

Why do They not Take the Cases? Institutional Interests in the Decision-Making of Chinese Courts

Xin (Frank) He*

Hauser Research Scholar, NYU Law School (2005-06)

Assistant Professor, City University of Hong Kong, China

Email: hexin1999@yahoo.com

Abstract:

Recent developments that Chinese Courts do not take some civil disputes raise questions on assumptions that courts would often expand their jurisdiction and that Chinese courts are firmly controlled by the state. Through closely examining the handling process of “Married out Women” disputes, this article shows that by taking the disputes, the courts would only bring themselves troubles and that is why the courts push away the disputes. By so doing, they reduce their workload, avoid the difficulty of judgment enforcement, but still retain their authority in the power relationship with the governments. Through comparing the courts’ evolving positions, the research argues that Chinese courts are capable of deliberating about, and transforming their situations by strategically interpreting the law. It suggests that judicial behaviors cannot be adequately explained in the absence of fairly thick descriptions and understanding of the legal arguments, political constraints, and strategic maneuvers open to the courts at their own context.

* The author wants to acknowledge Ju Xiaoxiong who brought my attention to the “MOW” issue and provided the basic positions of some courts in Guangdong province, and Zhang Rongbo who provided some interview materials regarding the issue of “MOW.” Stephanie Balme, Cai Yongshun and Su Yang offered constructive comments on an earlier version of the article.

It seems that as many authoritarian and transitional countries have developed judicial institutions with varying degrees of autonomy, the expansion of judicial power has become a global trend for several decades (Tate & Vallinder 1995). In explaining the expanding existence of such judicial power which was once believed a unique phenomenon only in democratic regimes, students of comparative judicial politics have widely regarded political jurisprudence as a useful approach (Shapiro 1964; 1981). They argue that as political agencies of the state judicial systems, can serve crucial governance functions which may not be achieved through straightforward social control mechanisms (Toharia, 1975; Tate & Haynie, 1993; Osiel 1995; Moustafa 2003; He 2005). Moreover, average citizens and opponent activists in particular also aggressively employ the arena of judicial power to advance their own interests. In addition, the expansion of judicial power is further fueled by courts themselves. As some argue, it is the institutional interests of courts to expand their jurisdiction and influence (Tate 1995; Smithey & Ishiyama 2002; Helmke 2005). Courts sometimes even support the positions of average citizens and opponent activists, though they are formally the agencies of the state.

In this line of literature, the point that judicial power tends to expand itself is often taken for granted. It is always assumed that as a rational institution, courts would proactively grab more power, and they have little reason to give up such opportunities. Ebbs or flows in the expansion of judicial power are simply the restriction of the state. The process of the expansion of judicial power is thus somehow a result of relevant forces and opportunities among the state, society, and the courts.

But recent developments of Chinese courts have raised questions on how far, or under what conditions this assumption can be applied. When some new disputes were

generated in China's unprecedented social transformation, the courts have refused to take them. The Supreme People's Court (SPC), for example, issued an opinion in 2002, rejecting disputes of class tort lawsuits caused by misrepresentation in securities trading. Another opinion of the Court stated that the courts would not take the disputes on housing demolition compensation as civil litigation.¹ The courts of Guangxi Zhuang Autonomous Region explicitly refused to take 13 categories of disputes in 2004.² This recoil rather than expansion of judicial power looks extremely surprising in light of the country's endeavors towards rule of law.

It shall be noted that among these disputes, some are politically charged in which the state itself has an interest. For these disputes, why the courts refused to take them could be easily explained away: the state, including the Communist Party and the governments, has direct or indirect control on the personnel and budget the courts; the courts thus are little more than a royal subordinate of the state; what they can do is carefully carrying out assigned tasks with little desire to resist interferences (He 1997). As a result, if the state does not want the courts to take the disputes, the courts have little room to say no (Lubman 1999; O'Brien & Li 2004).³ But the rest, and indeed the

¹ The Supreme People's Court, "关于当事人达不成拆迁补偿安置协议就补偿安置争议提起民事诉讼人民法院应否受理问题的批复[The Response to whether the People's Courts shall take the disputes on housing demolition compensation which filed through civil procedure]," August 11, 2005.

² These categories include capital-raising disputes, illegal 'sale-network' disputes, real estate disputes as a result of governmental management, disputes of lay-off-workers due to company re-structure, disputes on compensation for rural land requisition and resettlement of farmers, disputes of local governments terminating agricultural contracts in large scale, disputes on disbursement of collectively-owned assets, disputes relating to 'Two-Committees-One-Department' as debtors, bankruptcy application without clear employee settlement arrangements, disputes of manipulated securities trading causing infringement, disputes of fengshui, burials, and graveyards, etc. See, "Guangxi Courts Refuse to Take Thirteen Categories of Cases", August 24, 2004, *China Youth On Line*, the online version of *China Youth Daily*, last visited on the same date. Of course this phenomenon is by no means limited to Guangxi province.

³ In a brief discussion, He Weifang, Gao Minxuan, and Zhan Zhongle were generally of the view that the legal system of China has not been well-established, and the judiciary lacked independence to make its own decisions. See *supra* note 2.

majority of these disputes, the courts' rejection cannot be explained by the state's intention and its control on the courts. In fact, these disputes were not related to any state interests. They were usually civil disputes occurred when the interests of a huge amount of people were involved. In these situations, the state never prevented the courts from taking them; instead, both the Party committees and the governments repeatedly urged the courts to take and solve the disputes. They so urged because a huge amount of disputants had brought the disputes to them and demanded solutions. Some disputants even organized public demonstration to protest their unfair and grievant situations. As a result, the Party committees and the governments, to relieve their own pressure and to maintain social stability more generally, had requested the courts to solve the disputes by arguing that dispute resolution falls into the courts' responsibility. Usually the courts would, as Suli has shown, make an acceptable compromise to all relevant parties through balancing their modern legal skills, traditional custom, and local knowledge (2000). So the questions are: What is new about these disputes? Why did the courts not even take them? Why did they willingly give up the jurisdiction of these new conflicts? What strategies do they employ to resist the pressure from higher authorities? What logic in the decision making process has been revealed from this new development?

This article tends to explore these questions by closely examining how one type of the disputes has been handled.⁴ It will show that if the courts take the disputes, they would be mired in the complicated hearing process without being able to deliver an enforceable judgment. Consequently, the disputes would eventually get back at the courts. Taking the disputes would only bring the courts more trouble. That is why the

⁴ The data include not only relevant court judgments, decisions, documents, and news reports on the disputes, but also interview materials with judges who handled the dispute and relevant disputants.

courts have pushed away the disputes to the governments and then reviewed the governments' decisions in administrative litigation. By so doing, they have not only relieved the burden of hearing the disputes and enforcing the decisions, but also retained an advantageous position in the power relationship between the courts and the governments.

The research suggests that the courts have been successfully employed legal arguments, though not necessarily consistent, to deal with external pressure and make the case for a position which is in favor of their institutional interests. It argues that the courts in China are therefore not simply a passive instrument of other political powers; to certain extent, they are capable of deliberating about, and transforming their situations by strategically interpreting the law, even though their behaviors are still embedded in particular historical and power contexts (c.f. Smith 1992). This study illustrates the complexity of judicial decision-making process in contemporary China in which elements of law, power and politics are mixed. Judicial behaviors and decisions, including whether to expand their jurisdiction or not, cannot be adequately explained or assessed in the absence of fairly thick descriptions and understanding of the legal arguments, political constraints, and strategic maneuvers open to the courts at their own context (c.f. Keck 2004).

The rest of the article will first introduce the type of disputes—the Married out Women (wajianu, “MOW” hereinafter) disputes. They have a very widespread existence and constitute a major category of new disputes rejected by the courts across the country.⁵ Then the article proposes two plausible hypotheses on why the courts

⁵ These disputes at least exist in Shaanxi, Zhejiang, Hunan, Hebei Provinces. See “Local States have Their Own Ways to Protect the Land Rights of Rural Women”, 3 *Zhongguo gaige* [China Reform], 2003.

refused to take them. One is the institutional or legal barrier; the other is the institutional interests of the courts. The article proceeds by introducing later developments of the courts' positions. The developments will be employed to test the hypotheses in a quasi time series analysis (Box & Jenkins 1976). Subsequent analyses suggest that the second hypothesis seems to offer a more plausible explanation.

The “MOW” Disputes

“MOW” refer to peasant women who are married to someone outside their original villages but still keep their household registration (*hukou*) in their own villages.⁶ The issue of the disputes is whether “MOW” are eligible for sharing compensations, dividends and relevant benefits of their original villages. These disputes have occurred against the backdrop of the urbanization process of rural China, when the rural lands have been transformed into urban lands by state requisition or commercial leases. Legal speaking, the ownership of the lands still belonged to village collectives, although the land use right might have been allocated to individual households under the land reform scheme implemented in the early 1980s. Consequently, when rural lands are requisitioned or let, the state or enterprises which acquire the lands usually compensate village collectives as a whole. Of course individual peasants are supposed to get the compensation from the village collective later on, but how to divide the compensations,

⁶ Under the *hukou* system, people are officially designated either an urban or rural *hukou* according to where they were born. People with a rural *hukou* are usually permanently tied to the village they were born in, and they are entitled to have a portion of land in their village but not entitled to access the shelter, medical care, and transportation services outside their village. People may change their *hukou* status or more their *hukou* to another place through marriage, job, and higher education. But recently the market force has significantly loosened the rigidity of the system. See, China Quarterly.

dividends or benefits, and particularly whether “MOW” shall have a bite have become a controversial issue. Since the ownership of the lands collectively belongs to the village, the benefits or compensations shall also be shared by those who belong to the village collective. So the key question is whether “MOW” are still part of the village collective. One seemingly acceptable standard is where their *hukou* remain registered in the village. But using *hukou* as the sole criterion could lead to numerous unfair consequences because there are different types of “MOW.”

In a legal sense, “MOW” cover 1) women who do not or cannot move their *hukou* out after being married to other villages, urban areas, or overseas; 2) women who move their *hukou* to the village they are married to from their original village; 3) women who were married outside their original village but move their *hukou* back to the village because they are divorced or widowed; 4) women who are not allowed to move their *hukou* into the village that they are married to unless they agree not to enjoy any benefit of the village; 5) children of these women, including those from previous marriages, illegitimate children or children who are born without permission according to the birth control policy; 7) men married into the wives’ households(Sun et al 2004, at 27. Some survey suggests that all these “MOW” amounted to a bit more than one percent of the total population in Guangdong province where the urbanization process is under way. They were married outside their original villages, but for various reasons, their legal statuses—*hukou*—are not located at the place of their households.

To make things more complicated, according to the Organic Law of Villagers’ Committees (“the Village Organic Law”), it is the villager members meeting which shall, based on the majority rule, make the final decision on important issues such as this.

While the Law also states that the decisions shall not be contradictory to the Constitution and other laws, simply because most villagers will not regard “MOW” as their fellow villagers, the decisions made by the villager members meeting usually exclude the “MOW” for any benefits. Most villagers are of the view that “MOW” are water splashed out, an idea engrained in China’s history and culture. According to them, after getting married, the women become the member of their husbands’ households, and they hence have no substantive relationship with their original households on the mother side. As a result, even if many “MOW” have their *hukou* registered in the village, they still are not regarded as a village member by their fellow villagers. But a more direct reason for such decision is that additional persons to share a given lump sum of benefits will inevitably reduce the share of the benefits. Since “MOW” and their family members make up merely one percent of the villagers, they definitely have no way to turn this majority vote around.

But most “MOW” still believe they deserve equal treatments for the benefits and compensations in their original village, basically for two reasons. For one thing, the decisions of the villager members meeting shall not violate other laws. And numerous laws, including the Constitution and the Women’s Rights Protection Law clearly stipulate that women shall also have equal rights in the lands of rural collective according to the principle of gender equality, even though these general laws never mention the benefits and compensations of the lands.

Secondly, even though no detailed legal regulations specifying the issue, the benefits and obligations should be equally correspondent to each other, according to a principle of General Principle of Civil Law. “MOW” had contributed to the village

collective, and when the compensations from the lands are distributed, they shall also get a share. In the earlier stage of the reform, villagers were reluctant to work on the lands because yields from agricultural cultivation were little. In fact, cultivating lands at that moment meant an obligation and also a contribution to the village collective. Many “MOW” assumed the obligation then, so they should also have a share of the benefits generated from the lands. Indeed, some of them are required by the village collective to fulfill current obligations as a villager member, such as the military service and irrigation maintenance. Places of *hukou*, their households, or their abode, at least, should not be the sole standard.

As a result, indignant to their village collectives’ decisions which either deny or cut their compensations and benefits, many “MOW” have sought remedies from the Party committees, the governments, the women’s right protection committees, and the courts. Overwhelmed by their grievance, all these authorities urged the courts, the formal dispute resolution institution, to solve the disputes. Some “MOW” have tried to file lawsuits against their village collective since the late 1990s. Their main cause of action was a civil one, that is, the villager members meeting’s decision violated the principle of gender equality, and their property right was infringed. When these disputes reached the courts, they have bluntly refused to take them, despite the pressure or the expectation of all relevant parties that they shall offer a solution.

Hypotheses

What is the real reason behind this unusual behavior which is obviously contradictory to the power expansion assumption and also cannot be explained away by the political

control theory? Since there is a huge amount of political pressure that the courts shall take the disputes, the courts must have had some arguments to resist such pressure. A very plausible argument seems to be a legal one, in which the courts argue that there are legal barriers for the courts to take the disputes. To capture this possibility, we hypothesize that in the “MOW” disputes:

Hypothesis 1. According to relevant laws, the courts are not allowed to take the disputes. To make the hypothesis more specific, we have three sub-hypotheses.

Hypothesis 1A. According to relevant procedural laws, there is procedural difficulty for the courts to take the disputes;

Hypothesis 1B. According to relevant laws, the courts are not authorized to take the disputes;

Hypothesis 1C. According to relevant substantive laws, there are no clear regulations on this issue, or relevant regulations are contradictory. The courts have no laws to apply or no consistent laws to apply, so they cannot take the disputes.

A variation of Hypothesis 1A is indeed cited in some of the courts’ rejection letters: these disputes belong to neither civil litigation nor administrative litigation, and to accept them has no legal basis from the procedural laws. Under China’s procedural framework, there are three major litigation procedures—civil, administrative and criminal. Non-criminal disputes could only be handled by either the civil or administrative litigation procedure. While civil litigation handles disputes between parties with equal legal statuses, administrative litigation deals with disputes affected by concrete administrative behaviors. The courts could argue and indeed argued that the “MOW” disputes occur between the village collective and individual village members, but the village collective

is not equal to individual “MOW” in legal status. The village collective, the courts claimed, does not belong to regular civil parties because the collective also serves the administrative functions of managing the communities and maintaining the community order. It therefore becomes the administrator of individual “MOW.” This unequal status hence blocks the way to civil litigation. But on the other hand, there is no way to take the disputes as administrative litigation. According to the current administrative framework in China, the township government is the lowest administrative level. The village collective is not regarded as an administrative institution or an administrative agent, and it is impossible for the courts to review a decision of non-administrative institutions through administrative litigation.

Hypothesis 1B was also cited in some judgments dismissing the disputes. The courts argued that they do not have the authority to review the decision of the villager members meeting. As long as the decision that deprives the benefits of “MOW” is reached in compliance with the procedural requirement specified in the Village Organic Law, the courts have no authority to intervene. Of course “MOW” have argued that the decisions of the village collectives shall not violate the fundamental policies and constitutional principles of the country, which are also well written in the Village Organic Law. But in China’s legal structure, there are no laws explicitly authorizing the courts to review village collective’s decision. And they cannot do that simply because the decision violates the some general and vague legal principles. If the courts take such disputes and offer remedies for the “MOW,” then they might usurp the decision making power of the village collective.

Hypothesis 1C seems plausible in continental legal systems such as China's. Under such system, the courts do not have any legislative power and all they are supposed to do is to royally apply the written legal regulations. If there are no clear regulations on this issue, or relevant regulations are contradictory, the courts would have nowhere to turn to. And there is such problem on the issue. For example, the laws regulating this area are both incomplete and inconsistent. A fundamental conflict exists between laws protecting women's interests and the democratic decisions of village collectives. On one hand, that women's property deserves the same protection as that of men is well implied by the principle of gender equality stipulated in the Constitution and the Women's Rights Protection Law. Article 30 of Women's Rights Protection Law stipulates that "women and men in rural areas enjoy equal rights in agricultural lands and homestead lands allocation." "Women's agricultural lands and homestead lands should still be protected after marriage or divorce." But on the other hand, the Village Organic Law also specifies that it is the autonomous right of the village to make decisions on its internal affairs and the township governments shall not interfere. While the Law mentions that the decision made by the village collective shall not violate other laws, the Law does not mention how to redress the situation when such violation occurs.

More conflicts can be found among several local legal regulations. For example, Article 12 of "Guangdong Implementing Measures of 'Women's Rights Protection Law'" issued by the Standing Committee of Guangdong People's Congress (Guangdong Measures) states: "married women and their legitimate children, as long as their *places of abode and hukou* remain in their own village...shall be protected by the law (emphases added). They enjoy the same rights as other villagers in terms of agricultural and

homestead lands allocation, and dividend distribution; if the previous article is violated, the township governments shall order it be redressed. This Article explicitly specifies the places of abode and *hukou* as two preconditions in enjoying the dividends and other benefits. Most importantly, it also mentions that it is the township government's responsibility to remove the cause of infringement.⁷ But on the other hand, Article 8 of Several Stipulations of Women Rights Protection of Guangzhou Municipality (Guangzhou Stipulations), also issued by the Standing Committee of Guangdong People's Congress,⁸ states: "for those peasant women who are married to urban *hukou* holders but cannot have their own *hukou* moved out of the village, if they still *live and work* in the village, relevant parties cannot take away their agricultural lands and dividends. Their children shall also be equally treated (emphases added)." This Article however specifies the preconditions in enjoying the benefits simply as *hukou* plus places of living and working, without specifically requiring the place of abode. Nor does the article mention which authority shall be responsible for redressing the issue if the rights of "MOW" are infringed.

More importantly, there are also inconsistencies between upper-level laws and lower-level legal regulations. For instance, when the Women's Rights Protection Law specifies the principle of gender in protecting women's rights, it does not set any preconditions. But when the principle has been restated in the local regulations which are intended to implement the Women's Rights Protection Law, different preconditions have been added with little justification. Some of the preconditions are clearly unfair and unreasonable. For example, the "places of abode and *hukou*," as specified by Guangdong

⁷ Article 12 of Guangdong Measures.

⁸ According to China's Legislative Law (Lifafa), laws issued by institutions at the same hierarchical level shall have the same degree of effectiveness.

Measures, do not make much sense to protect the interests of the “MOW.” According to the Measures, only “MOW” who keep their *hukou* in the original village and never change their place of abode can enjoy the benefits. But when their lands are requisitioned or let, many of the peasants must find other jobs in other places. They thus have little economic reason to stay in the village. It is extremely unfair to deprive of their benefits simply because they have lived in another place or have their rural *hukou* removed.

The above introduce how we come to one hypothesis based on legal or institutional barriers. But another hypothesis may come from institutional interests. Although there is an opportunity for the courts to enhance their influence and expand their jurisdiction, the courts nonetheless do not take it. One plausible explanation is that this is not the right place to expand, or, in their local contexts, taking the disputes would actually bring the courts more troubles than benefits. Here, these troubles and benefits are not simply limited to economic costs or benefits. They shall also include political rewards or punishments. From this perspective, there are several factors which would have played a role in the courts’ decision. First of all, there are a lot of potential disputes in this regard and the courts would be overwhelmed by all these disputes if they agree to take them. As mentioned, “MOW” constitute more than one percent of the total pollution in Guangdong, and this number is daunting if a high percent of them file a lawsuit to the courts. For example, a district of Guangzhou has more than 8,000 “MOW,” and the number would be as high as 19,000 if their children are included. As most village collectives refuse to offer “MOW” benefits, potentially most of these “MOW” have a case to file. If the courts directly open the floodgate of litigation, they would be barely capable of dealing with so many disputes. Secondly, the disputes of “MOW” arise from

various causes, which may not be sorted out by a clear principle once and for all. The decisions of village collectives also vary across the villages in detail, for instance, the timing of moving out, the marital situation, the legal status of the children, and so on. If the courts take the disputes, they have to examine the situation on a case by case basis. As a result, they have to go through an extremely long and grueling process of hearing. Moreover, a large amount of village assets had already been divided, and it is very difficult, if not impossible, to recall these benefits from individual villagers. With the limited number of court sheriffs, which are supposed mostly to deal with criminal suspects and economic judgment enforcement, the courts hardly have extra capability to take this rather minor amount of money from individual villagers. At least it is impossible for the courts to monitor each time the members meeting distributing village benefits. Furthermore, the courts which are plagued by a huge amount of “MOW” disputes are generally located in coastal regions. Usually they already have a very high level of caseloads in their docket, and they have little economic or political incentive to take more cases (He 2006).

Secondly, the courts may not be able to deliver a reasonable but enforceable judgment to the “MOW.” If the courts hold that the decisions of the village have violated relevant laws, and subsequently offer a specific remedy to the “MOW,” it is likely that the village collective would resist and refuse to enforce such judgment. From the perspective of village heads, they have little incentive to listen to the courts. They are elected by village members and have no direct relationship with the judicial system. But these village heads have every reason to act on behalf of the majority of their fellow villagers. This is because without the support the major villagers, the village heads may

not even keep their positions. They are not controlled by the courts' rulings, but they are elected and monitored by their fellow village members. As far as this kind of disputes is concerned, most villagers believe that the benefits partition is an internal affair with which the outsiders like the courts have no right to interfere. Many villagers would not choose a village head who agrees to share the benefits with "MOW." In a word, it is possible that village heads would not implement favorable judgments to "MOW." After all, whether they cooperate with the courts or not would not affect their lives or career.

With a court judgment delivering no meaningful benefits, the "MOW" are very likely to appeal to higher authorities, claiming that the courts only offer "blank checks." Then the courts, after doing a lot of work, will again be blamed by these authorities for not really solving the disputes.

But if the courts disregard relevant laws and hold against the "MOW," they potentially act against the spirit of the principle of gender in the Constitution and Women's Rights Protection Law, further downgrading the social and family status of those rural women who already lost their lands, causing extremely unfair grievance to them. Similarly, the "MOW" are very likely to appeal the judgment to upper-level courts. Alternatively, they may take the judgment through the petitioning system, and claim that the courts have misapply the laws. At the end of the day, in both situations, the courts would once again become the direct complaining and blaming target, and it is very likely upper-level authorities will blame and criticize the courts for mishandling the disputes in delivering such judgments.

In a word, if the courts find themselves caught in a dilemma by taking the disputes, then a better strategy is not to take them. We thus hypothesize:

Hypothesis 2. The courts, by taking the disputes, would bring themselves more troubles than benefits.

Later Developments

It is true that the courts have given some explanations in their judgments. But in examining the rationale of institutional behaviors, we shall always look at what they did than what they said (Schumpeter 1950). I thus have traced the developments of the issue and see how the courts' positions and behaviors have evolved. I tend to use the different positions of the courts to test the hypotheses.

Although the “MOW” disputes were rejected by the courts, the pressure that the courts shall figure out a way out to has not receded. Some “MOW” continued to employ the petitioning, sit-in, and even public demonstration to have their voice heard. Partly due to the pressure exerted from all relevant parties, the Guangdong Higher Court sought internal instructions from the Supreme People's Court. In a response to this inquiry, the Research Department of the SPC issued an opinion in July 9, 2001, which states that the courts shall take the disputes as civil litigation because they are between two entities with equal legal status.⁹ But in August 19, 2002, in response to a similar request from the Zhejiang Higher Court, the Case Filing Department of the SPC issued another opinion. It provides that the disputes arising from the partition of land compensation between the

⁹ The Opinion of Research Department of the SPC, on July 9, 2001.

collective and its members are not civil disputes and the courts shall not take them as civil cases.

In light of these conflicting opinions from the SPC, which have only quasi effectiveness of law, many basic or trial courts in Guangdong province accepted a bunch of “MOW” cases. A district court in Zhuhai municipality in 2002 indeed awarded judgments in favor of “MOW.”¹⁰ This was regarded as the first instance in which “MOW” won through civil litigation and thus drew a national attention. Inspired by this court decision, many “MOW” urged other courts to take the disputes as civil litigation. Nonetheless, after careful deliberation, most basic courts dismissed these cases, even though some cases had already been initially accepted.¹¹ The reasons this time did not differ much from what the courts had claimed before the two opinions from the SPC.

A typical judgment of a district court of Guangzhou succinctly states:

“The distribution of benefits of rural collectives is the internal affairs of the rural collectives and they have the final say on the issue. The disputes arising from the distribution do not belong to civil disputes. As to whether the “MOW” are entitled to the benefits, it is a question related to the constitutional principles and national policies such as the equality of gender. This shall not be adjudicated by the court with the theory or spirit of the civil law.” (Civil Adjudication Judgment 2003: No 1467).

¹⁰ Southern Metropolitan Daily, “Collective Dividends Remained after Being Married,” Aug. 29, 2002, Section A19; see also, <http://www.cctv.com/program/lawtoday/20030826/100522.shtml> (visited on Mar. 26, 2006).

¹¹ Panyu district court in Guangzhou alone dismissed 213 of such cases in 2003.

This judgment basically sent out two messages: the disputes do not belong to civil disputes, and the court is not authorized to review the issue through the civil law because the issue by nature is constitutional.

It was in 2004 that the Guangdong High Court, after long debates inside and outside the court system, suggested a tentative solution to the “MOW” disputes.¹² “MOW” shall first request the township government to address their complaints. And the township government shall then make an administrative decision on the issue. If the “MOW” believe the decision made by the township government is unfair, they then shall go the upper level government—the district government—for administrative reconsideration. As to the decision of administrative reconsideration, they may file litigation in the court in the form of administrative litigation. The solution thus includes three steps: the intervening of the township government, administrative reconsideration, and administrative litigation.¹³ In this process, if the township government refuses to intervene, the “MOW” can also file administrative litigation on this very cause. This three-step solution was indirectly confirmed by another opinion issued by the SPC in 2005, which confirmed the opinion of the Case Filing Department in 2002 and nullified the previous opinion of the Research Department of SPC in 2001.¹⁴

¹² “Guangdong High Court: ‘MOW’ Have New Way of Protecting Rights,” April 5, 2004, Economic News Section, *Guangzhou Daily*.

¹³ Indeed the second step does not have sound legal basis because according to the Administrative Litigation Law, the plaintiff can directly file the lawsuit. But in this issue, to suggest the plaintiff to go through administrative reconsideration first suits the interests of both the courts and the governments. For the courts, administrative reconsideration can further filter out more cases of the courts. For the governments, they have one more chance to review the decision internally and thus may avoid judicial scrutiny. Therefore the second step may simply be a result of these forces. But in reality, not all “MOW” followed this instruction; some of them filed administrative litigation immediately after the township government had made a decision.

¹⁴ The Opinion of the SPC on Adjudicating Rural Contracted Land Disputes, on July 29, 2005. Although it does not explicitly mention how to solve the disputes, it is of the opinion that the disputes cannot be taken as civil disputes. In a way, it confirms the opinion of the Case Filing Department and nullifies the opinion of the Research Department of the SPC.

The courts thus have in this way narrowly opened the gate to disenfranchised “MOW.” In Panyu district court of Guangzhou municipality, it received a total of 88 of this kind of administrative litigation in 2005. The different results of the disputes are shown in the Table 1. An analysis of these judgments finds several points which would be useful for testing our hypotheses.

Table 1: “MOW” Administrative Cases Received by the Panyu District Court, Guangzhou, Guangdong Province in 2005.

Cases Received (Total)	Cases Closed	Administrative Decision upheld	Administrative Decision Revoked	Requesting the Township Government to Perform Duty	Cases Dismissed	Cases Withdrawn
88	81	17	31	12	8	13

Source: “Nongchun ‘waijianu’ wengti de sifa yanjiu [Judicial Research on Rural ‘MOW’]”(Zhang 2006).

First, the judgments, when relevant, all held that it was the responsibility of the township government to step in and redress the issue, which means the township government of course has the authority for so doing. Some judgments explicitly cited the Article in Guangdong Measures which briefly mention the responsibility.¹⁵ Some also cited the Organic Law of Local Governments and Congresses which only vague mentions that the township government shall protect the collective assets and maintain social order at the village level.¹⁶ In cases that the township government failed to make a decision

¹⁵ See supra note 7.

¹⁶ Art. 61, section 3 and 6 states, “It is the duty of the township governments to protect the collective assets and state-owned assets, to protect private assets, to maintain social order, to protect the personal democratic and other rights of citizens, so to protect women’s rights in labor, marriage and other rights specified in the

after being requested by the “MOW” or the village collective, the court held that the behavior of the government constituted administrative idleness, an improper administrative behavior in administrative law, and the government had to make a decision. But the judgments did not even mention that the township government’s intervening would potentially contradict the Village Organic Law and especially, infringe the autonomy of the village. It seems that the township government’s intervening has been taken for granted by the courts.

Second, the court consistently applied the so-called two places principle—the places of *hukou* and abode as the precondition for benefits—in relevant cases. That is, it simply applied the Article in Guangdong Measures but gave no explanation on why other regulations, such as Guangzhou Stipulations were not applicable. As to the obvious inconsistency between the two places principle and the higher-level laws which seem to imply that women deserve the benefits without any preconditions, the governments, as the defendant, responded that Guangdong Measures were an effective local regulation and thus could be applied. It is a bit odd that the court did not even discuss this important issue. It seems that despite all the potential conflicts among the laws, as discussed above, the court has reached a consensus with the governments. They all selectively applied those detailed and concrete regulations of Guangdong Measures. And the general principles stipulated in upper-level laws did not have much effect in the judgments.

As a result, only those “MOW” and their children whose *hukou* and abiding places remained unchanged got the benefits. If they happened to move to another town to live for whatever reasons, they lost the benefits. Needless to say, to rigidly apply this so-

constitutions and laws. From these sections, it is hard to conclude that the township governments have the authority to intervene the “MOW” issue.

called two places principle has caused many unfair situations. A divorced woman, for example, did not get the benefits because her original house had been demolished by government and physically had no place to stay in the village. A boy of a married out woman did not get the benefit simply because he went to school in another town and did not live inside the village. All these decisions seem extremely unfair in contrast to all the men and their children who live outside the village but still get the benefits. Moreover, these judgments, in applying the two places principle, have also affected relevant “MOW”’s choices, often with ridiculous consequences. A married out woman, for instance, in order to keep the benefits, had to give up a job in city because it was impossible for her to live in the village and commute to work.

Third, the court did not always support the decision of the governments. Indeed, among all the 81 cases closed in 2005, only 17, or 21 percent of administrative decisions were upheld and 8 cases were dismissed. Other than these, the plaintiffs in the rest 56 cases gained one thing or two. This result once again suggests that the courts are not a rubber stamp in China’s administrative litigation (Peerenboom 2002). While the court did not have any problem with the government’s application of the two places principle, it revoked or remanded many governments’ decisions on the basis that the evidence or the fact was not clear. Indeed, this part of work was most time and energy consuming in making the administrative decisions. To ascertain the place of abode of “MOW,” for example, the township governments had to go down to the village and gathered firsthand evidence from the “MOW” and their neighbors. To ascertain how much benefits had been distributed, the township government also had to seek the cooperation of the village

collectives. It is understandable that the court found many mistakes in these administrative decisions.

Somehow to my surprises, the enforcement of these judgments did not surface as a big problem. The township and even the district governments have been cooperative in implementing the judgments. Even when the governments' decisions were revoked and the decisions were favorable to the "MOW," the governments have successfully implemented the decisions. In cases that those decisions were resisted by the village collective, the governments have sent special delegates to the village and persuaded the villagers to accept the judgments.

Analyses

The developments of the issue and the changed positions of the courts offer a precious opportunity to assess the hypotheses of why the courts did not take the disputes as civil litigation. They are precious in that two important conditions have remained largely unchanged. The first is the pressure from various sides that the courts shall offer a solution to the disputes. The second is that the relevant legal framework has not been changed.¹⁷ This section will draw on the above developments and test which hypotheses make more sense.

As to Hypothesis 1A—the procedural difficulty, the later developments suggest that it was a serious concern, but not, at least not a decisive reason behind the courts'

¹⁷ In December 2005, the Women's Rights Protection Law was revised and took into effect. The revised law explicitly stipulates that women shall be treated equally in the division of benefits in rural village collectives. This article arguably invalidates the two places principle. But the courts in Guangdong still contend that the Guangdong Measures have not been abolished. As a result, the courts' position so far has basically remained unchanged.

decision. That the Guangdong and Zhejiang Higher Courts took the issue all the way up to the SPC, seeking instructions, suggests that the courts at least hoped to obtain a feasible solution from the SPC. And at least in administrative litigation, the procedural difficulty has been solved. As mentioned, it is impossible to directly take the disputes as administrative litigation because the village collective is not part of the administrative apparatus in China. But after the township government has stepped in and made a decision, the decision made by the government falls well into the scope of administrative litigation.

But the procedural difficulty cannot explain away why the courts were unwilling to take the disputes as civil litigation. Since civil and administrative litigation are not mutual exclusive, allowing “MOW” to file administrative litigation shall not exclude their right to file civil litigation as an alternative. Indeed, since civil litigation is an immediate and direct channel to access the courts, most “MOW” prefer this avenue. Moreover, the unequal legal status argument shall not have constituted an insurmountable legal obstacle. It is true that village collectives bear the responsibility of administering the business of the village. But this does not mean that all the decisions made by the village collective are administrative. Many of its activities are indeed business transactions and management. To divide the assets of the collective, arguably, has more to do with business management and transactions than with administrative responsibilities. The unequal legal status is thus at most a controversial argument in procedure, and that is why the SPC Research Department was once of the opinion that the disputes can be taken as civil litigation. While strictly speaking, the opinion of the Research Department is not regarded as law, it is a common practice that lower-level

courts could apply such opinions in their judgments. Arguably, this opinion once cleared the obstacle of the procedural difficulty. In fact, the district court in Zhuhai Municipality did take the cases as civil litigation. In other words, as long as the courts are willing to take the disputes in this way, they can at least make a good case. The controversial nature of the problem shall not have prevented the courts from so doing. But the developments indicated that even if the difficulty could be and was once cleared, most courts still dismissed the civil cases, even though they were accepted in the first place, and the courts as a whole eventually refused to take the disputes as civil litigation. It seems that the courts must have had more considerations beyond the procedural difficulty.

As for Hypothesis 1B—the courts were not authorized to review the issue, the later developments suggest that this is also a serious concern for the courts, because they would not take the issue when there was no clear authority from the law. The developments would not allow us to assert whether this was the reason behind the courts' decision. After all, no law has clearly authorized the courts to directly review the issue, and without such change, we do not have a chance to see whether a lack of legal authority was the real reason. But the later developments do suggest that in the administrative litigation, the courts have avoided such lack of legal authority. They have been willing to take the disputes after the intervening of the township government: the Administrative Litigation Law clearly stipulates that the courts can review concrete administrative behaviors. In this way, the courts do not have to confront the question whether they themselves are authorized to review the decision of the village collective. Instead, the authority problem has been pushed to the administrative power.

What seems odd is that the court judgments did not discuss whether the township government is authorized to review the decision of the village collective. The courts indeed might not have the authority to review the decision of the village collective. But this does not mean that the township government is in any better position to intervene. According to the Village Organic Law, nor does the township government have solid authority on this matter, let alone to make the decision for the village collective.¹⁸ Indeed, the Law clearly specifies that the township government shall not to interfere with internal affairs legitimately under villagers' scope of autonomy.

The courts nonetheless did not even consider and discuss this problem in their administrative judgments. As shown, they were simply of the opinion that it is the responsibility of the township government to make sure that the decisions of the village collective are in conformity with law. They did cite that Guangdong Measures which mention that the township government shall require the village collective to make changes if the village collective has violated law. But in legal authority, Guangdong Measure, issued by the Guangdong People's Congress, are far below the Village Organic Law, which is passed by the National People's Congress. If the courts took the authority problem seriously, they shall at least not apply Guangdong Measures. The silence on this important issue really looks odd in an age when the state has tried to broaden the scope of the democracy and autonomy at the grassroots level.

On the other hand, if the courts are willing to expand their influence in this area, the argument that the disputes are constitutional and thus cannot be tried by civil laws shall not have been a real obstacle. It is true that there are some public elements in the disputes, but the majority or the most of the disputes are still civil in nature. There has

¹⁸ Article_ of the law.

never existed such clear line between the public and private in China's legal practice, given the mixed nature of assets in a transition economy. When the district in Zhuhai Municipality took and adjudicated the disputes, this problem did not bother the court. The courts can simply use the principle in the civil law to solve the disputes. But in this issue, when the courts are not clearly authorized, they were hesitant to expand their jurisdiction, not to mention aggressively grabbing more power.

With regard to Hypothesis 1C—the courts did not take the disputes because the substantive laws on the issue are unavailable or contradictory—the later developments largely indicate that it cannot stand on itself. After the courts agree to take the disputes in administrative litigation, they still have to face, or they cannot avoid the contradictory substantive laws. If that was the true reason, it would be hard to explain why they took the disputes in administrative litigation later. As shown in the judgments, the governments have followed the principle of two places in making the decision. But as argued before, this principle itself has legal basis only in a local legal regulation and the principle is contradictory with the principle of gender equality and labor mobility in a market economy. And according to the Administrative Litigation Law in China, the courts in administrative litigation shall review the legality of concrete administrative behaviors.¹⁹ In other words, whether to apply this two places principle itself in the government's decision is still a question of legality and this question remains unclear in the substantive laws. But in their administrative judgments, this concern did not bother the courts. As shown in some judgments, they simply applied the Organic Law of Local Governments and Congresses, which only vaguely states that the township government shall protect the property of the village collective. In fact, it is really hard to see how this

¹⁹ Art. 5 of the ALL.

is relevant in the disputes. In another working report prepared by one of the basic courts, it argued that because the village collective shall register their village rules to the township government, the latter shall supervise and examine the legality of the rules.²⁰ But such interpretation of the word “register” is clear beyond any reasonable understanding in Chinese language.

Indeed, legal provisions—no matter whether in the common law system relying on precedents or in the continental law system relying on written statutes—would never be able to cover all possible kinds of disputes generated in the complicated social activities. Strictly speaking, legal provisions can never be absolutely perfect, and additional legislation and improvement of legal system cannot eliminate all legal loopholes. The role and the function of the courts are to handle disputes and the courts should always follow certain principles to handle new problems. In the continental system, the general principles, especially those in extremely vague wordings, such as fairness, goodwill, social ethics, etc. shall serve this function. Hard cases, as well as incompleteness of legal provisions should not constitute a sound basis for the courts to keep these disputes out of their doors (Hart 1961; Dworkin 1977).²¹ What seems odd is that in these cases, the courts only selectively apply some detailed articles in some lower-level laws, despite or ignore other principles which, legally speaking, should have overruled the local legal regulations.

Hypothesis 2—the courts did not take the disputes because taking them would bring themselves more troubles than benefits—is very much confirmed by the later developments. That is, when taking the disputes becomes less troublesome and actually

²⁰ Art. _ of the law.

²¹ Of course there are some disputes which would not be taken by courts. For instance, the courts in US will not take political disputes, but the MOW disputes can hardly fit into that category.

enhances the benefits of the courts as an institution, the courts are willing to take them. In the first place, the concern that “MOW” disputes are too complicated, too time and energy consuming, is well addressed when the disputes are taken as administrative litigation. Under the current solution, the most detailed and onerous part of handling the “MOW” disputes has been shifted to the township and district governments. It is now the responsibility of the governments to hear all the disputes at the grassroots level, but the courts will only review the disputes after they have gone through the governmental intervening process, and sometimes, administrative reconsideration. In this way, the courts have established a filtering process through the governments. That is, only after the “MOW” have gone through the administrative procedures can they reach the gate of the courts. In the process of governmental intervening and administrative reconsideration, most cases will be settled and thus filtered out of the court system (He 2005). Moreover, because this filtering procedure is complicated, expensive, lengthy and fragmented, and also because some “MOW” believe that bringing government to court is nothing more than hitting a stone with an egg (Finder 1992; Pei, 1997; O’Brien & Li 2004; Hung 2005), they would not even initiate such proceedings. As a result, the cases that the courts receive will be significantly fewer than the actual disputes existing in society (Felstiner et al 1981). The numbers of “MOW” cases that a district court of Guangzhou received, to a large extent, confirm this point. In 2005, all the administrative cases that the court received were only 88, despite 19,000 people of the district who potentially have a “MOW” dispute. But in three months of 2003, when the court agreed to take the disputes in civil litigation, it already received 213 cases (Zhang 2006). In other words, the courts have successfully controlled the numbers of the cases at a

manageable level. Of course, numerous complaints of “MOW” remain unaddressed.²² But this does not seem to be a primary concern of the courts.

Even for those cases that eventually reach the courts, the most onerous and laborious part of hearing, including the evidence gathering, particularly the interviews with villagers, now becomes the responsibility of the governments. The courts would basically review the paperwork which has become less burdensome. If the evidence and fact are clear, the courts would make a judgment. Otherwise they would simply remand the cases back to the governments. The courts have hence pushed away the most troublesome and thorny part of the disputes but taken the part which is much easier to handle. Indeed, this is not such a bad strategy: the governments have to work on the difficult part of the job, but the courts still retain the authority to supervise the governments.

The concern—to take as fewer troublesome cases as possible such as the “MOW” disputes—also helps explain why the courts have wholeheartedly embraced the so-called two places principle, even though the “principle” is only briefly mentioned by a local legal regulation, and the “principle” has indeed violated some real principles of upper-level laws. As shown in the judgments, all these real principles are either ignored or simply dismissed. One possible reason for so doing is that the two places principle might be the strictest restriction for those “MOW” to get the dividends. In their consistent application of the two places principle, the courts may simply want to set a clear standard to deter potential “MOW” disputants. Its application would prevent a large proportion of the “MOW” to file a lawsuit to the courts. On the other hand, the judgments awarded

²² See an interview on Lu Yuan, an expert in providing legal aid to the MOW, in http://www.ccrs.org.cn/article_view.asp?ID=1779. (Last visited Mar. 27, 2006).

according to this principle would encounter the least resistance from the majority of villagers. Through applying this so-called principle, the courts will solve the easiest part of the disputes, and keep all the other disputes away. At this point, it seems that the courts have much in common with the governments which may also want to take as least disputes as possible. And probably that is why the courts have tacitly acted in line with the position of the governments, despite the extremely unfair consequences resulted.

The current practice also, in a large measure, helps the courts avoid the difficulty of implementing the judgments. If the disputes do not reach the courts, it is the responsibility of the governments to address the complaints. Even if the disputes reach the courts, the courts do not have to implement the detailed remedy for the “MOW.” The courts only need to confirm or reverse the administrative decisions of the governments. It is still the responsibility of the governments to implement the decisions, even though the courts, in the administrative judgments, now make the decisions for the governments. In this sense, the courts implement the decisions through the power of the governments. Moreover, from the perspective of the courts, the governments are their right target for dumping such responsibility because the governments indeed have the capability to implement the judgments. While village heads have reason not to follow the decisions of the courts, they would very likely bow to the pressure from the township governments. Although they are not state officers, they still receive some allowance from the township governments. It is true that as local elite at the grassroots level, they could hardly have any inspiration or ambition to advance in this career path. But to a certain extent, they must cooperate with the township government because from time to time, they still need support from the township government to maintain or boost their authorities in the

village. As shown, through sending delegates to the village, the township governments are able to convince the villagers and their heads to implement the judgments, by explaining the law and especially the position of the governments and the Party committees.²³

But if the courts take the disputes as civil litigation, they have to make the decisions for the village collectives and bear the responsibility of implementing such decisions. In reality, when the courts took such disputes and awarded judgments favorable to the “MOW,” they did encounter a lot of resistance from the villagers and their heads. Without any power network at the grassroots level, the courts may not even locate the whereabouts of the village heads, let alone to convene the villagers and convince them to accept court judgments (Jiang 2003: 220-46, Suli 2000). Such court judgment basically remained on the paper as a blank check.²⁴ This indicates that the enforceability of their judgments is a serious concern for the courts.

Finally, the courts, through this solution, have successfully resisted the pressure from relevant parties which expect the courts to solve the disputes. Although they only take the tip of the dispute iceberg, they claim that they have already done their part. If, for whatever reasons, their judgments cannot be implemented, they will not be blamed as offering blank checks because they have now found the governments as the “scapegoat.” Even if numerous complaints of “MOW” remained unaddressed, the courts argue that it is the governments that do not do the job. In a sense, through this argument, the governments are forced to cooperative with the courts and help implement the court judgments, regardless of whether the governments’ original decisions have been upheld

²³ Interview with an enforcement sheriff, Aug. 3, 2004.

²⁴ Interview with an enforcement sheriff, Aug. 3, 2004.

or not. In a way, the courts have successfully shifted the attention of the blaming game to the governments.

At the same time, the chance that their judgments would be appealed becomes slim for two reasons. For one thing, the overall number of the disputes they are taking is very small. For another, without bearing the responsibility in judgment enforcement, the courts can “strictly” stick to the two places principle, making sure their judgments are legally correct, as far as this principle is concerned, even though they are not reasonable. In other words, they do not have to balance the reasonableness and legality of their judgments, which often constitutes a dilemma in transitional legal systems like that of China (Suli 2000). Even if the judgments are appealed, upper-level courts are unlikely to pick out any legal mistakes.

Discussions and Implications

The previous analyses suggest that in the “MOW” disputes, the contradictory substantive laws (Hypothesis 1C) were not even a concern for the courts. Otherwise they shall not have taken the disputes in administrative litigation, and shall not have applied the so-called two places principle. The procedural difficulty (Hypothesis 1A) and lack of authority (Hypothesis 1B) were all serious concerns for the courts, but they were unlikely the reason behind the decision of the courts. They decided not to take the disputes as civil litigation anyways, despite the clearance of the procedural difficulty during certain period. There were also feasible arguments for them to overcome the problem that the courts may not be authorized to review the matter. But they did not consider so doing

and they even did not discuss a similar authority problem faced the township government. Institutional interests (Hypothesis2), however, seem to be the most consistent and convincing interpretation for the courts' behaviors. By pushing away the disputes to the governments, the courts reduced their workload, avoided the difficulty of judgment enforcement, but still retained their authority in the power relationship with the governments.

Only from this perspective can we understand the odd phenomena found in the administrative judgments. When they selectively applied the lower-level local regulations—Guangdong Measures, and particularly the two places principle—they have successfully prevented most disputes from entering the formal dispute arena, despite such application of law is directly contradictory to the spirit of upper level Laws. In this process, they seemed to have reached an implicit bargain with the governments which did not want to be bothered by these disputes. When they reviewed the administrative decisions of the governments, the courts never seriously considered whether the governments are authorized to step into the scope of the village autonomy. This is because as long as the governments were willing to deal with the disputes, the authority question becomes unimportant to the courts.

There is no doubt that the law has become extremely significant in the decision making process of China's courts. But it is significant not in the sense that they are important in solving the disputes. The procedural difficulty, for example, is more likely a cover or a pretext for the courts to strategically and pragmatically balance their capability and the pressure of the parties and authorities imposed on them. And the confusions of the substantive laws, to certain extent, have provided the courts with an opportunity to

selectively apply the part which is in favor of their institutional interests. If the ambiguity of the law has coincided with the institutional interests of the courts, it is more likely used by the courts. Otherwise it is very likely ignored. The authority problem seems to have provided an excellent example in this regard. And that is also why the courts were so reluctant to expand their jurisdiction. All these have suggested that the courts have been able to use the law to advance their institutional interests.

In this sense, we have found that the courts have formed a complicated and subtle relationship with other powers in their localities, including the governments and the Party. Although the governments and the Party have full control of the courts' personnel and budget, the courts do not always follow their instructions. The courts are not simply an instrument of the governments and the Party, and there is a lot of politics between them (Upham 2005). In this case, the Party and the governments both strongly requested the courts to directly take the disputes. Yet, the courts eventually turned them down. The law has been successfully employed as a powerful weapon for the courts to resist the pressure from other powers. Through creatively and strategically interpreting the law, it seems that the courts have carved some room under the dominance of the Party and administrative power. The courts are thus not always a passive actor, simply reacting to various external forces which had been imposed on them. The courts are not merely used by external forces and institutions as an instrument; they also aggressively use other institutions to advance their own interests. But on the other hand, the courts are far from independent in the sense that they can make decisions free of outside influence. Indeed, in order to ease the pressure, they have to rely on, and indeed, take advantage of the administrative power. They have a lot of shared interests with the governments, for

example, in repressing the disputes. Their behaviors can certainly be better understood in their subtle relationship with the governments. That is why they simply applied some local legal principles or even invented some legal principles but ignore other more important principles. That is why they took some but not all of the disputes, pushing away the difficult and thorny part. That is why they have been, generally speaking, hesitant to expand their power into these areas. All these behaviors were produced by goals and purposes that are meaningful only in relation to their special contexts (Geertz 1983; Gillman 1994).

In this sense, in examining the question of judicial independence in China, we shall not merely ask to what extent that the courts can resist the influence from other powers. We shall also ask whether the courts are capable of solving the disputes independently (He 2004). Judicial independence may not be the best option even for the courts themselves. On the other hand, the formal degree of judicial independence is often not the best index in understanding the behavior of the courts (Holland 1991; Tate 1995; Smithey & Ishiyama). Under the seemingly dominant Party and administrative power, there is a lot of room for the courts to maneuver. There is a dynamic picture of conflict, repression, compromise, and cooperation in which law, power, politics are interacting. The more important thing, perhaps, is to examine the interests and behavior of the courts in their local contexts.

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