

JUSTICE WITHOUT JUDGES: THE CASE FILING DIVISION IN THE
PEOPLE’S REPUBLIC OF CHINA

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*with Michelle Liu***

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INTRODUCTION

The Chinese judicial system was reestablished when the “Gang of Four” was on trial in 1980. More than three decades later, justice still eludes many citizens. Despite drastic improvements in Chinese law, judicial infrastructure, and the quality of legal professionals, the judicial system still affords no reliable access to independent judges, which sometimes results in a complete bar to securing one’s right to a hearing before a judge.

This article in part examines how the institutional structure of the judiciary and governing laws give judges absolute power to dismiss cases without affording parties the opportunity to present the merits of their case before a judge. Rather than discuss the inherent weaknesses of the Chinese judicial system overall, a subject on which scholarship abounds, this article considers the case filing division (立案庭) and its associated phase of the legal process. This case filing division is separate from the trial division and gives judges immense power to exercise wide discretion in accepting or rejecting cases without affording any access or accountability to the public.

The case filing division was established as a separate court department very recently.¹ In the past, the trial division directly handled all initial aspects of cases, including the filing procedures.² In the early 1990s, a few

¹ See Yunan High People’s Court, 立审分立与审判流程管理情况的调查与研究 [Research & Study on Separation of Case Filing & Trial & Management of Trial Procedure] in vol. 2003, no. 3 立案工作指导与参考 [GUIDES & REFERENCES ON CASE FILING] 160, 172 (Jiang Xingchang et al. eds., People’s Court Press 2003).

² See *id.*

courts were selected to experiment with a new case filing system.³ Having observed its positive impact on judicial efficiency and integrity, the Supreme People's Court established a case filing division in 2000, signaling to the courts nationwide to follow its precedent.⁴

Although the responsibilities of the case filing division are numerous and are still under development, its primary purpose is to approve or deny access to the court system. This article challenges its judicial role, arguing that it is an obstruction to the administration of justice and that, in certain politically sensitive cases, it deprives plaintiffs of their right to procedural and substantive due process of law. Because the case filing division has the authority to accept or reject complaints from being filed in the courts, regulations governing the scope of its administrative power and civil procedure are of critical importance. A close examination of the case filing division reveals that it is flawed in both principle and practice, which has serious implications for China's legal system and social stability.

Interest in writing this article began in late 2002 following the author's own experience with the case filing division in two courts in Shenzhen. Liu & Wang, Attorneys at Law, the author's law firm ("the Firm"), was invited by a friend from the Shenzhen government to provide services to four state-owned enterprises ("SOEs") wishing to transfer 348 million shares of Shenzhen Development Bank to New Bridge Capital Ltd. ("New Bridge"), an American private equity firm.⁵ This important and well-publicized transfer involved 18% of all the shares in the Shenzhen Development Bank. It was also the first time that the Chinese government allowed a foreign enterprise to acquire a controlling interest in a Chinese bank. The local government officials were so enthusiastic about the deal that they even allowed New Bridge to establish new management before finalizing the details of the transaction. The legal and business communities in China and abroad were monitoring this agreement carefully for its potential precedential value.

The Firm was working jointly with Junhe Law Offices, a Beijing-based law firm, and Smith, Solomon & Barney, an international accounting firm. Four lawyers from the Firm joined the negotiation and the drafting of the

³ See 最高人民法院工作报告 (1986年) [Working Report of Sup. People's Ct.] (promulgated by Sup. People's Ct., Apr. 20, 1986), available at http://www.gov.cn/test/2008-03/27/content_929853.htm (last visited Aug. 16, 2010).

⁴ Establishing a case filing division in the Supreme People's Court was a milestone in the reform of courts in China. For purposes of guiding the case filing procedure in the courts, the Supreme People's Court also published a series of books on the works of the case filing division, entitled 立案工作指导与参考 [GUIDES & REFERENCES ON CASE FILING]. See vol. 2002, no. 1 立案工作指导与参考 [GUIDES & REFERENCES ON CASE FILING] 1, 2 (Shen Deyong et al. eds., People's Court Press 2002).

⁵ All case materials on file with author.

final contract. Under the supervision and guidance of the government, five meetings were held with the SOEs where the structure of the contract was discussed on several occasions. The SOEs subsequently accepted all the reports and legal documents produced by the Firm. At some point, the Firm asked the government whether the Firm should make a written contract for the legal service with the SOEs, but the answer came back that working with the government meant that a written contract would be unnecessary and that the SOEs would pay for the legal service.

After nearly two months of collaboration, the parties produced a draft contract, and provided legal advice concerning the risks and jurisdictional issues. The Firm submitted to the SOEs the documents regarding terms of legal fees after several weeks of negotiations, but they returned those documents unsigned. The SOEs then promised to pay the Firm after discussing the appropriate allocation among themselves. After several more weeks, the Firm sent the SOEs an update of the documents regarding their legal fee obligations. After the Firm verified that the SOEs had received the documents, the SOEs refused to sign the documents and returned them without an explanation. After nearly two months of meetings and over 300 billing hours by the Firm's lawyers, the SOEs ultimately refused to pay for the legal services they had received.

The Firm turned the matter to the court, and submitted hundreds of pages of documents to the Shenzhen Futian District People's Court ("Futian Court"), including e-mail correspondence, meeting notes, a privacy agreement signed by each SOE, papers signed by the SOEs acknowledging the receipt of the Firm's legal documents, the draft contract, and legal analysis regarding the share transfers. To the author's surprise, the case filing division refused to accept the case (不予受理), asserting that it had no factual evidence (无事实依据) to support the claim so it did not meet the conditions for initiating a civil action under Article 108 of the Civil Procedure Law.⁶ The Firm appealed the decision to the Shenzhen Intermediate People's Court, which rejected the case on the same grounds.⁷

The case filing division at the two courts said that the case had no supporting facts. However, the evidence provided to establish that offer and acceptance may have occurred was sufficient to show that the claim had a factual basis. As contract law of People's Republic of China ("PRC")

⁶ See 民事裁定书 [Civil Order], (2003) 深福法立裁字第84号 (on file with author). The court rejected the case and held that the Firm had not provided any factual evidence tending to show that a legal-service contract existed between the Firm and the SOEs or that the Firm had carried out its obligations under such a contract. Therefore, there was no factual evidence supporting the claim as required by the Civil Procedure Law. For a detailed discussion on the statutory requirements under the Civil Procedure Law, see *infra* Part III.

⁷ Civil order on file with Ms. He Xiangsha, Esq., a partner of Liu & Wang, Attorneys at Law, who was responsible for this appeal.

stipulates, a contract is concluded when the offeror receives a valid acceptance from the offeree.⁸ Article 22 of the Contract Law further stipulates several ways in which an offer and acceptance may occur, providing that, unless the offer is based on the parties' transaction practices or the offer indicates that an acceptance may be made by performance, an acceptance shall be made when notice is given.⁹

While the Firm never signed a written legal-service contract with the SOEs, all e-mail correspondence, meeting notes and other documents signed by the SOEs indicated that the Firm had agreed to accept the SOEs' offer and had in fact diligently worked on the case. Contract Law acknowledges that an enforceable contract can be formed without a final written memorial of the agreement:

Article 36: Contracts shall be written as provided by law, administrative regulation, or the parties, but if one party has performed the principal obligation and the other party has received the benefit of that performance, a contract is established even if the agreement is unwritten.¹⁰

Article 37: A contract, which is memorialized in written form, shall be established, if one party has performed its principal obligation and the other party has received it before signature or affixing its seal.¹¹

All the documents submitted to the courts showed that the Firm performed as instructed by the SOEs, and that the SOEs acknowledged, by issuing confirmations, that they received the services. Contract Law provides the Firm with the right to sue for damages, but the case filing division of Futian Court declined to hear the case and found that the complaint lacked evidence of a contract with the SOEs.

The court did not spell out its reasoning or clarify why the evidence submitted was insufficient to state a claim that the Firm had a contract. It denied the Firm an opportunity to proceed to a hearing or trial (庭审), depriving it of a chance to argue the case in a court proceeding.¹² Article 22 of the Contract Law supports at least an arguable claim. Further, it is unthinkable that the court could reach an informed decision on substantive

⁸ 合同法 [Contract Law] (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 15, 1999, effective Oct. 1, 1999) 1999 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 104 (P.R.C.), art. 14.

⁹ *Id.* at art. 22.

¹⁰ *Id.* at art. 36.

¹¹ *Id.* at art. 37.

¹² There is no Chinese equivalent to hearing as known in the U.S. legal context. In this article, the two terms hearing and trial are used interchangeably.

legal issues without granting a hearing. The court also rejected the Firm's application for a detailed explanation or a meeting.

While the merits of this case may be debatable, this example nevertheless reflects some fundamental institutional problems with the case filing division.¹³ Judges working in the case filing division (立案法官) wield the power to deny a claimant the opportunity to present his or her case before a trial judge (审判法官). This power may involve procedural or substantive decision-making on the merits of a case while bypassing the participation of the claimants, as evidenced in the New Bridge case. As a result, parties sometimes receive "justice" without the opportunity to argue before a trial judge.

It is important to note that the rejection of complaints by the case filing division probably does not exceed one percent of the total number of cases submitted to the courts nationwide.¹⁴ Obtaining the exact statistics of rejected cases, however, is difficult because the courts do not keep a public or internal record of the cases rejected by the case filing division. Although the government publishes official annual Law Yearbooks (中国法律年鉴), they do not normally include this statistical information. In July 2010, the Supreme People's Court published its working report for the first time, but for unknown reasons, there is no data on the rejections made by the court.¹⁵ Private organizations have also failed to regularly collect this data. Absence of research in this area of civil procedure may reflect the political sensitivity of the rejected cases and the government's awareness of the institutional weaknesses of the case filing division.¹⁶

The number of cases rejected by the case filing division may be estimated by inferring from other available statistics. For example, according to data gathered by the Supreme People's Court, 61,226 cases were rejected in 2004, which accounts for 1.4% of the total number of cases

¹³ As will be discussed later on in this article, this case had an unexpected ending. For details see, *infra*, the discussion between notes 320 and 321.

¹⁴ According to an interview with a chief judge of the case filing division from a Shanghai district court in July, 2010 [hereinafter Interview with Shanghai Judge] the court handled over 6,000 civil cases for the first half of 2010, of which the case filing division only rejected no more than 20. The name of this judge shall remain anonymous throughout.

¹⁵ There is plentiful data on other aspects of the operation of the court. See 人民法院工作年度报告(2009年) [2009 Annual Report on the Work of People's Courts] (promulgated by Sup. People's Ct., July 13, 2010), available at <http://vip.chinalawinfo.com/newlaw2002/slc/slc.asp?db=chl&gid=135129> (last visited July 26, 2010).

¹⁶ Some practitioners argue that the inclusion of the data on the rejected cases would provoke appeal and petition. As a bottom-line matter, it would cause embarrassment to the judiciary in a country where "saving face" is about pretty much everything. Interview with Ms. Dong, Esq., E. China Univ. of Political Sci. & L. (July 26, 2010).

(4,332,727) submitted to the case filing division that year.¹⁷ Because this statistic is only available for 2004, it is impossible to compare and determine its significance from a methodological perspective.

There are statistics available for the number of cases dismissed by judges after a trial is conducted (终结案件). Such instances are called dismissals (驳回起诉), a very different concept from rejections (不予受理), where the cases are thrown out before reaching the trial stage. Cases proceed to the trial judge when they meet the procedural requirements as understood by the case filing division. Most Mainland scholars and judges agree that the number of cases rejected by the case filing division is slightly smaller than those dismissed by trial judges.¹⁸ Approximately 0.5% to 1% of 5 million, however, is still a significant number. A conservative estimate would put the annual total at several tens of thousands of civil cases alone. The significance of this number is magnified by the fact that many of the cases rejected by the case filing division are controversial, and sometimes politically sensitive, as this article will discuss later. In some class action and retrial cases, lawyers charge legal fees upon the acceptance by the case filing division.¹⁹

Regardless of how one assesses the number of cases thrown out before reaching the trial stage, it reflects something more complicated than is immediately apparent in the earliest phase of the judicial process.²⁰ Although the responsibility of the case filing division is to register cases for a preliminary hearing or trial, in practice it operates as a decision-making body that considers procedural due process issues without conducting a hearing. Granting the case filing division the legal authority to reject cases based on procedural requirements touching upon certain substantive matters, however, actually enables it to decide on such matters.²¹ Under these circumstances, the case filing division acts as a gatekeeper to the court system that controls the docket-load according to judicial discretion.²²

¹⁷ See 2004年全国法院审理民事一审案件情况统计表 [Statistical Table for Trial of Civil Cases in the First Instance by Courts Nationwide in 2004], CHINA COURT NET, Apr. 19, 2005, available at <http://www.chinacourt.org/public/detail.php?id=158816> (last visited Aug. 16, 2010).

¹⁸ Interview with Judge, Case Filing Division, Shenzhen Interm. People's Ct. (2006) [hereinafter Interview with Shenzhen Judge].

¹⁹ Interview with Mr. Zhang, Esq., Associate, Liu & Wang, Attorneys at Law (2010).

²⁰ The courts have strong economic interest in court fees generated from judgment amounts, resulting in unnecessary barriers to parties filing a claim. See He Qiangxing et al., 立审分离的价值取向及有待完善的问题 [Value Orientation of Separating Case Filing from Trial & Resolved Problems] in 立案审判改革与探索 [REFORM & EXPLORATION ON CASE FILING & TRIAL], at 21 (Tian Xing et al. eds., 2004).

²¹ See Song Wangxing, 论民事诉讼审查制度 [On Case Filing System in Civil Proceedings], vol. 10, no. 2西南政法大学学报 [J. OF SWUPL] 83, 85 (2008).

²² See *id.* at 88.

Even if a case is accepted, the courts do not enlighten the claimants on the standard they apply because the entire case filing process lacks transparency. If the case filing division is actually operating as a preliminary hearing process, then both parties should have the opportunity to argue the procedural matters of their case in an open and accountable setting before a decision is rendered. The case filing division, in reality, operates behind closed doors, and is not obligated to state the rationale behind its decisions.²³ This lack of transparency is a serious problem embedded in the institutional foundation of the judiciary, undermining the faith of the public in the development of the judicial system itself if this problem is not properly addressed. In the near future, China's social and economic stability may largely depend on the ability of the judiciary to respond to the needs and expectations of the public.

This article argues that a right to justice or injustice can be selectively predetermined by the case filing division with the courtroom doors remaining closed. The existence of a case filing division is a unique characteristic of China's legal experience. It is an anomaly, contradictory in itself: on the one hand, it is designed to exercise self-restraint of judge's power and control the court jurisdiction, filtering out disputes reserved for resolution through other channels; on the other, it has turned out in practice to tend to abuse its discretion, rejecting cases that should have at least passed this initial threshold and leaving them with a limited channel through which to pursue justice. The petition system (信访制度), which is a roundabout way to realize justice when the judicial system is unavailable, goes hand-in-hand with the case filing division. It does not derive its legitimacy from any legal principles, but from the self-governance of the leadership. This article purposely leaves one difficult theoretical question unanswered, namely whether the petition system is obsolete given China's current political and social circumstances.²⁴

This article is divided into three main sections. Section I examines the origin, nature, function, organization, and operation of the case filing division. Section II examines the legal provisions governing the operation of the case filing division, with an emphasis on the criteria the case filing division employs in deciding which cases to reject. An analysis of recent cases will exemplify some of the major problems with its decision-making process. Having highlighted the deficiencies in the case filing division, Section III considers the recent regulations concerning an alternative avenue of legal redress, the petition system, and reflects on the curious, simultaneous coexistence of both the court and petition systems and the

²³ See *id.* at 86.

²⁴ This issue is extremely difficult and complicated, and a full discussion of this issue is beyond the scope and purpose of this article. For a brief discussion, see *infra* Part III.

implications for the long-term stability and judicial development of China.

I. WHAT IS THE CASE FILING DIVISION?

The case filing division started to emerge almost twenty years ago, and is still in an early phase of development.²⁵ Its relationship with other court divisions is constantly under discussion among Mainland scholars.²⁶ It is worth noting, however, that publications on the reform of the case filing division have decreased over the past several years.²⁷ The author believes that it is critical to reexamine the functions of the case filing division and encourage domestic and foreign debate on this important topic. This section places the case filing division in a historical and legal context by considering relevant laws and the domestic Chinese perspectives.

A. *A Historical Overview: The Origins of the Case Filing Division*

Even after the Chinese government initiated the “open door” policy and reestablished its legal system in 1978, the responsibility of filing cases in the courts did not rest with an independent department, which was consistent with China’s traditional legal practices.²⁸ A judge who filed a case would also oversee the trial and execution of the judgment.²⁹ This system persisted into the 1980s, at least in part because the number of cases filed in the courts was relatively small, and the staffing of the court was limited. In 1979, for example, the court system of the entire country employed only 58,000 people,³⁰ while concluding 520,000 cases in the same year.³¹

²⁵ In 1993, the Supreme People’s Court suggested called on lower courts to separate case filing from trial. Mr. Xiao Yang, the former president of the Supreme People’s Court required every court establish a case filing division before the end of 1998. See Zhang Shenzu, 人民法院立案庭的性质与职能 [*The Nature and Function of the Case Filing Division in People’s Court*] in vol. 2004, no. 2立案工作指导 [GUIDE ON CASE FILING] 190, 191 (Jiang Xingchang et al. eds., People’s Court Press 2004).

²⁶ Professor Fu Yulin is one of the scholars criticizing the current case filing system. See Fu Yulin, 对立审分离管理模式之质疑 [*Questions on the Mechanism of Separating Case Filing from Trial*], 人民法院报 [PEOPLE’S COURT DAILY], Oct. 24, 2001.

²⁷ The Supreme People’s Court issued a regulation entitled关于人民法院立案工作的暂行规定 [Interim Regulations on Case Filing in People’s Courts] in April 21, 1997. There is, however, no further document published for works of the case filing division since then.

²⁸ Zhang, *supra* note 25, at 190.

²⁹ *Id.*

³⁰ See JIANGHUA, 为实施几个重要法律做准备 [*Preparation for Enforcing Some Important Laws*] in 江华司法文集 [JIANGHUA’S PAPERS ON JUDICATURE] 90 (People’s Court Press, 1989).

³¹ See He Bing, 法院的案件危机与对策 [*Case Crisis & Countermeasures of Courts*] (June 19, 2009), http://law.china.cn/features/2009-06/19/content_2995565.htm (last visited July 21, 2010).

Allowing a judge to handle a case from start to finish produced several detrimental consequences. First, the potential for judicial corruption increased because one individual possessed power throughout the proceeding.³² By 1985, the total number of judicial employees had already expanded to 170,000, leaving an under-developed and under-trained system ripe for bribery and judicial abuse of power.³³ The case filing stage had inadequate legal knowledge and lacked institutional supervision to provide safeguards against corruption.

Second, this institutional framework failed to guarantee the procedural rights granted by law. More cases tended to be blocked from the court because a judge presiding over the entire process could not otherwise avoid considering substantive issues at the case filing stage - such as the facts and evidence, the difficulty of the case, and the background of the claimant - which would predictably cloud her decision as to whether to accept the case.³⁴ A single judge handling all aspects of a case would often have undue discretion in setting trial dates and other procedural issues.³⁵ Another immediate corollary is that a judge who also handles the case filing process would have ample pretrial contact with a litigant *ex parte*, which might result in bias against the other party.³⁶

Third, this institutional framework additionally compromised the substantive rights of the litigants. A judge might form a subjective judgment or a bias at the case filing stage, which would later affect her decision at the trial.³⁷ In addition, in the course of interacting with the claimant filing the case, a judge might say things that would become inappropriate at the trial, causing unnecessary troubles for rendering an otherwise fair judgment.³⁸

Legal ambiguities and lack of broader court supervision further increased the potential for judges to engage in corrupt behavior, usually characterized by relationships or connections (关系), either familial or otherwise.³⁹ The weak legal environment and the strong pressure of

³² Zhang, *supra* note 25, at 190.

³³ *Id.*

³⁴ Cheng Xiaoyong, 浅议立案庭的职能及其职能发挥 [*Brief Analysis on Functions of Case Filing Division & Implementation of those Functions*] in 法学研究 [JURISPRUDENCE STUDY], 2005 supp., available at <http://www.docin.com/p-17769795.html> (last visited July 21, 2010).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ Zhang, *supra* note 25, at 191. Though empirically grounded examinations of how the court is tainted by corruption are processed, a scholar has noted that judicial corruption in China is an institutionalized activity which is systemically inherent in the particular decision-making mechanism, guided by the Chinese Communist Party (CCP)'s instrumental rule-by-

corruption could easily lead judges at the case filing stage to purposefully shelve and “forget” certain cases, for example, thereby helping a relation to avoid litigation.⁴⁰ Local protectionist interests sometimes pressured judges to reject cases based on fabricated claims of improper jurisdiction.⁴¹ These outside influences seriously hindered the effectiveness and fairness of the system, and may have negatively influenced the social and economic development of the country.

As the public awareness and resentment of judicial corruption increased, an oversight system was created within the judiciary to limit the power of individual judges.⁴² In the early 1990s, specifically selected courts implemented structural reforms to separate the filing, trial, enforcement, and supervision of a lawsuit and judgment.⁴³ Four institutional bodies were then created to separate these functions: the case filing division (立案庭), the trial division (审判庭), the execution division (执行庭), and the supervision division (监督庭).⁴⁴ In 1993, the Supreme People’s Court recommended that courts throughout the country experiment with these reforms, known as the Three Divisions (三个分离), by assigning different judges to handle each division.⁴⁵ It is called the Three Divisions because this is the number of times the trial functions are divided from the case filing stage (not the number of divisions themselves after the reforms).⁴⁶ The new system is applied to cases of both the first and second instance, as well as cases eligible for retrial (再审).⁴⁷ In 1998, after several years of successful experimentation, Xiao Yang, the former President of the Supreme People’s Court, ordered that every court implement the Three Divisions by the end of that year.⁴⁸

Chinese practitioners generally believe that these institutional reforms

law ideal. For detailed discussion, see Ling Li, *The “Production” of Corruption in China’s Courts – The politics of judicial decision making and its consequences in a one-party state*, pending publication in *Journal of Law & Social Inquiry*, available at <http://www.usasialaw.org/?p=5680>.

⁴⁰ *Id.*

⁴¹ See Hu Sibao, 论民事诉讼立案阶段的地方保护主义 [On Local Protectionism at the Civil Case Filing Stage], 2009 no. 7 金卡工程 经济与法 [JINKA PROJECT ECON. & L.] 71, 71 (2009).

⁴² See Zhang Junpeng, 如何规范法官自由裁量权 [How to Regulate Judge’s Discretionary Power], 联谊报 [UNITY AND FRIENDSHIP NEWS], Nov.18, 2008.

⁴³ See Zhang, *supra* note 25, at 191.

⁴⁴ See Working Report of Supreme People’s Court, *supra* note 3.

⁴⁵ See Zhang, *supra* note 25, at 191.

⁴⁶ In short, the Three Divisions may be interpreted as dividing the judicial power according to its nature and chronological sequence in the judicial process so that the divisions will add check and balance on one another. See 沈德咏副院长谈“三个分立” [Vice President of the SPC, Shen Deyong’s Words on Three Divisions] in *supra* note 4, at 28.

⁴⁷ See Zhang, *supra* note 25, at 192.

⁴⁸ *Id.* at 191.

have improved the operation and management of the courts. Separating the case filing division from the other judicial functions enabled judges to specialize in one area of judicial practice, which some supporters argue may lead to a greater degree of procedural justice and efficiency.⁴⁹ Moreover, these reforms may further assist in reducing corruption, which of course has obvious benefits to both litigants and the public.⁵⁰ From a long-term perspective, these reforms may encourage judges to view their work as a strict procedural science rather than a flexible organization with an open door for interference.⁵¹

Although this structural reorganization marked a watershed in the Chinese legal reform, corruption and other problems nonetheless persist within the divisions. The Three Divisions reforms are inadequate to resolve the critical issues of judicial accountability and transparency, and also fail to address the possibility of corruption arising from close personal and institutional relationships among the four departments.⁵² Interviews with Mainland lawyers and judges confirm the fact that deal-making (交易) between filing and trial judges regarding which cases trial judges receive is still a common phenomenon, especially in civil disputes.⁵³ Where judges in the case filing division have close personal relationships with their colleagues in the trial division, they can easily assign a case as a favor to a colleague who has a personal interest in it, or for mutual “benefits.” While this article does not methodologically examine issues of corruption within the case filing division, it is important to acknowledge that the existence of corruption makes the institutional weaknesses of the case filing division even more susceptible to abuse of power.

⁴⁹ See He, *supra* note 20, at 1-3.

⁵⁰ See Zhang, *supra* note 25, at 191.

⁵¹ See *id.*

⁵² For a detailed discussion on corruption issues in Chinese courts, see Nanping Liu, *Trick or Treat: Legal Reasoning in the Shadow of Corruption in the People's Republic of China*, 34 N.C.J. INT'L L. & COM. REG. 180 (2008). For more information, also see MU RONG XUE CUN, 原谅我红尘颠倒 [DANCING THROUGH THE RED DUST] (Zhuhai Press 2008), a fictitious work that paints a largely realistic and disturbing picture of the interaction between Chinese lawyers and judges. The English version is expected to come out soon.

⁵³ Interview with Shenzhen Judge, *supra* note 18. It was also reported and worth noting that the deal-making occurs not only between the judges but also between the judges and those outside the judiciary as well. In China all the reforms regarding the judiciary system have so far failed to thoroughly exterminate the possibility of making the ‘justice’ to be somewhat of business. In Zhanjiang, a city in Guangdong Province of China, a ‘real estate company’ owner made large sums of money in collusion with several judges by buying the debts at relatively low prices and submitting them to the court for litigation and execution. Part of the income arising from a favorable judgments was, of course, the bribes offered to the judges involved. For a detailed discussion, see 法律成生意, 法官拿提成 [Law Becomes Business and Judges Take Commissions], 深圳商报 [SHENZHEN COMMERCIAL NEWSPAPER], Apr. 25, 2011, at A8.

Mainland scholars generally focus their research on technical issues concerning the duties and relationships of the case filing division with other judicial departments. While this article briefly reviews their findings and concerns, the author believes that Chinese scholars have thus far overlooked the most basic legal issue involved in the functioning of the case filing division – the lack of transparency and accountability.

One wonders how and why the courts selectively reject cases, and what happens next. Before analyzing some recent cases that exemplify the institutional weaknesses of the case filing division, it is constructive to consider first the precise nature, function, structure, and operation of the case filing division.

B. The Nature and Function of the Case Filing Division

In 1999, the Supreme People's Court clarified that the duties of the case filing division are independent from the work of trial judges. On September 8, 1999, it released a Notice entitled "On the Work of the Case Filing Division" (关于全国法院立案工作座谈会纪要), which defines 11 duties specifically assigned to the case filing division, including some very important tasks such as examining and registering cases and appeals, managing procedure of cases already in trial, and handling the court's petition responsibilities.⁵⁴

While those duties may appear vague, practical experience shows that the specific duties of the case filing division generally include registering cases⁵⁵, facilitating communication and the exchange of information (送达)⁵⁶, considering issues of procedural due process (诉讼保全)⁵⁷, undertaking pretrial mediation (庭前调解)⁵⁸, scheduling trial times and locations⁵⁹, handling pretrial procedures⁶⁰, taking notes during the trial⁶¹, supervising the schedule of the trial (审限监督)⁶², tracking the processing of cases filing⁶³,

⁵⁴ See关于全国法院立案工作座谈会纪要 [On the Work of the Case Filing Division] (promulgated by Sup. People's Ct. Sept. 8, 1999), *quoted in* Zhang, *supra* note 25, at 192, 193. This is not China's formal petition system (信访体制), but a place of inquiry for those with questions about cases already accepted by the court.

⁵⁵ Registering for the internal management purposes after a case is accepted by the court.

⁵⁶ Service of process, such as complaints, summons, et cetera.

⁵⁷ Pretrial preservation of property and evidence, such as deciding applications for pre-litigation injunction.

⁵⁸ Mediating simple cases to achieve a settlement before trial.

⁵⁹ Deciding the date and specific courtroom for the trial.

⁶⁰ Handling objections to jurisdiction, charging court fees on case filing, and receiving the evidence submitted by the parties.

⁶¹ Assigning a clerk of the court to keep a record of the proceedings.

⁶² Supervising and checking if a case can be settled within the time limit according to the procedural laws.

reexamining all cases on appeal⁶⁴, initiating the retrial process⁶⁵, performing other management and supervision activities⁶⁶. For example, when a plaintiff presents an application to the court for a pre-litigation injunction, the court has 48 hours to decide whether to grant the order.⁶⁷ If the order is granted, the plaintiff must file the complaint within 15 days.⁶⁸ The injunction or temporary preservation order is simply a pretrial motion, and does not mean that the case filing division has accepted the case for trial.

The functions of the *li'an* (case filing) are much more expansive than simply case registration. The case filing division is the first department that handles a claimant's complaint within the judicial process, which has broad authority to serve, manage, and supervise trial judges. Mainland scholars recognize the decision-making power of this court division, describing the filing judges as having three "trial functions" in that they can decide to accept or reject a case; examine jurisdictional conflicts and rule on whether the court should accept the case; and decide whether to grant a retrial.⁶⁹

The case filing division thus has a critical role in facilitating or hindering the litigation process. The combination of broad authority in this division and ambiguities in Chinese law may cause the case filing division to mishandle cases with serious consequences for both parties involved.

C. *The Case Filing Division: Personnel, Structure, and Operation*

The case filing division is a relatively small court department. In a Shanghai district people's court, there are altogether 280 staff members, twenty-three of whom are positioned in the case filing division.⁷⁰ The case filing division consists of four major committees, each of which is delegated specific responsibilities among those mentioned above.⁷¹ These committees include the case filing committee (立案组), committee for preservation of

⁶³ Deciding whether to accept a case based upon the case filing requirements. This is the focus of this article.

⁶⁴ Deciding whether to accept a case on appeal.

⁶⁵ Deciding whether to accept a case submitted by the litigants for retrial. Under certain circumstances, a losing party may apply for a retrial after the final judgment is handed down by the court of second instance.

⁶⁶ Primarily handling petition claims.

⁶⁷ 民事诉讼法 [Civil Procedure Law] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 28, 2007, effective Apr. 1, 2008), arts. 92, 93, available at <http://vip.chinalawinfo.com/newlaw2002/slc/slc.asp?db=chl&gid=98761> (last visited Sept. 2, 2010). In China, pre-litigation injunctions mostly refer to freeze or garnishment.

⁶⁸ *Id.* at art. 93.

⁶⁹ See Qian Yongping, 论立案庭的审判职能 [On the Function of Trial in Case Filing Division], in REFORM & EXPLORATION ON CASE FILING & TRIAL, *supra* note 20, at 25.

⁷⁰ Interview with Shanghai Judge, *supra* note 14.

⁷¹ *Id.*

evidence (保全组), committee for service of notice (送达组), and the petition committee (信访组).⁷² This article focuses solely on the case filing committee, which examines and registers incoming cases for trial.⁷³

The case filing committee is the largest and most important committee within the case filing division. Committee staff members are judges themselves.⁷⁴ The court staff operates on a rotating basis, so a judge in the case filing division likely may have been a trial judge prior to their current position and may have close relations with the judges who are still trying cases. As a practical matter, rotation occurs at irregular intervals.⁷⁵ In most cases, an assistant judge will first go to the case filing committee and the petition committee to gain hands-on experience before she is assigned to other court divisions.⁷⁶

The operation of the case filing committee resembles that of a business entity. First, one must take a ticket from a machine and then wait for the number printed on the ticket to be called at a counter.⁷⁷ In Guangdong Province, all court fees are paid directly to a special account opened by a provincial financial bureau, 15% of which is to be allocated by the provincial government for expenditures on improving the court system of the entire province.⁷⁸ The remaining 85% will be returned to the courts in the form of subsidiary operation fees (业务补助经费), which is to be used by the courts to cover every sort of expenditure, including fringe benefits for judges and other court employees.⁷⁹ This court fees arrangement creates a very businesslike atmosphere in the court system, rendering its primary

⁷² See *id.* The petition committee operates as kind of petition system inside of the courts, through which people may present their complaints involving the court proceedings. The courts all over the country received 1,120,6000 such complains in total from 2001 to 2004. See Xiao Yang, Address at 全国涉诉信访工作会议 [National Courts' Meeting on Litigation-Involving Petitions] (Excerpt) in *GUIDE ON CASE FILING*, *supra* note 25, at 1.

⁷³ In the subsequent text, the case filing division is used to refer to the case filing committee, if not otherwise indicated.

⁷⁴ Before the Three Division reforms, a judge would handle a case throughout. Zhang, *supra* note 25, at 190.

⁷⁵ Interview with Shanghai Judge, *supra* note 14.

⁷⁶ *Id.*

⁷⁷ On the ticket, it reads, "Your line-up number is A042. There are 25 customers before you. The process you intend to apply for is civil and administrative case filing. This ticket is only valid today; please line up again if you fail to answer your calling three times" (on file with author).

⁷⁸ See 关于贯彻《人民法院诉讼费用管理办法》实施意见的通知 [Notice on Enforcing Implementation Opinions on "People's Court Litigation Fees Management Rules"] (promulgated by Guangdong Provincial Fin. Ministry & Guangdong Provincial High People's Ct., 粤财文[2000]9号, Jan. 31, 2001), available at http://www.lawyee.net/Act/Act_Display.asp?RID=385331 (last visited July 22, 2010).

⁷⁹ *Id.* In the event of a case withdrawal, a portion of the court fees are returned to the parties.

concern to be an economic one, i.e. making money instead of dispensing justice.

Accepting or rejecting a case is a relatively fast process that occurs within a week. According to Article 112 of the Civil Procedure Law,

When a People's Court receives a statement of complaint or an oral complaint and finds, after examination, that it meets the requirements for acceptance, the court shall place the case on the docket within seven days and notify the parties concerned; if it does not meet the requirements for acceptance, then the court shall make an order within seven days to reject it. The plaintiff, if not satisfied with the order, may file an appeal.⁸⁰

Within the seven-day period, the court's objective is to ensure that the case filing comports with statutory requirements. For civil cases, Article 108 of the Civil Procedure Law sets forth four conditions for accepting civil actions.⁸¹ As will be discussed at length in Section III, these statutory requirements are anything but clear guidelines for the court in deciding whether to accept or reject a case. The current legal realities also teach us that satisfying these statutory requirements does not always mean that the court must accept the case. As vague as they appear, these requirements are easily susceptible to manipulation so that the court can dodge controversial and sometimes politically sensitive cases. The case filing committee operates behind closed doors, and is not obligated to provide a detailed reasoning for its decisions. This court practice's lack of transparency further adds to the unpredictability of this process and enunciates filing judges' overly broad discretion; it may also easily give rise to corruption and abuse of judicial power.

There are some limited interactions between the claimant and the judge deciding whether to accept the case, but it is not entirely clear as to the scope of that interaction and the extent to which the claimant can influence the judge with her arguments.⁸² As a judge from the case filing division will typically examine the filing documents on the spot at the counter, it is unlikely that she will engage herself in any meaningful give-and-take with the claimant.⁸³ The fact that some claimants come to file the case unaccompanied by a lawyer further discounts that possibility.

The decisions made by the case filing division are not just the subjective opinion of one judge. Although a claimant will attempt to file her case with one judge sitting at the counter, the decision-making process

⁸⁰ Civil Procedure Law, *supra* note 67, at art. 112.

⁸¹ For detailed discussions, see *infra* Part III.

⁸² Interview with Shanghai Judge, *supra* note 14.

⁸³ *Id.*

sometimes involves group consultation. If a case is especially complicated or important, the reviewing judge will usually consult the collegiate bench (合议庭), comprised of other judges within the case filing division. If they desire further guidance, they may also present the question at the court assembly (庭务大会), which all the judges from various divisions attend. If that does not solve the question, a judicial committee (审判委员会) will decide whether to accept the case.⁸⁴ Very occasionally, a district court may certify issues arising out of the case filing process to a higher court for instructions.⁸⁵

The exact course and nature of the group consultation often depends on the specific relations among the judges, and judges with greater experience or higher education are commonly sought for advice. In a Shanghai district court, three cases reached the judicial committee for a decision in 2009. Those cases involved new types of rights that did not fit neatly in the current legal norms, and disputes that would cause social unrest.⁸⁶

Within a week, typically a one or two-page court order (裁定书) is issued to the claimant to provide notice of the acceptance (立案) or rejection (不予受理).⁸⁷ The court order does not provide a detailed reasoning, but a mere recital of one or more broad articles taken out of the Civil or Administrative Procedure Law book.

II. THE CASE FILING DIVISION DECIDES WHETHER TO ACCEPT OR REJECT A CASE – THE LAW BY THE BOOK AND IN PRACTICE

This section examines in detail the legal principles the case filing division employs in making its decision whether to accept a case for court

⁸⁴ The judicial committee is an internal judicial organ that characterizes China's special circumstances. Courts of different levels all set up a judicial committee, comprised of experienced judges. It employs a centralized democracy policy, meaning that the majority decision prevails over the minority. Its main function is to discuss and decide complicated or important cases. The decision made by the judicial committee prevails over that of the collegiate bench. See 人民法院组织法 [Organic Law of People's Courts] (promulgated by the Standing Comm. Nat'l People's Cong., July 5, 1979, effective Jan. 1, 1980) (amended 2006), art. 10, available at <http://vip.chinalawinfo.com/newlaw2002/slc/slc.asp?db=chl&gid=81825> (last visited Sept. 2, 2010).

⁸⁵ See Mao Junmin, 我国民事起诉受理制度之缺失及对策 [*The Scarcity in Civil Case Filing System and Respective Countermeasures*], vol. 2006, no. 2, 诉讼法学司法制度 [Procedural Law and Judicial System] 68, 69 (Info. Ctr. for Soc. Sci., RUC, 2006).

⁸⁶ Interview with Chief Judge, Case Filing Division, a District People's Court in Shanghai (July 14, 2010). Disputes that may cause social unrest involve group disputes, sensitive issues, or issues under the public scrutiny.

⁸⁷ 裁定书 [Order] is a decision on procedural issues, such as jurisdictional matters. 判决书 [Judgment] is a judicial opinion on the disposition of a case, comparable to the U.S. understanding of judgment.

adjudication. The case filing division engages in de facto substantive review of a case, although it does not allow litigants to participate in this process (未判先审). Thus, the case filing division gains considerable discretionary power, so it may choose to block a case from the judicial process for virtually any reason.

This section consists of five parts. Part A discusses the statutory requirements under the Civil Procedure Law, and argues that substantive review of those requirements gives the case filing division excessive room for manipulation and abuse of judicial power. Part B discusses the statutory requirements under the Administrative Procedure Law, and argues that the case filing division routinely rejects politically sensitive cases. Part C discusses the possibility of filing a constitutional claim in the people's court. Part D discusses various court and administrative directives and the effects on further limiting court jurisdiction. Part E recapitulates the non-transparent operation of the case filing division, and argues that it contributes further to its unbridled discretionary power.

A. Case Filing Requirements Under the Civil Procedure Law

According to Article 108 of the Civil Procedure Law, the case filing division will accept a civil case only if it meets the following four conditions:

- 1) the plaintiff must be a citizen, legal person or an organization that has a direct interest in the case;
- 2) there must be a specific defendant;
- 3) there must be specific claims, facts, and causes of action; and
- 4) the lawsuit must be within the scope of acceptance for civil actions by the people's court and within the jurisdiction of the people's court where the suit is filed.⁸⁸

The court must accept a case satisfying these conditions, with the exceptions exhaustively listed in Article 111.⁸⁹ A valid arbitration clause,

⁸⁸ Civil Procedure Law, *supra* note 67, at art. 108.

⁸⁹ *Id.* at art. 111. The court will deal with the following situations individually: "(1) for a lawsuit within the scope of administrative actions in accordance with the provisions of the Administrative Procedure Law, the People's Court shall advise the plaintiff to institute administrative proceedings; (2) if, according to the law, both parties have on a voluntary basis reached a written agreement to submit their contract dispute to an arbitral organ for arbitration, they may not institute legal proceedings in a People's Court, which shall advise the plaintiff to apply to the arbitral organ for arbitration; (3) in case of disputes which, according to the law, shall be dealt with by other organs, the People's court shall advise the plaintiff to apply to the relevant organ for settlement; (4) with respect to cases that are not under its jurisdiction, the People's Court shall advise the plaintiff to bring a lawsuit in the competent People's Court; (5) with respect to cases in which a judgment or order has already taken legal effect, but either party brings a suit again, the People's Court shall advise that party to file an appeal instead,

for example, will prevent the court from claiming jurisdiction.⁹⁰

As will be discussed in detail below, in practice these statutory conditions may impose great difficulty for a plaintiff to have her case successfully filed with the court.

1. Qualified Plaintiff Requirements

A qualified plaintiff under the Civil Procedure Law must be a citizen, a legal person, or any other organization having a direct interest in the case.⁹¹ This can be further broken down into two essential requirements. First, the plaintiff must be a certain type of entity, and second, the plaintiff must have a direct interest in the dispute.

There is little problem when the plaintiff is a natural person, or legal person, such as a corporation.⁹² Although there are no written legal or administrative principles regarding the legal status of Falun Gong membership, it is generally agreed that the court will not accept a civil case brought by a Falun Gong practitioner who claims that her rights have been infringed upon by others or the government.⁹³

When the plaintiff is an aggregation of people, whether the aggregation qualifies as an organization contemplated by the statute is not so clear. In a judicial interpretation, the Supreme People's Court defines "other organization" as an unincorporated entity that forms according to law and maintains structure and assets, such as a partnership and other forms of enterprise.⁹⁴

In a lawsuit brought by a homeowner association (业主委员会) on behalf

except when the order of the People's Court is one that permits the withdrawal of a suit; (6) with respect to an action that may not be filed within a specific period according to the law, it shall not be entertained, if it is filed during that period; and (7) in a divorce case when a judgment has been made disallowing the divorce, or in which both parties have become reconciled after conciliation, or in a case concerning adoptive relationship in which a judgment has been made or conciliation has been successfully conducted to maintain the adoptive relationship, if the plaintiff filed a suit again within six months in the absence of any new developments or new reasons, it shall not be entertained.

⁹⁰ Civil Procedure Law, *supra* note 67, at art. 111(2).

⁹¹ *Id.* at art. 108(1).

⁹² The Civil Procedure Law treats foreigners and foreign corporation the same as their Chinese counterparts. *See id.* at art. 5.

⁹³ *See, e.g.,* Deng Ying, 谈民事纠纷立案审查制的可操作性 [On the Operability of the Case Filing System in Civil Disputes], vol. 28, no. 4 新疆警官高等专科学校学报 [J. OF XINJIANG POLICE OFFICERS' ACAD.] 38, 39 (2008).

⁹⁴ 关于适用《中华人民共和国民事诉讼法》若干问题的意见 [Opinions on Several Issues concerning the Application of Civil Procedure Law] (promulgated by Sup. People's Ct., 法发[1992]22号, July 14, 1992), art. 40, available at <http://vip.chinalawinfo.com/newlaw2002/slc/slc.asp?db=chl&gid=5840> (last visited July 22, 2010).

of the individual homeowners against a residential community developer, the court grappled with the concept of qualified plaintiff.⁹⁵ The lower court held that the homeowner association was not a qualified plaintiff, so the homeowners had to file the case individually, which would be costly and inconvenient.⁹⁶ In addition, because the case concerned the communal interests pertaining to all residents, it was not entirely clear whether homeowners had a direct interest individually in the dispute, satisfying the second condition concerning plaintiff. This would result in an anomaly, in which there is infringement of rights, but no one qualified to seek redress. The homeowner association appealed to the provincial high court, and the latter reversed the lower court.⁹⁷ The high court reasoned that the homeowner association was a creation of the homeowner conference (业主大会), so it was its executive body and should be able to perform duties delegated by the conference, which included procuring legal remedies for wrongs suffered by the homeowners.⁹⁸

In 2003, the Supreme People's Court instructed a lower court to accept a case brought by a homeowner association, holding that the homeowner association itself can bring a lawsuit as "an organization" against the real estate developer for a selection of misfeasance and nonfeasance.⁹⁹ This established the homeowner association as a qualified plaintiff with a direct interest in the disputes concerning communal interests specified in this judicial instruction. It is worth noting that the instruction itself may be limited to its facts, and that it does not have general legal effects.¹⁰⁰ There

⁹⁵ See Li Bing, 配套小楼引发连环官司 [Affiliated Building Causes a Series of Litigation], 南方都市报 [South Metropolitan Daily], May 5, 2005, at A05.

⁹⁶ See *id.*

⁹⁷ Civil Order (Guangdong High People's Ct., 2003), 粤高法立民终字第180号, available at http://szbbs.soufun.com/2810040533~-1~159/3942361_3942361.htm (last visited July 22, 2010).

⁹⁸ *Id.*

⁹⁹ 关于金湖新村业主委员会是否具备民事诉讼主体资格请示一案的复函 [Reply of Supreme People's Court on Whether the Homeowner Association of Jinhu New Village is an Eligible Plaintiff to Anhui High People's Court] (promulgated by Sup. People Ct., (2002) 民立他字第46条, Aug. 20, 2003), available at <http://vip.chinalawinfo.com/newlaw2002/slc/slc.asp?db=chl&gid=54678> (last visited July 22, 2010). The specifically mentioned misfeasance and nonfeasance in this judicial instruction include failure to provide the blueprint of the resident community or other materials, the affiliated public facilities, the special fund for the public facilities, the maintenance fee of the public area, housing for the estate management, or housing for business use.

¹⁰⁰ As a general matter, 批复 [judicial instruction] (or [reply]), has no general binding power compared with other forms of judicial interpretations promulgated by the Supreme People's Court, such as 解释 [judicial interpretation] and 规定 [judicial regulation]. There is no definitive authority in this area, and an increasing number of scholars regard judicial instructions as generally binding on all lower courts with respect to deciding a case with facts similar to those specified in the instructions.

are no specific laws or regulations clarifying this issue as of now, and it remains a case-by-case analysis.

Whether a plaintiff has a direct interest in a dispute has proven to be a trickier question. This requirement is roughly equivalent to the concept of standing in United States federal law with regard to at least one aspect – the plaintiff must have suffered or will imminently suffer injury to a legally protected interest – but procedurally speaking, there is a major difference.¹⁰¹ In the United States, a claimant can argue and prove standing in court proceedings, whereas in China deciding whether a plaintiff has a direct interest is a duty reserved solely for the case filing division at the case filing stage.¹⁰² As a claimant has little opportunity to argue otherwise if the case filing division finds no direct interest, this requirement has operated to block cases concerning evolving private rights not fully recognized by the court or public interests that do not directly involve harms to individual claimants.¹⁰³ In this regard, a narrow reading of this requirement generates very low expectations. As long as a public interest case is accepted by the court and draws attention to the public, it is considered a success in itself for the reason that the plaintiff seldom has a direct interest in a dispute concerning public interest that is sufficient to provide the case filing division with a reason to accept the case.¹⁰⁴

In 2005 a group of people, led by a law professor from the Peking University, filed a civil lawsuit in Heilongjiang Province against several oil and gas companies for causing harm to the ecosystem surrounding the Songhua River.¹⁰⁵ The plaintiffs demanded the defendants bear the legal liabilities for the pollution and compensatory damages as high as ten billion *yuan* for restoring the environment.¹⁰⁶

The court did not accept the case, holding that the plaintiffs did not have a direct interest in this dispute, as the pollution affected the claimants only in a generalized and undifferentiated way.¹⁰⁷ This result is hardly

¹⁰¹ See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992).

¹⁰² A claimant can appeal the decision of the court of the first instance to reject the case.

¹⁰³ See Wei Wenchao, 民事立案制度研究 [A Research on the Case Filing System] (Apr. 2008) (unpublished Ph.D. dissertation, China University of Political Science and Law) (on file with author).

¹⁰⁴ See Chen Huan, 上海律师上阵当原告 – 立案难公益诉讼缓慢前行 [*Shanghai Lawyers as Plaintiffs – Public Interest Cases Proceed Slowly as It Is Difficult to File Them*], Mar. 1, 2005, <http://media.163.com/05/0301/10/1DOIQ7SI0014183U.html> (last visited July 22, 2010).

¹⁰⁵ See Sun Shouwang, 试论我国民事公益诉讼制度的构建 [On the Construction of China's Public Interest Litigation Mechanism], Apr. 13, 2007, <http://www.chinacourt.org/public/detail.php?id=242414> (last visited July 22, 2010).

¹⁰⁶ *Id.*

¹⁰⁷ See *id.*

surprising, given the powerful corporate defendants involved in this case, many of whom likely had connections with the local and provincial governments. Evidently, the court was reluctant to declare war on those powerful players. Even with a liberal interpretation of this requirement, a court could nonetheless disclaim jurisdiction and direct the dispute to the mercy of administrative agencies. The court in this case also held that the court did not have jurisdiction.¹⁰⁸

2. Specific Defendant

There is no “qualified defendant” requirement under the Civil Procedure Law. All that a plaintiff has to plead is a “specific defendant,” who may be a natural person, a legal person, or any other qualified organization.¹⁰⁹ In theory, the case filing division only examines whether the defendant actually exists and is ascertainable, but does not examine whether the defendant is correct or qualified, and cannot reject a case for that reason at the case filing stage.¹¹⁰ In practice, if the defendant later proves to be a wrong party, the court can direct the plaintiff to drop the lawsuit and file a new one against the right defendant.

This is a minimal standard, which has given rise to abuse of litigation. For example, in order to maximize the chance of success, a claimant can list as many defendants as possible, sometimes involving innocent parties and causing them to incur unnecessary expenses.¹¹¹ In some cases, a claimant lists a witness as a co-defendant to compel her appearance in court proceedings.¹¹²

However, it is a very interesting question whether the Chinese Communist Party (CCP) can be a defendant in a civil case. There is a reported case in which a court accepted a complaint against the Central Party School (中央党校). The plaintiff was a judge who received a diploma in legal training through taking classes in the Hubei Provincial Party School (湖北省委党校).¹¹³ He subsequently found out that the diploma issued by the

¹⁰⁸ *Id.*

¹⁰⁹ Civil Procedure Law, *supra* note 67, at art. 49.

¹¹⁰ *See* Song, *supra* note 21.

¹¹¹ Qi Huanli, 关于民事诉状审查中存在的问题及建议（一） [*Problems & Suggestions in the Examination of Civil Complaints Part I*], 开封法院网 [KAIFENG COURT WEBSITE], Oct. 20, 2009, <http://kfzy.chinacourt.org/public/detail.php?id=2726> (last visited July 26, 2010).

¹¹² *Id.*

¹¹³ *See* Jiang Ming'an, 姜明安教授就党校文凭被拒司考案接受《南方周末》记者采访 [*Professor Jiang Ming'an Receives Interview from "South Weekend" Journalists on the Case that Party School Diploma Disqualifies for Bar Exams*], 南方周末 [SOUTH WEEKEND], Nov. 29, 2007, [available at http://vip.chinalawinfo.com/newlaw2002/slc/SLC.asp?Db=art&Gid=335585172](http://vip.chinalawinfo.com/newlaw2002/slc/SLC.asp?Db=art&Gid=335585172) (last visited July 23, 2010).

party school did not qualify him for the national bar examination.¹¹⁴ After efforts to redress the problem through administrative channels had failed, he brought a suit against both the provincial and central party schools in 2007, claiming that the party schools issued diplomas without authorization from the Ministry of Education and that the fact that the diploma did not qualify him for the bar examination constituted fraud.¹¹⁵ The Jianghuan District People's Court in Wuhan accepted the case, but the disposition is still pending as of the writing of this article.¹¹⁶ It should be noted that there are legal obstacles to holding the CCP or any other party in China as defendant in a civil suit.¹¹⁷ The General Principles of Civil Law governs disputes between entities of equal dignities (平等主体), and it is not entirely clear whether a political party, especially the CCP being the governing party, stands on equal footing with other entities.

Despite the nominal statutory requirement on the eligibility of the defendant, there are cases where the case filing division actively examined whether the defendant was qualified. In a case from Xinjiang Autonomous Area, plaintiffs, who were construction workers, sued the prime contractor when the subcontractor disappeared without paying them.¹¹⁸ There was a written contract between the plaintiffs and the subcontractor, but no such thing between the plaintiffs and the prime contractor.¹¹⁹ The district court refused to hear this case, finding that the defendant prime contractor had no contractual relationship with the plaintiffs so it was not a qualified defendant.¹²⁰

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ See 民法通则 [General Principles of Civil Law] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 12, 1986, effective Jan. 1, 1987), art. 2, available at <http://vip.chinalawinfo.com/newlaw2002/slc/slc.asp?db=chl&gid=2780> (last visited Sept. 2, 2010).

¹¹⁸ This case appeared in a prestigious online legal question discussion board, 法治论坛 [RULE OF LAW FORUM], a subdivision of 中国法院网 [CHINA COURTS NET]. The author posted the case to solicit suggestions from the fellow practitioners. See 阿图什市法院以被告不适格不予立案 [Atushi Court Rejects Case for Disqualified Defendant], June 15, 2010, <http://bbs.chinacourt.org/index.php?s=e6fb9a83d0d6d386c8c58b5b9d19b6e9&showtopic=388485> (last visited July 26, 2010).

¹¹⁹ See *id.*

¹²⁰ *Id.* In a 2004 Judicial Interpretation, the Supreme People's Court provides that if construction workers sue directly the prime contractor, the court may include subcontractors as co-defendants and the prime contractor is liable for the amount not exceeding the overall payment for the construction project. 最高人民法院关于审理建设工程施工合同纠纷案件适用法律问题的解释 [Interpretation on Issues Concerning Application of Law for the Trial of Cases on Disputes over Contracts on Undertaking Construction Projects] (promulgated by Sup. People's Ct., 法释(2004)14号, Oct. 25, 2004, effective Jan. 1, 2005), available at http://www.chinacourt.org/flwk/show1.php?file_id=97038 (last visited July 26, 2010).

3. Specific Claims, Facts, and Causes of Action

The third requirement under the Civil Procedure Law is especially problematic because it allows the case filing division to determine what constitutes adequate facts for the plaintiff to obtain at least the right to a hearing. In the New Bridge case, for example, the Futian Court rejected the Firm's complaint on this ground. The case filing division seemed to believe that the case lacked a factual basis because it found that the Firm had no evidence of a contract with the SOEs when there was no written agreement, despite the evidence and legal theories supporting the Firm's position that it concluded the contract by tendering performance.¹²¹ In doing so, the case filing division actually decided on the merits of the case without granting a hearing.

Allowing the case filing division to reject a case based on minimal facts without granting the claimants an opportunity for a hearing accords the case filing division broad and unchecked authority in controlling the court docket and corresponding case load. Because neither the legislature nor the Supreme People's Court accurately defines the scope of acceptance for the courts, deciding what constitutes "unclear facts" is inherently subjective, leaving the court ample room for manipulation. The prevailing understanding in the academia is that the case filing division should engage only in the review of format and procedure, but not in substance.¹²² Although the case filing division may be equipped with adequate legal training and experience in deciding substantive issues, deciding the merits of a case based on brief service over a counter, similar to that of a bank, should not be tolerated.

This requirement frustrates otherwise qualified claimants in obtaining access to the courts and enables judges to abuse their authority. Some scholars advocate a more liberal approach, and suggest that the law should instead read that, to avoid substantive review at the case filing stage, it is sufficient if "the claimant thinks that he or she has specific factual basis for the claim."¹²³ The proposed change would maximize a claimant's right to a trial; in the meantime, it would upset other more controversial functions served by the case filing division. While creating institutional flexibility to serve such purposes may not be a legitimate use of the judicial system, the case filing division is a convenient tool for the government to keep politically sensitive or potentially embarrassing litigations out of the court in order to maintain a façade of harmony and social stability. The following

¹²¹ See Contract Law, *supra* note 8, at arts. 36, 37.

¹²² See, e.g., Liu Guiyang, 论我国民事诉讼立案程序之完善 [On the Perfection of Case Filing Procedure in Civil Cases], vol. 16, no. 1长沙民政职业技术学院学报 [J. OF CHANGSHA SOC. WORK COLL.] 45, 45 (2009).

¹²³ See Deng, *supra* note 93, at 40.

cases illustrate this point.

In 2007, Dong Yanbin (Dong), a doctoral student of law, sued the Huaxing International Cinemas and the State Administration of Radio, Film, and Television (SARFT) for violating his consumer rights.¹²⁴ In his complaint against the cinema where he saw the movie *Lust, Caution*, he alleged that the censored version of movie shown at the cinema, stripped of several minutes of explicit sex scenes, infringed upon his rights as a consumer to information and fair trade.¹²⁵ In joining the SARFT as a co-defendant, he alleged that, without establishing a public movie rating system, its censorship has harmed the public interest and deprived consumers the right to make their own decisions based on public information about the film.¹²⁶ Dong's complaint demanded an apology, 500 *yuan* for emotional damages, and specific performance by the cinema to show the uncensored version to adult audiences.¹²⁷

The manager of the cinema responded that the cinema does not have the authority to choose whether to show a pre-censored or uncut version of the film.¹²⁸ The SARFT makes such decisions after it reviews the film, and the cinemas then receive the approved version for public display.¹²⁹ In addition, a film director often self-censors her own film to assure that it will receive SARFT approval. As a result, if the film originally had adult contents, the director probably cut it herself and it was not a part of the released version in Mainland China.

When Dong attempted to file his complaint with the case filing division, the division responded that he must first produce an uncensored version of the film to satisfy the evidentiary requirement.¹³⁰ This was impossible using legally recognized means in Mainland, and thus the case filing division was able to conveniently reject the case for lacking adequate supporting facts, effectively avoiding the need to balance the legitimate use of state censorship with consumer rights.¹³¹ Besides, SARFT would not want the case to go forward. The case filing division was able to utilize the third requirement in this case to keep a major scandal out of the courthouse.

In another case in 2008, Zhao Bandi (Zhao), a Chinese artist, sued

¹²⁴ See 法学博士生状告广电总局 [*Doctoral Student of Law Sues SARFT*], 南方都市报 [SOUTHERN METROPOLITAN] (Guangzhou), Nov. 15, 2007, at A21.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* See also He Caitou, 举证是本《色戒》，不可能的任务 [*Submitting Uncensored "Lust, Caution", Mission Impossible*], 南方都市报 [SOUTHERN METROPOLITAN NEWS], Nov. 16, 2007.

¹³¹ *Id.* See He Caitou, *Submitting Uncensored "Lust, Caution", Mission Impossible*.

DreamWorks and Paramount Pictures, the producer and the publisher, respectively, of the American film *Kung Fu Panda*.¹³² Zhao took the movie as an insult to the Chinese audience because panda's eyes are green and the panda's father is a duck.¹³³ The Chaoyang District People's Court in Beijing refused to accept this case but did not issue a written order required by law, which made Zhao unable to appeal to a higher court.¹³⁴ The district court explained that Zhao had no direct interest in this case, and that the evidence was insufficient to prove damages caused to him from the alleged insult.¹³⁵ As a jurisdictional matter, the court was unable to determine whether Zhao's right was infringed in Chaoyang District, where the court is situated.¹³⁶ The case filing division engaged in extensive substantive review of the facts by judging whether the evidence is sufficient, and we know from the court's explanation that its rationale for the rejection boiled down to a vague assertion that the facts were not clearly found (事实不清), failing to meet the third requirement.¹³⁷ This example shows the undue breadth of requirement's application. Rather than dismissing the case for failure to state a claim on which relief could be granted, as would happen in the United States, the rejection of this case fell under unclear facts when this was not the actual issue in the complaint.

Despite similarly broad statutory requirements on case filing, or "pleading," as it is known in the United States, a U.S. judge normally does not engage in an examination of the merits of a case at the pretrial stage. A plaintiff only has to set forth "a short and plain statement of the claim showing that the pleader is entitled to relief."¹³⁸ A judge will accept as true all the allegations brought by a plaintiff, and will dismiss a case only when the plaintiff can prove "no set of facts" in support of his or her claim.¹³⁹ This principle builds upon the concept of the notice-pleading standard that a complaint's primary purpose is to give a defendant fair notice of the

¹³² See 赵半狄因"功夫熊猫"是绿眼睛,起诉美国 [*Di Bandi Sues America Because "Kung Fu Panda" Has Green Eyes*], July 18, 2008, <http://www.artintern.net/bbs/frame.php?frameon=yes&referer=http%3A//www.artintern.net/bbs/redirect.php%3Ffid%3D22%26tid%3D2921%26goto%3Dnextnewset> (last visited July 27, 2010) (containing a copy of Zhao Bandi's complaint).

¹³³ *Id.*

¹³⁴ See 赵半狄没告成《功夫熊猫》 法院不予受理 [*The People's Court Rejects Zhao Bandi's Lawsuit against "Kung Fu Panda"*], July 24, 2008, <http://ent.sina.com.cn/m/f/2008-07-24/15542113045.shtml> (last visited July 27, 2010).

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ See *id.*

¹³⁸ FED. R. CIV. P. 8.

¹³⁹ See *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Note that the U.S. Supreme Court recently retired this principle. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 561 (2007).

allegations so that there will be no surprises at trial.¹⁴⁰ The plaintiff will usually be allowed to proceed to discovery, and any unmeritorious complaint will be weeded out by summary judgment later on in the process when both parties have had ample opportunities to present their arguments and evidence.¹⁴¹

It is worth noting, however, that the U.S. federal courts have been tightening up the pleading standard in light of the recent exponential increase of litigation. In its most recent decision, *Ashcroft v. Iqbal*, the U.S. Supreme Court applied a heightened plausibility standard to pleadings in civil actions.¹⁴² In order to satisfy the standard, a plaintiff must set forth factual allegations that state a claim for relief that is plausible on its face.¹⁴³ Both parties will have the opportunity to present evidence and arguments before a judge, who will in turn reason and enunciate why the court should permit a case to proceed to trial or, alternatively, to dismiss it at the pre-trial stage. As far as the Chinese legal realities are concerned, by contrast, it is draconian to throw out a case for its lack of merits at the case filing stage when the plaintiff has no chance to gather sufficient evidence or present arguments.

4. Scope of Acceptance and Jurisdictional Requirement

The Civil Procedure Law defines the scope of civil lawsuits as disputes among natural persons, legal persons, and other organizations over the status of property and personal relations.¹⁴⁴ Because this definition is fairly open-ended, over time the Supreme People's Court has issued a selection of judicial interpretations carving out exceptions to the scope of acceptance. For example, it has held that relevant government authorities, not the courts, should address disputes concerning lay-offs and unpaid salary issues arising from enterprise reorganization.¹⁴⁵

As a civil law jurisdiction, cases in China do not assume a precedential

¹⁴⁰ Ryan Gist, Note, *Transactional Pleading: a Proportional Approach to Rule 8 in the Wake of Bell Atlantic Corp. v. Twombly*, 2008 WIS. L. REV. 1013, 1020 (2008); see also Richard L. Marcus, *The Revival of Fact Pleading under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 460 (1986).

¹⁴¹ The same principles apply if the court grants a summary judgment sua sponte. See *Sadlowski v. Beniot*, 62 Fed. Appx. 3, 5 (1st Cir. 2003).

¹⁴² 129 S. Ct. 1937 (2009).

¹⁴³ See *id.* at 1950.

¹⁴⁴ See Civil Procedure Law, *supra* note 67, at art. 3

¹⁴⁵ 最高人民法院关于审理与企业改制相关的民事纠纷案件若干问题的规定 [Regulations on the Trial of Civil Disputes over Enterprise Restructure-Related Issues] (promulgated by Sup. People's Ct., 法释 [2003] 1号, Jan. 3, 2003, effective Feb. 1, 2003), available at <http://shlx.chinalawinfo.com/newlaw2002/slc/slc.asp?db=chl&gid=44408> (last visited July 27, 2010).

legal status.¹⁴⁶ Judicial interpretations and instructions issued by the Supreme People's Court have precedential effect and have the force of law.¹⁴⁷ The Supreme People's Court also resolves issues of conflicting statutory interpretations among jurisdictions, thus serving a unifying function for the judicial system.¹⁴⁸ Thus, this body of lesser-known jurisprudence is important in China where laws and regulations are constantly evolving, and are often conflicting and ambiguous.¹⁴⁹

The exceptions created by the Supreme People's Court largely reflect judicial efforts to help maintain harmony and social stability, which remains a priority for the government. Some of the disputes are the inevitable products of a transitional economy, and individual court judgments' attempts to resolve them sometimes seem ineffective and may cause social friction if judges fail to handle them with delicacy. It follows that the government is in a better position to handle these systematic disputes.

Some other exceptions reflect developments in both legal theories and practice. In 2001, the Supreme People's Court issued a judicial interpretation instructing lower courts not to accept civil compensation cases involving insider trading, fraud, and market manipulation in the capital market, for it considered the matter not ripe for court interference at that time.¹⁵⁰ The Supreme People's Court reasoned that these were newly-emerging issues in China, and that the courts were not adequately equipped to accept and adjudicate these disputes in light of the current legislation and judicial resources.¹⁵¹

Most of the time, however, the Supreme People's Court neglects to articulate any reasoning in its judicial publications. In a 2005 judicial

¹⁴⁶ See Keith Henderson, *The Rule of Law and Judicial Corruption in China: Halfway over the Great Wall*, GLOBAL CORRUPTION REPORT 2007 151, 153, available at <http://www.eldis.org/go/what-s-new&id=33536&type=Document> (last visited July 27, 2010). However, some decided cases do serve as a type of precedents in mainland China. See Nanping Liu, "Legal Precedents" With Chinese Characteristics: Published Cases in the *Gazette of the Supreme People's Court*, published under the Auspices of the Columbia University School of Law and the Parker School of Foreign and Comparative Law VOL. 5 SPRING 1991 NO. 1.

¹⁴⁷ For a full discussion regarding the interpretative function, see Nanping Lliu, *Opinions of the Supreme People's Court-Judicial Interpretation in China*, a book published in 1997 by Sweet & Maxwell Asia, a division of The Thomson Corporation (HongKong) Ltd

¹⁴⁸ See *id.*

¹⁴⁹ *Id.*

¹⁵⁰ 最高人民法院于涉证券民事赔偿案件暂不予受理的通知 [Notice on Refusing to Accept Civil Compensation Cases Involving Securities For the Time Being] (promulgated by Sup. People's Ct., 法明传 (2001) 406号, Sept. 21, 2001), available at <http://vip.chinalawinfo.com/newlaw2002/slc/slc.asp?db=chl&gid=36895> (last visited July 27, 2010).

¹⁵¹ See *id.*

instruction on house removal and compensation issues, the Supreme People's Court instructed a lower court not to accept civil cases involving these circumstances.¹⁵² The public could only speculate as to the rationale behind this instruction; the Supreme People's Court provided no further justification or explanation for its decision other than that it came to its decision "after research (经研究)."¹⁵³ Despite this lack of democratic process, a court's creating law practice is firmly established in China's judicial system.¹⁵⁴

While the Supreme People's Court may possess the authority and wisdom to make value judgments of this magnitude, more controversially some lower courts have also issued internal directives to keep certain types of cases out of the courthouse. In 2003, the High People's Court of Guangxi Autonomous Area issued an internal order directing all the lower courts in Guangxi to reject 13 categories of cases involving enterprise fund-raising, land, lay-off disputes, etc.¹⁵⁵ The apparent reason for the rejection is that

¹⁵² 最高人民法院关于当事人达不成拆迁补偿安置协议就补偿安置争议提起民事诉讼人民法院应否受理问题的批复 [Reply on Whether the People's Court Shall Accept the Civil Litigation on the Dispute over Compensation and Relocation Whereby the Parties Concerned Fail to Reach An Agreement of Compensation and Relocation Regarding House Demolishment and Relocation] (promulgated by Sup. People's Ct., 法释 [2005] 9号, Aug. 1, 2005, effective Aug. 11, 2005), available at <http://vip.chinalawinfo.com/newlaw2002/slc/slc.asp?db=chl&gid=59600> (last visited July 27, 2010).

¹⁵³ *See id.*

¹⁵⁴ *See* Yang Qingxiang, 司法解释权点滴谈 [Detailed Discussions on the Right to Judicial Interpretation], 中国法院网 [CHINA COURTS NET], Jan. 11, 2004, <http://www.chinacourt.org/public/detail.php?id=176020> (last visited July 27, 2010). *See also supra* note 52.

¹⁵⁵ *See* 广西区高级人民法院关于当前暂不受理几类案件的通知 [Notice on Several Categories of Cases that the People's Courts may not Accept for the Time Being] (promulgated by Guangxi Area High People's Ct., 桂高法[2003]180号, Sept. 1, 2003), *quoted in* 广西法院不受理13类案件 省高院称由国情决定 [Guangxi Courts Reject 13 Categories of Cases for the Provincial High Court Claims Social Conditions], Aug. 24, 2004, <http://news.sina.com.cn/c/2004-08-24/14093481688s.shtml> (last visited July 29, 2010). The types of cases in question include:

1. Disputes arising out of fund raising, including government organizations, enterprises and institutions raising fund for manufacturing, operations and building construction from employees internally and any entity raising fund from unspecified persons or organizations without approval;
2. Disputes arising out of illegal pyramid schemes by means of sale;
3. Real estate disputes arising out of administrative decisions and systematic changes;
4. Disputes arising out of large scale wage arrears due to enterprise reshuffling or poor performance and layoffs due to reforms of the labor system;

these cases “implicate many aspects of the society, are extremely sensitive, and are under the public scrutiny.”¹⁵⁶ This court claimed that adjudication of these cases might result in social friction and practical difficulties in enforcing the judgments.¹⁵⁷

While the High Court of Guangxi drafted the order purportedly in accordance with current legal norms, some other courts have issued orders in clear contradiction of legal principles. In a remote county in Henan Province, for example, the local courts refuse to hear compensation cases brought by HIV carriers.¹⁵⁸ A girl who contracted HIV via a blood

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5. Disputes arising out of the adjustment and transfer of state owned assets made by the government, conversion of creditors' right to shareholders' right made by the government or based on governmental orders, or the violation of democratic process or the resettlement of the workers during enterprise reshuffling;
 6. Disputes involving villagers and rural collective economic organizations for land expropriation and resettlement compensations, with the exception to resettlement fees paid directly to individuals without the arrangement of said organizations;
 7. Disputes arising out of civil claims brought by one party because the other party fails to perform the obligation imposed by administrative decisions on land ownership disputes;
 8. Disputes arising out of sweeping rescission of agricultural contracts by local governments pursuant to policies of agricultural industrialization and economies of scale;
 9. Disputes arising out of claims of division of accumulated property in collective economic organizations made by employees in sewing and iron co-operatives, barber shops, horse teams, and other collective economic organizations in the time of mass co-operative formation.
 10. Disputes arising out of debts borne by rural co-operative foundations, the township enterprise foundations, and supply-and-marketing co-operatives members equity capital services and claims by farmers against them;
 11. Disputes arising out of bankruptcy where the enterprises applying for bankruptcy fail to submit the required documents and to resettle their employees;
 12. Securities disputes arising out of stock price manipulation, insider trading and other illegal activities, with the exception to tort claims relating to false disclosures on which relevant administrative agencies have imposed administrative penalties or the people's courts have rendered criminal verdict; and
 13. Grave-related disputes arising out of fight for gravesites and *feng shui*.

¹⁵⁶ See *id.*

¹⁵⁷ See *id.*

¹⁵⁸ See Wang Wenyuan, 民事不立案问题研究 [Study on the Rejection of Civil Cases], 2009, no. 2 青海社会科学 [QINGHAI SOC. SCI.] 175, 175 (2009).

transfusion at a local hospital could only bring a lawsuit claiming compensation for contracting the hepatitis C virus through the fault of the hospital.¹⁵⁹

Proper jurisdiction is another element in the fourth requirement under the Civil Procedure Law. For example, a civil lawsuit brought against a legal person shall be under the jurisdiction of the people's court located in the place where the defendant has its domicile.¹⁶⁰ The domicile of a legal person shall be the place where its main administrative office is located.¹⁶¹ In a tort case, the people's court located in the place where the infringing act took place also has jurisdiction over the case.¹⁶²

In one case, a customer experienced considerable hassle when filing a case against Nestle for its infringement of the customer right to information. She claimed that one of the Nestle transgenic products was not properly marked on the package.¹⁶³ Her attorney, Wu Dong (Wu), first tried to file the case with the Intermediate People's Court of Shanghai, whose case filing division told him that a case relating to the customer's right to know should be filed with a district people's court at the local level.¹⁶⁴ Wu then went to the Changning District People's Court, located in the district where Zhu bought the Nestle product in a supermarket, but the judge in the case filing division told him to go to the Hongkou District People's Court because that was where the supermarket retained its business registration.¹⁶⁵ The Honkou District People's Court also declined jurisdiction and reasoned that the intermediate people's court should have jurisdiction because one of the co-defendants, Nestle Swiss, was a foreign entity.¹⁶⁶ Wu ignored the advice this time and did not return to court where he initially attempted to file the case.¹⁶⁷ He argued with the case filing division of the Honkou District People's Court, pointing out that the intermediate people's court only had original jurisdiction over cases with major economic matters involving

¹⁵⁹ *See id.*

¹⁶⁰ *See* Civil Procedure Law, *supra* note 67, at art. 22.

¹⁶¹ *See* 关于适用《中华人民共和国民事诉讼法》若干问题的意见 [Opinions on the Application of Civil Procedure Law] (promulgated by Sup. People's Ct., 法发(1992)22号, July 14, 1992), art. 4, available at <http://vip.chinalawinfo.com/newlaw2002/slc/slc.asp?db=chl&gid=5840> (last visited July 28, 2010).

¹⁶² *See* Civil Procedure Law, *supra* note 67, at art. 29.

¹⁶³ *See* Shi Yin, 朱燕翎:我控告雀巢“转基因”商品 [Zhu Yanling: I Sue Nestle Transgenic Products], 南方周末 [SOUTHERN WEEKEND], available at <http://www.wyzxsx.com/Article/Class22/201002/132721.html> (last visited Sept. 2, 2010).

¹⁶⁴ *See id.*

¹⁶⁵ *See id.*

¹⁶⁶ *See id.*

¹⁶⁷ *See id.*

foreign elements, and that the jurisdiction of all other cases involving foreign elements belonged to the district people's courts.¹⁶⁸ The Hongkou District People's Court eventually accepted the case.¹⁶⁹ Although the plaintiff in the end did not win, this example shows that complex jurisdictional matters can also be used as a convenient tool for the court to reject a case.¹⁷⁰

Moreover, a court may disclaim jurisdiction if it decides the case is outside the scope of civil actions. It would seem obvious to a western observer that any claim that can cite a legal basis should be actionable in the court, but this is not the case in China. Because no legal norms clearly specify the scope of civil actions, the courts still enjoy broad discretion in deciding whether to reject a case for jurisdictional matters. The reasons for rejecting cases based on a lack of jurisdiction are also analogous to those cited as having "unclear facts." As a practical matter, a lawyer will endeavor to file a case with the court where he or she has connections in the hope of obtaining a favorable judgment for the client. The court, on the other hand, will fight to claim jurisdiction over "cash cow" cases – cases that generate considerable court fees but are straightforward in facts and have only minor social implications and cases concerning local interests because of the local protectionistic nature of Chinese judicial system.¹⁷¹ The case filing division not only abuses its power by rejecting cases for jurisdictional matters but also by overreaching its own jurisdiction. Meanwhile, the court will shy away from cases that could embarrass or harm a powerful party, such as a government entity.¹⁷²

In 2007, an attorney named Liu Jiahui (Liu), entrusted by 900 car owners to sue China Insurance Regulatory Commission (CIRC), asked the court to order CIRC to hold an administrative hearing on the new compulsory traffic accident liability insurance for motor vehicles before it was put into practice.¹⁷³ Liu's case did not go far, as the court found the

¹⁶⁸ See *id.*

¹⁶⁹ See *id.*

¹⁷⁰ On appeal, Shanghai High People's Court ruled for the defendant. See "雀巢"转基因案朱燕翎终审败诉 [Zhu Yanling Loses on Appeal in the Nestle Transgenic Products Case], Oct. 26, 2004, <http://news.sina.com.cn/o/2004-10-26/15474042781s.shtml> (last visited July 28, 2010)

¹⁷¹ See Huang Yulin, 刍议民事初审立案制度 [Study on Trial of Civil Cases in the First Instance], vol. 23, no. 3新乡学院学报 [J. OF XINXIANG UNIV.] 45, 46 (2009). See also Sun Ruishao, 法院争案法律受伤 [Courts scrambled for cases while undermining the law], 深圳商报 [SHENZHEN COMMERCIAL NEWSPAPER], Mar. 17, 2011, at A9.

¹⁷² See *id.* at 45.

¹⁷³ See 车主起诉保监会推“交强险”需听证 法院未立案 [People's Court Refused to Accept the Car Owners' Case on Requesting the CIRC to Hold a Hearing on the "Compulsory Insurance"], July 17, 2007, available at http://www.ce.cn/xwzx/shgj/gdxw/200707/17/t20070717_12197386.shtml (last visited July

matter outside the scope of actionable civil lawsuits and claimed no jurisdiction.¹⁷⁴ Liu's only recourse at that point was to apply directly to CIRC for administrative reconsideration (行政复议), and file an administrative case if the reconsideration did not resolve the dispute.¹⁷⁵

Considering the widespread issue of corruption in the judicial system, it would not be surprising if a court rejected cases as a favor to parties having special relationships with the decision-making body in the judicial system.¹⁷⁶ Despite improvements in the substantive laws, the decision of the case filing division to block a dispute from initiating the court proceeding obstructs the implementation of those laws, especially in borderline cases where the underlying issues do not perfectly fit in the law book.¹⁷⁷ This is particularly counterproductive as an increasing number of new rights emerge with the advancement of technology.

5. Substantive Review Prior to Case Filing Hurts Claimants

The Civil Procedure Law was amended in 2007. Before finalization the draft amendments, recommended by Chinese legal experts, had been under heated debate four times.¹⁷⁸ One of the most significant changes in the draft amendments that drew nationwide attention was to establish a new registration system to replace the preexisting filing system.¹⁷⁹ Under the proposed system, the court would merely check a complaint for compliance with technical format, rather than examining the claim for compliance with procedural and substantive requirements, which requires exercising judgment.¹⁸⁰ The proposed system would maximize a claimant's right to a trial. The finalized amendments, however, address only regulation of retrial and enforcement of judgment, but not important issues such as the standards for accepting complaints and the registration system for case filing problems, an idea that was ultimately abandoned.¹⁸¹

28, 2010).

¹⁷⁴ *See id.*

¹⁷⁵ *See id.*

¹⁷⁶ *See Wang, supra* note 158. *See also supra* note 52.

¹⁷⁷ *See id.* at 176.

¹⁷⁸ *See* 民事诉讼法修正案草案:4大争议焦点 观点碰撞激烈 [Draft amendment of civil procedural law: 4 issues under heated debate], Aug. 16, 2007, available at <http://news.sina.com.cn/o/2007-08-16/085012394792s.shtml>.

¹⁷⁹ *See* 民事诉讼法修订:立案登记制度保护当事人诉权 [Amendment to the Civil Procedure Law: Case Registration System Protects Rights to Trials], Dec. 5, 2006, available at <http://news.sohu.com/20061205/n246805990.shtml> (last visited July 28, 2010).

¹⁸⁰ *See id.*

¹⁸¹ *See Zhao Lei & Deng Jiangbo, 利益各方未能充分“吵架” 民事诉讼法修改受质疑 [Interested Parties Failed to Fully "Quarrel", Causing Doubts in Amendments of Civil Procedure Law], 南方周末 [SOUTHERN WEEKEND], Aug. 15, 2007, available at*

As previously discussed, the four requirements under the Civil Procedure Law seem quite harmless on paper, but in application the courts often create unreasonable obstacles for claimants and block access to legal remedies in a number of disputes. In 2006, an attorney from Beijing was assaulted by the chief of the administration division of a district court in Tianjin Province when he filed a case regarding a dispute over house demolition and relocation with his client.¹⁸² In leaving total discretion to the case filing division, disagreement over the requirements and standards for case filing immediately and ironically leads to such result.

The main problem with filing cases is that the case filing division sometimes engages in substantive examination of the merits of the case rather than simply confirming ostensible compliance with the four requirements. In the New Bridge example, the case filing division took the position that the Firm had no contract with the SOEs because there were no supporting facts, failing the third requirement under the Civil Procedure Law. The Firm, however, was able to present a non-frivolous argument to the contrary. The case filing division in fact passed a judgment on the merits of the Firm's argument, which is the duty of a trial judge at a court proceeding, not the case filing division at the earliest stage of the suit. The case filing division should have let the New Bridge case go forward because all that was needed at the pleading stage was the facial compliance with the filing requirements.¹⁸³ It is not the duty of the case filing division to decide whether the Firm's argument would prevail at trial. The fact that the case filing division judged the case without granting the Firm a forum to argue its merits deprived it of its right to access the court.

By engaging in a substantive review without hearing arguments in a formal court forum, the case filing division functions as a gatekeeper, controlling the court docket. Shortly after the Cultural Revolution, China was in need of legal professionals and practitioners, especially to staff public security organizations, the people's procuratorates, and the people's courts.¹⁸⁴ Meanwhile, the number of disputes was increasing dramatically. The Supreme People's Court reported in 1988 that, from 1982 to 1987, the number of the staff in the courts had increased by 35.8%, while the number

<http://www.infzm.com/content/trs/raw/23600> (last visited July 28, 2010).

¹⁸² See 律师被打与民事诉讼立案标准 [Battered Lawyer & Civil Case Filing Standard], May 22, 2006, <http://www.minshangfa.com/html/2006-5-22/200652294512.htm> (last visited July 28, 2010).

¹⁸³ A chief judge from the case filing division in a Shanghai court agreed that he would accept the case because there was sufficient legal relationship (法律关系) between the Firm and the claim, which was what the third requirement under the Civil Procedure Law called for. Interview with Shanghai Judge, *supra* note 14.

¹⁸⁴ See HE WEIFANG, 中国法律教育之路 [LEGAL EDUCATION IN CHINA] 9, 30 (CUPL Press 1997).

of accepted cases increased by 89.75%, not including 8,000,000 cases on appeal(申诉) and petition(信访).¹⁸⁵ Cases were piling up as judicial resources and capacity could not match the caseload.¹⁸⁶ Because of this inadequacy, which still persists today, the court has the incentive to avoid controversial cases that may consume a great deal of judicial resources and invite troubles from elsewhere. The case filing division is well-positioned to perform that function.

In addition, some legal issues are politicized and further banned from the judicial process because of concerns for social stability.¹⁸⁷ In 2008, the contaminated milk powder produced by the China dairy giant Sanlu Group caused many babies to develop kidney stones, with some cases resulting in death.¹⁸⁸ Shortly after the incident, Professor Cohen, a scholar of Chinese law, commented that “the record so far suggests that the Chinese government may be cautious in limiting access to the courts” in this case and that “cases in very controversial areas and cases likely to cause class action litigation have not been allowed to proceed.”¹⁸⁹

Professor Cohen’s prediction so far has proven to be right. Before the disclosure to the public of the accident of the Sanlu formula milk powder, the government and the relevant authorities of Hebei Province had a meeting with all the lawyers in Hebei Province and requested that no lawyer take tort claims brought by the victims against Sanlu.¹⁹⁰ This policy resulted in all the lawyers in Hebei Province refusing to represent compensation claims.¹⁹¹ In October 2008, claimants from Shandong, Henan, Fujian and other areas submitted nine separate complaints to the Xinhua District People’s Court of Shijianzhuang, Hebei Province, claiming damages of 1,300,000 *yuan* in total.¹⁹² Later, on October 31, the case filing division announced that the

¹⁸⁵ See 最高人民法院工作报告(1988年) [Working Report of Supreme People’s Court] (promulgated by Sup. People’s Ct., May 1, 1988), available at http://www.gov.cn/test/2008-03/27/content_929873.htm (last visited July 28, 2010).

¹⁸⁶ See *id.*

¹⁸⁷ See, e.g., Peter Ford, *What China’s tainted milk may not bring: lawsuits*, CHRISTIAN SCI. MONITOR, Sept. 23, 2008, <http://www.csmonitor.com/World/Asia-Pacific/2008/0923/p01s01-woap.html> (last visited July 28, 2010).

¹⁸⁸ See *id.*

¹⁸⁹ *Id.*

¹⁹⁰ See 河北省政府要求律师不准受理三鹿奶粉事件受害者诉讼，涉嫌违宪 [Hebei Provincial Government Bans Lawyers from Representing Victims of the Incident of Contaminated Sanlu Milk Powder, Which may Violate the Constitution], Oct. 3, 2008, <http://www.xcar.com.cn/bbs/viewthread.php?tid=8420499> (July 28, 2010). This piece of news can only be found in some online discussion boards. For whatever reason, it seems that all major Chinese online news services have taken it down.

¹⁹¹ See *id.*

¹⁹² See 法院回复所有三鹿奶粉索赔不立案 称接上级指示, [With Orders from Superiors, Court Says All Compensation Cases Arising From Sanlu Milk Powder Will Be Rejected], Oct.

court would not accept these cases, and issued no order so there was no chance for appeal.¹⁹³ The decision was purportedly based on an internal order from the higher-level court.¹⁹⁴

Given the current legal and political background, the court is not entirely irrational in conducting substantive review of the cases being filed. Despite the undeniable existence of judicial corruption, the court nonetheless strives to some extent to be a neutral and fair forum for adjudicating disputes. To achieve this end, it seems inevitable that the court filters out controversial cases because cases of such nature tend to put pressure upon judges and impede fair adjudication.¹⁹⁵ If the court reads liberally the requirements under the Civil Procedure Law and accepts all the cases that facially comply with the stated requirements, but also delays certain cases indefinitely while deciding others in clear violation of legal norms, the public's faith in the judiciary might weaken.¹⁹⁶ As a result, some courts strive to implement the following: "a decision rendered for every case accepted (立得进, 判得出)."¹⁹⁷ The converse implies that if it were difficult to make a decision then the court would not accept the case, to avoid having to make a decision.

B. Case Filing Requirements Under the Administrative Procedure Law

The administrative law governs the relationships between government entities as well as between the public and the government. China is an administrative state under the central leadership of the CCP, and thus legal actions arising under administrative law have a presumption of political sensitivity in the people's court. The Administrative Procedure Law is one of the most controversial pieces of legislation ever enacted in post-Mao China and its scope of court jurisdiction is thus narrowly defined.¹⁹⁸ While an analysis of the administrative law is beyond the scope of this article, it is relevant to note that the nature of the Administrative Procedure Law reflects the court's hesitancy to accept administrative cases. The legislative history of the Administrative Procedure Law further illustrates the political sensitivity and vulnerability of this new law. The stipulation in the

31, 2008, <http://www.scol.com.cn/focus/zgsz/20081031/20081031194908.htm> (last visited July 28, 2010).

¹⁹³ *See id.*

¹⁹⁴ *See id.*

¹⁹⁵ *See Song, supra note 21, at 88.*

¹⁹⁶ *See id.*

¹⁹⁷ Interview with Shanghai Judge, *supra note 14.*

¹⁹⁸ *See KANG JUNXIN, 法院改革研究——以一个基层法院的探索为视点 [STUDY ON COURT REFORMS FROM THE PERSPECTIVE OF A BASIC-LEVEL COURT] 137-39 (CUPL Press 2004).*

Administrative Procedure Law that common people can sue officials (民告官) is an issue that is conceptually rather new. It is a question for which there is no custom and to which China has not adapted, and yet it is an enduring issue. Therefore, the scope for acceptance of cases is not yet set too widely but will be expanded step-by-step in order to benefit the implementation of the administrative litigation system.¹⁹⁹

Almost identical to the Civil Procedure Law, the Administrative Procedure Law also sets forth four requirements for case filing:

- 1) The plaintiff must be a citizen, a legal person or any other organization that considers a specific administrative act to have infringed upon his or its lawful rights and interests;
- 2) There must be a specific defendant or defendants;
- 3) There must be a specific claim and a corresponding factual basis for the suit; and
- 4) The suit must fall within the scope of acceptance for administrative actions by the People's Courts and under the jurisdiction of the People's Court where the suit is filed.²⁰⁰

The Administrative Procedure Law attempts to define its scope of jurisdiction narrowly and in an itemized way. It also provides four broad circumstances in which a court may not accept a case:

- 1) state actions, including, but not limited to, national defense and international diplomacy;
- 2) administrative rules and regulations, or decisions and directives of general binding force that are formulated and issued by administrative organs;
- 3) an administrative organ's decision to award or punish its personnel, or its decision to hire or dismiss personnel; and
- 4) an administrative organ shall have the final authority to rule on specific administrative actions, as stipulated by law.²⁰¹

The court may not accept cases concerning specific administrative affairs to protect the government from litigating potentially embarrassing lawsuits that would negatively affect the public image of the CCP.²⁰² Chinese law differentiates between "specific administrative actions"

¹⁹⁹ *See id.* at 138.

²⁰⁰ 行政诉讼法 [Administrative Procedure Law] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 4, 1989, effective Oct. 1, 1990), art. 41, available at <http://vip.chinalawinfo.com/newlaw2002/slc/slc.asp?db=chl&gid=4274> (last visited Sept. 2, 2010).

²⁰¹ *Id.* at art. 12.

²⁰² *See* Si Jiahui, 宪政视界下的中国行政诉讼制度 [The Chinese Administrative Litigation System in the Constitutional Vision], <http://shlx.chinalawinfo.com/NewLaw2002/SLC/SLC.asp?Db=art&Gid=335595480#key> (last visited Aug. 19, 2010).

(具体行政行为) and “general administrative actions” (抽象行政行为). Specific administrative actions are defined as acts taken by an administrative agency against a named party concerning a specific subject matter, which may fall under the scope of administrative suit.²⁰³ General administrative actions are essentially statutory enactments that target the public as a whole, so it is outside court jurisdiction.²⁰⁴ In addition, the Civil Procedure Law also states that a judge should inform a plaintiff to seek redress from relevant administrative organs in certain cases that are outside the scope of actionable civil suits.²⁰⁵ It reemphasizes that certain categories of cases implicating administrative organs under Article 12 of the Administrative Law are not actionable.²⁰⁶

China is not unique in limiting the court’s jurisdiction to accept administrative matters.²⁰⁷ Since rejecting a case is a substantial judicial power vested in the case filing division, the scope must be narrowly and clearly defined to limit its application within the statutory limits. It is ironic that, by not setting the scope “too wide,” the law vests broad powers in the case filing division to reject cases if they are beyond the scope of acceptance for administrative actions. This broad discretion predictably increases the opportunities for judges to engage in corruption or to protect the interests of a government entity from embarrassment and public scrutiny.

Recent cases suggest that the courts are generally hesitant, and act conservatively, in accepting cases involving government affairs when the law is open for interpretation. This seems to support the argument that the scope of cases rejected by the case filing system must be narrowly defined and mechanically implemented to ensure equal treatment for plaintiffs with

²⁰³ See Administrative Procedure Law, *supra* note 200, at art. 5.

²⁰⁴ See *id.* at art. 12(2). There was a reported case rejected by means of this distinction, in which a Shenzhen citizen brought an action against the local government claiming that he had been deceived by the government’s pledge on reducing the price of public transportation. The court reasoned that the determination of price affected the public in a generalized way, so it constituted a general administrative act outside the province of the court. Legal scholars suggest that the plaintiff sue individual public transportation companies first to have the case accepted by the court. See 告政府无信被法院驳回 [*The Case against Government for Deceit Was Rejected By the Court*], 南方都市报 [SOURHEN METROPOLITAN NEWS], Dec. 13, 2007, at A11.

²⁰⁵ Civil Procedure Law, *supra* note 67, at art. 111.

²⁰⁶ See *id.*

²⁰⁷ It is also worth noting that China’s accession into the WTO has placed significant pressure on the government to create independent tribunals to accept cases involving administrative disputes that implicate WTO interests. The WTO may thus have the potential to play an important role in promoting judicial reform of the case filing division. Vernon Mei-Ying Hung, *China’s WTO Commitment on Independent Judicial Review: Impact on Legal and Political Reform*, 52 AM. J. COMP. L. 77 (2004) (offering a comprehensive analysis of how the WTO is creating requirements to ensure that administrative cases are accepted and independent judicial review is executed to protect WTO parties’ interests).

similar complaints, as well as narrowly tailored to only reject cases that meet specific government interests.

In March 2006, the Beijing Yueqiu Cun Spaceflight Technology Company filed an action against Beijing Industry and Commerce Administration Bureau for publicly blacklisting the company through official publication.²⁰⁸ The Beijing Haidian District People's Court rejected this case, claiming that it was beyond the scope of actionable administrative cases.²⁰⁹ Critics, however, argue that the plaintiff's case clearly does not fall within the exceptions stated in Article 12 of the Administrative Procedure Law, and should have been accepted by the court pursuant to Article 11(7) of the Administrative Procedure Law.²¹⁰ This provision states that a court shall accept an action where a legal person or organization brings an action based on their belief that an administrative organ has violated its duty to carry out its obligations.²¹¹ Critics argue that this clause means that cases involving an administrative organ's violations of another party's right to its reputation or property are actionable.²¹²

The General Principles of Civil Law state, "Citizens and legal persons enjoy the right to their reputation, and a citizen's dignity is protected by law, it is prohibited to use the means of humiliation slander or libel to harm a citizen or legal person's reputation."²¹³ Thus, the failure to accept the Spaceflight case may represent an abuse of government power and a violation of Chinese law. Rejection of the case effectively rendered a judgment against the plaintiff without a hearing on the procedural due process issue.

In another example that occurred in Chongqing in 2002, a local public interest attorney, Zhou Litai (Zhou), challenged a 2001 regulation promulgated by the Chongqing Labor and Security Bureau (Bureau). The regulation stated that disputes involving social security for the elderly were beyond the scope of actions acceptable by the district or intermediate people's courts, in addition to the Committee on Labor Conflict.²¹⁴ Zhou

²⁰⁸ See Chen Pin, "逆向审查"扫描北京"月球村"一元索赔案的起诉 ["Reversed Scrutiny" over the One Yuan Lawsuit Brought by Beijing "Yueqiu Cun"], 中国法院网 [CHINA COURTS NET], Mar. 30, 2006, <http://www.chinacourt.org/public/detail.php?id=200165> (last visited July 28, 2010).

²⁰⁹ See *id.*

²¹⁰ See *id.*

²¹¹ See Administrative Procedure Law, *supra* note 200, at art. 11(7).

²¹² See Chen, *supra* note 208.

²¹³ See General Principles of Civil Law, *supra* note 117, at art. 102.

²¹⁴ See重庆市劳动和社会保障局关于养老保险争议受理问题的通知 [Notice on Issues concerning the Court Acceptance of Pension Disputes] (promulgated by Chongqing Labor Bureau & Chongqing Soc. Sec. Bureau, 渝劳社办发 [2001] 79号, Apr. 3, 2001), *quoted in* Zhou Litai's blog, Apr. 17, 2007, http://ztlawyer.blog.hexun.com/8895971_d.html (last visited

first tried to meet with officials from the Governmental and Legal Affairs Office (政府法制办) to discuss his concerns over this regulation.²¹⁵ He argued that the government did not have a legal basis to restrict labor disputes and define jurisdiction in the court system.²¹⁶ When the agency failed to respond to his argument, eight months later, he challenged the authority of the regulation by suing the Bureau in the Chongqing Intermediate People's Court.²¹⁷ When its case filing division refused to accept the case, he filed his complaint with the Chongqing High People's Court, which affirmed the rejection on the same grounds.²¹⁸

Zhou's case presents several interesting issues concerning the authority of the case filing division. The first issue concerns whether an individual through the court system can challenge administrative regulations after the agency fails to acknowledge a complaint. Another issue involves what is the practical legal remedy when a local agency issues regulations concerning jurisdiction in conflict with the national laws or the guidance issued by the Supreme People's Court. The immediate response would be that the supervision committee within that agency or at a higher level of government would be responsible for correcting the issue.²¹⁹ Given that the regulation passed despite the existence of these mechanisms, however, legal practice suggests that the courts are in a better position to ensure that administrative agencies do not legislate in violation of powers reserved to the judiciary. One would also assume that the judiciary would have an active interest in protecting its powers from administrative encroachment. The Chongqing High People's Court rejected the case, claiming that it did not have jurisdiction, which essentially ended Zhou's legal avenues of redress and insulated the administrative agency from possible embarrassment or sanctions from a higher-level government entity. It shows that the people's courts, as a non-independent branch under the NPC, share common interests with administrative agencies and operate as a parallel structure. Without allowing administrative cases to go beyond the case filing stage, private grievances resulting from the government overreaching are effectively

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²¹⁵ See Zhou Litai's blog, *supra* note 214.

²¹⁶ See *id.*

²¹⁷ See *id.*

²¹⁸ See *id.* The court of the first instance found the case outside the scope of actionable administrative suits because the regulation in question did not single out a certain disputant but affected them in a general manner, which constituted a general administrative act. Zhou, however, tried to argue that the failure of an administrative agency to respond to his concerns was the basis for his suit.

²¹⁹ See, e.g., Wen Jinrang, 上访是解决纠纷的最好方法? [Is Petition the Best Way to Solve Disputes?], Aug. 12, 2010, <http://bjzy.chinacourt.org/public/detail.php?id=766> (last visited Aug. 19, 2010).

beyond the scope of legal remedy.

Where the case filing division does allow a case to proceed against a government entity, the government often settles the case or resolves the issue before a trial date is set. Simply accepting a case, therefore, may give the government defendant sufficient pressure to avoid embarrassment and scrutiny from higher-level officials. In 2004, two Shanghai attorneys filed a complaint against a development company, a government-sponsored entity, alleging that the placement of its tollbooths constituted unfair business practice because motorists taking a toll-free route would also have to pass its tollbooths and pay the fees.²²⁰

Because no one had challenged this practice, the tollbooths had been there for four years before this lawsuit was initiated.²²¹ Some time after accepting the case, the judge called the plaintiffs and said that the defendant wished to settle the lawsuit. The plaintiffs declined the settlement proposal.²²² The court then neglected to set a trial date, perhaps because internal negotiations were already in progress. The defendant then promised to remove the tollbooths by February 2003.²²³ This is not an exceptional case, but may be one in which the procedural mechanism works efficiently to resolve plaintiffs' claims in the court.

It is in the best interest of the judicial system to settle as many claims as possible without undergoing a costly trial process, and thus allowing a government entity to be sued in court may be sufficient incentive to correct the infringement and avoid negative publicity. The legal realities, however, may indicate otherwise. As previously discussed, courts are very reluctant to accept cases against government entities.

C. Courts Are Particularly Reluctant to Accept Class Action and Mass Mobilizing Cases

As previously discussed, the Civil Procedure Law does not clarify the scope of actionable civil lawsuits. The courts of different levels consider this matter according to specific practical needs, rather than procedural principles. Not only did the Supreme People's Court try to add legal gloss to this scope by opinions, judicial interpretations, and judicial instructions in reply to individual lower courts, but the lower courts also tried to supplement it with opinions, replies and notices. Confusion as to what standard to follow increases the difficulty relating to case filing. In particular, uncertainty abounds with respect to class actions, which are

²²⁰ See Chen, *supra* note 104.

²²¹ See *id.*

²²² See *id.*

²²³ See *id.*

referred to as representative actions (代表人诉讼) in China.²²⁴

The system of representative litigation in China can be traced back to 1980s.²²⁵ A district people's court accepted a civil action brought by several villagers on behalf of hundreds of villagers harmed by a seed company.²²⁶ By allowing the representatives to proceed in court, it set a precedent not contemplated by any procedural law.²²⁷ After several other courts permitted cases utilizing the same representative system to go forward, the People's Daily reports brought this judicial experimentation to the attention of relevant authorities.²²⁸ Consequently, the Civil Procedure Law, passed in 1991, adopted the system of representative action, referencing the class action system in the United States.²²⁹ Even though theories on this litigation system are being developed all the time, it merely exists in law books and finds little application in practice. Gradually, this type of litigation has become associated primarily with distinct categories of disputes, such as employment disputes, illegal land expropriation, proprietor rights infringements, house compensation and demolition disputes, securities disputes, etc.

The China Lawyer Society requires that lawyers representing class actions register at the local lawyer society and submit a notice to the judiciary authority if the situation worsens. In practice, these requirements may be construed as discouraging lawyers to work on class action cases as there are no such requirements for lawyers representing any other type of case. Other main features of class action cases, such as their often large-scale and fiercely confrontational nature, suggest that the government may have strong interests in avoiding such a mechanism in the hope of attaining social harmony and stability.

In the area of employment law, the courts have refused to hear a large number of employment disputes. For example, the Guangdong Province High People's Court promulgated a guideline stipulating that the court should not accept cases over labor disputes relating to lay-offs and unpaid salaries in the course of SOE reconstruction, and should direct those disputes to relevant governmental authorities for resolution.²³⁰

²²⁴ It must be noted that there is no U.S.-type opt-out class action in China.

²²⁵ See Fu Yulin, 群体性纠纷的司法救济 [*Legal Remedies for Group Disputes*], Dec. 14, 2004, <http://www.civillaw.com.cn/article/default.asp?id=19634> (last visited July 28, 2010).

²²⁶ See *id.*

²²⁷ See *id.*

²²⁸ See *id.*

²²⁹ See Civil Procedure Law, *supra* note 67, at arts. 54, 55.

²³⁰ See 广东省高级人民法院关于审理劳动争议案件若干问题的指导意见 [Guideline on Several Issues Relating to Trials of Labor Disputes] (promulgated by Guangdong Province High People's Ct., 粤高法发[2002]21号, Sept. 15, 2002), available at <http://vip.chinalawinfo.com/newlaw2002/slc/slc.asp?db=lar&gid=16921094> (last visited July

In 2005, the Supreme People's Court issued an instruction to a lower court explaining that, if the demolisher and the owner cannot reach a settlement and the latter files a lawsuit relating to disputes over compensation for house demolition, the people's court should not accept it.²³¹ This judicial instruction further provides that the people's court should direct the claimants to relevant authorities according to Article 16 of the Regulation on the Dismantlement of Urban Houses.²³² Under this regulation, the claimants can apply for a decision of the House Dismantlement Administration Authority or the government of equal level.²³³ If the claimants are not satisfied with the decision, they can then file a lawsuit in the people's court within three months.²³⁴

At a time when rapid urbanization gives rise to mass demolition of old city structures, the Supreme People's Court added another obstacle to obtaining legal remedies for demolitions. Under its rationale, the initial civil dispute between a house demolisher and a house owner changed into an administrative dispute between the government authority and a house owner, where the balance of power tips further against the house owner.²³⁵ The house demolition dispute is a complicated issue because it concerns the interests of a large number of people. Establishing a system to keep the disputes out of the courthouse will only aggravate the situation. Law is the last resort that ordinary people can seek for relief; burying one's head in the sand does not make those conflicts go away. If the court has no courage to stand for the people it is supposed to serve and dispense justice, it will only open the proverbial Pandora's Box, releasing more societal ailments as a result.²³⁶ With respect to securities disputes, the Supreme People's Court

29, 2010).

²³¹ See 最高人民法院关于当事人达不成拆迁补偿安置协议就补偿安置争议提起民事诉讼人民法院应否受理问题的批复 [Reply on Whether People's Courts Shall Accept the Civil Litigation on the Dispute over Compensation and Relocation Whereby the Parties Concerned Fail to Reach an Agreement of Compensation and Relocation regarding House Demolishment and Relocation] (promulgated by the Sup. People's Ct., 法释[2005]9号, Aug. 1, 2005, effective Aug. 11, 2005), available at <http://vip.chinalawinfo.com/newlaw2002/slc/slc.asp?db=chl&gid=59600> (last visited July 29, 2010).

²³² See *id.*

²³³ See 城市房屋拆迁管理条例 [Regulation on the Dismantlement of Urban Houses] (promulgated by St. Council, 国务院令305号, June 13, 2001, effective Nov. 1, 2001), available at <http://vip.chinalawinfo.com/newlaw2002/slc/SLC.asp?Db=chl&Gid=35748> (last visited July 29, 2010).

²³⁴ See *id.*

²³⁵ See Cong Ping, 法院岂能不受理拆迁纠纷? [How Come the Courts do Not Accept Cases concerning Housing Demolishment?], 人民网 [PEOPLE.COM], 2005, <http://www.people.com.cn/GB/paper83/15817/1399132.html> (last visited July 29, 2010).

²³⁶ See Wang Zhian, 法院关闭大门, 潘多拉的盒子就会打开 [The Proverbial Box of

suggests that class actions should not be utilized, and encourages claimants to sue individually.²³⁷

Commentators have offered some interesting observations as to why the courts will bend over backwards to avoid class actions. In a typical class action involving government entities, a court acting as the mediator in the dispute between the government and ordinary people often feels powerless.²³⁸ Lacking in independent judicial resources, the court may find it most difficult to stand as a neutral forum.²³⁹ Government entities may also exert tremendous influence on the court.²⁴⁰ As the case filing division has considerable discretion in deciding whether to accept a case, it can conveniently throw out controversial cases to avoid incurring blame from the court or government officials at a higher level.²⁴¹ In addition, as a technical matter, a class action case only counts as one case on a judge's performance sheet but requires a disproportionate amount of time and energy, so there is an incentive to break down a class action into individual lawsuits.²⁴² After resolving the first case, the margin for additional resource input is diminished for other cases of the same kind.²⁴³

D. Constitutional Claims Find No Legal Remedy in Courts

It seems that the Chinese Constitution functions more like a deified political declaration than a document enshrining actionable rights. Although the Constitution grants citizens numerous basic rights, the court cannot directly apply the constitutional provisions when those rights are violated.²⁴⁴ In other words, the court will reject the cases concerning violation of constitutional rights if such cases are brought as civil or administrative cases to the court. The Constitution provides that the Standing Committee of the NPC has the power to interpret the Constitution and ensure its

Pandora will Open if the Courts are Closed], Sept. 6, 2008, <http://blog.ifeng.com/article/1693807.html> (last visited July 29, 2010).

²³⁷ See 最高人民法院关于受理证券市场因虚假陈述引发的民事侵权纠纷案件有关问题的通知 [Notice on the Relevant Issues concerning the Acceptance of Cases of Disputes over Tort Cases Arising from False Statement in the Securities Market] (promulgated by the Sup. People's Ct., 法明传[2001]43号, Jan. 15, 2002), available at <http://vip.chinalawinfo.com/NewLaw2002/SLC/SLC.asp?Db=chl&Gid=38474> (last visited July 29, 2010).

²³⁸ See Fu, *supra* note 225.

²³⁹ See *id.*

²⁴⁰ See *id.*

²⁴¹ See *id.*

²⁴² See *id.*

²⁴³ See *id.*

²⁴⁴ See Donald C. Clarke, *What's Law Got to Do with It? Legal Institutions and Economic Reform in China*, 10 UCLA Pac. Basin L.J. 1, 33 (1991).

enforcement.²⁴⁵

In 1998, Beijing Minzu Hotel laid off 34 employees when the public election was in progress.²⁴⁶ All these 34 employees were on the list of registered voters, but none of them received his or her voter registration card; they were not even aware of the election.²⁴⁷ The omission allegedly deprived these laid-off employees of the right to vote granted by Article 34 of the Constitution.²⁴⁸ After the election, some of these employees brought a case with the Xicheng District People's Court in Beijing asking the court to confirm the illegality of this omission and claiming damages as high as 2,000,000 *yuan*.²⁴⁹ The court did not accept this case, so the employees appealed the decision to the Intermediate People's Court of Beijing, which also rejected the case.²⁵⁰ This case shows that, though the Constitution seems to guarantee the citizens' right to vote, there are no special courts in China to accept and try cases involving constitutional claims. Claimants may have to petition the Standing Committee of the NPC to trigger a complex constitutional review procedure.

The Qi Yuling (Qi) case, however, represented a turning point.²⁵¹ In 1990, the plaintiff Qi and one of the defendants Chen Xiaoqi (Chen) were both students at Shandong Tengzhou No. 8 High School. Because Chen failed in the preliminary examination, she lost the chance to take the general examination for enrollment in a higher educational institution. Qi, on the other hand, passed the preliminary examination, and did well in the general one. She was admitted by Shandong Jining Business School as a commissioned student. Qi's admission letter was taken by Chen when it arrived at Tengzhou No. 8 High School. As Chen's father instructed, Chen went to study in Jinning Business School under the name of Qi Yuling through all deceptive schemes. After graduation, Chen continued using the name of Qi Yuling and worked in the Tengzhou branch of Bank of China. Upon learning all these facts, Qi filed a civil action with Zaozhuang Intermediate People's Court against Chen, Chen's father and Jinning Business School. The plaintiff claimed that defendants defrauded her and

²⁴⁵ See 宪法 [Constitution], art. 67 (1982) (P.R.C.).

²⁴⁶ See 王春立等诉民族饭店选举权纠纷案 [*Wang Chunli et al. Sues Minzu Hotel for Violating Their Voting Rights*], Jan. 4, 2010, <http://www.xianfa.cn/Article/ShowArticle.asp?ArticleID=157> (July 29, 2010).

²⁴⁷ See *id.*

²⁴⁸ See *id.*; Constitution, art. 34.

²⁴⁹ See *Wang Chunli et al.*, *supra* note 246.

²⁵⁰ See *id.*

²⁵¹ See 齐玉苓诉陈晓琪冒名顶替到录取其的中专学校就读侵犯姓名权、受教育的权利损害赔偿案 [*Qi Yuling Sues Chen Xiaoqi in a Compensation Lawsuit for Accepting School Admission under Her Name in Infringement of Her rights to Personal Name and Education*] (Shandong High People's Ct., Aug. 23, 2001).

infringed her rights to personal name and education. The court of first instance upheld the plaintiff's claim on the right to her personal name, but rejected the claim on the infringement of the right to receive education under the Constitution.²⁵² Qi appealed to the High People's Court of Shandong, which submitted the constitutional issue to the Supreme People's Court. In 2001, the Supreme People's Court instructed the High People's Court of Shandong to enter judgment for Qi because her right to receive education under the Constitution was actionable through misappropriation of her personal name.²⁵³

To some extent, this case opened the door for citizens to defend in the people's court their constitutional rights not specifically provided for in any statutory law. The High People's Court of Shandong entered judgment for Qi, applying Article 46 of the Constitution.²⁵⁴ To the dismay of many commentators, the Supreme People's Court annulled this judicial instruction in 2008, meaning that there is no longer any legal authority for accepting a case based on constitutional claims.²⁵⁵ As a result, a court may not directly apply the Constitution, and may reject a constitutional claim if it falls outside the scope of actionable lawsuits under the Civil Procedure Law.

E. Nontransparent Operation Produces Unbridled Discretion

The judicial process in China is not entirely transparent, and how the

²⁵² See *id.*; General Principles of Civil Law, *supra* note 117, art. 99 (providing that citizens shall enjoy the right of personal name and shall be entitled to determine, use or change their personal names in accordance with relevant provisions and that interference with, usurpation of and false representation of personal names shall be prohibited).

²⁵³ See 关于以侵犯姓名权的手段侵犯宪法保护的公民受教育的基本权利是否应承担民事责任的批复 [Reply on Whether the Civil Liabilities Shall Be Borne for the Infringement upon a Citizen's Basic Right of Receiving Education] (promulgated by the Sup. People's Ct., 法释[2001]25号, July 24, 2001, effective Aug. 13, 2001) (repealed Dec. 24, 2008), available at <http://vip.chinalawinfo.com/newlaw2002/SLC/SLC.asp?db=chl&gid=36302> (last visited July 29, 2010).

²⁵⁴ See Qi Yuling Sues Chen Xiaoqi, *supra* note 251.

²⁵⁵ See 最高人民法院关于废止2007年底以前发布的有关司法解释(第七批)的决定 [Decision on Abolishing the Relevant Judicial Interpretations (the Seventh Batch) Promulgated before the End of 2007] (promulgated by the Sup. People's Ct., 法释[2008]15号, Dec. 18, 2008, effective Dec. 24, 2008), available at <http://vip.chinalawinfo.com/newlaw2002/SLC/SLC.asp?Db=chl&Gid=111685> (last visited July 29, 2010) (Judicial Instruction 法释[2001]25号 has ceased to apply (已停止适用)). However, a recent case shows that a judge may mention the Constitutional principle, but not cite the specific provision of the Constitution to support the decision when there is no other existing specific applicable legislative or statutory or administrative provision for a certain sensitive topic. For detailed discussion, see Wang Xing, *Chinese Court Expresses Support for Free Speech on Sina Weibo in Ruling*, ICHINASTOCK.COM, Sept. 2, 2011, <http://news.ichinastock.com/2011/09/chinese-judge-expresses-support-for-free-speech-on-sina-weibo-in-ruling/>.

case filing division operates remains hazy to outsiders.²⁵⁶ While the reasoning in a judicial opinion may shed light on how a judge arrived at his or her decision, a court order rejecting a case is never more than two pages long.²⁵⁷ Typically, it is a mere recitation of article numbers taken from the law book, without detailed explanation as to the application of facts or law.²⁵⁸ One cannot ascertain what exactly transpired and prompted the decision because there is simply not that much information available. This gives judges in the case filing division considerable discretion to cherry-pick cases for a number of reasons, such as external interference and connections (关系).²⁵⁹

Although the Constitution is meant to guarantee the people's court as a neutral forum free from any interference by the executive branch, organizations, or individuals, undue external influences still play a large part in the workings of the court.²⁶⁰ Whenever a case concerns matters detrimental to a harmonized society or matters that may place the government in an unfavorable light, the court will be more reluctant in claiming jurisdiction because court officials are afraid of incurring blame from disgruntled higher-level governmental officials.

Chinese judges often rotate between different departments. Judges in the case filing division may have previous experience working as trial judges and thus are likely to have personal relationships with the current trial judges, so it is not surprising that some decisions are made primarily out of response to personal favors and/or bribes.

Local protectionism may also play a part in this process, especially when a local business giant or a SOE is at stake.²⁶¹ Three years after the New Bridge case was rejected, a friend of the author's and also the chief of the relevant governmental agency said that the judge in the case filing division had asked for his opinion on whether to accept the New Bridge case, and that the government expressed its lack of enthusiasm because it was a case against SOEs. This shows that there are some extrajudicial channels for decision-making. The entire process operates in secrecy; the case filing division would not let claimants know what is actually going on

²⁵⁶ See Luo Zheng, 关于完善民事诉讼立案审查制度的思考 [*Thoughts on Improving the Case Filing Procedure in Civil Cases*], 2009, no. 3 金卡工程 经济与法 [JINKA PROJECT ECON. & L.] 48, 48 (2009).

²⁵⁷ See Song, *supra* note 21, at 86.

²⁵⁸ See *id.*

²⁵⁹ See Luo, *supra* note 256. For the interactions between the decision-making and the use of connections, see Nanping Liu, *supra* note 52.

²⁶⁰ See Constitution, art. 126.

²⁶¹ See Hu Sibao, 论民事诉讼立案阶段的地方保护主义 [On the Local Protectionism at the Case Filing Stage in Civil Cases], 2009, no. 7 金卡工程 经济与法 [JINKA PROJECT ECON. & L.] 71, 71 (2009).

behind the closed doors.

A court may also refuse to hear cases that are merely factually or legally complicated. In 2002, a university professor in Sichuan Province tried to bring a lawsuit for slander because the defendants allegedly accused him of fraud in his research papers.²⁶² The court rejected this case and explained that scientific research concerned matters of grave importance and was too factually complicated.²⁶³ While it might have involved cutting-edge technology that would probably elude those lacking a scientific background, instead of hiring experts to address this inadequacy, the court chose the easy and, perhaps, unlawful way out.

The case filing division functions as a gatekeeper that keeps an array of eligible cases out of the judicial system so that the court docket remains manageable and the judicial resources are directed to where they are needed the most.²⁶⁴ Some courts are willing to go even further, and operate in a way that resembles a quota system.²⁶⁵ Typically, they will accept fewer cases near the end of the year because they may have reached the annual target caseload, or they may simply want to look good in the annual report by having few outstanding cases remaining on the docket.²⁶⁶ While the unlawfulness of this approach should not be in dispute, a claimant can hardly attack this practice because the case filing division lacks accountability.

The court's failure to strictly adhere to legal rules concerning the acceptance of cases that present colorable claims makes it difficult for a claimant to predict which standards the court will apply to a given case. There is very little opportunity to appeal because the judge sometimes will only verbally deliver the decision to the claimant, without issuing a written court order.²⁶⁷ This is especially true when the decision stands on shaky legal grounds, such as instructions from superiors in the court or in the government. Without a written court order, a claimant has no judgment to appeal. Left with no other options, a claimant may then attempt to file the case directly with the appellate court, or bring the matter to the attention of the court petition office.²⁶⁸ On appeal, an appellate court almost always affirms the lower court in this particular matter.²⁶⁹ This mechanism renders

²⁶² See Wang, *supra* note 158.

²⁶³ See *id.*

²⁶⁴ See Song, *supra* note 21, at 88.

²⁶⁵ Interview with Mr. Fan, Esq, partner of Liu & Wang, Attorneys at law (summer 2010). For further discussion, see, Ng Tze-wei, "Sorry, we've used up justice quota", SOUTH CHINA MORNING POST [南华早报] Oct. 21, 2010.

²⁶⁶ *Id.*

²⁶⁷ See Song, *supra* note 21, at 86.

²⁶⁸ Interview with Shanghai Judge, *supra* note 14.

²⁶⁹ See, e.g., 北京市高级人民法院关于民商事上诉案件改判和发回重审若干问题的意见(试行) [Opinions of the Beijing High People's Court on Several Issues Relating to the

the decision of the case filing division final in most cases, while observing little procedural due process. Because the case filing division exercises considerable discretion in an environment that lacks transparency, the case filing division may become a new hotbed for corruption as its centralized and unchecked authority could lead to ample opportunity for abuse.²⁷⁰

The lack of transparency in Chinese courts is also antithetical to the principles used in major civil law jurisdictions. In France, for instance, every person has a right to a fair hearing.²⁷¹ Hearings, like every other phase of the trial process, offer open access to the public to ensure fairness.²⁷² German civil procedure operates under similar principles; people have a right to a fair hearing and their legal rights cannot be affected without a chance to defend themselves.²⁷³ The Japanese Constitution guarantees access to the courts as a human right and this access is coupled with a requirement for oral argument and a public hearing.²⁷⁴ So long as the technical pleading requirements are met and accepted by the court, litigation commences without additional, preliminary substantive review. These basic standards ensure rule of law from the beginning of the judicial process. From the abovementioned examples of France and Germany we can see that even in civil law countries where the judge plays a more active role in the fact-finding process, the parties are given a trial or hearing to understand the judge's legal holding and argue their case.

In this matter, China shares its lack of a transparent filing process with some of the most despotic regimes in the world. Although, for instance, the North Korean Constitution calls for public judicial proceedings performed in accordance with the law, this happens only for minor violations.²⁷⁵ The Cuban judicial system also denies public trials and procedural safeguards in cases that are politically sensitive.²⁷⁶

Reverse and Remand of Civil and Commercial Cases (Tentative)] (promulgated by Beijing High People's Ct., Jud. Comm., 京高法发[2002]366, Dec. 27, 2002) (P.R.C.).

²⁷⁰ See Luo, *supra* note 256.

²⁷¹ See INTERNATIONAL CIVIL PROCEDURE 21 (Shelby R. Grubbs ed., Kluwer Law International 2003).

²⁷² *Id.* at 214.

²⁷³ *Id.* at 240.

²⁷⁴ See MERYLL DEAN, JAPANESE LEGAL SYSTEM 524 (Routledge-Cavendish 2d ed. 2003).

²⁷⁵ See Country Reports on Human Rights Practices, U.S. Dep't of Justice, Mar. 8, 2006, <http://www.state.gov/g/drl/rls/hrrpt/2005/61612.htm> (last visited July 29, 2010).

²⁷⁶ See Country Reports on Human Rights Practices, U.S. Dep't of Justice, Mar. 8, 2006, <http://www.state.gov/g/drl/rls/hrrpt/2005/61723.htm> (last visited July 29, 2010).

III. PETITION VS. THE CASE FILING DIVISION: AN ALTERNATIVE WAY TO JUSTICE

Once the case filing division rejects a case, the claimant can appeal the rejection to a higher court. If that again fails, the claimant is not without recourse in China; the claimant can bring the matter to a petition bureau, which retains jurisdiction over virtually all kinds of disputes.

The petition (信访) system is an alternative, extra-judicial mechanism through which the public can seek redress for grievances.²⁷⁷ The State Bureau for Letters and Calls (国家信访局) is the national authority governing petition issues.²⁷⁸ All levels of governments and administrative departments have their own petition bureaus.²⁷⁹ Even a people's court has its own petition office that handles complaints about its operation.²⁸⁰ In some courts, the chief official at the court petition office may also be responsible for the case filing division. In fact, the case filing division itself has a petition committee that handles petition requests to the court.

It seems that the pervasive use of the petition system by the public reflects the inherent weaknesses of the case filing system and the judicial system as a whole.²⁸¹ As previously discussed, the internal order issued by the Guangxi High Court to disclaim court jurisdiction over enterprise fund-raising, land and lay-off disputes would surely mobilize a large number of claimants to seek administrative remedies, channeling legal cases to petitions in local governments.²⁸² Under these circumstances the petition system appears to be the preferred method to seek redress for various types of grievances, and the number of petitions lodged in Beijing alone has skyrocketed in recent years.²⁸³

The institutions established by the petition system have not been able to

²⁷⁷ See Carl Minzner, *Xinfang: An Alternative to the Formal Legal System*, 42 STAN. J. INT'L L. 103, 105 (2006).

²⁷⁸ For more information, visit website <http://www.gjxfj.gov.cn/> (last visited July 29, 2010).

²⁷⁹ See Minzner, *supra* note 277, at 116.

²⁸⁰ See *id.*

²⁸¹ See *id.* at 107.

²⁸² See Notice, *supra* note 155. However, this also has caused a lot of cases wherein the rights of petitioners have been infringed upon. For a detailed discussion, see Yu Jianrong, 于建嵘: "侵犯信访公民合法权利的制度根源是什么?" [*What are the institutional roots of violations of citizens legitimate petition rights?*], TIANYI, Dec. 29, 2008 <http://www.aisixiang.com/data/23763.html>.

²⁸³ See Minzner, *supra* note 277. See also Liu Jun, 全国信访量逐年下降, 维稳压力却不断增大 [*the Number of petitions falls every year but the pressure for maintaining stability increases*] [南方周末], Sept. 30, 2010, <http://www.infzm.com/content/50681>. While the number of petitions of the whole country decreased in the last consecutive 5 years, the petitioners have less confidence in the local authorities and tend to resolve their grievances in Beijing.

keep up with exponentially expanding public demand, which has led to inefficiency and public frustration. Despite these well-known deficiencies, the public's persistent preference for the petition system suggests that the public does not have confidence in their local courts. In 2003 alone, at least three million petitioners hoping to resolve their grievances traveled to Beijing to request a meeting with the highest officials.²⁸⁴

The existence of a petition system is an anomaly; it is a kind of alternative dispute resolution unique to China, initially created to suit China's political and social climate when the rule of law in China had not been fully established. Because the judiciary is still a relatively weak and dependent political body in China, and many cases are either not accepted by the case filing division or are handled improperly due to various reasons, it would not be practical or advisable to give full faith to the courts and eliminate the petition system as for now. The petition system serves an important and still greatly needed function of giving the public an alternative method to lodge a civil or administrative complaint where the court either fails to act or acts improperly.

As the judicial reforms come along and gradually boost public reliance and confidence in the courts, one can anticipate that the use of the petition system will accordingly decrease, as the public transitions its trust into the courts as an efficient, reliable and impartial mechanism of dispute resolution. The petition system has been described as the Rule of Man (or Party), not the Rule of Law.²⁸⁵ Some commentators characterize it as a "general purpose governance tool, with historical origins in centralized authoritarian rule."²⁸⁶

Chinese citizens may sometimes attempt to use both the petition and formal legal channels simultaneously, but publicly available Chinese statistics show that the courts are used far less than petition bureaus.²⁸⁷ Such has been the case since the 1980s.²⁸⁸ From a practical standpoint, the petition regulations provide a system of ruling a large populace governed by an authoritarian party that has set stability as its highest priority, but there is evidence that the leadership is growing uneasy.²⁸⁹

²⁸⁴ See 建国以来最大的信访潮 [The Biggest Petition Wave since the Founding of New China] in JI SHUOMING & ZHOU DONGHUA, 中国新政 [NEW ADMINISTRATION IN CHINA] (China Friendship Press).

²⁸⁵ See Minzner, *supra* note 277.

²⁸⁶ See *id.* at 120.

²⁸⁷ Fair and effective implementation of the law will certainly not be an easy journey for China where government officials hold the ultimate legal reins at local and national levels.

²⁸⁸ See Minzner, *supra* note 277, at 161 n.350.

²⁸⁹ See 2005年中国社会蓝皮书 [Blue book of Chinese Society in 2005] the number of mass disturbance events reached 60,000 in 2003 while the number is 10,000 in the year of 1993 and the number of people participating in such events rose to 3,070,000 from 73,000

A. *Comprehensive Petition Rules Are in Place*

In 2005, the Prime Minister signed new administrative regulations on the petition system. The 2005 National Petition Regulations (信访条例) (Regulations) instructs petition bureaus (信访局) of all levels:

- 1) to provide information to central authorities and conduct research on social problems;
- 2) to serve as a channel for citizen input into policymaking;
- 3) to monitor the conduct of local government officials;
- 4) to participate in maintaining social order;
- 5) to conduct some propaganda functions; and
- 6) to handle individual grievances.²⁹⁰

These Regulations demonstrate the way in which the petition system rests at the crossroads of law and politics in the Chinese society, designed primarily to facilitate the free flow of information between officials and citizens.²⁹¹

In terms of procedural issues, the Regulations provide that petition bureaus must announce within 60 days whether a petitioner's case is accepted; an extension of 30 days is allowed under complicated circumstances.²⁹² On a particularly positive note, the Regulations provide that petition bureau officers must not discriminate against petitioners and must not refuse to assist them, with the exception of situations involving national security.²⁹³

Designed primarily as a method to promote social harmony and stability, the Regulations provide for crowd control means. For disputes involving a group of petitioners, no more than five of them are allowed to appear as representatives at a petition bureau.²⁹⁴ Petition bureau staff members only take questions at the office during business hours, rather than anywhere or at any time petitioners might find them, so as to prevent possible harassment by desperate petitioners.²⁹⁵ The Regulations also list a host of measures that cannot be used to pressure staff members in the

within the time period.

²⁹⁰ See 信访条例 [National Petition Regulations] (promulgated by St. Council, 国务院令 第431号, Jan. 10, 2005, effective May 1, 2005) (P.R.C.), *restated in* Minzner, *supra* note 277, at 120.

²⁹¹ See Minzner, *supra* note 277, at 107.

²⁹² National Petition Regulations, *supra* note 290, at art. 33; *see also* 群众信访谁主管谁负责 [Those in Charge of Petitions Should Also Responsible for It], 南方都市报 [SOUTHERN METROPOLITAN NEWS], Apr. 29, 2005, at A14.

²⁹³ National Petition Regulations, *supra* note 290, at art. 47; *see also* 信访人以自杀相威胁可能会追究刑责 [Petitioners Threatening Suicide may Be Charged with Criminal Offense], 南方都市报 [SOUTHERN METROPOLITAN NEWS], May 27, 2006, at A17.

²⁹⁴ National Petition Regulations, *supra* note 290, at art. 18.

²⁹⁵ *Id.*

petition bureau, which include applying violence, besieging vehicles, threatening suicide, and so on.²⁹⁶ These restrictions, while certainly reasonable, point to the practical concerns surrounding the smooth operation of the petition system. From 1979 to 1982, there were only 20,000 petitions complaining about wrongdoings committed by the government.²⁹⁷ In 2005 alone, however, there were 30,000,000 petitions of the same nature.²⁹⁸ The throngs of people overburdening the petition system have prompted petition bureaus to redirect some claims to the court system.²⁹⁹

It might come across as a surprise to Western observers, but in some extreme cases Chinese judges have even been petitioners themselves. In 2006, a district people's court in Hunan Province held that the government of Luoding City in Guangdong Province was indebted to the plaintiff for 456,000 *yuan* but the defendant government refused to honor the judgment.³⁰⁰ In 2007, three judges in the enforcement division were sent to Luoding City to enforce the court judgment.³⁰¹ Rather than satisfying the full amount of the judgment, the vice mayor of the city insisted on paying only 50,000 *yuan* to settle the case.³⁰² As the creditor did not authorize the judges to settle the case, the judges went to the Petition Bureau in Yunfou City, a superior of the Luoding government, to file a petition.³⁰³ The Yunfou government called a meeting on the issue, but that was the end of the petition.³⁰⁴

The overall trend is that the petition system has gone from being the last channel for resolving disputes to the first. Ordinary citizens frequently seek the petition system because it represents the government's ability to solve problems where the law is unable to do so.³⁰⁵ They recognize the futility of

²⁹⁶ *Id.*; see also 集体上访不得超过五人 [Those Who Visit in Group Should Be Fewer Than Five People], 南方都市报 [SOUTHERN METROPOLITAN NEWS], Jan. 18, 2005, at A13.

²⁹⁷ See Zhou Meiyuan, 中国信访的制度困境及出路 [Dilemma and Solution to China's Petition System], 2004 International Symposium, May 17, 2004, available at <http://www.chinaelections.org/newsinfo.asp?newsid=56112> (last visited Aug. 23, 2010).

²⁹⁸ See Yu Jianrong, 中国信访制度批判 [Critique on China's Petition System], Feb. 14, 2007, <http://china.findlaw.cn/susong/xsssfmw/1414.html> (last visited Aug. 23, 2010).

²⁹⁹ See 信访归位有赖政治生态建设 [Normalization of Petition System Depends on Local Political Environment], 南方都市报 [SOUTHERN METROPOLITAN NEWS], Apr. 18, 2005, at A02.

³⁰⁰ See Zhao Wenming, 湖南法官上访 [Huan Judges Went on Petition], 法律文摘 [LEGAL DIGEST] (P.R.C.), June 2007, at 42; Liu Hui, 法官也上访, 求助法律还是权力? [Judges Also Went on Petition, for Help of Law or Administrative Power], 法律文摘 [LEGAL DIGEST], June 2007, at 43.

³⁰¹ See *id.*

³⁰² See *id.*

³⁰³ See *id.*

³⁰⁴ See *id.*

³⁰⁵ See 法治与信访并行不悖 [Rule of Law Is Not Contrary with Petition], 南方都市报

calling the court for help. Rather than placing their faith in law, they place it in the CCP and the ultimate power it represents. Often the petition system will prove to be a more effective method for resolving certain problems, and this is because of the implicit score system in place.³⁰⁶ Repeated petitioner's visits for the same matter will result in penalty scores, and bad scores will invite blame from government officials of higher levels, pressuring the relevant authority to make efforts in addressing the matters brought by petitioners.³⁰⁷ As a result, no matter how strange it may appear, the petition system is on its way to becoming an alternative mechanism of dispute resolution to the traditional judicial system in China.

B. Petition Works Wonders Where Courts Fail

Not only does the petition system provide methods to redress non-legal or quasi-legal grievances on which the court refuses to claim jurisdiction, it can also operate in conjunction with litigation to prevent corruption committed by court officials and ensure a just outcome. The author has personally participated in a case involving three rounds of litigation and is ongoing at the time of publication of this article.³⁰⁸

It all started with a restaurant's expansion plan in violation of the city's zoning regulations. Residents in an adjacent building complex could not tolerate the nuisance caused by the expansion, so they called the matter to the attention of the City Management Authority (城管) (CMA), which is responsible for zoning issues, but the CMA did not bother to take any action.

The residents brought an administrative lawsuit in a district people's court against the CMA for nonfeasance.³⁰⁹ The district court entered a favorable judgment; the appellate court affirmed the judgment and ordered the CMA to take appropriate actions within 60 days. As a result, the CMA issued an official reply to the residents, stating that the CMA would not take any further action until the authority of a higher level had clarified certain issues because relevant laws and regulations were not clear on what kind of administrative penalties suited this situation. In other words, the CMA

[SOUTHERN METROPOLITAN NEWS], Jan. 24, 2005, at A02.

³⁰⁶ See Mu Ran, 要民主不要信访 [We Want Democracy, Not Petition], Feb. 18, 2009, <http://hi.baidu.com/laosan68325/blog/item/2159aa643a4593f7f73654a2.html> (last visited Aug. 23, 2010).

³⁰⁷ See Gongmin Huayu, 论对百姓上访不正当处理所造成的不良影响 [On the Adverse Influence Caused by Improper Handling of Petitions by People], June 2, 2010, <http://www.wyzsx.com/Article/Class22/201006/156026.html> (last visited Aug. 23, 2010).

³⁰⁸ Subsequent description of events is based on the author's own experience. All relevant case materials are on file with the author.

³⁰⁹ Civil Order, (2003) 深福法立裁字第84号, Guangdong Province, Shenzhen City, Futian Dist. People's Ct.

acknowledged the illegality of the expansion, but it claimed it did not know how to deal with it.³¹⁰

The residents brought another administrative lawsuit against the CMA after 60 days and the CMA slept on its official reply as an excuse not to take further actions. This time the court had to decide whether the issuance of the official reply constituted a specific administrative act (具体行政行为) contemplated by the judgment in the first case. Holding for the defendant, the district court reasoned that the court was not in a position to direct the undertaking of a government entity. On appeal, the presiding judge was visibly angered by the lower court's judgment, and hinted at her willingness to reverse the decision. Nevertheless, the author suspected under-the-table deal-making, and therefore paid a visit to the petition office of the court to ensure a just outcome. The petition office chief promised that the presiding judge would act impartially in deciding the case, and went so far as to suggest a personal meeting with the judge, although she was in a court proceeding at that time and so unavailable. Three days later, a law clerk telephoned the lawyer representing the residents and informed the lawyer that when she was about to stamp the judgment with the official court seal, she was interrupted and informed of the petition to the court petition office. It could be inferred from the clerk's telephone message that the original judgment was not the same one that the court eventually handed down to the parties.³¹¹ What was most important was that the appellate court reversed and remanded the case in its "revised" judgment.

Petition seemed to be the only way to resolve the dispute when the residents' conflict with the CMA did not end in their winning a second case. The CMA again-stepped back on its official reply, and claimed that they could not take any further action unless the court told them exactly what to do. As the court lacked the authority to do this, any more disputes in court would be futile. In such a deadlock situation, the author once again suggested a visit to the district petition bureau. If this also were to fail, going to the city petition bureau was another option that the author contemplated.

The experience at the city petition bureau, which the parties ended up resorting to, turned out to be extraordinarily pleasant, though unhelpful. The chief official at the bureau received the author and the representatives of the

³¹⁰ In fact, the CMA knew the solution like the back of its hand. The author speculates that the restaurant might have offered bribes to officials from the CMA so their hands were tied. For the grounds for such speculation, see Nanping Liu, *supra* note 52, discussion around notes 468-469.

³¹¹ This is a prime example in support of the thesis of *Trick or Treat*. Often, a Chinese court does not reason in its legal opinion; instead, it simply announces its judgment with a broad recitation of item numbers in the law book. It follows that a judge can easily direct the result for ulterior purposes. See Nanping Liu, *supra* note 52.

residents with courtesy; she listened attentively to the grievance; and she promised that a solution was underway. In case the chief official's statements were not completely truthful, some residents also went to the provincial capital to petition, and the provincial petition bureau mailed out a confidential letter as a result. Shortly after, the city petition bureau arranged a meeting for the author and the residents with the Chief of the District where the restaurant operated. Within three days, another meeting was in place, which some court officials also attended. At the meeting, the restaurant made a settlement offer, which the residents did not take in the belief that the law sided with them. The author and the residents were then tricked into shaking hands and participating in a photo shoot with the officials at the meeting, probably meant to illustrate the goodwill between the parties so that officials at the city petition bureau could show this to their superiors in the provincial capital. In appeasing the residents, the CMA ordered the restaurant to correct the violation within 60 days, as the Regulations so provided. The residents were not happy with the solution; they wanted the restaurant to shut down immediately.

As the matter ceased to make any progress, the author was determined to go to the bottom of petition. Because the National People's Congress (NPC) was in session, he sent a phone messages to the chief of the city petition bureau and drew her attention to the non-enforcement of law. To his surprise, the author found himself being watched outside his residence the next day, and the spying continued for 15 days until the NPC concluded the session.

After this bizarre interlude, a third lawsuit was underway. The restaurant commenced a lawsuit against the CMA in court. The real estate company that initially leased the property to the restaurant was a third party to the suit. The residents' rights were involved in this lawsuit so they also applied to join the suit as a third party, but the judge in the case filing division rejected the application because, as she explained, her superiors had so instructed. Without the residents' participation in this lawsuit, the court would not consider the nuisance issue and might return a judgment in favor of the restaurant, which would in effect overrule the previous judgments for the residents. Thus, the residents went to the petition office of the court while also threatening to file a complaint against the judge in the City People's Congress. After many twists and turns, the court eventually agreed to include the residents as a third party to the lawsuit.³¹²

³¹² The residents received a mysterious telephone call that the trial judge was having lunch with the plaintiff. The lawyer retained by the residents called that judge immediately and accused him of violation of court rules, but he categorically denied the accusation. Later on, after the court accepted the application by the residents, the trial judge explained that he was sent by the court chief, which was an exception to the improper personal communication with one party. At trial, he even offered to recuse himself.

The Urban Planning Commission, a higher-level authority, finally instructed the CMA to remove the expansion in a suggestive way, which in turn required the restaurant to shut down temporarily in a way. As the residents braced themselves for the lawsuit, the restaurant suddenly withdrew its complaint. The author has reason to believe that the case had received special attention so that under-the-table deal-making seemed unlikely. If the judgment returned in favor of the CMA, it would reaffirm the enforceability of its administrative act (行政行为判决化). The withdrawal was, therefore, a smart move given the attending circumstances.

Despite all the twists and turns, it is abundantly clear from this case that the petition system has a legitimate place in China's current legal and political environment. The concept largely stands on the quintessential principle of the Rule of Man, which is deeply rooted in the Chinese history.³¹³ While the law books disagree, in reality the government of different levels retains considerable power over matters within the exclusive jurisdiction of the court of law. Obviously, the government cannot make the court intentionally violate the law, but there is legitimate purpose in making the court strictly follow the law. As a preventative measure, petition is an effective tool to combat corruption and promote justice in China's judicial system.

A successful petition requires a good deal of courage and a touch of art. Despite a comprehensive petition system in place, it remains difficult for an ordinary person with no financial resources or connections to persuade a government official to stand for his or her justice. A petitioner must understand the law and the workings of the government. In this case, the author anticipated possible deal-making by the defendant, and intercepted it by expressing his concerns through petition to the court chief. The subsequent visits to different petition bureaus ensured that the matter had received earnest attention from relevant authorities.³¹⁴ An ordinary petitioner would likely not consider these courses of action, and thus not be able to fully utilize the petition system.

CONCLUSION

In 1977, Professor Victor Li (Li) published an article entitled "Law without Lawyers" which was, in part, a survey of the institutions and mechanisms that maintained stability in China.³¹⁵ At that time, China had

³¹³ See, e.g., Ling Cuiying, 中国人治的历史根源探析[*Analysis on the root of the rule of Man in Chinese history*] Vol. 11, No. 3 柳州师专学报[J. OF LIUZHOU NORMAL WORK COLL.] 24 (1996).

³¹⁴ The fact that the author has a Western educational background and is also a scholar well read in legal matters may have contributed to the result.

³¹⁵ See VICTOR LI, LAW WITHOUT LAWYERS: A COMPARATIVE VIEW OF LAW IN CHINA

only several thousand legal professionals.³¹⁶ In 1979, the number of all employees in the courts was 58,000, including judges, court police officers and others.³¹⁷ Drawing on Chinese history and philosophy, Li explained how ordinary people and government officials did not abide by courts or legal professionals, but rather by social norms articulated through the mass media, as well as a widespread commitment to community, compromise and mediation.³¹⁸ Li argued that China bridged the gap between law and the masses without the assistance of legal professionals serving as intermediaries.³¹⁹

Thirty years later, despite the existence of 400 law schools and more than 200,000 registered lawyers, a gap between law and the masses is nonetheless clear.³²⁰ Just as too few lawyers did not mean a complete absence of law for Professor Li in 1977, an abundance of lawyers – some say that China has so many that there is not enough work to go around – has not brought about genuine Rule of Law. The gap between law and the people exists even at the earliest stage of the judicial process.

In the New Bridge case, which was the impetus for this article, even the author did not expect a turn of events after the court turned its back on the claim. Several stalls in the ongoing negotiations between New Bridge and the SOEs postponed the final deal until 2004. However, in early 2006, the Firm suddenly received payment for the work done in 2002. This is a very ironic end to the case: the parties involved agreed on the formation of the contract, but the case filing division of the court did not.

Over three years after the case filing division rejected the claim for lack of facts, someone with the SOEs evidently believed that a factual basis for the Firm's claim existed. As is often the case in China, a "back door" was the most effective in settling the dispute. Meanwhile, filing cases with the Futian Court and Shenzhen Intermediate People's Court appears to have

AND THE UNITED STATES (Westview Press 1978) (1977).

³¹⁶ *See id.*

³¹⁷ *See* JIANGHUA, *supra* note 30.

³¹⁸ *See* Li, *supra* note 315.

³¹⁹ *See id.*

³²⁰ For the updated number of the lawyers, see the news issued on the website of Chinese Lawyer [中国律师网] on Jan. 8, 2011, "Annual Symposium in 2010 of Criminal Legal Committee of Chinese Lawyers' Association" [全国律协刑事专业委员会2010年年会], <http://www.chineselawyer.com.cn/pages/2011-1-8/s59398.html>. (last visited September 25, 2011) As a reference, China has a continental or civil code legal system that emphasizes codified statutory law over case law. The court system has four levels: 3,000 or so district people's courts at the local level; 390 intermediate people's courts at city and prefecture levels; 31 high people's courts at provincial level; and one Supreme People's Court (SPC) in Beijing at the national level. Within this structure, there are approximately 200,000 judges. It is noteworthy that there are estimated to be twice as many judges in China as practicing lawyers. *See* Henderson, *supra* note 146.

been a meaningless exercise.

The Chinese have at hand a long list of potential avenues of legal and non-legal redress: the people's courts, the petition system, labor associations, women's leagues, the people's congresses, and so on. This creates a chaotic legal environment in which a claimant must make sometimes ill-informed decisions as to what avenues to pursue, and in what order.

Both Chinese society and the legal system are in a transitional phase, and it remains to be seen whether the legal system can reform fast enough to keep up with the economic development.³²¹ Protests by the public rose from 72,000 to 86,000 between the years 2004 and 2005.³²² New regulations instructing lawyers to register all cases involving 20 or more claimants and the new restrictions on the number of representative petitioners physically at petition bureaus are indicative of Chinese leadership's concern with minimizing social friction.³²³

Even worse, despite China's increase in the quantity and quality of its judges, in some phases of the judicial process they do not act neutral. Without the parties' participation, the courts carry out substantial examination at the case filing stage, which seems to infringe on the parties' right to trials, constituting improper judicial intervention. The abuse of the judicial power by the courts is the origin of the major difficulty in commencing a lawsuit in China.³²⁴

The problems that the initial reform was supposed to address have not been completely solved. The legitimacy of judicial institutions in the eyes of ordinary people is at stake. Any meaningful analysis and reform must be informed by the actual experiences of the various groups of people affected.

³²¹ A multi-layered horizontal and vertical judicial structure and decision-making process, coupled with reliance on local government funding, provides many opportunities for judicial interference and corruption. Therefore, without separation of powers, we will not see a kind of modernization similar to the West, but only the modernization that China already had a thousand years ago during the prosperous Tang Dynasty. See Nanping Liu, *A Vulnerable Justice: Finality of Civil Judgments in China*, 13 COLUM. J. ASIAN L. 35, 98 (1999).

³²² See Zhang Aijun, 群体性事件概念之名实辨析 [Analysis on the Concept of Mass Mobilizing Incidents], 中国选举与治理 [CHINA ELECTION & GOVERNANCE], Sept. 18, 2009, <http://www.chinaelections.org/NewsInfo.asp?NewsID=157127> (last visited Sept. 2, 2010).

³²³ See 关于加强律师代理重大群体性敏感案件监督的通知 [Notice on Reinforcement of the Supervision on Lawyers Representing Important & Sensitive Group Cases] (promulgated by Guangdong Provincial Jud. Dep't) Notice No. 208 (2004). See also 关于加强律师办理重大群体性敏感案件报告制度的通知 [Notice on Reinforcement of the Reporting System of Lawyers Representing Important & Sensitive Group Cases] (promulgated by Shenzhen Mun. Jud. Bureau) Notice No. 170 (2004).

³²⁴ See Fu Yulin, 对立审分离管理模式之质疑 [Questions on the Model of the Separation of Case Filing & Trial], <http://www.civillaw.com.cn/news/article/default.asp?id=9348> (last visited Dec. 4, 2007).

People are unclear how the case filing division should synthesize work with the trial judges. In some cases, it does not do its job, and in some others, it oversteps its bounds. A cynical view is that the case filing division is a gatekeeper that the Chinese leadership employs to keep things that embarrass it out of its courts. Even beyond where corruption exists or professionalism is deficient, politics reign supreme in the case filing division. Where the weak groups cannot get access to justice in the legal system, they would turn to alternative reliefs, such as appeal to higher authorities through petition.³²⁵

In principle, the case filing should be about discussing the complaint with a judge, and everyone should get a hearing if the complaint conforms ostensibly to the statutory requirements. The importance of transparent and predictable procedures for the day-to-day operation of the justice system is well worth emphasizing. Adverse effects from lack of institutionalized practices may be amplified for marginalized groups. How could we speak of the procedures ensuring transparency and predictability when the forum as such is still informal and invisible?³²⁶

Whether to accept or reject a case should not be something that is decided behind closed doors. Contrary to the idea that the Chinese people abuse the court system, people will not abuse the system when they are paying for it, such as in China where claimants must pay a court fee based on their claim.³²⁷

Although the case filing division was initially established with the main intention of restricting a judge's power over case selection, it has now turned into the place where a judge may abuse his discretion. From a broad

³²⁵ The lawyers' involvement in the group cases, therefore, is not a kind of combat with the government but an important link to resolve the conflicts. See Qin Yuemin, 正确看待律师介入群体性事件 [*Right Perspective on the Lawyers Involvement in Group Cases*], 南方都市报 [SOUTHERN METROPOLITAN NEWS], May 22, 2006, at A03.

³²⁶ The public needs reliable access to information pertaining to laws, proposed changes in legislation, court procedures, judgments, judicial vacancies, recruitment criteria, judicial selection procedures and reasons for judicial appointments.

³²⁷ Lawsuits in China are divided into two categories for the purpose of charging court fees, namely non-property cases and property cases. The people's court charges a nominal fee for non-property cases, which are further divided into several subcategories, such as divorce cases (10 to 50 *yuan* for each case if no property is involved). Court fees for property cases are charged on a progressive percentage of the cash value of the property in dispute: 50 *yuan* for less than 1000 *yuan*; 4% for the amount over 1,000 to 50,000 *yuan*; 3%, over 50,000 to 100,000 *yuan*; 2%, over 100,000 to 200,000 *yuan*; 1.5%, over 200,000 to 500,000 *yuan*; 1%, over 500,000 to 1,000,000 *yuan*; and 0.5% for the amount over 1,000,000 *yuan*. The appellate court will charge the same amount of court fee as the court of first instance. See 人民法院诉讼费收费办法 [The People's Court Litigation Fees Charging Measures] (promulgated by the Sup. People's Ct., 法[司]发[1989]14号, July 12, 1989, effective Sept. 1, 1989), *repealed by* 诉讼费用交纳办法 [Litigation Fees Payment Measures] (promulgated by the Sup. People's Ct., Apr. 20, 2007).

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perspective, these types of anomalies may partially explain the phenomenon in mainland China nationwide: an intended-creature may have to achieve a distorted or opposite result when operating in a society with no existence of a workable Rule of Law.