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Bounded Legality: China's Developmental State and Civil Dispute Resolution

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ESSAY

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An Essay in Honor of Professor Hungdah Chiu

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I am honored to be part of this celebration of Professor Chiu Hungdah's life and accomplishments. Professor Chiu was a scholar and a mentor to me. Even after all our years of friendship, he remained the respected "Professor Chiu." When I started out in my academic career some 25 years ago, it was to Professor Chiu's intellect and his extensive library that I first turned. At the time, there were few Chinese law related materials available (primary or secondary), which stands in stark contrast to present day, where there seems to be an overabundance of materials (some accurate, but many not). Professor Chiu was one of the first to have a comprehensive collection of good and relevant Chinese-language law materials. If the material was in Professor Chiu's collection, I knew it to be a reliable source. And so, every Wednesday for the first year of my academic career, I would drive from D.C. to Baltimore, park my car, and come in for a day's research. Eventually, I also learned to bring my "bento" box lunch because each day at noon Professor Chiu, Mrs. Wu, and whoever was working in the office that day, would sit down around a long conference table in the library for lunch. It was a time for conversation and advice. Through these lunchtime talks, Professor Chiu became a friend and a mentor.

I also learned quite a bit about the Chinese legal system from Professor Chiu's writings. In preparation for this conference, I pulled out Leng & Chiu's *Criminal Justice in Post-Mao China*, written in the early 1980s. Presciently, the conclusions contained in that book

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remain relevant today. In expressing caution about the future of Chinese legal reforms, Professor Chiu noted that, "[b]oth socialist and traditional theories put emphasis on order over freedom, duties over rights, and group interests over individual ones."[1] This assessment of the Chinese legal order remains as true today as it was then.

I teach civil procedure, a seemingly technical area. But it is procedure and the promise of regular and consistent process in enforcing legal norms and a method to check arbitrary powers that underlie the "rule of law." Free market reformers have long argued that a predictable and consistent legal system established to support markets will also inevitably lead to rule of law and a more democratic state.[2] A democratic state, they argue, promotes greater inclusiveness not only in lawmaking but also in law enforcement.[3] Courts are seen as public places where citizens can adjust top-down dictates to bottom-level realities, and participate in the shaping of norms applicable to everyday life.[4] The United States, for example, with its historic distrust of government authorities, has entrusted private civil litigants with the role of enforcing certain legal norms and civil litigation as one vehicle in developing public norms. With this broader public function for civil litigation, American civil procedure developed to accommodate easier access to courts for individual citizens and give great autonomy to parties in court to shape, develop, and prove their litigation.[5]

1. SHAO-CHUAN LENG & HUNGDAH CHIU, CRIMINAL JUSTICE IN POST MAO CHINA: ANALYSIS AND DOCUMENTS 171 (1985).

2. *See generally* SAMANTHA F. RAVICH, MARKETIZATION AND DEMOCRACY: EAST ASIAN EXPERIENCES 7–30 (2000); Adel M. Abdellatif, *Good Governance and its Relationship to Democracy and Economic Development*, GLOBAL FORUM III ON FIGHTING CORRUPTION AND SAFEGUARDING INTEGRITY (May 20-31, 2003), *available at* http://www.pogar.org/publications/governance/aa/goodgov.pdf.

3. *See supra* note 2.

4. *See, e.g.*, DANIEL BUTT, DEMOCRACY, THE COURTS AND THE MAKING OF PUBLIC POLICY, THE FOUNDATION FOR LAW, JUSTICE AND SOCIETY, 3 (2006), *available at* http://www.fljs.org/uploads/documents/Butt_Policy_Brief%232%23.pdf (last visited Feb. 26, 2012) (noting the growth in a court's role in influencing and determine policy outcomes, in areas ranging from welfare spending to environmental protection).

5. One of the purposes of the Federal Rules of Civil Procedure is "to secure the just, speedy, and inexpensive determination of every action and proceeding." FED. R. CIV. P. 1. See also the liberal joinder rules, which give litigants the ability to shape claims and parties in the litigation. FED. R. CIV. P. 18 & 20. For a historical overview, see *Whether the Supreme Court Has Limited Americans' Access to the Court: Hearing Before the S. Comm. On the Judiciary*, 111th Cong. 3–7 (2009) (statement of Stephen B. Burbank, David Berger Professor for the Administration of Justice, University of Pennsylvania), *available at* http://www.judiciary.senate.gov/pdf/12-02-09%20Burbank%20Testimony.pdf.

To what extent does China challenge the above assumptions regarding the public and possibly democratic role of the courts? In recent years, China has experimented with participatory lawmaking by opening its laws for comment and citizen participation.[6] Similarly, China has also seen an increase in private citizen law enforcement due to a dramatic increase in recent decades in the rate of civil litigation.[7] But much like the policies it has pursued in the economic sphere, the Chinese state retains substantial discretion and control over the form and manner of legal development,[8] not to mention its control over legal institutions, including the process of litigation.[9] The developmental state is characterized by deep state involvement in economic development and, in the case of China, extends to legal developments such as guiding major litigation and resolution of socially significant disputes, even when those disputes are between private parties.[10] One recent mass tort case not only illustrates Professor Chiu's prognosis that the Chinese legal system will continue to put "emphasis on order over freedom, duties over rights, and group interests over individual ones,"[11] but also how the legal system accommodates the state's role and the development of a multi-track litigation system.

6. "Laws shall be made in order to embody the will of the people, enhance socialist democracy and guarantee that the people participate in legislative activities through various channels." Legislation Law of the People's Republic of China (Order of the President No. 31) (adopted by the Standing Comm. Nat'l People's Cong., Apr. 29, 2000, effective Sept. 1, 2000), art. 5, http://english.gov.cn/laws/2005-08/20/content_29724.htm. *See also id.* arts. 16, 29, 34, 58; Jeffrey S. Lubbers, *Notice-and-Comment Rulemaking Comes to China*, ADMIN. & REG. L. NEWS, Fall 2006, at 5, 5–6, *available at* http://apps.americanbar.org/adminlaw/news/adlaw_fall2006.pdf.

7. Huazhong Wang & Jingqiong Wang, *Courts Hit by Rising Number of Lawsuits*, China Daily, July 14, 2010, http://www.chinadaily.com.cn/china/2010-07/14/content_10102630.htm.

8. During the 2007 National Conference on Political-Legal Work, Chinese President Hu Jintao told the assembled judges, procurators and officials: "In their work, the grand judges and grand procurators shall always regard as supreme: the party's cause, the people's interest and the constitution and laws." Jerome Cohen, Op-Ed., *Body Blow for the Judiciary*, S. CHINA MORNING POST, Oct. 18, 2008, at 17 [hereinafter Cohen, *Body Blow*]. In 2008, this policy was actively implemented by the new head of the Supreme People's Court Wang Shengjun (王胜俊) as the "Three Supremes": 1. "Supremacy of the business of the CCP" (党的事业至上); 2. "Supremacy of the interests of the people" (人民利益至上); 3. "Supremacy of constitutional law" (宪法法律至上). *See* Jerome Cohen, *Jerome Cohen on the "Three Supremes"* (Oct. 22, 2008), CHINESE L. PROF BLOG, http://lawprofessors.typepad.com/china_law_prof_blog/2008/10/jerome-cohen--1.html.

9. *See* Cohen, *Body Blow*, *supra* note 8.

10. *See generally* Amiya Kumar Bagchi, *The Past and Future of the Developmental State*, 6 J. WORLD SYS. RES. 398 (2000), *available at* http://jwsr.ucr.edu/archive/vol6/number2/pdf/jwsr-v6n2-bagchi.pdf.

11. SHAO-CHUAN LENG & HUNGDAH CHIU, *supra* note 1, at 171.

I. THE ARMILLARISIN A CASE[12]

In April 2006, shortly after taking Armillarisin A injections, a medication used to treat gallstones and gastritis, patients in the Third Affiliated Hospital of Sun Yat-sen University[13] (Hospital) in Guangzhou City began to suffer from acute renal failure.[14] Qiqihaer the Second Pharmaceuticals Limited (Qiqihaer Pharmaceuticals) produced the injections, and Guangdong Medicines and Health Products (Guangdong Medicines) distributed them under an agreement with Jinhengyuan, another distributor. [15] After discovering these patient injuries, the Hospital stopped using the medicine and reported what they had found to the Center for ADR Monitoring, the government entity responsible for monitoring the quality and safety of medicine in China.[16] The central government immediately created an investigative team, while the local government gathered an expert panel.[17] The panel concluded that Armillarisin A injections had negatively impacted those patients with acute renal failure and neurologic lesions, agreeing with the Hospital's suspicions.[18] The Center for ADR Monitoring then issued an order halting distribution of Armillarisin A medications throughout China.[19]

12. Margaret Y.K. Woo & Cai Yanmin, *China's Developmental State and the Challenge of Formal Process: The Case of Counterfeit Medicine*, 49 SUP. CT. L. REV. 361 (2010). The Armillarisin A case was litigated by Professor Cai Yanmin, of Zhongshan University. Much of the information contained in the following section was originally published in this previous article.

13. *Id.* at 363.

14. *Id. See also Suspect Held as Bogus Drug Kills 4*, XINHUA GEN. NEWS. SERV., May 15, 2006, http://news.xinhuanet.com/english/2006-05/15/content_4546421.htm.

15. Woo & Cai Yanmin, *supra* 12, at 363.

16. *Id.*

17. *Id.*

18. *See Investigation Continues into Bogus Drug Maker*, XINHUA GEN. NEWS SERV., May 15, 2006, http://news.xinhuanet.com/english/2006-05/15/content_4545842.htm. Taixing Chemical Plant substituted Diglycol, a cheaper drug, for propylene glycol, an inactive ingredient in Armillarisin A. Diglycol is a toxic industrial material that can cause severe kidney, liver, and neurological damage. Duan Hongqing, et al., *Toxic Shots Kill at Least Nine Patients*, CAIJING MAGAZINE (May 29, 2006), http://english.caijing.com.cn/2006-05-29/10008363.html.

19. Margaret Y.K. Woo & Cai Yanmin, *supra* note 12, at 363. As I have described elsewhere:

> The Health Department of Guangdong Province formed expert panels on May 26, 2006 and July 12, 2006, respectively. A preliminary diagnosis was made after a series of tests on each patient that had taken Armillarisin A medications. On May 22, 2006, the Health Department made a request to the State Council and the Ministry of Health, asking that more experts be sent to diagnose the patients. The State Council assigned the Ministry of Health, the State Food and Drug Administration and the Chinese Medical Association to the job on May

On July 19, 2006, Prime Minister Wen Jiabao and the Standing Committee of the State Council concluded that Qiqihar Pharmaceuticals had used fake pharmaceutical materials during the production process.[20] The government launched a criminal prosecution, during which "one of the defendants made the surprising admission that Qiqihar Pharmaceuticals had bribed officials to obtain a Good Manufacturing Practice (GMP) certificate."[21] As a result of the defective drug, close to 65 patients sustained renal failure, 14 of whom died with one patient in critical condition.[22] Reflecting their dependence on the developmental state, parties injured by the contaminated medicine turned first to the Chinese government, rather than the courts, for relief. Responding to the clamor for relief from the 60 injured patients, the provincial government formed a coordinating team to mediate the claims.[23] Eventually, the team asked the Hospital to compensate the patients; over 40 eventually settled.[24]

While the course of this dispute on the surface may have parallels in the U.S. system, there are distinctive differences traceable to the Chinese preference for "order over freedom, duties over rights and group interest over individual ones." For one, the almost immediate turn to government-led mediation represents a continuing emphasis on "order over freedom," even in light of twenty years of legal reform towards greater legal formality.

A. "Order over Freedom"

Beginning in the 1980s and continuing in the '90s, Chinese civil justice grew both in greater professionalization of the judiciary and greater formalism in civil justice with an emphasis on adjudication over mediation. While "[i]n the mid-1980s the Ministry of Justice

27, 2006. Together, they formed an investigation team, into which they then proceeded to invite leading experts.

Id. at 363 n.3.

20. *Id.* at 364. *See also id.* at 364 n.4 (collecting citations).

21. *Id.* at 364 & n.5. *See also id.* at 364 n.6 (describing a Good Manufacturing Practice, or "GMP" as "a monitoring system to ensure the quality and safety of products sold in the Chinese market," requiring "manufacturing enterprises to maintain facilities in a good condition, [with] reasonable productions process[es], consistent quality control, and a strict examination system").

22. Wang Xiaolin (王晓林), *Qieryao Jiayaoan Bufen Shouhairen Lingdao Peichangjin* ("齐二药"假药案部分受害人领到赔偿金) [*Fake Medicine Victims Receive Compensation*], CAIJING (财经) [FINANCE] (Mar. 3, 2009), http://www.caijing.com.cn/2009-03-10/110116934.html.

23. Woo & Cai Yanmin, *supra* note 12, at 364.

24. *Id.*

expected the courts to conclude no less than 80 percent of all civil disputes by mediation,"[25] the expectation in the 1990's was for courts to issue adjudicated decisions. Thus, the 1982 Chinese Civil Procedure Code emphasized mediation as the principal method of dispute resolution such that in conducting civil proceedings, the people's courts "shall stress conciliation.[26] By contrast, the 1991 Civil Procedure Law emphasized adjudication, voluntariness, and party autonomy in civil cases.[27] With an emphasis on adjudication for civil cases in the 1990s, there was also a corresponding shift in the responsibility to gather evidence from judges to litigants and an emphasis on party autonomy.[28] In many ways, Chinese legal reforms took on the patina of the adversary system and the independent civil litigation process.[29] Chinese citizens flocked to the courts and litigation rates rose dramatically in the 1990s.[30]

But formal adjudication did not, according to some, provide an effective forum for the resolution of the growing social conflict. As the economic boom in China resulted in greater disparities in power and income, there was greater social unrest, an increase in letters or visits of complaint, known as *xinfang* (a method of petitioning seeking relief from governmental entities), and also, for reviews of cases even after final appeals to governmental entities and courts.[31] In 2005, President Hu Jintao called for the construction of a

25. *See* STANLEY LUBMAN, BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO 272 (1999).

26. Civil Procedure Law of the People's Republic of China (promulgated by the Standing Comm. of the Nat'l People's Cong., Mar. 8, 1982, implemented on a trial basis, Oct. 1, 1982), art. 6, http://www.novexcn.com/civil_procedure_law.html.

27. "The aim of the Civil Procedure Law of the People's Republic of China is to protect the exercise of the litigation rights of the parties, ensure that the people's courts ascertain facts, distinguish right from wrong, apply the law correctly, try civil cases promptly." Civil Procedure Law of the People's Republic of China (promulgated by the President of the People's Republic of China, Apr. 9, 1991), art. 2, www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383880.htm [hereinafter 1991 Civil Procedure Law]. Article 9, meanwhile, provided that, "[i]n trying civil cases, the people's courts shall conduct conciliation under the principles of voluntariness and lawfulness; where conciliation efforts fail, the people's courts shall render judgments without delay." *Id.* art. 9.

28. "A party shall have the responsibility to provide evidence in support of its own propositions." *Id.* art. 64.

29. *Id. See also* Renmin Fayuan Wunian Gaige Gangyao (人民法院五年改革纲要) [Five-year Reform Program of the People's Courts] (promulgated by Sup. People's Ct. Oct. 20, 1999, effective Oct. 20, 1999) 62 SUP. PEOPLE'S CT. GAZ. 185, Oct. 20, 1999, *available at* http://law.chinalawinfo.com/newlaw2002/SLC/slc.asp?db=chl&gid=23701 [hereinafter First Five-Year Reform Program].

30. *See* LUBMAN, *supra* note 25, at 255.

31. *See generally* Carl Minzner, *Xinfang: Alternative to Formal Chinese Legal Institutions*, 42 STAN. J. INT'L L. 103 (2006).

"harmonious society" in an effort to stem this tide of social unrest.[32] The president of the Supreme People's Court, placing blame on the courts in failing to end disputes, followed suit and strongly encouraged people's courts to "mediate cases that could be mediated, adjudicate cases that should be adjudicated, combining mediation with adjudication, concluding the case and ending the dispute concurrently."[33] The message was that the ultimate goal is to end disputes, preserve harmony, and adjudication is merely one avenue, not necessarily the preferred avenue, towards the achievement of this goal.[34]

While Chinese mediation remained commonly used for family and neighborhood disputes, even throughout the 1990s reform period, it was because they require the personal knowledge or understanding of the local residence/mediation committee. By contrast, litigation had been touted for arms-length economic disputes involving property or commerce.[35] However, in the recent turn to mediation, the concern for stability has led to a strategy of government-based mediation even for economic disputes and in particular, for mass torts and collective actions.

Significantly, in 2006, the Supreme People's Court identified selected categories of cases for enhanced mediation. These include cases of great public interest requiring the collaboration of the government and other relevant departments; class actions; complicated cases in which the parties' relationship is very tense and neither of the parties has a stronger case according to evidence; cases involving matters not governed by any legislation; very sensitive cases and cases of great social concern; and reviews of petitions and retrials.[36] Concerns for social stability have led the courts to return to an endorsement of enhanced mediation, particularly for cases of

32. When addressing a high-level Party seminar recently in Beijing, Chinese President Hu Jintao instructed the country's leading officials and Party cadres to place "building a harmonious society" at the top of their agenda. Maureen Fan, *China's Party Leadership Declares New Priority: 'Harmonious Society'*, WASH. POST, Oct. 2, 2006, at A18.

33. Woo & Cai Yanmin, *supra* note 12, at 365.

34. *Id.*

35. Aaron Halegua, *Reforming the People's Mediation System in Urban China*, 35 HONG KONG L.J. 715, 720 (2005).

36. XIAO YANG (肖扬), ZUIGAO RENMIN FAYUAN GUANYU KAIZHAN GUIFAN SIFA XINGWEI ZHUANXIANG ZHENGGAI QINGKUANG DE BAOGAO (最高人民法院关于开展规范司法行为专项整改情况的报告) [REPORT OF THE SPC ON THE SITUATION OF LAUNCHING RECTIFICATION AND REFORM TO REGULATE JUDICIAL BEHAVIOR] (Oct. 30, 2006), *available at* http://cms.npc.gov.cn:87/servlet/PagePreviewServlet?siteid=1&nodeid=1482&articleid=353846&type=1.

"great social concern."[37] Collective actions and joint tort litigation are now viewed as potentially destabilizing to society and discouraged both by Chinese courts' refusal to accept these cases and the imposition of stricter requirements for lawyers in taking on such cases.[38] Instead, for mass torts cases, mediation can take place with or without the request of the parties and by governmental departments rather than through the "neutrality" of a formal court process.[39]

In the Armillarisin A case described above, the first course of action was the formation of a government-led mediation group. The mediation working group was composed of members of the provincial ministry of justice, the public health division, the public security division, and the letters and petitions division.[40] Despite the fact that the Hospital might not have been the party who caused the injury, the group directed the Hospital to mediate with and, if appropriate, to compensate the victims.[41] This reflected the government's focus on victim compensation, rather than "adjudication of right and wrong."[42] With these priorities in mind, the Hospital had no choice but to negotiate with the victims.[43]

This bifurcated process (that is, steering major cases towards mediation while allowing formal justice to run its course in run-of-the-mill cases) has been utilized for other major cases such as those arising out of the Szechuan earthquake and the Sanlu milk contamination scandal.[44] In both incidents, Chinese courts again refused to accept the cases and instead relied on the executive branch to step in to negotiate, mediate, and ultimately broker settlements.[45] For example, in the Sanlu contaminated milk powder incident, the

37. *Id.*

38. *See, e.g.*, Edward Wong, *Families File Suit in Chinese Tainted Milk Scandal,* N.Y. TIMES, Jan. 21, 2009, at A19. Chinese lawyers had a difficult time filing a class action on behalf of 213 families of children who drank tainted milk. The Court refused to accept the case and instead encouraged mediation.. *See also*, Andrea Cheuk, Comment, *The Li'an ("Docketing") Process: Barriers to Initiating Lawsuits in China and Possible Reforms*, 26 UCLA PAC. BASIN L.J. 72, 73–75 (2008).

39. Cheuk, *supra* note 38, at 73–75.

40. Woo & Cai Yanmin, *supra* note 12, at 366.

41. *Id.* at 366–67.

42. *Id.* at 367.

43. *Id.*

44. *See* Wong, *supra* note 38; Edward Wong, *Parents of Schoolchildren Killed in China Quake Confirm Lawsuit*, N.Y. TIMES, Dec. 23, 2008, at A12; *Chinese Court Rejects Parents' Earthquake Lawsuit*, CHINA DIGITAL TIMES, Dec. 24, 2008, http://chinadigitaltimes.net/2008/12/chinese-court-rejects-parents-earthquake-lawsuit/.

45. *See supra* note 44.

estimated 300,000 injured victims similarly had their claims quickly and quietly resolved through apology and financial compensation.[46] The entire mediation was accomplished in less than a year. On September 16, 2008, the state inspection services announced that contaminated milk had been sold.[47] In December 2008, the criminal prosecution of relevant parties occurred (the former chairwoman of Sanlu pled guilty)[48] and on January 8, 2009, the Sanlu company paid 132 million yuan into a fund set up by the government for the victims of the tainted milk.[49]

In total, the Sanlu families received about 200,000 yuan ($29,200) for the death of a child, 30,000 yuan ($4,400) for children suffering more serious injuries, and 2,000 yuan ($300) for less serious cases.[50] More than 95% of the injured families have accepted compensation of this type.[51] Those who participated in government mediation were denied access to Chinese courts.[52] Chinese scholars touted "the completeness of this resolution: for the victims' families; for the companies involved, which have avoided bankruptcy; and for society at large, for which the disruption of economic and social stability has been mitigated."[53]

Certainly, government-led compensation efforts also happen in the United States. The U.S. federal government has stepped in to resolve compensation questions in instances of mass disasters such as the compensation fund established for victims of the 9/11 terrorist attacks and for victims of the BP oil spill in the Gulf of Mexico.[54]

46. Fan Yu, *Multi-Ways to Groups Tort Incident: Comparison of Sanlu Milk Powder and Hapatitis C Litigation of Japan*, CHINA NAT'L KNOWLEDGE INFRASTRUCTURE JOURNAL, http://en.cnki.com.cn/Article_en/CJFDTOTAL-FXJA200902010.htm (last visited Feb. 29, 2012). *See also China Couple Gets Payout after Child Killed by Tainted Milk*, CHANNEL NEWS ASIA, Jan. 16, 2009, http://www.channelnewsasia.com/stories/afp_asiapacific /view/402860/1/.html/.

47. David Barboza, *China Says Complaints About Milk Began in 2007*, N.Y. TIMES, Sept. 24, 2008, at A8.

48. *See China Milk Scandal "Guilty" Plea*, BBC NEWS (Dec. 31, 2008 19:14 GMT), http://news.bbc.co.uk2/hi/asia-pacific/7805560.stm; Edward Wong, *Milk Scandal in China Yields Cash for Parents*, N.Y. TIMES, Jan. 17, 2009, at A10.

49. Edward Wong, *Civil Suit Hearing Held in China's Milk Scandal*, N.Y. TIMES, Nov. 29, 2009, at A8.

50. *China Couple Gets Payout after Child Killed by Tainted Milk*, *supra* note 46.

51. Woo & Cai Yanmin, *supra* note 12 at 367.

52. *Id.*

53. Fan Yu, *supra* note 46.

54. *See* KENNETH FEINBERG, U.S. DEP'T OF JUSTICE, FINAL REPORT OF THE SPECIAL MASTER OF THE 9/11 VICTIM COMPENSATION FUND OF 2001 3, *available at* http://www.justice.gov/final_report.pdf (describing the creation of the September 11th

The stated rationales for these funds have alternated between a need to mitigate the economic impact of mass torts and to compensate victims in the absence of an identifiable culprit. Ultimately, the 9/11 fund was viewed as an expression of national grief and, therefore, unique and limited in its application.[55] In most other mass tort cases between private parties, however, the United States will typically leave the resolution to the neutral forum of the judicial process.

By contrast, concerns for stability and social unrest have led the Chinese government to take a more affirmative role in resolving and mediating mass tort cases as an initial matter rather than allow litigation. This is true even when the case is between two identifiable private parties and there is relatively little economic impact.[56] In China, it is a top-down state policy of enhanced mediation for mass cases. The resurgence and embrace of mediation, particularly state-initiated mediation, can be directly traced to the Chinese state's concern for stability and order rather than an individual's right to bring litigation.[57]

In sum, while the 1980s and '90s saw the reformation of the civil courts and the implementation of formal process, more recent decades have seen a resurgence of mediatory justice.[58] The greater affirmation of adjudication in the 1990s may be a response to the increase in commercial disputes between strangers due to market

Victim Compensation Fund of 2001 as part of a scheme to prevent the airline industry's collapse in the wake of 9/11, allowing victims to receive compensation from the government only if they agreed not to sue the airlines); *Frequently Asked Questions*, GULF COAST CLAIMS FACILITY, http://www.gulfcoastclaimsfacility.com/faq#Q1 (last visited Apr. 4, 2012) (describing how after White House involvement, BP replaced its original claims facility and created a new escrow facility which, although funded by BP, is administered by a neutral third party).

55. FEINBERG, *supra* note 54, at 78–79.

56. *See* Guanyu Jinyibu Fahui Susong Tiaojie zai Goujian Shehui Zhuyi Hexie Shehui zhong Jiji Zuoyong de Ruogan Yijian (关于进一步发挥诉讼调解在构建社会主义和谐社会中积极作用的若干意见) [Regarding the Next Step Towards Litigation Development According to Socialist Principals and Harmonious Society] (promulgated by the Sup. People's Ct., Mar. 7, 2007, effective Mar. 7, 2007) 125 SUP. PEOPLE'S CT. GAZ. 15, art. 10, *available at* http://rmfyb.chinacourt.org/public/detail.php?id=106477 [hereinafter Next Step]. *See generally* Andrew J. Green, *Tort Reform with Chinese Characteristics: Towards a "Harmonious Society" in the People's Republic of China*, 10 SAN DIEGO INT'L L. J. 121 (2008).

57. *See* Next Step, *supra* note 56, art. 2.

58. *See generally* Fu Hualing & Richard Cullen, *From Mediatory to Adjudicatory Justice: The Limits of Civil Justice Reform in China*, *in* CHINESE JUSTICE: CIVIL DISPUTE RESOLUTION IN CONTEMPORARY CHINA 25 (Margaret Woo & Mary Gallagher eds., 2011) (providing a helpful analysis of this trajectory of Chinese legal reform).

reforms and the need for more formal adjudication.[59] In those years, Chinese courts were given greater breathing space to decide cases between two private parties.[60] There were even nascent efforts by the Supreme People's Court to reinterpret national legislation in order to empower courts to deal with complicated civil cases.[61]

However, a more conservative trend has since emerged that focuses on social harmony and stability. Chinese scholars and judges are rediscovering the virtues of mediation, including its efficiency, cost effectiveness, and humanity.[62] The Supreme People's Court, in a series of judicial interpretations, has steered particular "socially significant" cases towards mediation, with or without a litigant's consent.[63] Mediation may provide such harmony, but it can also downplay the litigant's freedom of choice.[64] And so, the preference of mediation over adjudication in China is also a preference for maintaining "order over freedom."

B. "Duties over Rights"

Where mediation fails, litigation begins. If the litigation is "socially significant," the Chinese state remains involved both to shape the issues and to ensure the presence of the appropriate parties.[65] In the Armillarisin A injections case, eleven patients and their families filed lawsuits against the Hospital instead of settling their claims through government-sponsored mediation.[66] The other ten patients and their families refrained from the litigation, but closely followed the ongoing trial.[67] While the plaintiffs' injuries were the result of counterfeit medicine, the Hospital was named as the sole defendant in the lawsuit, rather than the pharmaceutical manufacturer.[68]

59. *See generally* Benjamin Liebman, *Chinese Courts: Restricted Reforms*, 2007 CHINA Q. 620; Donald C. Clarke, *Legislating for a Market Economy*, 2007 CHINA Q. 567.

60. *See supra* note 59.

61. *Id.*

62. *Id.*

63. *See generally* Fu Hualing & Cullen, *supra* note 58, at 48–53.

64. *See generally* Next Step, *supra* note 56.

65. *See, e.g.*, 1991 Civil Procedure Law, *supra* note 27, art. 119 ("If a party who must participate in a joint action fails to participate in the proceedings, the people's court shall notify him to participate.").

66. Woo & Cai Yanmin, *supra* note 12 at 368.

67. *Id.*

68. *Id.* at 368. The plaintiffs' attorney explained to the court and in media interviews why they sued only the Hospital. For one thing, Qiqihar Pharmaceuticals had already been fined 19,200,000RMB by the Food and Drug Administration in Heilongjiang Province, and

In response, the Hospital argued that it was not legally liable since it had followed all appropriate laws pertaining to the utilization of Armillarisin A.[69] The Hospital also maintained that it was the first to discover the problem and further, that it had promptly reported the issue.[70] Therefore, the Hospital contended that the manufacturers of Armillarisin A, not the Hospital, should be legally responsible for the effects of the product.[71] For these reasons, the Hospital requested permission from the court to join manufacturer Qiqihar Pharmaceuticals, and the distributors, Jinhengyuan and Guangdong Medicines, as defendants in the lawsuits.[72] The plaintiffs protested, arguing that they "had the right of action," which included the right to determine which defendants to sue, and that both the Hospital's application of joinder and the Court's decision to grant it therefore compromised those rights.[73] In an interview, the plaintiff's attorney explained that joinder in this case would have negative consequences, such as lengthier litigation delaying timely compensation to the plaintiffs.[74] In June 2007, however, the court disagreed with the plaintiffs, ordering that the two sellers and manufacturers be joined as defendants.[75]

The ability of the Chinese court to bring in new defendants absent consent of the plaintiffs underscores the perennial tension between the preference for substantive justice and respect for party autonomy.[76] The right of the defendants to join interested parties not initially included a lawsuit is a situation that every legal system must address.[77] For example, in the United States, where party autonomy is

the persons-in-charge had been prosecuted. As a result, the company was not in a position to make compensation. For another, since there was no direct relationship between the plaintiffs and the pharmaceutical sellers, joinder of these defendants would lead to protracted litigation and ultimately would not result in timely compensation to the plaintiffs. *Id.* at 368 n. 18.

69. *Id.* at 368.

70. *Id.*

71. *See* Cai Yanmin, *Qieryao Jiayaoan Minshi Shenpan zhi Fansi* (1) (齐二药"假药案民事审判之反思 (1)) [*Thoughts on the Qiqihaer Er Counterfeit Drug Litigation (1)*], BJ148 (Sept. 22, 2011), http://www.bj148.org/fxyj/jaxl/qt/201109/t20110922_160658.html [hereinafter *Thoughts 1*]; Cai Yanmin, *Qieryao Jiayaoan Minshi Shenpan zhi Fansi* (2) (齐二药"假药案民事审判之反思 (2)) [*Thoughts on the Qiqihaer Er Counterfeit Drug Litigation (2)*], UNILAW, http://www.unilaw.cn/Read.asp?id=206 (last visited Apr. 4, 2012) [hereinafter *Thoughts 2*].

72. Woo & Cai Yanmin, *supra* note 12 at 368–69.

73. *Id.* at 369.

74. *Id.*

75. *Id.*

76. *Id.*

77. *See* 1991 Civil Procedure Law, *supra* note 27, art. 119; FED. R. CIV. P. 19 & 24.

strong and the plaintiff is "the master" of his litigation,[78] the plaintiff may sue the wrong defendant or leave out certain defendants, and only under certain exceptions can the defendant and/or the court reshape the litigation.[79] The plaintiff may choose to sue one joint tortfeasor and not the other. The defendant's job is to deny and defend the plaintiff's claim against it, and if necessary, himself pursue against the other tortfeasor for contribution. The court's job is to ensure a level playing field. As noted by Stephen Burbank, the structure of American litigation is very much left to the parties, particularly to plaintiffs, as to whom they wants to sue.[80]

By contrast, in China, joinder of defendants appears to be less restrictive, less dependent on the will of plaintiffs, and more reliant on perceptions of efficiency and substantive justice. This sense of who should be brought into an action can override the plaintiff's right of autonomy over the lawsuit. Article 119 of the Chinese Civil Procedure Code states simply that "If a party who must participate in a joint action fails to participate in the proceedings, the people's court shall notify him to participate."[81] The rule gives the court discretion to join necessary parties with or without request from the litigants. When a defendant requests joinder, the court may also order it if, after investigation, the court finds the request to have a basis.[82]

In the Armillarisin A case, the court concluded that this is a case of necessary joint action and that the existing defendant, the Hospital, had the right to demand joinder of the other parties, and that the court could join the other defendants even without the consent of the plaintiffs.[83] Much to the parties' dismay, however, rather than dismissing the case against the Hospital, the court maintained the

78. *See* The Fair v. Kholer Die Co., 228 U.S. 22, 25 (1913) ("Of course the party who brings a suit is master to decide what law he will rely upon . . . ."); Stanley Blumenfeld, *Artful Pleading and Removal Jurisdiction: Ferreting Out the True Nature of a Claim* 35 UCLA L. REV. 315, 316 (1987) ("The underlying notion [of *The Fair*], which is now firmly entrenched in federal procedural law, is that the plaintiff is free to chart the course of his own lawsuit.").

79. *See* FED. R. CIV. P. 19.

80. Stephen B. Burbank, *The Complexity of Modern American Civil Litigation: Curse or Cure?* 3 (Scholarship at Penn Law, Paper No. 166), *available at* http://lsr.nellco.org/upenn_wps/166.

81. *See* 1991 Civil Procedure Law, *supra* note 27, art. 119.

82. Guanyu Shiyong Zhonghua Remin Gongheguo Minshi Susongfa Ruogan Wenti de Yijian (关于适用《中华人民共和国民事诉讼法》若干问题的意见) [Opinions on Application of the Civil Procedure Law of the People's Republic of China], 31 Sup. People's Gaz. 70 (Sup. People's Ct. 1992) (China).

83. Woo & Cai Yanmin, *supra* note 12, at 372.

Hospital as a defendant in the case.[84] The court reasoned that "it could fully adjudicate responsibly only if all of the possible obligors were joined to the lawsuits."[85]

But it is unclear how the Hospital could be viewed as a joint tortfeasor since it merely administered the medicine and was in no way involved in its manufacture or distribution.[86] Indeed, the Hospital pointed out that the pharmaceutical manufacturers and distributors were the real parties in interest.[87] The pharmaceutical producers maintained control of the counterfeit medicines before they were used by the plaintiffs.[88] The Hospital also noted that, pursuant to Chinese laws and regulations, it is both the producers and the sellers who were obligated to maintain the quality of pharmaceuticals during distribution and the injuries caused by counterfeit medicines were the result of the failure of both the producers and the sellers to fulfill these obligations.[89] Consequently, the Hospital argued that under Chinese tort law,[90] the producers and sellers were the actual interested persons, not the Hospital.[91] The court, therefore, could have decided to dismiss the case against the Hospital.[92]

Indeed, it is only with a broad reading of Chinese tort law and liberal application of Chinese joinder rules in the context of promoting a "harmonious society" could the court have kept the Hospital in the case.[93] This appears to be true, as in fact, the Supreme People's Court has explained that, in personal injury compensation cases, all joint tortfeasors shall be made defendants when the plaintiff sues only some of them.[94] Chinese scholars provided guidance on the

84. *Id.*

85. *Id.*

86. *Id.* at 375.

87. *See id.* at 371; 374–75.

88. *Id.* at 371.

89. *Id.*

90. *Id.*

91. *Id. See also Thoughts 1*, *supra* note 71.

92. Woo & Cai Yanmin, *supra* note 12 at 372.

93. *See* Green *supra* note 56, at 149–53. The author predicts continued favorable results for plaintiffs as China seeks to emphasize protection for those less well off as part of the "harmonious society" policy. *Id.*

94. Zui Gao Renmin Fayuan Guanyu Shenli Renshen Sunhai Peichang Anjian Ruogan Wenti de Jieshi (最高人民法院关于审理人身损害赔偿案件适用法律若干问题的解释) [Interpretation of the Supreme People's Court of Some Issues concerning the Application of Law for the Trial of Cases on Compensation for Personal Injury] (promulgated by the Sup. People's Ct., Dec. 26, 2003, effective May 1, 2004) (Lawinfochina) art. 5, *available at* http://www.lawinfochina.com/display.aspx?lib=law&id=3416 [hereinafter Personal Injury Interpretation].

joinder rule, explaining that a necessary "joint action" can arise when there are one or more claims involving common rights and obligations as well as several parties who must initiate or respond to a lawsuit together.[95] A determination that the claims should be tried as "necessary joint actions" may simply mean that the court cannot adjudicate them separately.[96] This is a broad view of "joint actions" consistent with the approach of Chinese tort law, which emphasizes both rights and responsibilities, rather than rights as either a sword or shield.[97]

In the Amarmillarism A case, there are several further explanations as to why the court kept the Hospital in the litigation. The court may have believed that by joining the parties and ensuring that all interested persons were brought into the action, the court could better determine the facts, the responsible parties, and their respective liabilities. In this way, substantial justice would be more efficiently done, even if the litigation did not proceed in exactly the manner as anticipated by the plaintiffs. Alternatively, the court may have believed that the Hospital owed a duty to the plaintiffs, whether it was a legal or a moral one, such that the Hospital should be made answerable to the plaintiff. With either justification we see the emphasis of "duty over rights" playing out in this litigation through the Chinese court's affirmative efforts to shape the litigation.

C. "Group Interest over Individual Interests"

Finally, the court in the Armillarisin A cases, having brought in all possible defendants, proceeded to hold all of them liable for plaintiffs' injuries.[98] By appearing to impose collective liability rather than determine individual culpability in its attempt to resolve the dispute, the court's ruling appeared to go beyond the requirements of China's products liability law.[99]

95. Woo & Cai Yanmin, *supra* note 12 at 371.

96. Zhang Wusheng (章武生) & Duan Housheng (段厚省), *Biyao Gongtong Susong de Lilun Wuqu yu Zhidu Chonggou* (必要共同诉讼的理论误区与制度重构) [*Theoretical Misunderstanding and Institutional Reshaping Necessary Joint Actions*], 1 SCI. L. 111, 112 (2007).

97. George W. Conk, *A New Tort Code Emerges in China: An Introduction to the Discussion With a Translation of Chapter 8 – Tort Liability, of the Official Discussion Draft of the Proposed Revised Civil Code of the People's Republic of China*, 30 FORDHAM INT'L L. J. 935, 940 (2007).

98. *See Thoughts 1*, *supra* note 71; *Thoughts 2*, *supra* note 71.

99. *See Thoughts 1*, *supra* note 71; *Thoughts 2*, *supra* note 71.

As discussed above, Chinese products liability law imposes the burden on the pharmaceutical manufacturer and distributors to prove that they had carried out their responsibilities regarding Armillarisin A. Article 41 the 2000 Product Quality Law specifies that manufacturers are liable for injuries caused by defective products unless they can prove one of the following: 1) they did not put the defective product into circulation; 2) defects later found did not exist at the time the product was put into circulation; or 3) the defects could not have been detected at the time of their release due to scientific or technological reasons.[100] Meanwhile, Article 42 of the same act provides that sellers will be liable for injury caused by defective products unless they can prove: 1) they are not at fault for the damages caused by the defective goods; and 2) they can identify the manufacturer and other suppliers of the product.[101] Finally, Article 35 of the Pharmaceutical Administration Regulations requires that "a pharmaceutical wholesale enterprise perform a quality examination on medicines purchased for the first time from a pharmaceutical producer."[102]

In the Armillarisin A case, the manufacturer (Qiqihar Pharmaceuticals) did not respond to the lawsuit or appear in court, let alone provide evidence that the company had satisfied the requirements of Article 41.[103] The distributor, Jinhengyuan, which bought the medicine directly from Qiqihar Pharmaceuticals, admitted in court that because of inexperience, it did not conduct a quality inspection of the medicine.[104] The other distributor, Guangdong Medicines, signed a sales contract with Jinhengyuan but received the medicine directly from Qiqihar, and admitted that upon receipt it only examined such items as outer packages and sale documents.[105]

As could be expected, the court found the manufacturer, Qiqihar Pharmaceuticals, liable for failing to satisfy the requirements of Article 41 of the Product Liability Law, and the distributors, Jinhengyuan and Guangdong Medicines, liable as wholesale

100. Product Quality Law (2000 Amendment) (promulgated by the Standing Comm. Nat'l People's Cong., Feb. 22, 1993, effective, Sept. 1, 1993), art. 41, http://www.bjkw.gov.cn/n244495/n244634/2658335.html [hereinafter Product Quality Law].

101. *Id.* art. 42.

102. Yaopin Guanli Fa (药品管理法) [Law on Pharmaceutical Administration] (promulgated by the Standing Comm. Nat'l People's Cong., Feb. 28, 2001, effective Dec. 1, 2001), art. 35, http://www.sda.gov.cn/WS01/CL0064/23396.html.

103. *See Thoughts 1*, *supra* note 71; *Thoughts 2*, *supra* note 71.

104. *See Thoughts 1*, *supra* note 71; *Thoughts 2*, *supra* note 71.

105. *See Thoughts 1*, *supra* note 71; *Thoughts 2*, *supra* note 71.

enterprises for failing to conduct proper examinations on the medicine.[106] The court believed that, if the manufacturer or the distributor had carried out its responsibilities of quality control, the counterfeit medicine would never have entered the market or gone into the Hospital.[107]

The Hospital maintained that it did not have the same responsibility for quality control as that prescribed to the manufacturer and the distributors.[108] Instead, the Hospital argued that its only obligation was to abide by the administrative regulations for public bidding but since Guangdong Medicine had won the public bidding for Armillarisin A organized by the provincial government, all hospitals within the province were forced to purchase the medicine from Guangdong Medicine.[109]

The court rejected the Hospital's argument and instead, imposed joint liability on the Hospital, together with the manufacturer and distributors.[110] It was unclear what action taken by the Hospital could be pinpointed to as unlawful or so closely connected to the manufacturer and distributor's actions as to constitute liability. The court subsequently explained that the Hospital was held liable because the Hospital constitutes a "seller" and therefore bears fault-based liability. In the alternative, the Hospital was also held under "strict liability" or no-fault liability under the General Principles of the Civil Code.[111] The Hospital, however, pointed out that the General Principles of the Civil Code only provides for "strict liability" liability if the underlying substantive law so specified, (that "civil liability shall be borned [sic] even in the absence of fault, if *the law so stipulates*,") and the Products Quality Law places responsibility on sellers only for the defects they cause.[112] Here, the Hospital argued that "strict liability" did not apply, that it did not cause any defects, and that it should not be held liable.[113]

106. Woo & Cai Yanmin, *supra* note 12 at 373.

107. *Id.*

108. *Id.* at 374.

109. *Id.*

110. *Id.* at 375.

111. General Principles of the Civil Law of the People's Republic of China, (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 12, 1986, effective Jan. 1, 1987), art. 106, http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383941.htm.

112. *See* Product Quality Law, *supra* note 100, arts. 30–31 (emphasis added).

113. *See Thoughts 1*, *supra* note 71; *Thoughts 2*, *supra* note 71.

Yet, the court's imposition of liability on the Hospital may nevertheless be consistent with how Chinese courts have interpreted Chinese substantive tort law, and with broad collective liability. In "Interpretation of the Supreme People's Court of Some Issues Concerning the Application of Law for the Trial of Cases on Compensation for Personal Injury," the Supreme People's Court has specified that liability shall be imposed if the "injurious acts are directly combined and result in the same injury consequence even if there is no joint intent or joint negligence." [114] This same opinion also made clear that

> where two or more persons have no joint intent or joint negligence, but separately commit several acts that are indirectly combined and result in the same injury, they shall bear corresponding compensation liabilities respectively in appropriate proportions upon the extent of their faults.[115]

In holding the Hospital liable, the court in the Armillarisin A case must have concluded that either the acts of all four defendants combined to produce a single injury to each plaintiff or that the defendants' separate acts were so closely connected that it was impossible to ascertain what share of the damage each defendant inflicted. But if the Hospital's sole role was to apply the injections as instructed, the court could have viewed that service as a separate act distinct from the manufacturer or seller's liability. The court could have declined to hold the Hospital liable, or at least only hold the Hospital responsible for its respective portion of liability. Significantly, even the plaintiffs admitted in court that they never blamed the Hospital for the medical services received and that their claim was one based on the infringement of product quality.[116] It is only by reading broad collective liability into Chinese tort law and applying that liability liberally that the court could hold the Hospital liable.

Finally, one additional factor may have affected the court's ruling on liability. Given the criminal prosecution of the manufacturer and the relatively small size of the distributor and seller companies, the Hospital was the sole defendant financially able to provide relief to the plaintiffs.[117] The court's ruling could thus be

114. Personal Injury Interpretation, *supra* note 94, art. 3.

115. *Id.*

116. Woo & Cai Yanmin, *supra* note 12, at 375.

117. *Thoughts 1*, *supra* note 71; *Thoughts 2*, *supra* note 71.

seen as an attempt to provide redistributive and substantive justice for the injured plaintiffs.[118] It may also reflect a sense of group obligation, and the concern of providing group relief for these plaintiffs, over and above the sense of individual liability.[119] And so, it can still be said that Chinese law emphasizes "order over freedom, duties over rights, and group interests over individual ones."

II. THE PATH OF CHINESE LEGAL REFORMS

Even as Chinese law continues to emphasize "order over freedom, duties over rights, and group interests over individual ones,"[120] the inquiry cannot end there. Equally important, one must ask who is defining the nature of this "order over freedom," the identity of which "duties" should prevail over which "rights," and what "group interests" override "individual ones." The answer for China is inevitably the Chinese Communist Party (CCP).[121] To understand legal reform in China, one must take into account the role of the CCP as the driving force for the Chinese developmental state and how its involvement in legal reforms has resulted in the latest turn—one that establishes a multi-track litigation system, in which minor and relatively insignificant cases are mediated, commercial cases are adjudicated, and mass cases are carefully controlled and shaped by the Chinese state (as exemplified by the Amarillarism A litigation).[122] The most recent discussions on the amendments to the Chinese procedural codes reveal efforts to codify just such a strategy.

This multi-track strategy to civil litigation is yet the latest phase in the history of Chinese legal reform. One could even say that it is a response to deficiencies created by the privatization of the legal profession coupled with greater formality.[123] As discussed earlier, for a time in the mid-1990s, the Chinese state encouraged the use of the courts in the hopes that the courts could assist in stabilizing society

118. Woo & Cai Yanmin, *supra* note 12, at 375.

119. *See generally* Green, *supra* note 56.

120. SHAO-CHUAN LENG & HUNGDAH CHIU, *supra* note 1, at 171.

121. In December 2007, Chinese president Hu Jintao urged the judiciary to subordinate the written law to the interests of the CCP and the maintenance of "social stability:" "In their work, the grand judges and grand procurators shall always regard as supreme the party's cause, the people's interest and the constitution and laws." *See* Cohen, *Body Blow*, *supra* note 8.

122. *See supra* notes 11–12 and accompanying text.

123. *See* Sida Liu, *With or Without the Law: The Changing Meaning of Ordinary Legal Work in China*, *in* CHINESE JUSTICE: CIVIL DISPUTE RESOLUTION IN CONTEMPORARY CHINA *supra* note 58, at 234–69 (providing a useful discussion of the growth of legal technocracy in China).

and serve as a neutral forum for litigants trying to rein in local bureaucrats.[124] Speaking at the landmark national civil justice conference held between December 1978 and January 1979, Jiang Hua, the former President of the Supreme People's Court, spoke of the necessity and legitimacy of civil justice, positioned the Supreme People's Court to take the lead in judicial administration, and started to assert the Supreme People's Court's institutional autonomy.[125] After the conference, Chinese legal reformers enhanced their efforts at procedural and institutional change while the Supreme People's Court decreed that Chinese courts should "further improve the work of trying civil cases, protect the civil rights and interests of citizens and legal persons according to the law, and promote the just, safe, civilized, and healthy development of society."[126]

For the next twenty years, China was determined to develop a professional legal system, leaving the particular design of civil justice to the expertise of the judiciary.[127] More law schools were established and qualifications for both lawyers and judges were both strengthened and clarified.[128] In a series of Five Year Plans, the Supreme People's Court reduced the inquisitorial and investigative role of judges while simultaneously increasing the responsibility of parties to produce evidence and prove their case.[129] During this period, Chinese judicial reformers urged the development of civil courts that would play a more general, public, and normative role in applying and proclaiming rules.[130] Yet, in many ways, such efforts limited citizen's empowerment even as they added to it. Legal markets created great disparities in the availability of legal services between rich and poor; formal procedures increased the alienation

124. Ren Jianxin (任建新), Supreme People's Court President, Address before the Fourth Session of the Eighth National People's Congress (Mar. 12, 1996), *in* BBC SUMMARY OF WORLD BROADCASTS, Apr. 9, 1996, at 26; Renmin Ribao (人民日报) [China Daily], Mar. 14, 1997.

125. *See Minshi Shenpan Gongzuo Tongdeng Zongyao* (民事审判工作同等重要) [*Civil Justice is Equally Important*], SINA (Aug. 14, 2007), http://book.sina.com.cn/nzt/history/cha/jianghuaz/66.shtml, *cited in* Hualing Fu, *Access to Justice in China: Potential, Limits and Alternatives*, *in* CHINESE JUSTICE: CIVIL DISPUTE RESOLUTION IN CONTEMPORARY CHINA, *supra* note 58, at 25.

126. *Id.*

127. *See, e.g.*, First Five-Year Reform Program, *supra* note 29.

128. *See generally* Liebman, *supra* note 59.

129. *See Second Five-Year Reform Program for the People's Courts (2004-2008) (CECC Partial Translation)*, CONG.-EXEC.COMM'N ON CHINA, http://www.cecc.gov/pages/virtualAcad/index.phpd?showsingle=38564 (last visited Apr. 8, 2012) [hereinafter Second Five-Year Reform Program].

130. *See generally* Liebman, *supra* note 59.

and burdens of poor litigants such that they were unable to access the judicial system.[131]

Facing pressure from the international community as well as the needs of a market economy, the Chinese state had applied market principles to the provision of legal services. But in the short run, the creation of a legal market has not led to greater access to justice. While China now has more than 15,888 law firms with 155,457 full-time lawyers, or one lawyer for every 8,586 people,[132] fully 85 percent of licensed lawyers work in large or medium sized cities, leaving only a small percentage to serve the vast population in rural areas.[133] Equally problematic, lawyers are unevenly distributed, not only with more lawyers in the cities than in the countryside, but also in the matters they handle.[134] Lawyers tend to enter the more lucrative areas of commerce rather than the less lucrative areas of family law, debt, and employment.[135] With the latter being areas of greatest concern to ordinary citizens, there exists a tremendous gap in the availability of services between the urban rich and the rural poor.

Similar resource disparities exist within the Chinese courts. The different levels of economic development among the provinces are reflected in the disparate resources provided to judges and local courts.[136] Until recently, local governments, rather than the central government, appointed and paid Chinese judges, subjecting Chinese courts to the whims of local government budgets. Poor provinces with limited resources, such as Hubei, Guizhou, and Sichuan, even lacked physical court facilities and faced shortages of judicial

131. *See, e.g.*, Margaret Y.K. Woo, Christopher Day & Joel Hugenberger, *Migrant's Access to Civil Justice*, 4 LOY. U. CHI. INT'L L. REV. 167 (2007).

132. *22-6 Basic Statistics on Lawyers, Notarization and Mediation*, CHINA STATISTICAL YEARBOOK, http://www.stats.gov.cn/tjsj/ndsj/2010/html/W2206e.htm (last visited Apr. 8, 2012). *See also* Geoffrey A. Fowler, Sky Canaves, & Juliet Ye, *Chinese Seek a Day in Court: With New Faith in Rule of Law, More Citizens File Suits*, WALL ST. J., July 1, 2008, at A12; *China Has More Than 143,000 Lawyers*, PEOPLE'S DAILY ONLINE., Apr. 16, 2008, http://english.peopledaily.com.cn/90001/90776/90882/6393774.html..

133. Fu Hualing, *Access to Justice in China: Potentials, Limits, and Alternatives*, *in* LEGAL REFORMS IN CHINA AND VIETNAM: A COMPARISON OF ASIAN COMMUNIST REGIMES 163, 167 (John Gillespie & Albert H.Y. Chen eds., 2010).

134. RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARDS RULE OF LAW 362 (2002).

135. *Id.*

136. Linchun Zhang (张林春), Zhongguo Zhongxibu Diqu Sifa Jigou Rencai Liushi Wenti Yanzhong (中国中西部地区司法机构人才流失问题严重) [*The Serious Problem of Personnel Loss in Judicial Institutions in Central and Western Regions*], XINHUA WANG [XINHUA NET] (Mar. 12, 2006), http://news.xinhuanet.com/misc/200603/12/content_4295068.htm.

manpower.[137] Recognizing this disparity of resources between different provinces, the Chinese state has recently begun efforts to distribute funds directly from the central government budget.[138] Until that reform is fully implemented, however, judicial resources are still deficient in many provinces.

This scarcity of lawyers and judges proved to be a huge problem particularly as China increasingly formalized its litigation procedures. In an effort to "modernize" and to alleviate the burgeoning workload of Chinese judges, the Chinese state moved away from a civil law inquisitorial system toward rules that relieve Chinese judges from the burden of investigation and impose on litigants the burden of coming forward with evidence.[139] Absent the assistance of judges to investigate and gather evidence, poor litigants need legal representation more than ever and without it, are at the mercy of litigants with greater economic resources.

Due to all of the above factors—a lack of lawyers, a lack of judges and an increased burden on unrepresented litigants, public discontent with the courts has mounted.[140] Grievance petitions filed with the Chinese state have skyrocketed: many of these petitions deal with litigants dissatisfied with court treatment.[141] In a number of areas, we are seeing the next phase of Chinese legal reforms as the Chinese state tightens its control over the courts and over the process of civil litigation. This can be seen in the latest set of proposed amendments to the Chinese Civil Procedure Code.

137. *Id. See also Daibiao Suo Weidong Weiyuan Chen Zhilun tan Falü Rencai Duiwu Jianshe* (代表索维东委员陈智伦谈法律人才队伍建设) [*Representatives Discuss Construction of Legal Personnel System*], TENGXUN WANG [TENCENT WEB] (Mar. 9, 2006), http://news.qq.com/a/20060309/001799.htm (describing similar problems in Sichuan).

138. In 2008, the Political and Legislative Affairs committee of the Central Committee of the CCP issued an opinion urging a change from local to national financing of the courts. *See* Zhong Yang Zhgen Fawei Yuanhui Guanyu Shenhua Sifati Zhihe Gongzuo Jigai Geruo Ganwen Ti De Yi Jian (中央政法委员会关于深化司法体制和工作机制改革若干问题的意见) [Initial Funding for China's Legal System Initially Established], 360DOC, http://www.360doc.com/content/11/0421/11/1993767_111229089.shtml (last visited Apr. 8, 2012).

139. *See* Renmin Fayuan Dierge Wunian Gaige Gongyao (2004–2008) (人民法院第二个五年改革纲要(2004–2008)) [Supreme People's Court Notification on the Issue of The Second Five-year Reform Outline of the People's Courts] (promulgated by the Sup. People's Ct., Oct. 26, 2005) 110 SUP. PEOPLE'S CT. GAZ. 8 (Sup. People's Ct. 2005), *available at* http://www.law-lib.com/law/law.view.asp?id=120832 (last visited Apr. 8, 2012).

140. *See* Mary E. Gallagher, *Mobilizing the Law in China: "Informed Disenchantment" and the Development of Legal Consciousness*, 40 LAW & SOC'Y REV. 783, 784 (2006).

141. Carl Minzner, *Xinfang: Alternative to Formal Chinese Legal Institutions*, 42 STAN. J. INT'L. L. 103, 106 (2006) ("Many petitions . . . are extra-legal appeals for court decisions.").

On June 10, 2011, the Central Committee Legislative Affairs Bureau posted draft revisions to the Chinese Civil Procedure Code.[142] The Chinese Civil Procedure Code was initially promulgated in 1982 for trial implementation, formally enacted in 1991, and most recently amended in 2007.[143] However, the ever increasing number of civil lawsuits and the over-burdened Chinese trial courts have since led to discussions of yet another round of changes to the Civil Procedure Code.[144] The 2011 draft amendments are designed to address some of the country's concerns with social instability, the increased workload of Chinese judges, and the external pressures of a World Trade Organization (WTO) treaty regime that urges greater access to justice and greater transparency of the courts.[145] Most significantly, the proposed amendments would codify the multi-track approach to cases.[146]

First and foremost, the proposed amendments to the Chinese Civil Procedure Code would formalize the emphasis on mediation as an effective mechanism for resolving disputes, noting that "suitable cases should first be mediated."[147] New subsections would also be added to protect the integrity of mediated agreements.[148] Litigants may apply for enforcement of extra-judicial mediated agreements by the courts, so long as the agreement is filed with the courts within 30 days of the agreement.[149] Under the amended rules, a civil court may, after investigation, enforce the agreement or require the parties to mediate again, if it finds the agreement unlawful.[150]

Along with mediation, the revisions would also make clear that simplified procedures are to be used for many civil cases in which the

142. Minshi Susong Fa Xiuzhengan (Caoan) Tiaowen ji Caoan Shuoming (民事诉讼法修正案(草案)条文及草案说明) [Draft Amendment to Chinese Civil Procedure Code and its Explanations], *available at* http://www.npc.gov.cn/npc/xinwen/syxw/2011-10/29/content_1678367.htm [hereinafter 2011 Amendments].

143. *Minsufa Xiugai Jianzhi Liudanan* (民诉法修改剑指六大难) [*Six Major Difficulties in the Revision of the Civil Procedure Code*], NAT'L PEOPLE'S CONG. (Oct. 26, 2011), http://www.npc.gov.cn/huiyi/lfzt/msssfxg/2011-10/26/content_1677140.htm.

144. *Id.*

145. *Id.*

146. *See supra* notes 7–12 and accompanying text.

147. 2011 Amendments, *supra* note 142, para. 25 (inserting a new article as new Article 121).

148. *Id.* para. 39 (amending Chapter 15 by inserting new Section 6 (Confirming Cases regarding Mediated Agreements) and Section 7 (Implementing Cases regarding Security Interests)).

149. *Id.*

150. *Id.*

facts are relatively undisputed and the amount in controversy is not large. One new proposed amendment would require that simple cases with a value below 5,000 RMB be limited to one trial only.[151] A second amendment would expand the simplified procedures' parameters.[152] In addition to requiring some simple cases to use simplified procedures, parties themselves could agree to the use of simplified procedures.[153] Finally, a third amendment would require that cases from the basic people's court and those sent out from the trial courts use more convenient methods to summon litigants, deliver documents, and try cases, but in all cases protect the litigants' rights and opinions.[154]

Second, responding to the problem of courts refusing to accept complaints, particularly in difficult and socially significant cases, the proposed revisions would secure a litigant's right to file a complaint and to present evidence. Drafters of the revisions added a new clause to Article 111[155] which would require a court to accept a filed case meeting the requirements of Article 118.[156] The court's decision whether to accept a case must be made within seven days and litigants are notified of their right to appeal an adverse decision.[157]

Similarly, to implement a litigant's right to present evidence, these articles specify the timing and procedure for the receipt of evidence. Under the proposed amendments, a court must accept the evidence offered by a party and must record under court seal the type of evidence presented, the number of pages, the time of receipt, and the length of the presentation.[158] The new amendments also focus on the pretrial conference, at which the parties would focus on the major points in dispute, the nature of the evidence to be presented at trial,

151. *Id.* para. 35 (inserting a new article as new Article 161).

152. *Id.* para. 33 (changing Article 142 to new Article 156 and inserting a new subsection in new Article 156 as Subsection (2)).

153. *Id.*

154. *Id.* para. 34 (changing Article 144 to new Article 158 and modifying new Article 158).

155. *Id.* para. 27 (changing Article 112 to new Article 122 and modifying new Article 122).

156. *Id.* para. 27 (changing Article 112 to new Article 122 and modifying new Article 122).

157. *Id.*

158. *Id.* para. 10 (inserting two new articles as new Articles 65 and 66).

and the identification of points of agreement that would enable the parties to simplify the trial.[159]

Third, in lieu of not accepting cases, these proposed articles set out the process by which Chinese judges would decide in the very initial stages of the litigation how to track civil cases. The People's Court must assess and track the case to one of the following possibilities: 1) an expedited procedure (*du cu*) translated loosely as "supervised procedure" if the case, such as a debt case, has few or no factual disputes; 2) a mediation, if the litigants' disputes are more substantial; 3) a simplified procedure or ordinary procedure, according to the needs of the case; and/or 4) a procedure for litigants to exchange evidence to clarify the points of dispute for cases that require a trial.[160] The goal is that such tracking will leave very few cases for full adjudication and trial. It is through a multi-tracked system that litigation will be contained.

As for socially significant cases, the revisions also grapple with a citizen's right to bring these cases with a broader social impact. In recent years, Chinese courts have discouraged group litigation. In 2006, the All-China Lawyers Association even issued a "guiding opinion" instructing law firms to assign only "politically qualified" lawyers to cases involving ten or more litigants. Fears of instability have led courts to withdraw from group litigation. The proposed procedural revisions, however, recognize the need to expand standing for public interest cases beyond those who have sustained a direct injury to include relevant governmental organs and civil society organizations.[161] In consumer protection and environmental cases, these entities may have standing to file suit on behalf of the public interest.[162] Of course, expanding standing to government agencies will have the effect of bringing control of such cases back to the Chinese developmental state, this time as formal parties in litigation.[163]

159. *Id.* para. 25 (inserting a new article as new Art. 121). *See* explanation 1.1 (Adding a Provision of Mediation after Register). *Id.*

160. *Id.* para. 28 (inserting a new article as new Article 132).

161. *Guiding Opinion of the All China Lawyers Association Regarding Lawyers Handling Cases of a Mass Nature*, CONG.-EXEC. COMM'N ON CHINA (May 30, 2006), http://www.cecc.gov/pages/virtualAcad/index.phpd?showsingle=53258 (providing both the original Chinese and translated English versions).

162. 2011 Amendments, *supra* note 142, para. 8 (inserting a new article as new Article 55).

163. *Id.*

Finally, the new provisions would also expand supervision over the courts. Prosecutors in China have the unique authority to supervise judicial work that is distinct from the role of appellate courts in reviewing cases. The current civil procedure code provides for one prosecutorial supervision method (*kansu*) under which an upper level prosecutor can file a protest with a lower court seeking retrial (reopening) of a legally effective judgment or with an upper level court for review if the judgment is not yet legally effective. Under the proposed amendments, Chinese prosecutors can also propose a new supervision method (jianyi) under which a prosecutor would propose to a court at the same level for the retrial of cases with legally effective judgments, mediated agreements, or arbitration decisions, so long as there is a newly discovered error, the case meets Article 198 conditions, or if a mediated agreement harms the public good.[164] Alternatively, the prosecutor could also ask the an upper level prosecutor to file a *kansu*.[165]

The amendments also increase the parameters of supervision. To address the problem of collusion between litigants and mediation authorities, a new provision would allow prosecutors to protest (*kansu*) or to petition for retrial in the executions of any judgments, or to challenge any mediated outcome that may harm the public good.[166] The investigative authority of prosecutors would be increased to allow a prosecutor to investigate whether a protest (*kansu*) with the court at the next higher level or a proposal for retrial (*jianyi*) to the court at the same level is necessary.[167] The prosecutor would also be empowered to review court records, question the litigants, or investigate beyond the case.[168] Through these various amendments, the Chinese state would give itself a role as a litigant before the court to challenge results it does not like in cases of social significance.

CONCLUSION

The Chinese Communist Party at its 15th National Congress in 1997 set the first ten-year target for national economic and social development with a basic strategy of "governing the country

164. *Id.* para. 44 (changing Article 187 to new Article 206 and modifying new Article 206).

165. *Id.*

166. *Id.*

167. *Id.* para. 45 (inserting two new articles as Articles 207 and 208).

168. *Id.*

according to law and building a socialist country ruled by law."[169] By the end of August 2011, the Chinese legislature had enacted 240 effective laws including the current constitution, 306 administrative regulations, and over 8,600 local regulations.[170] In the areas of court and legal procedures, Chinese legal reforms adopted some elements of the adversary system including party autonomy and burdens of proof.[171] But while the language of rights may have been easy to import, the process of rights assertion has been more difficult. Efforts to establish legal formality and legal markets in China have led to the dominance of technocracy and great disparity in access to justice. Concerns for social stability have led the Chinese state to retreat from formality and develop a multi-track civil dispute resolution system. For poor and rural residents, simplified procedures and informal mediation remain the preferred dispute resolution methods;[172] while litigant autonomy holds sway in the run-of-the-mill commercial litigation. But in socially significant cases, the Chinese state is heavily involved—both through greater control of the litigation by the court and through greater supervision of the courts.

Such a multi-track system, while born of necessity, may serve to defuse the potential of courts to serve democratic reforms. It follows from this view that China's legal system will focus more on efficiency than on participation by ordinary citizens, giving more weight to the state's view of justice than to the ordinary litigant. Indeed, just as China embarked on "socialism with Chinese characteristics," we are also witnessing "rule of law with Chinese characteristics." And the "rule of law with Chinese characteristics" means a multi-tracked approach to rendering justice—one that focuses on preserving harmony rather than adjudicating right from wrong, dispute resolution rather than readjustment of public norms.

And yet, the presence of the Chinese developmental state and "rule of law with Chinese characteristics" is inevitable. Therefore, the challenge for future legal reformers is to recognize the reality of a dominant state but work towards ways to incorporate and ensure

169. *Establishment of the Socialist System of Laws with Chinese Characteristics*, INFO. OFFICE OF THE STATE COUNCIL OF THE PEOPLE'S REPUBLIC OF CHINA (Oct. 27, 2011), http://www.china.org.cn/government/whitepaper/2011-10/27/content_23738846.htm.

170. *Id.*

171. *Features of the Socialist System of Laws with Chinese Characteristics*, INFO. OFFICE OF THE STATE COUNCIL OF THE PEOPLE'S REPUBLIC OF CHINA (Oct. 27, 2011), http://www.china.org.cn/government/whitepaper/2011-10/27/content_23738836.htm.

172. *See generally* CHINESE JUSTICE: CIVIL DISPUTE RESOLUTION IN CONTEMPORARY CHINA, *supra* note 58.

citizens' voices into Chinese law and governance even within the structure of the dominant state. There are promising signs, such as in the area of increasing judicial transparency. The new revisions of the Civil Procedure Code would require that all judgments and judicial orders be made public and that the basis for the decision be explained in writing (New Articles 151, 153, and 155).[173] Nevertheless, civil litigants must be given the freedom and opportunity to shape and formulate their own civil litigation before civil litigation can truly serve the democratic role of preserving citizen voices.

173. *See* 2011 Amendments, *supra* note 142, para. 32.