

# ROUTINIZATION OF DIVORCE LAW PRACTICE IN CHINA: INSTITUTIONAL CONSTRAINTS' INFLUENCE ON JUDICIAL BEHAVIOUR

XIN HE \*

## ABSTRACT

Based on in-depth fieldwork investigations and extensive interviews, this article demonstrates that adjudication has replaced mediated reconciliation and become the dominant way of handling seriously contested divorce petitions in contemporary China. Specifically, for first-time petitions, judges routinely render against divorce. But for second-time petitions, they routinely render adjudicated divorce. This shift is closely linked to recent reforms in the Chinese judiciary and especially the assessment criteria imposed on courts and judges. This article thus argues that the assessment criteria and the institutional constraints of Chinese courts more generally have overwhelmingly affected, if not dictated, the decision-making process of Chinese judges.

## INTRODUCTION

Despite its relatively minor role in the legal system, divorce law practice has drawn wide attention from students of China across various disciplines. It is widely believed that divorce law practice not only exemplifies China's civil justice but also evinces the relationship between the state, the law, and the society. One theme of these studies is that the state has penetrated deeply into this rather private area of social life (Diamant, 2000; Huang, 2005; Palmer, 1996, 2007). Specifically, in his recent study renowned historian Philip Huang suggests that divorce law practice usually involves on-site investigations by judges and aggressive efforts at mediation, with a goal to reconcile the couple (2005). He further contends that mediated reconciliation remains important in contemporary Chinese civil justice (2005: 171).

While this characterization of divorce law practice as mediated reconciliation has been true during much of the history of the People's

\*Associate Professor, School of Law, City University of Hong Kong; Global Faculty, NYU Law School. Email: lwxin@cityu.edu.hk. The author wants to acknowledge Michael Dowdle who offered detailed comments on an earlier version of the article

Republic of China (PRC), it becomes problematic if taken as the case today. In the 21st century, not only have social structures been fundamentally altered but also the judiciary itself has undergone significant changes as well. Based on the author's fieldwork investigations and second-hand empirical reports, this article argues against the notion that mediated reconciliation remains significant in the divorce law practice of contemporary China. Instead, adjudication has become the dominant approach, and this shift is closely linked to recent reforms in the Chinese judiciary, especially the assessment criteria imposed on courts and judges. Under the incentive structures of 'justice' and 'efficiency', the current themes of the Chinese judiciary, Chinese judges routinely simplify the handling process of those time-consuming petitions for the sake of efficiency, as long as they are not appealed or a complaint is made, which are the official assessment criteria for justice. More specifically, for seriously contested first-time divorce petitions for which the legal rules do not provide a clear-cut legal answer, the judges routinely render against divorce. By so doing, they promptly close the cases without getting into the messiness of dividing up matrimonial property and child custody. This routine has been well established despite the judges knowing for certain that the marriage has no future and the couple will return later for a divorce. But for second-time petitions, judges routinely render adjudicated divorce to avoid potential complaints and appeals. Although they may in this way be sacrificing justice, their performance increases according to the assessment measurements, that is, an increased number of cases with lower appeal and complaint rates. In this way, the assessment criteria of Chinese courts have overwhelmingly affected, if not dictated, the decision-making process of Chinese judges.

This article seeks to deepen our understanding of judicial behaviour in China through the institutional structure in which it is embedded. Until now, students of the Chinese legal system have focused mainly on the sociological background variables of judges and have tried to link their modus operandi with their training, age, gender, and prior experience. Some argue, eg, that judges who were once military officials tend to mediate more, while those who received formal legal training in law school are more likely to render formal decisions (Jiang and Zhao, 1998). Yet these studies, based as they are on sociological background variables, appear to overlook an obvious but far more important factor: the bureaucratic environment under which Chinese judges make their decisions, and especially the incentive structure that has been implemented with the judicial reforms. Although many scholars have recognized some general problems associated with these features (Zhu Suli, 2000) and have vehemently criticized this way of administration (Ai, 2008; He, 1997), few studies have raised the question of how these factors might affect the way judges make up their minds

in deciding cases. The cumulative effects of such an oversight are, *inter alia*, the failure to realize the real picture and address relevant potential problems in civil law practice.

Part I of this article briefly introduces the structure of Chinese law on divorce. Part II demonstrates the flaws of conventional wisdom concerning today's divorce law practice and shows that adjudicated denial and adjudicated divorce have become the respective pattern for first-time and second-time contested divorce petitions. Part III illustrates the consequences of such routinization while Part IV argues that the most immediate and fundamental cause is, among other factors, the institutional constraints on the courts and the judges. Part V goes beyond divorce cases to show how broadly the institutional constraints have affected Chinese judicial behaviour. Part VI concludes with some implications of the research.

## 1. A BRIEF HISTORY OF PRC DIVORCE LAW

Throughout the history of the PRC, the most predominant legal criterion for divorce has been 'whether the emotional relationship is truly ruptured' (Ma, 2002). As this criterion is extremely elusive, the fine line of whether a divorce will be granted has varied remarkably across time owing to different political and social environments and the state's legal policies. Until the late 1980s, eg, it was extremely difficult to get a divorce. A divorcing couple had to go through a series of mediation hurdles inside their communities, including work units and neighbourhood or village committees, before they could even reach the court gate. In the courts, judges focused primarily on reconciling the marriage (Huang, 2005).

But this restrictive situation was relaxed in 1989 by the guidelines promulgated by the Supreme People's Courts (SPC), which explicitly allowed divorce under fourteen situations, thereby initiating a period of liberty in matters of divorce (SPC 1989; see also Palmer, 1996). This relaxation soon contributed to a considerable increase in the divorce rate: some reports indicate that by the late 1990s the number had reached 20% in some areas (Palmer, 2005). The 14 guidelines then suffered a backlash from many fronts: many criticized the law as too liberal, leading to unstable family relationships and rushed marriages (Yang and Qu, 2001). In response, the current Marriage Law, amended in 2000 and implemented one year later, reduced the 14 situations to five. The paramount article governing divorce now reads: '[W]hen contested divorce petitions are filed, the court shall first mediate; in the event that mediation fails to bring about a reconciliation and the emotional relationship has been ruptured, divorce shall be granted under the following situations: 1) bigamy or cohabitation with a third party; 2) domestic violence or maltreatment and desertion of family members; 3)

incurable bad habits such as gambling and drug addiction; 4) separation for more than two years because of affection discord; 5) other situations leading to the rupture of the emotional relationship'.<sup>1</sup>

This amendment has, once again, left judges with a great deal of discretion. Since it provides no detailed interpretation for the 'other situations' in section 5, the law in fact lists only four situations in which a divorce shall be granted. Many situations listed under the 1989 guidelines have been dropped, such as 'one party sentenced to prison' or 'diseases preventing sexual intercourse or having children'. Under the new law, whether these other situations have led as well to the rupture of the emotional relationship is totally subject to the judge's discretion. Even in the four listed situations, the seriousness of the problem is also to be determined by the judge. Other than domestic violence, for which the SPC provides a more detailed interpretation, there are no definitive criteria for many key words such as 'affection discord', 'desertion', or 'incurable bad habits'.

In addition to the extremely vague wording in the divorce criteria, considerable room for the judge's discretion is also provided by the mandatory mediation procedure in the amended law, perhaps the most unique aspect of Chinese marriage law and long touted as the most distinctive characteristic of Chinese civil law practice (Clarke, 1991; Cohen, 1967; Lubman, 1967; Palmer, 1996), namely, that all divorce petitions must first be mediated by a judge. Specifically, in handling divorce cases, judges are required by the law to help the couple reach a reconciliation, and even if the mediation efforts prove futile, the judge may or may not grant a divorce. As a result of these compulsory mediation procedures, a contested divorce petition may lead to one of four possible court decisions: mediated reconciliation (*tiaojie hehao*), mediated divorce (*tiaojie lihun*), adjudicated divorce (*panjue lihun*), or adjudicated no divorce (*panjue buli*).

## 2. DIVORCE LAW PRACTICE TODAY

Under this legal and policy framework, many have long believed that mediated reconciliation has been the dominant modus operandi of divorce law practice since the founding of the PRC. A typical picture is usually drawn as follows. The judge in charge first conducts several on-site investigations to determine the real reason for the divorce. Then in a ceremonial setting in which all relevant parties are present, the judge employs ideological indoctrination emphasizing family and social stability to criticize or educate the couple. The tremendous familial, community, and official pressures marshalled through the courts, together with some material inducement, make it almost impossible for the divorce petitioners to resist. More often than not,

they have to confess their ‘mistakes’ and ‘naivetés’ and reach the so-called reconciliation arranged by the courts with the other party (Huang, 2005). Some scholars believe this picture has generally continued even with the revisions of the laws and other changes both inside and outside the courts. Professor Huang asserts, eg, that ‘much of the old resistance to unilateral divorce persisted, even in the “liberal” 1990s, and mediated reconciliations, though certainly reduced, still accounted for a large number of cases, with almost as many adjudicated denials in 2000 (89,000) as in 1989 (108,000)’ (2005: 170) and that ‘in the twenty-first century, *ex parte* divorce remains difficult to obtain in China, and the pre-reform legacy of mediating reconciliation remains an important feature of Chinese civil justice’ (2005: 171).

This section of the article argues against this position. Although the picture illustrated above may be fairly accurate for the pre-reform period or the early stage of the reform, Huang has little basis for asserting that it persists into the 21st century. Indeed, all the examples Huang uses are exclusively from the pre-reform period (2005). Although Huang was told by his informant judges that the treatment of divorce cases has shifted dramatically from the pre-reform style of justice requiring on-site investigations to judging cases at court because the pre-reform model is very time consuming and thus became impractical as caseloads mounted in the 1990s, Huang simply dismisses their points as exaggerated (2005: 170). Huang also uses recent official statistics indicating large number of mediated reconciliations to support this point, but as I will show in detail below, this large number does not necessarily suggest the persistence of the pre-reform style of civil justice. Instead, it results partly from a changed baseline in adjudicated denial, ie, the actual meaning of mediated reconciliation has changed even though it still wears the original label. A closer examination of the numbers of seriously contested divorce petitions, together with fieldwork investigation of the case files and court hearings and interviews with judges, shows that adjudicated denial has replaced mediated reconciliation as the dominant way of handling seriously contested first-time divorce petitions and that adjudicated divorce has become routine for second-time petitions.

This shift can be seen first from an analysis of available statistics on first-instance petitions.<sup>2</sup> While national statistics clearly show that divorce is granted for a great majority of petitions either by mediation or by adjudication (see Table 1), many studies, including Huang’s, indicate that most of these divorces are basically effected by mutual consent. They occur usually when the couple have no serious disputes over ending the marriage itself but are simply unable to agree on the division of matrimonial property or child custody. The courts then have little choice but to grant divorce; their job is mainly to work out the specifics of each settlement. What we need to focus on instead are

seriously contested divorce petitions, which are those denied divorce by the courts (either mediated reconciliation or adjudicated denial).

It is clear that from 1989 to 2001, the period for which national statistics on the four outcomes of divorce cases are available, adjudicated denials significantly increased while mediated reconciliations remarkably decreased. As Table 1 shows, of the first-instance divorce petitions in which the plaintiffs were not granted a divorce in 1989 (159,690 arguably seriously contested divorce petitions, calculated from adding the numbers of mediated reconciliations and adjudicated denials), 78.6% were handled in the form of mediated reconciliation. But by 2001, this percentage had declined to 42.5. In a court of Guangdong province where I conducted fieldwork investigations, mediated reconciliations made up 50% of adjudicated denials in 2003. Three years later, that percentage had slumped dramatically to 26 (see Table 2). In another municipal court of south-western Hunan province, of 301 divorce cases received between 2004 and 2005, there were only four mediated reconciliations while adjudicated denials were eleven times higher at 45 (Zheng, 2006). Another empirical study found only three mediated reconciliations among 100 divorce cases completed between 2004 and 2007 in a district court (Ye, 2007). This pattern has been found in many other empirical studies of divorce cases (China Data Net, 2007; Guangdong Court Net, 2005; Jiao, 2004; Ma, 2005). Throughout the country, there have been reports that reconciling divorcing couples through mediation is difficult (see eg, Liu, 2005), and it has generally become routine for courts to render adjudicated denials for first-time divorce petitions (Shao, 2006).

My own fieldwork investigations of the court docket in the 21st century further verify this change. In the summer of 2007, I visited a district court in Guangdong province, examining their dockets, conducting interviews with judges, and sitting in court hearings. I began my investigation by randomly selecting 60 divorce cases in which the outcomes were mediated reconciliations or adjudicated denials from the docket files of the years 2004, 2005, and 2006.<sup>3</sup> After examining all these files and figuring out the normal patterns of these 'no divorce' cases, I further supplemented the data by examining 40 cases that rendered divorce decisions in these years.<sup>4</sup> These 40 cases were supposed to provide a contrast against the no-divorce cases. The examination of the court files of a basic-level court in Guangdong province found that the most significant component of the case dossiers was the hearing record. This pattern was more obvious in no-divorce cases than in cases with divorce decisions. Although there might be other evidence in the files, it was usually provided by the litigation parties instead of collected by the court itself. Sporadic investigation reports did exist, but more often than not it was the litigants who provide investigation channels and facilities in an effort

to influence the outcome of the case to their own benefit. Sometimes such investigation reports were provided by representative lawyers. In those rarely conducted investigations, as far as the dossiers show, the purpose was not to pave the way for a mediated reconciliation but to gather evidence to justify the judge's later decision, which, as will be shown, was very likely to be adjudicated denial.

For those rare cases in which on-site investigations took place, the investigation reports were very short or even summary, and many court interviewees provided no valuable information regarding the real causes for the divorce. As clearly indicated in the case files, some staff of the neighborhood committees, especially those in urban areas, had not even heard of the divorce petitions when asked by relevant judges. What they could provide at best was some general impression of the couple, eg, their romance, kids, income, and personalities. Indeed, it is not surprising that the neighbourhood committee staffs – often some retired cadres – knew little of the family disputes inside each separate apartment. It is hard to imagine that the court could in such a process determine the real reasons for divorce, which is crucial for a successful mediated reconciliation.

Table 1. Outcomes of first-instance divorce cases in China, 1989–2005

Year	Cases handled	Mediated divorce	Adjudicated divorce	Mediated reconciliation	Adjudicated denial	Others (basically voluntary withdrawal)
1988	NA	3,25,645	65,690	1,11,597	25,854	NA
1989	7,47,074	3,76,729	88,344	1,25,423	34,260	1,22,291
1990	8,09,825	3,88,459	1,10,889	1,22,764	40,203	1,47,513
1991	8,73,863	3,97,912	1,31,973	1,21,834	48,420	1,67,322
1992	8,97,771	4,02,847	1,31,567	1,28,368	53,555	1,81,434
1993	NA	4,36,479	1,37,719	1,29,536	51,631	NA
1994	NA	4,77,269	1,49,417	1,34,967	56,065	NA
1995	NA	5,16,687	1,71,018	1,40,661	65,724	NA
1996	NA	5,44,947	1,94,693	1,39,715	76,353	NA
1997	NA	5,42,762	2,15,820	1,30,449	86,856	NA
1998	NA	5,01,551	2,24,039	1,40,912	1,01,893	NA
1999	NA	4,88,536	2,35,513	1,18,999	1,06,075	NA
2000	NA	4,78,820	2,45,198	89,425	1,07,675	NA
2001	NA	4,64,153	2,58,316	80,163	1,08,490	NA
2002	10,65,519	NA	NA	NA	NA	NA
2003	1,06,0019	NA	NA	NA	NA	NA
2004	9,73,428	NA	NA	NA	NA	NA
2005	9,55,643	NA	NA	NA	NA	NA

Sources: China law yearbooks, 1988–2005; NA= not available.

Note: it is hard to speculate why relevant numbers are not available in so many years; but it is clear that since 2002, some statistical criteria have been changed due to the merge of civil and commercial cases in official statistics.

Yet this is not to suggest that judges might not accidentally come across the real reasons for divorce in this process. The point instead is that, as far as the files can tell, they generally would not purposely seek out the reasons. Nor would they make an effort to salvage the divorcing marriages. Even if they bumped into some clues, they rarely conducted a follow-up investigation to pinpoint the underlying reasons. Although they might occasionally persuade the man and woman to work on their marriage, in all the dossiers I examined there was no ceremonial setting in which various pressures could be marshalled toward mediated reconciliation. All these contrast starkly with the pre-reform picture painted by Huang in which the file was dominated by lengthy investigation reports (2005).

As far as could be told from the dossiers, most cases basically followed the procedures stipulated in the Civil Procedural Law, ie, adjudging the cases with the evidence provided by the litigation parties rather than going down to the grassroots to collect evidence. The hearing records indicate there is a procedure of judicial mediation in the adjudication process, as required by the Marriage Law. But in reality, this new type of judicial mediation differs completely from the old pre-reform style. The goal of the pre-reform style was to reconcile the parties of the marriage, and the means of reaching that goal was to determine the real reasons for divorce through an in-depth investigation and then to reconcile the couple through proper education and material inducements. But as will be shown below, the goal of this new type of judicial mediation is simply to conform to the procedural requirements of the law and to handle the cases in a way beneficial or convenient for the judges and the courts. This new type of judicial mediation nonetheless generates a large number of mediated reconciliations: a result with the same label but with totally different content.

It is difficult to know exactly how this kind of judicial mediation is conducted merely from examining the court hearing record. Indeed, most hearing records only contain a few words on this stage, basically indicating whether or not the couple has accepted such a mediation. To understand this process, I personally sat in on several hearings on the

Table 2. Outcomes of divorce cases at court P, Guangdong province, 2003–2006.

Year	Mediated divorce	Adjudicated divorce	Mediated reconciliation	Adjudicated denial
2003	406	225	48	95
2004	280	236	36	84
2005	215	217	39	97
2006	199	231	25	105

*Source:* the author's fieldwork investigation, 2007.

issue. The following is what had happened in a hearing in which the judge in charge regarded as quite representative.

The facts of the case were very straightforward: the husband filed a divorce lawsuit after one year of marriage, claiming that the wife often left for work in other cities without even informing him of her contact information. There were also some personal grudges and quarrels between the husband and wife and between the wife and other family members of the husband's side. While the facts suggested that the problems in the marriage might not be serious, the court hearing process told a different story. Each side was accompanied by 8–10 relatives who had travelled roughly 50 miles by hiring a minivan all the way from their hometown to the courthouse. The courtroom was so crowded by these relatives that a family member had to sit with the plaintiff on the specifically designed plaintiff seat. For questions raised by the judge, both the plaintiff husband and the defendant wife from time to time sought advice from their respective relatives sitting behind them. Obviously, both families were deeply involved in the marriage. Not until nearly the end of the hearing did the plaintiff finally speak the truth, about which he might have felt shy or been hesitant to indicate in the petition letter: the wife did not want to have sex with him (*fuqi shenghuo*), claiming she had diseases that prevented her from engaging in sexual intercourse. All of a sudden the courtroom grew quiet and time seemed to stand still.

Had this hearing occurred in the pre-reform period, one would expect the judge to immediately suspend the hearing process. Presumably, the judge would seek to verify the truthfulness of the claimed disease. After locating the real reason for divorce, the judge was supposed to criticize, persuade, and educate the couple in an effort to rescue the marriage.

But no such thing happened in this case. It seems that the judge did not hear the debate on this crucial issue nor did she even ask any follow-up questions. Instead, she started raising questions about the couple's matrimonial property. After both sides were given a last opportunity to add whatever they felt necessary, the judge said: 'The court discussion is now over. Now we move to the stage of court mediation. Could the defendant and your family members leave the courtroom, please?'

With only the plaintiff and his relatives present, the judge said: 'As I mentioned to you [the plaintiff] before the court hearing process, you guys got married hastily and little affection has since been established. In addition, the defendant clearly indicates that she does not want a divorce.<sup>5</sup> For this kind of situation, it is very unlikely that the court will grant divorce. I would suggest that you reconcile with the defendant or voluntarily withdraw the petition'.

The plaintiff immediately responded: 'I don't want a reconciliation; there is virtually no affection between us'.

The judge replied: 'Then I would suggest a [voluntary] withdrawal; if you insist upon a divorce and keep the process running, the result would very likely be adjudicated denial. If you withdraw, you can avoid direct confrontation with the defendant and her family. You guys are husband and wife, and in the meantime she still wants to keep the marriage. An adjudicated denial would create more conflict between you guys and the two families. Today all your family members have come; maybe all your fellow villagers would come the next time. There is no need to escalate the conflict'.

The plaintiff's elder brother then asked: 'What is the difference between voluntary withdrawal and adjudicated denial in terms of legal consequences?'

'It is the same', the judge answered. 'Both voluntary withdrawal and adjudicated denial will give you guys more time to work on the relationship. The law allows you to file another divorce petition six months later. By then the situation of this six-month observation period will be regarded as evidence for considering whether a divorce shall be granted. If the couple still have problems, then the court is very likely to grant a divorce. No marriage can be based on coercion, right? But marriage is something very serious: the court cannot hastily grant a divorce whenever a party files a divorce petition. If you agree to withdraw now, I can inform the defendant that after the court has made an effort, you guys still want to live together'.

After some discussion among family members, the plaintiff's elder sister said: 'Let's withdraw first'.

The plaintiff followed: 'I withdraw'.

Unlike the pre-reform style of practice, the judge here was not concerned with the real cause for the divorce. She had no interest in verifying the alleged disease. Nor did she want to spend time on reconciling the two parties. When after the hearing I asked her why she did not work in that direction, she responded: 'We do not have enough resources to check everything. And questions like that basically fall into the area of the couple's privacy. Most importantly, further inquiries into the question are not necessary: all I need to know is that the couple have problems in communicating with each other, and that is good enough. The seriousness of the problem can be detected from the court hearing, especially for experienced judges like me. As long as we know that the conflict between the couple and their respective families is not serious to the extent that they cannot live under the same roof, it is enough for me to handle the petition'.

All the evidence from a variety of empirical reports, the examination of case files, the observation of court hearings, and interviews with judges makes it quite clear that, in contrast to the traditional picture of

judges aggressively conducting mediation, adjudicated denial has replaced mediation reconciliation as the main modus operandi of the courts toward seriously contested first-time divorce petitions entering the 21st century.

One might then wonder: why, although their percentages have been declining, are there still a large number of mediated reconciliations? One reason might be that judges benefit from mediation: no need for enforcement, no risk of being appealed against, and even no need to write the judgments. But the above documentation and the examination of case files suggest another plausible explanation: the shift of the main modus operandi itself. When adjudicated denial replaces mediation reconciliation in seriously contested first-time divorce petitions, a certain number of mediated reconciliations are still generated. For seriously contested divorce petitions in which a reconciliation seems impossible, the mandatory mediation has become more procedural than substantive. The judges follow the standard procedures of civil litigation and inform the litigation parties of the new baseline – no divorce will be granted to see if this will make the parties accept a mediation decision, as opposed to a real mediation settlement. Although judges will not make an all-out effort to seek mediation, they have little reason not to pursue it when the opportunity arises, especially with all the benefits that mediation entails.

As the above hearing process shows, the judge clearly conveyed the court's baseline to the plaintiff – adjudicated denial – and suggested either reconciliation or voluntary withdrawal to him. She also made an effort to inform the plaintiff of the advantages of voluntary withdraw, including avoiding direct confrontation with the other party, and assured him that this choice would not affect his chances of getting a divorce 6 months later. Even though she was quite certain that this marriage was over, as she could tell from the direct confrontation between the two sides in the court hearing, she guided the plaintiff to choose voluntary withdrawal. It might be unfair to say that the judge manipulated the process; after all, she also made it clear that the plaintiff could make his own choice. But as a judge, her suggestion and explanation of the law apparently had enormous impact on the plaintiff's final decision. Although it is true that the court mediation process has become less coercive and normative, the role of the judge was far from neutral. Had she acted differently, the final result of the case could have been completely different. Although in this case the plaintiff chose voluntary withdrawal, it is hard to say that the choice came from the bottom of his heart. What he really wanted was a divorce, as he had made clear in the petition letter and the mediation process; only when the divorce became unobtainable did he accepted voluntary withdrawal, and this because it placed him one step closer to divorce. The decision was clearly made in the

shadow of adjudicated denial and was heavily affected by the judge's guidance (Mnookin and Kornhauser, 1979).

Although in this example the result was voluntary withdrawal, one could easily imagine a 'mediated reconciliation' occurring under similar circumstances: it all depends on how the judge guides the plaintiff. Under the shadow of adjudicated denial, it is likely that many petitioners are persuaded to accept so-called mediated reconciliations. This changed baseline explains in large measure why a large number of mediated reconciliations still appear in the national statistics. Indeed, while mediated reconciliations are still used in the official statistics and documents, the actual meaning of the term has significantly changed. In a word, the large number of mediated reconciliations does not necessarily suggest the persistence of the pre-reform style of civil justice. What need to be explored are the changes that have occurred beneath this label, how these changes have occurred, and what the reasons are behind such changes.

### 3. REASONS

Many factors have contributed to this baseline change. First, the changed social environment has made the pre-reform practice less feasible. Community pressure, one of the supporting pillars of the pre-reform style of divorce mediation, has become very difficult to marshal. While many family members might be involved, the village, the neighbourhood committees, and the work units where the divorcing couple live and work know little about these people's family affairs. In a time when population mobility has significantly increased and privacy has become more valued, especially in the urban and relatively developed areas, these institutions have lost much of their surveillance function. It is also a common knowledge that the bosses of companies, even under the solicitation of the courts, are reluctant to lend a hand in criticizing their staff members for not correctly handling their spousal relationship or for cheating on their spouses. After all, marriage by and large has become a private issue within the family. Work units might step in, but only when they are solicited by the couple themselves. The courts might be able to secure the support of family members in selling a mediation deal, but they have little leverage in marshalling community pressure. This is also a reason why many recent reports on divorce cases have found that it is difficult to conduct the traditional type of mediation (Jiao, 2004; Ma, 2005; Zheng, 2006).

Second, with the retreat of the state from society, the courts also lack sufficient moral authority and material resources to persuade or cajole the divorcing couple to accept their mediation arrangement. Ideological and moral indoctrination, once very effective in the pre-reform period, has lost much of its appeal in a time when money and happiness dictate.

Other branches of government might be willing to cooperate with the courts with regard to significant issues such as those affecting social stability, but they are unlikely to fully support the courts on these politically trivial issues (He and Su, 2008). Without the cooperation of other government branches, the courts, with usually limited financial resources, cannot really offer material inducement to litigation parties. Moreover, since the early 1990s many courts, especially those in developed areas, have been overwhelmed by mounting caseloads (He, 2007; Zhu, 2007), making it almost impossible to conduct on-site investigations, which are extremely time and energy consuming. For courts not under heavy caseload pressures, often in rural areas, the pre-reform practice has a greater chance of survival. But these rural courts, usually underfunded, also have greater incentive to work on cases that can bring in financial income (He, 2007). It is still doubtful whether these courts want to put a lot of resources into divorce cases which usually entail only 50 yuan as the litigation fee, obviously not very helpful for improving the dire financial situation of the courts.

While these two factors are certainly important, this section of the article argues that the incentive mechanism inside the courts is the most immediate and significant cause of the change, a point that has largely been neglected in the current literature. It will show that adjudicated denial for first-time divorce petitions is a calculated outcome of judges under their current incentive mechanisms. The outcome of adjudicated denial fits well with their own concerns, including workload and job performance. More specifically, adjudicated denial stands out as the baseline simply because it allows judges to close cases without getting into the messy division of matrimonial property and child custody. The changed baseline in divorce law practice has to be understood within the institutional context of Chinese courts.

As many scholars have pointed out, Chinese courts are more or less a bureaucratic institution (He, 1997). Chinese judges are recruited, administered, and promoted almost the same as functionaries in other bureaucratic institutions, with no tenure for life and subject to various administrative penalties. The hierarchical system of judges and the relationship between the different levels of court are all indicative of this entrenched bureaucratic nature (He, 1997). Thus, it is not surprising that assessing court performance is based upon many quantified administrative criteria. These criteria, of course, have varied along with the different goals of the state in different periods. Starting in the early 1990s and continuing into the 21st century, when the former SPC president Xiao Yang introduced systematic reforms toward adjudicated justice and efficiency and justice emerged as the dominant themes of the judiciary (SPC 1999, 2004), the main criteria of court performance have correspondingly become the absolute number of cases completed or handled (*jie'an shu*), the completion rate of received

cases, the appeal rate, the remand rate for retrial, and the complaint (*toushu*) rate. The number of cases completed and the completion rate are basically measurements of efficiency because presumably they indicate the overall number of disputes resolved by the courts, while the appeal, remand, and complaint rates are supposed to evaluate the quality of dispute resolution or justice. This can be clearly seen from the work reports of various courts across the country in which these numbers and rates are eye catching.

In addition, the courts are being subjected to greater scrutiny. Their performance, for example, will be significantly discounted or even punished if litigants successfully file a complaint against them. When social stability becomes a serious concern for the ruling party and government, anything that might lead to a mass social movement will be severely punished. If a 'vicious incident', usually referring to collective sit-ins, demonstrations, or unnatural death, results from some court behaviour, it will immediately ruin the political future of the directors or heads (*yuanzhang*) of the courts, no matter the merits of the courts' behaviour (see for instance, Panyu Annals, 2006; He, 2007a; Sichuang Annals, 2006: 85–7).

When these numbers and rates become the assessment criteria of the courts and the court directors, they are soon translated into the evaluation criteria for individual judges. In addition to the general requirements specified in the Judges Law (Amended 2001, Articles 32–5), more detailed regulations, such as measures for holding adjudicating staff responsible for wrongfully deciding cases (*cuo'an zhuijiu zhi*) (SPC 1998), have been issued by various courts across the country.<sup>6</sup> A stipulation of post responsibilities of P. District Court in Guangzhou, Guangdong province, lists four measures for assessing the court staff (or judicial cadres): virtue, capability, diligence, and performance (Article 3).<sup>7</sup> While virtue and capability are measured by abstract terms such as active participation in political and professional education, measurements of diligence, and performance are quantified in detail. For example, Section 3 of Article 7, which concerns diligence, stipulates: 'Four points for: no "rude, cold, rigid, dodging" working style; congenial working attitude; no complaint from litigation parties or masses (no points for this item if there is any verified complaint, unless the complaint is unfounded or mistakenly filed)'. Of the 100 points for overall assessment, performance constitutes 65. Furthermore, Section 1 of Article 8 reads: '[T]he staff of the adjudicating chambers and the enforcement bureau shall complete 90 and 85 percent, respectively, of the cases assigned by the petition filing division (37 points) (if the completion rate is lower than 90 or 85 percent for the adjudicating staff and enforcement staff, respectively, three points will be deducted for each percentage lower, until all 37 points are deducted)'. Section 3 reads: '[T]he quality of adjudication and

enforcement shall reach the basic requirement (20 points). For the following situations, points will be deducted accordingly: if more than five percent of the appealed cases are reversed completely for subjective reasons of the adjudicating staff, three points will be deducted; if more than three percent of the appealed cases are remanded for subjective reasons of the adjudicating staff, three points will be deducted; for each case completed beyond the statutory deadline, one point will be deducted; for each non-standardized adjudicating and enforcement document, or a document with typos, one point will be deducted’.

Naturally, this institutional environment generates certain incentives, or chilling effects, for judges. On one hand, they try to maximize the total number of cases they handle. According to some judges whom I interviewed, if they are allowed to choose which cases to adjudicate, they will take the easiest ones.<sup>8</sup> As for cases assigned by the petition filing division, the judges simplify the adjudicating process as much as possible. They also have incentives to mediate the disputes or persuade the plaintiffs to withdraw, if so doing is not very time consuming. But on the other hand, they cannot merely focus on efficiency. As shown, the courts have set the measurements of quality as the appeal rate, reversed rate, remand rate, and complaint rate. The judges will thus try their best to lower all these rates. Throughout the adjudicating process, they also have to be extremely cautious in preventing any complaint or vicious incident from occurring. To reduce the likelihood of a complaint against them, naturally they try to make decisions acceptable to both sides.

Only in the context of these assessment criteria can one understand why judges refuse to grant divorce even though they know for certain that the marriage has no future. What do judges have to say on this issue?

Judge Song, who is in his early thirties, said:

For most first-time divorce petitions, regardless of whether the emotional relationship is truly ruptured, we will not grant a divorce unless the litigants themselves have already worked out everything. Why? If I grant a divorce, it is my duty to divide every penny of their matrimonial property and child custody, when applicable. Property division is an extremely messy issue. Sometimes you have to divide everything from an apartment to a teapot. These things are messy in nature, no matter whether or not there are legal guidelines. It is very likely that both parties would be unsatisfied no matter how we divided them, or how much time we invested. Let me tell you this: to complete the process of an adjudicated divorce would consume five to ten times of the time for an adjudicated denial. There is no point getting into this process.

For the majority of seriously contested petitions, whether the emotional relationship is ruptured is not so hard to tell. But the division of property is a real problem. Even if both parties reach a consensus that the marriage is over, they may have serious disputes over property or child custody. From

our perspective, granting a divorce simply offers them an opportunity to appeal. And as you can imagine, the more complicated the couple's property relationship is, the more likely that the courts will adjudicate against divorce.

While granting few or no divorces for first-time divorce petitions certainly helps to improve efficiency, is this not too cursory a way of handling the cases? How do judges protect themselves from being appealed or complained against? When Judge Wang, who joined court directly from law school and has handled divorce cases for 6 years, was asked these questions, she replied: 'In addition to the efficiency consideration, whether the litigation parties can accept our decisions is a major concern. For first-time petitions, divorce is very difficult for the defendant to accept. Some litigation parties carry a bottle of agricultural poison to the court hearing. What if he (or she) commits suicide? What if he (she) kills the other party or relevant family members? But when the relationship still does not work out after the first adjudicated denial and the couple comes back for divorce again, it is another story: the defendant will be psychologically more prepared by then'.

Although Judge Wang's account brings the social acceptance or consequences (Posner, 1990) of court decisions back to the scene, these two accounts are indeed complementary in context. Because complaints usually occur when one party is dissatisfied with the court's decision, making sure the decision is acceptable for both sides is an effective way of avoiding complaints. To grant adjudicated denial to first-time petitions of course satisfies the defendant. But for the plaintiff, this is not a sheer failure. The plaintiff can and will use this adjudicated denial as evidence for future divorce attempts and the courts are likely to grant one when the couple reappear in court. With both parties okay with the decision, the judge minimizes the risk of being complained against. In other words, adjudicated denial is the best strategy for judges under the pressures of efficiency and justice by striking a balance between the litigating parties.

One may interpret Judge Wang's account as a pragmatic approach to dispute resolution in which judges employ local knowledge and legal analysis to balance the interests of various relevant parties (Zhu Suli, 2000). But it is also important not to ignore the significant impact of the judges' own concerns in this process. While it is true that the judges are balancing various interests, they are certainly placing their own interests in a very important position, if not making them their first priority. Even though they may take the interests of the litigation parties into account, their overriding concern is to avoid possible adverse consequences.

One may wonder whether the plaintiff would appeal such an adjudicated denial that did not really take into account the legal standard of 'whether the emotional relationship is ruptured'. The judges are usually safe on this point for two reasons. First, since judges are given vast discretion in interpreting the seriousness of a ruptured emotional

relationship, it is almost impossible to say the adjudicated denial is a decision wrongfully made as long as no mandatory legal requirements are trumped. Moreover, adjudicated denial helps maintain the family and achieve social harmony. It conforms to a Chinese saying: maintaining a marriage is more desirable than building ten bridges. Denying a divorce petition thus serves the expectations of both state and society. Second, an entrenched legal principle of the Chinese legal system prevents most plaintiffs from appealing in this situation: all issues shall be offered an opportunity for appeal (*lianshen zhongshen*). Consequently, even if the appeals court regards the trial court's denial of divorce as inappropriate or wrong, it cannot overrule the decision by directly granting a divorce. This is because when the trial court adjudicates against divorce, it does not divide matrimonial property and child custody. But when the appeals court overrules the decision and grants a divorce, it does divide the property and child custody. No opportunity for appeal is then available for such decisions regarding the divisions because the appeals court's decision is already final according to current civil procedure. Therefore, when the trial court adjudicates against divorce, legally speaking it is impossible for the appeals court to reverse the decision by directly granting a divorce. The appeals court can only remand this kind of case back to the original trial court. While a remand decision does the judge in charge of the first trial no good, this process usually takes much longer than 6 months. Hence, this route is not worth pursuing because the plaintiff can simply wait 6 months after the trial court's adjudicated denial and then file a second-time divorce petition, which almost guarantees a divorce. After all, all the plaintiff wants is a divorce. He or she has little reason to fight against the judge. According to one of my informant judges, if a lawyer advises the defendant to appeal an adjudicated denial, the lawyer is either ignorant or simply greedy in extracting more lawyering fees from the plaintiff.

Bearing all these considerations in mind, one can easily understand why adjudicated denials are a calculated outcome of the judges. But such outcomes would not occur if the courts stubbornly and persistently granted the plaintiffs no divorce in their repeated petitions. But although adjudicated denial might improve the efficiency and performance of the judges, they cannot play this card forever. Otherwise the plaintiffs will, sooner or later, complain against the judges or appeal the denial decisions. That is why in reality a second-time divorce petition is often allowed.<sup>9</sup> While the current official account for adjudicated divorce is that the emotional relationship cannot be established or recovered after the court's adjudication and education, a more fundamental reason lies in the concerns of judges who want to reduce their risk of being complained or appealed against. This is a crucial self-protective exit strategy. It is also why in the adjudicating process, as seen in the above court hearing, a judge often implicitly or explicitly

informs the plaintiff that a divorce will be available in the second-time divorce petition. By letting plaintiffs know how to get what they want, judges successfully avoid the risk of being appealed against. In other words, they can manipulate the appeal or complaint rates in their favour. In this sense, the law is not used simply as the basis of adjudication; it is also an instrument for the judges' self-protection.

All these behaviours are understandable under the current institutional environment. Chinese judges lack sufficient protection for themselves: no life tenure, while their career is affected by all the quantified measurements. When they are complained or appealed against, especially when the complained event becomes known outside their courts, they make trouble for the court directors. After all, the directors have to spend much time and energy dealing with the complaint, whether or not the judges have made a mistake. Because these 'troublemakers' would leave a bad impression on the directors, which would adversely affect their career prospects (Ai, 2007), they have to make sure no such incidents occur. Furthermore, although Chinese judges are placed in the position of dealing with many complicated social relationships, they lack the corresponding authority and legitimacy (Fu, 2005). Thus, they have to employ various skills for self-protection. When American judges deliver judgments, everyone is listening: both the litigants and average people will accept the court's decision even if they do not think it is right (Tyler, 1990). But in Chinese society either the litigation parties or the masses are always ready to challenge a court's decisions, not only through the normal appeal system within the judiciary system but also through other external mechanisms such as letters and petitions and individual case supervision (Peerenboom, 2006). While these other mechanisms might provide a way for upper level governments and officials to collect information and constrain judicial corruption (Cai, 2004; He, 2009; Minzner, 2006), they also adversely affect the authority of the court because their very existence indicates that the court is not the final arbiter (Peerenboom, 2006). In light of these considerations, it is not surprising that various strategies, whether lawful or not, have been employed.

As a result, like mediated reconciliation, the content of adjudicated denial has also undergone significant change since the pre-reform period. During that period adjudicated denial was a result of the no-divorce policy. Nowadays, adjudicated denial has been transformed into a strategy of judges for maximizing their interests and protecting themselves. And all these are directly linked to the institutional structure in which they are embedded.

The increased number of adjudicated denials for first-time divorce petitions in today's practice of justice therefore has little to do with continuation of the pre-reform tradition, the restrictive orientation of the amended law on divorce or the alleged penetration of the state

into private life. Otherwise, the courts would not grant divorce even if the plaintiffs repeatedly filed petition, and the situation in the 21st century would be much like that of the 1980s, when the courts 'stubbornly' or 'irrationally' adjudicated against divorce. The truth, however, is that, everything else being equal, adjudication for divorce has become routine when the plaintiff re-initiates the same divorce petition. Adjudication against divorce for first-time petitions and adjudication for divorce for second-time petitions all serve the same function: to increase the judges' performance and to reduce their risk of being adversely affected under the current incentive structures. This has happened despite the possibility of the governing law as to 'whether the emotional relationship is truly ruptured' being slighted, manipulated, or even sacrificed.

#### 4. CONSEQUENCES

The previous sections of this article have demonstrated that although the predominant governing law regarding the standard of divorce remains unchanged, the law is implemented by judges embedded in their institutional context, and consequently many extra-legal considerations come into play. This institutional perspective allows us to see exactly what the consequences have been. The most conspicuous is that a large number of first-time plaintiffs return for divorce. The reason behind repeated petitions is straightforward: when one of the couple has determined to initiate a divorce, the conflict between them must be very serious and thus difficult to pacify by simply offering a 6-month observation period. A determined divorcing husband or wife will rarely change his or her mind toward the marriage itself. Of course, there are situations in which the divorce petitioner does not really want a divorce – the petition is filed as a posture or strategy in dealing with a personal grudge – but these cases are extremely rare. Since no statistics are available on this matter, it is hard to pinpoint the exact percentage of return plaintiffs. But many of my informant judges estimated it to be as high as 85%. Even the most conservative judge I interviewed believed it was at least 50%. But all my informant judges confessed that the current approach in granting adjudication against divorce for first-time divorce petitions has not been effective in solving the couple's problems as the law requires.

The repeated divorce petitions certainly lead to more cases for the courts. While one goal of the courts is to relieve themselves of heavy caseloads, the current treatment eventually leads to many repeat cases that would not have existed if a divorce had been rightly or lawfully granted in the first trial. On the other hand, because the handling process has become so routine, these additional cases are not as contested in court as they would be otherwise. They might not necessarily consume more energy simply because of the increased caseload.

For the litigation parties, adjudicated denial could lead to some undesired results, especially for those under the threat of domestic violence. A second-time petition letter reads:

Had divorce been granted last time, none of the following would have taken place: on December 28, 2000, the lover of the other party [the husband] came to my apartment when I was out. They locked my daughter outside the apartment while they were having an affair, despite the freezing temperature of the winter night and the fact that we are still married. When I accused him of doing this the next day in his work unit, he beat me with a wooden paddle. My neck, waist, and spine were seriously injured and I could not even stand. Even after spending 20,000-30,000 yuan for various medical treatments, I have become almost paralyzed. As a result, I have lost my ability to work. All I want now is a divorce.

It is difficult, of course, to know exactly the extent to which these incidents occur as a result of inappropriate adjudicated denials. But for many cases, the judges know on first sight that the marriage cannot be recovered solely by granting a 6-month observation period. Nonetheless, they render an adjudicated denial as long as evidence suggests that the couple can still stay under the same roof. While a small percentage of this sort of court judgment may rescue a collapsing marriage, in most situations the judgments only further deteriorate the already tense relationship between the couple, and the conflict between them is more likely to escalate (Zheng, 2006). After all, when the plaintiffs decide to bring the issue of divorce to the courts, they must have already had many debates. When they eventually overcome their hesitancy and decide to fight the other half in court, there is little chance the marriage can be recovered. As a fieldwork investigation shows, most of a plaintiff's confidence toward the other party sinks further after getting an adjudicated denial (Zheng, 2006). It is not surprising then that some defendants may retaliate against the plaintiff for initiating the divorce petition. Some plaintiffs may also escalate the conflict to give themselves additional evidence for divorce in the second-time petition.

Another consequence is that the squeaky wheel gets more grease. As discussed, to avoid being complained against or to prevent a vicious incident from occurring, a judge will always try to strike a balance between the relevant parties. When one of the litigants acts radically or emotionally, the judge will take more of his or her will into account, even though some legal rules are bent as a result. One of my informant judges expressly said that he would never grant a divorce if the defendant was suicidal or homicidal, no matter how many times the plaintiff might file a divorce petition. Similarly, those who play hardball or who complain more readily are more likely to be awarded more property. The result is to encourage strategic behaviour by the parties involved because the behaviour will be rewarded with more benefits. But more

strategic behaviour only increases the difficulty of reaching a settlement either inside or outside the court (Mnookin and Kornhauser, 1979).

## 5. BEYOND DIVORCE CASES

Institutional constraints are thus significant in influencing the judicial mind in contemporary China; moreover, this argument is not limited to the treatment of divorce cases. In other types of cases, legal decisions are also affected by the same institutional constraints. Anecdotal evidence already indicates that the phenomenon of the squeaky wheel getting more grease is widespread in court decisions.<sup>10</sup> In dealing with malpractice disputes, for example, judges tend to hold hospitals at least partially responsible even if evidence suggests they are completely innocent. After all, the injured party has already suffered in the process of the medical treatment and is likely to become a squeaky wheel: if they gain nothing in litigation, it is very possible they will appeal or complain. On the other hand, hospitals always have greater resources: holding them partially responsible is unlikely to put them in a position of appeal or complaint. Rendering a judgment acceptable for both parties thus strikes a balance. Of course, the judges themselves also benefit from so doing: they have not only resolved the dispute but also protected themselves against potential liability. This way of handling matters can also be widely seen in disputes involving traffic accidents and unpaid worker salaries<sup>0</sup> and the notorious ‘married-out women’ disputes in which some women in rural areas claim land compensation from their village committees (He, 2007a).

While the combination of both legal and social effects has become a cliché in the rhetoric of the Chinese judiciary, the real message conveyed is that the courts have to consider whether a balance can be achieved and whether the judgment is acceptable for the relevant parties; this in turn has much to do with the institutional constraints. Some of my informant judges even said explicitly that an effective way to control appeal rates would be to increase the cost of appealing, that is, to award some benefits to the losing party although there is no legal basis for so doing. When the losing party gains something, it has less motivation to appeal.<sup>11</sup> After all, the goal of appealing is usually to gain some benefit. If such a goal has been satisfied beforehand, further action of appeal is unlikely to occur. In this sense, the ‘haves’ might not always come out ahead in contemporary China (Galanter, 1974). Although China’s balanced treatment of disputes does have something to do with the legitimacy and ideological concerns of the judges, as found in the Philippines (Haynie, 1994) and Israel (Dotan, 1999), it has a more direct correlation with the institutional constraints.

When facing a significant and complicated case without a clear-cut answer from the legal rules, Chinese judges have frequently sought

instruction from upper level courts. According to traditional wisdom, this happens because the state and upper level courts want to fully control the judiciary. For a long time, most students of Chinese law have uncritically focused their attention on the undue external or internal influences on judges; to them, judges have always appeared passive under the various pressures of the decision-making process. But from the perspective of institutional constraints, the reason why judges at lower level courts seek instruction from upper level courts is that they tend to avoid potential liability for answering these legally difficult questions. The judges of the lower courts are the ones who seek instructions from other, more powerful political forces to avoid any potential liability. Because this practice has been widely criticized for displacing the principle of appeal and interfering with judicial independence, upper level courts have become reluctant to offer opinions.<sup>12</sup> When recently individual judges have been authorized to handle cases more independently, the courts and the judges have used internal directives; speeches of court leaders, members of the ruling party, or government officials; and minutes of meetings in which high-ranking officials have participated as the basis for deciding legally difficult questions. When these resources have been unavailable, judges have even tried to rely on the precedents of upper level courts,<sup>13</sup> even though they know these precedents have no official legal effect whatsoever. Some of them rely on the decisions of courts in other jurisdictions (Liebman and Wu, 2007). They do so nonetheless because these precedents provide some shelter for avoiding potential criticism and scrutiny. By the same token, judges tend to rigidly interpret and apply statutory articles to new situations regardless of their legislative intent, even though such applications are very problematic.<sup>14</sup> They also tend not to apply abstract legal principles because such applications are not clearly supported by clear statutory articles and thus might be struck down as wrong. It is not clear whether, given greater discretion, they would apply the law more independently in accordance with its provisions, but it is very clear that they have employed various self-protective measures. Deeply engrained in the behavioural patterns of the court staff is the logic of institutional constraints: the greater the discretion Chinese judges enjoy, the more likely they are to succumb to the pressures of the assessment criteria.

Many local variations across China further strengthen the argument that institutional constraints have a huge influence on the judicial mind. For example, in areas where caseloads are low, meaning that efficiency is not an imminent goal for local courts, high mediation rates have once again become an important standard for assessing the performance of the court staff. Judges and courts in these areas have mobilized all possible resources and employed both creative and stereotyped strategies, repeatedly cajoling a divorcing couple to

reconcile (Gao and Zhou, 2006). The baseline for divorce petitions has shifted back to mediated reconciliation: the courts are reluctant to render any decisions unless and until the couple signs a reconciliation agreement. The courts handle divorce petitions this way not because they really care that much about the couple's future or about social harmony, but ultimately for their own interests' sake: mediation helps avoid running the risk of being petitioned, scrutinized, appealed, or complained against (Gao and Zhou, 2006: 71). Anecdotal evidence also suggests that in courts where the expected working style is 'busy', judges tend to render more adjudicated divorce decisions because those decisions make them busy, or at least look busy.<sup>15</sup> In some courts where the judges' salary is quite low and there is no effective way to check corruption, adjudicated divorce also becomes a choice for many judges because it offers them an opportunity to divide matrimonial property and consequently greater opportunities for rent seeking.<sup>16</sup> Court decisions thus become a function of many elements, whereby the number of completed cases, the completion rate, the appeal rate, and the complaint rate play a significant role at a time when justice and efficiency are the themes of the bureaucratized judiciary. Instead of weakening this article's overall thesis, these local variations further corroborate that under certain incentive structures, self-interest rules the behaviour of judges, and self-protection or self-preservation is a theme in China's judiciary.

## 6. IMPLICATIONS

Through examining the way Chinese judges handle seriously contentious divorce petitions in the real world, this article has demonstrated that traditional mediated reconciliation has lost much of its territory; instead, adjudicated denial and adjudicated divorce have become routine for first- and second-time petitions, respectively. The flaws of conventional wisdom largely derive from inadequate attention to the institutional constraints of Chinese judges and courts. The impact of these constraints is conspicuous in the treatment of divorce cases simply because in this area judges enjoy vast discretion. It also exists in the treatment of other types of cases, though perhaps in a more subtle and less noticeable way.

This study thus helps strengthen the understanding of the judicial reasoning process through the perspective of institutional constraints. It provides an opposing example for the importance of the safeguards in the American constitutional design: only under institutional structures, such as separation of powers, can one take the view that rational action theory is limited in predicting judicial decisions (Cohen 1991: 187, 192, 193; Epstein, 1990: 827, 838; Posner, 1993; Sisk et al, 1998: 1498). When these incentive structures are removed or altered, it could not be clearer that self-interest rules behaviour, even though the resulting consequences

may be well balanced. This study thus offers a further endorsement of the theory of self-interest: as external constraints are inappropriately imposed, legal decisions will be affected, if not twisted, and in such a way that judges maximize their own welfare. Furthermore, greater judicial independence or discretion will not guarantee that judges will decide cases in accordance with the norm of the 'original tenor' or 'original meaning' of the legislation, as assumed by some economists (Posner and Landes, 1975: 885). All these considerations suggest that incentive structures remain significant in studying judicial behaviour.

In addition to shedding light on the functioning logic and the behavioural patterns of Chinese judges and courts, this study raises questions about the future development of Chinese law and the legal system. How have the institutional constraints of Chinese courts affected the development of China's legal reforms? For the last decade experts have debated whether China should reform its legal system through transplanting Western laws,<sup>17</sup> drawing from indigenous resources (Liang, 1996; Zhu Suli, 1996), or putting the two approaches together (Huang, 2007). But legal principles or rules, whether imported from the West or drawn from indigenous resources, are soon assimilated into the whirlpool of a judiciary with certain institutional constraints. These legal principles or rules might then lead to results that have lost any trace of what was originally intended. Without placing the institutional constraints of the courts and their impact on judicial decisions into perspective, the decade-long debate over whether Chinese law appears to be in the middle of nowhere. Whether one can design a reform plan and successfully implement it in China is of course a question beyond the scope of this article. But to make sure the legal principles or rules achieve their intended results, priority should be given to examining the institutional constraints of the courts. As shown, the oversimplified incentives of 'efficiency and justice' are misplaced: it is these incentives that have led to such routine treatment of contested divorce cases. This study, by offering a new perspective on this old debate, points to a more realistic and useful research agenda: Will it do greater social good for these incentives to be reduced in the Chinese judiciary? How can a balance be struck between making judges more accountable on one hand (Gong, 2004) and freeing them from the pressures of various measurements on the other? What side effects will the assessment measurements bring along? Does the state have sufficient incentive to create an elite group of judges in the administration process in accordance with the law? Do balanced decisions in light of the incentives of the judiciary not conform to the interests of the state? If the state's paramount goal in China's legal reform is to preserve social stability, does the state have sufficient incentive to overhaul the institutional constraints of the judiciary? Answers to all these questions will surely offer insights into understanding the Chinese judiciary and its development.

## NOTES

The Judges Law of the PRC, adopted in 1995, amended in 2001.

The Marriage Law of the PRC, adopted in 1981, amended in 2001.

SPC (1989) 'Several Opinions on How to Determine Whether the Emotional Relationship is Truly Ruptured in Divorce Petitions, issued by the SPC', 21 November 1989.

SPC (1998) 'The Measures of Holding Adjudicating Staff Responsible in Unlawful Adjudication (Trial)', promulgated by the SPC, 26 August 1998.

SPC (1999) 'The Outline of Five Years Reform', promulgated by the SPC, 20 October 1999.

SPC (2004) 'The Outline of the Second Five Years Reform', promulgated by the SPC, 26 October 2004.

<sup>1</sup>Article 32 of the Marriage Law of the PRC, amended in 2000.

<sup>2</sup>One trick in these first instance statistics is that the number does not differentiate first-time petitions and second- or more time petitions: they are all first instance as opposed to appeal cases. But as will be shown, the court's treatment of the first-time and second-time petitions is totally different.

<sup>3</sup>Thanks to the electronic file system of the court, I was able to check down the divorce case file numbers in which the outcomes are no-divorce in the first place. Then I located the files in the court archive.

<sup>4</sup>The same method as in footnote 4 was used.

<sup>5</sup>The judge later told me that the reason the wife wanted to keep the marriage was vanity: she did not want to be divorced within only one year of marrying.

<sup>6</sup>Reports of this sort are too many to be listed here. A search of 'Responsibilities of Wrongfully Decided Cases' on Google will generate numerous pages. I list only two examples for illustration purposes. 'Responsibilities for Wrongfully Decided Cases in a Chongqing Intermediate Court' was reported in *Mingpao*, Section A15, 4 September 2007. According to the report, judges may lose their jobs for committing such mistakes as abusing discretion or having typos in their judgments. See also 'The Measures of Responsibilities in Urumqi, Xinjiang for Wrongfully Decided Cases', available at [http://www.xinjiang.gov.cn:8080/1\\$005/1\\$005\\$007/305.jsp?articleid=2005-7-18-0022](http://www.xinjiang.gov.cn:8080/1$005/1$005$007/305.jsp?articleid=2005-7-18-0022) (last visited 6 September 2007).

<sup>7</sup>'The Stipulation with regard to Post Responsibility of P. District Court, Guangzhou Municipality (Trial)', in *The Compilation of Regulations and Institutions of P. District Court, Guangzhou Municipality*, Volume 1, pp. 181–8, June 2004 (no press or ISBN series number).

<sup>8</sup>This happens when the judiciary first sets up the accelerated division to handle cases that are obviously straightforward.

<sup>9</sup>This comes from my interviews with several judges in the Guangdong district court, 2007.

<sup>10</sup>This comes from a conversation with an experienced judge of a Guangdong district court, 2007.

<sup>11</sup>This comes from my interviews with Judge Song of the Guangdong district court, 2007.

<sup>12</sup>Ibid.

<sup>13</sup>Ibid.

<sup>14</sup>For example, the Guangzhou Intermediate Court recently sentenced a person to prison for life because he intentionally overdraw 175,000 yuan from a dysfunctional ATM machine. The statute that the court relied on is Art. 264 of the Criminal Law, which was intended to punish those who steal the funds of financial institutions. The sentence was so problematic that it caused a huge stir in the media and subsequently the appeals court remanded the decision. See *Mingpao News*, A19, 11 January 2008.

<sup>15</sup>From a conversation with Professor Xu Xin, an expert on empirical studies of China's judicial system.

<sup>16</sup>This was told by a judge in Western Guangdong province, 2007.

<sup>17</sup>The literature along this line is too large to fully cite here. For some representative examples, see Xu (1994) and Zhang (1994).

## REFERENCES

- Ai, J. (2008) 'What do Chinese judges maximize?', (in Chinese) *Law and Social Sciences* 3, 98–151.  
 Cai, Y. (2004) 'Managed participation in China', *Political Science Quarterly* 119, 425–51.  
 China Data Net (2007) 'An investigation into divorce cases', available at <http://www.zhzn.net/article.asp?articleid=10710> (last visited 10 September 2007).

- Clarke, D. C. (1991) 'Dispute resolution in China', *Journal of Chinese Law* 5(2), 245–96.
- Cohen, J. A. (1967) 'Chinese mediation on the eve of modernization', *Journal Asian and African Studies* 2(1), 54–76.
- Cohen, M. A. (1991) 'Explaining judicial behavior, or what's unconstitutional about the sentencing commission', *Journal of Law, Economics and Organization* 7, 183.
- Diamant, N. J. (2000) *Revolutionizing the Family: Politics, Love, and Divorce in Urban and Rural China, 1949–1968*, Berkeley, CA: University of California Press.
- Dotan, Y. (1999) 'Resource inequalities in ideological courts: the case of the Israeli high courts of justice', *Law & Society Review* 33(4), 1059–80.
- Epstein, R. A. (1990) 'The independence of judges: the uses and limitations of public choice theory', *Brigham Young University Law Review*, 827–56.
- Fu, Y. (2005) 'A positive analysis of the civil adjudication supervision' in Wang, Y. et al, (eds), *Positivist Analysis of Legal Process*, (in Chinese) Beijing, China: China's University of Political Science and Law Press, 199–262.
- Galanter, M. (1974) 'Why the 'haves' come out ahead: speculations on the limits of legal change', *Law & Society Review* 9, 95–126.
- Gao, Q. and Zhou, W. (2006) 'The approach and method of judicial mediation', (in Chinese) *Law and Social Development* 1, 59–73.
- Gong, T. (2004) 'Dependent judiciary and unaccountable judges: judicial corruption in contemporary China', *China Review* 4(2), 33–54.
- Guangdong Court Net (2005) 'An investigation into divorce cases by Foshan and Shanshui courts', available at <http://www.gd148.cn/lovenew050530.htm> (last visited 10 September 2007).
- Haynie, S. L. (1994) 'Resource inequalities and litigation outcomes in the Philippine supreme court', *Journal of Politics* 56, 752–72.
- He, W. (1997) 'Two problems of Chinese judicial administration', (in Chinese) *China's Social Science*, 117–30.
- He, X. (2007) 'The recent decline in economic caseloads in Chinese courts: exploration of a surprising puzzle', *The China Quarterly* 190, 352–74.
- He, X. (2007a) 'Why do they not take the disputes? Law, power and politics in the decision-making process of Chinese courts', *International Journal of Law in Context* 3, 15–37.
- He, X. (2009), 'Administrative law as one of the mechanisms of political control in contemporary China', in M. Dowdle and S. Balme, (eds.), *Building Constitutionism in China*, Palgrave Macmillan.
- Huang, P. C. C. (2005) 'Divorce law practices and the origins, myths, and realities of judicial 'mediation' in China', *Modern China* 31(2), 151–203.
- Huang, P. C. C. (2007) 'Whither Chinese law?', *Modern China* 33(2), 163–94.
- Jiang, S. and Zhao, Xiaoli (1998) 'Legal interpretation under a dual structure' (in Chinese) in Liang, Z. (ed.), *The Problems of Legal Interpretation*, Beijing, China: China's University of Political Science and Law Press.
- Jiao, W. (2004) 'An investigation into and reflection on divorce cases received in Haikou intermediate court', (in Chinese) available at [http://www.hicourt.gov.cn/theory/artilce\\_list.asp?id=2364](http://www.hicourt.gov.cn/theory/artilce_list.asp?id=2364) (last visited 10 September 2007).
- Liang, Z. (1996) *Customary Law in the Qing: Society and the State*, (in Chinese) Beijing, China: China's University of Political Science and Law Press.
- Liebman, B. and Wu, Tim (2007) 'China's network justice', *Chicago Journal of International Law* 8, 257.
- Liu, J. (2005) 'Adjudicating divorce cases in the new period' (in Chinese) available at <http://www.tjlawyer.net.cn/Article/Class37/Class41/200505/1510.shtml> (last visited 10 September 2007).
- Lubman, S. B. (1967) 'Mao and mediation: politics and dispute resolution in communist China', *California Law Review* 55, 1284–359.
- Ma, Y. (2002) *New Discussions on Marriage and Family Law*, (in Chinese) Beijing, China: Beijing University Press.
- Minzner, C. (2006) 'Xinfang: an alternative to formal Chinese legal institutions', *Stanford Journal of International Law* 42, 103–79.
- Mnookin, R. and Kornhauser, L. (1979) 'Bargaining in the Shadow of the Law: the Case of Divorce', *Yale L.J.* 88, 950.
- Palmer, M. (1996) 'The re-emergence of family law in post-Mao China: marriage, divorce, and reproduction' in Lubman, S. (ed.), *China Legal Reforms*, Stanford, CA: Stanford University Press, 110–34.
- Palmer, M. (2005) 'Marriage reform and population control: changing family law in contemporary China in A. Bainham (ed.), *International Survey of Family Law*, Bristol, UK: Jordan Publishing, 185.

- Palmer, M. (2007) 'Transforming family law in post-Deng China: marriage, divorce and preproduction', *The China Quarterly* **191**, 675–95.
- Panyu Annals (2006) (in Chinese), Beijing: Fangzhi Press, 75–6, (ed) Panyu Annals Editorial Office.
- Peerenboom, R. (2006) 'Judicial independence and judicial accountability: an empirical study of individual case supervision', *The China Journal* **55**, 67–94.
- Posner, R. A. (1990) 'What has pragmatism to offer law?', *Southern California Law Review* **63**, 1653–69.
- Posner, R. A. (1993) 'What do judges and justices maximize? The same thing everybody else does', *Supreme Court Economic Review* **3**, 1.
- Posner, R. A. and Landes, W. (1975) 'The independent judiciary in an interest group perspective', *Journal of Law and Economics*, 875.
- Shao, X. (2006) 'A reflection on some questions of the court treatment of divorce cases' (in Chinese). available at [www.cccv.cn/Article/detail/2006/11/26819.asp](http://www.cccv.cn/Article/detail/2006/11/26819.asp) (last visited 10 September 2007).
- Sichuang Annals (2006) Sichuang Annals Press.
- Sisk, G. C., Heise, M. and Morriss, A. P. (1998) 'Charting the influences of judicial mind: an empirical study of judicial reasoning' *New York University Law Review* **73**(5), 1377–500.
- Tyler, Tom (1990) *Why People obey the Law*, New Haven: Yale UP.
- Xu, C. (1994) 'The market economy and legislative directions of foreign economic laws in China', (in Chinese) *Faxue yanjiu (Journal of Legal Research)* **6**, 40–3.
- Yang, X. and Qu, Zhi (2001) *Focusing on Controversial Issues in the New Marriage Law*, (in Chinese) Shenyang, China: Liaoning Huabao Chubanshe.
- Ye, P. (2007) 'An investigation into and analysis of divorce cases in rural areas', (in Chinese) available at <http://hi.baidu.com/lunwen518/blog/item/2b59febf459600819d81fb9.html> (last visited 10 September 2007).
- Zhang, W. (1994) 'The trends of China's legal scholarship at the nexus of centuries', (in Chinese) *Zhongguo Faxue (China's Jurisprudence)*, **2**, 2.
- Zheng, M. (2006) 'An investigation into the divorce cases in the municipal court of Wugang, Hunan province', (in Chinese) available at <http://belawyer.fyfc.cn/blog/belawyer/index.aspx?blogid=113259> (last visited 10 September 2007).
- Zhu Jing-wen (ed.), (2007) *China Legal Development Report (1979–2004)*, (in Chinese) Beijing, China: Renmin University Press.
- Suli, Zhu (1996) *Rule of Law and Its Local Resources*, Beijing, China: China's Univ. of Political Science and Law Press.
- Suli, Zhu (2000) *Bring the Law to the Countryside*, (in Chinese) Beijing, China: China's University of Political Science and Law Press.