

Title:

Why the Chinese Public Prefer Administrative Petitioning over Litigation

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Abstract:

In recent years, the Chinese public, when facing disputes with government officials, have preferred a non-legal means of resolution, the Xinfang system, over litigation. Some scholars explain this by claiming that administrative litigation is less effective than Xinfang petitioning, while others argue that the Chinese have historically eschewed litigation and continue to do so habitually. A closer examination of contemporary and historical data indicates that both explanations are questionable: Xinfang petitioning is, in fact, much less effective than litigation, and very rarely solves the petitioner's problem. On the other hand, traditional Chinese societies, particularly those in the Qing and Republican eras, do not display significant anti-litigation tendencies. This paper proposes a new explanation: Chinese have traditionally litigated administrative disputes, but only when legal procedure is not overly adversarial and allows for the possibility of reconciliation through court-directed settlement. Because this possibility does not formally exist in modern Chinese administrative litigation, people tend to avoid it.

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Introduction

In recent years, the innocuously named Ningxiang County (literally: “Peaceful County”), located in China’s Hunan Province, has been wracked by a series of widely publicized popular protests against government taxation and corruption.¹ The unrest started in June 1998, when local people staged a peaceful demonstration in Daolin town against a number of administrative fees imposed by local authorities. A second demonstration, held on January 8, 1999, led to more severe consequences. A large clash between several thousand demonstrators and local government forces killed one peasant and wounded several others. Hardened by this tragedy, the protestors decided to seek higher official support for their grievances. Ignoring the judicial system, they filed petitions to the Xinfang (literally: “Letters and Visits”), or complaints, office of Changsha, the provincial capital, and later to various Xinfang offices in Beijing. In the meantime, both domestic newspapers and the *New York Times* began to report on the petitions, creating hope that authorities would cave in to media pressure. The government response, however, was mixed: the family of the victim received 60,000 Yuan (about \$7500) in compensation, but nine organizers of the rallies were arrested in August and sentenced to terms from two to six years. The original goal of the demonstrations, to curb over-taxation and unreasonable fees, was not addressed.

The filings of most administrative grievances in China do not closely resemble Ningxiang’s experience: they often involve fewer people and less tragic circumstances and, of course, rarely receive attention from the *New York Times*.² Nonetheless, the Ningxiang petitions were typical of recent (1996 to 2004) administrative grievance cases in some very important ways. First, the petitioners never initiated any kind of judicial litigation, instead preferring the less-formal Xinfang system. This is probably quite surprising to many western lawyers who are unfamiliar with China’s legal system. In the United States, England, and France, for example, administrative complaints against government corruption and abuse frequently end up in usual courts of law or in specialized administrative courts. China’s administrative litigation procedure, on the other hand, remains largely ignored even after eighteen years of existence. This would be less troublesome if the alternative, and much more popular, option, the Xinfang system, yielded a higher rate of success for petitioners. But here, too, the Ningxiang experience was typical: the petitioners did not solve their problem.

China’s rather peculiar system of Xinfang was established in the early 1950s as a general-governance tool. Official regulations demand that all kinds of government branches, including administrative, legislative and judicial organs at all levels, establish Xinfang offices that are open to the public. These offices then receive complaints, suggestions, and requests from the general population through either letters (“Xin”) or in-person visits (“Fang”), hence their name. Since how they handle these petitions is not expressly regulated by any document or law, these offices are clearly distinct from judicial organs. To this day, the official Xinfang regulations issued by the State Council theoretically allow people to present petitions and comments on virtually any aspect of social life: wages, contracts, access to public services, and even weddings.³ In more

¹ The narrative in this paragraph is found in Thomas P. Bernstein, *Unrest in Rural China: A 2003 Assessment*, Center for the Study of Democracy, UC Irvine, Paper 04’13, at 5.

² *Id.*

³ Laura M. Luehrmann, *Facing Citizen Complaints in China*, 43 *ASIAN SURVEY* 845, 861 (2003).

recent years, however, Xinfang petitions have converged on two main categories: appeals of judicial decisions and administrative grievances against various government organs. As I will argue, available statistics suggest that the vast majority of petitions in the former category involve civil, not administrative, disputes. Existing studies also agree that the latter category, administrative grievances against the government, accounts for most other petitions, to the extent that one scholar habitually referred to the Xinfang system as an “administrative process[] for promoting administrative accountability.”⁴ While many, probably most, administrative grievances filed with the Xinfang offices can also be resolved through judicial litigation, people very rarely go to court. Indeed, some estimates based on available statistics reasonably suggest that there were perhaps four or five million administrative Xinfang petitions a year during the 1996-2004 period, but only around one hundred thousand administrative complaints filed with the courts. Even a more conservative estimate would have to agree that the Xinfang system is used *far* more frequently. This paper attempts to explain why.

Existing studies on China’s Xinfang system typically pin its virtual monopoly over administrative dispute resolution on two reasons. First, some argue that China’s administrative litigation system is so ineffective and corrupted that people have no better option than the Xinfang offices.⁵ Second, several scholars have also blamed China’s historical tradition: Chinese people, they argue, have a long history, extending back to at least the Qing Dynasty, of utilizing *non-legal* means to resolve administrative grievances and continue to do so out of cultural habit.⁶ In addition, at least one scholar has suggested that China’s more recent Communist history can also help explain this anti-legal path-dependency.⁷ Of course, the “judicial inefficiency” explanation and the “anti-legal tradition” explanation, if we may call them by those names in this paper, are not mutually exclusive. A number of scholars have, indeed, made both.⁸

⁴ Michael Palmer, *Controlling the State?: Mediation in Administrative Litigation in the People’s Republic of China*, 16 TRANSNAT’L L. & CONTEMP. PROBS. 165, 175 (2006); Vai Io Lo, *Resolution of Civil Disputes in China*, 18 UCLA PAC. BASIN L.J. 117, 120 (2000).

⁵ See, e.g., Eva Pils, *Land Disputes, Rights Assertion and Social Unrest in China*, 19 COLUM. J. ASIAN L. 235, 266 (2005); Gu Guilin, *Zhongguo Nongmin Weihe Xin “Fang” Bu Xin “Fa,”* RENMIN DAIBIAO BAO, <http://www.wtolaw.gov.cn/display/displayInfo.asp?IID=200212011512470120> (2002); Carl F. Minzner, *Xinfang: An Alternative to Formal Chinese Legal Institutions*, 42 STAN. J. INT’L L. 103, 176-77 (2006); Kevin J O’Brien & Lianjiang Li, *Suing the Local State: Administrative Litigation in Rural China*, 51 THE CHINA JOURNAL 75, 84, 87 (2004); Ying Xing, *Zuowei Teshu Xingzheng Jiuji De Xin Jiuji [The Xinfang Remedy: A Special Form of Administrative Relief]*, 3 FA YANJIU [JURISPRUDENCE RESEARCH] 58, 66-70 (2004); Bao Yonghui & Lu Guoqing, *Qunzhong Yueji Xinfang: Tamen Weihe Xin “Fang” Bu Xin “Fa,”* LIAOWANG XINWEN ZHOUKAN (Nov. 1, 2004), available at <http://www.jzrd.gov.cn/xinxi/list.asp?id=916>.

⁶ See, e.g., Minzner, *supra* note 5, at 107, 110-14; Gu Guilin, *supra* note 5; Li Wenling, *Zhongguo Gudai De “Wu Song” Linian Yu Xiandai “Hexie” Shehui*, 2006 GANSU SHEHUI KEXUE 108; Yu Shenhong, *Yingxiang Sifa Gongxinli De Yinsu Fenxi*, 33 J. OF HENAN NORMAL UNIVERSITY 91 (2006); Zhang Qing, *Nongmin Jiecheng De Xianzheng Fenxi*, ZHONGGUO FAXUE (2005), available at

<http://www.oao.com.cn/bbs/ispbbs.asp?boardID=13&ID=2043&page=3>; Yu Jianrong, *Xinfang De Zhiduxing Queshi Ji Qi Zhengzhi Houguo*, FENGHUANG ZHOUKAN, (2004), available at http://www.hy148.com/Article_Show.asp?ArticleID=398; Yu Jianrong, *Zhongguo Xinfang Zhidu Pipan*, 2005 ZHONGGUO GAIGE 26; Zuo Weimin & He Yongjun, *Zhengfa Chuantong Yu Sifa Lixing*, SICHUAN DAXUE XUEBAO (2005), <http://justice.fyfz.cn/blog/justice/index.aspx?blogid=23325>; Isabelle Thireau & Hua Linshan, *The Moral Universe of Aggrieved Chinese Workers: Workers’ Appeals to Arbitration Committees and Letters and Visits Offices*, 50 THE CHINA JOURNAL 83, 87 (2003).

⁷ Minzner at 107.

⁸ Mainly, Minzner at 107, 176-77.

This paper argues that a more comprehensive analysis of contemporary and historical data indicates that both existing explanations are questionable. The more popular “judicial inefficiency” thesis contradicts a large body of evidence indicating that judicial litigation, for all its problems, gives petitioners a much higher chance of success than the opaque and unpredictable Xinfang system. There is also little evidence to suggest that petitioners have been misinformed or possess an incorrectly low opinion of the courts. In addition, while some scholars have suggested that the Xinfang system’s popularity is due to its ability to provide the public with a means of political participation,⁹ this hypothesis is unfounded: existing evidence suggests that the vast majority of Xinfang petitioners use the system for dispute-settlement, not to satisfy any psychological need to participate in policy-making.

As for the “anti-legal tradition” thesis, its proponents simply have their history wrong: First, the system that they consider the Qing equivalent of Xinfang, the “Jing Kong” (“Capital Appeals”) process, was, in fact, a judicial system. Moreover, judicial litigation was probably the most prevalent means of addressing administrative grievances in the Qing, even though institutions that more closely resembled the Xinfang system did exist. Moreover, available statistics concerning the use of Xinfang and administrative litigation in the Communist era suggest that a “habitual reliance on earlier Communist institutions” explanation is also inadequate. It does not fit into the history of the Xinfang system, and cannot explain why the use of judicial litigation rose rapidly after it became available, even as Xinfang petitions were decreasing in number, but then began to decline at the same time that Xinfang petitions began to increase.

In place of these existing explanations, I will propose a new and more subtle theory: the Chinese public dislikes administrative litigation because it uses procedures that are unfamiliar to them. In other words, it is not that they are unaccustomed to using *law* in administrative disputes, but only that they are unaccustomed to *some* law. A comparison of China’s current administrative litigation system with its more successful civil litigation system and with Qing legal traditions suggests that the source of people’s discomfort is very likely the more adversarial nature of modern administrative litigation. This largely stems from the administrative litigation law’s prohibition of mediation in administrative cases and its requirement that all suits receive a public trial. The Chinese public seems to both expect and prefer that its lawsuits, whether civil or administrative, adopt more paternalistic and less confrontational methods, if only in appearance: the judge should appear as a benevolent “Fu Mu Guan” (“father figure”) who is seeking to solve problems through the least intrusive way possible, not a cold arbitrator between two adversaries. The fact that the people are facing government officials in administrative litigation probably makes the lack of mediation seem even less desirable. Thus, the heightened adversarial nature of modern Chinese administrative litigation may very well deter people from filing their complaints with the judiciary. In comparison, the opacity of the Xinfang system and its noble rhetoric of “serving the people” probably seem much more comfortable, even though its non-legal nature causes more ambiguity and decreases accountability. This theory is, of course, ultimately based on historical analysis, but its use of history is hopefully more accurate than previous “anti-legal tradition” explanations.

⁹ Minzner at 172; Yongshun Cai, *Managed Participation in China*, 119 POLI. SCI. Q. 425, 427, 431 (2004); Luehrmann at 846.

Due to the lack of statistical data and appropriately crafted surveys, there is no way to directly prove this thesis by tapping the minds of petitioners. Nonetheless, since it readily agrees with existing evidence even as other conceivable explanations lead to sharp contradictions and problems, there is good reason to believe that it is correct. In any case, the length of this paper places many limitations on the depth of our analysis (for example, there is an obvious comparative angle with the “adversarial legalism,”¹⁰ to use Robert Kagan’s phrase, of the United States). A full study would likely take years of field research and end up book-length. This paper only seeks to comprehensively survey the existing data and academic literature and, upon that, propose a potentially more rewarding theory for future study. It has, I hope, much to offer. Apart from presenting a clearer picture of the numerical trends than has been done before, its criticism of the “judicial inefficiency” explanation is, to my knowledge, more systematic and thorough than previous scholarship, while the conclusions of its historical analysis are new, at least in the Xinfang context.

One important qualification must be made. Given the significant cultural, economic and social differences between different areas of China, what is true in the rural areas, where much of my data and discussion is focused, is not necessarily true of the major cities. For that matter, what is true in central China may be grossly wrong when applied to Guangdong. Xinfang petitioning might actually be more effective than litigation in a number of areas, and the causes of its popularity might vary from region to region. Nonetheless, this paper attempts to use national statistics and data whenever possible and avoids projecting local samples onto the national scale without careful comparison with other national statistics. In addition, while Chinese society varies geographically, its legal system and government bureaucracy is considerably more uniform and, after many centuries of centralized political unification,¹¹ it does make sense to speak of Chinese society as a somewhat homogeneous whole, although with emphasis on the “somewhat.” In any case, the explanations that I examine, criticize and advocate here are all attempts to theorize on the national scale. Thus, it is important to remember that these claims and conclusions, many of which have existed in academic circles for a long time, are all *approximations* when applied to the local level, and are probably better approximations in some geographical areas than others. Since this paper is presented as a reasoned proposal of a new theory, and not as a conclusive proof of it, it leaves open the possibility of future research that focuses more specifically and carefully on certain localities.

The paper is separated into four parts. Part One gives a basic description of the Xinfang and administrative litigation systems, using available statistics to outline how frequently they are used, and for what kinds of disputes. Existing scholarship has yet to describe the dramatic numerical contrast between Xinfang petitions and formal administrative litigation requests in clear terms, and this part seeks to fill in that void. Part Two refutes the “judicial inefficiency” explanation and a few other potential explanations that seem plausible at first, but can be straightforwardly debunked through statistical analysis. Part Three refutes all currently existent forms of the “anti-legal

¹⁰ ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* (2001).

¹¹ China has had unified central governments since the Qin Dynasty was established in 221 B.C. Since the Yuan Dynasty, which began in 1279, the only periods of non-centralized rule were in the Republican era (1912-1949).

tradition” explanation, examining how administrative disputes were settled in both the Qing and early Communist eras. Part Four proposes my own explanation and examines its validity in light of historical and contemporary evidence. A short conclusion follows.

Part One: Overview

State Council regulations dictate the establishment of Xinfang offices at all levels of government.¹² The most recent version of these regulations was issued in 2005, which only made cosmetic changes to the 1996 edition.¹³ They lay the basic groundwork for the Xinfang system, although local governments may provide their own, more detailed, regulations. According to the State Council, Xinfang offices exist so that “citizens, legal persons and other organizations” may “report situations or submit opinions, proposals or requests to the people’s governments at various levels or departments of the people’s governments at and above the county level” through “letters, telephone or personal appearance.”¹⁴ The offices thus maintain a “governance link” between the government and the masses.¹⁵ In a non-democratic country, the existence of such a link obviously plays an important part in the government’s political legitimacy.¹⁶

Xinfang offices now populate the entire spectrum of Chinese government, taking more than 10 million cases each year.¹⁷ Technically, the regulations permit them to handle virtually any kind of problem. These include four general categories: any “criticisms, proposals or requests for an administrative authority or its staff,” accusations that expose “violations of laws or negligence by the staff of administrative authorities,” “complaints against an infringement of the rights or interests of the complainant,” or, in the famously hazy language that Chinese laws and regulations often use, “other matters.”¹⁸ Since the two unambiguously defined categories, “violations” and “complaints,” both expressly deal with administrative misconduct, we can reasonably assume that the Xinfang system was mainly intended to be, in the words of Michael Palmer, an “administrative process[] for promoting administrative accountability.”¹⁹ Nonetheless, the other two vaguely worded categories technically allow for petitions that have nothing to do with administrative grievances. Such petitions were especially common in earlier decades. In 1996, for example, a complaint office in Tianjin reported

¹² Guowu Yuan Xinfang Tiaoli [Regulations on Complaint Reporting], Art. 1, (1996) [*hereinafter* 1996 Regulations]; Guowu Yuan Xinfang Tiaoli [Regulations on Complaint Reporting], Art. 1, 2005 [*hereinafter* 2005 Regulations]

¹³ Compare 2005 Regulations with 1996 Regulations.

¹⁴ 1996 Regulations, Art. 2; 2005 Regulations, Art. 2.

¹⁵ Minzner at 120.

¹⁶ See, e.g., Zheng Weidong, *Xinfang Zhidu Yu Nongmin Liyi Biaoda*, 33 SHANXI SHIDA XUEBAO 10, 11 (2006) (discussing how the Xinfang system is key to political accountability); Minzner at 174-75 (discussing how the social role of Xinfang offices is often similar to that of democratic participation in the United States); Yongshun Cai, *Managed Participation in China*, 119 POLI. SCI. Q. 425, 435 (2004) (discussing the importance of Xinfang to communication between the government and the people).

¹⁷ Minzner, *supra* note 5, at n.351. See also, ZHONGGUO FA LU NIAN JIAN [LAW YEARBOOK OF CHINA] 884, tbl. 6 (2002) (covering the years 1990-2001); Peng Jixiang, Qianxi Xinxingshi Xia Shesu Xinfang De Xingshi, Chengyin Ji Duice, <http://www.xx.gov.cn/develop/1342.html> (Mar. 16, 2006).

¹⁸ 1996 Regulations, art. 8. The 2005 version is worded differently, but means essentially the same thing. It removed the “other matters” category, but still allows petitioners to “make suggestions” to administrative bodies, which, technically, incorporates all kinds of everyday requests. 2005 Regulations, arts. 2 & 14.

¹⁹ Palmer, *supra* note 4.

a barrage of citizen complaints about the need for regulations for an open-air market in the residential area.²⁰ A more bizarre report came from Guangdong Province, where Xinfang officials reported that one of their “big cases” in 1984 was helping an anxious groom procure a place to hold his wedding ceremony.²¹

In recent years, however, Xinfang petitions seem to have converged on two less innocuous categories: appeals of judicial decisions (“she su shang fang”) and administrative grievances against the government. While official Xinfang statistics are frustratingly scarce and frequently imprecise,²² the prevalence of such petitions is unmistakable. In 2003, for example, around 40% of all Xinfang cases appealed the results of previous litigation, a number that was consistent with previous and later years.²³ These two main categories seem to have very little overlap. While there are no nation-wide statistics, a few counties do keep detailed records on the nature of litigation-related petitions. One such county reported that roughly 2% to 5% of litigation-related Xinfang petitions stemmed from administrative litigation, while the rest originated from criminal prosecution or civil disputes.²⁴ This figure makes sense on the national level too, as there are about 4 to 5 million “litigation-related” (“she su”) Xinfang petitions a year, but only 100,000 administrative litigation cases.²⁵

On the other hand, administrative disputes clearly constitute a very large portion of *all* Xinfang petitions: a 1996 report claimed that “concerns about clean government and cadre work style” alone constituted one third of all Xinfang petitions,²⁶ and there is good reason to suspect that this number has been even higher in more recent years. For example, in a 2004 survey of Xinfang petitioners, 87% of respondents claimed that their grievances were related to official corruption and abuse.²⁷ Even if statistically inflated, this nonetheless reveals the high frequency of corruption-related petitions. But even the one-third figure would place the number of administrative grievance petitions at over half of all petitions not related to previous litigation, which, as noted, cover around 60% of all cases. Indeed, since complaints about “clean government and cadre work style” are but one of many categories of administrative grievance petitions, which cover access to public services, taxation policies, and birth control, to list only a few, such petitions

²⁰ Luehrmann at 861.

²¹ *Id.*

²² Most notably, they do not define their terminology and never give concrete examples. Fortunately, some terms, such as “she su” (“related to previous litigation”) are fairly easy to understand. See discussion at Minzner, *supra* note 5, at n.349.

²³ These percentages are based on interviews with officials, who provide statistics on the total number of Xinfang petitions in the years around 2004, and reports issued by the Supreme People’s Court, which gives statistics on the total number of “She Su” petitions. Interview with Zhou Zhanshun, Director of the State Bureau of Letters and Calls, Nanfang Wang, Nov. 20, 2003, *available at* <http://www.southcn.com/news/china/zgkx/200311200686.htm>; Minzner, *supra* note 5, at n.351. *See also*, sources cited at *supra* note 17.

²⁴ Peng Jixiang, *supra* note 17.

²⁵ There are surveys that seem to contradict this claim. One particularly famous survey, conducted in 2004 by the renowned sociologist Yu Jianrong, stated that 87% of Xinfang petitioners who responded had some sort of administrative grievance, usually related to corruption, and that well over half of them had filed complaints with courts. Yu Jianrong, *Zhiduxing Queshi*, *supra* note 5. It is mathematically impossible that this is true of the entire Xinfang pool. Yu’s sample represents, at most, the situation among petitioners who have made their way to Beijing, which is a very small portion of the total petitioning population.

²⁶ Luehrmann at 863.

²⁷ *Id.*

probably account for at least 40 to 50 percent of all Xinfang cases, which would bring the total number of administrative Xinfang petitions to between 4 and 6 million a year. As noted above, the vast majority of such petitions were brought to the Xinfang offices without any prior litigation.

Once a petitioner has filed his complaint with a Xinfang office, he or she has virtually no control over how the office processes his complaint. Regulations demand that the office respond to all petitions it accepts within 90 days, but do not set forth any standard of proof, process of investigation, or transparency requirements.²⁸ Although responses must be in writing, there are no rules concerning what should actually be written, so offices are free to be as ambiguous as they like.²⁹ The vagueness of this decision-making process makes appeals to higher Xinfang offices, which are, of course, governed by similarly hazy regulations, highly difficult.

The lack of meaningful standards and rules of procedure clearly differentiate the Xinfang system from most modern legal systems. Moreover, a response from a Xinfang office only represents a government decision to either grant or refuse official aid, and cannot be seen as passing *legal* judgment on anything, even if the office is effectively expressing its own opinion on the legal (or administrative) validity of the petition. Ultimately, as one scholar put it, the system is distinctly non-legal (though not illegal, of course), representing “the rule of man (or Party), not the rule of law.”³⁰ And yet, as argued above, over 4 million administrative grievances annually ignore judicial alternatives in favor of this opaque system. The sheer scope of these numbers almost makes one wonder whether a judicial alternative to the Xinfang system actually exists. But that would be a rhetorical question. For many, if not most, of those administrative grievance petitions, the answer is clearly yes.

China’s National People’s Congress passed its Administrative Litigation Law (ALL) on April 4, 1989, allowing Chinese citizens, for the first time since the People’s Republic’s founding in 1949, to sue government officials who violated the law in the course of administrative activity.³¹ Prior to this, administrative disputes were largely settled through the Xinfang offices, but the ALL was intended to provide a more accountable and legitimate means of resolution.³² Unlike the Xinfang system, the ALL provided specific procedures of evidence gathering and clear standards of proof, which will be discussed in greater detail later on.

Although earlier drafts of the ALL attempted to limit the number of actionable administrative activities,³³ the final draft responded to academic criticism by expanding courts’ jurisdiction. It allows aggrieved citizens to seek redress in eight kinds of circumstances: first, when they refuse to accept certain administrative penalties; second, when they refuse to accept compulsory administrative measures such as the seizure of property; third, when they believe that an administrative organ has abused its managerial decision-making powers; fourth, when they believe that their application for a permit or

²⁸ 1996 Regulations, Arts. 31, 32.

²⁹ *Id.* at Art. 33.

³⁰ Minzner at 105.

³¹ ZHONGHUA RENMIN GONGHE GUO XINGZHENG SUSONG FA [ADMINISTRATIVE LITIGATION LAW OF THE PEOPLE’S REPUBLIC OF CHINA] [*hereinafter* ALL].

³² Susan Finder, *Like Throwing An Egg Against A Stone? Administrative Litigation in the People’s Republic of China*, 3 J. CHINESE. L. 1, 5-7 (1989).

³³ *Id.* at 27-28.

license is legally valid, but has been rejected or ignored by an administrative organ; fifth, when an administrative organ has refused or neglected to perform a legal obligated duty; sixth, when they believe that an administrative organ has failed to distribute a pension; seventh, when they believe that an administrative organ has illegally demanded the performance of duties; and, eighth, when they believe that an administrative organ has infringed upon other rights of person and of property.³⁴ Rule 12 of the ALL also defines three categories of administrative action that cannot be sued: issues of national defense and foreign relations; administrative rules, regulations, and decisions that have general applicability; administrative personnel decisions; and certain actions where, by law, administrative organs have the final say.³⁵

Clearly, these rules allow for a fairly broad range of administrative suits, covering corruption and abuse of power, failure to provide certain public services, and incorrect decisions that do not constitute an abstract regulation. Although the Supreme People's Court has interpreted the four Rule 12 exceptions to include all abstract regulations that apply to "an indefinite number of persons" and "can be applied multiply,"³⁶ they do not include attempts to enforce them. In some cases, courts may choose to ignore regulations that they consider illegal, as long as they do not actually declare them as such.³⁷

In addition to these basic categories of actionable activities, the law also notoriously requires the plaintiff to identify a "concrete administrative act" that led to the grievances.³⁸ An oft-criticized 1991 provisional Supreme People's Court interpretation (whose current validity is unclear) defined this term as "a unilateral action taken by an administrative organ exercising administrative authority against a specific person or organization, which involves the rights and obligations of that person or organization."³⁹ This would allow litigation over abuses of power, acts of personal corruption that have harmed the plaintiff's interests, virtually any type of actual enforcement or, indeed, any regulation that is aimed at specific persons or organizations. Thus, the only administrative actions that would be exempt are either those that have no practical impact outside of the government, or the establishment of abstract rules that are generally applicable to all. This does not seem to be much different from the Rule 12 exceptions discussed above.

While the Rule 12 exceptions and the "concrete act" requirement have proven, on occasion, to prevent potential litigants from going to trial,⁴⁰ such cases do not appear to happen too frequently. Based on statistics published by the Chinese judiciary, which, we may add, are most probably more accurate than Xinfang statistics, courts accept 75 to 80

³⁴ ALL sec. 11.

³⁵ ALL sec. 12.

³⁶ 中华人民共和国最高人民法院, 最高人民法院关于执行〈中华人民共和国行政诉讼法〉若干问题的解释 (Nov. 24, 1999).

³⁷ Pils, *supra* note 5, at 263, text surrounding n.83.

³⁸ ALL sec. 11.

³⁹ 最高人民法院关于贯彻执行《中华人民共和国行政诉讼法》若干问题的意见(试行), *available at* http://www.smjy.com.cn/dzts/6/Product6/Law/12_admin_Proceeding/11_synthesize/11_synthesize1020.htm. For academic criticism of this decision, see, for example, Huang Daoxun, *Jianshu Juti Xingzheng Xingwei de Gainian Renmin Fayuan Wang*, <http://www.chinacourt.org/html/article/200701/11/230363.shtml> (criticizing the definition for being too narrow).

⁴⁰ See, e.g., Pils, *supra* note 5, at 263-64.

percent of administrative litigation petitions filed with them.⁴¹ Perhaps more importantly for the purposes of this paper, complaints against “abstract rules” seem to constitute only a very small portion of administrative Xinfang petitions.⁴² Instead, as discussed above, these petitions generally focus on specific acts of official corruption, abuse, and negligence. When administrative regulations do come into play, they generally do so as part of the petitioner’s legal basis: the petitioners usually claim that officials misapply the rules, not that the rules themselves are wrong. This implies, of course, that many, probably most, administrative Xinfang petitions could also be brought to court as formal litigation petitions under the ALL. The overlap, as more than one scholar has noticed, is substantial.⁴³

Some will surely point out that there exists an alternative to both Xinfang petitioning and administrative litigation: administrative reconsideration, which allows petitioners to challenge a administrative organ’s decision or act by filing a complaint with it’s direct superiors. Unlike courts, these superiors possess the authority to review matters of abstract policy, and would seem to have greater expertise and competency than the judiciary. While it is important to acknowledge the existence of this alternative mechanism, it is ultimately not one of this paper’s central concerns, as it bears no direct logical connection to why people prefer Xinfang petitioning over litigation. In addition, administrative reconsideration is utilized even less frequently than litigation, with only 70,000 or so filings per year,⁴⁴ and does not seem to be a major factor in most administrative disputes.

Both Xinfang petitioning and litigation occur much more frequently, although petitioners decidedly prefer the Xinfang system, and in a very dramatic fashion. As noted above, the number of administrative grievances filed with the Xinfang offices is probably somewhere between 4 to 6 million a year, and increased every year from 1993 to 2003.⁴⁵ In comparison, the number of administrative litigation petitions filed with courts seems almost insignificant, at around 100,000 a year.⁴⁶ This number includes all petitions that were rejected in the first instance and did not even go to trial. In addition, the number of litigation petitions actually dropped after 1999, when they hit a peak of over 110,000. By 2004, the number had gradually declined to 92,000.⁴⁷ The contrast could not be any more vivid.

As with all Chinese statistics, these numbers do not present a completely accurate picture, although they are probably not too far off the mark. As the *New York Times* has reported in recent years, many litigation filings are rejected by court clerks without even

⁴¹ 2005 ZHONGGUO FALU NIAN JIAN [2005 LAW YEARBOOK OF CHINA] 1081.

⁴² Luehrmann at 863.

⁴³ Minzner at 120; Palmer at 175 (describing the Xinfang system as an “alternative” to the ALL).

⁴⁴ Qunian Woguo Xingzheng Fuyi Shuliang Shouci Xiajiang [Last Year, the Number of Administrative Reconsideration Cases Fell for the First Time], <http://law.shaanxi.gov.cn/shownews.asp?id=23952> (last visited June 14, 2008).

⁴⁵ Interview with Zhou Zhanshun, Director of the State Bureau of Letters and Calls, Ban Yue Tan [Bimonthly Discussion], Nov. 20, 2003, available at <http://www.southcn.com/news/china/zgkx/200311200686.htm>.

⁴⁶ 2005 ZHONGGUO FALU NIAN JIAN [2005 LAW YEARBOOK OF CHINA] 1066. This numerical comparison is also made by Ethan Michelson, *Causes and Consequences of Grievances in Rural China* 6-7, http://www.indiana.edu/~emsoc/Publications/Michelson_Dickinson.pdf (Mar. 28, 2004).

⁴⁷ *Id.*; Palmer at 179.

being formally recorded or considered.⁴⁸ This raises the likelihood that people may in fact attempt to use the litigation system more frequently than the official numbers suggest. The problem, however, is that existing data does not allow us to deduce *how much* more frequently. In the case reported by the *Times*, the litigating villagers were able to formally file a complaint in one court, but were turned down without any record in two others.⁴⁹ To complicate matters, we also know that many Xinfang offices also have a habit of turning away large numbers of petitions without record.⁵⁰ Combined, this limited set of data does not solidly support the inference that the ratio between administrative Xinfang petitions and litigation attempts is qualitatively different than (roughly) the 5 million to 100,000 figure discussed above. The actual figure might be, perhaps, 30 to 1 instead of 50 to 1, but that does not affect our claim that Xinfang petitioning dominates administrative disputes.

This is not to simplistically claim, of course, that, for every dispute brought to the courts, dozens more are filed with Xinfang offices, although that is certainly possible. Due to the scarcity of information, we do not know how many Xinfang cases, or, for that matter, how many litigation petitions, a single dispute can generate. As a couple of case studies on well-publicized Xinfang petitions demonstrate, however, the number is probably not high for either. The Ningxiang County petitioners described at the outset of this essay filed only one Xinfang petition with provincial authorities, and no more than a small handful in Beijing. An even more well-publicized case, the Faxi land and housing disputes, seemed to generate only one Xinfang petition, but led to several litigation requests. It seems safe to somewhat ambiguously assume that, of all administrative grievances that could be filed with both Xinfang offices and courts, the *vast* majority go to the former. Exact ratios do not matter as much as the overall trend, which is unmistakable.

These observations are consistent with a number of surveys that have been conducted over the past decade. A 1999-2001 survey in three southern provinces indicated that less than 10% of respondents would consider litigation or seek professional legal help if they ever had an administrative grievance.⁵¹ A 2002 study of around 4500 rural households produce even more extreme figures: only 2% of respondents claimed that they would consider approaching a lawyer or initiating a lawsuit to resolve a dispute.⁵² The lower figure may have been a result of the study's focus on rural areas, where people are probably more wary of the legal system.

What makes these trends even more eye-opening is the fact that the government has actually been trying to divert such grievances away from Xinfang offices and into the courts. State Council Xinfang regulations, whether in 1996 and 2005, have expressly stated that, when a petition is more properly resolved through the people's congresses, administrative reconsideration, or judicial litigation, Xinfang officials should reject the petition and transfer the case to the more appropriate government organ (including the courts).⁵³ While this happens quite rarely in practice, numerous government officials and

⁴⁸ Joseph Kahn, *When Chinese Sue the State, Cases Are Often Smothered*, NY TIMES, Dec. 28, 2005.

⁴⁹ *Id.*

⁵⁰ Yu Jianrong, *Zhiduxing Queshi*, *supra* note 5.

⁵¹ O'Brien at 76.

⁵² Ethan Michelson, *Causes and Consequences of Grievances in Rural China* 6-7, http://www.indiana.edu/~emsoc/Publications/Michelson_Dickinson.pdf (Mar. 28, 2004).

⁵³ 1996 Regulations, art.16.

judges have forcefully advocated the need to enforce this regulation more forcefully and channel more petitions into the courts.⁵⁴

Whether that would indeed be beneficial is an exceedingly complicated question, which must take into account not only the success rate of petitions, but also issues of government reputation, cultural compatibility, and so on. These normative concerns are not the focus of this paper, which seeks only to explain the phenomenon described above. While this paper is apparently the first to describe the numerical contrast between Xinfang petitions and formal litigation in clear terms, existing scholarship has noticed that the Xinfang offices are considerably more popular. A number of explanations have been circulated, which, as noted in the Introduction, largely fall into two categories. To these we now turn.

Part Two: The Relative Merits of the Xinfang and Litigation Systems

Perhaps the most prevalent explanation among scholars and other commentators who have analyzed the popularity of the Xinfang system is that it results from simple rational choice: formal legal channels, according to quite a few scholars, are simply inefficient and usually fail to solve the problem. This leaves the public with “no better recourse” than the Xinfang system.⁵⁵ The alleged problems are numerous: first, the system leaves too many loopholes that allow government authorities to unjustly influence the outcome of the litigation;⁵⁶ second, unlike the Xinfang system, judicial litigation does not allow multiple appeals;⁵⁷ third, courts have limited jurisdiction and are frequently unreceptive;⁵⁸ fourth, the cost of litigation is high;⁵⁹ fifth, local officials frequently attempt to discourage litigation through coercive methods, even through physical force;⁶⁰ sixth, they are only responsive to pressure from administrative superiors and may have little respect for court decisions.⁶¹ Existing criticisms of the administrative litigation system, I believe, generally consist of some combination of these six accusations.

None of them, however, constitutes a valid reason for rationally choosing Xinfang over litigation. Indeed, they are either logically unrelated, inaccurate, or can also be found in the Xinfang system and thus unhelpful. Let us run through them one-by-one: First, since there is no formal procedure and virtually no transparency in the Xinfang process, it would be impossible to argue that it is any more immune to unjust influences than the courts. Second, the fact that the Xinfang system allows multiple appeals does little to explain why the great majority of petitioners never even engage in administrative litigation at all. After all, it surely does no harm to litigate first, especially since formal litigation ensures appellants at least one obligatory review by a higher court. In fact, a

⁵⁴ See, e.g., <http://justice.fyfz.cn/blog/justice/index.aspx?blogid=23325> (discussing in general the government’s negative attitude towards Xinfang petitioning); <http://www.dffy.com/fayanguancha/sd/200508/20050827103045.htm> (discussing how judges are reluctant to receive Xinfang petitions); <http://scholar.ilib.cn/A-gjcgxyxb200406014.html> (expressing a government prosecutor’s desire to curb the amount of petitions).

⁵⁵ Minzner at 176-77.

⁵⁶ E.g., O’Brien, *supra* note 5, at 84.

⁵⁷ E.g., Ying Xing, *supra* note 5, at 58, 66-70.

⁵⁸ E.g., Pils, *supra* note 5, at 263-64.

⁵⁹ E.g., Ying Xing, *supra* note 5, at 66-70; Gu Guilin, *supra* note 5.

⁶⁰ E.g., Palmer, *supra* note 4, at 184.

⁶¹ E.g., Cai at 427; Pils, *supra* note 5, at 268.

formal court decision, even if unfavorable, gives Xinfang petitioners a firmer documentary basis for their claims, which can shorten the process and thus substantially lower petitioning costs. In particular, it allows petitioners to conform to the aforementioned requirement that they first pursue judicial means when possible,⁶² and thus avoid rejection on that basis. Third, even though the “concrete action” requirement can limit courts’ jurisdiction, the vast majority of administrative grievances that *can* be resolved through both Xinfang offices and formal litigation still go to the former. Jurisdictional limitations, therefore, do not explain much. In fact, Xinfang offices very frequently give petitioners a cold shoulder as well. This is especially common in Beijing, where petitioners are often booted back and forth between several reluctant offices before, if they are lucky, someone finally accepts their complaint.⁶³ Fourth, the cost of using the Xinfang system, as several scholars have pointed out, is also substantial.⁶⁴ Given the fact that the great majority of cases are conducted without legal assistance for either side,⁶⁵ litigation costs are probably not significantly higher than the transportation and organization costs that Xinfang petitions generally generate. Fifth, there is no reason why officials who will retaliate against litigation will refrain from doing so against Xinfang petitions. According to a survey of petitioners, well over half of the respondents had experienced some form of retaliation, either through seizure of personal property or through physical assault by local gangs who work for authorities.⁶⁶ Even if these are inflated statistics, they indicate a significant problem. Sixth, although local and provincial authorities have shown, on occasion, disrespect for judicial recommendations issued through the Xinfang system,⁶⁷ there is no evidence to show that any substantial number of formal legal decisions are left unenforced. Quite the contrary, surveys of administrative Xinfang petitioners who have already been in court indicate that barely 2% of complaints stem from enforcement failures.⁶⁸ This is consistent with numbers provided by Jilin Province, which reported that over 98% of administrative litigation decisions issued in 2004 were successfully enforced.⁶⁹ The extremity of these numbers suggests that, even if they are not entirely reflective of the national figures, judicial decisions are usually enforced. On the other hand, Xinfang offices frequently have problems enforcing their decisions.⁷⁰

Although the Xinfang and litigation processes share many of the deficiencies described above, in practice, they produce distinctly different rates of successful petition. Based on official numbers, over 20% of 2004 administrative cases resulted in a victory for the plaintiff.⁷¹ This does not take into account the large number of cases, around 30% of all cases, where the plaintiff withdrew his case prior to an official decision.⁷² Thus,

⁶² 1996 Regulations, art.16.

⁶³ Yu Jianrong, *Zhiduxing Queshi*, *supra* note 5.

⁶⁴ Cai at 444; <http://www.66wen.com/03fx/faxue/faxue/06812/32242.html>; Zhang Youzhi & Li Shiyuan, “*Yi Fa Zhi Fang*” *Yu Woguo Xinfang Zhidu De Gaige*, 2002 HUNAN SHEHUI KEXUE 63, 68.

⁶⁵ Li Hongbo, *Nongmin Shangfang, Falu Yuanzhu Yu Sifa Gongping*, 2007 ZHENGFA LUNCONG 25; Council on Foreign Relations, Access to Justice in China, <http://www.cfr.org/publication/15745/> (Apr. 16, 2008).

⁶⁶ Yu Jianrong, *Zhiduxing Queshi*, *supra* note 5.

⁶⁷ Pils, *supra* note 5, at 288.

⁶⁸ Yu Jianrong, *Zhiduxing Queshi*, *supra* note 5.

⁶⁹ 全省法院行政审判良性发展, JILIN RIBAO [JILIN DAILY], Apr. 21, 2003.

⁷⁰ *Baixing Gaozhuang Weihe Nan*.

⁷¹ 2005 ZHONGGUO FALU NIAN JIAN [2005 LAW YEARBOOK OF CHINA] 1065-67.

⁷² *Id.*

plaintiffs won around 30% of cases that reached a final decision, which is generally consistent with the overall trend since 1989.⁷³ Moreover, it seems reasonable to assume that at least *some* of the withdrawals were motivated by out-of-court settlements that satisfied the plaintiff.⁷⁴ Generally speaking, even if we assume that every plaintiff has a legitimate complaint and, in theory, *should* win the case, administrative litigation still offers them a somewhat low, but not entirely hopeless, chance of receiving an agreeable result. Of course, if they lose, they still get an official response that explains the decision in some detail, which may then serve as the documentary basis for further petitioning.

Although administrative litigation does not present very optimistic prospects for plaintiffs, it certainly offers *much* more hope than the Xinfang process. A commonly accepted statistic is that only 0.2% of Xinfang cases lead to successful resolution of the dispute.⁷⁵ No matter how you look at this figure or attempt to qualify it, it is shockingly low. Its credibility, however, is not easily challenged, since it was generated by a government-sanctioned project that had little incentive to make the Xinfang situation seem even worse than it was.⁷⁶ One possible counter-argument may be that there is significant “self-selection” going on: the hard cases go the Xinfang offices, while the easy ones go to the courts. This suggestion is rather implausible, since it would imply that “hard” cases outnumber “easier” ones by several dozen to one. Moreover, it is difficult to see how this “self-selection” works in real life. How can people intuitively determine which cases are too “difficult” for the courts when the vast majority of them never even attempt to litigate? The more reasonable conclusion is that, when administrative litigation is possible, as it frequently is, it is almost always preferable to Xinfang. Scholars who have argued otherwise have usually failed to consider either the 30% success rate of administrative litigation⁷⁷ or were not aware of the 0.2% figure, which, admittedly, was not available until three years ago.

In fact, it makes sense that litigation would yield a substantially higher chance of success. As argued in the previous section, litigation offers greatly superior procedure and clearer standards of judgment. In addition, judges are under greater mental pressure to “get it right,” since judicial decisions usually possess some kind of normative meaning: the judge is seen as passing legal, and sometimes moral, judgment on an administrative act. Few would claim that decisions made by Xinfang offices carry the same weight. We may reasonably assume that greater mental pressure leads to increased diligence and care. In addition, although China’s judiciary can hardly be considered an “independent” branch of government, it is at least somewhat less intertwined in administration than administrative organs themselves. Thus, while there is most certainly a great deal of

⁷³ 法治政府向我们走来, 中国经济导报 (June 29, 2004).

⁷⁴ See Kevin J. O'Brien & Lianjiang Li, *The Politics of Lodging Complaints in Rural China*, 143 THE CHINA QUARTERLY 756, 766 (1995) (arguing that administrative litigation can be used as an effective negotiation chip to generate desirable out-of-court agreements).

⁷⁵ See, e.g., Zhao Ling, 国内首份信访报告获高层重视, NANFANG ZHOUMO [SOUTHERN WEEKEND], Nov. 4, 2004; Minzner, *supra* note 5, at 106; Li Hongbo, *supra* note 61; <http://www.66wen.com/03fx/faxue/faxue/06812/32242.html>; <http://www.mzyfz.com/zzxd/2005/2005-1s/gd4.asp>; <http://justice.fyfc.cn/blog/justice/index.aspx?blogid=23325>. For other comments on the low effectiveness of Xinfang petitioning, see Palmer at 177; and Zhang Youzhi & Li Shiyuan, “Yi Fa Zhi Fang” Yu Wuguo Xinfang Zhidu De Gaige, 2002 Hunan Shehui Kexue (June Issue) 68.

⁷⁶ Zhao Ling, *supra* note 75.

⁷⁷ Minzner is a prime example of this. See also Tong Dahuan, 上访洪峰如何削平 (on file with author).

backdoor dealing and improper influence behind judicial decisions, Xinfang office decision-making probably boasts even more.

Strictly speaking, the administrative litigation system is not difficult to use. As noted, its jurisdiction requirements are fairly easy to satisfy as long as the government has actually taken concrete action against the plaintiff. Evidence gathering, unless the plaintiff demands that his own lawyer engage in discovery, is customarily conducted by the court.⁷⁸ The standard of proof for plaintiffs is the same as in civil cases.⁷⁹ The entire trial process is, as with most civil law legal systems, much more streamlined and simple than what American lawyers are accustomed to. This also lowers the need for lawyers to manage every step of the petition, although legal aid lawyers are often available at no charge.⁸⁰ All in all, administrative litigation is a reasonably accessible system that, as the statistics demonstrate so convincingly, is vastly superior to Xinfang petitioning in terms of success rate. And yet, the great majority of Chinese are apparently blind to this.

A few scholars have put forth a theory that can potentially explain why people still use the Xinfang system despite its extraordinarily low success rate. Xinfang petitioners, they argue, have more than just the resolution of their administrative grievance in mind when they file their complaints.⁸¹ They go to Xinfang offices because it allows them to speak directly to administrative staff and satisfy their psychological desire for political participation. In other words, the Xinfang system is popular because people not only care about resolve disputes over “the actions of individual officials in carrying out policy decisions, such as the construction of major hydroelectric projects,” but also “demand for participation in the process of drafting these policies in the first place.”⁸² Thus, even if the Xinfang system actually offers a substantially lower chance of actually resolving their disputes, people still use it because it allows them to at least formally participate in the making of political decisions. Intuitively, judicial litigation does not seem to possess this function.

While this explanation seems to make some theoretical sense, it cannot make sense of the general facts. It is important to remember that the great majority of Xinfang petitioners are not there to complain about general regulations or policies, but to seek redress for specific acts of administrative abuse or neglect.⁸³ First and foremost, they are there to protect their personal interests. Given that administrative litigation offers an exponentially higher chance of success in that regard, it is extremely unlikely that the desire for political participation would be sufficient to lure so many people away from judicial litigation. Moreover, the “political participation” theory, if we may call it that, cannot explain why more people do not pursue both Xinfang petitioning *and* litigation. After all, that would seem to offer the best of both worlds. Although the costs of Xinfang petitioning and litigation may prohibit many people from pursuing both simultaneously, there is, most probably, a significant number that do possess enough resources. Moreover, the cost of pursuing both is not simply the sum of engaging in both separately. As noted above, litigating first gives people a firmer documentary basis for further

⁷⁸ ALL at §§ 34, 35, 36.

⁷⁹ Finder at 23.

⁸⁰ Li Hongbo, *supra* note 61.

⁸¹ Minzner at 172; Cai Yongshun at 427, 431; Luehrmann at 846.

⁸² Minzner at 177.

⁸³ See text accompanying note 22 and Yu Jianrong, Zhiduxing Queshi, *supra* note 6.

petitioning, which can shorten the process and thus cut costs. This indicates that, even if the desire for political participation is widely prevalent, as long as we assume rational choice, we would still expect to see a fairly large number of them also pursue litigation. This, of course, is not true in reality.

What about the potential suggestion that people simply have the wrong impression? Can't they just believe that Xinfang petitioning is actually the more effective method? Even if this were true, we would still have to explain how that severely wrong impression came to exist in the first place, since irrational or factually wrong assumptions do not spring magically from thin air. In our present case, it seems unlikely that the dominant cause was simple misinformation. A recent study shows that people in both Beijing and poorer rural areas who have no litigation experience tend to have a generally *favorable* impression of courts.⁸⁴ Even so, the great majority of them (well over 90%), still refrain from litigating their personal grievances.⁸⁵ This suggests that misinformation about the effectiveness of courts is not a major cause of that reluctance.

In the end, the decision to eschew litigation is clearly counterproductive, while widespread misinformation seems unlikely. It is much more reasonable to assume, therefore, that the widespread dislike of litigation stems not from a rational evaluation of cost and benefit, whether based on correct or incorrect information, but from some “irrational” fear (I use quotation marks here to indicate that such fears may well be just as useful and prudent as more “rational” thought processes) that ignores and transcends cost-and-benefit analyses. “Irrational” fears are, of course, capable of distorting cost-and-benefit analysis. As several scholars, particularly Dan Kahan, have argued in recent years, when faced with a problem, people are much more likely to believe in solutions that appeal to their cultural worldview or subconscious personal preferences, which, in turn, are frequently shaped by historical traditions or social norms.⁸⁶ Thus, “cost-and-benefit analysis” is not a strictly rationale comparison of various measurable factors, but is instead heavily influenced by our inherent “prejudices” or “habits.” Not only can such habits compel a person to take a certain course of action even when he realizes, to some extent, that it is unreasonable, but they can also sway our reasoning in a more fundamental sense: they can make a habitually or culturally comfortable solution seem inherently more reasonable than its alternatives.⁸⁷ As a crude example, many children find themselves arguing vehemently (and usually earnestly) that spinach is nutritionally useless, even though their understanding of the food goes no further than their instinctual dislike of its taste. But it does not matter which kind of thought process is more prevalent among Xinfang petitioners: the key point is that most of them, indeed the great majority

⁸⁴ Ethan Michelson, *Popular Attitudes towards Dispute Processing in Urban and Rural China*, at 6, in *RULE OF LAW IN CHINA: CHINESE LAW AND BUSINESS* (Foundation for Law, Justice and Society, 2008), <http://www.fljs.org/uploads/documents/Michelson%231%23.pdf>.

⁸⁵ *Id.*

⁸⁶ Kahan's writings on this subject are extensive and fairly well known. See, e.g., Dan M. Kahan & Donald Braman, *Cultural Cognition and Public Policy*, 24 *YALE L. & POL. R.* 147 (2006). More information can be found at the Cultural Cognition Project, http://culturalcognition.net/index.php?option=com_content&task=blogsection&id=14&Itemid=90 (last visited, March 7, 2009).

⁸⁷ *Id.*

of them, most probably possess *some* sort of “irrational” fear. The challenge, of course, then becomes finding a reasonable source for this fear.

One possible cause of such “irrationality” is that people prefer to bring their petitions to the highest authorities possible, because they have a blind faith that higher-level government organs will be more sympathetic and less corrupted than local or provincial bosses. In some sense, distance generates a perception of beauty. Existing surveys do show that the public has a significantly higher opinion of the State Council and central Party and government organs than of provincial and local authorities. Thus, assuming that the Xinfang system offers easier access to these high authorities than litigation, people might very well prefer the former, even if, in reality, that would lower their chance of successful petition. At least one scholar has hinted that this kind of explanation might be helpful.⁸⁸ The problem is, however, that the “easier access” assumption is actually false. In reality, central authorities see only a very small portion of Xinfang petitions. For example, the Supreme People’s Court handled 147,665 petitions in 2004, whereas the entire judiciary, as argued above, handled at least 4 million.⁸⁹ Indeed, the Xinfang regulations expressly forbid bypassing local Xinfang offices in favor of direct appeals to higher authorities. Thus, access to these higher authorities is no easier under the Xinfang system than under the litigation system, especially since administrative litigants may often bring their original complaints directly to courts that are *one level higher* than the defendants.⁹⁰ If, for example, the target of the grievance was a county level official, the initial venue of both litigation and Xinfang petitioning would be at the city level. While one may appeal to higher level Xinfang offices if the city office is unhelpful, it is not like Chinese law does not allow legal appeals. The petitioner might even choose to litigate first, and then legally pursue Xinfang at a higher level. We have, of course, shown that this rarely happens.

A more popular theory, as noted in the Introduction, has been what I have called the “anti-legal tradition” explanation. Chinese people, some scholars argue, have a history of utilizing non-legal means to resolve disputes, both civil and administrative, and continue to do so out of cultural habit. In other words, they are simply not accustomed to using law in certain circumstances. These explanations have a broader sweep than necessary, since they suggest that Chinese people have historically avoided litigation for virtually any type of dispute, not just administrative grievances. The next Part seeks to demonstrate that, quite the contrary, China has a long historical tradition of utilizing law and litigation to resolve disputes, and that administrative disputes are no exception.

Part Three: Historical Precedents?

I. Qing Litigation Systems

It might be best to clarify at the very outset that I have absolutely no intention of arguing against the use of historical comparison in studying the Xinfang phenomenon. Quite the opposite, any culture-based explanation *must* rely at least partially on historical analysis, or else it carries no weight. The problem with existing scholarship is not that it seeks to find historical “precedents” for the popularity of Xinfang petitioning, but that its use of historical evidence is not sufficiently careful. This leads to a number of mistaken

⁸⁸ Yu Jianrong, Zhiduxing Queshi, *supra* note 6.

⁸⁹ Minzner at 160.

⁹⁰ Rule 8, <http://zhidao.baidu.com/question/30546084.html?fr=qr13>; ALL art. 14.3.

beliefs about China's legal traditions. Comparisons based upon these beliefs are, of course, misleading.

Several Chinese scholars, along with at least one western academic, have incorrectly highlighted the Xinfang system's non-legal nature as the cause of its popularity. To prove that the Xinfang system is "well-rooted" in Chinese historical tradition, they then seek to demonstrate that Chinese people have historically preferred the "rule of man" ("ren zhi") to the "rule of law" ("fa zhi"),⁹¹ and that traditional Chinese governments sought to resolve criminal, civil and administrative problems through "administrative," not "legal," means.⁹² Despite the sweeping nature of these claims, their proponents have yet to provide a detailed analysis of Chinese legal history to back them up, and what evidence they do offer usually comes in the form of broad generalizations. Such generalizations generally fall into three categories, all of which, as I will now explain, have fairly crippling factual or logical problems.

As noted above, proponents of the "anti-legal tradition" explanation tend not to distinguish between administrative grievances and other causes for litigation, including civil disputes. To meet their claims head-on, my counter-arguments will first discuss the Qing legal system in more general terms, and then turn specifically to administrative litigation after I have dealt with the third category.

The first category includes observations that the Qing government did not have a fully independent judiciary.⁹³ This observation stems, of course, from the fact that local government magistrates performed both administrative functions, such as tax-collecting and labor regulation, and legal functions, which included hearing all criminal, civil, and administrative disputes within his geographical realm of governance. At least one scholar has used this to argue that the way these traditional governments resolved disputes was more "administrative" than "legal." That is, its goal was more to solidify social order and ensure good governance than to pass legal judgment.

There are a number of problems with this argument. First of all, it takes an overly simplistic view of local-level adjudication. As historians have realized for some time, the great majority of local-level cases that were not criminal were not handled by the magistrate himself.⁹⁴ Instead, he left them to clerks and assistants who specialized in legal work. This was largely due to necessity: most local-level magistrates had very limited knowledge of the law, while the clerks and assistants were usually highly experienced specialists. Perhaps due to some commendable acknowledgement of his own limitations, the magistrate almost never intervened in their work unless it triggered a public outcry.⁹⁵ In addition, bureaus and officials that specialized in judicial affairs, both formally and in practice, did exist at higher levels of government, such as in the provinces or in Beijing, where the Ministry of Punishments (Xing Bu) was located.⁹⁶ Thus, one could argue that, in effect, the Qing did have a specialized "judiciary" at all

⁹¹ See sources cited *supra* note 6.

⁹² Minzner uses these terms at 111-13.

⁹³ *Id.*

⁹⁴ TUNG-TSU CH'U, LOCAL GOVERNMENT IN CHINA UNDER THE CH'ING 118-19 (1988).

⁹⁵ *Id.*

⁹⁶ Nancy E. Park, *Corruption in Eighteenth Century China*, 56 JOURNAL OF ASIAN STUDIES 967, 986 (1997).

levels of government. This “judiciary” was not, of course, fully “independent” in the modern American sense, but neither is the modern Chinese judiciary.⁹⁷

More importantly, the fact that a single official performs both administrative and legal duties does not mean that those duties are indistinguishable from or interfere with each other. In fact, the opposite was true. The Qing government treated laws quite differently from administrative decisions. Unlike the latter, laws were supposedly immutable, “not to be changed in ten thousand generations.”⁹⁸ The *Qing Code* could only be formally changed through legally defined procedures, which occurred only once, in 1725.⁹⁹ In addition, as historians have long realized, legal decision-making in Qing courts was rigorously regulated by formal procedural rules, standards of evidence, and fairly systematic definitions of actionable misconduct. Indeed, one of the main tasks of Qing appeals courts was determining whether lower courts had applied “fair judicial procedure” in their investigation and decision-making.¹⁰⁰ As in the West, Qing courts were directed to “ascertain the facts of a case after a careful investigation of physical evidence, interrogation of the litigants and witnesses, and so on.”¹⁰¹ We now know that there were legal limitations on how much torture could be used to obtain testimony, formal categorization of evidence, including oral testimony, physical evidence, official autopsies and expert examination, documentary evidence, and others.¹⁰² Trials and presentation of evidence were generally open to the public, and thus had a certain theatrical element.¹⁰³ All of these procedural rules significantly limited the amount of administrative discretion officials could wield, and thus served to formally separate their administrative duties from their legal ones. Moreover, they were nominally *required*, with no exceptions, to give citations to the *Qing Code* for every judicial decision they made.¹⁰⁴ The message was quite obvious: legal decisions were, at least formally, supposed to be based on *law*, not administrative necessity. Qing law clearly drew a distinct line between the government’s judicial functions and its administrative functions, and local level officials were expected to understand this distinction even as they performed both. This was not lost upon the general population, as the emergence and high popularity of “litigation masters” in the mid and late-Qing demonstrates quite vividly: people knew that legal proceedings were a separate realm of affairs that needed special expertise.¹⁰⁵

Studies published over the past decade or so have demonstrated that these legal regulations were not merely formalities that could be readily ignored in practice. Instead, officials did adhere to formal procedure when presiding over cases. A well-known 1996

⁹⁷ One of the most famous articles criticizing the Chinese judiciary’s lack of independence is He Weifang (贺卫方), ‘Eight great difficulties with judicial reform (*Sifa gaige de ba da nanti*, 司法改革八大难题), (Apr. 2003, 2001) <http://www.legaltheory.com.cn/info.asp?id=3444>.

⁹⁸ HUANG ZONGZHI, QINGDAI DE FALU, SHEHUI, YU WENHUA: MINFA DE SHIJIAN YU BIAODA 226 (1996)
⁹⁹ *Id.* at 225.

¹⁰⁰ Jonathan K. Ocko, *I’ll Take it All the Way to Beijing: Capital Appeals in the Qing*, 47 J. OF ASIAN STUDIES 291, 293 (1988).

¹⁰¹ Robert M. Marsh, *Weber’s Misunderstanding of Traditional Chinese Law*, 106 THE AMERICAN JOURNAL OF SOCIOLOGY 281, 289 (2000).

¹⁰² 10 ZHONGGUO FAZHI TONGSHI [A COMPLETE HISTORY OF CHINESE LAW] 816 (1999).

¹⁰³ *Id.* at 80.

¹⁰⁴ DERK BODDE & CLARENCE MORRIS, *LAW IN IMPERIAL CHINA* 174 (1967).

¹⁰⁵ Melissa A. Macauley, *Civil and Uncivil Disputes in Southeast Coastal China, 1723-1820*, in *CIVIL LAW IN QING AND REPUBLICAN CHINA* 89-92 (Kathryn Bernhardt & Philip HUANG eds. 1994).

study published by Philip Huang demonstrates that, based on a sample drawn from three counties, decisions in civil disputes were generally consistent with legal rules and did not seem to be unduly influenced by administrative concerns.¹⁰⁶ Legal decisions also employed the rhetoric of logical causation, attempting to present their conclusions as logical consequences of legal principles.¹⁰⁷ This suggests that Qing magistrates considered themselves bound by the law, and that they recognized the difference between their administrative and legal duties. In fact, quite a few Qing scholars argued that hearing litigation disputes, being the key to social harmony, was the *most* important duty of a local magistrate.¹⁰⁸

The second kind of evidence that proponents of the “anti-legal tradition” explanation have presented focuses on the large amount of anti-litigation rhetoric historically issued by both the government and by a large number of Confucian scholars, who very often were, of course, officials themselves.¹⁰⁹ Such rhetoric seems to suggest a historical tradition of avoiding legal solutions to disputes, which might explain why modern Chinese prefer Xinfang petitioning to litigation. As Confucius himself put it, the ideal government was not one that effectively resolved all litigated disputes, but one that managed to “have no litigation.”¹¹⁰ This ideal eventually became so popular among educated scholars that the emperor himself occasionally would express a desire to curb litigation.¹¹¹ The Qing emperor Jiaqing, for example, once issued an edict instructing his officials on “extinguishing litigation and bringing peace to the common people.”¹¹² The most obvious problem with using these statements to explain the Xinfang phenomenon is that they do *not* advocate resolving disputes through a non-legal, but nonetheless government-oriented, system like Xinfang petitioning. Instead, they advocate resolving the dispute before it goes into any kind of government appeals process. Confucian scholars and bureaucrats who followed the “anti-litigation” ideal strived to provide enough moral education to the general public so that *no* disputes would have to be formally resolved through government arbitration.¹¹³ The modern Xinfang system would most likely be no better than formal litigation in the eyes of these men. Thus, their statements provide no historical “precedent” for that system’s popularity.

In addition, despite the wide popularity of anti-litigation rhetoric, “common people” still brought a considerable number of suits into court each year. While existing academic estimates on the volume of Qing litigation varies wildly, most historians agree that the total number of cases was not insignificant.¹¹⁴ According to the records of one Qing magistrate, on a particularly busy day, he would “receive one or two thousand litigation petitions. Even on less busy days, the number would often surpass 1200 or

¹⁰⁶ HUANG at 75-106.

¹⁰⁷ Guangyuan Zhou, *Illusion and Reality in the Law of the Late Qing: A Sichuan Case Study*, 19 MODERN CHINA 427, 435 (1993).

¹⁰⁸ HUANG at 190 (1996).

¹⁰⁹ E.g., Li Wenling, *supra* note 6; Yu Jianrong, *Zhiduxing Queshi*, *supra* note 6.

¹¹⁰ Confucius 12.13.

¹¹¹ Melissa A. Macauley, *Civil and Uncivil Disputes in Southeast Coastal China, 1723-1820*, in CIVIL LAW IN QING AND REPUBLICAN CHINA 89-92 (Kathryn Bernhardt & Philip HUANG eds. 1994); Li Wenling, *supra* note 6; HUANG at 189-92.

¹¹² Macauley at 90.

¹¹³ See, for example, the Wang Yangming example used in the Li Wenling essay.

¹¹⁴ Compare HUANG at 163-72 with Macauley at 88.

1300.”¹¹⁵ Since the local government accepted litigation documents for 72 days each year,¹¹⁶ the total number of litigation petitions received yearly by that magistrate would reach 100,000. Other documents indicate a much lower number: an average county might receive anywhere from 200 to 500 civil cases a year, while the volume of administrative litigation was about 40% of that.¹¹⁷ Considering the extremely wide gap between these estimates, the reality probably lies somewhere in the middle. In any case, even proponents of the lower figures agree that Qing people displayed, to some extent, an increasing eagerness to litigate.¹¹⁸ If an average county took in 490 new cases, civil and administrative, during a given year, it would mean that one family in roughly every fifty had brought a new suit into court.¹¹⁹

All in all, these numbers are lower than what the United States is accustomed to, suggesting that common people did indeed dislike litigation, but not severely enough to prevent them from litigating when necessary. Confucian anti-litigation rhetoric was, therefore, somewhat effective, but certainly not as influential as its advocates would have liked. Moreover, as noted above, the nature of rhetoric suggests that its effect would not merely have been to discourage litigation, but to discourage people from seeking official intervention of *any* kind. In fact, the reason Confucian scholars singled out litigation for attack was probably that it was the most common means by which people approached the government. As Philip Huang has famously argued, when common people finally made up their minds to seek government intervention, they generally did so through filing a formal legal complaint, which initiated the entire process of judicial decision-making that we have discussed in some detail, and not through seeking non-legal administrative intervention.¹²⁰

The third type of argument some have made in favor of the “anti-legal tradition” thesis is comparison to the Qing’s legal appeals system, which allowed litigants to pursue a virtually unlimited number of appeals, potentially culminating in a “capital appeal” (“jing kong”) directly to the emperor himself. Some have argued that this system contained “the seeds” of Xinfang petitioning, highlighting the fact that the latter also allows an unlimited number of appeals.¹²¹ Such arguments, however, fail to address the fact that, apart from allowing multiple appeals, the Qing appeals system shares very few similarities with Xinfang petitioning. First and foremost, Qing appeals courts, like local courts and, indeed, the overall litigation system in general, were distinctly legal in nature. As noted above, each level of appeals court reviewed lower-level decisions by the same process and criteria: no improper procedure, no recantations of testimony, no illegal torture, and so on. Capital appeals were obviously different, as the emperor himself was not formally bound by rules of procedure of defined legal standards, but he generally did not, in fact, pass judgment. Instead, his role was to determine whether the appeal had sufficient merit and then, if it did, either dispatch an imperial agent to conduct hearings or

¹¹⁵ Macauley at 88.

¹¹⁶ HUANG at 163.

¹¹⁷ Based on numbers in HUANG at 24, 164, 167.

¹¹⁸ HUANG at 171.

¹¹⁹ *Id.*

¹²⁰ HUANG at 75, 172.

¹²¹ *E.g.*, Minzner at 114; <http://justice.fyfc.cn/blog/justice/index.aspx?blogid=23325>; *see also*, Isabelle Thireau & Hua Linshan, *The Moral Universe of Aggrieved Chinese Workers: Workers' Appeals to Arbitration Committees and Letters and Visits Offices*, 50 THE CHINA JOURNAL 83, 87 (1988).

direct the provincial governor to re-hear the case.¹²² Since these officials were bound by formal “trial rules” that applied “long-established principles” from provincial appeals, capital appeals were most certainly not a procedure and regulation vacuum like the modern Xinfang system is.¹²³ Moreover, at any level in the appeals process, the appeals court’s decision still took the form of an official judgment, not an administrative decision on whether to extend government aid to the litigant’s grievance.

Some have also argued that the Qing appeals system served certain administrative functions, and was therefore partially administrative in nature. Certainly, appeals to higher levels of authority did help the central government gather information about the performance of local-level adjudicators, and Qing officials were indeed subject to “performance reviews” on their handling of judicial litigation.¹²⁴ However, the existence of two administrative side-effects does not make the entire appeals system non-legal. In fact, the modern Chinese judicial system serves similar information-gathering functions, and modern judges, like their Qing counterparts, are rewarded or reprimanded based on their trial record. Yet no one would venture to argue that the modern Chinese judiciary is a hybrid administrative-legal organ. Ultimately, the best modern analogy to the Qing appeals system is simply the current appeals system, not an administrative organ like the Xinfang offices.¹²⁵

In addition, although the level of capital appeals increased throughout the 19th Century, they peaked at about two thousand per year.¹²⁶ In comparison, the entire judicial system took around 700,000 cases annually.¹²⁷ Thus, even if the number of capital appeals was still large enough to severely burden the central government,¹²⁸ it was actually only a tiny fraction of the total judicial workload.¹²⁹ Although the total number of provincial-level appeals has yet to be systematically estimated, it seems safe to tentatively assume that it was relatively low as well, especially since a substantial number of appellants circumvented the provincial court and went directly to Beijing.¹³⁰ This suggests that the great majority of cases were resolved at the local level and, therefore, that the Qing tolerance of multiple appeals was significantly less important to the overall functioning of its legal system than some have assumed. Thus, even if this tolerance can be considered a cultural tradition that finds its current reincarnation in the Xinfang system, it is altogether not significant enough to explain that system’s enormous

¹²² Ocko at 296.

¹²³ *Id.* at 299.

¹²⁴ Minzner at 112.

¹²⁵ Ocko himself compares the capital appeals process to the widespread use of Xinfang offices in the late 1970s to redress political grievances suffered during the Cultural Revolution. It is worth noting, however, that administrative litigation did not yet exist in China at that time, so Xinfang petitioning would have been the *only* possible comparison.

¹²⁶ Ocko at 298 (at an average of over 100 per province, the national total would come to about 2000, since there were 18 provinces).

¹²⁷ This figure is obtained by assuming that, as previously explained, the average county received around 490 new cases per year. Since the average county had around 300,000 people, while the entire population during the 19th Century hovered at around 400,000,000, the total number of cases nationwide would have been approximately 700,000. This is, of course, a very rough estimate, and the real number may be as low as half of this (assuming that the average county received only 150 to 200 cases), or several times higher.

¹²⁸ See Ocko at 294-98.

¹²⁹ This point is also made by Park, *supra* note 92.

¹³⁰ *Id.* at 297-98.

popularity. Similarly, the Qing capital appeals system was simply not used frequently enough to warrant consideration as one of China's key legal traditions.

Although the discussion above has been organized as a three-part refutation of existing "anti-legal tradition" explanations of the Xinfang phenomenon, it also gives a fairly clear overview of the Qing litigation system: even though it often shared personnel with the government's administrative organs, it was unmistakably legal in nature, a fact that both officials and common people generally acknowledged. While this observation is certainly useful enough, this paper's focus on administrative grievances makes it logically necessary to go one step further by focusing on Qing *administrative* litigation. After all, it is at least conceivable that administrative disputes were a special area, in which the social and political ramifications of suing an official made litigation seem especially undesirable. Thus, even if people were willing to let the government operate through litigation in other kinds of disputes, they may well have demanded that the government provide alternative, less formal means of resolving administrative grievances. While no one has made this specific argument yet, I will still attempt to preempt it.

The Qing criminal code allowed commoners to bring allegations of official misconduct to both local magistrates and higher authorities in the provincial or central government.¹³¹ Since the Qing had no separate civil code or administrative law, instead laying out all causes for prosecution or litigation in its criminal law, these administrative actions had virtually the same legal status as civil litigation. Both were initiated through the filing of written statements with a judicial court, and went through comparable phases of investigation and adjudication. The procedural rules and requirements of legal citation described above were generally applicable to all suits under the criminal code, and thus applied to administrative litigation with no exception. The central government actually took extra care to maintain the objectivity and fairness of administrative litigation. If an official was obligated to adjudicate a case involving misconduct by those directly under his supervision (whose actions he was also responsible for), he would receive no more than some very light disciplining as long as he ensured a fair trial.¹³² Such guarantees helped maintain the separation between the government's legal and judicial functions.

As with China's current administrative litigation system, a fairly wide array of government misdeeds could be sued, including disputes over state financial practices and, of course, alleged acts of personal corruption.¹³³ All usual routes of judicial appeal, including the capital appeals, were open to administrative suits. In fact, the capital appeal was theoretically off-limits to civil disputes,¹³⁴ giving administrative litigation an additional level of review. While, as argued above, such review was rarely utilized in practice,¹³⁵ it was nonetheless an attempt to increase the accountability of administrative adjudication. Generally speaking, administrative litigation had essentially the same legal status and procedures as civil litigation, with a few more safeguards against unjustified administrative influence. It bears virtually no resemblance to the current Xinfang system.

¹³¹ Park, *supra* note 92.

¹³² Ocko at 299.

¹³³ Park, *supra* note 92; Ocko at 300.

¹³⁴ Ocko at 293.

¹³⁵ As noted both above and below, the total number of administrative cases received each year would likely have been around 200,000, while there were only around 2000 capital appeals. Thus, even if all capital appeals were administrative ones, a highly unlikely scenario, they still would only have constituted 1% of all administrative cases.

The main difference between civil and administrative litigation was that, in practice, the central government actually encouraged the latter, whereas it disliked the former. As a Nankai University professor has argued, Ming and Qing governments saw administrative litigation as a fairly effective way to control lower level official activity, and made no effort to discourage its use of commoners.¹³⁶ Thus, their use of Confucian “anti-litigation” rhetoric was often limited to civil disputes. This led to a fairly large number of administrative suits. While we have no nationwide figures, a case study of several counties indicates that administrative litigation consistently constituted around 10 to 15 percent of new cases throughout the later Qing and early Republican eras, and about 30% of non-criminal (civil and administrative) litigation.¹³⁷ This would have brought the total number of administrative cases to around 200,000. During peak years, administrative grievances could even outnumber civil litigation.¹³⁸ These numbers are, of course, strikingly different from what the current judiciary faces: over the past decade, courts received around 4 million civil cases a year, but only 100,000 administrative suits. There is no apparent continuity with Qing practice.

The Qing government actually did possess an administrative agent similar to modern Xinfang offices. This was the imperial censor, who monitored the performance of government agents at all levels, and also provided the emperor with commentary on particular government actions, including individual legal decisions.¹³⁹ The censor could move for imperial intervention in local government activities and, due to his high status, was frequently asked to personally participate in everyday decisions at various levels of the bureaucracy.¹⁴⁰ By the Qing, imperial censors were present in most major provinces, and led a large staff that permeated every level of government, effectively forming a nationwide “network” of inspectors.¹⁴¹ Common people were allowed to approach these inspectors, present administrative grievances, and seek redress.¹⁴² The decision-making of these censor offices was not formally regulated by procedural law; while their decisions, like those of Xinfang offices, did not constitute formal legal judgment. In all these ways, imperial censors resembled modern Xinfang offices much more closely than any Qing judicial system. This resemblance, however, does not extend to rate of use. Historians have yet to publish any evidence indicating that these censors were approached by petitioners with much frequency. While scholars have noted that the capital appeals system was frequently overburdened, no one has made a comparable claim about the censors. Quite the contrary, the censor system seemed to have fallen into disuse by the end of the dynasty, largely due to government negligence.¹⁴³ It is hard to

¹³⁶ 侯欣一, 清代南方地区民间健讼问题研究—以地方志为中心的考察, 法学研究, available at <http://www.law-culture.com/showNews.asp?id=14440>.

¹³⁷ HUANG at 24, 167.

¹³⁸ *Id.* (especially during the 1830s).

¹³⁹ Laura Luehrmann, *Officials Face the Masses: Citizen Contacting in Modern China*, 23-24 (2000) (unpublished Ph.D. dissertation, The Ohio State University) (on file with The Ohio State University Main Library).

¹⁴⁰ ZHANG JINFAN, *ZHONGGUO FALU DE CHUANTONG YU JINDAI ZHUANXING* 186-88, 318 (1997); Zhang Yinli, *Qianxi Zhongguo Gudai Xingzheng Jiandu Zhidu*, 24 *HEFEI XUEYUAN XUEBAO* 127 (2007) (discussing the broad range of powers delegated to censors); Zhang Jingjing, *Qingdai Qinchai Dachen Cunzai Yuanyin Tanxi*, 42 *HENAN DAXUE XUEBAO* 68 (2001).

¹⁴¹ *Id.*

¹⁴² See, e.g., Zhou, *supra* note 93, at 434; Luehrmann, *supra* note 124.

¹⁴³ Zhang Yinli, *supra* note 125; Zhang Jingjing, *supra* note 125.

imagine how this could have happened if it had been receiving a large number of petitions. The existence of a Qing institution that closely resembled the Xinfang system but was largely ignored by the general public drives home our point that the Xinfang phenomenon can find no precedent in Qing legal history.

II. Communist Origins?

What about more recent history? In particular, could the Communist Party's reliance on the Xinfang system during earlier phases of the PRC have created some kind of path-dependency on that institution?¹⁴⁴ After all, for over four decades after the PRC's creation, the Xinfang system was the *only* way to resolve administrative disputes apart from internal review. It only seems natural that people would have continued to use that institution out of pure habit, even after a new and, frankly, far better way to resolve administrative grievances had been established in the form of the ALL. While this explanation makes quite a bit of intuitive sense, it has its own share of problems.

First and foremost, the history of the Xinfang system suggests that it has not had enough time to develop into an important "habit" of the general public. This claim probably seems very odd, since four decades is certainly not a short period of time. The problem is that the system's development was not linearly upward during that period. Instead, the Cultural Revolution forced the system, which was considered a "bourgeois practice," into general disuse for over a decade.¹⁴⁵ As scholars have noted, during the Cultural Revolution, most Xinfang offices were simply shut down. Others existed in name, but did not engage in anything that could be called "working with the masses."¹⁴⁶ This decade-long vacuum has led several scholars to place the beginning of the current Xinfang tradition in the 1980s, and not in the 1950s when the system was formally established.¹⁴⁷ Even after the offices were eventually reestablished during the 1980s, their work consisted mainly of abnormal political grievances accumulated during the Cultural Revolution. Normal administrative disputes and litigation-related petitions did not become the bulk of their work until the late 1980s. Thus, in 1989, when the ALL was passed, Xinfang offices had been in normal operation for no more than four or five years. Preceding those years was a prolonged period of political chaos in which people had access to neither legal nor administrative redress to their administrative grievances. Thus, even if habitual reliance on the Xinfang system did exist when administrative litigation became available, it had yet to become deeply entrenched in the Chinese public's socio-political life. This weak reliance does not seem capable of explaining the enormous preference for Xinfang petitioning over litigation that the public currently displays.

Second, the comparison with the civil litigation system suggests that something more than simple anti-legal path dependency is at work here. Prior to a series of legal reforms carried out in 1979, civil disputes in China were primarily resolved through government-authorized mediation committees, set up under a 1954 law concerning the establishment of "People's mediation committees."¹⁴⁸ Mediators were elected by public

¹⁴⁴ Suggestion was made in Minzner at 107.

¹⁴⁵ Luehrmann, *supra* note 3, at 852-54.

¹⁴⁶ *Id.* at 853.

¹⁴⁷ See, e.g., *id.*; Isabelle Thireau & Hua Linshan, *The Moral Universe of Aggrieved Chinese Workers: Workers' Appeals to Arbitration Committees and Letters and Visits Offices*, 50 CHINA JOURNAL 83, 86 (2003).

¹⁴⁸ Lo at 123.

representatives or by local people's congresses, and could be replaced if negligent towards their duties. Few formal rules governed their investigatory and decision-making powers, but they were not allowed to issue punishment or force a party to participate in mediation.¹⁴⁹ Like the Xinfang system, this non-legal means of dispute resolution remains in widespread use even today: in 1998, these committees handled around 5,267,000 cases, although this number had declined to around 4,414,233 by 2004.¹⁵⁰ But the similarities end here. Once legal reforms in 1979 made civil litigation a realistic option, the number of civil disputes skyrocketed, growing from around 300,000 cases in 1978 to 3,375,069 in 1998, and then to well over 4 million by 2004.¹⁵¹ While litigation is still used somewhat less frequently than official mediation, the contrast is nowhere near as large as the difference between administrative litigation and Xinfang petitioning. Of course, the reasons behind civil litigation's booming popularity are probably extremely complicated, but there is no need to examine them here. My point is merely that, since earlier Communist reliance on non-legal means in civil dispute-resolution did not generate a strong enough "path-dependency" to prevent the widespread use of civil litigation, there is no apparent reason why earlier Communist reliance on Xinfang petitioning could have blocked the prevalence of administrative litigation.

Finally, if path-dependency is really the main cause of the Xinfang phenomenon, then we would expect the use of administrative litigation to display one of two numerical trends: either the habitual reliance of Xinfang petitioning is so strong that it keeps litigation at a consistently low level, that is, without much growth at all; or there is some slow, but steady growth as people eventually overcome their path-dependency to take advantage of the superior effectiveness of litigation. The actual numbers follow neither of these scenarios. Instead, administrative litigation swiftly rose in popularity during the first few years of its existence, peaked in 1999, but has experienced decreasing or stagnating popularity ever since.¹⁵² In comparison, the number of Xinfang petitions actually decreased during the late 1980s and early 1990s,¹⁵³ but then began a prolonged period of sustained growth after 1993.¹⁵⁴ These trends do not fit in well with a "habitual reliance" explanation and, instead, suggest that people were eager to try out the new litigation system after its establishment, but then abandoned it after experiencing some sort of discomfort (but not relative lack of effectiveness, as argued above).

Part Four: Towards a New Explanation

The previous discussion narrows down the field of potential explanations quite severely: we have ruled out path-dependency on Communist-era institutions, any attempt to identify a powerful anti-litigation tradition in Chinese history, and all claims that litigation is less effective than Xinfang petitioning. This leads to the following conclusions: something about the administrative litigation system makes the Chinese public uncomfortable, driving it away even though litigation is objectively more effective than the Xinfang system. This cannot, however, simply be the fact that litigation is a

¹⁴⁹ For an overview of the few rules that did exist, see *id.* at 132.

¹⁵⁰ *Id.* at 133-34; see also Allcountries.org, 2005, China Statistics 23-9, http://www.allcountries.org/china_statistics/23_9_number_of_civil_disputes_mediated.html.

¹⁵¹ Lo at 118; 2005 ZHONGGUO FALU NIAN JIAN 1064.

¹⁵² Palmer at 179.

¹⁵³ Luehrmann, *supra* note 3, at 856-57.

¹⁵⁴ <http://www.china.org.cn/chinese/2003/Nov/446032.htm>.

judicial process. Instead, it is necessarily found in the ALL's content, in the way administrative litigation is set up. As the Qing's legal history and the current popularity of civil litigation demonstrate, Chinese people are perfectly capable of accepting certain kinds of litigation systems, even administrative litigation systems. But what aspect of the ALL makes it so unpopular? The best way to approach this is probably by comparing the ALL with litigation systems that have gained, or used to gain, popular acceptance.

There are actually few procedural differences between the ALL and the civil litigation system.¹⁵⁵ Definitions of jurisdiction and venue are obviously not comparable between the two, so we will limit our discussion to the investigation and trial stages. In both administrative and civil litigation, discovery powers are held by the court, although the plaintiff may conduct his own investigation. In administrative cases, however, the defendant (the government) cannot request evidence from either the plaintiff or from external witnesses. This is largely a formality, as only the court can compel discovery. While the ALL does not expressly lay out how trials should be conducted, administrative litigation apparently follows the same trial procedure that was laid out in the civil procedure law: examination of evidence, three short rounds of oral argument, consideration by the judges, and issuance of the decision. Standards of proof are expressly made identical between civil and administrative litigation. Appeals procedures, too, are basically alike.

The ALL, however, does have two important peculiarities: first, courts are not allowed to attempt mediation; second, they must hold a public trial unless "national security or personal privacy" concerns dictate otherwise.¹⁵⁶ In comparison, civil litigation has fairly detailed guidelines on how mediation should be conducted, while plaintiffs of civil suits can be allowed to request a private trial even when the "national security and personal privacy" exceptions do not apply.¹⁵⁷ While administrative plaintiffs are allowed to withdraw their suits before a decision is issued, the court is not allowed, at least in theory, to actively generate such a result. These regulations suggest that the goal of administrative litigation is primarily to determine right and wrong, while civil litigation places much more emphasis on dispute resolution and preservation of "social harmony," to borrow the most recent catch-phrase in Chinese politics. At least on paper, administrative adjudication would seem to offer less chance of reconciliation between the two parties, thus making the entire process considerably more adversarial than civil litigation. Of course, the ALL might still seem predominantly judge-centered and thus not very adversarial by American standards, but that is obviously not the correct legal system to compare with.

Comparison of the ALL with historical Chinese administrative litigation systems yields a similar conclusion. As noted above and in existing scholarship, traditional Chinese scholars and governments, driven by a powerful desire to buttress "social harmony," generally aimed to lessen the volume of litigation. When suits were nevertheless brought into court, magistrates were forced to follow rules of procedure, but

¹⁵⁵ Compare generally ALL with Zhonghua Renmin Gonghe Guo Minshi Susong Fa [Civil Litigation Law of the People's Republic of China] [*hereinafter* CLL].

¹⁵⁶ ALL at §§ 45, 50.

¹⁵⁷ CLL at ch. 8 (§§ 85-91), § 120.

often continued to push for settlement.¹⁵⁸ The law itself did not prohibit such attempts, while rhetoric from both government and academic sources clearly encouraged them. Even when a formal judgment was issued, the decision would frequently call for conciliation between the two sides, its language suggesting that preservation of social peace and concord was one of the most important goals of adjudication.¹⁵⁹ Officials were also given a significant amount of leeway when determining suitable fines, repayments, and punishments, and would often exercise discretion based on concerns of morality and custom (“ren qing”).¹⁶⁰ All in all, the Qing litigation system gave off the impression that it treated the litigants less like adversaries who respectively represented right and wrong, and more like petitioners who simply wanted to solve a problem. Thus, the system placed significant emphasis on resolving their disputes and, ideally, ensuring that similar conflicts would not arise in the future. This stands, of course, in clear contrast with the ALL, which does not allow mediation and puts disputes on open display by conducting public trials.

Since mediation in Qing administrative litigation has apparently never been studied, most of these conclusions were generated by studying civil disputes. But there is no evidence that most administrative disputes were treated much differently. After all, civil and litigation both stemmed from a unified criminal code and used similar legal procedure. There are indeed records of dissatisfied administrative litigants who, after realizing that provincial magistrates were more intent on generating some kind of compromise and thus resolving the dispute, made the long trek to Beijing to obtain a more clear-cut decision.¹⁶¹

Accusations of serious corruption or abuse were, of course, treated much differently, especially since the government treated administrative litigation as an important means of controlling lower-level officials. Existing scholarship does not seem to give any clues on the volume of such accusations, but the fairly high volume of administrative litigation suggests that serious cases warranting extensive investigation and severe punishment constituted only a minority of the total caseload. After all, it is hard to believe that more than a fraction of the 200,000 or so administrative disputes brought annually before Qing courts could have been issues of serious corruption, especially when there were only around 1300 counties in the entire country. As historians have noted, a local magistrate was held responsible for the behavior of his subordinates, and serious accusations against them would frequently lead to an official impeachment (successful or not) against him as well.¹⁶² Since we have no evidence that the average Qing local magistrate was impeached on a regular basis, it is probably safe to assume that such serious administrative suits were rare.¹⁶³ Even if we suppose that each

¹⁵⁸ This literature on this is very large. See, e.g., Cao Pei, *Qingdai zhouxian minshi susong chutan*, 2 *ZHONGGUO FAXUE* 133–56 (1984); ZHENG QIN, *QINGDAI SIFA SHENPAN ZHIDU YANJIU* 216–34 (1988); ZHANG JINFAN, *QINGDAI MINFA ZONGLUN*, 287–93 (1998); *ZHONGGUO MINFA SHI* 590–92 (Ye Xiaoxin ed., 1993); NA SILU, *QINGDAI ZHOXIAN YAMEN SHENPAN ZHIDU* 254–6 (1981).

¹⁵⁹ See, e.g., Linxia Liang, *Rejection or Acceptance: Finding Reasons for the Late Qing Magistrate's Comments on Land and Debt Petitions*, 68 *BULLETIN OF SOAS* 276, 292 (2005).

¹⁶⁰ HUANG at 82-89 (compare the punishments that the law recommended with the actual penalties).

¹⁶¹ E.g., Zhou at 431.

¹⁶² Officials were held responsible if their subordinates were accused of corruption. See CH'U at 32-33, 53-54, 114.

¹⁶³ *Id.* at 34-35.

county generated ten serious scandals or disputes a year, which would suggest that the political position of local magistrates was in constant jeopardy, these cases would still constitute less than 5% of all administrative cases. In most cases, the litigants obviously cared enough about their own interests to go to court, but the offense was probably not so grave as to warrant a heightened level of concern or scrutiny. Most, in fact, seemed to be rather petty offenses involving minor acts of corruption such as attempts to evade due bills.¹⁶⁴ There is, therefore, little reason to assume that the great majority of administrative disputes were treated very differently from civil suits.

The use of mediation in a system of adjudication does not make it non-legal. As Philip Huang demonstrates, most cases brought before Qing courts did result in a clear, law-based, decision for one of the parties.¹⁶⁵ The issue I am attempting to highlight here is not whether magistrates or judges refused to apply the law, but *how* they applied it. Leaving open the possibility of mediation makes the litigation process seem less like a contest. When encouraging mediation or conciliation, even after the issuance of a formal decision, the judge becomes more than just a cold arbitrator who issues judgments of right and wrong, but a kind of father figure (or, in Chinese, “Fu Mu Guan,” which literally means “an official who is like a parent”) who hopes to teach moral lessons and preserve social peace.¹⁶⁶ The comparison to a parent who is settling a dispute between two troublesome brothers is perhaps a bit too extreme, but it captures the essence of traditional Chinese adjudication in many ways. In some recorded cases, the judge would make a considerable effort to ensure that the litigants had learned their moral lesson, sometimes even by threatening a decision that neither side desired.¹⁶⁷ The law gave magistrates considerable leeway to engage in this kind of “education,” but the proceedings still followed formal procedure, and the end result was still an official decision that cited the *Qing Code*. Legal philosophers, of course, still debate whether law can take morality into account without losing its status as law,¹⁶⁸ but there is no indication that these moral lessons and calls for conciliation were part of the law. Instead, they might simply be considered “add-ons” that the law permitted. On the other hand, they did have a profound effect on the external appearance of legal proceedings, making them seem less confrontational and, theoretically, less destructive of social relations.

There is good reason to believe that the less-adversarial nature of Qing litigation was welcomed by the public. While we have demonstrated that commoners most likely preferred judicial methods when seeking government involvement in their disputes, it is equally important to remember that they were not particularly eager to approach the government in the first place. The anti-litigation and pro-social harmony views advocated so enthusiastically by Confucian scholars for centuries could not have failed to have *any* effect on social behavior, although it certainly did not prevent a large number of cases from going to trial. All in all, litigation rates in China have historically been much lower than in the United States, and there is no indication that things are about to

¹⁶⁴ HUANG at 88.

¹⁶⁵ *Id.* at 75-106.

¹⁶⁶ *Id.* at 75; ZHANG JINFAN at 280-84.

¹⁶⁷ Bobby KY Wong, *Dispute Resolution by Officials in Traditional Chinese Legal Culture*, 10 MURDOCH UNIV. ELECTRONIC J. OF LAW § 8 (June 2003), http://www.murdoch.edu.au/elaw/issues/v10n2/wong102_text.html.

¹⁶⁸ This is, of course, Ronald Dworkin’s primary criticism of the positivists.

change.¹⁶⁹ The great majority of disputes were resolved within the local communities, either by negotiation between family elders, or through mediation conducted by a mutually respected neighbor.¹⁷⁰ The law often lurked somewhere in the background of these mediations, either as a standard of “good” behavior or as a bargaining chip, but the government itself had no role in the proceedings. Confucian ethics and communal ties led these communal mediations to forcefully encourage mutual reconciliation, although a basic determination of right and wrong was also made when the responsibilities were clear beyond dispute. In addition, since the mediations were often conducted by people of elder age, they frequently included a large dose of moral lecturing and persuasion. People preferred to maintain good social ties within the community, to “save face,” so to speak, for as many parties as possible. As most civil disputes arose between neighbors and people who shared a significant amount of social space, it would not do to simply mete out “justice,” but neglect to repair the social relations that had been damaged during the conflict.¹⁷¹

Given communal mediation’s high rate of usage and success, even those directly involved in the conflict seemed to realize this. When the dispute did end up in court, either because of dissatisfaction with mediation results or lack of communication, the litigants probably felt a considerable amount of reluctance. In all likelihood, they hoped that their social reputation and ties, even with their legal opponents, would receive as little damage from the legal process as possible. This follows naturally from the overall preference for communal mediation, and fits in with the predominantly Confucian nature of Chinese social ethics. Thus, the less adversarial, sometimes even patronizing, nature of Qing litigation would have been quite reassuring to litigants. It gave off the impression that formal litigation was not unbearably colder and more inflexible than communal mediation, thereby encouraging people to use the system more readily. Litigation was probably still the last resort, but its triggering conditions were made easier by the possibility of court mediation.

Disputes between commoners and the government followed the same logic: people had even more incentive to maintain good relations with authorities than with their neighbors. Even when the dispute was serious enough to litigate, they probably still hoped that the judge would make some effort to encourage conciliation and, as much as possible, a mutually satisfactory result. As argued above, extremely serious conflicts, in which common people had entered into a severely hostile relationship with the authorities, were probably quite rare, so some level of conciliation was almost always desirable. In the great majority of cases, the incentives and hopes of litigants were probably quite comparable to civil litigation.

While scholars have yet to systematically examine the motivations behind modern Chinese administrative litigation, existing studies on civil litigation suggest that the cultural preference for less confrontation remains quite prevalent to this day. As Zhu Suli notes in his famous *Song Fa Xia Xiang* (*Sending Law down to the Rural Areas*), local judges are frequently forced to innovate when the formal law fails to anticipate the complexities of civil litigation. When conducting such innovations, the most urgent need,

¹⁶⁹ See HUANG at 170.

¹⁷⁰ For a basic overview of such mediation, see ZHANG JINFAN at 286, and HUANG at 57-64.

¹⁷¹ HUANG at 60-62; ZHANG JINFAN at 293.

as recognized by both the judges and the litigants, is to “resolve the problem.”¹⁷² This is where mediation frequently comes in handy. The litigants are usually not looking to label their opponents as “wrongdoers” or to punish them, but merely to protect their own interests. In quite a few cases, the social familiarity between the two sides can actually lead them to desire less severe consequences for the other side.¹⁷³ Other scholars who have conducted empirical research on local Chinese adjudication have frequently reached similar conclusions.¹⁷⁴ This is, of course, entirely consistent with the cultural traditions that were so powerful during the Qing. As with Qing administrative litigation, the enormous volume of administrative grievances people now file with either the Xinfang offices or the courts suggests that only a small fraction of them can be extremely serious conflicts in which the petitioner or litigant no longer hopes for any sort of reconciliation with the accused officials, especially since most petitions target local authorities who will continue to be an important part of local life after the conflict passes. The lack of mediation and the mandatory public trial in administrative litigation can, therefore, be highly uncomfortable for the petitioners in less serious conflicts, when their goal is only to further their own interests, and not to bring down the offending authorities.

In addition, the establishment of the people’s mediation committees in 1954 seems to be a clear continuation of the Chinese people’s historical preference for less confrontational methods of dispute-resolution. Indeed, the continued viability of these committees, along with the high percentage of civil disputes that end in mediation,¹⁷⁵ seem to be fairly strong indicators that this culture of anti-adversarialism is indeed alive and well, and that Zhu Suli’s observations do indeed resonate with larger-scale statistics.

I am somewhat hesitant to label this tradition a “Confucian” tradition. As almost any expert on China will agree, Confucianism’s vitality in modern China is unclear. It is, of course, no longer dominant in government or academic discourse, and has indeed endured a prolonged period of outright attack by official propaganda. While its place in everyday life and social norms is clearly different, China’s complex modern history makes it impossible to make any blanket statement on the “current state” of Confucianism. Nevertheless, even if people no longer expressly cite Confucian texts to justify their dislike of confrontation, that does not mean the behavioral “habits” instilled in them by social and familial culture have necessarily changed beyond recognition. A change in justification does not always entail a change in behavior. In fact, if the behavior is entrenched deeply enough in culture and tradition, it can very easily survive the demise of the ideology that initially gave birth to it. Scholars who have studied the influence of Christianity on Western legal traditions are surely no stranger to such cases. The data provided by Zhu Suli does not mean that Confucianism, as an ideology, is still

¹⁷² ZHU SULI, SONG FA XIA XIANG 179-83 (2005).

¹⁷³ *Id.* at 179-83, 245-47.

¹⁷⁴ See, e.g., Sida Liu, *Beyond Global Convergence: Conflicts of Legitimacy in a Chinese Lower Court*, 37 LAW & SOCIAL INQUIRY 75 (2006).

¹⁷⁵ In many cities and towns, the percentage can reach as high as 80%, and is usually above 60% in any case. See, e.g., Li Jiang City, <http://www.51766.com/www/detailhtml/1100431928.html>; Peng Lai City, <http://www.jiaodong.net/ytzfw/system/2008/06/24/010279592.shtml>; Hainan Province, <http://www.whhnfy.gov.cn/news.php?id=540>. Some provinces set minimum mediation percentage requirements for their courts, usually at around 50%: http://www.xjbz.gov.cn/html/news/jrbz/2007-7/17/10_07_38_834.html; <http://www.gs.chinanews.com.cn/news/2008/09-19/8213.shtml>.

alive in China, but merely indicates that certain socio-legal habits it established long ago appear to exist even now, with or without justification through quoting the *Analects*.

For all its faults and opacities, the Xinfang system offers a decidedly less adversarial and combative resolution process than litigation.¹⁷⁶ In the fairly unlikely circumstance that an office accepts a petition, one of the most common responses is to send a “work team” (“gong zuo zu”) down to the locality where the dispute occurred and then attempt to resolve the conflict through informal and frequently reconciliatory means, usually by generating some kind of compromise.¹⁷⁷ There is little doubt that these methods are probably more comfortable than a litigation process in which court-mediated reconciliation is formally impossible.

A number of scholars have argued that, despite the formal prohibition against mediation in administrative litigation, courts nonetheless secretly encourage it through a variety of hints and urges.¹⁷⁸ This is reflected in the high percentage of cases that are withdrawn prior to conclusion. Yet it would be somewhat silly to expect the average litigant or petitioner to realize this, since even trained scholars must sort through piles of complicated case data to reach that conclusion. Petitioners can be expected to conduct some basic research of the law and perhaps on success rates of various forms of action, but cannot be expected to keep up with recent academic developments. What they see when they research the ALL is a litigation system that expressly bans mediation, and that, most likely, is what they will believe to be true in practice. Of course, if the number of administrative litigants was larger, then the courts’ informal use of mediation might spread through word-of-mouth. The phenomenon that this paper seeks to explain, however, is precisely why the volume of litigation is so low.

Whether fear of an apparently adversarial trial process is enough to offset all the procedural deficiencies that are inherent in the Xinfang system is not necessarily clear, but there is no need to attempt a detailed evaluation. As noted above, an irrational fear of or discomfort with the litigation system can easily make potential litigants prejudicially blind to its advantages. Thus, although the litigation is clearly the superior option, they may simply be too uncomfortable to understand that. Considering how easily our better judgment can be clouded by prejudice, this is by no means a far-fetched scenario.

It may be possible to present the explanation proposed here as a more advanced version of the “rational choice” theory. This would necessarily be based on the *long-term* interests of petitioners: they might value their long-term relationship with local authorities more than their short-term interest in resolving the dispute. Since the heightened “adversarialism” of the litigation system would seem to damage that long-term relationship more than Xinfang petitioning, petitioners are willing to bear with a lower chance of short-term success. This explanation has a number of technical problems before it can be considered a compelling theory: As the widespread retaliation against Xinfang petitioners show, local officials are quite antagonistic towards petitioning as well, so the benefit in long-term relationships, while probably existent, might not be extremely impressive. Thus, whether this benefit is enough to overcome the drastically lower

¹⁷⁶ Palmer at 175; Thireau & Hua at 87 (noting that both Qing administrative litigation and Xinfang petitioning are fairly unfrontational).

¹⁷⁷ E.g., Minzner at 25; YING XING, DAHE YIMIN SHANGFANG DE GUSHI 55-61.

¹⁷⁸ Palmer at 183; He Haibo, *Xingzheng Susong Chesu Kao*, ZHONG WAI FAXUE (2001), available at http://article1.chinalawinfo.com/article/user/article_display.asp?ArticleID=35464.

success-rate of Xinfang petitioning is highly questionable. In any case, such calculations of long-term versus short-term interest are exceedingly ambiguous in the first place, and it seems highly difficult to identify a solidly rational basis for comparison. It is easier to believe that dislike of “adversarialism” had simply prejudiced petitioners against litigation.

I do not intend to suggest that the ban on mediation is the only possible reason why the ALL has received a colder reception than the current civil litigation system or the Qing legal system. There are too many historical and cultural factors that could influence the validity of that claim. It is plausible, and the comparisons clearly are quite illuminating, but it would take at least a full book to fully consider all possible counter-arguments. On the other hand, a less adversarial resolution is perhaps the *only* positive aspect of the Xinfang system that administrative litigation cannot match. We have demonstrated that the Xinfang system offers a much poorer chance of successful resolution, and that China’s legal and political history does not display a powerful enough “anti-litigation” tradition to explain the ALL’s immense inferiority in popularity. Proof by exclusion of alternatives is crude, but, at least in our present case, it can be effective.

Conclusion

This paper has argued that the best explanation for the Xinfang system’s superior popularity over administrative litigation is the latter’s inflexible and more adversarial procedure, which stems from its prohibitions against mediation and private trials. While I have not presented a direct proof of this theory, instead stopping at demonstrating its potential validity and the failures of alternative explanations, the construction of a direct proof would be fairly straightforward. Intuitively, it would take an extensive survey of Xinfang petitioners, at least as thorough as those conducted under government authorization in 2004, which asks them, in direct terms, why they chose the Xinfang system over litigation. The failure of previous researchers to ask this question has seriously limited the scope of current scholarship on the Xinfang phenomenon, including this paper.

Assuming that my proposed explanation is ultimately proven as I expect, its ramifications would be very significant. Most importantly, it would demonstrate the power of China’s cultural affinity towards mediation-based law and thus provide an important case study for more general cultural comparisons between Chinese law and western legal systems. For policy-makers, it would also suggest that future attempts to increase the ALL’s popularity, if indeed they are normatively or practically desirable, should not necessarily focus on increasing the “legal awareness” of the general population. The success of civil litigation and China’s own legal traditions suggest that a willingness to litigate is not lacking in Chinese culture, as long as the legal system satisfies certain requirements. Thus, the main thrust of the reforms should be changing the ALL, not the people who will potentially use it. Since reforming law is far easier than altering cultural habits or preferences, the future of administrative litigation in China may yet be brighter than many have assumed. Pulling it out of the shadow of Xinfang petitioning might not be such a Herculean task after all.