Historical tradition gave rise to the French peasants’ belief in the miracle that a man named Napoleon would bring all glory back to them. And there turned up an individual who claims to be that man because he bears the name Napoleon, in consequence of the Code Napoleon, which decrees “Inquiry into paternity is forbidden.”


2.1 The Definition of Problem

The responsibility of the court system in a country is to fulfill its judicial function as established by the country, which has become common sense. However, this is usually the standard analysis and stipulation of court functions from the perspective of politics and constitutions, as well as the tautology of “court’s” definition. In our real lives, courts of different countries are composed of by many people (judges and other auxiliary personnel). They have their own fiscal budgets and expenditures, as well as other administrative and auxiliary works. It is therefore fair to say that every court has its internal administrative affairs. In all countries, at least part of this kind of non-judicial and administrative work can only be borne by courts themselves. Even though due to different systems, the total amount of 

1These are called “judicial” departments in the USA, i.e., government institutions with judicial power. In China, “judiciary” often refers to a administrative organization subordinate to the government, and the national judicial power is shared by the court and the procuratorate. That’s why in this article, the “court” will be used in areas when there might be confusions when talking about China’s cases.
this kind of work borne by courts of different countries is varied. For example, compared to the Supreme People’s Court in China, the Supreme Court of the USA bears much less administrative work with federal judges having unsophisticated jobs.\(^2\) Even so, the U.S. Chief Justice and Associate Justices of the Supreme Court, who are seen as symbols of pure justice, have to run many “errands” and perform administrative duties as well. Take the U.S. Chief Justice as an example, he (there hasn’t been a she yet) has to take care of the appeal list of the Supreme Court, preside over meetings and case discussions of the Supreme Court and be conscious of time. As far as specific cases are concerned, when he belongs to the majority, he will designate a federal judge to write judicial opinion. All these are obviously administrative affairs related to judiciary falling into the category of court administration. In addition, more than 50 articles of federal laws stipulate other administrative work that the Chief Justice is responsible for.\(^3\) All this administrative work is reflected by salaries. As a reward for more work, the annual pay of the Chief Justice is higher than those of other federal judges. Every federal judge has his own administrative work. Each of them has at least four law clerks and two secretaries. Law clerks are usually interviewed and selected by the federal judges themselves. They obey the assignments given by the federal judges and write judicial opinions according to the case judgments by the federal judges. If the former Associate Justice of the Supreme Court Lewis Powell was right in saying that each of the nine Associate Justices, with their law clerks and secretaries, constitute “nine small independent law firms,”\(^4\) then every Associate Justice is the director of each law firm.

Courts in reality always have to implement administrative functions related to trials. It is because of this that administration in the courts necessarily overlaps and

\(^2\)For instance, the U.S. federal courts have their administrative offices to “execute the basic administrative functions of the federal courts. It also collects and deals with materials of federal courts. ... In addition, administrative offices are the connecting bond for federal [court systems], conference, legislative, and administrative institutions. The representative conference of administrative offices put budgetary requirements toward Congress, propose for the increase of judges, put forward suggestions of changing court activity rules or with major influence to the federation.” In the U.S. federal court system, there are also Judicial Conferences for the USA, Circuit Judicial Council, and Federal Judicial Center. Since contemporary times, each court has had a non-judicial “court administrator,” engaged specially in non-judicial works of court administration, such as drafting budgets, recruiting court staff, and managing court files. These institutions and people undertake certain decision-making tasks and daily works of administration similar to that of Chinese courts. Please see Peter Renstrom, *The American Law Dictionary*, translated and proofread by He Weifang, China University of Political Science and Law Press, 1998, pp. 45–47, 51–52, 60–61, 57, 84–85; Please also see Henry J. Abraham, *The Judicial Process*, 4th ed. Oxford University Press, 1980, pp. 175–178. In addition, about the administration of German courts, there is a very simple introduction to case distribution. Please see Fu De: “Judicial profession and independence of Germany,” *Procedural, Justice and Modernization*, edited by Song Bing, China University of Political Science and Law Press, 1999, especially pp. 28–30.


\(^4\)O’Brien, *Storm Center*, the same as the previous note, p. 157.
mingles with trials, and even interferes with the execution of judicial power, and thus to a certain extent influences the implementation of judicial power. There is a well-known fact that the U.S. Chief Justice usually uses their own administrative power to seek and in fact gain certain special influences to judicial decisions. In the individual case of each justice, they usually try to be with the majority and designate themselves or judge with most similar opinions the job of writing the judicial opinion and thus influence the judgment and the future development of related laws.5

Although court administration has some major influences on court decisions, in the traditional research of normative jurisprudence, this issue hasn’t been given enough importance, especially in China.6 Since contemporary times, the judicial systems in China have been transplanted from Western countries. After the transplant, due to frequent social reforms, judicial systems haven’t been able to establish independent traditions of practice but have halted in philosophy. China’s law circle has for a long time placed extra emphasis on and illustrated the abstract judicial philosophy and principle of “judicial independence” or “independent adjudication.” It does not know much, or strictly speaking, is not conscious of, reflect on or care about the real operation of courts. Many scholars try to avoid or ignore this issue intentionally or unintentionally due to the feeling that the recognition of the conflict between administration and trial will inevitably destroy the image of rule of law in one heart. The world of concepts is always more innocent and comforting than the real world.

In the limited systematic discussion of Chinese scholars I have seen, Two Problems in the Chinese System of Judicial Management published by He Weifang is an exception.7 This article has, for the first time, put forward the problem of

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6 In the USA, this issue belongs to the research of behaviorist politics traditionally. In the field of legal science, although lawyers dealing with law practices know this fact, and often use this established fact in their judicial practices, this issue is often ignored in legal writings. This is because on one hand, the law that lawyers care about is the decision that judges might make; the lawyers are not able to change the institutional framework of court function and thus generally not considering this issue. On the other hand, the focus of the law faculty is more about the normative legal research, and this unclean “judicial politics” is just what traditional law professors try to get rid of.

7 It was originally published on Social Sciences in China, Issue 6, 1997, and then included in He Weifang: Judicial philosophies and Systems, China University of Politics and Law Press, 1998. The name of the article was changed to On Non-administration and Non-Bureaucratization of Justice. You may also see related analysis in Hu Jianhua and Li Hancheng: “On Self-management of Court Judicial Administration,” People’s Judicature, Issue 12, 1992, pp. 33–34. Hu and Li’s article basically emphasizes that the internal administrative works of the courts shall be managed by courts themselves, but not by judicial administrative organizations. The article also mentions examples in foreign countries, but the authors have obviously not realized that judicial functioning inevitably clashes with judicial administration.
administrative systems in the contemporary Chinese courts (i.e., Justice in He’s article) rather systematically and sharply. His article pointed out that the court system in our country has serious administrative and bureaucratic colorings, such as the hierarchy of judges, judicial committee systems, relationships between courts of different levels and others. He believes that this has seriously influenced the trial function implemented by China’s courts.

I share He’s view on many issues he has put forward. However, I believe that He’s analysis could go deeper and make some adjustments to its framework of analysis. To a certain extent, He’s article stops at normative research. It compares the Western (mainly American) or the so-called international standard formal judicial system with the formal system expressly stipulated by Chinese law. This approach forbids him from having deeper understanding of and giving more relevant criticism to problems related to China’s judicial system. If my previous analysis of court administration is somewhat to the point, then factors influencing the trial function of China’s courts include not only “Organic Law of the People’s Court,” all kinds of procedural laws, and formal trial systems expressly stipulated by other relevant laws, but also administrative systems and customs in the courts related to the trial. If we only pay attention or pay too much attention to formal systems and confuse trial systems with administrative systems in the analysis, then we are prone to attribute problems caused by internal administrative systems or customs of courts to the setup of the trial systems, or to exaggerate drawbacks of certain trial systems. If we only pay attention or pay too much attention to formal systems and confuse trial systems with administrative systems in the analysis, then we are prone to attribute problems caused by internal administrative systems or customs of courts to the setup of the trial systems, or to exaggerate drawbacks of certain trial systems. It can certainly serve the purpose of a wake-up call when using an “international standard” as a comparison since we can help people to have a new understanding of the problem by changing the frame of reference and thus pushing the problem to be solved. However, this comparison of principle itself will not help people solve their problems. It is always easy to emphasize principle. And the principle can be and always be rather simple. The principle of judicial independence or independent adjudication can totally “clean up” or “segregate” administrative works of courts in terms of concept or principle. But in real life, this kind of cleaning-up or segregation can’t eliminate internal administration which is indispensable to the operation of courts.

This chapter focuses on the level of actual operation and how the administrative system of China’s courts influences or may influence the trial function of courts. It mainly observes from the conventional system setup inside the court system. My basic view is that due to unavoidable internal administrative affairs, administration inside the courts is legitimate and necessary. However, this kind of administrative system might erode and distort the trial system. Many of the problems faced by

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8A typical example is that He Weifang and I have different views on trial committee system. Apart from the above mentioned, you may see He’s view from “A Few Comments on Trial Committee System,” *Peking University Law Review*, vol. 2, Law Press, 1999. This article has also been included in He’s collected works *Judicial Philosophies and Systems*, which is the review of my paper “Observation and Thoughts on Trial Committee System of Basic-level Courts” (*Peking University Law Review*, vol. 2, Law Press, 1999; the article is the third chapter of this book). However, my discussion only focuses on the trial committee of the basic-level courts.
China’s court system, like judicial independence or independence of adjudication, are connected to mishandling of or insufficient attention to this problem. My conclusion is that what is important is not to reject administrative affairs, but to gradually and systematically separate the courts’ administrative function from their judicial function with the development of the social division of labor.

2.1 The Definition of Problem

2.2 Two Institutions and the Structure of Courts

I will first of all mention two intertwined formal institutions in China’s courts. These two institutions in principle are directed at, respectively, the trial work which is the court’s constitutional function, and the internal administrative work of courts.

First of all, I will address the trial system. From the level of a formal system, China’s courts at different levels are all composed of by one president and several deputy presidents, tribunal directors, deputy tribunal directors, and judges. There is no difference in trial duties of presidents, deputy presidents, tribunal directors, and deputy tribunal directors as stipulated by law. On the contrary, according to Article 6 of Judges Law, those presidents and directors are the same as the other judges during the trial. They are judges first of all and thus must execute their duties. Inside the courts, according to the Organic Law of the People’s Court, specific tribunals are established with tribunal directors designated, but the law doesn’t stipulate the specific functions of those tribunals or special responsibilities of tribunal directors. There is only one express stipulation for responsibilities of tribunal directors, that is, the chief judge of the collegiate panel should be appointed by the president of the court or by the tribunal director. Strictly speaking, this is neither a stipulation of judicial responsibilities nor a distribution of judicial power and its limits. It is just an unavoidable and auxiliary distribution of administrative responsibilities. According to the Organic Law of the People’s Court, it is up to the collegiate panel or a single judge to hear specific cases. In practice, only cases of the first instance in basic-level courts can be tried by a single judge. Cases at the higher courts and above, as well as cases of the basic-level courts which are not simple, shall be tried by a collegiate panel of at least 3 judges.

9 Article 19, 24, 26 and 30 of the Organic Law of the People’s Courts.
10 Please see Article 10 of the Organic Law of the People’s Courts; Article 94 of Detailed Provisions of the Supreme People’s Courts on the Court Trial Procedures of Criminal Cases (1994); Article 42 of Civil Procedure Law. But in the basic-level courts during our research, chief judges are actually designated by tribunal directors.
11 Article 10 of the Organic Law of the People’s Courts.
12 Article 147 of the Criminal Procedure Law; Article 11 of the Organic Law of the People’s Courts.
According to the Organic Law of the People’s Courts, there is also a specific organization for collective judicial work—a judicial committee, whose purpose is to discuss and decide on important, complicated, and difficult cases. This is another institution related to the trial system. It is not clear by which procedure that cases tried by a collegiate panel or single judges can enter judicial committee for discussion and decision. There is no detailed stipulation in the Organic Law of the People’s Court, Civil Procedure Law, or Administrative Procedure Laws. It is only stipulated that if a president of a people’s court of any level finds a court decision or ruling which is already legally binding that has errors of fact or law and thus needs review, he or she shall submit it to the judicial committee for discussion and decision. It is then up to the judicial committee to decide whether it is necessary for review. The Criminal Procedure Law and the Supreme Court’s interpretation of it generally stipulates the procedure for cases tried by a single judge or a collegiate panel to enter a judicial committee for discussion and decision; that is, they shall be submitted by the collegiate panel or the single judge undertaking the cases.

This is a formal institutional arrangement of China’s current laws on the judicial system of courts at different levels. Only seen from the words, as far as implementing judicial functions is concerned, this kind of institutional arrangement is different from the court system of Western countries in many aspects. Because the judicial organizations of courts in Western countries are different from one another, from the conceptual and logical point of view, it is difficult to say that the internal judicial organization and system of China’s courts have problems. Even the judicial committee system much criticized by the circle of jurists is not unreasonable if considering the series of restraining factors of Chinese society.

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13 Article 11 of the Organic Law of the People’s Courts.
14 Article 14 of the Organic Law of the People’s Courts, Article 177 of the Civil Procedure Law, Article 63 of the Administrative Procedure Law. If this regulation is followed strictly, during the trial procedure of civil, economic, and administrative cases, decisions made by collegiate panel or single judges are supposed to be effective rulings unless errors occur and be put forward by court presidents. The judicial committee has no right to interfere. However, it is discovered through investigation of basic-level courts that it is not usually the case. On this point, you may refer to Chap. 3 of this book: “The Judicial Committee System in Basic-level Courts.”
15 Article 149 of the Civil Procedure Law. Please also see the Interpretation of the Supreme People’s Court on Several Issues Concerning the Implementation of the Criminal Procedure Law of the People’s Republic of China (for trial implementation) (1996) Article 115 stipulates that for difficult, complicated, and major cases, if the collegiate panel thinks it necessary, it can ask the president of the court for his decision to submit those cases to the judicial committee for discussion and decision. Cases stipulated by this Article include cases of the death penalty, on which judges of collegiate panels have major disputes, which are protested by people’s procurators, or have a major impact on the society, and other cases which need the judicial committee to discuss and decide. This article also stipulates that cases tried by single judges can also be suggested by the court president to be submitted to the judicial committee whenever single judges think necessary.
16 Please see Chap. 3 of this book “The Judicial Committee System in Basic-level Courts” for related analysis and discussion.
If following this system strictly, we can’t say for sure that a president, vice president, tribunal director, and deputy tribunal director have more legitimate judicial authority than normal judges either in terms of correctness or determination of judgment. As far as judicial trial is concerned, they are only judges and share equal judicial rights. According to this institutional arrangement, president, vice president, tribunal director, and deputy tribunal director definitely have a kind of capability of influencing other normal judges and even decisions within the existing court judicial system. For example, they may influence decisions by designating chief judges or collegiate panels. However, since this kind of administrative authority affiliated with trials does exist in a court with many judges, it is impossible to expect neutralizing this kind of influence under the condition that no extra transaction fees or institutional disadvantages are added. There is no experienced research up till now to demonstrate that other institutional settings will have any less transaction fees or disadvantages. Even if we presume that the operational mode of American courts is desirable, this kind of influence unnecessarily exceeds the influence of Chief Judges of American courts on other judges.

There is also a necessity to discuss settings of various divisions inside the courts. According to the Organic Law of the People’s Court, courts of all levels have to or may set up (of basic people’s court) different divisions: a civil division, criminal division, administrative division, and an economic division (later changed into civil division 2), as well as appoint a division director and deputy director. Although the American courts do not have this setting, as I have mentioned before, relevant laws haven’t stipulated the specific functions of those divisions in the trial. Judging from the division of labor based on specialization inside the courts, especially considering current Chinese judge’s relative lack of adequate cultural and legal professional studies, this division of labor based on specialization may be able to make up for the disadvantages of the lack of professionalism (this still needs real evidence to prove that it can be of that effect) and be conducive to judicial specialization (although from another point of view, this kind of division of labor also has its disadvantages which I will discuss later). As a matter of fact, courts of continental countries also have this kind of division of labor or set up

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17 This is also demonstrated in legal regulations of judicial committee system. According to Article 11 of the Organic Law of the People’s Court, judicial committees “practise democratic centralism,” but not “executive accountability” as prosecutorial committees practice. Please also refer to Article 87 of the Detailed Provisions of the Supreme People’s Court on the Court Trial Procedures for Criminal Cases (1994), “decisions made by judicial committee can pass only when more than half number of the committee members approve.” Our research has discovered that this has been widely implemented in the basic-level courts. Those attending judicial committees, regardless if they are president, vice president, or tribunal director, will have one vote for each. It is also true that this common conclusion does not eliminate the possibility that the real life that president or certain committee member exerts influence on other committee members intentionally.

18 Article 19, 24, 26 and 30 of the Organic Law of the People’s Courts.
various kinds of special courts.\(^{19}\) There is also a trend of special courts emerging in the USA.\(^{20}\) Due to the division inside courts, there certainly will be some administrative affairs and the necessity to set up division directors.

If this is China’s judicial system, there is nothing to be said against it even though it is not perfect. However, this set of institutions is not only for China’s courts to execute their judicial trial functions, or even to execute administrative functions affiliated to trial, but also undertake some other functions. Because even some administrative chores affiliated with trial need to be dealt with, it still can’t explain why almost every court and every division have so many deputies. The institutional settings inside China’s courts must have some other functions which have not yet been included in the academic views of researchers on standard constitutions, judicial systems, or politics.\(^{21}\) What matters most to the issues discussed here is the internal administration of courts.

The administrative affairs of the Chinese court system are much more complicated and onerous than those of American courts. According to the law, presidents and vice presidents have to undertake not only many administrative works related to trial,\(^{22}\) but also administrative works that are not directly related to trial such as...

\(^{19}\)For example, the Supreme Court of France has 6 trial divisions, separately dealing with cases of private laws, economic and trade, industrial relations, social insurance, and criminal cases. Please see You Rong (chief editor): *History of Foreign Legal Systems*, Peking University Press, 1992, p. 436. There are also civil division and criminal division in German and Japanese court systems. Please see Zeng Guangzai (writer and compiler): *Constitutions and Governments of Western Countries*, Hubei Education Press, 1989, pp. 548, 625. In addition, there are also Federal Patent Court, Administrative Court, Labor Court, Social Court and Fiscal and Tax Court in Germany. Please see “Court System in Germany,” in *Judicial Systems and Procedures of the United States and Germany*, Song Bing (editor), China Political and Law University Press, 1999, pp. 128–131.


\(^{21}\)For example, setting a large number of deputies has created many symbolic resources for the convenience of appointments. There is also distribution of other political powers and material wealth and resources to go with it. This kind of institutional setting therefore serves the purpose of resource distribution. But these very important aspects are not that related to issues discussed in this chapter, so there is not much to say about it. Other scholars may well analyze Chinese and foreign court system further from this point if interested.

\(^{22}\)For example, Article 11 of the Organic Law of the People’s Court stipulates that “Members of judicial committees of local people’s courts at various levels are appointed and removed by the standing committees of the people’s congresses at the corresponding levels, upon the recommendation of the presidents of these courts”; Article 11 of the Judges Law stipulates that “The assistant judges of the People’s Courts shall be appointed or removed by the presidents of the courts where they work”; Article 47 stipulates that The number of persons on a commission for examination and assessment of judges shall be five to nine. “The chairman of a commission for examination and assessment of judges shall be assumed by the president of the court it belongs to.”
disciplinary inspection, supervision, and even statistics. In addition, there are also a large number of administrative affairs which, although not explicitly stipulated, need to be or are, in fact, undertaken by presidents and vice presidents, such as the appointment, removal and deployment of directors and vice directors of each division, chief judges, and deputy chief judges of people’s court at the basic levels, as well as principals of non-operating departments in the courts, evaluation and promotion of judges, and other factors. With courts of all levels getting increasingly complicated, works related to appointment, removal, and deployment of officials in related institutions have increased. There are even more unofficial but administrative and transactional duties. According to our research on basic-level courts, this kind of work includes all kinds of part-time education provided by the court system to improve the cultural and professional qualities of judges, judicial reform, various works to improve working conditions of courts, and to increase benefit packages of people working for the courts (such as “development cases” like building dormitories and office buildings). This also includes all kinds of evaluations through comparison and inspection, taking part in large number of works not related to the judiciary such as poverty reduction, disaster resistance, donation, development of social culture and ethics, as well as attending various kinds of meetings called up by local party and political leaders. Every court is therefore given many administrative affairs. Like many factories, enterprises, institutions, and schools, the courts in China are themselves a unit, and sometimes even a small “community.”

The large number of administrative works goes to not only the court level, but to each division as well. Some of those works, such as allocation of cases, composition of collegiate panels, and designation of chief judges, are legitimately undertaken and implemented by directors and deputy directors, but not by presidents of the courts, at least in the basic-level courts of our research. Those administrative affairs as mentioned in the above paragraph have given divisions to many administrative works due to the requirement that “each task must be pinned down to a specific person.”

It is because China’s courts are a unit and a community in which there are many administrative affairs that China’s court system itself has a relatively strong institutional demand for administration. It is necessary to set up so many presidents, vice presidents, directors, and deputy directors to deal with administrative affairs, manage the community, safeguard, and increase community welfare.

Here is one thing that we need to be careful with. The court and its divisions have their institutional demands of administration and have established a corresponding administrative system to fulfill this demand, but this does not necessarily

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23 Article 8 of Notice of the Supreme People’s Court on Issuing “the Temporary Measures of Supervisory Departments in the People’s Courts to Investigate and Deal With Cases of Disciplinary Violation” stipulates that “the Supreme People’s Court establishes Supervisory Department, which is responsible for leading and managing supervisory works of national court system under the leadership of the President of the Supreme People’s Court. It also supervises the Supreme Court, its working staff, president, and vice presidents.” Article 4 of Several Regulations of the Supreme People’s Court on the Judicial Statistic Work of the People’s Court stipulates that the statistic work shall be regarded as “an important job of the court of which the president or a vice president of the court is in charge.”
result in the strong administration of the court system. As for what has been men-
tioned before, the court system of every country, such as the American court sys-
tem, all have administrative works as well, no matter how few they are. However,
the American courts don’t have a strong feature of administration. Even in theory,
the increase of administrative affairs does not necessarily add to the administrative
features of the institution. The constitutional separation of powers in Western coun-
tries only appears under the historical background of dramatic increases of state
administrative affairs in contemporary times. The increase of affairs and the division
of labor gave rise to departments of specific functions to deal with different types
of problems. This kind of division of labor not only improves efficiency, but also
encourages different functional departments to form their own operational logistics.

The problem in the administration of China’s courts is caused by the interac-
tion and combination of functions of two sets of institutions aiming at separately
dealing with two different kinds of problems inside the court system. There are
no divisions of functions when installed by the system or desired by us. Both of
these two sets of institutional settings have their rationale. Since the basic social
function of the court is trial, its internal administration should be used to support
the trial function of the court from the perspective of institutional logic, and thus
should be auxiliary. However, these two sets of institutions are attached to the
same institution and function in an institutional space where institutions are inter-
twined with each other. Then, the logistics of these two institutions may mix up
and mingle with each other. My research at the basic-level courts has found that
these two sets of institutions are not only often mixed up, but the progression of
positions is often put upside down by building the trial system into an administra-
tive system with the court as one of its parts. The administrative system plays a big
role in the court’s implementation of its trial function. Some are positive but more
often negative, although the specific evaluation depends on the angle and position
of the observers and readers. In addition, when these two institutions interact with
each other, there is a series of informal but in fact quite influential trial institutions
formed, which differs enormously from the formal trial institution from legal texts.

2.3 Administrative Judicial Institution in the Judicial
Process

The above contents are only demonstrations of my logic and ideas. We must
observe in detail the actual process of a court to decide its judgment if we want to
find out the informal judicial institution that actually works.

24As for formal systems mentioned in this chapter, they are court’s organizational structures and
operational procedures stipulated by written law; informal systems refer to systems that are not
explicitly stipulated by the above law, but are customs and conventions which people working in
the court usually observe voluntarily or involuntarily and even must observe, as well as ideas to
go with these customs and conventions. The reason that we call these customs and conventions
“systems” is that they, like formal legal regulations, restrict people’s behaviors and have become
When a case enters into the court and is, for example, determined to be a civil case, it will be transferred to the civil division of the court for trial. Commonly speaking, the division director will determine whether the case will be tried by a single judge or a collegiate panel. If a collegiate panel is chosen, then the division director will be entitled to appoint a chief judge. The authorities of the division director have been explicitly stipulated by law and have a feature of administration, but they are also collateral administrative activities that can’t be avoided. This is exactly where the administrative institution of the court interferes with the trial and drags or includes the judgment into the administrative institution.

For a long period of time, judges without administrative posts have been accustomed to regard themselves under the leadership of the president, vice president of the court, director, and deputy director of divisions inside the court. They are used to asking their leaders for instructions and reporting to them on rather important issues, no matter whether they are or are not regarding a trial. It has become a tradition of courts of all levels although there is no explicit legal stipulation. Even a simple case tried by an independent judge, or a case on which a collegiate panel has reached an agreement and made decisions, the decision will normally be reported to the division director and later the vice president in charge for approval. If the case is difficult or controversial and cannot be solved by the division director and vice president in charge, it will be reported to the president and then to the judicial social norms which people have to obey. The definition of system here is different from the system we usually refer to (as a formal organizational institution or rule). However, more and more people nowadays accept that “the institutions are, in substance, prevalent habits of thought with respect to particular relations and particular functions of the individual and of the community, … the institutions of today—the present accepted scheme of life.” (Thorstein B Veblen: *Theory of the Leisure Class*, Cai Shoubai (translated), the Commercial Press, 1964, pp. 138–144.) It is necessary to point out that some institutions are formal, but are restricted by all kinds of informal institutions and thus ineffective. They are just institutions on paper. The informal institutions are regarded by institutions only because they are effective in the real life. It is fair to say that informal systems are, generally speaking, institutions that are actually influential. An important example is the Bankruptcy Law stipulated in 1980s. We should also point out that when we study courts in modern China, it is not that clear what is formal institution and what is not. It also depends on the perspective and definition of researchers. For example, it is a reality in China that party committees or the Communist Party are in charge of cadres and that it is a basic principle stipulated in the constitution that the leadership of China’s communist Party should be upheld. From this perspective, the influence and function of the Party inside the court should be a formal institution. But if we only look at the Organic Law of People’s Courts and other texts of procedural law, the actual influence and function of the Party inside the court is not explicitly stipulated by law, but is established by the development of China’s modern history. As far as the court institution is concerned, the party committee of the court is therefore an informal institution of court function. However, it is not important to distinguish whether the party committee of the court is a formal or an informal institution. What is important is what I will discuss later: that when we observe the court institutions, we should pay attention to not only institutions explicitly stipulated by law, but also those informal institutions that are actually influential.
committee for discussion. The president can directly intervene in the case trial according to certain laws or his administrative duties under certain circumstances.25

The collegiate panel or independent judges are not really what the jurisprudential circle or legal circle criticize as “those who try don’t decide” or “try cases without giving decisions.” As a matter of fact, before handing the case to a division director or vice president in charge, the collegiate panel will, and actually must, put forward a conclusive decision, generally speaking.26 The division director will examine the opinions of the collegiate panel on the case. If he or she agrees with the collegiate panel, he will submit the case to the vice president of the court for approval. If he or she does not agree with the collegiate panel, he or she will briefly write down or speak out his or her opinion and ask the collegiate panel to re-evaluate. When the case reaches the president or the vice president of the court, it will meet the following three situations: First, the president agrees with the opinion of the collegiate panel and issues a court decision; second, he or she does not agree with the opinion of the collegiate panel and, like the division director, he or she will ask the panel to reconsider the decision; third, if he or she thinks that case is important and/or complicated, he or she will transfer the case to the judicial committee for discussion.

Generally speaking, either the division director or vice president in charge has complete and final power to decide the case. The collegiate panel’s opinions are only an important reference. The collegiate panel may well insist on their initial opinion and once again ask the division director and the president to approve and issue the decision. This is because the signature of the case decision is from the members on the collegiate panel, not of the division director or the president.27 The main body taking the responsibility of the consequence of the case decision is still the collegiate panel. It is true that the collegiate panel may also receive the “instructions” from the division director and the president to rediscuss the case, but normally speaking, those instructions from the director or the president are not always clear and definite, and sometimes obscure regarding purpose. This is, on the one hand, for the convenience of avoiding the responsibility. If the case is wrongly tried in the second instance, those giving instructions can explain their instructions in one way or another. On the other hand, the formal judicial institution has some restrictions after all, and the director or the vice president themselves are not

25 As for related legal regulations, please refer to Article 10, 11, 14, 16, and 37 of the Organic Law of People’s Courts; Article 6 of the Judges Law; Article 42, 47 and 177 of the Civil Procedure Law; Article 47 and 63 of the Administrative Procedure Law; Article 30, 147, and 205 of the Criminal Procedure Law; and Article 26, 112, 115, 120, and 283 of Detailed Provisions of the Supreme People’s Court on the Court Trial Procedure for the Criminal Cases.

26 Please refer to Article 149 of the Criminal Procedure Law. Our research has found out that it has become a convention in civil and administrative procedure.

27 Article 138 of the Civil Procedure Law stipulates that “the judgment shall be signed by the judicial officers and the court clerk, with the seal of the people’s court affixed to it.” Article 164 of the Criminal Procedure Law (1996) stipulates that “the written judgment shall be signed by the members of the collegiate panel and by the court clerk, and the time limit for appeal and the name of the appellate court shall be clearly indicated therein.”
legitimate parties or organizations to try the case. The judicial committee is the judicial organ of the highest level established inside the court. It does not hear the case nor give judgment directly though. But once the case enters into the judicial committee, the committee is entitled to give decisions to settle the case which the collegiate panel needs to implement, and issue judgment on behalf of the collegiate panel.

We can see that the judicial institution stipulated by law has been transformed during the actual process of trial and has become the actual but informal institution of court trials in China.

First of all, there is confusion between judicial institutions and administrative institutions. The division director has become a superior to the independent judge or the collegiate panel to a certain extent; there are not only division directors but vice presidents in charge of the division and the president between the legitimate judicial organizations like collegiate panels or independent judges and judicial committee. A case trial is therefore not finally decided by the judge nor the collegiate panel undertaking the case, but needs to be reported to the division director, vice president in charge, and even the president consecutively for “approval.” Once this practice has become a convention and been given a flavor of institution, then those administrative leaders can sometimes intervene in the case directly, which gives them major influence on the case trial. If not from the legal text, but from the point of power to decide the case, we will find out that the judicial institution of the court is not the institution of an independent judge or a collegiate panel, but a collegiate system of four, five, or even more people.

Secondly, it is not only the trial function mixed up with the administrative functions, but more importantly, the judicial institution has become the auxiliary to the administrative institution of the court. The independent judge, collegiate panel, and judicial committee are only organizational forms of the court to carry out judicial functions. They are not independent organizations or individuals that carry out judicial powers. The independent judge and collegial panel are in fact and also in principle must carry out judicial activities under the guidance of the division director and the president.

28 We not only feel about this point through the interviews with judges, but also read from some official documents that judges undertaking cases try to resist the erosion of judicial power by administrative power of the court through certain legal regulations. Article 14 of the Reply of the Supreme People’s Court on Several Questions related to Detailed Application of Laws in Serious Criminal Cases Tried by the People’s Courts (September 20, 1983) has left traces for this kind of resistance. A question from the Province of Zhejiang is that “for the serious criminal cases that are currently severely punished and given speedy trial, is it possible that on the legal documents issued by the courts, there will be no signatures of judicial officer and the court clerk, but only a seal of the people’s court affixed to it?” The reply of the Supreme People's Court to this is that “Article 122 of the Criminal Procedure Law stipulates that ‘the written judgment shall be signed by members of the collegial panel and by the court clerk’. It still needs to be carried out currently.”

29 Article 87 of the Detailed Provisions of the Supreme People’s Court on the Court Trial Procedure for the Criminal Cases stipulates that “decision of the judicial committee shall be implemented by the collegial panel. If there is a disagreement, the decision can be submitted to the judicial committee for review by the president.”
Thirdly, there is also some kind of “trial grade system” inside the court, especially on some difficult, complicated, and major cases. A judgment of courts at a certain level is actually the product of progressive approval process inside the court. Not only has the judicial power of the presiding judge been divided, but the judicial power designated to the court of this level by law has been highly decentralized.

There are many other factors reinforcing the influence of the administrative system on judicial institutions. One of them is the appointment and removal of judges. According to the Organic Law of the People’s Court, the president, vice president, division director, deputy director, and judges all have equal judicial functions; the court can only appoint and remove assistant judges of the court, while the judges can only be appointed by the standing committee of the same level.30 Up until now, the appointment by the standing committee has only been procedural and a necessary formality. The majority of judges are nominated by leaders of different courts. Leaders of the division and the court first recommend certain judges and then the personnel department will examine those candidates. Then the Party Committee of the court, composed by the president, vice president, director of political department, and the leader of the disciplinary inspection group, will make their final decisions. However, once whether a judge can get his position is, to a large degree, decided by some other “judges” who are working in the same court as he or she, then his or her case trial will definitely be influenced by them and he or she will tend to figure out “what those leaders think.” And the division director and court president will also use this power pattern to influence the case dealings. During this power structure, judges with administrative functions have different decision powers from those without administrative functions. Thus, judges inside the court have various ranks.

2.4 Collective Decisions of Administration

Be sure not to think that this kind of institutional arrangement of China’s courts only gives actual judicial activities a strong feature of administration or that the decision of cases of China’s courts are all administrative bureaucracy. The administration of judicial decisions of courts is only one of the features demonstrated because of the mix-up of two sets of institutional functions. It is not fair to generalize the judicial features of China’s courts only because of this. The mix-up of these two sets of institutional functions also demonstrates other features, one of which is the mode of “democratic” collective decision. The “democratic” or collective decision mentioned here does not necessarily have the positive meaning given by the current popular ideology. It only refers to the decentralization of decision powers, and that every person involved in the process may exert a certain

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30Article 35 of the Organic Law of the People’s Court.
influence on the final decision. In principle, this feature seems to go against the feature of judicial administration as above mentioned. This kind of paradox does exist in reality. If the court was purely administrative, then the trial would have the strict system of the chief executive taking full responsibility. But the judicial institution in China’s court is not like this. It has the features of administrative instructions and decentralized decisions. It is the combination of two, with one reinforcing and supporting the other.

The judicial committee is a democratic organization with group decision making of the administrative trial of the court. I have discussed it in some other papers and will not give unnecessary details here. The general process of trial discussed before demonstrates this from another angle. In this informal institution, trial decision power has been divided in the process from prosecution to court decision. The hearing and the adjudication are not concentrated in any specified organization or individual. Any individual related to this process can speak and intervene and his opinions will be accepted to some extent as long as they are sensible. Of course, the result of this democratic group decision making normally is that nobody will take the final responsibility for the result of this case—and it becomes difficult to ask someone to take full responsibility.

It is therefore not difficult for us to understand another informal institution which is never stipulated by law, but commonly exists and functions in every court’s affairs meetings. Our research has discovered that sometimes division directors would take the cases still under trial by the collegiate panel to the court affairs meeting for discussion and require that all judges of the division should participate in the discussion. Cases under discussion are sometimes those in which director and collegiate panel have strong differences. More judges are asked to participate in the discussion so that their opinions would be heard and collective wisdom would be adopted. It can also be the case that there are differences in the collegiate panel itself and it cannot put forward a convincing and complete opinion, and thus wants to hear about views of other judges. Judges are working in the same office without separate space for research and case consideration; thus, it is very easy for them to feel accustomed to exchanging ideas with other judges on cases they are “not sure about,” and to ask for and listen to suggestions and recommendations of other judges. This kind of practice of judicial democracy is in sharp contrast with the above-mentioned administration of courts. Although this kind of democratic way of collective decision may not get approval from the jurist circle.

This democratic way of collective decision is even shown inside the collegiate panel sometimes. The collegiate panel is usually composed of three judges, one of

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31 The collegiate panel can even suggest submitting the decision of judicial committee to the committee for review. Please see Article 87 of Detailed Provisions of the Supreme People’s Court on the Court Trial Procedures for the Criminal Cases, which stipulates that “the decision of the judicial committee, … if [the collegiate panel] still has different opinions, it can suggest the president to submit the decision to the judicial committee for review.”

32 Mr. Ling Bin, a student of Law Faculty of the Peking University discovered this relevance during his internship. I would like to thank him for his contribution here.
which is the specific undertaker of the case who is taking main responsibility for the factual and legal issues of the case. The preparation of the case before the trial, examination of evidence, writing the initial settlement suggestions are basically all done by the judge himself. Other members of the collegiate panel only glance over the files and participate in the trial. According to their impressions from the files and the trial, plus reports of the judge undertaking the case, members of the collegiate panel will put forward their own opinions. Due to the normal situation that the composition of the collegiate panel is relatively stable with the same members cooperating with each other, judges of the collegiate panel will try their best to maintain a relationship pattern of collaboration. The principle of majority rules is practiced in the collegiate panel, and the judge undertaking the case would normally want his opinions to be accepted and supported by the other two judges. If the opinion of the judge undertaking the case is always the minority during the panel discussion, it means that he or she is not competent. As reciprocity, whenever there is no substantial dispute, the judge who wishes the result of cases he or she undertakes be recognized by other judges would tend to recognize the results of cases undertaken by other judges. This reciprocity does not mean that there is always an agreement on the collegiate panel. We can only say that within the discretion scope allowed by law, judges of the collegiate panel will try their best to reach an agreement.

We can still notice even from here that the decision manner of collegial panel is influenced by the court administrative system of current times. Compared with micro-group analysis related to foreign court decisions, an important factor in the collegial panel of China’s court to facilitate more co-operations among judges is the administrative system of China’s court, which has never appeared in relevant foreign researches. If there is no agreement in the collegiate panel, the case will enter into the administrative judicial system in the court when the division director and vice president in charge will be asked for instructions. This will add to the work load of the division director, vice president, president, and even the judicial committee. But generally speaking, these people or organizations do not welcome

33Article 148 of the Criminal Procedure Law.

34As for this point, if judging from the concept, it does not correspond with “independence of judge” or the so-called internal independence of judges. We must point out that this kind of viewpoint actually forgets about the fact that a judicial decision always comes from a court which is an organization but not from an individual judge. Group cooperation is necessary and essential since none of us know which judge has a correct view or whether he or she is always right. Cooperation and compromise among judges to a certain extent is actually effective, and at least can prevent going to extreme. As a matter of fact, the important judicial opinions (i.e., majority opinions) produced by the decision mode of the Supreme Court of the USA admired by many Chinese scholars are mostly product of compromise by a majority of judges and even all judges.

35For example, American judicial research has discovered that the probability for the three-judge judicial tribunal to have disputes is sharply lower than the tribunal composed by 7 or 9 judges. The smaller the trial group, the lower the ratio of opposition. Please see Richard J. Richardson and Kenneth N. Vines, *The Politics of Federal Courts*, Little, Brown and Company, 1970, pp. 122ff; and please refer to Sheldon Goldman and Thomas P. Jahnige, *The Federal Courts as a Political System*, Harper and Row, 1971, p. 178 for related explanation.
such an added work load. If the dispute of the collegiate panel on the case trial emerges, it will do no good to any judge. If a collegiate panel cannot solve its own disputes, it will possibly make leaders in the court think that judges on the collegiate panel are not competent in their professional work and not capable enough to deal with cases, which may affect their future interests. This factor will force every judge on the collegiate panel work hard to reach an agreement. This shows that even in the democratic group decisions of the collegiate panel, there is also a trace of the administrative systems of the court. After all, the collegiate panel is only a judicial system built in the court.

2.5 The Final Review

Based on the abstract, this chapter “describes” the decision process of judgment inside China’s courts, as well as its complex features. This is a description of “ideal type.” In reality, the decision process of every court and even every case is different. But this chapter has roughly generalized the basic features of the process of China’s courts, especially the courts at the basic level in trial cases. This kind of generalization is different not only from the former trial system of court regulated by law, but from the court administrative system as well. It is actually the combination of the actual function of these two systems in reality.

This chapter neither intends to go deep into discussion of the rationality or limitations of this system nor tries to trace back to their historical origins or transitions. It does not want to investigate other external systems or social factors which create the administration of the court’s judicial system, although these external factors may be preconditions for the court to demand and have a powerful administrative system. I would like to excavate certain implied meaning of research on countermeasures and jurisprudence based on the above-mentioned description and analysis.

As far as countermeasures are concerned, although this chapter has pointed out that the judicial system of China’s court is dominated by the internal administrative system of the court and to a certain extent has become the subsidiary to the internal administration of the court, and I have implied criticism on this, I still don’t try to avoid or reject court administrative issues by using ostrich tactics. I do

36Although this chapter has made criticisms on the internal administrative system and the judicial system of China’s court, I still don’t deny that they have played certain positive roles in China’s social environment today. For example, because the average professional qualities of judges in our country are not high, reporting for approval level by level makes more people take part in the case trial. This can, to a certain extent, bring the collective wisdom into play and avoid a wrong judgment; also, it may, to some extent, limit malpractice and corruption of certain judges. From a long-term perspective, whether to implement trial function by this system is reasonable or economic is still doubtful. To support such trial, system demands huge costs and approval at different levels will surely increase litigation costs of clients and delay the litigation. The major reason for the current judicial reform is to increase the efficiency of litigation.
not aim to replace the logistics of life by a logistical life. On the contrary, this chapter has pointed out that the purpose to establish court is to implement its judicial function, but as long as the court is established, administration can’t be avoided. So the issue that has been ignored for a long time or forgotten intentionally by China’s jurists should be treated seriously. At least from the experience of the Supreme Court of the USA, for a court to effectively implement its judicial functions, the administrative ability of the chief justice is one of the very important factors, apart from his experience of judicial trials or legal knowledge. When China discusses its court reform or judicial reform nowadays, it cannot restrict itself only to reforms in the mode of trials. The reform of the administrative system should not be excluded. This is even more important in modern China, since the administrative affairs faced by China’s courts are more in terms of quantity, more complicated, and more onerous. The goal for making efforts should be possible reduction of administrative affairs brought to courts of all levels by institutional defects such as problems of “receiving subsidies from the government” within the general framework of reform in the state political system. However, this goal can’t be reached in the short term, as the number of administrative affairs cannot be reduced dramatically within a short time, not to mention be eliminated completely. The internal administration of the court is a practical issue that China’s court has to face over the long term. Jurists can eliminate these issues in the jurisprudence framework of separation of powers or judicial independence. But those issues cannot be eliminated from our lives.

37In the nearly 200 years since John Marshall took the post in the Supreme Court of the USA and the institutional importance of the Supreme Court was truly established, there were altogether 12 Chief Justice (excluding Chief Justice ahead of John Marshall since by then the Supreme Court hadn’t established its authority) in the Supreme Court, among which 5 of them did not have any experience in trial courts before taking the post, 3 of them did not have any experience of court trial before taking the post of Chief Justice of Supreme Court, 1 of them had 1 and a half years of experience in the federal court, and John Marshall himself had only 3 years of experience in courts similar to the basic-level people’s court in China. The four most capable Chief Justice widely recognized by the US law circle are John Marshall, William Howard Taft, Charles Evans Hughes, and Earl Warren. They were all good at administration. Before taking post of Chief Justice, they all served as very important administrative leaders or exhibited excellent administrative talent: John Marshall used to be Secretary of State, William Howard Taft used to be President, Charles Evans Hughes used to be Vice President and Republican presidential candidate, and Earl Warren used to be the Governor of California. Please refer to Abraham, *Judicial Process*, pp. 56–58, table II. If there had been no Chief Justice Marshall and his excellent talent as a politician not as a lawyer, the Supreme Court of the USA and even the US Constitution would be unimaginable. Benjamin Nathan Cardozo used to point out that “Chief Justice gave to the constitution of the USA the impress of his own mind; and the form of our constitutional law is what it is, because he molded it while it was still plastic and malleable in the fire of his own intense convictions.” Please see *The Nature of Judicial Process*, translated by Suli, Commercial Press, 1998, p. 107. Benjamin Nathan Cardozo’s comment was objective, but was regarded as inconceivable to legalists: the first regulatory responsibility of a judge to observe constitution and law has gone so far as to mold the so-called most rigid constitution of the USA. However, this is a history which does not necessarily follow standards and logic, and often seems to be like this.
The other key point hidden in this chapter is that the problem of China’s courts may not be the large number of administrative affairs (although this is certainly one factor), but may lie in the mixing up of functions of administrative institutions and trial institutions. There is no division of different court functions which is based on its basic function or constitutional function. If we need to increase the level of specialization and professionalism of the court, then this division of functions deserves more attention. I can’t agree with some scholars who believe that the problem of China’s judicial reform is to eliminate those systems inside the court which fail to integrate into the world, like the system of a judicial committee. As far as I see, a judicial committee is one of the few formal judicial institutions inside the courts of our country. As a trial institution, its function is quite reasonable in China’s basic-level courts. If it is eliminated, under the current court administrative institution, the current administrative feature of the court will be further intensified to my prediction (dominated by current court administrative institutions, how the single judge or judges of a collegiate panel can possibly “hold up the court directly” under the pressures of a misjudged case investigation system, supervision of justice by the people’s congress, and supervision by public opinion). I don’t deny that the operation of the judicial committee of courts at all levels have problems, but those problems exactly reflect that because the judicial committee system is built in the current court administrative institution, the logic of administration limits the composition of its members, restricts its role in the Chinese court, and weakens its judicial function. If the judicial function of this system is earnestly strengthened, separated from the current administrative institution of the court, and made the legitimate and last judicial decision organization inside the court, it may not be in line with the idea of the independence of judges, but rather the strong administrative feature of “leading cadres assuming responsibilities” of court can be weakened dramatically, at least.

If this analysis can hold water, then the reform of judicial methods or systems of court can start with the separation of system functions. Even from my own perspective, the transformation of functions of the Chinese court can be realized and the system logic of the court as a trial organ be cleared only by getting hold of this point. That’s why the approach of my research overlaps with the popular approach taken by the current court system, but there are still some differences. The popular viewpoint of the current court system and jurist circle is that there are two ways to consolidate China’s judicial or trial independence. One way is to reform trial methods, and the other way is to settle the power over finances and personnel, that is to say to “receive subsidies from the government” financially while enjoying the power of choosing appropriate persons for jobs. These two aspects are very important indeed. But my analysis has demonstrated that this kind of reform is not good enough and even misses the point. As a matter of fact, the current reform of trial methods can also be seen and even should be seen as reform of the administrative institutions of the court. It actually intends to separate the procedures which mingle with the trial and have the feature of administration from the trial process (such as the so-called holding the court directly). But my analysis that members of the collegiate panel are trying to seek common grounds in the last paragraph of
the previous section have demonstrated that even the current jurist circle is optimistic about the system of trial by collegiate panel, despite in fact being influenced by court administrative institutions through some other channels. We must realize that if we don’t separate and adjust the functions of these two institutions inside the court, even when we have “government subsidies” and power to use appropriate personnel, it will be difficult to weaken the current administrative features of China’s courts. On the contrary, the administrative features of the court system will be even stronger. The result may be that the court is more independent of administrative departments, but there won’t necessarily be any improvement in the issue of trial independence, since in terms of judicial professionalism, a judge in the highly administrative court which is independent of administrative departments does not necessarily enjoy more power of judicial decision than judges under current situation. There is even the possibility that they have fewer powers of judicial decision.

In addition, this chapter has demonstrated that it is not to the point to simply discuss judicial democracy, democratic participation, and the fact of democratic supervision, which is to give a prescription with popular ideology and cure disease with panacea. The administrative trial process of China’s court also has its decision democracy, although this kind of democratic product is not the desired end product. We must emphasize that China’s court has gradually formed its own system of logic and professional tradition of justice based on its separation of functions.38 In Chinese history, there was no distinction between judges and administrative officials. The court of contemporary times was approximately separated from “Yamen” (government office) based on the philosophy of the separation of powers, and it was easily seen by political leaders and ordinary people as an administrative organ to settle disputes, but not a typical judicial institution. Without separation of powers, it was naturally very difficult to foster professional judges. Without professional judges, the execution of court trial functions could only be ensured by logic and an administrative system, which has in turn changed the due system and logic of the court. From this, we can see that the formation of judicial independence of trial independence is not only and even mainly not based on how it is stipulated by law and whether it has transplanted or believed in certain philosophy or principle, but a product of a series of comprehensive social conditions.

For the purpose of legal research, this chapter has, first of all, demonstrated how different institutions auxiliary to the same organ but targeting different problems erode each other and deform institutions. The administrative institutions seriously erode and assimilate other institutions of certain organs. This phenomenon is often seen in modern China. There are examples everywhere. The administrative logic of the university outweighs the logic of university as an organ of education and scientific research. The administrative logic of enterprise outweighs the logic of an enterprise as a market business. The analysis of this essay may therefore somewhat enlighten the research in the institutional problems of many social

organizations in modern China. As a by-product, it also challenges the popular and strict philosophy of the separation of powers, which has to some extent become a new ideology. No organization in reality can implement a single and pure function. The histories of constitutional development in many Western countries have actually proved this point.\(^{39}\) In addition, this research can also help us to understand how the institutional functions (i.e., responsibilities) of a certain organ have changed or transformed.

Secondly, in terms of research on the judicial system, the empirical approach of this chapter helps to eliminate the research blind spot brought about by the traditional approach of jurisprudence to discuss court functions. It also brings the internal administration which is requisite to the court into the vision of research jurists. It may help us to have a fairer and more comprehensive understanding of the system by which the Chinese court actually functions. It may also provide a new but more practical understanding on issues currently existing in the Chinese court system, as well as the possibility and approach of the reform of the court system. It is not a kind of criticism of ideology simply based on judicial principle or international standards.

Thirdly, for a long period of time, China’s jurisprudence and jurisprudential circle paid attention only to research on legal texts, but not to those informal systems. They ignore informal systems, especially those taking shape in the formal systems, although people are generally restricted by those informal systems. This chapter starts from analyzing two formal systems inside the Chinese court and points out the obvious but often neglected informal systems that have been formed by the mix-up of these two formal systems. These informal systems, no matter whether they are regarded as custom or habit, are large in number and play practical roles in many aspects of modern China. This research not only proves that we must have empirical research and analysis of a large number of specific systems in order to discover (but not approves since discovering may only aims to transform) all kinds of informal systems that actually influence social lives. It also demonstrates that unlike what many jurists have imagined that the informal systems only exist in Chinese rural areas that wait to be modernized. They are just living with us, within the fields which to our belief are under the complete control of formal systems and in which the formal systems play their roles.

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