of approximately 3, I estimate that approximately 2-3 per cent of Chinese lawyers, around 5,300 in total, could be characterized as politically embedded lawyers.

It is vital to remember that in 1992 China only had approximately a seventh of the number of lawyers it has today. Considering that many lawyers from that era would no longer be practicing, there is a relatively small number of lawyers who could have the experience and connections to be politically embedded lawyers. As the legal profession

⁷⁰³ Anhui Province Statistical Bureau, *Anhui Statistical Yearbook Various Years*.

⁷⁰⁴ Michelson, "Gender Inequality in the Chinese Legal Profession," 345.

broadens and matures, it is possible that we will see more lawyers with the means to become politically embedded lawyers.

My regression also casts light on reluctant administrative litigators. It showed that personal ties were an important factor in motivating lawyers to take the occasional administrative case. In contrast, lawyers who took more cases from strangers were less likely to be drawn in by personal ties and less likely to take any administrative cases. Additionally, the kind of sympathy that moves lawyers to take generally unprofitable labour cases also seems to motivate lawyers to do some administrative litigation. Conversely, lawyers who do more litigation for strangers and big companies, and therefore were presumably more commercially minded, were more likely to never take a case against the state.

Other Variables

In addition to my findings above, there are a number of other variables that might have been expected to be important, but turned out not to be significant. Most importantly, the small percentage of lawyers who considered themselves involved in “popular rights protection activities representation [民间维权活动代表]” did not prove in the regression, or in an additional t-test, to be involved in significantly more administrative cases than those who did not. And, at 67 lawyers, this group was not necessarily too small to have had adequate statistical power. Although administrative cases are not synonymous with rights protection cases, there is significant overlap; many of well-known *weiquan* lawyers Gao Zhisheng and Cheng Guangcheng’s rights protection cases were administrative. Based on the conventional idea of *weiquan* lawyers, we should expect there to be a correlation. The fact that there is not, seems to confirm that the impact of more radical

weiquan lawyers is so small as to be statistically insignificant, at least in terms of number of cases, and reinforces the idea that it is not their motives that separate politically embedded lawyers from others, but their means. Lawyers who self-identify as participating in rights protection may be more willing to take the state to court, but lawyers with administrative experience and connections with the state still take the lion's share of cases.

Lawyers' age did not have a statistically significant impact on administrative litigation. I had initially expected age to be a factor, as most of the politically embedded lawyers I encountered in my interviews were older and several cited either the Cultural Revolution or the Tiananmen incident as motivation for pursuing more altruistic types of litigation. The idea that this older generation tended to be more public-spirited was confirmed in a t-test in which older lawyers proved statistically significantly more likely to identify themselves as involved in rights protection. The fact that age did not translate into more administrative litigation provides further evidence that it is the means and not the motivation that makes for an administrative litigator.

Years of experience as a lawyer did not impact involvement in administrative litigation. I had anticipated that the length of legal experience would have had an effect, as it would have provided not only the experience necessary for handling administrative cases, but also the contacts. I suspect the reason this did not turn out to be significant was that some newly minted lawyers have already accumulated substantial experience and connections in previous careers, especially as judges or officials.⁷⁰⁵ These lawyers will therefore enter the profession prepared for administrative cases, whereas many

⁷⁰⁵ Interview: XX10S.

experienced lawyers (for example, those who have concentrated on commercial law) may have failed to develop the capacity, especially the connections with the state, that makes for frequent administrative litigators.

Income is another variable that I would have suspected would have more impact than it did. While there was some indication that lawyers whose incomes were higher than average, but not in the highest bracket, might be more inclined towards administrative litigation, this finding was not very robust. Perhaps this is due to the fact that some lawyers, especially those just starting out, are so desperate for work or so indiscriminate in their quest for additional income that they will take essentially any case that will pay, no matter how small or how undesirable, including administrative cases.⁷⁰⁶ There may, then, be two contradictory logics at work, which cancel each other out. Wealthier lawyers may be more willing to take unprofitable administrative cases because they are wealthy and can afford it, but poorer lawyers may be willing to take cases because they are poor and desperate.

Having been an official, even one involved in the legal system, did not necessarily translate into the kind of strong relationship with the state that makes a politically embedded lawyer. Some lawyers had worked for decades within China's legal institutions without accumulating the experience or connections to litigate administrative cases.⁷⁰⁷ This is demonstrated by the fact that previous careers in the courts or officialdom also did not prove to have a significant relationship to administrative litigation.

⁷⁰⁶ Interview: SH08S. On the intense financial insecurity of Chinese lawyers see: Michelson, "The Practice of Law as an Obstacle to Justice."

⁷⁰⁷ Interview: SH20N.

While the literature on the practice sites of cause lawyers is relatively complex and nuanced, it is reasonable to assert that cause lawyering outside of China, especially the more transgressive kind, is mostly based in small law firms and rarely in large corporate ones.⁷⁰⁸ Additionally, Fu and Cullen suggest that “Chinese *weiquan* lawyers, like lawyers in general – tend to cluster in small firms in big cities, especially in Beijing.”⁷⁰⁹ Based on the survey data, however, it appears that there is no relationship between firm size and administrative litigation. To a certain extent, this is probably because, as Fu and Cullen note, the vast majority of Chinese law firms are relatively small. More importantly, however, politically embedded lawyers are generally respected, connected, and successful enough that the partners in their firm tend not to object when they take on even relatively controversial cases.⁷¹⁰ There is little need, for them to strike out on their own. Additionally, being based in a large firm that does lots of noncontroversial cases helps provide cover. The significance and sign of the Beijing dummy variable in the always zero regression seem to confirm Fu and Cullen’s assertion by suggesting that Beijing lawyers may be slightly more involved in administrative litigation. This makes sense since Beijing is the centre of China’s legal and political system. Its lack of significance, however, in the negative binomial regression suggests that Beijing lawyers are not more likely to be frequent administrative litigators.

Despite the less than perfect nature of the data, my use of quantitative techniques is important for several reasons. First, it shows that my results were representative of the larger population of Chinese lawyers and, conversely, suggests that more radical cause

⁷⁰⁸ Scheingold and Bloom, “Transgressive Cause Lawyering.”

⁷⁰⁹ Fu and Cullen, “Weiquan Lawyering in an Authoritarian State,” 3.

⁷¹⁰ Interview: AL01-L.

lawyers are not a statistically significant presence. Second, it helps clarify what kind of connections with the state matter, principally those that result in lawyers working for the state. Third, it was able to verify the importance of personal connections, something that is often difficult to capture. Fourth, it helped show that some of the other factors such as age, experience as a lawyer, and income were not as important as I had suspected.

Conclusion

Administrative litigation in China is still an extremely weak tool of reform. It is hard to imagine such a limited instrument contributing to rapid liberalization or democratization. Yet, especially in the hands of relatively powerful politically embedded lawyers, it has become an important formal process for protecting Chinese against the excesses of an authoritarian state. In this way, it has already contributed to limiting local governments and forcing them to abide by their own laws and regulations. I suggest that this results from a combination of accident and design.

As I argue in the first chapter and demonstrate in the following one, administrative litigation was probably created by the state largely as a tool for monitoring and controlling its own agents.⁷¹¹ Central government leaders created a relatively weak administrative legal system and officials make its use relatively difficult; this meant that mostly politically embedded litigators take such cases. Whether or not the ALL's drafters foresaw this outcome, it seems likely that high level officials approve of the current arrangement in which lawyers who are relatively conservative insiders use administrative litigation to help the state monitor its agents.

⁷¹¹ He, "Administrative Law as a Mechanism for Political Control."

As we have seen, politically embedded lawyers are not the radical activists that garner so much attention in the West. They are well entrenched and have a strong interest in the establishment. From a Tocquevillian perspective, politically embedded litigators, unlike many Chinese lawyers, seem to hold "...that high rank in society which is their due"⁷¹² and we should therefore expect to find that "their temper will be eminently conservative and will prove antidemocratic."⁷¹³ They are a conservative force of reform primarily working towards improving rule of law and government accountability rather than democracy or other liberal goals. They may be doing as much, or more, to support China's authoritarian regime as to challenge it, even as they soften its rough edges.

But the commitment of politically embedded lawyers to rule of law is strong and the continued growth of administrative litigation suggests that they are having an impact. What is more, the next chapter shows that embedded lawyers have developed effective strategies to challenge the state. A strong legal infrastructure, even one that currently serves an authoritarian regime, could just as easily serve a more liberal government and would be important to both its initial emergence and survival. Rule of law and a muscular legal profession to support it would be a strong bulwark against an outcome like the one that followed Russia's democratic transition.

⁷¹² De Tocqueville, *Democracy in America*, 265.

⁷¹³ *Ibid.*

Chapter Five: How Lawyers Sue the State

“Why should I worry about county officials?” chuckled a veteran lawyer from a large firm in Lanzhou, the capital of Gansu province. I had expected him to be anxious about the consequences of suing the county government in a sensitive land expropriation case. Yet, he felt completely insulated from political pressure. He explained that he was confident his connections would protect him. Officials from the rural county in a neighbouring province would have difficulty exerting pressure on the indifferent Lanzhou officials who could cause trouble for the lawyer, and he was a former presiding judge in a Lanzhou intermediate court. The county level court would not touch the case, but the lawyer’s attempts to litigate persuaded a higher court judge to travel to the county where he was able to gather the parties in a hotel room in order to resolve the case.⁷¹⁴ Yet in other cases, similarly situated lawyers fear that development companies, closely associated with local governments and standing to gain from the cheaply acquired land, may hire thugs to intimidate or even attack plaintiffs, lawyers and their families.⁷¹⁵

Situations like these are fairly common in controversial administrative litigation in China, yet they turn conventional understandings of Chinese state-society relations on their heads. No longer are state-society relations necessarily a David and Goliath story in which small groups battle the state leviathan or individuals throw themselves at the feet of officials pleading for justice. Instead, politics are beginning to look more like state-society relations elsewhere. While the state maintains a central role, other powerful

⁷¹⁴ Interview: LZ03-L/J.

⁷¹⁵ Interviews: SH21S, BJ28S.

interests and actors also have a place at the table. High powered lawyers and journalists and multi-million dollar companies can outgun parts of the state which may seek assistance from its own non-state actors, such as development companies or law firms.

This chapter is principally a detailed empirical study that describes and explains strategies that lawyers use when handling administrative litigation in the People's Republic of China. It relies primarily on the interviews and other sources treated in the methodology chapter. It outlines the empirical basis for the concept of authoritarian polycentrism that I presented in the theory chapter, giving concrete details and showing how the system works in practice.

As I have suggested in previous chapters, sensitive administrative cases in which courts, and plaintiffs and their lawyers are most likely to experience pressure tend to dominate popular and academic consideration of administrative litigation in China,⁷¹⁶ but they account for only a small percentage of total administrative cases. Most of this dissertation attempts to correct for that bias, and the strategies detailed here are generally of greater importance in more sensitive cases. Yet even in more mundane administrative cases, lawyers may find these strategies useful, especially for maintaining a good relationship with the state. Sometimes it is their judicious use that may prevent administrative cases from becoming overly sensitive. As we shall see, these strategies not only demonstrate the polycentric nature of China's authoritarianism, but in many cases their use may contribute to it.

⁷¹⁶ See for example: O'Brien and Li, "Suing the Local State," 2005; He, "Administrative Law as a Mechanism for Political Control"; Finder, "Like Throwing an Egg Against a Stone?"; Hung, "Administrative Litigation and Court Reform"; Ruan, "Politics of Administrative Litigation"; Zhang, "The Xinfang Phenomenon"; Hung, "China's WTO Commitment."

Cast of Characters

One of the characteristics of administrative litigation in China that will become evident in this chapter and that highlights its polycentric nature is the diversity of possible actors relevant to any given administrative suit. Table 11 describes and categorises actors that appear in administrative cases litigated by my informants. Though it is neither exhaustive nor sufficiently detailed to stand on its own, Table 11 should not only serve to introduce the actors that will appear in this chapter, but should also provide a sense of their variety and sheer number.

Table 11: Possible Actors in Administrative Litigation

| Actor | Actor Type | Likely Involvement |
|--|---|---|
| Plaintiff | Non-State | Has grievance against the state |
| Defendant | State | Department being sued |
| Plaintiff's Lawyer | Non-State | Represents the plaintiff |
| Court of First Instance | State | First court to hear the case, most likely to receive pressure from defendant |
| Court of Second Instance | State | Second court to hear the case, less likely to receive pressure from defendant |
| Adjudication Supervision Court | State | May review cases after the second instance, least likely to receive pressure from defendant |
| Partners in Plaintiff's firm | Non-State | Receive pressure from defendant or other actors to put pressure on plaintiff's lawyer |
| Defendant's Lawyer | Non-State | Provide legal advice to and represent defendant |
| All China Lawyer's Association | Quasi-State | Pressured not to renew lawyer's licence |
| Judicial Bureau | State | Pressured to make things difficult for plaintiff's firm |
| Local Government (for each level of court) | State | May pressure the court |
| Local People's Congress (for each level of court) | | May pressure the court |
| Other Defendant Departments | State | Put pressure on defendant to resolve dispute (Shotgun Strategy) |
| Police | State | Assist defendant in putting pressure on plaintiffs or lawyers |
| Third Party (usually companies) | Non-State or Quasi State | May support the state in court |
| Development Companies | Quasi State | May support the state in court or take more drastic action against plaintiffs and their lawyers, families etc. |
| Media | Non-state, Quasi State or State | Can pressure courts and support plaintiffs with favourable coverage |
| Thugs | Non-state, Quasi State or State (may be officials or police in plain clothes) | May be hired by defendant or third parties to intimidate and/or attack plaintiffs, lawyers and their families or forcibly evict plaintiffs, tear down buildings, disconnect utilities, etc. |

Several of the actors in Table 11 could be broken down into constituent units. In particular, courts could be reduced into the case filing divisions that accept or reject

cases,⁷¹⁷ the collegiate panels that hear cases, and the adjudication committees that review “significant, difficult or complex (重大, 疑难, 复杂)” cases⁷¹⁸. Indeed many of these subparts could be further broken down to examine the President and Vice-Presidents of the court as well as other individual judges. Even polycentrism at this level can make a difference as some judges might be more connected to some lawyers, while the defendant might more easily sway others. It is difficult to generalize about the impact of different actors at this level as this is usually the result of personal relationships rather than institutional ones. Even generalizations that seem likely, such as the idea that political pressure on courts tends to come through Court Presidents and the adjudication committee, are not sufficiently supported by my data. Put simply, a large number of disparate actors at different levels have an important role to play in administrative litigation.

The tremendous number of state, quasi-state and non-state actors that play different roles in this discussion of the tactics of administrative litigation, should be sufficient to suggest that a more polycentric understanding of the Chinese state is necessary. But in a significant way, the fact that powerful non-state actors are increasingly able to contribute to policy outcomes in China is a sign that China is becoming more normal. It is an unusual system in which actors such as high powered lawyers or large corporations are excluded from power.

⁷¹⁷ Liu and Liu, “Justice Without Judges.”

⁷¹⁸ Chng, “The Adjudication Committee Debate and the Challenges Faced By Courts in China When Striving for Substantive Justice and Efficiency,” 6; *Law on the People’s Courts of the People’s Republic of China* 人民法院组织法, 1954 Article 11.

Levelling Up and Over

Taking cases to higher courts, which I term “leveling up”, is one of the most basic strategies lawyers use in administrative litigation and one that relies on polycentrism. Judges can feel significant pressure in cases against parts of the local state due to the considerable influence local governments, party officials and People’s Congresses wield through their supervision of courts’ work, the control of the appointment, promotion and discipline of court personnel and the provision of their budgets.⁷¹⁹ As we saw in Chapter Three, in some cases political pressure results in administrative cases being rejected before they make it to court⁷²⁰ or in favorable treatment of and verdicts for defendants. This is where administrative appeals may play an important role in helping higher levels of the Chinese state to monitor lower levels.⁷²¹

At higher levels of the court system which are more likely to be located in larger cities, judges are generally more professional, better paid, and better educated;⁷²² local

⁷¹⁹ Liu, “Beyond Global Convergence,” 90; Lubman, “Looking for Law in China,” 23; Cho, “Symbiotic Neighbour or Extra-Court Judge?”; Dominic Jerry Nardi, “Can a Caged Bird Still Fly? A Comparative Analysis of Judicial Accountability in the People’s Republic of China and New Order Indonesia,” *SSRN eLibrary* (April 26, 2009), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1395522; Randall Peerenboom and Xin He, “Dispute Resolution in China: Patterns, Causes and Prognosis,” *East Asia Law Review* 4 (2009): 46; While none of my informants suggested that they had yet had an impact, since 2008 measures have begun to centralize court funding: Kinkel and Hurst, “Access to Justice in Post-Mao China,” 487.

⁷²⁰ For a more on the rejection of cases see: Liu and Liu, “Justice Without Judges.”

⁷²¹ Administrative law in general plays a monitoring role, but the multiple levels of government involved means that the appeals system provides a particularly good example of this fire alarm monitoring mechanism. There is a fairly extensive literature on administrative law and procedure as a monitoring tool, mostly in the context of the US. For example, see: Mathew D. McCubbins, Roger G. Noll, and Barry R. Weingast, “Administrative Procedures as Instruments of Political Control,” *Journal of Law, Economics, and Organization* 3 (1987): 243–277; Matthew D. McCubbins, Roger G. Noll, and Barry R. Weingast, “Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies,” *Virginia Law Review* 75 (1989): 431; McCubbins and Schwartz, “Congressional Oversight Overlooked”; Emerson H. Tiller and Pablo T. Spiller, “Strategic Instruments: Legal Structure and Political Games in Administrative Law,” *Journal of Law, Economics, and Organization* 15 (1999): 349–377.

⁷²² Peerenboom, “Introduction,” 8 & 10.

governments will have more difficulty putting pressure on them.⁷²³ By appealing an unfavorable ruling or a lower court's refusal to hear a case, plaintiffs improve their chance of a fair hearing because their case will be examined by a higher-level court. Sometimes, lower courts will explicitly tell lawyers that they are under too much pressure and that the case should be taken to a higher court.⁷²⁴ Similarly judges, strategic actors in their own right, have their own version of the leveling up strategy. If they anticipate pressure from a local people's congress, judges may ask higher-level courts to instruct their ruling in advance knowing that the People's Congress "cannot review the decisions of higher-level courts."⁷²⁵

As with many of the strategies considered here, the state possesses counter measures that it may deploy in an attempt to derail certain sensitive cases. In these instances, appealing a case that the lower court has refused to accept becomes difficult or impossible because they will not issue the written document (*caidingshu* 裁定书) that should accompany the refusal which needs to be presented to the higher court.⁷²⁶ This tactic is effective because it allows local governments to use their considerable influence over lower courts to prevent the case from effectively reaching the higher courts which they are less able to influence. This counter strategy exemplifies the way in which relationships between actors determine outcomes and the processes that create them.

The levelling up strategy also gives us insight into why an authoritarian regime like China allows administrative law to challenge the local governments. As other scholars have suggested, a major factor seems to be the courts' ability to assist higher

⁷²³ Pei, "Citizens V. Mandarins," 847; O'Brien and Li, "Suing the Local State," 2005, 38.

⁷²⁴ Interview: LZ03-L.

⁷²⁵ Cho, "Symbiotic Neighbour or Extra-Court Judge?," 1079.

⁷²⁶ Interview: XX09S.

levels in monitoring and checking the power of other parts of the state.⁷²⁷ Higher courts consider cases appealed from lower courts, but are usually beholden to different and higher levels of government than the court of first instance. This means that grievances can get past the protective umbrellas (*baohu san* 保护伞) that officials use to hide their misdeeds from higher-ups.⁷²⁸ The system may be thought of as fire alarm monitoring, an institutional arrangement that gives individuals or groups the opportunity to assist in monitoring parts of the state by creating avenues for them to relay their grievances and concerns to supervisory organs. Because it uses a polycentric approach that shifts much of the costs of monitoring to individuals and groups outside the state who are closer to the bodies being monitored, fire alarm monitoring is often more efficient and effective than more active and costly police patrol monitoring.⁷²⁹ For high level Chinese officials, active police patrol monitoring of subordinates is problematic because it is costly and local officials have a strong incentive to hide their misdeeds from their superiors. Therefore, higher level officials may rely on plaintiffs to assist them in monitoring their underlings by allowing courts to examine administrative appeals for evidence of malfeasance.⁷³⁰

Comparing administrative litigation appeals with their close relation, administrative reconsideration (a.k.a. administrative review 行政复议), further reveals China's polycentrism. As I explained in the third chapter, administrative reconsideration is a system by which grievances with the Chinese state may be brought to the department

⁷²⁷ Liebman, "China's Courts: Restricted Reform," 635–6; He, "Administrative Law as a Mechanism for Political Control."

⁷²⁸ O'Brien and Li, *Rightful Resistance*, 57.

⁷²⁹ For more on these two types of monitoring see: McCubbins and Schwartz, "Congressional Oversight Overlooked."

⁷³⁰ Some China scholars argue that protest can play a similar function: Kevin J. O'Brien, "Rightful Resistance," *World Politics* 49 (1996): 31–55; O'Brien and Li, *Rightful Resistance*; Lorentzen, "Regularized Rioting."

that committed them and reviewed for legality and appropriateness, usually by the direct superiors of the responsible level.⁷³¹ The comparison between administrative reconsideration and litigation shows us that it is not merely levelling up that makes for effective monitoring, but levelling up and over, that is, bringing the actions of a state actor to the attention of other state actors who have neither direct horizontal nor vertical ties to it. Many of the lawyers with whom I spoke suggested, and official Chinese statistics⁷³² confirm, that administrative reconsideration was generally less effective than administrative litigation. The reason that lawyers gave for this discrepancy was that the direct superior of a department which would hear administrative reconsideration cases rarely sides against its own subordinate. In the words of one experienced administrative litigator: “usually when a father sees his child make a mistake his instinct is to protect his child.”⁷³³ For example, instead of the faults of a county level Industry and Commerce Department being considered by the prefecture level Industry and Commerce Department (as it would under administrative reconsideration), an appealed administrative case would bring the issue to the attention of the prefectural level courts and, in more sensitive cases, the prefectural level government and People’s Congress that are most likely to influence it.

Levelling up and over suggests that part of China’s polycentrism is the result of higher levels of the state monitoring lower levels, in this case through the use of administrative appeals. Several facts support the view that administrative appeals serve

⁷³¹ Lubman, *Bird in a Cage*, 212–4; Peerenboom, *China’s Long March*, 417–9; Halverson, “China’s WTO Accession: Economic, Legal, and Political Implications,” 355.

⁷³² Official Chinese statistics from a number of different sources tend to show that administrative reconsideration cases produce a lower percentage of favorable outcomes. See for example: Halverson, “China’s WTO Accession: Economic, Legal, and Political Implications,” 355.

⁷³³ Interview: QD04-L.

this function. First, higher courts accept a much larger percentage of appeals in administrative cases than in other kinds of cases.⁷³⁴ Second, my interviews corroborate stories of plaintiffs being told by judges to appeal incorrect verdicts above the pressure from local governments that tied their hands.⁷³⁵ Third, scholars of both modern⁷³⁶ and imperial China⁷³⁷ have argued that administrative law's primary function is and was to facilitate the control of local agents. Fourth, similar systems have been observed in other contexts; "...appeal has been used in France as one of numerous routine mechanisms for controlling and coordinating government agents in the field."⁷³⁸ This reinforces the idea that institutions in China are starting to look more those in other countries, especially civil law jurisdictions. Using appeals to bring in state actors without direct horizontal or vertical ties to the defendant is a basic strategy that takes advantage of the authoritarian state's polycentric approach to monitoring its own agents.

Political Connections

As I discuss extensively in Chapter Four, Chinese lawyers who litigate significant numbers of administrative cases overwhelmingly have close connections to the state. This characteristic, which following the example of Michelson⁷³⁹ I term "political embeddedness," primarily signifies having informal, quasi-formal and/or formal connections with the state. While the last chapter focused on the characteristics of these lawyers, this section demonstrates how lawyers leverage their connections to the state to

⁷³⁴ A number of appeals equal to approximately 30 per cent of total administrative cases were accepted during the three years from 2004-2006. Luo Feng, *China Legal Yearbook*, 2007.

⁷³⁵ Peerenboom, *China's Long March*, 399.

⁷³⁶ He, "Administrative Law as a Mechanism for Political Control."

⁷³⁷ Kinkel and Hurst, "Access to Justice in Post-Mao China" endnote 25.

⁷³⁸ Shapiro, *Courts*, 55.

⁷³⁹ Michelson, "Lawyers, Political Embeddedness."

gain protection from official harassment and inside knowledge, and how this fits in with other strategies.

As my model demonstrated, the most important variable for predicting how likely a lawyer is to sue some part of the Chinese state is how likely the lawyer is to defend another part of the Chinese state. Previously, if sued, many government departments would simply ignore the suit or, at best, send a legally knowledgeable official to represent it in court. We have seen, however, that the Chinese state is increasingly “lawyering up” by hiring prominent local lawyers, usually with annual retainers that cover legal advice and representation in court if necessary. Because of conflict of interest requirements, law firms may not sue parts of the state that have employed them. A lawyer I spoke with in Changsha, for example, consulted for and had defended several local traffic departments (*jiaotongju* 交通局), but had also taken cases against local police (*gonganju* 公安局) and land departments (*tudiziyuanju* 国土资源局) as well as a transportation department in a nearby jurisdiction. Consulting for and defending transportation departments gave him the experience to develop administrative litigation as one of his specialties and made him an effective administrative litigator, especially against transportation departments.⁷⁴⁰ This insider knowledge is so important in administrative litigation because it is usually regulations written by the relevant government departments, not actual laws that are at issue.

As the former Lanzhou judge suggested, state connections can also provide protection from harassment⁷⁴¹ and give lawyers the confidence to litigate sensitive cases.

⁷⁴⁰ Interview: CS20S.

⁷⁴¹ Interview: LZ03-L/J.

Political connections tend to have a deterrent effect since officials are much less likely to act against a politically connected lawyer and, so, the lawyers in my sample had rarely had to use their political connections to protect themselves.

If the Chinese state were not so dramatically polycentric, working for another part of the state would be a liability rather than an asset in administrative litigation. Officials could threaten lawyers with the loss of prestigious⁷⁴² and stable government consulting contracts. Instead, the fact that lawyers who sue the state tend to represent other parts of the state contributes to polycentrism because it means that the lawyers who do the most administrative litigation have built-in state allies in the form of the government departments that employ them. A department that is unhappy about being sued by a lawyer would have a hard time making the case to a local judicial department or anyone else that the lawyer was undermining state authority if that lawyer often provided valuable legal services to a different part of the state.

Yet the connections between administrative litigators and the state are a two way street. As I suggest in the previous chapter, politically embedded lawyers are relatively conservative, pursuing incremental reform from the inside and eschewing the most sensitive cases and radical tactics. Administrative litigation itself is fundamentally an insider's tool for challenging the state. As we saw, Chen Guangcheng suffered his fate in part because he was trying to use an insider's tool as an outsider, both in terms of his connections with the state and his status as an unlicensed self-taught lawyer. Filing a case in court, unless done as pure theatre, implies a certain amount of faith in the system, a

⁷⁴² Interview: SH05S.

faith that frequent administrative litigators have as actors who are trying to change the system from the inside.

The Shotgun Strategy

While political connections help lawyers take advantage of polycentrism by turning other parts of the state into allies, the shotgun strategy turns parts of the state against administrative defendants in a more dramatic fashion. Probably the strategy that most clearly relies on and demonstrates authoritarian polycentrism within the Chinese state, the shotgun strategy has lawyers file suits against several different parts of the Chinese state simultaneously.

The multiplicity and ambiguity of administrative regulations and the fact that officials often try to obscure their identities and affiliations when engaged in legally dubious activities means that, even for experienced administrative litigators, it is often unclear which part of the local state is the proper target of litigation. In order to deal with this uncertainty, an extremely prolific administrative litigator has developed what I call the shotgun strategy. The strategy involves suing as many as six or seven government organs that are at least vaguely related to a grievance. For example, in a land dispute a lawyer might file suits against the land department, planning bureau, demolition management authority (房屋拆迁管理部门), county and/or prefectural level governments.

The shotgun strategy has two major advantages over limiting litigation to a single defendant. First, even if the plaintiff and his lawyer are unable to identify the specific part of state that should be sued, they will in all likelihood still manage to name them as the defendant in one of their suits. Second, the shotgun strategy can force various parts of the

state to suss out which organ is at fault or at least to pick a scapegoat. Chinese officials do not like being named in administrative suits as they feel it reflects negatively on them and may even hurt their careers.⁷⁴³ Rather than face an administrative suit, even one they could certainly win, officials may exert pressure on the guilty party to resolve the issue so that the plaintiff will drop the suits. This strategy is effective because it has the potential to turn several parts of the Chinese state that might otherwise be indifferent or even hostile, into powerful, if grudging, allies. Additionally, like most of the strategies favoured by administrative litigators, although it is a powerful tactic that relies on the polycentricism of the Chinese state, it keeps the dispute off the streets and out of the public eye.

I believe this strategy is used by only a small portion of the already small minority of Chinese lawyers who do a significant amount of litigation.⁷⁴⁴ However, the strategy is used widely by a lawyer who in the past decade has apparently been the lead lawyer in approximately 1.5 per cent of all administrative cases in China in which a lawyer represented the plaintiff.⁷⁴⁵ Considering that he also takes more prominent cases with relatively large numbers of plaintiffs, his use alone of the strategy is worth noting. The success of this lawyer is an excellent, albeit extreme, example of the fact that private actors in China can be powerful in their own right. Additionally, the fact that even such a prolific administrative lawyer was sometimes unable to identify what part of the state was

⁷⁴³ Interview: BJ08L.

⁷⁴⁴ Interviews: AL01-L, NB09S, CS12S.

⁷⁴⁵ Interview: AL01-L.

responsible for a particular action further demonstrates the polycentric nature of the Chinese state.⁷⁴⁶

The Cross Jurisdictional Strategy

The contribution of geographic size and decentralization to China's polycentrism is clearly evidenced by the fact that lawyers who litigate more administrative cases tend to take cases outside of their home jurisdiction.⁷⁴⁷ Local lawyers may be unwilling to take sensitive administrative cases, generally for fear that a soured relationship with the state would hurt their practice. Not only do they rely on connections with the local state for conducting everyday business,⁷⁴⁸ but courts could treat them less favorably in the future, judicial bureaus (*sifaju* 司法局) could make things difficult for their firm, the Lawyer's Association could cause trouble when lawyers seek the annual renewal of their license and other departments might find other methods of retribution.

Lawyers from outside the jurisdiction, on the other hand, are largely immune to these forms of retaliation. In the words of one Beijing lawyer who had returned to his hometown in Hebei to help a friend with an administrative reconsideration case: the local government "cannot put any pressure on me (压不到我)."⁷⁴⁹ The stark difference between litigating against a local government and a government in another province is demonstrated by Figure 13. In this hypothetical case, the defendant, County C, could relatively easily put pressure on local law firm E through the county level judicial bureau

⁷⁴⁶ Interview: AL01-L.

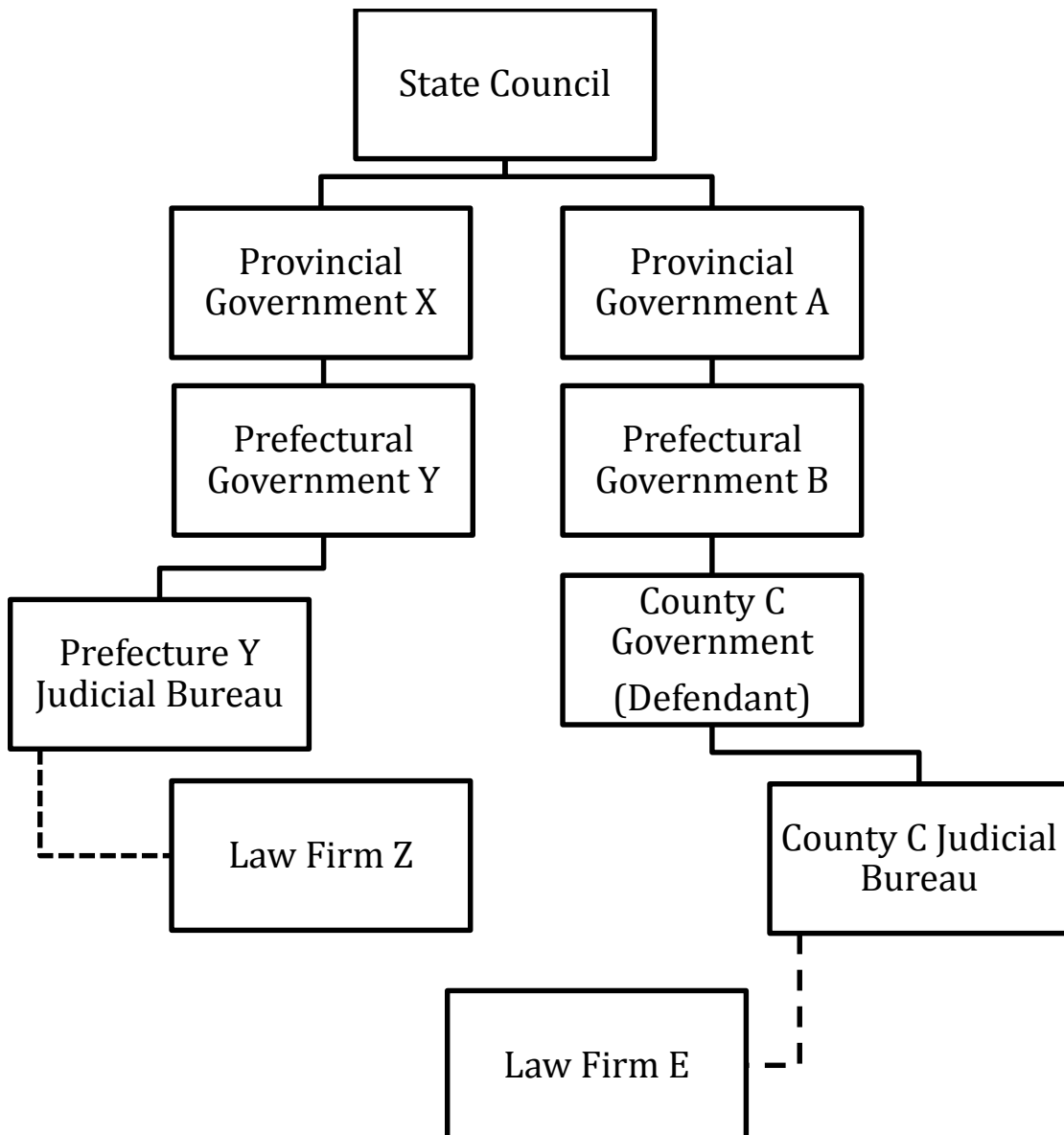
⁷⁴⁷ For example, the lawyer that is probably China's most prolific administrative litigator takes 70 per cent of his cases outside his hometown: AL01-L.

⁷⁴⁸ Michelson, "Lawyers, Political Embeddedness."

⁷⁴⁹ Interview: BJ10N.

which regulates all law firms in the county. If the plaintiff were a township level government or department (the direct subordinates of County C), the relationship would be slightly less close, but pressure through the judicial bureau would still be a very real possibility.

Figure 13: The Organizational Logic of the Cross Jurisdictional Strategy



By contrast, County C would find it much more difficult to put pressure on a lawyer from a law firm in a neighboring provincial capital, such as Law Firm Z. The number and level of formal connections that separate County C from the Judicial Bureau and other actors in Prefecture Y make retaliation through official channels an impossibility in all but the most dramatic cases.

Because the formal connections that link likely defendants in administrative suits to the state and quasi state entities that would most likely be able to help them (i.e. higher level courts, judicial bureau's and lawyers' associations in other jurisdictions) can be remote, it is often officials' informal connections that determine how and if they are able to pressure courts and retaliate against lawyers and plaintiffs. This means that it is not just jurisdictional boundaries that offer protection to lawyers but also physical/geographic separation. Despite being under the same prefectural government, lawyers from neighboring counties may send each other cases that they feel are more sensitive.⁷⁵⁰ In such cases, the same logic at work in Figure 13 is present, but the defendant and relevant judicial bureau are simply separated by far fewer vertical levels. The geographic separation of counties from each other and the prefectural seat also play a part because officials are less likely to have the kinds of close connections that come from frequent contact and interaction. By contrast, even though two urban districts in a city would share the same superiors, lawyers almost never suggested that litigating in another district offered an advantage. The point is further illustrated by the case of Chongming island which is physically, though not administratively, separated from the rest of Shanghai. The lawyer I spoke with on Chongming suggested that a lawyer from urban Shanghai

⁷⁵⁰ Interview: NB20S.

would have less trouble with administrative litigation there,⁷⁵¹ whereas lawyers in urban Shanghai generally felt that lawyers from another district enjoyed no extra protection. The difference seems to be that while officials in different urban districts would be likely to have relatively close connections cemented through frequent contact, Chongming officials are sufficiently isolated for this to be much less likely. Additionally, physical distance helps insulate a lawyer and his or her family from cruder third-party threats and attacks. A Beijing based lawyer and his family were threatened when he took a case in Hebei, technically a separate province than, but geographically surrounding, Beijing. In contrast, while litigating cases farther away from Beijing, he was only threatened while in the field; his family remained unmolested safely in Beijing. Finally, as a safeguard against future dangers resulting from his practice, the lawyer took the ultimate jurisdiction crossing step and sent his son abroad.⁷⁵²

The cross-jurisdiction strategy works not only because it takes advantage of the polycentric nature of the Chinese state, but also because authoritarian polycentrism means that non-state actors, especially powerful ones with strong state connections, have a place at the table. Lawyers who employ the cross jurisdictional strategy tend to come from higher level jurisdictions, usually from the provincial capital to cities and towns in the same or neighboring provinces,⁷⁵³ or from Beijing, Shanghai or Guangdong to other provinces⁷⁵⁴. The lawyers who leave their home jurisdictions to litigate sensitive cases tend to be more prominent and better connected than average, and this status becomes relatively greater as they descend on more remote areas. These lawyers are likely to be

⁷⁵¹ Interview: SH20N.

⁷⁵² Interview: BJ28S.

⁷⁵³ Interviews: LZ03-L, CS24S.

⁷⁵⁴ Interview: BJ06N.

better educated, speak more standard Chinese and have stronger legal expertise than local officials. They also tend to be well respected by judges⁷⁵⁵. Nor are they shy about expressing their perceived superiority: “Beijing lawyers sometimes know more than the local lawyers.”⁷⁵⁶ They may even have better connections within the state than the local officials they are suing.⁷⁵⁷ This means that even if local officials have connections with officials in a lawyer’s home jurisdiction, they are likely to find it difficult or impossible to use them against such a well connected lawyer. Even if lawyers are not well connected, local officials are unlikely to know an outside lawyer’s background and may not risk treating a lawyer too aggressively or badly for fear that he or she might have connections to high ranking people in his or her home city, especially Beijing.⁷⁵⁸ The presence of one of these lawyers in local litigation can dramatically swing the odds against the state, making locally powerful officials look like parochial pushovers. This is especially true when lawyers use the leveling up and over strategy to move cases to higher level courts which tend to be farther from the powerbase of local officials and where the substance and form of the law are more important.⁷⁵⁹ Here, lawyers leverage their legal expertise and experience with higher courts to get cases accepted and win.⁷⁶⁰

As we saw in the last two chapters, when challenged in administrative court, Chinese officials are increasingly hiring law firms to represent them in administrative cases instead of relying on legally knowledgeable officials, relatively rare in-house counsel or simply ignoring litigation entirely. While local governments tend to contract

⁷⁵⁵ Interview: BJ28S.

⁷⁵⁶ Interview: BJ15N.

⁷⁵⁷ Interviews: LZ03-L/J, AL01-L, CS21N, BJ28S.

⁷⁵⁸ Interview: BJ04S.

⁷⁵⁹ Interviews: BJ14-L, BJ06N.

⁷⁶⁰ Interviews: LZ03-L/J, CS24S.

well-established firms to provide their legal advice and represent them in court, they inevitably choose local firms. Yet, especially in more remote areas, even the most respected local lawyers may find themselves intimidated and outgunned by experienced administrative litigators from large cities. That the Chinese state finds it increasingly necessary to rely on private lawyers, and may find its outside consul inadequate compared to out-of-town lawyers is evidence of how polycentric the system has become.

Representativeness of the Cross Jurisdictional Strategy

Probably due to the difficulty of collecting data on political participation in authoritarian regimes, too much research identifies and theorizes about phenomena without speaking to how prevalent or important they are. Using the data from the 2007 All China Lawyers' Association survey, I performed two simple statistical tests in order to assess the frequency of Chinese lawyers' use of the cross jurisdictional strategy. First, I used an independent group T-test to compare the mean number of plaintiff administrative cases accepted by lawyers who litigate more or fewer than the median number of cases outside their home jurisdiction. The statistically significant results in Table 12 show that lawyers who travel more than the median number of times (two) outside their jurisdiction to handle cases, litigated approximately 67 per cent more administrative cases.

Table 12: Independent Group T-Test on Jurisdiction Crossing Lawyers

| Administrative cases by lawyers who crossed jurisdictions more or less than the median | | | | |
|---|--------------------------|-------------|---------------------------|---------------------------|
| | # of Observations | Mean | Standard Error | Standard Deviation |
| Lawyers crossing jurisdictions less | 606 | 0.97 | 0.19 | 4.78 |
| Lawyers crossing jurisdictions more | 662 | 1.62 | 0.22 | 5.78 |
| Difference | | 0.65 | 0.30 | |
| | Assuming Equal Variance | | Assuming Unequal Variance | |
| P Value | 0.02 | | 0.01 | |
| Degrees of Freedom | 1266 | | 1253.33* | |

*Satterthwaite's degrees of freedom test

Second, I used another independent group T-test to compare the mean number of cross jurisdictional cases taken by lawyers self-identified in the survey as being involved in “popular rights protection activities representation (民间维权活动代表)”.

Table 13: Independent Group T-Test on "Rights Protection" Lawyers

| Cross jurisdictional cases by lawyers involved in "rights protection representation" | | | | |
|---|--------------------------|-------------|---------------------------|---------------------------|
| | # of Observations | Mean | Standard Error | Standard Deviation |
| Non-rights protection lawyers | 889 | 5.30 | 0.31 | 9.35 |
| Rights protection Lawyers | 62 | 8.58 | 1.50 | 11.94 |
| Difference | | 3.25 | 0.31 | |
| | Assuming Equal Variance | | Assuming Unequal Variance | |
| P Value | 0.00 | | 0.02 | |
| Degrees of Freedom | 949 | | 66.33* | |

*Satterthwaite's degrees of freedom test

The results in Table 13 show that lawyers who self-identified as participating in rights protection traveled outside their home jurisdiction to handle cases significantly more often than lawyers who did not. Unfortunately, since the survey does not ask specifically what type of cases were litigated outside the home jurisdiction, this merely demonstrates that lawyers that tend to take cases in other jurisdictions also tend to take administrative cases and that lawyers involved in rights protection tend to handle cases outside their jurisdiction. While this evidence is far from conclusive it does suggest that the cross jurisdictional strategy might be quite widespread.

The evidence for the prevalence of the cross jurisdictional strategy in my interviews is more mixed. Still, approximately a quarter of my informants said they would be likely to recommend that a client with a sensitive administrative case go outside the jurisdiction to find a lawyer, even though it would be more time-consuming and costly. Some lawyers in more developed regions were not always enthusiastic about going to less developed regions to litigate sensitive cases. One Beijing lawyer explained that taking cases in Beijing was safer, “if you represent a plaintiff in an administrative case outside Beijing, your personal safety can be threatened.”⁷⁶¹ On the other hand, a different Beijing lawyer who made a practice of litigating rights protection type cases in remote areas told me that: “I keep my office open on weekends to allow us to meet with peasants (农民) who come from far away, arrive on the weekend and cannot afford to stay in a hotel. They come from as far as Sichuan, Yunnan, and Qinghai.”⁷⁶² While I am unable to make a precise estimate of how common the cross jurisdictional strategy is, the empirical evidence seems to suggest it is a fairly common phenomenon in administrative and other rights protection litigation.

Limitations of the Cross Jurisdictional Strategy

Despite its effectiveness, prominence and apparent prevalence, the cross jurisdictional strategy has its limitations; mainly resulting from direct retaliation by local officials. Additionally, the cross jurisdictional strategy might harm other local actors involved in rights advocacy in these regions.

⁷⁶¹ Interview: BJ09-L.

⁷⁶² Interview: BJ06N.

While it is the fact that local governments have few institutional means of retaliating against outside lawyers that makes the cross jurisdictional strategy so effective, local governments sometimes turn to aggressive tactics to visit retribution on outsiders they feel are causing too much trouble. Probably because these means of retaliation fall outside official channels, it is often third party thugs⁷⁶³ or at least individuals hiding their official status, who make and carry out threats against Chinese lawyers and plaintiffs.⁷⁶⁴ This is further considered in the section on counter strategies.

Jurisdictional lines may also fail to provide protection should a lawyer manage to offend officials at the highest levels of the Chinese state. This is arguably what happened to Li Zhuang, a Beijing based lawyer whose aggressive defence of an alleged mobster in Chongqing saw him convicted of tampering with evidence, probably because it put him at odds with then Chongqing Party Secretary and national politburo member Bo Xilai. It is possible that this bold action on Bo's part may have contributed to his well-publicized downfall,⁷⁶⁵ especially since, in another display of the complexity of China's polycentrism, the head of Zhuang's law firm is the son of a Communist Party elder who is more important than Bo's father. Nevertheless, Bo's fall came too late to save Zhuang from serving a term in prison.⁷⁶⁶

In part because of the greater likelihood of agitating higher level officials, the cross jurisdictional strategy is least effective in the big cities such as Beijing and Shanghai. While some recommended going to Shanghai or Guangdong for a lawyer in a

⁷⁶³ Interview: SH21S.

⁷⁶⁴ Interview: BJ28S.

⁷⁶⁵ "Bo Xilai Scandal."

⁷⁶⁶: John Garnaut, "Children of the Revolution," *The Sydney Morning Herald*, February 13, 2010, <http://www.smh.com.au/world/children-of-the-revolution-20100212-nxjh.html>.

sensitive administrative case in Beijing,⁷⁶⁷ most Beijing lawyers felt that a Beijing lawyer would do just as well if not better. Partially, this is an issue of pride. Beijing lawyers tend to believe they are the best, especially when it comes to dealing with the state. And indeed, lawyers from Shanghai or Guangzhou will not have the same relative advantage in Beijing in terms of status and connections as elsewhere in China. At the same time, however, lawyers suggested that litigating against the state was less problematic in developed cities. In the words of one lawyer “in Beijing, suing the state won’t affect your career.”⁷⁶⁸ So while the cross jurisdictional strategy offers less protection in large developed coastal cities, it may be somewhat less needed in these instances.

Finally, the cross jurisdictional strategy does little to protect plaintiffs from retribution⁷⁶⁹ and may make things worse for local lawyers by turning officials or even judges against contentious litigation in the future. Since they are generally out of the reach of these officials and may not be repeat players in that jurisdiction, outside lawyers may be less worried about the consequences of upsetting local officials. For example, two lawyers in Tianjin complained about a well-known Beijing lawyer, Wang Lin, whose encounter with a Tianjin court official I related in Chapter Three.⁷⁷⁰ The Tianjin lawyers knew the official, believed him to be a fair person, felt that Wang must have acted unreasonably to provoke such an extreme reaction and were slightly concerned about the implications of the incident.⁷⁷¹ So while the cross jurisdictional strategy seems to have definite advantages in terms of protecting lawyers and helping plaintiffs in the short term,

⁷⁶⁷ Interview: BJ29S.

⁷⁶⁸ Interview: BJ09-L.

⁷⁶⁹ Interview: CS24S.

⁷⁷⁰ Human Rights Watch, *Walking on Thin Ice* section V page 7.

⁷⁷¹ TJ02/03-L

its contribution to the long term well-being of plaintiffs and the rule of law is not without its costs.

Media Strategy

Polycentric authoritarianism means that lawyers can use contacts in the media to intimidate and even threaten officials. One of China's most prolific administrative lawyers recalls telling an official "If you mess with me, I'll mess with you, I'll call my friends in the media!"⁷⁷² (His choice of words in the original Chinese was less polite.) Lawyers without media connections may sometimes be lucky enough to show up in court to find journalists already present, and benefit from the exposure.⁷⁷³ Like connections with the state, having pull with the media serves the vital function of helping to protect lawyers from the fallout from contentious litigation because officials generally like bad press even less than losing lawsuits. Additionally, there is some synergy between the cross jurisdictional and media strategies. Lawyers from big cities where most of China's news outlets are located are more likely to have connections with the media,⁷⁷⁴ and media outlets are more easily able to report on stories outside their own jurisdiction.⁷⁷⁵ Finally, media attention related to administrative cases can be beneficial for lawyers' careers, raising their stature and drumming up business. Yet, at least one prominent administrative litigator complained that the impact of such media attention is short-lived.⁷⁷⁶

⁷⁷² Interview AL01-L.

⁷⁷³ Interview: BJ03N.

⁷⁷⁴ Interview: BJ04S.

⁷⁷⁵ Givens and Repnikova, "Advocates of Change in Authoritarian Regimes."

⁷⁷⁶ Interview: BJ28S.

Perhaps because of legitimacy concerns related to the lack of electoral mandate, CCP officials can be particularly sensitive to public opinion.⁷⁷⁷ In administrative cases, this can translate to officials paying attention to the pressure of public opinion and the media.⁷⁷⁸ Yet even media exposure is not a guarantee of a successful outcome. In the case against the Labour and Social Security Bureau discussed in Chapter Three, an admission from the courts that the underlying rule was unreasonable, compounded by media scrutiny still proved insufficient to tip the case in the Plaintiff's favour.⁷⁷⁹

Unless lawyers are particularly well connected, they may fail to have their cases be publicized. One Changsha litigator explained that, although he has some connections with people in the media and might call them to try to publicize an occasional case, they make their own choices about what to publish. In an administrative compensation case he had called contacts in the media, but they did not report on his case for two reasons. First, the relatively small case, compensation for wrongful arrest and detention, was seen as not particularly newsworthy. Second, his journalist friends felt pressure from the local government not to publish.⁷⁸⁰ This example shows the added value of having out of town media connections that do not mind goading other local governments and that the increasing commercialization of the Chinese media is a double-edged sword. While the creeping privatization of China's media has led to the exposure of some of the most sensational abuses of government power,⁷⁸¹ more common types may fail to excite.

⁷⁷⁷ Liebman, "Watchdog or Demagogue? The Media in the Chinese Legal System."

⁷⁷⁸ Interview: BJ11N.

⁷⁷⁹ Interview: BJ15N.

⁷⁸⁰ Interview: CS04S.

⁷⁸¹ Liebman, "Watchdog or Demagogue? The Media in the Chinese Legal System."

Additionally, cases sometimes fail to receive media coverage because they relate to an issue about which litigation is possible, but media coverage is not. Indeed I would even suggest that, in general, limits on the media are tighter than those on lawyers. For example, many, though certainly not all, Falun Gong practitioners and Tibetan rioters manage to find lawyers willing to defend them vigorously. In an admittedly extreme instance, an attorney who argued for his client's innocence of the crime of splitting the motherland quoted one of the Dalai Lama's statements to show that the exiled leader did not support Tibetan independence.⁷⁸² By contrast, reporters self-censor on these topics, regarding them as "completely forbidden".⁷⁸³ When lawyers themselves enter the media sphere, for example to speak on a talk show, they may be told that certain legal issues that they deal with on a regular basis in their practice are too sensitive and therefore off limits for discussion.⁷⁸⁴

On the other hand, the fact that the media has a mind of its own also means that it takes note of cases without prompting,⁷⁸⁵ and sometimes lawyers and plaintiffs with no media connections or savvy may find a powerful ally in the press. One relatively novice Beijing lawyer arrived at court for an administrative case to find several news outlets that monitor courts for newsworthy cases were already interested in her case. The media coverage essentially forced the courts to rule for the plaintiff who, despite a legally shaky case, was easily portrayed as having suffered a common sense injustice at the hands of

⁷⁸² Zhang 张清扬 Qingyang, 朱久虎律师法庭为达赖喇嘛抗辩 Lawyer Zhu Jiuhu Defends the Dalai Lama in Court, 2008, Available: <http://news.boxun.com/news/gb/china/2008/11/200811071107.shtml>, 10 November 2008.

⁷⁸³ Givens and Repnikova, "Advocates of Change in Authoritarian Regimes," 27.

⁷⁸⁴ Interview: BJ04S.

⁷⁸⁵ Interview: AL01-L.

unfeeling bureaucrats.⁷⁸⁶ In the end, the media is just another player in the increasingly complex and polycentric game of administrative litigation.

Winning without Fighting

As was discussed in Chapter Three, a majority of administrative litigation ends with the plaintiff withdrawing the case. Sometimes this is because a plaintiff has withdrawn due to intimidation or frustration, however, in many cases, it means that the relevant government department has relented and will make concessions that are, at least marginally, acceptable to the plaintiff. Critics of China's legal system often see mediation, especially in administrative cases, as a sign of the lack of progress of China's legal system,⁷⁸⁷ but for many Chinese administrative plaintiffs and their lawyers, it is both a goal and strategy.

Mediated outcomes save face for officials who feel that being sued makes them look bad.⁷⁸⁸ Once a court has accepted a case or a judge notifies an official that the court is preparing to accept it, officials will often be willing to negotiate. In the words of a Shanghai lawyer:

“The solution isn't to win but to get the problem solved. Winning could affect your client negatively; especially their relationship with the [defendant] department. Sometimes there is a quota set for fines so administrative agencies won't be upset when companies don't think it's fair. Sometimes a company will be penalized more if they are more closely under scrutiny of administrative agencies, for example maybe if the company's factory is close to the government offices. Direct communication tends to be better than gossip. Basically, the government department has things it needs to do/show to its superiors. So if the [plaintiff] company explains their problem and the government explains their position you can work something out. Sometimes, if you give a proposal to an administrative agency they can give it to their superiors, problem solved.”⁷⁸⁹

⁷⁸⁶ Interview: BJ03N.

⁷⁸⁷ Palmer, “Controlling the State”; Palmer, “Compromising Courts and Harmonizing Ideologies.”

⁷⁸⁸ Interview: NB20S, HK02-L.

⁷⁸⁹ Interview: SH11N.

This quote demonstrates what this lawyer learned by consulting for the government, that the apparently arbitrary and capricious “authoritarian zeal”⁷⁹⁰ of the local state is often the product of constraints and targets imposed by higher levels of the state. Negotiated plaintiff withdrawals give officials an attractive alternative to losing a case (which also looks bad to superiors) or resorting to intimidation and political pressure.

Non-litigated outcomes may be able to provide an opportunity for success even when “the court would not accept the case.”⁷⁹¹ In one such instance, “the courts just issued a recommendation (建议书) to the city authority to compensate a [small] businessman [who had had his wares confiscated and been beaten by the police]. So in the end they agreed to compensate him.”⁷⁹² Officials will sometimes ask a mutual acquaintance to help negotiate and like most negotiated outcomes, withdrawals tend to generate less bad blood than litigation, further reducing the potential for retaliation against plaintiffs and their lawyers.

As we saw in Chapter Three, defendants in administrative cases are likely to comply with a settlement or decision. Nevertheless, at least one lawyer who litigated larger numbers of more sensitive administrative cases reported that withdrawals generated fewer implementation problems than favourable verdicts.⁷⁹³ Finally, at the risk of cultural essentialism or orientalism, some lawyers cited a cultural preference for avoiding direct conflict,⁷⁹⁴ though this can also be found in essentially any legal system⁷⁹⁵.

⁷⁹⁰ Blecher and Shue, “Into Leather,” 381.

⁷⁹¹ Interview: BJ15N.

⁷⁹² Interview: BJ15N.

⁷⁹³ Interview: BJ28S.

⁷⁹⁴ Interview: BJ28S.

⁷⁹⁵ Michelson, “Climbing the Dispute Pagoda: Grievances and Appeals to the Official Justice System in Rural China,” 460–1; Nader and Todd, *The Disputing Process*.

All of this means that many of my informants actually preferred deals ending in withdrawals, pointing out that they are “better, faster, and cheaper.”⁷⁹⁶ One lawyer referenced Sun Tzu’s classic *Art of War*,⁷⁹⁷ explaining that “the greatest skill is to win without fighting (不戰而屈人之兵，善之善者也).”⁷⁹⁸

Even a withdrawal cannot guarantee that local governments will not retaliate, as this case clearly demonstrates:

*“In one case in Hebei, local police arrested citizens seeking to file a collective complaint about pollution on charges of instigating public turmoil and detained them for six weeks. Following their release, the petitioners initiated an administrative lawsuit and reached a settlement with the local government on compensation. Nonetheless, after the administrative suit was dropped, the activists were again arrested, prosecuted, and tried for blackmail and instigating acts of turmoil against social order.”*⁷⁹⁹

Nevertheless, this case and some of the other retaliatory counterstrategies that we will see in the next section provide additional insight into why lawyers and plaintiffs should be careful about angering local officials.

Counterstrategies and Retaliation

This chapter principally deals with the lawyers’ strategies in administrative litigation, but administrative defendants have a variety of counterstrategies they can use to try to dissuade and disrupt administrative litigation. Many of these have already been mentioned, including threats and attacks on lawyers and plaintiffs and political pressure on courts. These strategies are important for understanding administrative litigation in China and further underscore the polycentric nature of China’s authoritarianism.

⁷⁹⁶ Interview: CS20S.

⁷⁹⁷ Sun Tzu 孙武, *The Art of War 孙子兵法* (China Art Network 艺术中国网, 2000).

⁷⁹⁸ Interview: BJ28S.

⁷⁹⁹ van Rooij, “People’s Regulation,” 152.

One of the counterstrategies used by departments unhappy with being litigated against is to threaten the livelihoods of plaintiffs and their relatives. Plaintiffs and relatives that work for some part of the local state may be told that they will lose their jobs if the case is not dropped. This is a true counterstrategy in that it has the potential to be effective despite the lawyer's utilization of several of the strategies employed here. For example, in a sensitive land expropriation case in Southern China, the plaintiffs' lawyer was prominent and well connected (politically embedded) from a neighboring province (cross jurisdictional) who had already appealed the case to the provincial high court (leveling up and over). This meant that it was probably impossible for the defendant, a prefectural level city, to put significant pressure on the lawyer or the courts. The defendant, however, found it relatively easy to threaten the jobs of plaintiffs or relatives that worked for the state since, as local residents, they would almost certainly be working for the city or a department or level of government directly below it. In the end, the city was able to threaten 3 out of 17 plaintiffs in the case, though it was only able to force a slightly faster and smaller settlement.⁸⁰⁰

Some counterstrategies mean that out of town lawyers can occasionally find themselves in serious trouble as a result of administrative litigation. One informant told me the story of some Beijing lawyers who had gone to Guangdong province to represent a group of plaintiffs in a sensitive land expropriation case. The Beijing lawyers had been hired because of a well-founded belief that local lawyers would be unwilling or unable to take such a sensitive case. One evening, young women appeared at the lawyers' hotel room door. As soon as the lawyers opened the door, the women undressed and the local

⁸⁰⁰ Interview: CS24S.

police promptly arrived to arrest the dumfounded lawyers on charges of solicitation. “They should have known better than to open the door to those prostitutes,”⁸⁰¹ he concluded.

As a precaution against the types of retribution experienced by these lawyers in Guangzhou, a very senior lawyer with substantial experience litigating sensitive cases outside of Beijing follows a strict regimen designed to guard his personal safety. When outside Beijing for sensitive cases, he changes his phone’s sim card regularly and eats all his meals in his hotel which he only leaves to go directly to court.⁸⁰² While the danger of more transgressive types of retribution from local governments and their goons are real, it should be emphasized that the story about the lawyers arrested in Guangdong came second or third hand and that these were the most extreme instances reported in over 150 interviews with Chinese lawyers.⁸⁰³

Third Parties

Statist conceptions of Chinese politics mean that consideration of administrative litigation tends to emphasize state responses that rely on defendants putting pressure on other parts of the state. These usually mean putting pressure on courts to refuse cases or rule against plaintiffs, judicial bureaus to put pressure on lawyers, and police to threaten, harass or arrest plaintiffs or lawyers.⁸⁰⁴ Since the strategies outlined in this chapter often make it difficult or impossible for defendants to put pressure on these parts of the state, a

⁸⁰¹ Interview: BJ04S.

⁸⁰² Interview: BJ28S.

⁸⁰³ Nevertheless, this story seems to accord with the idea of control parables: Jonathan Hassid and Rachel E. Stern, “Amplifying Silence: Uncertainty and Control Parables in Contemporary China,” *Comparative Political Studies* 45 (2012).

⁸⁰⁴ Interview: BJ04S.

polycentric perspective helps us understand that it is often third parties and quasi or non-state actors who are responsible for taking action against plaintiffs and their lawyers.

Article 27 of the Administrative Litigation Law states that “any other citizen, legal person or any other organization who or which has interests in a specific administrative act against which an action is initiated may apply to participate in the action as a third party, or may participate in the proceedings upon notification by the people's court.”⁸⁰⁵ In general, third parties to administrative cases are on the side of the Chinese state. They are often companies that the government has treated favourably in some way, for example, companies that, according to the perspective of competitors, have not had regulations enforced against them. As one lawyer representing a third party opined: “from the government’s perspective this was a tough case, but not from my perspective.”⁸⁰⁶

While the focus in the literature is on officials resisting administrative litigation, in many, if not most, cases it is a third party that threatens or carries out threats against administrative plaintiffs and their lawyers; officials simply turn a blind eye. Development companies who have or will purchase the land that local governments have expropriated from residents or farmers can be particularly forceful third parties. Strict regulations prevent government organs from removing holdouts (commonly know in China as 钉子户, literally “nail households”) by force or by turning off their utilities. In these cases, development companies may hire thugs to disconnect or damage local utilities or even

⁸⁰⁵ *Administrative Litigation Law*.

⁸⁰⁶ Interview: NB05S.

beat stubborn residents.⁸⁰⁷ Local officials pretend not to notice because holdouts attract negative attention and can slow the investment and development that is vital to their careers.

A variety of administrative cases involve third parties, usually companies that are more or less on the side of the state. Commonly, in regulatory or IP cases the plaintiff is a rival company asking the defendant agency to enforce a law or regulation against the third party. For example, a mobile phone company in Lanzhou sued the local communications department (通信管理局) for not enforcing regulations that limited the prizes such companies could offer in promotional contests; the third party in this case was a rival mobile phone company that had offered a car as a grand prize.⁸⁰⁸ In these types of cases, large companies often hire lawyers and may help the government demonstrate that they are in compliance with the law, but they rarely take any extreme measures.

In land expropriation cases, by far the most common type of administrative case in China over the past decade,⁸⁰⁹ development companies which are generally closely tied to the local governments tend to do much of the dirty work. Because these companies will ultimately be developing the expropriated land they have a strong incentive to quickly and cheaply remove the existing residents or farmers (in the case of rural land). They may be associated with local organized crime syndicates, especially in areas where the local state is weak.⁸¹⁰ It should not be surprising that such companies are often responsible for more extreme tactics including turning off residents' utilities; throwing

⁸⁰⁷ Liza Weinstein and Xuefei Ren, "The Changing Right to the City: Urban Renewal and Housing Rights in Globalizing Shanghai and Mumbai," *City & Community* 8, no. 4 (2009): 420, doi:10.1111/j.1540-6040.2009.01300.x.

⁸⁰⁸ Interview: LZ03-L.

⁸⁰⁹ China Statistical Yearbook Editorial Committee, *China Statistical Yearbook Various Years*.

⁸¹⁰ Hurst, Liu, and Tao, "Reassessing Collective Petitioning in Rural China."

garbage in already abandoned lots in order to make the area unlivable; threatening plaintiffs, lawyers and their families; forcibly evicting tenants and tearing down buildings; and sending groups of thugs to attack residents. In one case thugs were sent into a central Shanghai neighbourhood to beat up remaining residents, women to beat up the women and men to beat up the men. Although a police car was already parked nearby, it did not take any action. When residents called the police, they were told that a police car was already there.⁸¹¹ The complicity of the local government is certainly evident from the lack of police reaction to this situation, but because those involved in such activities take pains to hide their identities and affiliations, it is difficult to know just how involved different actors are in visiting retribution on plaintiffs and lawyers. Nevertheless, the close involvement of actors like development companies and hired thugs demonstrates that many of the most vicious disputes in China are now polycentric affairs in that they involve quasi and non-state actors on both sides.

Conclusion

By providing the means and opportunity for a number of state, quasi-state, and non-actors to participate in the creation of policy outcomes, administrative litigation expands the polycentrism of the modern PRC. While this polycentrism certainly marks a pluralisation of Chinese politics and society since the Mao-era it should not be confused with democratisation. It is common for powerful private sector actors to have a seat at the table in authoritarian regimes. The fact that the very same lawyers who represent the state, sue the state, suggests that this is largely a process in which certain actors are

⁸¹¹ Interview: SH21S.

invited into the elite circle of power holders, rather than one in which power is extended out towards the masses. To an extent, this helps answer the question of how the Chinese Communist Party has managed to maintain power despite the pluralisation that should accompany capitalist growth.

Yet, liberals should find some cause for optimism. Giving more power to non-state elites, such as politically embedded lawyers, has already led to greater access for some ordinary Chinese, such as the administrative plaintiffs those lawyers represent.

Chapter Six: Foreign Plaintiffs Suing the State

Since multinational corporations began entering China in the 1980s, the trickle has grown to a torrent, and today nearly every CEO is required to have a strategy for his or her company's involvement in China. The combination of China's participation in the world economy, accession to the WTO, and the growing presence of foreign companies in China was supposed to help bring China into line with international standards of governance, including rule of law and eventually human rights. In some sectors progress is clearly visible. Representatives of multinationals frequently bring suits against the Chinese state in the form of the patent or trademark office in Beijing's First Intermediate Court. Such cases have become routine, and while some foreign litigants still complain about delays and the quality of some proceedings, litigation runs at something approaching an international standard.⁸¹² Yet in any given year, outside of this single chamber in a single court in a single city in a country of over a billion people, only a small handful of foreign litigants will directly challenge the Chinese state in court.

Instead, disagreements between foreign multinationals and other parts of the Chinese state will most likely be settled in direct meetings with officials. Foreign companies are anxious to not endanger vital relationships with local governments and local officials are usually eager to encourage international investment to help them meet development quotas, impress their superiors, and receive promotions. In general, companies prefer to avoid litigation, but in China even if a dispute proves difficult to resolve, multinationals may turn to other resources and tactics, and rarely, if ever,

⁸¹² Interviews: WG01-FL, BJ07-PA, SH04-PA.

consider litigating against the state. Indeed, foreign lawyers in China who would willingly recommend litigation against China's Trademark and Patent offices frequently looked horrified when I asked about suing local governments.

This chapter argues that this discrepancy is part of a compromise between the Chinese state and multinationals operating in China.⁸¹³ The “groping for stones to cross the river [摸着石头过河]” approach that has been a hallmark of China's Reform-era government means that instead of using a foreign presence to motivate reform and improve the administrative legal system, the state created an effective but *ad hoc* solution to resolve problems affecting foreigners. For their part, multinationals are given the incredible opportunity of access to the PRC, both as a market and as a production site. Additionally, they are given a venue for Intellectual Property (IP) disputes with the state,⁸¹⁴ and the reasonable expectation of favourable treatment by local governments, especially outside the largest and most developed coastal cities. In return, the Chinese state receives foreign investments that include intellectual property because foreign firms are at least minimally comfortable that their intellectual property will be protected and that there will be reasonable recourse if it is not. The Chinese state can therefore continue to enjoy this foreign investment without significant foreign pressure to make costly reforms granting independence to its justice system.

Specifically, this chapter addresses the following points. I first consider the theoretical implications for the relationship between rule of law and development and legal convergence. After addressing my data sources, I turn my attention to the

⁸¹³ Although, this chapter is focused on multinational corporations, many of its insights may also hold true for domestic Chinese companies.

⁸¹⁴ While this chapter focuses on administrative litigation, the IP chamber of Beijing's First Intermediate Court also offers a reasonably impartial venue for settling some civil IP cases.

Intellectual Property Chamber of Beijing's First Intermediate Court, the exception to the rule that multinationals do not sue the Chinese state. I then show that, although administrative litigation is a viable mechanism for both individuals and firms to resolve problems with the state, multinationals rarely resort to suing the Chinese state. Providing an example, I demonstrate that although foreign firms may have difficulty litigating against the Chinese government, on balance the process is no more difficult for them than most other classes of plaintiffs. I consider the following reasons that multinationals shy from litigation: 1) Their perceptions of administrative litigation in China are founded on a received wisdom based on a familiar criticism of Chinese rule of law rather than on empirical reality or experience; 2) Their activities are sometimes of dubious legality; and 3) They often have a wealth of extra-legal alternatives. Finally, I conclude that while the reluctance of multinationals to engage the Chinese state in litigation is understandable, multinationals' reluctance to make use of administrative courts and preference for extra-legal special treatment severely limits their potential contribution to China's rule of law.

Theory

This chapter is a careful, empirical, close to the ground study in an area generally dominated by theorizing, multi-country studies, sweeping generalizations and analyses of black letter law. It adds much needed data to several important theoretical debates including: legal convergence, authoritarian resilience, and the relationship between rule of law and development. As a careful empirical study, however, it does not present easy answers. Nevertheless, I will briefly cover some of the relevant theoretical issues in this section.

An important theoretical issue touched on by this research is the relationship between rule of law and development. Rule of law is frequently seen as a precondition for economic development because it enforces contracts and property rights, creating certainty, and thereby encouraging investment.⁸¹⁵ China is sometimes cited as an outlier or exception by achieving spectacular growth without rule of law.⁸¹⁶ The case for Chinese exceptionalism is often overstated as China's legal system is not particularly weak for its level of *per capita* income.⁸¹⁷ Nevertheless, it is still worth asking how and why foreign investors and capital have continued to flood into China over the last three decades if rule of law was insufficient to protect investments?

There are a variety of possible answers to this question, but the one that most closely jibes with my findings is that “appropriate institutions”⁸¹⁸, “second best institutions”⁸¹⁹, or “transitional institutions”⁸²⁰ are able to provide sufficient, if not perfect, guarantees and certainty to investors. These institutions may “take into account context-specific market and government failures that cannot be removed in short order”⁸²¹ but “often diverge greatly from best practice”⁸²². Others have already argued that these types of institutions explain how China was able to achieve such high levels of development

⁸¹⁵ For examples see: Peter Boettke and J. Robert Subrick, “Rule of Law, Development, and Human Capabilities,” *Supreme Court Economic Review* 10 (2002): 109–126; Kaufmann, Kraay, and Mastruzzi, *Governance Matters IV*; Kaufmann, Kraay, and Mastruzzi, *Governance Matters VI*; Douglass C. North, “The New Institutional Economics and Development,” *Economics Working Paper Archive at WUSTL* (1993).

⁸¹⁶ Donald C Clarke, “Economic Development and the Rights Hypothesis: The China Problem,” *American Journal of Comparative Law* 51 (2003): 91–3, doi:10.2139/ssrn.309640.

⁸¹⁷ China, for example, is ranked more highly in the World Bank's rule of law index than several other countries with higher per capita incomes, such as Mexico, Russia, and the Philippines. See: Kaufmann, Kraay, and Mastruzzi, *Governance Matters VI*.

⁸¹⁸ Djankov et al., “Appropriate Institutions.”

⁸¹⁹ Rodrik, *Second-Best Institutions*.

⁸²⁰ Qian, “How Reform Worked in China.”

⁸²¹ Rodrik, *Second-Best Institutions*, 0.

⁸²² *Ibid.*

with weak rule of law.⁸²³ What this study adds is that transitional institutions can be hybrids, a patchwork of second best institutions, like the special treatment foreign firms sometimes receive from Chinese local governments, and best practice institutions, such as the IP chamber in Beijing.

Theories of legal convergence suggest that “‘western’ business and legal practices are becoming universal as a consequence either of the globalization of capital or the diffusion of professional training and norms.”⁸²⁴ Dezalay and Garth, two advocates of legal convergence, believe that the process is underway in China. They see multinational law firms and foreign lawyers in China as “moral entrepreneurs,”⁸²⁵ the increasing presence of which are “key engines of legal transformation.”⁸²⁶ A broader but parallel view holds that “[i]nvestment by U.S. firms [in countries where human rights are less well defended] may well help move human rights in a positive direction.”⁸²⁷ This view is also relevant here because administrative litigation in China is not simply a means to solving business disputes, but is (to a limited extent), could, and should be an important venue for protecting the rights of individuals against an overzealous state. Should multinationals and their law firms be contributing to the development and convergence of China’s administrative law system, it then follows that that they would also be contributing to the protection of human rights in China.

⁸²³ Qian, “How Reform Worked in China.”

⁸²⁴ Richard P. Appelbaum, “The Future of Law in a Global Economy,” *Social & Legal Studies* 7 (1998): 171.

⁸²⁵ Yves Dezalay and Bryant G. Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (Chicago and London: University of Chicago Press, 1998), 33.

⁸²⁶ *Ibid.*, 257.

⁸²⁷ Debora L. Spar, “The Spotlight and the Bottom Line: How Multinationals Export Human Rights,” *Foreign Affairs* 77 (1998): 12.

The aim of this chapter is not to argue that legal convergence is not occurring in China. That argument is both overly simplistic and has been made before.⁸²⁸ Instead, I find that legal convergence is evident in a few of China's most developed coastal cities, and particularly in the Intellectual Property Chamber of Beijing's First Intermediate Court. This Chapter also shows that multinationals and their foreign legal counsel are not making the contribution to legal convergence that is hypothesized by Dezalay and Garth. In some cases, this foreign presence may contribute to legal convergence, but in many others, multinationals are loath to contribute to legal development if it means risking upsetting government officials; they are more than happy to benefit from extra-legal favourable treatment made available to them by parts of the Chinese state.

Data Sources

The chapter is drawn primarily from the interviews described in the Chapter Two. While my randomly sampled interviews provided a wealth of knowledge about administrative litigation in China and an important point of comparison in this chapter, the vast majority of Chinese law firms never interact with foreign parties and my random sample of firms yielded little direct information about foreign involved administrative litigation. Seeking more data, in the spring of 2011 I conducted 23 semi-structured interviews in Shanghai and Beijing with lawyers and other business support staff at foreign law firms that have a presence in China and with high profile Chinese law and intellectual property firms⁸²⁹. In Shanghai and Beijing foreign law firms and the high

⁸²⁸ Appelbaum, "The Future of Law," 171.

⁸²⁹ Intellectual property firms in China specialize in assisting clients with intellectual property issues such as patent registration and may also represent clients in IP-related litigation. They employ both lawyers and non-lawyer patent agents, both of which may represent their clients in IP-related litigation.

status Chinese law and intellectual property firms that tend to have more foreign clients are generally clustered in a handful of prestigious addresses and areas where I solicited interviews. My informants were selected more or less randomly, from among these big-name firms, depending on who was available and willing to give me an interview. I conducted an additional six interviews with other lawyers who were recommended to me as having had some experience with foreign involved administrative litigation in China. I also sent e-mails seeking information to at least one lawyer at each of 50 foreign law firms in Hong Kong that deal with PRC law. I received 13 responses, none of which, however, implied significant experience with administrative litigation and was judged to warrant an interview.

In the methods chapter, I mention the potential concerns arising from the use of official Chinese government data such as that used in this chapter. For our purposes in this analysis, there is no reason to believe that the official statistics I use here have been manipulated in such a way as to support my findings that foreign firms engage in less administrative litigation than civil litigation or than their domestic counterparts. Additionally, since my sources come from national as well as provincial yearbooks from Guangdong and Hubei and cover a span of over twenty years, any bias would have to be both systematic and long lasting to seriously affect my findings. I proceed with the understanding that, while they are surely less than perfect, there is no reason to believe that these particular statistical records are biased in favour of my conclusions.

Intellectual Property, the Exception

This section briefly considers the intellectual property chamber of Beijing's First Intermediate Court, the one place in which multinationals frequently involve themselves

in administrative litigation and where legal convergence is most evident. Understanding this chamber and the work it does is important not only because it is the principle site for foreign involved administrative litigation, but also because it serves as an example of how legal convergence can result from concerted foreign involvement and pressure. While the specifics of how this court operates and the details of administrative IP litigation need not detain us, two important points help connect this argument. First, a reasonably effective and impartial court for protecting IP rights, including litigation against patent and trademark departments, has been set up in which multinationals feel reasonably comfortable suing the Chinese state and do so relatively frequently. Second, this has come to pass “as a result of external pressures and internal economic objectives.”⁸³⁰

Since 2001 when the current system was put in place, suing China’s Patent Review and Adjudication Board (PRAB) and Trademark Review and Adjudication Board (TRAB) has become relatively commonplace. The departments were set up to review decisions of China’s trademark and patent authorities, and litigation arises when plaintiffs are not satisfied with the reviews that they conduct. “When appeals to the courts were first introduced there was concern that this would bring a politicised judiciary into the decision making process which had been relatively professional until then. However the TRIPS [Trade Related Aspects of Intellectual Property Rights] agreement required the ability to appeal to the courts, so it was introduced.”⁸³¹ Since then, both their frequency and professionalism set such cases apart from other types of administrative litigation to

⁸³⁰ Alan Cox and Kristina Sepetys Sepetys, “Intellectual Property Rights Protection in China: Litigation, Economic Damages, and Case Strategies,” in *Corporate Counsel’s Guide to Doing Business in China* (Thomson West, 2005), 11.403.

⁸³¹ From an e-mail from informant: HK03-L.

the point that many of the lawyers to whom I spoke did not generally consider such cases to be administrative litigation at all.⁸³² They have a point; the cases are heard in a specialist Intellectual Property Chamber of the court that hears both civil and administrative litigation instead of the generalist administrative chambers that would hear the vast majority of administrative cases. From the perspective of Chinese lawyers, administrative IP cases for foreign companies are fairly profitable which is also in stark contrast to the unprofitable cases that I have shown are typical in administrative litigation.⁸³³ Some lawyers and patent agents actually do more administrative IP litigation than civil IP litigation, which can be far more difficult since it often involves going to courts in less developed areas where the infringement is actually occurring.⁸³⁴ One informant went as far as to suggest that registering patents with the Chinese state is the least corrupt business in the country.⁸³⁵

One of the most important reasons multinationals feel comfortable litigating against TRAB and PRAB is that, despite some initial misgivings,⁸³⁶ these departments have become accustomed to being litigated against. “In the early days, the courts did reverse a large number of PRAB decisions, mainly on procedural grounds. Now they are less likely to, but do from time to time.”⁸³⁷ Yet despite these falling win rates, companies continue to file cases with Beijing’s IP chamber. This is because, the chief concern that makes multinationals reluctant to sue a government department is not the fear that they will lose, but the fear of hurting their relationship with the department they are suing.

⁸³² Interview: BJ15-FL.

⁸³³ Interviews: SH01-L, BJ10-PA.

⁸³⁴ Interview: BJ07-PA.

⁸³⁵ Interview: SH04-PA.

⁸³⁶ From an e-mail from informant HK03-L.

⁸³⁷ From an e-mail from informant HK03-L.

Also, officials of these bodies do appear in court to defend their decision,⁸³⁸ whereas, as we have seen, despite some recent improvement, this has been a problem in most types of administrative litigation.⁸³⁹ This casts light on the difficulty of reforming administrative litigation in China. Making courts and their decisions more impartial would be difficult, but ensuring that other administrative organs become as responsible and professional as TRAB and PRAB may be impossible in the medium term.

Why representatives of the Chinese state make any decision is always a tricky question to answer definitively and my sources offer no special insight into the logic of Chinese officials. The general consensus is that foreign pressure and involvement, including pressure from foreign investors, the WTO, and foreign embassies and governments was at least partially responsible for creating a specific institutional structure that allows for reasonably impartial IP administrative litigation.⁸⁴⁰ In an early case a foreign lawyer "...did get feedback from the PRAB that they were not happy to be named as defendants in actions."⁸⁴¹ This suggests that the willingness of foreign firms to risk litigating during the early days of the system helped desensitize PRAB and TRAB and pave the way for the current more professional environment. Further evidence comes from a similar IP chamber in the well-developed northern port city of Qingdao. While Qingdao's chamber has more or less the same institutional structure as Beijing's, a prolific IP litigator suggested to me that it was actually less professional because far

⁸³⁸ Interview: BJ06-L.

⁸³⁹ Chinese Lawyer Net 中国律师网, "On the Need for the Defendant's Legal Representative to Come to Court."

⁸⁴⁰ Cox and Sepetys, "Intellectual Property Rights Protection in China," 11.403.

⁸⁴¹ From an e-mail from informant HK03-L.

fewer foreigners used it; "...the government wanted to put its best face on for foreigners who are usually suing in Beijing, but that was not really a concern in Qingdao."⁸⁴²

The IP chamber in Beijing could certainly provide a model for other relatively specialized kinds of administrative cases. For example, specialist environmental courts already exist in China⁸⁴³ and might be improved along these lines to a point where they attract more environmental administrative cases, the current number of which remains pitifully low.⁸⁴⁴ Whether Beijing's specialist IP chamber can serve as an example or a starting point for improving administrative litigation more broadly, is unclear. Intellectual property, as opposed to more common types of administrative litigation related to land and policing, is essentially unrelated to protecting the rights of average Chinese. Foreigners have, therefore, made only a limited contribution by influencing China to vastly improve its intellectual property litigation.

Non-Litigiousness

One of the central conceits of this chapter is that aside from cases in Beijing's intellectual property chamber, foreign firms generally do not sue the Chinese state. This assertion is not controversial and, in foreign business and legal circles in China, it is the received wisdom. As the experienced head counsel of a large foreign multinational with a long history in China put it "as a matter of principle, we would not think about resorting to administrative litigation."⁸⁴⁵ As with so much received wisdom, no one has yet gone to the trouble to make a systematic and convincing empirical case that foreign firms rarely

⁸⁴² Interview: BJ09-L.

⁸⁴³ Wang and Gao, "Environmental Courts and the Development of Environmental Public Interest Litigation in China."

⁸⁴⁴ China Statistical Yearbook Editorial Committee, *China Statistical Yearbook Various Years*.

⁸⁴⁵ Interview: WG02-FL.

resort to administrative litigation. Since this is the starting point of my analysis I will do so here.

First and most importantly, my interviews with both foreign lawyers who have experience in China, and with Chinese lawyers who regularly represent foreign clients confirm the fact that foreign companies are extremely unlikely to involve themselves in administrative litigation in China. Indeed in all of my interviews and e-mail exchanges, only two informants were found to have had direct experience with a non-IP foreign involved administrative case.

Unfortunately, statistical data that would help us establish the frequency of foreign involvement in administrative litigation in China is relatively difficult to acquire. Some official data is available in legal yearbooks published at the national and sometimes at the provincial levels. While such data lacks both consistency and specificity, it does seem to confirm that multinationals engage in very little administrative litigation, and in less administrative litigation than civil or than their domestic peers.

As can clearly be seen in Table 14, foreign firms rarely sue the Chinese government. If anything, Table 14 actually overstates the involvement of multinationals in administrative litigation for several reasons. Both Table 14 and Table 15 fail to include many categories of administrative litigation for which there was not a foreign-related case in all the years for which I have data, including technology supervision, social security, finance, commodity prices, foreign exchange, international trade, traffic and many others. Additionally, while cases litigated against the commerce, customs, or patent departments are very likely to have firms as plaintiffs, some of these of categories are likely to include cases litigated by foreign individuals rather than companies.

Table 14: Total and Foreign Involved Administrative Cases by Category⁸⁴⁶

| Year | '87 | '88 | '89 | '90 | '91 | '92 | '93 | '94 | '95 | '96 | '97 | '98 | Total |
|------------------------------------|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-------|
| Total Admin (in thousands) | 5 | 9 | 10 | 13 | 26 | 27 | 28 | 35 | 53 | 80 | 91 | 96 | 472 |
| Prostitution | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 |
| Customs | 0 | 0 | 1 | 3 | 0 | 0 | 0 | 0 | 0 | 0 | 3 | 0 | 7 |
| Rights Infringement | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 |
| Land | 0 | 0 | 0 | 1 | 1 | 0 | 5 | 2 | 1 | 1 | 2 | 0 | 13 |
| Public Order | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 4 | 0 | 3 | 1 | 2 | 11 |
| Re-education Through Labour | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 1 |
| Public Security | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 1 | 1 | 0 | 1 | 4 |
| Business Registration | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 1 |
| Advertising | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 1 |
| Commerce | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 4 | 0 | 1 | 6 | 12 |
| Tax | 0 | 0 | 0 | 0 | 0 | 0 | 2 | 0 | 0 | 0 | 0 | 1 | 3 |
| Health | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 1 | 0 | 0 | 2 |
| Patent | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 1 | 2 |
| Trademark | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 1 |
| Audit | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 1 |
| Medicine | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 1 |
| Tobacco Monopoly | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 1 |
| Forestry | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 2 | 2 | 0 | 4 |
| City Construction | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 1 |
| Environmental Protection | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 1 | 8 | 10 |
| Border Authority | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 1 |
| Other | 0 | 0 | 0 | 0 | 0 | 0 | 6 | 2 | 5 | 4 | 9 | 61 | 87 |
| Total Foreign Admin | 1 | 0 | 1 | 5 | 1 | 1 | 14 | 12 | 14 | 15 | 21 | 83 | 168 |

Foreign citizens in China can and do sue the state. Indeed, in one of my first interviews, a lawyer, misunderstanding my meaning asked me (an obvious foreigner) what department I wanted to sue and indicated willingness to consider representing me in such a case before I managed to correct the misunderstanding.⁸⁴⁷ While such cases are not the focus

⁸⁴⁶ China Lawyers Yearbook Editorial Committee, *China Lawyer's Yearbook Various Years*.

⁸⁴⁷ Interview: LZ02-L.

of this chapter, they nevertheless may have been included in the official statistics reproduced in Table 14 and Table 15.

Finally, when considering administrative litigation, and especially when evaluating statistics on foreign involvement, it is important to take third party participation into account. By definition, a private party, such as a multinational, cannot be a defendant in an administrative lawsuit. As we have seen, however, companies are frequently third parties to administrative litigation in China. This means that they have sufficient interest in an administrative suit to be represented in court and are usually on the side of the defendant. A common example of multinationals' third party involvement would be the case of a Chinese company suing the government in response to patent or trademark enforcement in which the relevant IP is owned by a multinational. The multinational in this case would be represented in court in order to support the state's assertion that it is the rightful owner of the intellectual property. Third party involvement may actually account for the majority of cases of foreign involvement in administrative litigation in China. One Beijing patent lawyer, for example, reported that representing foreign companies as third parties in administrative litigation made up a majority of the cases he took in 2009.⁸⁴⁸ Obviously, standing on the side of the government in administrative litigation is dramatically different than litigating against it. Indeed, one Beijing patent lawyer described such work as “much more relaxed [轻松很多].”⁸⁴⁹

While the sudden uptick in administrative litigation cases with foreigners involved in 1998 looks encouraging, Table 15 suggests that it might be an anomaly rather

⁸⁴⁸ Interview: BJ07-PA.

⁸⁴⁹ Interview: BJ07-PA.

than the beginning of a dramatic upward trend. In 1998, the one overlapping year in both tables, Guangdong alone appears to be responsible for just over a quarter of all foreign involved administrative cases. Unfortunately, I am not aware of any national level statistics after 1998 that shed light on foreign involvement in administrative litigation and so now turn to the provincial level statistics from Guangdong.

Table 15 seems to corroborate the same basic story as Table 14. Not only does this data from Guangdong suffer from the same drawbacks as Table 14, it may further downplay the true lack of foreign participation in administrative litigation. Guangdong in the past twelve years is certainly a “most likely” case. That is, considering the tremendous presence and history of foreign firms and capital in Guangdong, the province’s relatively high level of development, and the relative liberalism of the Guangdong Model⁸⁵⁰ it is undoubtedly one the areas in which we could expect to find more foreign-related litigation. As we shall see, these figures compare poorly to foreign involvement in civil litigation in Guangdong in the same period.

⁸⁵⁰ “Governing China: The Guangdong Model,” *The Economist*, November 26, 2011, <http://www.economist.com/node/21540285>.

Table 15: Total and Foreign Related⁸⁵¹ Administrative Cases in Guangdong⁸⁵²

| Year | Total Admin | Total Foreign | Public | Resources | Commerce | City Const. | Customs | Patents | Other |
|--------------|----------------------------|---------------|----------|-----------|----------|-------------|----------|----------|-----------|
| 1998 | 1923 | 23 | 0 | 0 | 0 | 0 | 0 | 0 | 23 |
| 1999 | No Data Available for 1999 | | | | | | | | |
| 2000 | 3244 | 12 | 0 | 0 | 0 | 1 | 1 | 2 | 7 |
| 2001 | 7692 | 14 | 3 | 0 | 0 | 0 | 0 | 0 | 11 |
| 2002 | 8348 | 2 | 0 | 0 | 1 | 1 | 0 | 0 | 0 |
| 2003 | 3812 | 5 | 0 | 0 | 0 | 2 | 1 | 0 | 2 |
| 2004 | 4171 | 4 | 0 | 0 | 2 | 1 | 0 | 0 | 1 |
| 2005 | 4674 | 1 | 0 | 0 | 0 | 1 | 0 | 0 | 0 |
| 2006 | 4966 | 6 | 0 | 0 | 0 | 3 | 0 | 0 | 3 |
| 2007 | 5703 | 16 | 2 | 4 | 0 | 8 | 0 | 1 | 1 |
| 2008 | 5590 | 7 | 0 | 1 | 0 | 4 | 0 | 0 | 2 |
| 2009 | 6412 | 24 | 0 | 1 | 0 | 6 | 0 | 0 | 17 |
| Total | 56535 | 114 | 5 | 6 | 3 | 27 | 2 | 3 | 67 |

The case of Guangdong demonstrates that even in China's most developed coastal areas with the largest foreign presence, multinationals rarely involve themselves in administrative litigation. Drawing conclusions from this is tricky, however. Both legal practitioners⁸⁵³ and international experts⁸⁵⁴ acknowledge that rule of law is far better developed in these metropolises,⁸⁵⁵ and lawyers see their local governments as less prone to let administrative litigation affect their relationship with a plaintiff.⁸⁵⁶ This could be taken as evidence that multinationals are unwilling to use even well-developed courts to

⁸⁵¹ Foreign cases include any case involving a foreign party (but excluding parties from Hong Kong and Taiwan).

⁸⁵² Guangdong High Court, *Guangdong Court Yearbook Various Years*.

⁸⁵³ Interview: SH05-L.

⁸⁵⁴ *China Governance, Investment Climate, and Harmonious Society: Competitiveness Enhancements for 120 Cities in China*, Poverty Reduction and Economic Management, Financial and Private Sector Development Unit East Asia and Pacific Region (World Bank, 2006), http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2006/11/09/000090341_20061109094356/Rendered/PDF/37759.pdf.

⁸⁵⁵ Interview: SH05-L. When I refer to more developed coastal cities with better rule of law, I generally mean Shenzhen, Guangzhou, Shanghai and Beijing, but a number of other secondary cities such as Ningbo, Qingdao and Hangzhou could also be included.

⁸⁵⁶ Interview: SH03-L.

litigate against more professional local governments even though retaliation seems unlikely. In my interviews it was more common to hear, especially Chinese lawyers, that multinationals in Shanghai or Beijing rarely sued these jurisdictions because they seldom had problems with these more sophisticated and rule-abiding local governments.

Foreign firms in China are generally reluctant to litigate even in civil cases, but the following statistical tests using data from Guangdong show that they are statistically significantly more likely to engage in civil litigation than administrative litigation. I use an independent group T-test to compare the mean percentage of foreign involved administrative cases and the mean percentage of foreign involved tort and contract cases. The results in Table 16 show that foreign parties were involved in over twice the percentage of tort and contract cases, although the percentage of overall cases is tiny.

Table 16: Foreign Involvement in Administrative vs. Tort and Contract Cases

Independent Group T-Test: % of Cases in Guangdong Involving Foreign Parties 2000-2009

| | # of Observations | Mean | Standard Error | Standard Deviation |
|---|-------------------------|-------|---------------------------|--------------------|
| Percentage of Tort and Contract Cases Involving Foreign Parties | 18 | 0.40% | 0.06 | 0.24 |
| Percentage of Administrative Cases Involving Foreign Parties | 11 | 0.17% | 0.04 | 0.13 |
| Difference | | 0.23% | 0.08 | |
| | Assuming Equal Variance | | Assuming Unequal Variance | |
| P Value | | 0.01 | | 0.00 |
| Degrees of Freedom | | 26 | | 25.99* |

*Satterthwaite's degrees of freedom test

Table 17 is similar to Table 16 except that it compares administrative cases exclusively to contract cases. Again, we see that although foreign parties make up only a tiny percentage of both types of litigation in China, foreign parties still make up a statistically significantly larger share of civil litigation.

Table 17: Foreign Involvement in Administrative vs. Contract Cases

Independent Group T-Test: % of Cases in Guangdong Involving Foreign Parties 2000-2009

| | # of Observations | Mean | Standard Error | Standard Deviation |
|---|-------------------|-------------------------|---------------------------|--------------------|
| Percentage of Contract Cases Litigated by Foreign Firms | 10 | 0.32% | 0.06 | 0.18 |
| Percentage of Administrative Cases Litigated by Foreign Firms | 10 | 0.17% | 0.04 | 0.13 |
| Difference | | 0.25% | 0.07 | |
| | | Assuming Equal Variance | Assuming Unequal Variance | |
| P Value | | 0.02 | | 0.02 |
| Degrees of Freedom | | 18 | | 16.13* |

*Satterthwaite's degrees of freedom test

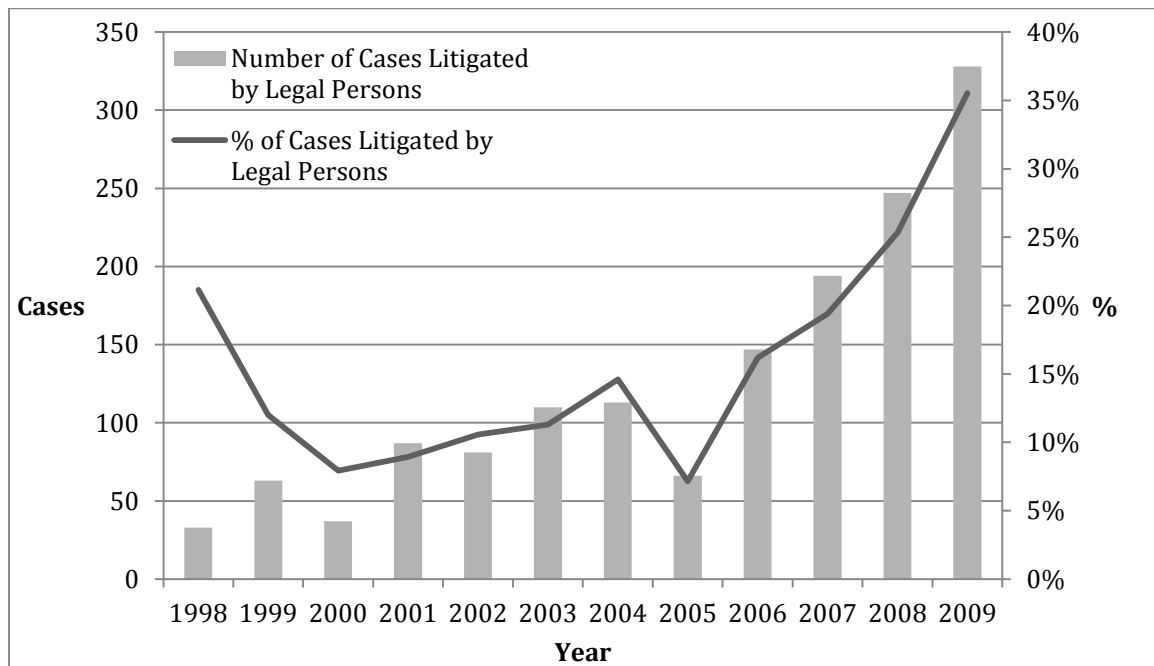
An important question remains to be considered. Are foreign firms in China much less willing to litigate against the state than their domestic counterparts? In general, both foreign and domestic firms are relatively reluctant to sue the state. Firms in both categories prefer to rely on connections with local governments and officials to resolve problems. Yet lawyers who represent domestic companies do not express the same degree of reservation about pursuing administrative litigation as do foreign lawyers who advise multinationals in China.

Turning again to a provincial statistical yearbook, this time from Hebei Province, it appears that while companies do not make up a majority of cases brought against the state, they do make up a large percentage. As Figure 14 shows, litigation brought by legal persons, as opposed to individuals, makes up a reasonably large and apparently increasing percentage of administrative cases.⁸⁵⁷ This data from Hebei suffers from two drawbacks. First, it only represents the subset of administrative cases in which the

⁸⁵⁷ Other sources have corroborated this data's suggestion that companies make-up a large share of plaintiffs in administrative litigation. See: Peerenboom, *China's Long March*, 478.

defendant actually mounted a legal defence (应诉). This happened in approximately 28 per cent of cases in this sample. The sample may be biased therefore, depending on whether Hebei government departments are more likely to mount a defence when sued by legal persons rather than citizens.⁸⁵⁸ Second, there are types of legal persons other than companies that may be included in this category. Although this may be less of a concern for the general argument being made here since non-governmental organizations (NGOs) and other non-commercial organizations famously have trouble getting legal status in China and even when they do, they still often have difficulty having their standing recognized in administrative courts.⁸⁵⁹

Figure 14: Administrative Cases in Hebei Litigated by Legal Persons⁸⁶⁰



⁸⁵⁸ While this is certainly possible, I am not aware of any evidence suggesting this conclusion.

⁸⁵⁹ Peerenboom, *China's Long March*, 420.

⁸⁶⁰ Hebei Legal System Year Book Editorial Committee, *Hebei Legal Yearbook, Various Years*.

While much of the quantitative data used in this section is less than ideal, it does serve to corroborate the claim, already supported by received wisdom and my interviews, that foreign firms in China engage in relatively little administrative litigation.

An Example

To better understand why foreign companies and the Chinese and foreign law firms that represent them are reluctant to recommend litigation against the state, it is instructive to examine more closely one of the few examples of a non-IP foreign involved administrative case.

In the early 2000s, a foreign company's joint venture with a Chinese firm had run into trouble with the customs department in a large Chinese port.⁸⁶¹ A few million US dollars worth of product that the company had imported had gone missing in the port and was then sold on the local market.⁸⁶² The joint venture requested an administrative review of the local customs agent's action which was conducted by the national customs agency since the port city's customs was directly under their supervision.⁸⁶³ When the results of the review did not prove satisfactory, the joint venture approached the large multinational law firm that was its Hong Kong based counsel. The firm recommended three potential Chinese law firms in the port city to represent them in the matter and the joint venture chose the largest local law firm. Assisted by its Hong Kong counsel and represented in China by the local firm, the joint venture took the national customs department to administrative court.

⁸⁶¹ My data on this case is drawn from two separate interviews with lawyers who worked on the case. Interviews: HK01-FL, HK02-L.

⁸⁶² The name of the firm, the nature of the product, the name of the city and the law firms are all intentionally omitted to protect the anonymity of my informants.

⁸⁶³ For more on the administrative review system see: Peerenboom, *China's Long March*, 417–9.

Despite having devoted significant funds to legal fees, especially for the foreign law firm, the joint venture ultimately lost, both in the first instance and on appeal. As is relatively common in Chinese administrative cases, the judge explained that the political situation would not allow him to rule for the plaintiff, “we cannot let you win this case, because this is linked to... [a large smuggling] case.”⁸⁶⁴ The officials in question in the administrative suit appeared to also be defendants in a large criminal smuggling case and apparently this made the joint venture’s law suit simply too hot for the administrative courts to handle.

Something of a compromise was made. The joint-venture agreed not to pursue the case any further, and the customs department agreed not to take any action against the company in an apparently unrelated issue that was pending against the joint venture. This case displays many of the problems that are common among all kinds of administrative litigation in China. It also demonstrates that the problems faced by multinationals in China are not necessarily any different than those of any administrative plaintiff described in my dissertation. It seems unlikely that any domestic firm would have fared any better under the same circumstances.

Helping or Hurting? Foreign Involvement

Despite numerous flaws in China’s administrative courts it is not immediately apparent why multinationals engage in less administrative than civil litigation or why they engage in less administrative litigation than their domestic counterparts. This section

⁸⁶⁴ Interview: HK02-L.

will show that multinationals, if anything, are in a stronger position in regard to administrative litigation than are their domestic counterparts.

The issue of how multinationals behave in China is made all the more complicated by the fact that many of them are not technically multinationals. In the early stages of China's reform era, many foreign firms could only get access to China by setting up joint ventures with Chinese partners. By 1997 Wholly Foreign Owned Enterprises (WFOEs) had become the investment format of choice and more and more foreign investment has taken this form.⁸⁶⁵ New difficulties arise, however, from the Variable Interest Entity (VIE) or "Sina structure" that "has been used for years primarily to circumvent China's rules that ban foreigners from investing in certain sectors such as internet and telecommunication."⁸⁶⁶ How joint ventures or VIEs deal with problems with the Chinese state may depend on how their Chinese partners approach the problem.

For the most part, both foreign and domestic plaintiffs face the same problems that plague administrative litigation in China, and which have been addressed extensively throughout this dissertation. There may be, however, areas in which foreign firms face advantages or disadvantages in administrative litigation. Indeed, the involvement of a foreigner in any litigation in China tends to make a case more sensitive, and in one instance I was told of an otherwise banal case being rejected simply because the involvement of a foreigner made judges fear it was too sensitive to handle.⁸⁶⁷ Unlike judges in more independent judicial systems, Chinese judges may be penalized for what

⁸⁶⁵ Jonas F. Puck, Dirk Holtbrügge, and Alexander T. Mohr, "Beyond Entry Mode Choice: Explaining the Conversion of Joint Ventures into Wholly Owned Subsidiaries in the People's Republic of China," *Journal of International Business Studies* 40 (2008): 388–9.

⁸⁶⁶ Joy Shaw, Lisa Chow, and Samuel Wang, "China VIE Structure May Hold Hidden Risks," *Financial Times*, November 11, 2011, <http://www.ft.com/cms/s/2/0a1e4d78-0bf6-11e1-9310-00144feabdc0.html#axzz1gKDIQ0jO>.

⁸⁶⁷ Interview: SH15S.

their superiors consider an “incorrect ruling” and the more sensitive or important the case, the more damaging the potential consequences for a judge. Additionally, suing a higher level of government can also increase the level of sensitivity.⁸⁶⁸ Multinationals are probably more likely to have disputes with higher-level administrative agencies than their domestic counterparts, and may find administrative litigation to be more challenging for that reason.

On the other hand, multinationals do appear to have some advantages over their domestic counterparts. In terms of cases being accepted, a regulation issued by the SPC in 2002 “allows parties, including foreign investors, to institute litigation in the courts to request judicial review of any “concrete” act of a government authority in connection with a WTO-related matter.”⁸⁶⁹ This should mean that multinationals in China have more of a basis from which to challenge administrative decisions. Foreign involved cases also start one level higher up the judicial system than totally domestic litigation. For example, first instance cases that would normally be heard in a lower level court will start in an intermediate court. Because higher-level judges are usually better qualified and less prone to corruption and local protectionism, this can help foreign companies. Some informants even suggested that courts would be more conscientious in cases involving foreign parties, perhaps being more polite and patient.⁸⁷⁰ Another suggested that they might receive favourable treatment in courts outside Beijing and Shanghai where foreign presence is more rare.⁸⁷¹

⁸⁶⁸ Interview: BJ09-L.

⁸⁶⁹ Halverson, “China’s WTO Accession: Economic, Legal, and Political Implications,” 360–1.

⁸⁷⁰ Interview BJ14-L, SH03-L.

⁸⁷¹ Interview: SH05-L.

Further assisting foreign parties in administrative litigation is the use of diplomatic pressure to resolve a dispute with the Chinese government. Embassies, chambers of commerce, and other international and home country institutions can sometimes be mobilized to put pressure on parts of the Chinese state, especially in bigger cases.⁸⁷² While this option can be utilized in conjunction with administrative litigation, we will see that it is generally used as part of an alternative strategy of direct negotiation.

Ultimately, whether a party is foreign or domestic, much more likely to have an impact on a case are variables such as the professionalism of the relevant court and defendant department, the sensitivity of the issue, the connections and stature of the two parties, and the quality of the case, evidence, and counsel. As one Chinese lawyer put it: “why would the courts treat Chinese and foreign parties differently, because the colour of their hair is different?”⁸⁷³

Conceptions and Misconceptions

As we have seen, Chinese administrative litigation is problematic at the best of times. Yet, the disadvantages suffered by foreign parties are probably more or less balanced by advantages. Why then are foreign firms still so reluctant to litigate? First, to a large extent the problem is simply one of perception. Foreigners generally see administrative litigation as hopeless, costly and dangerous to their relationship with the state. This perception is certainly not without basis, but it is in large part a product of the constant criticism levelled against the Chinese legal system. Since very few foreign businessmen or lawyers have any actual experience with administrative litigation in

⁸⁷² Interview: SH03-L.

⁸⁷³ Interview: SH08-L.

China, they have little reason to doubt the received wisdom which is that administrative litigation is not worth considering.

A variety of voices from developed countries, especially politicians, the legal establishment and industry groups, frequently and loudly complain about insufficient rule of law in China.⁸⁷⁴ The US Congressional-Executive Commission (CECC) on the People's Republic of China, for example, monitors human rights and rule of law in China, and publishes annual reports detailing its progress, regress, and continuing deficiencies. As I will show, this kind of rhetoric is problematic for two reasons. First, constant criticism of the legal system and the prevailing wisdom that administrative litigation is a non-option dissuades multinationals from contributing to the PRC's administrative legal system by engaging in it. Second, criticism of Chinese courts is at least somewhat hypocritical when it is used by multinationals and foreign law firms that not only would prefer to rely on extra-legal means to resolve problems, but in many cases are also intentionally ignoring, skirting, or violating Chinese law.

Even in civil disputes, multinationals tend to prefer arbitration over litigation,⁸⁷⁵ and this further dilutes their experience with, and perhaps appetite for, any type of litigation in China. What foreign firms are most concerned with in administrative cases is that a relatively direct and confrontational tactic such as litigation will be likely to sour their relationship with specific offices or units of the state that they can expect to encounter time and time again as they conduct business in China. Even if they were to win, both plaintiffs and lawyers fear that government departments would take revenge on

⁸⁷⁴ Lubman, "The Dragon as Demon."

⁸⁷⁵ Interview: SH05-L.

them in another time and in another way.⁸⁷⁶ As we can see from the customs example, this is not necessarily the case. In that example, despite winning in both the first and second instance, the customs department still made an effort to bury the hatchet with the plaintiff.

One foreign lawyer with tremendous experience in China summed up his understanding of the prevailing view of administrative litigation in China as follows:

“I’m afraid we all have the common wisdom of not challenging the administration unless there is a good combination of the elements below:

(1) The client is a very strong company which is willing to suffer heavy expenses and potential losses;

(2) The government organ is not very powerful (e.g. local government, marginal ministry not related to the business of the company, etc.);

(3) You have strong political backing of the home country government, trade organizations, etc.;

(4) You are supported by another competing Chinese government organ.

Even more important, if you have a case that could support an administrative lawsuit, then you are well advised to start by carrying out discreet negotiations with the relevant government organ. But be careful not to make the dispute public. The moment it becomes public, the government is likely to become less willing to give up.”⁸⁷⁷

Additionally, of the 13 lawyers at foreign firms in Hong Kong who responded to my e-mail inquiries, none were familiar with even a single case of their firm being involved in administrative litigation in the PRC; those who elaborated at all echoed the received wisdom that not only are companies unlikely to win, but that administrative litigation risks damaging a plaintiff’s relationship with the government.

Foreign executives, when dealing with the Chinese state, are unlikely to receive advice from individuals with experience in administrative litigation. Large multinationals often hire and receive their advice on dealing with the local state from government relations personnel who are usually former government officials. These “local

⁸⁷⁶ Interviews: SH09-FL, SH14-L, SH06-FL, HK02-L, SH01-L.

⁸⁷⁷ From an e-mail from informant BJ15-FL; some small changes have been made.

government relations staff will always want to resolve such disputes by negotiation. Even if higher up in the company others want to seek a review this will generally be rejected.”⁸⁷⁸ Even when multinationals do turn to lawyers for advice on dealing with local governments, they are unlikely to consult lawyers with experience in administrative litigation. As I show in Chapter Four, not only are the most successful and prolific administrative lawyers those with close connections to the state, but lawyers who take significant numbers of economic cases and tend to represent large companies are actually less likely to have experience with administrative litigation than an average Chinese lawyer. Lawyers who do international commercial law and/or work at foreign law firms and are therefore more likely to come in contact with foreign companies do not see the need to cultivate relationships with government officials ⁸⁷⁹ which is the most distinguishing feature of active administrative litigators. This means that even though foreign companies might have little trouble finding the type of lawyer who could help them litigate administrative cases, they are likely receive preliminary advice from a lawyer who may be sceptical or simply ignorant of the process of administrative litigation. These lawyers frequently mentioned their concern about the impact of administrative litigation on multinationals’ relationships with the state,⁸⁸⁰ whereas most frequent administrative litigators never mentioned such concerns.⁸⁸¹

⁸⁷⁸ From an e-mail from informant HK03-L.

⁸⁷⁹ Interviews: BJ14-L, SH03-L.

⁸⁸⁰ Interviews: SH01-L, SH05-L, SH09-FL, SH14-L, SH06-L, HK02-L, SH01-L.

⁸⁸¹ Interviews: CS24S, BJ28S, AL01-L.

Alternatives to Litigation for Multinationals

While multinationals and their legal representation tend to lack experience with and have misconceptions about, administrative litigation, they do have prodigious resources that can be mobilized to solve their disputes with the state by extra-legal means. In many cases foreign firms prefer to rely on their connections and/or to negotiate directly with the state because they expect, and often receive, special treatment that is at best informal and extralegal and at worst a violation of Chinese law.

One reason that foreign companies do not sue is that they have recourse to other means that would not be available to ordinary Chinese small or medium domestic enterprises, or in some cases even to large Chinese companies. Local government officials gunning for promotions not only want the investment that often comes with multinationals, but the prestige that accompanies a foreign presence. A Shanghai lawyer describes how she is able to negotiate with government departments on behalf of her clients. Generally, litigation is never mentioned. Instead she suggests that “this company pays so much tax in your district, if you don’t fix this we will move.” This has worked because her clients tend to be large companies and it works even better if they are foreign ones.⁸⁸² Another recourse that is available to foreign parties is to use diplomatic pressure to resolve a dispute with the Chinese government. While pressure through EU or American channels can be very effective, mobilizing the resources of a smaller ‘less-important’ country may not have much of an impact.⁸⁸³ Large multinationals may also use their connections with high level officials in China and at home to accumulate

⁸⁸² Interview: SH21S.

⁸⁸³ Interview: BJ15-FL.

personal and institutional support.⁸⁸⁴ Additionally, multinational institutions like the WTO are another source of support.⁸⁸⁵

Academics, lawyers,⁸⁸⁶ and business people sometimes argue that relying on connections, networks and relationships is an adaptation to a local culture of “*guanxi* [关系]”, preferring informal relationships to a reliance on rules and formal institutions.⁸⁸⁷

Whatever truth there might be to these claims, this is exactly the kind of behaviour that theories of legal convergence would expect foreign lawyers and business people to change rather than adopt.

At least one informant suggested that litigation and negotiation were not necessarily mutually exclusive alternatives. “Administrative litigation is a great way to get business done even in China and even from a pragmatic perspective. However, it is worth noting that you do not need to win a case to achieve your purpose. Filing a case itself may give you a favorable negotiation power and then you can do the government a favor by withdrawing the case if they finally agree with your position.”⁸⁸⁸ This point of view stands in dramatic opposition to those lawyers who would not consider going to court.⁸⁸⁹ It also reminds us that litigation should be a last resort, but is still useful and important as such.

⁸⁸⁴ Interviews: WG02-FL, SH03-L.

⁸⁸⁵ Interview: BJ15-FL.

⁸⁸⁶ Interview: SH14-L.

⁸⁸⁷ For a treatment of *gaunxi* see: Gold and Guthrie, *Social Connections in China*; Mayfair Mei-hui Yang, *Gifts, Favors, and Banquets: The Art of Social Relationships in China* (Cornell University Press, 1994); Mayfair Mei-hui Yang, “The Resilience of Guanxi and Its New Deployments: A Critique of Some New Guanxi Scholarship,” *China Quarterly* (2002): 459–476.

⁸⁸⁸ E-mail interaction with: SZ01-L.

⁸⁸⁹ Interview: WG02-FL.

Another alternative to litigation is to find a “business way” to work around problems with the state. For example, by cooperating with a Chinese company and using their license to enter into activities or areas for which official approval was not granted.⁸⁹⁰ These types of solutions, however, are sometimes of dubious legality. The structure of VIEs, for example, is intended as a method of circumventing Chinese regulations. While the Chinese state has yet to come after VIEs directly,⁸⁹¹ if problems arise litigation is unlikely to be a good option “because those contracts [that make up a VIE] carry little legal weight, if any, in China.”⁸⁹² Indeed, in some cases, foreign companies simply ignore Chinese law, and when a dispute arises they must resort to alternatives to litigation as they simply do not have a legal leg to stand on. While those that skirt them often perceive these laws as unfair, this behaviour can hardly be considered to be contributing to the development of rule of law in China.

When multinationals are pursuing a strategy that is not particularly legal, they may not have grounds for administrative litigation, but might find their clout still earns them ready solutions to their problems. In an admittedly extreme example, Carrefour, the world’s second-largest retailer, “opened 27 stores [in China] between 1996 and 2000, many of them technically illegal, since they were joint ventures with units of local governments that were not approved by the central government, as the law required. Opposition from domestic retailers was so fierce that the State Council, in early 2001,

⁸⁹⁰ Interview: BJ15-FL.

⁸⁹¹ A recent announcement by the Ministry of Commerce was “the first time that the VIE structure has been expressly mentioned by a PRC authority.” While the announcement forbids the use of a VIE structure in this instance it “does not expressly say the use of such structure is illegal.” “MOFCOM Declaring the Use of VIE (Variable Interest Entity) Structure in the Internet Sector Illegal?,” *Herbert Smith LLP*, August 13, 2012, <http://www.herbertsmith.com/NR/rdonlyres/B2D7179F-6F1A-4CF9-AE4E-9641F753BA5A/26803/0817MOFCOMdeclaringtheuseofVIE.htm>.

⁸⁹² Shaw, Chow, and Wang, “China VIE Structure May Hold Hidden Risks.”

was forced to order the company to stop opening new outlets.”⁸⁹³ After six months and a personal apology from the company’s Chief Executive, however, Carrefour received permission to open 5 new purchasing centres⁸⁹⁴ and opened 8 new stores in 2002.⁸⁹⁵ When foreign firms violate Chinese law and still receive such preferential treatment, it is little wonder they do not resort to China’s flawed legal system.

Conclusion

Multinationals are not having the positive impact on China’s legal system that they could because they prefer extra-legal solutions that they regard as less risky. I do not wish to suggest these individuals, be they lawyers, businessmen, or others, are negligent or dishonest when they decline to sue the Chinese state. They are following the common wisdom that is shared by their colleagues and taking the action they think is in the best interest of their clients or shareholders. Nor would it be fair to conclude that foreign participation in China’s legal system and markets has resulted in no progress towards legal convergence or the development of rule of law in China. The example of Beijing’s IP chamber shows that multinationals are willing to sue the Chinese state when they believe a reasonable system is in place, and especially when they do not fear reprisals. If the Chinese state devoted more resources towards improving its courts and allowing them greater independence, multinationals would almost certainly be more willing to use them. At the same time, however, it is clear that foreign firms and governments, and

⁸⁹³ Mark O’Neill, “Retailers Under Siege with ‘Wolves’ at the Door,” *South China Morning Post*, November 24, 2004.

⁸⁹⁴ Mark O’Neill, “Punished Carrefour Forgiven,” *South China Morning Post*, October 27, 2001.

⁸⁹⁵ O’Neill, “Retailers Under Siege with ‘Wolves’ at the Door.”

multilateral institutions have not put the same pressure behind reforming other parts of the Chinese legal system.

My findings suggest the unsurprising conclusion that economic engagement is not a panacea when it comes to building the rule of law. As with the IP Chamber of Beijing's court, a combination of diplomatic pressure, multinational organizations and foreign firms can contribute to legal convergence. Yet, multinationals will only contribute to the development of best practice institutions when they follow best practices. The PRC has made this difficult by putting up barriers against the participation of foreign enterprises in many areas, and then allowing extra-legal methods of subverting them. Multinationals and the law firms that advise and represent them are profit-driven entities and there is no reason they should act as "moral entrepreneurs" if the more profitable route is to take advantage of the system. If the developed world did become more serious about promoting rule of law in China, especially if multinationals shrugged off advice from local government relations personnel and became willing to take the risk of suing the Chinese state, it might have a dramatic impact. The funds available to foreign NGOs promoting the rule of law in China, such as the Ford Foundation and the American Bar Foundation, pale in comparison to the legal budgets of multinationals. The resources that multinationals deploy so successfully in extra-legal channels could push China to improve its legal system.

The PRC is able to build and maintain its legitimacy through investment that keeps its economy growing and increases its prominence on the world stage because multinationals are willing to opt for extra-legal solutions. Yet even a few noteworthy administrative cases could help change this. When local governments violate the rights of

ordinary Chinese, administrative courts are often unable to provide sufficient remedy. Walmart and Carrefour could not be dismissed so easily and it might prove increasingly difficult to deny ordinary Chinese the same impartial justice that multinationals expect and receive in the intellectual property chamber of Beijing's First Intermediate Court.

Conclusion

This conclusion begins with a brief review of my findings. I then evaluate the major obstacles that prevent administrative law from reaching its full potential as a tool for limiting the actions of the Chinese state. I make a number of practical recommendations that are likely viable given the current constraints of the system and that could facilitate the further development of administrative law. Finally, I continue by making clear the significance of my findings for the future of China, arguing that while administrative litigation may contribute to the stability of China's authoritarian regime in the short to medium term, in the long term it may make an important contribution to liberalisation and even to democratisation.

Review of Findings

In Chapter One, I raise the question of the resilience of China's authoritarian regime and investigate several existing conceptions of state-society relations that help explain its longevity. Uniting three of the most important and common themes I identified in this literature, fragmentation, embeddedness, and participation, I propose that the modern PRC is best understood through the concept of polycentric authoritarianism. I define polycentric authoritarianism as a system of power in which policy outcomes are determined by the formal and informal relationships between a number of state, quasi-state and non-state actors with state and quasi-state actors generally maintaining a central, if not necessarily dominant, role. Finally, I argue that administrative litigation in China, and, by extension, in other authoritarian regimes, serves three purposes: helping the state to monitor and control its own agents, facilitating

limited popular participation through controlled input institutions, and providing a sufficient degree of political certainty to facilitate confident investment and thereby promote continued economic growth.

Chapter Two explains my methodology, data collection, and sources in such a way that I hope will make my work instructive for future researchers. It presents the information necessary to replicate my research, ensure the reliability of my data and understand its limitations. My methodology informs the rest of my dissertation by showing that using random samples as well as representative survey and official data can create a more representative and balanced picture of administrative litigation than by using just one of these alone – a picture which may, in turn, deviate significantly from the prevailing view.

Chapter Three begins by providing background on China’s legal system; it then paints a broad picture of administrative litigation in China. It addresses a number of issues relating to, and facets of, administrative litigation. Much of this is necessary for understanding the subsequent chapters, but it also goes far beyond providing background. This chapter corrects common misconceptions that corruption and the enforcement of verdicts are central problems in administrative litigation. I show that coercive mediation is not the critical issue that Palmer⁸⁹⁶ has suggested. I point out that though the literature has failed to account for the obstacle posed by the three-month statute of limitations, it is actually of supreme practical importance. I show that while case filing and local government retaliation can be extremely problematic, these issues only arise in a minority of cases. I analyse plaintiffs’ chances of winning administrative cases to show that

⁸⁹⁶ Palmer, “Controlling the State”; Palmer, “Compromising Courts and Harmonizing Ideologies.”

administrative litigation has forced the state to superficially be more law abiding, but since administrative agencies are relatively powerful and in control of both evidence and the writing of the administrative rules, this does not necessarily result in significant changes. I conclude that the state is increasingly playing by the rules, but they are still its rules, and so it is still winning in administrative court most of the time.

My fourth chapter tells us which kinds of lawyers sue the state and why. Based on a statistical model built on data from a survey of Chinese lawyers, I determine that lawyers who sue the state are generally the same lawyers who represent the state. Additionally, I identify a second group of reluctant administrative litigators who take cases mostly because of a pre-existing relationship to or sympathy for their clients. Lawyers who represent the state are politically embedded lawyers who may leverage their connections to, and knowledge of, local governments to also become powerful advocates for administrative plaintiffs. Given that in China there is still a relatively weak administrative legal system and officials who make its use difficult, it is primarily these litigators who accept and can win administrative cases. There is every reason to believe that high level officials are relatively happy with an arrangement in which lawyers who are consummate insiders help the state monitor its agents. I suggest that while administrative litigation in China is a weak tool of reform, in the hands of relatively powerful politically embedded lawyers it has become an important formal process for protecting Chinese citizens against the excesses of an authoritarian state.

My fifth chapter provides a detailed empirical study that describes and explains strategies that lawyers use when handling administrative litigation. It provides the empirical basis for my concept of authoritarian polycentrism, but also describes some of

the more dramatic counterstrategies that parts of the state may employ to resist being sued. By providing the means and opportunity for a variety of state, quasi-state, and non-state actors to participate in the creation of policy outcomes, administrative litigation both takes advantage of and expands China's authoritarian polycentrism. This polycentrism represents a dramatic pluralisation of Chinese politics and society, especially when compared to what preceded it. Pluralisation, however, is not the same as democratisation. In both democratic and authoritarian regimes, it is common for powerful private sector actors to have a seat at the table. The fact that the very same lawyers both represent and sue the state, suggests that this is a process in which certain actors are invited into the elite circle of power holders, rather than one in which power is extended out towards the masses. To an extent, this helps answer the question of how the Chinese Communist Party has managed to maintain power despite the pluralisation that should accompany capitalist growth. Liberals should have some reason for optimism because, although administrative litigators are establishment insiders, when they sue the state they are still opposing state action, providing access to formal justice, and, in some sense, allowing ordinary Chinese to confront their government as equals.

Chapter Six shows that, while multinational corporations doing business in China frequently sue the Patent and Trademark Review and Adjudication Boards in Beijing's specialized intellectual property chamber, most disagreements between foreign multinationals and other parts of the Chinese state are settled in negotiations where multinationals expect and receive special treatment. Instead of foreign pressure facilitating wider reforms and improvement to the administrative legal system an effective but *ad hoc* solution has been created to fix problems affecting foreigners. This is

essentially a compromise between these companies and the Chinese state that is part of the “groping for stones to cross the river” approach of China’s reform era government. I conclude that while the reluctance of multinationals to engage the Chinese state in litigation is understandable, multinationals’ reluctance to make use of administrative courts and a preference for extra-legal special treatment severely limits their potential contribution to China’s rule of law.

Obstacles to the Development of Administrative Litigation

As we have seen throughout this dissertation, litigation against local governments in China is still a powerful tool for limiting the state, especially when compared to the other options available. Yet China’s legal system in general, and administrative law in particular, is developing from an extremely low base and this section will review some of the most significant obstacles keeping administrative litigation from reaching its full potential for holding the Chinese state to account.

A major limitation on the continued progress of administrative litigation is that administrative plaintiffs lack lawyers. China is producing graduates with a legal education at a prodigious rate, but a university education alone cannot create politically embedded lawyers who are the most common and effective administrative litigators. Indeed, while China’s law schools and firms should easily meet an increasing demand for corporate lawyers, they rarely produce qualified administrative litigators. Being a politically embedded lawyer requires a close relationship with the state that takes years of experience and network building. Opportunities to work with the state, especially in administrative suits, are vital for giving lawyers the contacts and experience they need. It is possible, therefore, that the supply of embedded lawyers will continue to be

insufficient to meet demand, further reducing the effectiveness of administrative litigation. This could happen if administrative defendants increasingly monopolize the already small pool of politically embedded lawyers, making it more difficult for plaintiffs to find an experienced administrative litigator. A countervailing trend might improve the situation. As the number of administrative suits continues to rise and administrative defendants take such cases more seriously, additional lawyers may be hired by the state and thereby develop the experience and expertise to become politically embedded lawyers. This would produce a larger pool of lawyers with experience in administrative law, just as increasing financial activity in China has increased the pool of lawyers specializing in transactional law. Even if China develops a larger pool of politically embedded lawyers, the impact would not be uniformly progressive, as such lawyers have a dual nature. Their involvement in administrative cases on behalf of plaintiffs is driven primarily by fairly liberal motivations such as a desire to improve the state's adherence to law. Yet not only do they work for local governments, but they are insiders, seeking to change the system only incrementally and avoiding the most sensitive cases and confrontational tactics. Therefore, even if the pool of experienced administrative litigators expands, we should expect modest progress not revolutionary change.

As we saw in the last chapter, multinationals who do business in China and the international law firms that assist them are not having the positive impact on China's legal system that they could because they prefer extra-legal solutions that they regard as less risky, especially because they tend to receive special favorable treatment from Chinese local governments eager to encourage development. While this is hardly the most serious obstacle faced by the Chinese administrative legal system, it is one of the

few that people outside the Chinese state and legal profession can control. If administrative law is to reach the same level of effectiveness and impartiality as is visible in developed legal systems, multinationals must become more willing to take part in the Chinese legal system. The sooner this occurs the better, as the example of Beijing's IP chamber shows the remarkable progress that can be made when multinationals are willing to put pressure on and litigate against the Chinese state.

Recommendations

While this dissertation is fundamentally scholarly work, and not a policy paper, my research suggests a few straightforward ways in which the administrative legal system could be made more effective in providing plaintiffs and their lawyers with more effective remedies against, and thereby limiting, the Chinese state.

- **More Practical Training in Administrative Law:** In general, China's system of legal education is overly theoretical and does not prepare students for the actual practice of law.⁸⁹⁷ The situation is particularly bad in terms of administrative litigation where the emphasis is on the theory of legal principles of administrative law. Indeed, courses on administrative law eschew the study of actual subjects of litigation such as local government departments and their regulations in favour of thoroughly impractical topics such as the study of Central Government Administrative Organs (中央国家行政机关)⁸⁹⁸ which are not potential targets of

⁸⁹⁷ Minzner, "The Rise and Fall of Chinese Legal Education," 21.

⁸⁹⁸ This is based on a syllabus from an administrative law course at a Chinese law school, the name of which I suppress in order to protect the anonymity of the professor who provided it to me.

litigation.⁸⁹⁹ Instead, an administrative law curriculum designed and taught by experienced administrative litigators could address practical considerations and the administrative rules and regulations on which cases are won or lost. Such a program could teach students how to identify problems in administrative actions based on local rules and regulations and show them how to collect evidence and build a case. More practical administrative legal education could address the problem of many administrative plaintiffs being unrepresented by increasing the pool of potential administrative litigators. While becoming a politically embedded litigator requires more than education, this kind of training would provide an excellent foundation. Because administrative law is already a mandatory part of Chinese legal education and China graduates around 200,000 law students a year,⁹⁰⁰ such a reform could quickly have a significant impact.

- **Larger and More Frequent Compensation:** As we saw in Chapter Three, most administrative courts rarely award compensation and even when they do, the amount is generally relatively minor. Policies to increase the size and frequency of awards might prompt more plaintiffs to resort to administrative litigation by making such cases less Pyrrhic. Increased cash incentives could induce more lawyers to practice and specialize in administrative litigation.⁹⁰¹ In particular, larger awards in administrative litigation cases would encourage lawyers to take

⁸⁹⁹ The study of Central Government Administrative Organs has no practical use in administrative litigation because litigation almost always occurs at the prefectural level or lower. For statistics showing the administrative levels at which administrative litigation occurs, see: Hebei Legal System Year Book Editorial Committee, *Hebei Legal Yearbook, Various Years*.

⁹⁰⁰ Minzner, "The Rise and Fall of Chinese Legal Education," 8.

⁹⁰¹ Interview: TJ04-P/J.

more cases on a contingency fee basis (which is currently possible but uncommon), thereby significantly lowering the barriers to hiring a lawyer. While greater monetary consequences might also encourage officials to think twice before flouting the law, they should not be taken so far as to bankrupt local governments, many of which are already desperately cash-strapped,⁹⁰² or make losing an administrative case so costly for local governments that they resist litigation at all costs. Recent reforms such as a 2009 Tort Liability Law amendment that allows for some punitive damages⁹⁰³ and a 2010 amendment to the State Compensation Law allowing for compensation for mental anguish and suffering⁹⁰⁴ already suggests movement in the direction of influencing behaviour through larger awards.

- **Centrally Financed and Managed Administrative Chambers:** One of the most commonly criticized features of China's legal system is the ability of standing committees of People's Congresses to appoint and remove judges, and local governments to control court budgets and the salaries and welfare benefits of judges.⁹⁰⁵ Naturally, in administrative litigation where the defendant is part of the local government, this substantial leverage over the court is especially problematic. I therefore propose that control of both financing and personnel be

⁹⁰² J.C. Oi and S. Zhao, "Fiscal Crisis in China's Townships: Causes and Consequences," in *In Grassroots Political Reform in Contemporary China*, ed. Elizabeth J. Perry and Merle Goldman (Cambridge, MA: Harvard University Press, 2007), 75–96.

⁹⁰³ Kristie Thomas, "PRC Tort Liability Law 2009: Implications for Enterprises Operating in China," *SSRN eLibrary* (2011), doi:10.2139/ssrn.2000164.

⁹⁰⁴ A amendment to the State Compensation law allowed compensation for mental anguish and suffering: Xinhua, "China Adopts Amended State Liability Compensation Law." Li, "State May Pay for Causing Distress."

⁹⁰⁵ Cohen, "Reforming China's Civil Procedure."

transferred to higher level courts. I would not be the first to suggest these changes to China's legal system, however, the reform might be more workable if it were, initially at least, restricted to administrative chambers. Because only a relatively small fraction of China's courts are administrative chambers, this should make the reform less expensive and more feasible. Here, too, there is cause for modest optimism, as there have already been some moves towards paying for local court expenditures out of the central budget.⁹⁰⁶

- **Specialized Administrative Judges:** As I suggest in Chapter Three, judges are regularly transferred in and out of administrative chambers, which restricts their ability to develop deep-rooted expertise in administrative litigation, and makes them more susceptible to external pressure. I propose that judges be permitted to choose a specialization in administrative law, perhaps after completing an advanced degree in the subject, and work continuously in administrative chambers. This would help ensure that judges in administrative chambers were committed to that branch of the law and allow them to develop a level of experience in the field that would not only improve litigation, but also assist them in using legal reasoning to resist external pressures. This would follow the lead of the specialized judges that Chapter Six showed were so effective in improving Beijing's intellectual property court.

⁹⁰⁶ Yuhua Wang, "Court Funding and Judicial Corruption in China," *China Journal*, The 69 (2012): 7.

- **Longer Statute of Limitations:** As I discuss in Chapter Three, while it is not unreasonably short by either theoretical or comparative measures, the 3 month statute of limitations imposed on most administrative litigation may well be the most common stumbling block for potential administrative plaintiffs. Extending this period, to a year perhaps, would make a tremendous difference in the usefulness of administrative courts as tools for providing remedies against the actions of the Chinese state. A longer time limit is not unreasonable; other types of litigation also allow for longer periods and German administrative litigation allows up to a year in exceptional cases.⁹⁰⁷ To my knowledge, no scholarly work has yet identified the importance of this issue and such a reform has not been previously proposed. As a reform that is small, inexpensive, and relatively technical, but with tremendous potential, it is perhaps the most important proposed here.
- **More Foreign Plaintiffs:** In Chapter Six, I show that outside of Beijing's specialized intellectual property chamber, foreign multinationals rarely consider litigating against the Chinese state. Yet I also suggest that multinationals could have a dramatic impact if they shrugged off the conventional wisdom and took the risk of suing the Chinese state. This would require a shift in the culture and management of multinationals. It is often only the Local Government Relations staff that dissuades multinationals from litigation since executives are generally accustomed to environments where litigation is a viable option. Additionally,

⁹⁰⁷ Mussett, *Code of Administrative Court Procedure of the Federal Republic of Germany*, Sections 58 and 60.

foreign governments and international NGOs might be able to facilitate litigation, perhaps by providing resources to multinationals considering litigating against the state, and especially by helping to connect them with experienced and effective administrative litigators.

There might be room for foreign NGOs or foreign governments to promote these reforms in China, or help in, for example, the development of better programs of administrative legal education. Aside from the last, however, these recommendations are primarily steps that would need to be taken by the Chinese state itself. Yet they are not proposals as fundamentally threatening to the CCP as asking the party to step down or hold truly democratic elections, but well-grounded and modest concrete suggestions. The concept of rule of law and the role of administrative courts reflected in these suggestions are largely the same as those the Chinese state itself espouses and are inherent to the very nature of administrative law which is fundamentally about legal limits being placed on the state. I could easily propose a much longer list of potential reforms that would include more dramatic changes. For example, granting administrative courts the right to review the reasonableness and/or constitutionality of administrative decisions and the rules, regulations, and laws on which they are based would be a huge step forward. Not only would this be a much more fundamental change to the Chinese legal system, but, as I argued in Chapter Three, it is not one of the most immediate obstacles to administrative litigation. I will therefore content myself with these more modest recommendations, the practical potential of which can be seen in the fact that specialized judges, more central funding, and larger awards actually correspond with existing reform trends.

Implications

Readers who have struggled through the entirety of this work, or have hastily skipped to the end, deserve an answer to what all this research means for the future of China and other regimes in similar situations. Before I proceed it must be recognized that “what does administrative law mean for China?” may be too broad a question. In Ningbo, administrative law may well approach the standards achieved in developed legal systems, limiting local governments and holding them accountable in impartial courts when they do not comply with laws and regulations. In underdeveloped rural Hunan, on the other hand, administrative law may be primarily a way to deflect dissent, bog down opposition, and give a veneer of legality to heavy-handed authoritarian tactics. While this dissertation makes some effort to discuss regional variation in administrative litigation, exploration of this variation is an important avenue for future research.

Returning to the question that I asked in Chapter One: “is administrative law contributing to the rationalization, liberalization, or even democratisation of the Chinese regime or do its many limitations mean that it is simply contributing to the maintenance of authoritarian power?” illuminates the implications of my research. The answer to the question is simply that while administrative litigation helps stave off liberalisation and democratisation in the short term, it contributes to the rationalisation of the Chinese state and may improve the environment for future liberalisation and/or democratisation. In the short to medium term, administrative litigation has bolstered the strength and flexibility of the CCP in myriad ways. It has facilitated economic growth and helped make China attractive for foreign investors and businesses. It acts as a safety valve allowing people to vent their anger and channel dissatisfaction into a controlled venue that reaffirms the

legitimacy of the state. It employs lawyers to do its dirty work by making it their job to convince clients that their grievances against the state do not have a legal basis. It enlists both experienced lawyers and ordinary Chinese in assisting the higher levels of the regime to monitor their local agents.

Yet, in the long term, almost all these trends seem likely to work against the resilience of China's authoritarian state. Minxin Pei, for example, recognizes that "economic growth may underwrite the erection of serious short-term or medium-range barriers to democracy, even as it fosters favourable structural conditions for democracy in the longer term."⁹⁰⁸ Administrative litigation has played its small part in facilitating the most impressive period of economic growth the world has ever seen, but, in the long run, wealth is correlated with democracy.

In the introduction of this dissertation, I suggest that the development of administrative litigation may have important implications for advancing democracy in China. While the PRC is still far from fair and free national elections, there are important forces of learning and culture at work. Ordinary Chinese, having grown accustomed to holding their leaders accountable in court, might be more likely to demand the ability to hold them accountable at the ballot box. Officials, comfortable with the idea that their power can be checked by citizens working through institutionalized channels, might come to see elections as less objectionable and as a logical next step. Indeed, some survey evidence suggests that administrative litigation has already begun to effect the way officials think and work.⁹⁰⁹ Moreover, administrative litigation has begun to contribute to democracy in China in a much more direct and concrete way. In several

⁹⁰⁸ Minxin. Pei, "How Will China Democratize?," *Journal of Democracy* 18, no. 3 (2007): 55.

⁹⁰⁹ Peerenboom, *China's Long March*, 404.

instances, candidates for village elections have used administrative litigation to try to overcome difficulties in getting on local ballots, and others have challenged officials who failed to recognize their eligibility as voters.⁹¹⁰ As in many authoritarian regimes, a favourite tactic of local bureaucrats is to manipulate elections by controlling the nomination of candidates.⁹¹¹ If candidates are able to use administrative litigation to put their names on ballots, this is an important and concrete, if small, step forward for democracy.

While issues like liberalisation and especially democratisation might be sexier, the rationalisation of governance that comes with administrative litigation might be more significant for the lives of average Chinese. After all, everyday disputes with the state are often too small to be addressed by institutions such as a free press or elections. Additionally, this rationalisation of everyday governance facilitated by an established system of administrative law would transfer relatively easily to a new regime, should democratization occur. As I showed in the first chapter, existing theory suggests that a robust legal system can be important for the institutionalization of democracy, once a transition begins.⁹¹² Strong rule of law, and especially a well-developed system of administrative litigation, could help guard against the type of ballot box authoritarianism that is evident in many parts of Asia and the post-Communist world. Administrative law, therefore, might be better characterized as an institution that *seems to be* contributing to

⁹¹⁰ “On the Constitutional Significance of Litigation Regarding the Eligibility of Voters 论选民资格诉讼的宪政意义,” *FindLaw.cn*, March 11, 2002,

<http://china.findlaw.cn/info/guojiafa/zhidu/xuanju/chengxu/207460.html>; 闫莉青 Yan Liqing, “Groundless Cancellation of Registration Causes Candidate for Village Election to Sue 村官候选人资格被无故取消 村民起诉获法律确认,” *Youth.cn*, May 30, 2011, http://news.youth.cn/gn/201112/t20111228_1881766.htm.

⁹¹¹ Tianjian Shi, “Village Committee Elections in China: Institutional Tactics for Democracy,” *World Politics* 51, no. 3 (April 1, 1999): 402.

⁹¹² Larkins, “Judicial Independence and Democratization: A Theoretical and Conceptual Analysis,” 625–6.

the stability of an existing authoritarian regime in the short to medium term, *might* lead to democratisation in the long-term, and *will* make such a democratic regime more stable if and when it occurs. Keeping a careful eye on its development, especially if and when regime change occurs, will tell us a great deal about how administrative law can contribute to the resilience of an authoritarian regime and its impact vis-à-vis liberalisation and democratisation. In the meantime, the real, if limited contribution of administrative litigation to the improvement of the lives of ordinary Chinese must not be ignored.

Research Methodology Appendixes

Appendix A: Interview Codes

Each of the 178 interviews I conducted for this dissertation is represented by a code that identifies and provides some basic information about each interview. The first two letters of each interview code indicate the field site, with WG referencing those interviews that were conducted outside of China. The number indicates the order in which the interviews were conducted. Field sites, randomly sampled, and nonprobability sampled interviews are all numbered separately. For the randomly sampled interviews, the letter at the end of the code indicates either that that informant's firm was selected in my original sample (S) or was included through my additional sampling technique (N) which I described in the methodology chapter. For my nonprobability sampled interviews, the letters after the dash indicate the position(s) of the informant, PL for plaintiff, FL for foreign lawyer, and so on. The lists below provide basic information on each interview and should clarify the codes for each field site and position. The exact date of interviews is suppressed in order to better protect the anonymity of my informants.

Appendix B: Randomly Sampled Interviews

| Interview Code | Location | Time of Interview | Head or Assistant Head of Firm | Partner | Original or Additional Sample |
|----------------|----------|-------------------|--------------------------------|---------|-------------------------------|
| BJ01N | Beijing | July, 2010 | No | Yes | Additional |
| BJ02S | Beijing | July, 2010 | No | No | Original |
| BJ03N | Beijing | July, 2010 | Yes | Yes | Additional |
| BJ04S | Beijing | July, 2010 | No | No | Original |
| BJ05S | Beijing | July, 2010 | No | Yes | Original |
| BJ06N | Beijing | July, 2010 | Yes | Yes | Additional |
| BJ07S | Beijing | July, 2010 | No | No | Original |

| | | | | | |
|--------------|------------------|------------------------|-----|-----|------------|
| BJ08S | Beijing | July, 2010 | Yes | Yes | Original |
| BJ09N | Beijing | July, 2010 | No | No | Additional |
| BJ10N | Beijing | July, 2010 | No | No | Additional |
| BJ11N | Beijing | July, 2010 | No | No | Additional |
| BJ12S | Beijing | July, 2010 | No | No | Original |
| BJ13N | Beijing | July, 2010 | No | No | Additional |
| BJ14N | Beijing | July, 2010 | No | No | Additional |
| BJ15N | Beijing | July, 2010 | No | No | Additional |
| BJ16N | Beijing | July, 2010 | No | No | Additional |
| BJ17N | Beijing | July, 2010 | No | No | Additional |
| BJ18N | Beijing | July, 2010 | No | No | Additional |
| BJ19S | Beijing | July, 2010 | No | No | Original |
| BJ20N | Beijing | July, 2010 | Yes | Yes | Additional |
| BJ21S | Beijing | July, 2010 | Yes | Yes | Original |
| BJ22S | Beijing | October/November, 2010 | No | No | Original |
| BJ23S | Beijing | October/November, 2010 | No | No | Original |
| BJ24N | Beijing | October/November, 2010 | No | No | Additional |
| BJ25N | Beijing | October/November, 2010 | Yes | Yes | Additional |
| BJ26S | Beijing | October/November, 2010 | Yes | Yes | Original |
| BJ27S | Beijing | October/November, 2010 | No | No | Original |
| BJ28S | Beijing | October/November, 2010 | Yes | Yes | Original |
| BJ29S | Beijing | October/November, 2010 | No | No | Original |
| BJ30S | Beijing | October/November, 2010 | Yes | Yes | Original |
| BJ31N | Beijing | October/November, 2010 | Yes | Yes | Additional |
| NB01S | Ningbo, Zhejiang | August, 2010 | No | No | Original |
| NB02S | Ningbo, Zhejiang | August, 2010 | No | No | Original |
| NB03N | Ningbo, Zhejiang | August, 2010 | Yes | Yes | Additional |
| NB04S | Ningbo, Zhejiang | August, 2010 | No | No | Original |
| NB05S | Ningbo, Zhejiang | August, 2010 | No | No | Original |
| NB06S | Ningbo, Zhejiang | August, 2010 | No | No | Original |
| NB07S | Ningbo, Zhejiang | August, 2010 | Yes | Yes | Original |
| NB08S | Ningbo, Zhejiang | August, 2010 | No | No | Original |
| NB09S | Ningbo, Zhejiang | August, 2010 | No | Yes | Original |
| NB10N | Ningbo, Zhejiang | August, 2010 | No | No | Additional |
| NB11S | Ningbo, Zhejiang | August, 2010 | No | No | Original |
| NB12N | Ningbo, Zhejiang | August, 2010 | No | No | Additional |
| NB13S | Ningbo, Zhejiang | August, 2010 | No | No | Original |
| NB14S | Ningbo, Zhejiang | August, 2010 | No | No | Original |
| NB15N | Ningbo, Zhejiang | August, 2010 | No | No | Additional |
| NB16S | Ningbo, Zhejiang | August, 2010 | No | Yes | Original |
| NB17S | Ningbo, Zhejiang | August, 2010 | No | No | Original |
| NB18S | Ningbo, Zhejiang | August, 2010 | No | No | Original |
| NB19S | Ningbo, Zhejiang | August, 2010 | No | Yes | Original |

| | | | | | |
|-----------------------------|------------------|----------------|---------|---------|------------|
| NB20S | Ningbo, Zhejiang | October, 2010 | Yes | Yes | Original |
| NB21S | Ningbo, Zhejiang | October, 2010 | Yes | Yes | Original |
| NB22S | Ningbo, Zhejiang | October, 2010 | Yes | Yes | Original |
| SH01S | Shanghai | October, 2010 | No | No | Original |
| SH02N | Shanghai | October, 2010 | No | Yes | Additional |
| SH03S | Shanghai | October, 2010 | Yes | Yes | Original |
| SH04S | Shanghai | October, 2010 | Yes | Yes | Original |
| SH05S | Shanghai | October, 2010 | No | No | Original |
| SH06S | Shanghai | October, 2010 | No | Yes | Original |
| SH07S | Shanghai | October, 2010 | No | No | Original |
| SH08S | Shanghai | October, 2010 | No | No | Original |
| SH09S | Shanghai | October, 2010 | No | No | Original |
| SH10N | Shanghai | October, 2010 | No | No | Additional |
| SH11N | Shanghai | October, 2010 | No | No | Additional |
| SH12S | Shanghai | October, 2010 | No | Yes | Original |
| SH13N | Shanghai | October, 2010 | Yes | Yes | Additional |
| SH14S | Shanghai | October, 2010 | No | Yes | Original |
| SH15S | Shanghai | October, 2010 | No | Yes | Original |
| SH16S | Shanghai | October, 2010 | No | No | Original |
| SH17S | Shanghai | October, 2010 | No | No | Original |
| SH18N | Shanghai | October, 2010 | No | No | Additional |
| SH19S | Shanghai | October, 2010 | No | No | Original |
| SH20N | Shanghai | October, 2010 | No | No | Additional |
| SH21S | Shanghai | October, 2010 | No | No | Original |
| SH22N | Shanghai | October, 2010 | No | Yes | Additional |
| XX01S | Rural Hunan | December, 2010 | No | No | Original |
| XX02S | Rural Hunan | December, 2010 | Yes | Yes | Original |
| XX03S | Rural Hunan | December, 2010 | No | Yes | Original |
| XX04S | Rural Hunan | December, 2010 | No | N/A* | Original |
| XX05S | Rural Hunan | December, 2010 | No | N/A* | Original |
| XX06S | Rural Hunan | December, 2010 | Yes | N/A* | Original |
| XX07S | Rural Hunan | December, 2010 | No | Yes | Original |
| XX08N | Rural Hunan | December, 2010 | No | No | Additional |
| XX09S | Rural Hunan | December, 2010 | No | N/A* | Original |
| XX10S | Rural Hunan | December, 2010 | No | No | Original |
| XX11S ⁹¹³ | Rural Hunan | December, 2010 | Unknown | Unknown | Original |
| XX12S | Rural Hunan | December, 2010 | No | No | Original |
| XX13S | Rural Hunan | December, 2010 | No | Yes | Original |
| XX14S | Rural Hunan | December, 2010 | Yes | Yes | Original |

⁹¹³ This interview was terminated almost immediately as the informant had to leave unexpectedly. Instead, I interviewed XX12S, a more junior lawyer at the same firm.

| | | | | | |
|--------------|-----------------|----------------|-----|-----|------------|
| XX15S | Rural Hunan | December, 2010 | No | No | Original |
| CS01S | Changsha, Hunan | November, 2010 | No | No | Original |
| CS02N | Changsha, Hunan | November, 2010 | No | No | Additional |
| CS03S | Changsha, Hunan | November, 2010 | No | No | Original |
| CS04S | Changsha, Hunan | November, 2010 | No | No | Original |
| CS05S | Changsha, Hunan | November, 2010 | No | No | Original |
| CS06S | Changsha, Hunan | November, 2010 | No | Yes | Original |
| CS07S | Changsha, Hunan | November, 2010 | Yes | Yes | Original |
| CS08S | Changsha, Hunan | November, 2010 | No | Yes | Original |
| CS09N | Changsha, Hunan | November, 2010 | No | Yes | Additional |
| CS10S | Changsha, Hunan | November, 2010 | No | No | Original |
| CS11S | Changsha, Hunan | November, 2010 | Yes | Yes | Original |
| CS12S | Changsha, Hunan | November, 2010 | No | Yes | Original |
| CS13S | Changsha, Hunan | November, 2010 | No | No | Original |
| CS14S | Changsha, Hunan | November, 2010 | No | No | Original |
| CS15N | Changsha, Hunan | November, 2010 | No | No | Additional |
| CS16N | Changsha, Hunan | November, 2010 | No | No | Additional |
| CS17S | Changsha, Hunan | November, 2010 | No | Yes | Original |
| CS18N | Changsha, Hunan | November, 2010 | No | No | Additional |
| CS19N | Changsha, Hunan | November, 2010 | No | No | Additional |
| CS20S | Changsha, Hunan | November, 2010 | Yes | Yes | Original |
| CS21N | Changsha, Hunan | November, 2010 | No | No | Additional |
| CS22N | Changsha, Hunan | December, 2010 | Yes | Yes | Additional |
| CS23N | Changsha, Hunan | December, 2010 | No | No | Additional |
| CS24S | Changsha, Hunan | December, 2010 | Yes | Yes | Original |
| GL01S | Guilin, Guanxi | February, 2011 | No | No | Original |
| GL02S | Guilin, Guanxi | February, 2011 | No | No | Original |
| GL03S | Guilin, Guanxi | February, 2011 | Yes | No | Original |
| GL04S | Guilin, Guanxi | February, 2011 | No | No | Original |
| GL05S | Guilin, Guanxi | February, 2011 | No | No | Original |
| GL06S | Guilin, Guanxi | February, 2011 | No | Yes | Original |
| GL07S | Guilin, Guanxi | February, 2011 | No | No | Original |
| GL08S | Guilin, Guanxi | February, 2011 | No | No | Original |
| GL09S | Guilin, Guanxi | February, 2011 | No | No | Original |
| GL10L | Guilin, Guanxi | February, 2011 | Yes | No | Additional |
| GL11S | Guilin, Guanxi | February, 2011 | No | No | Original |
| GL12S | Guilin, Guanxi | February, 2011 | Yes | Yes | Original |

* As state-owned or quasi-state-owned institutions, these firms do not have a partnership structure.

Appendix C: Nonprobability Sampled Interviews

| Interview Code | Location | Time of Interview | Description ⁹¹⁴ |
|----------------|-------------------|-------------------|---|
| AL01-L | Withheld | August, 2010 | Prodigious administrative litigator |
| BJ01-P | Beijing | April, 2010 | Professor of law |
| BJ02-J | Beijing | November, 2010 | Retired judge |
| BJ03-LW | Beijing | November, 2010 | Legal worker, law student |
| BJ04-LW | Beijing | November, 2010 | Legal worker |
| BJ05-LW | Beijing | November, 2010 | Legal worker, law professor |
| BJ06-L | Beijing | March, 2011 | Lawyer at a specialized IP firm |
| BJ07-PA | Beijing | March, 2011 | Patent agent at patent agency |
| BJ08-L | Beijing | March, 2011 | Lawyer and partner |
| BJ09-L | Beijing | March, 2011 | Of counsel lawyer |
| BJ10-PA | Beijing | March, 2011 | Patent agent |
| BJ11-FL | Beijing | March, 2011 | Foreign lawyer |
| BJ12-L | Beijing | March, 2011 | Lawyer |
| BJ13-L | Beijing | March, 2011 | Chinese lawyer at a foreign firm |
| BJ14-L | Beijing | March, 2011 | Lawyer at IP firm |
| BJ15-FL | Beijing | March, 2011 | Foreign lawyer at Chinese firm* |
| CS01-PL | Changsha, Hunan | November, 2010 | Administrative plaintiff |
| CS02-PL | Changsha, Hunan | December, 2010 | Potential administrative plaintiff |
| GL01-PL | Guilin, Guanxi | December, 2010 | Potential administrative plaintiff |
| LZ01-L | Lanzhou, Gansu | May, 2010 | Lawyer |
| LZ02-L | Lanzhou, Gansu | May, 2010 | Lawyer |
| LZ03-L/J | Lanzhou, Gansu | May, 2010 | Lawyer, former judge |
| LZ04-L | Lanzhou, Gansu | May, 2010 | Lawyer |
| QD01-L/O | Qingdao, Shandong | June, 2010 | Lawyer, former official |
| QD02-L | Qingdao, Shandong | June, 2010 | Partner lawyer |
| QD03-L | Qingdao, Shandong | June, 2010 | Lawyer |
| QD04-L | Qingdao, Shandong | June, 2010 | Partner lawyer, founder |
| TJ01-P/L | Tianjin | January, 2010 | Law professor, lawyer |
| TJ02-L | Tianjin | January, 2010 | Lawyer |
| TJ03-L | Tianjin | January, 2010 | Partner, law professor |
| TJ04-P/J | Tianjin | January, 2010 | Law professor, former judge |
| SH01-L | Shanghai | May, 2010 | Lawyer |
| SH02-M | Shanghai | May, 2010 | Marketing executive foreign law firm |
| SH03-L | Shanghai | May, 2010 | Chinese lawyer at Hong Kong firm |
| SH04-PA | Shanghai | May, 2010 | Patent agent at a Hong Kong patent agency |
| SH05-L | Shanghai | May, 2010 | Lawyer at a foreign firm |

⁹¹⁴ Unless otherwise specified firms and lawyers are domestic Chinese.

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|---------|--------------------|-----------------|--|
| SH06-L | Shanghai | May, 2010 | Foreign lawyer at a foreign firm |
| SH07-L | Shanghai | May, 2010 | Chinese lawyer at a foreign firm |
| SH08-L | Shanghai | May, 2010 | Partner lawyer |
| SH09-FL | Shanghai | May, 2010 | Hong Kong lawyer foreign firm |
| SH10-FL | Shanghai | May, 2010 | Foreign lawyer at a foreign firm |
| SH11-BD | Shanghai | May, 2010 | Business development executive at a foreign law firm |
| SH12-L | Shanghai | May, 2010 | Partner lawyer |
| SH13-S | Shanghai | May, 2010 | Partner lawyer |
| SH14-L | Shanghai | May, 2010 | Chinese lawyer at a foreign firm |
| SZ01-L | Shenzhen Guangdong | November, 2011 | Partner lawyer* |
| WG01-FL | Outside China | March, 2011 | Foreign lawyer at foreign firm* |
| WG02-FL | Outside China | September, 2011 | Foreign in house counsel at multinational in China |
| WG03-FL | Outside China | August, 2010 | City attorney in California |
| HK01-FL | Hong Kong | January, 2011 | Foreign lawyer |
| HK02-FL | Hong Kong | June, 2011 | Originally Chinese lawyer at a foreign firm |
| HK03-FL | Hong Kong | December, 2011 | Barrister* |

* These interviews were either partially or completely conducted through e-mail or other remote communication.

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