

# Why did they not take on the disputes? Law, power and politics in the decision-making of Chinese courts\*

Xin He

Assistant Professor, City University of Hong Kong

---

## Abstract

*Chinese courts' recent refusal to take on some disputes raises questions on the extent to which they are controlled by superior political powers in their region. Through a close examination of the handling process of 'Married Out Women' disputes, this article shows that lower courts in Guangdong Province, China, have effectively resisted pressure to solve the disputes. Arguing legal barriers and enforcement difficulties, the courts ultimately referred the disputes to the governments but agreed to review the governments' decisions in administrative litigation. In so doing, the courts retain an advantageous position in the power relationship with the governments. The article argues that Chinese courts are capable of deliberating about and transforming their situation by strategically interpreting the law and negotiating with superior powers. It suggests that judicial independence in China is far more complicated than is often recognised, and that judicial behaviour cannot be adequately explained without thick descriptions and understanding of the legal arguments, resource constraints and strategic interpretations open to the courts, in context.*

Despite the passage of hundreds of laws and the expansion of the judiciary since the late 1970s, a dominant theme in the literature is that Chinese courts have enjoyed little judicial independence (Lubman, 1999; Peerenboom, 2002; Fu, 2003; He, 2004; O'Brien and Li, 2005). Scholars and observers find that the party-state has direct or indirect control of the courts: judges are still on the payroll of local governments, their professionalism is limited, and the influence of local protectionism on the courts is strong. The courts are thus little more than a loyal subordinate of the party-state that carefully carries out assigned tasks; they have no will or capacity to resist the party-state's interference (He, 1997). This theme has become so dominant in the field that failing explicitly to discuss the topic in a book claiming to be a comprehensive research on justice in rural China automatically constitutes an inexcusable drawback (Upham, 2005). And a response to such criticism is that the political influence of the Communist party on the courts is omnipresent to an extent that they are indistinguishable, and hence there is no need – and actually, it is impossible – to discuss it (Suli, 2006).

Although Suli is certainly right that the influence of the Communist party on the courts exists everywhere, the influence of other state or party institutions on the courts can be and shall be studied. As scholars such as Joel Migdal have proposed, state power can be understood by looking at

---

\* This article was first presented at NYU Law School's global fellows forum on 11 April 2006. The author wants to acknowledge Ju Xiaoxiong, who provided the basic positions of some courts in Guangdong province, and Zhang Rongbo, who supplied some interview materials. Stephanie Balme, Cai Yongshun, Stephen Humphreys, Lewis Kornhauser, Mattias Kumm, Charles Qu, Frank Upham and Su Yang provided invaluable comments in the writing process. Special thanks go to Michael Dowdle and Sally Merry, who offered detailed and insightful comments on an earlier version of the article.

interactions between various authorities at multiple levels and at how they interact with assorted social groups (Migdal, 1995, p. 14). Along with the expansion of legal institutions and promulgation of laws and policies, some recent studies have suggested that the party-state of China shall be disaggregated, and this approach seems fruitful (Diamant et al., 2005, pp. 17–20). Recent developments in Chinese courts, however, have raised questions on how far, or under what conditions, the conventional wisdom that Chinese courts are incapable of resisting political pressure from superior powers holds up. When some new sorts of dispute have been generated in China's unprecedented social transformation, the courts have in many instances refused to take them. The Supreme People's Court (SPC), for example, issued an opinion in 2001 temporarily rejecting disputes of class tort lawsuits caused by misrepresentation in securities trading.<sup>1</sup> Another opinion of the Court states that the courts should not take the disputes on housing demolition compensation as civil litigation.<sup>2</sup> The courts of Guangxi Zhuang Autonomous Region explicitly refused to take thirteen categories of dispute in 2004.<sup>3</sup> This recoil rather than expansion of judicial power looks extremely surprising in light of the country's tendency towards governing every aspect of social life by law.

For some of these disputes, the courts' refusal to take them can be easily explained by the inferior position of the courts: when superior political powers such as the Communist Party and the government do not want the courts be involved in the dispute resolution process for political reasons, then the courts have little room to disobey.<sup>4</sup> This has been well illustrated in the handling of urban housing demolition disputes. But for many other disputes, the courts' rejection cannot be adequately explained by the inferior position of the courts or the interference of the local governments or Party Committees. These disputes are not *directly* related to state interests, nor are they political in nature. Instead, they are usually civil in nature and occur when the interests of a large number of socially unimportant people are infringed. The issues have become legally or politically important only when these people effectively organise public demonstrations to protest their unfair and grievant situation. The superior political powers in these regions, such as the local committees of the Communist Party and the governments, to relieve their own pressure and to maintain social stability, have repeatedly urged the courts to solve these 'major and complex' disputes, for dispute resolution officially falls into the courts' scope of duty. The truth is that the courts have persistently resisted the pressure from the superior powers and refused to take the disputes. So the questions are: What is new in these disputes? How do the courts resist the pressure, given their inferior political position? What light can this new development shed on the decision-making process of the courts?

1 The Supreme People's Court, 'Guangyu she zhengquan minshi peichang anjian zhangbu shouldi de tongzhi' ['The Notice on Not to Take Securities-Related Civil Compensation Lawsuits'], issued on 21 September 2001. But the Court has subsequently agreed to take the lawsuits since 2002.

2 The Supreme People's Court, 'Guangyu dangshiren da bucheng chaiqian buchang anzhi xieyi jiu buchang anzhi zhengyi tiqi minshi susong renmin fayuang yinfo shouldi wenti de pifu' ['The Response to Whether the People's Courts Shall Take the Disputes on Housing Demolition Compensation Which Filed through Civil Procedure'], issued on 11 August 2005.

3 These categories include capital-raising disputes, illegal 'sale-network' disputes, real estate disputes as a result of governmental management, disputes of workers laid off due to company re-structuring, disputes on compensation for rural land requisition and resettlement of farmers, disputes of local governments terminating agricultural contracts on a 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', 24 August 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.

4 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 n. 3, *China Youth on Line*, 'Guangxi Courts Refuse', 24 August 2004.

This article aims to explore these questions by closely examining how one type of new dispute has been handled by the courts in Guangdong province. It will show that, if the courts were to take the disputes, they would be mired in the complicated process without being able to deliver an enforceable judgment. The disputes would eventually end up back in court. To conserve limited legitimacy and capacity for implementation, the courts, through tactically arguing that there are legal difficulties in handling the disputes, have pushed the disputes over 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 successfully reduced the number of complaints likely to result from the decisions and perhaps stir discontent against the townships, a result acceptable to if not desired by the superior political powers. This result is also important to the courts politically and institutionally because they have retained an advantageous position in the power relationship between the courts and the governments.

The research suggests that the courts, by employing legal arguments and displaying their resource constraints, have effectively resisted external pressures and achieved a result which is in favour 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 behaviours are still embedded in a particular political and power context. In this sense, there are a lot of similarities with their counterparts in a democratic regime (Smith, 1992). This study illustrates the complexity of the judicial decision-making process in contemporary China in which elements of law, power and politics are mixed. Judicial behaviours and decisions, including whether to expand judicial jurisdiction or not, cannot be adequately explained or assessed in the absence of fairly full descriptions and understanding of the legal arguments, resource constraints and strategic interpretations open to the courts, within their context (Keck, 2004).

The rest of this article will first introduce a type of dispute, the Married Out Women (*waijia'nu*, hereinafter 'MOW') disputes, which occurs country-wide but has been frequently reported in Guangdong province.<sup>5</sup> The article then describes how the basic or lower courts in Guangdong province, against the pressure from local party committees and governments, bring up legal barriers and resource constraints as the basis for rejecting the disputes. It proceeds by introducing the later developments of the courts' positions and how they ultimately handle the disputes, which will serve to illustrate the effectiveness of the courts' resistance.<sup>6</sup> The article concludes with some implications for the relationship between the courts and the governments, and for judicial independence and the prospect of the human rights movement in China.

## The MOW disputes

'MOW' refers to peasant women who are married outside their home villages. The issue of the disputes, generally speaking, is whether MOW are eligible for sharing compensation, dividends and relevant benefits of their home or destination villages. These disputes occur against the backdrop of the urbanisation process of rural China, where rural lands have been transformed into urban lands

5 These disputes at least exist in Shaanxi, Zhejiang, Hunan and Hebei Provinces. See 'Local States Have Their Own Ways to Protect the Land Rights of Rural Women', *Zhongguo gaige [China Reform]*, No. 3 (2003), pp. 8–9.

6 The analyses and data are based on not only court judgments (including all the administrative judgments of the MOW disputes in a basic-level court of Guangzhou in 2005), relevant administrative decisions, government documents and directives, and news reports on the disputes, but also on in-depth interviews with seven judges who handled the disputes (five in a basic-level court and two judges of the administrative chamber at an intermediate court), three township-level officials, twelve MOW, five human activists who have unsuccessfully assisted the MOW to obtain their justice, and four cadres of a village in the outskirts of Guangzhou during the years 2003–06.

by state requisition. Legally speaking, the ownership of the lands still belongs to the village collective, 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, the state acquiring the lands usually compensates the village collective once and for all. Of course, individual peasants are supposed to get the compensation from the village collective later on, but how to divide the compensation, or dividends or benefits derived from the compensation, and particularly whether MOW should have a share, has become an extremely controversial issue. Since the ownership of the lands rests with the village collective, from a legal standpoint, the benefits or compensation should also be shared by villagers who make up the village collective. So the key question is whether MOW are still part of the home village collective. One seeming standard is whether their household registration (*hukou*) remains with the village.<sup>7</sup> But this standard is not workable because China's *hukou* policy is extremely complicated: Under the system, whether one can or cannot move their *hukou* depends on many contingencies. In fact, there are many different types of MOW as a result of the *hukou* policy, and using *hukou* as the sole criterion could lead to numerous unfair consequences. In a legal sense, the term MOW broadly covers: (1) women who do not or cannot transfer their *hukou* after being married to other villages, urban areas, or overseas;<sup>8</sup> (2) women who move their *hukou* to the destination village from their home village – it will be seen that in this perspective, MOW also covers 'Married In Women' (MIW); (3) women who have married outside their home village and moved their *hukou* to their destination village but have now moved their *hukou* back to their home village because they are divorced or widowed; (4) women who are allowed to move their *hukou* to the destination village under the condition that they agree not to enjoy any benefits of the village; (5) children of these women, including those from previous marriages, illegitimate children or children who are born outside the One Child Policy; (6) men married into their wives' households; in this sense, MOW also covers 'Married Out Men' (MOM) (Sun et al., 2004, p. 27).

To make things more complicated, according to the Organic Law of Villagers' Committees ('the Villager's Organic Law'), it is the village members' meeting which shall, based on the majority vote, make final decisions on such important issues. While the Law also states that the decisions shall not contradict the Constitution and other laws, the decisions made by the village members' meeting usually exclude the MOW from any benefits.<sup>9</sup> Most villagers do not regard MOW as their fellow villagers: they are of the view that MOW are water splashed out from their parents' family, an idea deeply ingrained in China's history and culture. According to the villagers, after getting married, the women become members of their husbands' households, and they hence have no substantive

7 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 the land in their village but not entitled to access any welfare outside their village. One of the major functions of the *hukou* system is to restrict people in the rural areas from migrating into urban areas. People may change their *hukou* status or move their *hukou* to another place only through very limited channels like marriage, work, and higher education. But recently the market force has significantly loosened the rigidity of the system. For a detailed description on the origin and development of this extremely complicated system, see generally, Kam (1994); Cheng and Selden (1994); Solinger (1999); Wang (2005).

8 To restrict people from moving into the cities, the current *hukou* policy usually does not allow MOW to move their rural *hukou* to their husbands' households in city, although moving an urban *hukou* back to rural areas is much easier. The current practice is still largely based on the Art. 10 of the Ordinance on *Hukou* Registration of the PRC in 1958, which provides: 'Citizens migrating from the countryside to cities must have proof of employment from urban labor agencies, proof of admissions from schools, or proof of permission from urban *hukou* registration agencies.'

9 This phenomenon has been widely reported by the media. See e.g., *Nanfang Agricultural News*, 5 December 2005, [www.nanfangdaily.com.cn/southnews/dd/nc/sntt/200512050702.asp](http://www.nanfangdaily.com.cn/southnews/dd/nc/sntt/200512050702.asp) (last visited 22 August 2006).

relationship with their parents' households. Consequently, even if many MOW still have their *hukou* registered at the home village, they are not regarded as village members by their fellow villagers. However, a more direct reason for such a decision is that additional persons to share a given lump sum of benefits will inevitably reduce the value of each share. And the fact is that even in Guangdong province where the urbanisation process is well under way, some surveys find that all these MOW only amount to a little more than one percent of the total population.<sup>10</sup> So they definitely have no way to turn this majority vote around. For this very reason, the destination villages of many MOW also refuse to offer them any benefits. As a result, some MOW, including MIW, MOM and their children, cannot get benefits from either their home or destination villages, leading to an extremely grievant situation.

But most MOW still believe they deserve equal treatment for the benefits and compensation at their home or destination villages basically for two reasons. First, the decisions of the village members' meeting must not violate relevant laws. And several important national laws, including the Constitution and the Women's Rights Protection Law, clearly stipulate that female villagers shall enjoy the same rights as male villagers in the lands of village collectives according to the principle of gender equality, even though these general laws never specifically mention the benefits and compensation of the lands. The MOW raise a very simple question: Why can men enjoy the benefits regardless of their actual residence while women cannot?

Second, even though no detailed provisions mention this particular issue, the benefits and obligations should be correspondent to each other, according to General Principles of Civil Law, the country's basic general law governing civil law relationships. The argument is that MOW have contributed to the village collective and the lands, so when the compensation for the lands is distributed, they should also be entitled to a share. In the earlier stage of the reform, villagers were reluctant to work on the lands because yields from agricultural cultivation were little during that period. In fact, cultivating lands then meant an obligation and indeed a contribution to the village collective. Many MOW assumed the obligation then, so now they should have a share of the benefits generated from the lands. Another extremely unfair situation, according to some MOW, is that they are still required by their destination village to fulfill obligations as a village member, such as the irrigation maintenance duty, simply because their households are located in the village; but when the members' meeting of the destination village distributes benefits, the MOW are excluded (Sun et al., 2004, pp. 27–8). They thus argue that the place of their *hukou*, household, or actual residence, should not be the determining factor. Instead, the benefits should be allocated according to the MOW's actual contribution to the lands and the village collective.

Indignant about their village collectives' decisions which either denied or cut their compensation and benefits, many MOW have sought help from any authority which might offer a remedy.<sup>11</sup> They went to the township and district governments, but the governments said that they could not interfere with the internal business of the village. They recommended that the MOW take the disputes to court. MOW also went to local women's rights protection committees. While the committees have been sympathetic to the situation of MOW, they do not have any authority in resolving the disputes. The only thing they could do was to urge local party committees, people's congresses, local courts and some upper-level women's rights protection organisations to address the issue. When some MOW went to the local people's congresses for help, what the congresses did was to initiate an individual case supervision (*ge an jian du*) process and demand the courts reply (Peerenboom, 2006). All these authorities have unanimously urged the courts, the formal dispute

10 The report in *Nanfang Agricultural News* states that there are 100,000 MOW in Guangdong province. See supra n. 9. But from the context, it seems that this number does not include MIW, MOM and their children.

11 The following accounts are based on interviews with various officials, MOW, and human right activists.

resolution institution, to solve the disputes.<sup>12</sup> Some MOW have thus tried to file lawsuits against their village collective since the late 1990s. Their main cause of action was a civil one, that is, the decisions of the village members' meeting violated the principle of gender equality, and their property right was infringed. The courts, however, bluntly refused to take the disputes. The reason cited in the courts' rejection letters was that the disputes could not fit into the current procedural framework, which will be explained in detail below.

Being kicked out by all these authorities, many MOW who share the same grievance and frustration fired the last missile in their arsenal: backed by some human rights activists, they organised themselves and protested the decisions of their village collective through public demonstrations and sit-ins.<sup>13</sup> In the process of having their grievance heard, the MOW usually broke down into tears, lost control, and demanded solutions from the highest authority in local affairs – the party committees. Luckily for the MOW in Guangdong province, the rapid process of urbanisation has generated a large number of such MOW. While the scale of their protest was not large – after all, usually MOW within the same village are easily organised – their grievance was so obvious that the events have drawn wide attention.<sup>14</sup> Subsequently, the petty disputes which are related to a group of socially unimportant people have become 'major and complex' in the eyes of the local party committees and the governments, which once again urged the courts to solve the disputes.

## The courts' resistance

This section will show how the courts resisted the pressure and refused to take the disputes. It begins with a brief introduction of the Political-Legal Committees (PLCs), the co-ordinating mechanism among the local courts, governments and party committees. It will show that the PLCs are not only an institution through which the local party committees and the governments exert pressure on the courts, but also a place in which the courts resist such pressure. It will then describe three major arguments raised by the courts.

As many observers have shown, local party committees and governments can effectively influence courts through the PLCs at corresponding levels (Hung, 2005, p. 10). As a routine, all 'major and complex' cases are discussed and ultimately determined by the PLCs (Peerenboom, 2000). The PLCs are composed of senior officials of local party committees, relevant government branches, procuracies and people's congresses. They are usually headed and convened by a senior party member who often serves in the government, such as the head of the police. The director of the courts, however, is usually only an ordinary member of the committees. As a party apparatus, the PLCs function in line with the internal rules of the party rather than according to any formal legal procedures. These senior officials' positions in the PLCs speak more of their political status than of their official positions in their own institutions. For example, the head of the police who usually serves as the

12 Interview with a vice president of a basic-level court on 19 August 2004. The request usually takes place in the PLC meetings in which the directors of various relevant institutions explain their difficulties. As to this issue, it has been generally clear that the courts shall assume the responsibility of dispute resolution, even though the courts raise a lot of counterarguments and difficulties, as shown in the next section.

13 There have been rare news reports on their protest. But according to the MOW that I interviewed, this kind of protest occurs quite often and they visited many institutions and important officials during the past five years. As the MOW are obviously a very weak social group and their complaints have a point, the authorities have never been overtly rude to them. The protesters are usually treated well when they seek to meet with higher-level officials and the authorities often send them home in official vehicles.

14 There are numerous news reports on this issue, including some prestigious official news outlets like *Guangzhou Daily* and *Yangchen Evening News* (28 December 2005; 24 November 2006). If one keys in 'waijialu' in search engines like Google or Baidu, the search generally results in more than 500 links.

convener of a PLC would make decisions on the ‘major and complex’ cases, but the director of the courts, as an ordinary member of the PLC, would obey and implement the decisions (Hung, 2005). Obviously, under such a political and power structure, the courts do not enjoy the supremacy or respect often seen in legally mature countries; rather, they look more like a subsidiary of the local party committees and governments. Indeed, as social stability has recently become such a sensitive issue in China, the courts, along with other government branches, are required by the PLCs to sign a ‘social security and comprehensive governance (*shehui zhi’an zhonghe zhili*)’ responsibility letter. The goal is to hold them responsible for serious incidents in their jurisdiction. The PLCs periodically check and assess the situation, and reward and punish relevant officials accordingly. In case of such incidents, the officials in charge are severely scolded in routine PLC meetings. They not only lose face in the meeting; more importantly, their political career is also adversely affected. While there is never a clear definition on what ‘social security and comprehensive governance’ is, public demonstrations and massive petitions are generally regarded as vicious incidents. Needless to say, when the MOW disputes were discussed at the PLCs, the director of the courts was inevitably grilled, if not scolded, for not solving the disputes.

Admittedly, under the political and power structure, the courts can hardly resist such pressure; what they usually do, consequently, is to make a compromise acceptable to all relevant parties in the dispute through balancing modern legal skills, traditional custom and local knowledge (Suli, 2000, pp. 130–3). But this does not mean that the courts will take everything dumped on them. As a member of the PLC, the director of the courts could always argue that while dispute resolution generally falls into the courts’ scope of duty, it is not possible for them to solve disputes which are beyond their capability or jurisdiction. And if the PLCs require the courts to solve these disputes, the PLCs should first address the capability or jurisdiction problems raised by the courts.

The courts have argued that there are barriers in the laws preventing the courts from taking the disputes.<sup>15</sup> That is to say, according to relevant laws, the courts are not allowed to take the disputes. More specifically, the major argument consists of three components: (1) there is procedural difficulty which prevents the courts from taking the disputes; (2) according to relevant substantive laws on the issue, the courts are not authorised to take the disputes; and (3) there are no clear regulations on this issue, or relevant regulations are contradictory to each other, so the courts have no laws to apply, or at least no consistent laws to apply.

In terms of procedural difficulty, the courts argued that these disputes are neither civil nor administrative disputes, and to accept them has no legal basis in procedural law. Under the framework of China’s procedural laws, there are three major litigation procedures: civil, administrative and criminal. Non-criminal disputes may only be handled by either the civil or administrative litigation procedure. While civil litigation handles disputes between parties with equal legal status, administrative litigation deals with concrete administrative behaviours. The courts argued that the MOW disputes occur between the village collective and individual village members, but these two are not equal in legal status. The village collective, the courts claimed, is not a regular civil party because it also serves the administrative functions of managing the community affairs and maintaining the village order. It is indeed 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 and the village collective is not regarded as an administrative institution or an administrative agent. It is therefore impossible for the courts to review a decision of non-administrative institutions through administrative litigation.

15 The positions of the courts come from interviews with judges at one basic-level court and an intermediate court of Guangdong province in the years 2004 and 2005.

The courts also argued that they do not have the authority to review the decisions of the village members' meeting. As long as the decisions depriving the benefits of MOW are reached in conformity with the procedural requirement specified in the Villagers' Organic Law, the courts have no legal basis to intervene. While the village collectives are not allowed to make decisions contrary to the fundamental policies and constitutional principles of the nation, there are no laws explicitly authorising the courts to review village collective's decisions. And they cannot do so simply because the decisions have violated some general and vague legal principles. If the courts take such disputes and offer remedies for MOW, they might end up usurping the decision-making power of the village collectives.

In addition, the courts argued that there are no clear regulations on this issue, or relevant regulations are contradictory. While this argument seems odd in a common law jurisdiction, it makes some sense in a legal system such as China's. Under this system, the courts do not have any legislative power and all they are supposed to do is faithfully to apply the written legal regulations. Even though, in reality, the courts always have to deal with laws that are incomplete, they argue that they have difficulty in solving the disputes if the laws are either incomplete or inconsistent. With regard to the issue of the MOW, a fundamental conflict exists between the laws protecting women's interests and the democratic decisions of village collectives. On the one hand, that women's property deserves the same protection as that of men is implied in the principle of gender equality. Article 30 of the Women's Rights Protection Law stipulates that 'women and men in rural areas enjoy equal rights in agricultural lands and homestead lands allocation' and that 'women's agricultural lands and homestead lands should still be protected after marriage or divorce'. But, on the other hand, the Villagers' Organic Law also specifies that it is up to 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 does occur.

More conflicts can be found among relevant legal regulations on the local level (*difang fagui*). For example, Article 12 of 'the 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 actual residence and hukou* remain at their home village . . . shall be protected by the law. 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 (emphasis added).'

This Article explicitly specifies the places of *hukou* and actual residence as two preconditions in enjoying the dividends and other benefits. Most importantly, it also mentions that it is the township government's responsibility to take action and fix the problem.<sup>16</sup> But, on the other hand, Article 8 of Several Stipulations of the Women's Rights Protection of Guangzhou Municipality (Guangzhou Stipulations), issued by the Standing Committee of Guangzhou Municipality People's Congress and approved by the Standing Committee of the Guangdong People's Congress 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 (emphasis added).' However, this article specifies the preconditions in enjoying the benefits simply as *hukou* plus places of living and working, without specifically requiring the place of actual residence. Nor does the article mention

---

16 Article 12 of Guangdong Measures.

which authority shall be responsible for redressing the issue if the rights of MOW are infringed. It does mention, however, that MOW can directly take the disputes to the governments or courts in case of such infringement.

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 equality 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. The preconditions of the 'places of actual residence and *hukou*', as specified by Guangdong Measures, for example, do not help improve the rights of the women; rather, the addition has significantly restricted their interests. According to the Measures, only MOW who keep their *hukou* in the home village and never change their place of actual residence can enjoy the benefits. But when their lands are requisitioned, many of the peasants must find jobs elsewhere. They thus have little reason to stay at the village. It is clearly inequitable to deprive them of their benefits simply because they live at another place or remove their rural *hukou* to another place.

The second major argument raised by the courts is that as an institution, they do not have the capability or resources, or they are not in a good position, to solve such disputes. They argue that there are a huge number of potential disputes in this regard and the courts, with their current resource constraints, would be overwhelmed if they agreed to directly take them as civil disputes (Sun et al., 2004). According to them, a single 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 opened the floodgate of litigation, they would be barely capable of dealing with so many disputes. Furthermore, since the disputes of MOW arise from various causes, and the decisions of village collectives vary across villages on criteria for benefits – the timing of moving in or out, the marital situation and the legal status of the children – they cannot be sorted out by a clear principle once and for all. If the courts take the disputes, they do not have enough personnel and resources to examine relevant evidence and go through an extremely complicated hearing process. Further, a large amount of village assets have already been distributed, and it is very difficult, if not impossible, to recall these benefits from individual villagers who are scattered around rural areas. With a limited number of court sheriffs, who are supposed to deal with criminal suspects and economic judgment enforcement, the courts hardly have the extra capability to collect this rather minor amount of money from individual villagers. At the very least, it is extremely difficult for the courts to monitor each time the members' meeting distributes village benefits.<sup>17</sup>

The third, and perhaps the most important, major argument of the courts is that they are unable to deliver an equitable but enforceable judgment to the MOW. If the courts hold the decisions of the village collectives unlawful and subsequently offer specific remedies to the MOW, it is likely that the village collective would resist and refuse to implement such a judgment. This can only be understood in China's context in which the laws do not have much legitimacy and people's behaviours are better understood through instrumental incentives and power relations (He, 2005b). From the perspective of village heads, they have little incentive to follow the instructions of 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 majority of villagers, the village heads may not even be able to keep their positions. They are not controlled by the courts' rulings, but are elected and monitored by their fellow village members. As far as this kind of dispute is concerned, most villagers believe that the benefits partition

17 Interview with a judge of the research department of a basic court in Guangdong, 15 August 2004.

is an internal affair with which the outsiders like the courts have no right to interfere. In my fieldwork interview, many villagers openly claimed that they would not support a village head who agrees to share the benefits with MOW.<sup>18</sup> Under such circumstances, it is not very likely that village heads would implement judgments favourable to MOW. After all, whether or not they co-operate with the courts would hardly affect their life or career, but losing the support of villagers definitely would. Without any power network on the grassroots level, the judiciary may not even locate the whereabouts of relevant villagers, let alone convince them to implement the court judgments (Jiang, 2003; Suli, 2000). At the end of the day, such a court judgment basically will remain on paper as an empty promise.

With a court judgment delivering no meaningful benefits, the MOW are very likely to appeal to higher authorities, claiming that the courts only offer empty promises. Then the courts, after doing a lot of work, will once again be blamed by these authorities for not really solving the disputes. The courts thus argue that even if they take the disputes, the problems will persist and eventually get back to the PLCs and the courts.<sup>19</sup>

But if the courts hold against the MOW, they potentially act against the spirit of the principle of gender equality in the Constitution and Women's Rights Protection Law, and the MOW are very likely to appeal the judgment to upper-level courts. Alternatively, they may take the judgment to other authorities through the petitioning system (*shangfang*), and claim that the courts have misapplied the laws. Then upper-level authorities will blame and criticise the courts for mishandling the disputes in delivering such judgments and the courts would once again become the direct target for complaints and blame. The courts argue that they are not only supervised by the PLCs as a judicial institution, but also required seriously and strictly to apply the law. The upper-level courts also periodically investigate how lower-level courts have implemented the law. After all, to follow the law strictly is also an important mission of the party, and the PLCs on local levels have to take that into consideration.

It should be noted that, in making these arguments, the courts do not directly cite the Constitution, which provides that no institution shall interfere with the courts' business. They all know too well that, with their personnel and budget controlled by the local party committees and the governments, those vague and general words in the Constitution cannot be of any use. Instead, the courts subtly make their arguments by displaying their detailed and concrete difficulties to the local party committees and governments. But, in a sense, they are negotiating with these superior powers: the courts will not be able to take the task and bear the responsibility unless these superior powers can solve all these problems. They have also taken advantage of the conflicts among the PLCs, the upper-level courts, and the rule of law slogan uttered by the party itself. In short, the courts have argued that both legal and institutional barriers have prevented them from taking and solving the disputes. Even if the PLCs can remove the resource difficulty by significantly increasing the courts' human and other resources, there still exists the legal barrier which may only be addressed by upper-level legislative bodies.

## Further developments

Are the arguments of the courts accepted by the superior powers? Are the strategies of the courts successful in resisting the pressure of the local party committees and governments? This section traces the developments of the issue, which will provide some clues to answering these two questions.

<sup>18</sup> Interview with villager cadres of a town in the outskirts of Guangzhou in June 2004.

<sup>19</sup> Interview with a judge of the research department of a district court in Guangzhou, 22 October 2005.

Although the MOW disputes were rejected by the courts, the pressure that the disputes be resolved did not recede. Some MOW continued to employ petitioning, sit-ins, and public demonstrations to have their voices heard. Partly due to the pressure from MOW, as well as from other local authorities, lower courts sought internal instruction from higher-level courts to clarify the legal barriers. In response to this inquiry raised by the Guangdong High Court, the Research Department of the Supreme People's Court issued a reply on 9 July 2001. It was of the opinion that individual MOW and the village collectives are two entities with equal legal status. Consequently, the courts should take the disputes as civil litigation.<sup>20</sup> But in less than one year, on 19 August 2002, in response to a similar inquiry from the Zhejiang High Court, the Case Filing Department of the SPC issued another reply. It provides that the disputes arising from the partition of land compensation between the collective and its members are not civil disputes and the courts shall not take them as civil cases.<sup>21</sup> Legally speaking, neither reply has the effect of law for they are not issued by the adjudicating committee of the SPC, as required by the Legislative Law. But in reality, these replies may nonetheless provide some guidance for lower-level courts. In light of these conflicting opinions from the SPC and, more importantly, in order temporarily to release the mounting pressure imposed by the MOW and the PLCs, many basic courts in Guangdong province accepted a set of MOW cases. Indeed, a district court in Zhuhai municipality in 2002 awarded judgments in favour of more than 50 MOW.<sup>22</sup> This was regarded as the first instance in which MOW won through civil litigation, and the decision thus drew national attention. Inspired by this court decision, many MOW further urged other courts in Guangdong province to take the disputes as civil litigation. Nonetheless, after several months, most basic courts dismissed these cases.<sup>23</sup> The reasons provided by the courts did not differ much from what the courts had claimed before the two replies were issued by the SPC.

A typical judgment of one of district courts of Guangzhou succinctly states:

‘The distribution of benefits of rural village collectives is the internal affair 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.’<sup>24</sup>

Basically, two messages can be read from this judgment: the disputes are not civil disputes, and the court is not supposed to review an issue of national policies and constitutional principles with civil law. Whatever the reasons, the position of the courts was clear: they would not directly take the disputes as civil litigation.

It was in 2004 when the Guangdong High Court, after long debates inside and outside the judiciary, suggested a tentative solution to the MOW disputes (*Guangzhou Daily*, 2004).<sup>25</sup> MOW should 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 that the

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

21 One might wonder why the Research Department and Case Filing Divisions of the SPC have issued conflicting replies. This is, perhaps, because of their different positions. Since these replies do not have the effect of the law, the inconsistencies are not regarded as a serious problem. After all, inconsistencies even exist in many formal opinions issued by the SPC itself.

22 *Southern Metropolitan Daily*, ‘Collective Dividends Remained after Being Married’, 29 August 2002, Section A19; see also, [www.cctv.com/program/lawtoday/20030826/100522.shtml](http://www.cctv.com/program/lawtoday/20030826/100522.shtml) (last visited 26 March 2006).

23 Panyu District Court in Guangzhou alone dismissed 213 of such cases in 2003.

24 Civil Adjudication Judgment 2003, Panyu District Court, No. 1467.

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

**Table 1** Outcomes of 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 make a decision	Cases dismissed	Cases withdrawn
88	81	17	31	12	8	13

Source: 'Nongchun 'wajianu' wengti de sifa yanjiu' ['Judicial Research on Rural MOW'] (Zhang, 2006).

decision made by the township government is unfair, they should go the upper-level government – the district government – for administrative reconsideration. As to the result of administrative reconsideration, MOW 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.<sup>26</sup> In this process, if the township government refuses to intervene, the MOW can also file administrative litigation based on administrative inaction. This three-step solution was indirectly upheld by a formal opinion issued by the SPC in 2005, which confirmed the reply of the Case Filing Department in 2002 and nullified the 2001 reply of the Research Department of the SPC.<sup>27</sup>

In this way, the courts have narrowly opened the gate to the MOW. The Panyu district court of Guangzhou municipality received a total of 88 of this kind of administrative litigation in 2005. The results of all of the litigation are shown in Table 1. An examination of these judgments offers several points which will be useful for our analysis.

First, the judgments, when relevant, all clearly held that it was the responsibility of the township government to step in and redress the issue. Some judgments explicitly cited the Article in Guangdong Measures which briefly mentions such responsibility.<sup>28</sup> Some also cited the Organic Law of Local Governments and People's Congresses which only mentions that the township government shall protect the collective assets and maintain social order on the village level, even though this stipulation is only remotely related to the issue of whether the township government shall be responsible for dividing the assets of the village collective.<sup>29</sup> In cases where the township government failed to make a decision after being requested by the MOW or the village collective, the court consistently held that the behaviour of the government constituted administrative inaction, an

26 Indeed, the second step does not have a 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 go through administrative reconsideration prior to filing the lawsuit suits the interests of both the courts and the governments. For the courts, administrative reconsideration can filter out additional cases. For the governments, this is one more chance to review the decision internally and thus perhaps avoid judicial scrutiny. Therefore, the second step may simply be a result of these forces. But from relevant judgments, we have found that not all MOW followed this instruction; some of them filed administrative litigation immediately after the township government had made a decision.

27 The Opinion of the SPC on Adjudicating Rural Contracted Land Disputes, 29 July 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.

28 Article 12 of Guangdong Measures.

29 Article. 61, section 3 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 constitutions and laws.' From this section, it is hard to conclude that the township governments have the authority to intervene in the MOW issue.

improper administrative behaviour in administrative law, and thus the government had to make a decision. The courts obviously wanted to use these authorities, no matter how brief and remote they are, to justify that the governments have the authority, and more importantly, that the governments also bear the responsibility to take care of the issue.

Second, with regard to the substantive law on the issue, the court consistently applied the so-called two places principle – the places of *hukou* and actual residence as the precondition for benefits. That is, it simply applied the Article in the Guangdong Measures but gave no explanation on why the Guangzhou Stipulations were not applicable. As a major municipality of Guangdong province, Guangzhou Municipality is also empowered to issue local legislation according to the Law of Legislation. More importantly, the Guangzhou Measures are approved by the Standing Committee of Guangdong People's Congress. While it is unclear whether a local legislation 'approved' by Guangdong People's Congress would have the same legal authority as legislation directly issued by it, the Guangzhou Stipulations certainly are the most immediate governing local regulation for relevant disputes in Guangzhou region, and should be applied in relevant disputes.<sup>30</sup> Arguably, the preconditions set out by the Guangzhou Stipulations – the places of living and working and *hukou* – do not directly clash with those of the Guangdong Measures which clearly require the places of actual residence and *hukou*. One may argue that the place of living and working shall be interpreted as the place of actual residence, and this shall understandably fall to the discretion of the courts. But without even discussing the difference, a direct application of the Guangdong Measures in Guangzhou seems to be a misapplication of the laws. As to the obvious inconsistency between the two places principle and the higher-level laws which imply that women deserve the benefits without any preconditions, the governments, as the defendant, responded that the Guangdong Measures was still an effective local regulation and thus there was nothing wrong in applying it. The court did not further discuss the issue, which suggests that the court was on the side of the governments. Putting these two points together, it seems that despite all the potential conflicts among the laws and especially the one between the Guangzhou Stipulations and the Guangdong Measures, the court has reached a consensus with the governments: They all applied the Guangdong Measures and ignored the regulations in the Guangzhou Stipulations.

As a result, only those MOW and their children whose *hukou* and actual residence remained unchanged got the benefits. If they happened to move to another town for whatever reasons, they lost the benefits, even though their *hukou* remained registered at the village. Of course, they could not get any benefits from their new village or town where their *hukou* were not even registered. Needless to say, the rigid application of this so-called two places principle has led to many unfair consequences. A divorced woman, for example, did not get the benefits because her original house had been demolished by government and she physically had no place to stay in the village. The son of a MOW did not get the benefits simply because he went to school in another town and did not live inside the village.<sup>31</sup> All these decisions seem extremely inequitable, given all the men 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 the city because it was impossible for her to live in the village and commute to work.<sup>32</sup> Of course, one might argue that the

30 Another argument that the Guangzhou Stipulations should be applied here, is that they were issued in 1996, later than the Guangdong Measures of 1994. The Legislative Law of China stipulates that in case of conflict between local regulations issued by the same legislative body, the one issued later prevails. Of course, one may argue that the Guangzhou Stipulations, though approved by the Standing Committee of Guangdong Congress, are not really issued by it.

31 Interview with MOW on 20 August 2005.

32 Interview with a MOW on 18 August 2005.

courts' role is to apply the laws faithfully, regardless of outcome or policy consequences. But, as already noted, the application of the Guangdong Measures rather than the Guangzhou Stipulations is itself problematic and almost indefensible. All these inequitable results further suggest that there must be a reason why the court chose to apply the two places principle.

Third, despite the alleged inferior political position of the judiciary, the court did not always support the decision of the governments, which is indicative of the power relationship between the courts and the governments. Indeed, the court has often struck down the administrative decisions. Among all the 81 cases closed in 2005, only 17, or 21 per cent of administrative decisions were upheld and eight cases were dismissed. Other than these, the plaintiffs in the remaining 56 cases gained something out of the litigation. This result once again suggests that the courts are not a rubber stamp in China's administrative litigation (Peerenboom, 2002, p. 400). In our data set, while the court did not have any problem with the government's application of the two places principle, it revoked or remanded many government decisions on the basis that the evidence or the facts were not clear. With its director as only an ordinary member in the PLCs, the court is not in a position to confront the governments. But with regard to the detailed issues in administrative litigation, the courts seem to have reversed their underdog role by asserting a supervisory position toward the governments.

In addition, the enforcement of these administrative judgments did not surface as a big problem. The townships and even the district governments have been co-operative in implementing the judgments. Even when the governments' decisions were revoked and when the court judgments were favourable to the MOW, the governments have nonetheless successfully implemented the judgments. When some judgments were resisted by the village collective, the governments sent special delegates to the village, and persuaded and cajoled the villagers to accept and implement the judgments (Zhang, 2006).

With the two places principle applied by the courts and the governments, most MOW cannot get remedies through this narrowly interpreted principle. Together with other social groups, such as the China Confederation of Women, which use international human rights language to deal with the issue, MOW successfully pushed the revision of the Women's Rights Protection Law in December 2005. The revised Law explicitly stipulates that women shall be treated equally in the division of benefits in rural village collectives. This revision arguably invalidates the two places principle. But the courts in Guangdong, including those in Guangzhou region, still contend that the Guangdong Measures have not been abolished and the detailed regulations trump general stipulations in the upper-level laws. Another provision of the revised law further explicitly stipulates that if the disputes are brought to the courts, the courts shall take them. But the courts argue that the revised law does not specify that the disputes must be taken as civil lawsuits and the courts have already taken the disputes in administrative litigation. As a result, the courts' handling of the disputes has so far not been changed by the revised Women Rights Protection Law, either in procedure or in substance.<sup>33</sup>

## Analysis

While the minutes of the PLCs may not be accessible and it is unrealistic to interview the most important officials or judges in charge of the issue, the above developments of the issue nonetheless offer a good opportunity to explore the extent to which the resistance and strategies of the courts are effective. Obviously, if the courts are still required to solve the disputes despite the legal and enforcement difficulties they have raised, their arguments are clearly proven ineffective. On the

33 See supra n. 9, *Nanfang Agricultural News*, 5 December 2005.

contrary, if their concerns are addressed, it seems very likely that their arguments have been somehow effective. Otherwise it is hard to figure out other reasons why, given the overwhelming pressure to solve the disputes, these concerns have been addressed.

The later developments suggest that the procedural difficulty has been well addressed. Taking the issue all the way up to the SPC for internal instructions indicates that the procedural difficulty is a serious concern for the courts. From the way in which the courts are handling the disputes, we can see that the procedural difficulty has been solved or at least avoided. As noted, it is impossible to take the disputes directly as administrative litigation because the village collective is not part of the administrative apparatus. 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. That is to say, taking the disputes as administrative litigation at this stage presents no procedural difficulty. Moreover, this concern has further been addressed by the opinion of the SPC that explicitly excludes the possibility of taking the disputes as civil litigation. The opinion is important for the lower courts in that it is a strong endorsement for their position. After all, whether the disputants of the MOW cases are equal or not is a very controversial issue. It is true that there are some public elements in the disputes, but the main issue of the disputes lies in how the village collective shall manage and divide its assets or profits. As many experts argue, this kind of behaviour has little to do with the administrative and regulative function in governing the internal affairs of the village; it is largely civil in nature (Sun et al., 2004). There has never existed a clear line between the public and the private in China's legal practice, given the mixed nature of assets in a transition economy. The opinion of the SPC clearly blocked the way of obtaining resolution via civil litigation.

The concern that the courts were not authorised to review the decisions of the village collective was also well addressed. After the township government is required to step in and make a decision, and the disputes have been transformed into administrative litigation, the courts do not have to review the decision of the village collective directly. Instead, they simply review the decision of the township government. In this scenario, the decision of the township government is certainly concrete administrative behaviour and to review this behaviour has clear authorisation under the Administrative Litigation Law. In this way, the courts avoid the question of whether they themselves are authorised to review the decision of the village collective. Rather, the authority problem has been pushed to the administrative power.

What seems odd is that, in justifying the current way of handling the disputes, the administrative judgments of the courts simply jump to the conclusion that the township government is authorised - and indeed bears the responsibility - to review the decisions of the village collective. While the courts might not have the authority to review the decisions of the village collective, the township government is not in any better position. According to the Villagers' Organic Law, even the township government does not have solid authority to make decisions for the village collective.<sup>34</sup> Indeed, the law clearly specifies that the township government shall not interfere with the internal affairs which belong to the autonomy of the village. Whether the village autonomy would allow the villager collective to make decisions contrary to the law, and whether, in refusing to give benefits to MOW, the village collective violates the laws, are of course difficult legal questions. But the courts certainly should have clearly addressed the legal basis on which the township government makes decisions for the village. As shown, the courts 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 the laws. The judgments did cite the Guangdong Measures which briefly mention that the township government shall require the village collective to make changes if the village collective has violated the law. They also mentioned the Organic Law of Local Governments and People's Congresses, which

---

34 Article 4 of the Law.

only vaguely states that the township government shall protect the property of the village collective.<sup>35</sup> In fact, it is really hard to see how this is relevant in the disputes. Another working report prepared by one of the basic courts argues that because the village collective shall register (bei'an) their village rules at the township government, the latter shall supervise and examine the legality of the rules (Zhang, 2006). In addition to the difficulty in regarding the decisions of the village collective on dividing village benefits as the village rules ('cungui,' usually addressing the conduct code of villagers), the interpretation of the word 'register' as 'supervise' or 'examine' is clearly beyond any reasonable understanding in Chinese language.

Moreover, the court judgments did not even mention the existence of the Guangzhou Stipulations, which according to the normal interpretation mentioned above, shall be applied in Guangzhou region. The Guangzhou Stipulations do, however, mention that indignant MOW can either demand a solution from the township government or *directly* file a lawsuit in the courts. This regulation is clearly inconsistent with the current way of handling the disputes. This silence is, of course, open to many possible explanations such as that the adjudicating staff made mistakes or was simply incompetent. But in an article published by the vice director of the Intermediate Court of Guangzhou and his fellow judges, this potential conflict is well stated (Sun et al., 2004, p. 28). It is very unlikely that the courts are not aware of such obvious inconsistencies after spending several years in figuring out a way to resolve these 'major and complex' disputes. A more plausible explanation seems to be that the courts have directed their efforts towards handing the disputes to the governments.

The concern of the courts that the substantive laws on the issue are unavailable or contradictory is also addressed, though somewhat ill-addressed. In the administrative judgments, the substantive conflict between the upper-level laws and local regulations seems to disappear: both the courts and the governments have tacitly followed the principle of two places in making decisions. But, as argued earlier, this principle, derived from the Guangdong Measures, is not only contradictory to the principle of gender equality and labour mobility, but also inconsistent with the relevant regulations of the Guangzhou Stipulations. Moreover, whether it is appropriate to apply the two places principle in the governments' administrative decisions is, itself, a question of legality which certainly should be clearly addressed in their administrative judgments.<sup>36</sup> The difficulty of applying incomplete laws, raised earlier by the courts, seems to vanish. Or the difficulty seems more like an excuse, or a bargaining chip for the courts.

What can be seen in their judgments, however, is that the courts have nevertheless applied a clear and straightforward principle. Arguably, the two places principle might be the strictest restriction for MOW to get benefits and dividends. In their consistent application of the two places principle, the courts simply set a clear standard to deter potential MOW disputants. Its application would prevent a large proportion of the MOW from filing a lawsuit to the courts. In addition, the judgments awarded according to this principle would encounter the least resistance from the majority of villagers. Through applying this principle, the courts solve the easiest of the disputes, while keeping all others away.

In applying the two places principle, the courts have tacitly toed the line with the governments, despite the potential conflict of laws and the extremely unfair consequences for MOW. The surprising consistency suggests that the courts and the governments have reached a consensus in the PLCs, which are responsible for co-ordinating various conflicts and making final decisions.<sup>37</sup> For all the

35 Panyou District Court Civil Adjudication Judgment 2003: No. 1467.

36 According to the Administrative Litigation Law (ALL) in China, the courts in administrative litigation shall review the legality of concrete administrative behaviours. Art. 5 of the ALL.

37 Many judges and officials that I interviewed admitted this, though the decisions seemed made independently by the leaders in their basic-level courts or district governments.

reasons mentioned above, the courts want to push off the disputes to the governments; but the governments certainly are not willing to take the disputes. In order successfully to release themselves from responsibility, the courts must work out a plan the governments can accept. Obviously, if the governments themselves are unable to solve the disputes or they are clearly prevented from solving the issue by using the law, there is no way that the courts can dump the disputes on the governments. In this sense, the application of the two places principle seems an agreement reached between the courts and the governments in the PLCs: it allows the governments to do less work, and its application encounters the least resistance. It is more like a compromise resulting from the struggle, mutual blaming, and co-operation between the governments and the courts than a consistent legal interpretation based on relevant laws and local regulations. Partly because of the legal unsoundness of the principle, MOW have been able to push for the revision of the Women Rights Protection Law which invalidates the two places principle.<sup>38</sup> Only in this way can we understand why, even when the revised Women's Rights Protection Law has invalidated the two places principle, the courts, together with the governments, are still unwilling to deviate from their shared position.

Indeed, difficult cases and incompleteness of legal provisions should not constitute a sound basis for the courts' keeping these disputes from their doors (Hart, 1961; Dworkin, 1977).<sup>39</sup> The role and the function of the courts are to handle disputes, and the courts should always follow certain principles in handling new disputes. In China's system, the general principles, especially those which use such vague terms as 'fairness', 'goodwill', 'social ethics', etc., are to serve the function of these principles in handling news disputes. Strictly speaking, legal provisions will never be able to cover every possible kind of dispute which might be generated by complicated social activities; legal provisions can never be absolutely perfect, and additional legislation and improvement of a legal system cannot eliminate all legal loopholes. But these incompletenesses and inconsistencies seem to have become a useful bargaining tool for the courts in their negotiations with other powers. In other words, the ambiguity of the law provides them with an opportunity to bend their position in exchange for something more desirable.

The final concern of the courts - i.e. that they are incapable of directly handling the disputes - is also addressed. First, when the disputes are taken as administrative litigation, there have not been numerous complicated MOW disputes flooding and overwhelming the courts. Now it is the responsibility of the governments to hear all the disputes at grassroots level, while the courts will only review the governments' decisions after the disputes have gone through the government intervention process, and sometimes administrative reconsideration. In this way, the courts have established a filtering process through the governments. This means that once the MOW have gone through the administrative procedures can they reach the gates of the courts. In the process of government intervention and administrative reconsideration, most cases will be settled and thus filtered out of the court system (He, 2005a). Moreover, because this filtering procedure is complicated, expensive, lengthy and fragmented, and also because some MOW believe that bringing governments to court is as effective as 'hitting a stone with an egg' (Finder, 1989; O'Brien and Li, 2005; Pei, 1997), they will tend not even to initiate proceedings. As a result, the cases that the courts receive will be significantly fewer than the actual disputes existing in society (Felstiner et al., 1980-81). The number of MOW cases that a district court of Guangzhou received, to a large extent confirms this point. In 2005, the court received only 88 administrative cases, despite some 19,000 MOW of the district who potentially have a MOW dispute. By contrast, during the three months of

38 See a report of an interview with Lu Yuan, an expert in providing legal aid to the MOW, at [www.ccrs.org.cn/article\\_view.asp?ID=1779](http://www.ccrs.org.cn/article_view.asp?ID=1779) (last visited 27 March 2006).

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

the year 2003 when the court agreed to take the disputes in civil litigation, it received 213 cases (Zhang, 2006). In other words, the courts have in this way successfully controlled the number of the cases at a manageable level, even though numerous complaints of MOW remain unaddressed. This certainly serves the purposes of the courts because they already have a very high caseload, and they have little economic or political incentive to take more (He, 2007).

Even for those cases that eventually reach the courts, the most onerous and laborious part of hearing, including the evidence gathering and particularly the interviews with villagers, now becomes the responsibility of the governments. To ascertain the place of actual residence of MOW, for example, the township governments have to go down to the village and gather first-hand evidence from the MOW and their neighbours scattered around rural areas. To ascertain how many benefits were already distributed, the township governments also have to seek the co-operation of the village collective. As noted, because most villages are resistant to outside interference on the issue, the courts alone may not even be able to obtain the co-operation of the village collective. But under the current solution, the courts only need to review the paperwork prepared by the governments and the plaintiff MOW. If the evidence and facts are clear, the courts will make a judgment. Otherwise, they will simply remit the cases back to the governments. The courts have thus offloaded the most troublesome and thorny part of the disputes while retaining the easiest part. In fact, this is not such a bad strategy: the governments have to work on the difficult part of the job, but the courts retain the authority to supervise the governments. This point is clearly indicated by the revoked or remanded administrative cases which constitute more than a half of the total cases. In striking a deal with the governments in handing the disputes through administrative litigation, the courts certainly have managed to improve their traditionally disadvantageous position.

The current practice also, in 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 deliver the detailed remedy for the MOW. What the courts need to do now is 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, make the decisions for the governments. In this sense, the courts implement the decisions through the power of the governments. In fact, from the perspective of the courts, the governments are definitely the appropriate place for offloading such responsibility: the governments have the capability to implement the judgments. While village heads have every reason not to follow the orders of the courts, they will very likely bow to 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. To a certain extent, however, they must co-operate with the township government because from time to time, they still need support from the township government to maintain or boost their authority inside the village. As shown, through sending delegates to the village, the township governments are able to convince or force the villagers and their heads to implement the judgments, through explaining the law and especially the position of the governments and the PLCs.<sup>40</sup>

At the same time, the chance that the courts' judgments will be appealed becomes slim for two reasons: first, the overall number of the filed cases is very small; secondly, without bearing the responsibility for judgment enforcement, the courts can 'strictly' stick to the two places principle, making sure their judgments are legally correct. In other words, they do not have to balance the reasonableness with the legality of their judgments, which often constitutes a dilemma in

---

40 Interview with an enforcement sheriff, 3 August 2004.

transitional legal systems like that of China (Suli, 2000). Because the judgments are awarded according to the two place principle, the 'consensus' of the higher-up, and thus are legally correct, the appeal courts are unlikely to find any legal mistakes.

The above analysis suggests that the courts' concerns have in one way or another been addressed in the later developments. Through pushing away the disputes to the governments and taking the disputes in administrative litigation, the courts have effectively resisted the pressure from relevant authorities and parties expecting the courts to solve the disputes. In a way, the courts have successfully shifted the blame to the governments. Although the courts only take the tip of the dispute iceberg, they claim that they have already done their part. If, for whatever reason, their judgments cannot be implemented, they will not be blamed for offering empty promises because they have now installed the governments as the scapegoat. Even if numerous complaints of MOW remain unaddressed, it is the governments, the courts argue, that have failed to do the job.<sup>41</sup> In a sense, the governments are forced to co-operate with the courts and help implement the court judgments, even though the governments are reluctant to take the disputes either. The courts have thus defeated the governments in the argument over which institution should bear the responsibility for solving the disputes. This result is definitely acceptable to, if not preferred by, the PLCs and the local party committees, the ultimate power arbiters of the region. Their concerns on social and political stability have been well addressed by the courts' actions because there is now one channel for solving the disputes, but that channel will not cause much social instability as it controls the floodgate of the disputes. Faced with the complicated administrative and litigation process, not many MOW are likely to protest the decisions of the governments or the courts, or to stir discontent against the township governments. By handing the disputes over to the governments, the courts have reduced their workload, avoided the difficulty of judgment enforcement, and gained an advantageous position in the power relationship with the governments.

## Implications

This case study has demonstrated that although the local party committees and governments have full control of the courts' personnel and budget and the courts' business is frequently if not invariably interfered with by them, the courts do not always follow the instructions of these superior powers. While both the local party committees and governments had strongly and repeatedly requested the courts to take the disputes directly, the courts eventually, and effectively, turned them down. The PLCs are certainly a channel through which other superior powers can exert influence on the courts, but the PLCs also become an arena for the courts to display their difficulties and raise their legal arguments of resistance. There is no doubt that in this interaction, the legal doctrines and even the detailed wording of the laws have become extremely significant for the courts. But they are significant not necessarily in the sense that they are important in solving the disputes per se, but in the sense that they have become a powerful weapon for the courts. Through creatively and strategically interpreting the law, it seems that the courts have carved some room under the dominance of the superior political powers. The procedural difficulty, for example, has been strategically and pragmatically used in balancing the courts' institutional capability with the pressure that the MOW and the superior powers imposed on them. The conflicting stipulations of the substantive laws on the issue have, to a certain extent, offered the courts an opportunity in bargaining and eventually reaching a compromise with the governments. All these legal arguments are in a way complementary to the institutional capabilities or interests of the courts. Moreover, the courts have also steered around these conflicts among the different pressures and authorities. For

41 Interview with a judge in the research department of a district court in Guangzhou, 22 October 2005.

example, the courts argued that handling the disputes in accordance with the laws is also an important goal of the party-state itself, and they suggested that the governments are in a better position to solve the disputes. They also obtained an opinion from the SPC to support their position in not directly taking the disputes. The combined force of these arguments is so compelling that the courts have eventually gained an advantageous position favored to 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. In order to ease the pressure, they have to rely on, and indeed take advantage of, administrative power. While the local party committees and the PLCs, the highest arbiters in charge of local affairs, have a pressing need to solve the disputes, both the courts and the governments have vested interests in avoiding or even repressing the disputes. The behaviour of the courts would certainly be better understood in their subtle relationship with the governments and the local party committees. This is why they have applied some local legal regulations or even created the two places principle, but ignored other regulations; it is why they have accepted some but not all of the disputes; and it is why they have been, generally speaking, hesitant to expand their power into these areas. All these behaviours are produced by goals and purposes that are meaningful only in relation to their special context (Geertz, 1983; Gillman, 1994; Tate and Haynie, 1994).

This article has thus suggested that, by strategically manoeuvring the space of the laws and displaying their own institutional difficulties, the basic courts in China are able to resist the pressure from other superior actors and develop a significant form of judicial independence, even though they are still embedded in a complex web of political and power structure. The political embeddedness and their own resource constraints somehow determine that they are not purely motivated by power maximisation. But they are nonetheless still capable of fashioning some degree of juridical autonomy out of this political and power embeddedness. This study thus paints a more complicated and nuanced picture of the relationship between the judiciary and other powers in China than is conventionally recognised. The courts are not simply a passive instrument of the governments and the party, yielding to various external forces which have been imposed on them. Under the seemingly stable surface of iron control, there exist dynamic turbulences of conflict, repression, resistance, competition, compromise, and co-operation in which law, power and politics are interacting. There is some, if not a great deal, of room for the courts to manoeuvre in the dominance of the party and administrative power. The conventional wisdom seems too simplistic, that Chinese courts are simply a passive instrument of other political or administrative powers.<sup>42</sup>

In this sense, before one asks whether the courts are independent in adjudicating disputes, one shall ask whether the courts have the capability to solve the disputes independently (He, 2004). At least in this case, judicial independence is not a preferred option even for the courts themselves. As already indicated by many studies, the degree of judicial independence on the institutional level is often not the best index in the understanding of the behaviour of the courts (Holland, 1991; Toharia, 1975; Smithey and Ishiyama, 2002). In China's context, one must understand that the judiciary itself was placed into the Chinese bureaucracy, and the launch of a series of administrative laws was intended to limit the power of administrative agencies and local governments within the framework of the party-state. The courts may have had to seek distance themselves from other administrative powers as part of a bureaucratic struggle, rather than battling for judicial independence which has been the case in Western and democratic countries. To understand whether Chinese courts will expand their own territory or whether they will aggressively achieve 'judicial independence', we shall perhaps

---

42 It should be noted that this kind of resistance is by no means unique in the discussion of the MOW disputes. In addressing the difficulty of judgment enforcement, for example, the courts usually cite that other powers are not co-operative and the courts do not have enough resources. This practice can be frequently seen in the annual working reports of the courts. Clearly, this is to serve two functions: one is to push away the courts' responsibility and shift the attention of the blame game; the other is to get more resources.

have to pay more attention to the legal environment and history, institutional interests and power structure in which the courts are embedded.

When the courts' behaviours are placed and understood in this context, it is very hard to say whether the judicial power has recoiled or expanded. The courts were indeed reluctant to expand their jurisdiction into these areas, but they have gained more territory through reviewing the administrative behaviours. This seems to be a paradoxical process because in giving up some territory, they have regulated, disciplined and rationalised more social activities. Unlike the situation in other transitional countries (Moustafa, 2003; Helmke, 2005), what is happening in this case is not a direct judicialisation of politics but a judicialisation of administrative power. This is perhaps a well-trodden path for legal development in a country in which administrative power is staggeringly dominant but the party-state nevertheless needs to use the courts to handle more and more disputes. If the courts directly grab power in judicialising politics and confronting superior powers, they will encounter tremendous resistance which may even threaten their very existence.<sup>43</sup> The weak judiciary must therefore first rely on, and co-operate with, administrative power in fulfilling the social control function required by the party-state. It must be acutely aware of the circumstances where it executes its power.

This story thus offers an opportunity to reflect on the limitation of the human rights movement in quasi-authoritarian states like China. As shown, the movement certainly has made some progress while urging the courts to take the disputes and pushing the revision of the Women's Rights Protection Law. The courts eventually also offer a channel, though an extremely narrow one, for the disputes to be addressed. Compared with the original situation in which no judicial remedy existed, this progress is more symbolic than meaningful in the protection of women's rights. Neither the MOW nor the human rights activists in China have achieved what they originally expected. The courts do not immediately embrace the positions of the indignant MOW or human rights activists. The revised law and the human rights movement only offer the courts an opportunity subtly to adjust their power position in the political context. When modern law is translated into local practice, the meaning of the law itself may be twisted and deformed (Merry, 2006). The decision-making process of these courts suggests that, while China is moving toward more protection of women's rights, the progress is very incremental and the road towards justice and fair treatment is long and bumpy. Human rights activists may have to pay more attention to the dynamic of local politics, in order to better understand their own role and potential in the complicated interaction of power, law and politics.

## References

- CHAN, Kam Wing (1994) *Cities with Invisible Walls*. Hong Kong: Oxford University Press.
- CHENG, Tiejun and SELDEN, Mark (1994) 'The Origins and Social Consequences of China's Hukou System', *China Quarterly* 139: 664–8.
- DWORKIN, Ronald (1977) *Taking Rights Seriously*. Cambridge, MA: Harvard University Press.
- FELSTINER, William et al. (1980–81) 'The Emergence and Transformation of Disputes: Naming, Blaming, Claiming', *Law and Society Review* 15: 631–54.
- FINDER, Susan (1989) 'Like Throwing an Egg against a Stone: Administrative Litigation in the People's Republic of China', *Journal of Chinese Law*, 3: 1–28.
- HART, H. L. A. (1961) *The Concept of Law*. Oxford: Clarendon Press.

43 See, for example, when Li Huijuan, a mid-level judge of Luoyang, Henan province, China, announced that a local regulation was void, she herself was almost removed from the position. 'A Judge Tests China's Courts, Making History', *New York Times*, 28 November 2005, Section A1.

- HE, Xin (2004) 'Ideology or Reality? Limited Judicial Independence in Contemporary China', *Australian Journal of Asian Law* 6: 213–30.
- HE, Xin (2005a) 'Administrative Law as a Political Control Mechanism in Contemporary China', Paper presented at the conference 'Constitutionalism and Judicial Power in China' organised by CERI and Sciences Po in Paris, 12–13 December 2005.
- HE, Xin (2005b) 'Why Do They not Comply with the Law? Illegality and Semi-legality among Rural-urban Migrant Entrepreneurs in Beijing', *Law and Society Review* 39: 527–62.
- HE, Xin (2007) 'Recent Decline of China's Economic Caseloads: Exploration of a Surprising Phenomenon' *China Quarterly* 190: 352–74.
- HE, Weifang (1997) 'Zhongguo sifa zhidu de liangge wenti' ['Two Problems of Chinese Judicial System'], *Zhongguo shehui kexue* [Social Science in China] 6: 117–30.
- HELMKE, Gretchen (2005) *Courts under Constraints: Judges, Generals, and Presidents in Argentina*. Cambridge: Cambridge University Press.
- HOLLAND, Kenneth M. (ed.) (1991) *Judicial Activism in Comparative Perspective*. New York: St Martin's.
- HOU, Meng (2003) 'Sifa gaige beijing xia de zhengfa zhili fangshi: jiceng zhengfa weiyuanhui zhidu ge'an yanjiu' ['The Political-Legal Governance in the Background of Judicial Reform: A Case Study of Political-Legal Committees on Grassroots Level'], *Huadong zhengfa xueyuan xuebao* [Journal of East China University of Political Science and Law] 5: 99–106.
- HUNG, Vernon (2005) 'Judicial Reform in China: Lessons from Shanghai', *Carnegie Papers Series*.
- FU, Hualing (2003) 'Putting China's Judiciary into Perspective: Is It Independent, Competent, and Fair?', in Erik Jenson and Thomas Heller (eds.), *Beyond Common Knowledge*. Stanford: Stanford University Press, pp. 193–219.
- GEERTZ, Clifford (1983) *Local Knowledge*. New York: Basic Books.
- GILLMAN, Howard (1994) 'On Constructing a Science of Comparative Judicial Politics: Tate and Haynie's 'Authoritarianism and the Functions of Courts'', *Law and Society Review* 28: 355–76.
- JIANG, Shigong (2003) 'Falu bu ru zi di de minshi tiaojie' ['Civil Mediation in a Lawless World'], in S. Jiang, *Fazhi yu zhili* [Legal System and Governance]. Beijing: China's University of Political Science and Law Press.
- KECK, Thomas M. (2004) *The Most Activist Supreme Court in History: The Road to Modern Judicial Conservatism*. Chicago and London: University of Chicago Press.
- LUBMAN, Stanley B. (1999) *Bird in a Cage*. Stanford: Stanford University Press.
- MERRY, Sally (1990) *Getting Justice and Getting Even*. Chicago: University of Chicago Press.
- MERRY, Sally (2006) *Human Rights and Gender Violence: Translating International Law into Local Justice*. Chicago: University of Chicago Press.
- MOUSTAFA, Tamir (2003) 'Law versus the State: The Judicialization of Politics in Egypt', *Law and Social Inquiry* 28: 883–930.
- O'BRIEN, Kevin J. and LIANJIANG Li (2005) 'Suing the Local State: Administrative Litigation in Rural China', in N. Diamant et al. (eds.), *Engaging the Law in China: State, Society and Possibilities for Justice*. Stanford: Stanford University Press.
- PEERENBOOM, Randall (2002) *China's Long March Toward Rule of Law*. Cambridge: Cambridge University Press.
- PEERENBOOM, Randall (2006) 'Judicial Independence and Judicial Accountability: An Empirical Study of Individual Case Supervision', *China Journal* 67–94.
- PEI, Minxin (1997) 'Citizens v. Mandarins: Administrative Litigation in China', *China Quarterly*, 152: 832–62.
- SMITH, Rogers M. (1992) 'If Politics Matters: Implications for a "New Institutionalism"', *Studies in American Political Development* 6: 1–36.
- SMITHEY, Shannon I. and ISHIYAMA, John (2002) 'Judicial Activism in Post-Communists Politics', *Law and Society Review* 36: 719–42.

- SOLINGER, Dorothy J. (1999) *Contesting Citizenship in Urban China: Peasant Migrants, the State, and the Logic of the Market*. Berkeley, CA: University of California Press.
- SULI, (2000) *Songfa xia xiang [Bring the Law to the Countryside]*. Beijing: China's University of Political Science and Law Press.
- SULI, (2006) 'Zhongguo sifa zhong de zhengdang' ['The Political Parties in China's Judiciary'], *Fafu yu shehui kexue [Law and Social Sciences]* 1: 256–84.
- SUN, Hailong et al. (2004) 'Chengshi hua beijing xia nongchun wajianu quanyi jiufeng jiqi jie jue jizhi de sikao' ['An Meditation on Rural "MOW" Disputes and Their Resolution Mechanism In the Background of Urbanization'], *Falu shiyong [Legal Application]* 3: 26–30.
- TATE, C. Neal (1995) 'Why the Expansion of Judicial Power?', in N. Tate and T. Valinder (eds.), *The Global Expansion of Judicial Power*. New York: New York University Press.
- TATE, C. Neal and HAYNIE, Stacia (1993) 'Authoritarianism and the Functions of Courts: A Time Series Analysis of the Philippine Supreme Court, 1961–1987', *Law and Society Review* 27: 707–40.
- TOHARIA, J. Jose (1975) 'Judicial Independence in an Authoritarian Regime: The Case of Contemporary Spain', *Law and Society Review* 9: 475–96.
- UPHAM, Frank K. (2005) 'Who Will Find the Defendant if He Stay with His Ship? Justice in Rural China', *Yale Law Journal* 114: 1675–718.
- WANG, Fei-Ling (2005) *Organizing through Division and Exclusion: China's Hukou System*. Stanford: Stanford University Press.
- ZHANG, Yongbo (2006) 'Nongchun "wajianu" wengti de sifa yanjiu' ['Judicial Research on Rural "MOW"'], Panyu District Court edn., *Yushan fatan [Yushan Law Forum]*, p. 2.