

## Mediatory Versus Legalistic Discourse in Chinese Courts

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*Drawing from detailed courtroom discourses on divorce cases in China, this article provides a micro-level comparison between two styles of case handling: mediatory and legalistic. The two styles differ in discourse multiplicity, discourse interchange, interruption, and dispute processing. It finds that in terms of dispute resolution, the mediatory style seems to fare better than the legalistic style. One major reason for the difference is that the legalistic style tends to suppress rather than uncover what truly matters for the litigants. The mediatory style also seems to better fit the cultural expectation of suburban and rural China. The findings compel reconsideration of the extent to which rule formalism in transitional China should be promoted. [courtroom discourse, dispute resolution, rule formalism, China]*

The Chinese judiciary has been wavering between formalistic and populist justice in civil adjudication. Before the Cultural Revolution, Chinese courts required judges to mediate conflicts

through “persuading and educating disputants rather than adjudicate their disputes according to established legal principals” (Fu and Cullen 2011, 28). In the late 1980s, a series of reforms were launched to formalize civil adjudication and reduce mediation. Most of these reforms, however, were reversed in 2003, after the number of disgruntled litigants soared and was perceived to threaten social stability (Liebman 2011). Today, Chinese judges are once again required to take the “mass line,” that is, to hear the views of the masses; they are also to adopt a less haughty style of judging. For closed cases, the mediation rate has become a criterion on which to assess judges’ performance (Minzner 2011).

In academia, rule formalism is also controversial. On the one hand, advocates have attributed the judiciary’s ineffectiveness to the lack of rule formalism in adjudication. Peerenboom (2002, 290) contends that the judges’ unprofessional adjudication has resulted in an “alarming high level of wrongly decided cases,” which “has generated intense criticism by the citizenry” and “threatens to undermine the legitimacy of the legal system.” Fu and Cullen (2011) argue that many of the problems related to ineffective dispute resolution can only be addressed through deeper judicial reforms. Opponents, on the other hand, cast doubt on the competency of a formalist court in underdeveloped areas, in which people lack basic understandings of the law but expect substantive justice. For many disputants, nonlegal channels seem more popular and effective than formal legal proceedings. Zhu Suli (2000, 322–92), a pivotal legal philosopher, argues that to resolve disputes in rural areas, one needs only common sense combined with local knowledge,

not legal knowledge.

This article intends to shed light on the debate between formal and informal legal discourse by empirically examining and comparing three separate sets of courtroom discourses, a perspective that has never been used as related to China. Compared with other kinds of data, live dialogues speak volumes on the dispute resolution process in court. In Susan Philips's words (1998, xi), "speech by judges in the courtroom *is* judicial behavior." As will be shown, important details reveal themselves in discourses and form a vivid comparison between legal and nonlegal styles of adjudication.

Drawing on courtroom discourses from three divorce cases collected from a suburban trial court in China, this article compares the case-handling process between legal and extralegal adjudicative approaches at the microlevel. From the perspective of discourse, it aims to deepen the understanding of dispute resolution in the vast suburban and rural areas of China. The empirical data and analysis will add to the debates on the formalist rule of law model advocated by the law and development movement.

### **Courtroom Discourse**

Discourse, as defined by Conley and O'Barr (2005, 6), is "connected segments of speech or

writing”; discourse, in this article, is primarily understood and analyzed in the linguistic sense.

Our analysis focuses on how such segments are structured and used in communication to achieve the goal of the speaker. Through courtroom discourses, we observed conversations, sermons, stories, question-and-answer sequences, interruptions, and so forth. These courtroom discourses demonstrate, in a most intuitive way, how disputes are processed and resolved. Foucault (1972) influenced our research in that discourse is how things get talked about; it is the locus of power that constitutes the speakers’ objectives through interpreting practices. There are thus different genres of discourse in divorce litigation that represent varied dispute resolution frameworks and paradigms that compete and negotiate with each other (Comaroff and Roberts 1981).

Two styles of discourse may be identified in China’s divorce courts: legalistic and mediatory.

The distinction between these discourses draws on Merry’s (1990) classic categorizations of legal, moral, and therapeutic discourses. Merry’s categorizations focus on the power underlying the discourses, that is, whether legal rights and facts (legal discourse), relationship and moral obligations (moral discourse), or attribution of fault (therapeutic discourse) as the discourse paradigms. While overlapped with Merry’s emphasis on power, the legalistic style and the mediatory style are also distinguished by procedures and outcomes: the former emphasizes formal adjudication, while the latter facilitates reconciliatory outcomes. The legalistic style is characterized by the use of legal discourse, which, similar to Merry’s legal discourse, refers to “a discourse of property, of rights, of the protection of the self and one’s goods, of entitlement, of

facts and truth” (112). The mediatory style entails nonlegal discourses, including mainly moral discourse, therapeutic discourse (113–14), and pragmatic discourse, aimed at achieving “a convenient legal solution” (He and Ng 2013a, 307). The mediatory style does not exclude legal discourse but only uses it as a supplement to the nonlegal discourses.

Different discourses entail different processes and outcomes. Through the functioning of legal discourse that connects facts and rights with references to laws, for example, the problems brought to judges are refined and reorganized into cases (Merry 1990). In the context of legal discourse, on the one hand, laws provide established categories and procedures. According to Mather and Yngvesson (1980–1981), this reinterpretation is a “narrowing” process that imposes “established categories” to “classify events and relationships” (778). On the other hand, nonlegal discourses are less likely to follow established structures since they do not directly address the parties’ rights. In the mediatory style, legal rules are often marginalized and a reconciliatory outcome is preferred (Greatbatch and Dingwall 1999; He and Ng 2013a).

In order to achieve effective dispute resolution, Chinese judges, like US district judges, usually adopt a mixture of legal and extralegal discourses (Cowan and Hitchings 2007; Cowan et al. 2006; He and Ng 2013b). However, they do have preferences. Our empirical findings indicate that Chinese judges’ preferences are mainly associated with their professional backgrounds. For example, judges with formal legal training gravitate toward the legalistic style; judges with little

legal education are more comfortable with the mediatory style. Sociological backgrounds, such as age and marital status, also make a difference; and experienced judges are usually more mediatory than their junior counterparts. It is more common for an older, married judge with a family to suggest what is right and wrong in family affairs; meanwhile, it may seem awkward for single or newly married young judges to tell middle-aged couples how they should live their lives.

### **Data and Methodology**

Our analysis primarily drew on discourses in divorce litigation, a major category of trial cases in China. According to official statistics, divorce cases made up 23 percent of all civil and commercial cases in 2010 (China Law Yearbook 2011, 171). While divorce litigation seems mundane, it determines if a marriage is allowed to be terminated, and with it property division and child custody. Even seemingly trivial marital disputes, if not handled well, may escalate, threatening social stability and personal safety. They are also some of the most difficult types of cases at the grassroots level for judges. Since the conflicts between a couple and family members are multifaceted, the key issue may not be uncovered until the end of the court hearing process. This requires the judge to be sensitive and vigilant.

The episodes analyzed in this article are taken from divorce trials that we attended in December 2013 at a district court in suburban Beijing. Thirty miles away from the city center, the district is

mostly mountainous. The district's GDP per capita reached US\$6,000 in 2013, one-fifth of the urban area in Beijing. It has attracted a large number of migrant workers who moved from the hinterlands. Of the three hundred thousand residents in the jurisdiction, nearly 20 percent were registered migrants. This court handled around five thousand cases each year. Each judge had to close sixty cases annually, a figure that falls within the average range for courts across the country.

Gaining access to the court through personal connection, we were allowed to sit in the courtroom during multiple trial processes. It is not permitted to record court proceedings in China, so during our fieldwork we relied mostly on our written notes. Toward the end of our fieldwork, however, the judiciary of China kindly agreed to make available to us copies of the official court transcripts of a number of the trial sessions we had attended. The quotes cited in this article are based on our written notes and the official transcripts.

To make the comparison coherent and minimize potential confusion caused by unexplained backgrounds, we examine three cases in detail rather than collect discourse excerpts from the thirty-five cases we observed. To illustrate the difference of each discourse style, we chose the extremes in the spectrum of our data: the case relying most heavily on the legalistic style and its opposite, the case most heavily reliant on the mediatory style. Since the ideal comparison is to have judges with different styles handling the same case, we also chose a third one, which was

handled in succession, coincidental to our fieldwork, by two judges with different dominant styles. We do not aspire that these cases are representative of the judges' discourses, but hope that, taken together, they illustrate the differences of the two discourse styles.

The first case, handled mainly in the mediatory style (henceforth, the Mediated Case), was presided over by a middle-aged judge who was a demobilized military officer (henceforth, Ex-Military Judge).<sup>1</sup> The case involved a couple married for twenty-three years. They were migrant workers from a neighboring province and had a twenty-year-old son. Through two decades of hard work, they owned an apartment and had settled down in suburban Beijing. According to the plaintiff wife (henceforth, Hardworking Wife), her forty-five-year-old husband (henceforth, Idle Husband) was reluctant to work and had been unemployed for a long time. He also gambled frequently and cared little about family members. The expenses of the whole family, including their son's college tuition, depended solely on the income of the wife, who had an unstable job. Disappointed with his laziness, Hardworking Wife had filed several petitions for divorce, but to no avail. Idle Husband not only refused to divorce but also he claimed that his wife was aggressive and bossy. Nevertheless, by the end of court mediation, Idle Husband promised to find a job as soon as possible, and Hardworking Wife withdrew her divorce petition.

The second case was adjudicated by a young judge who had received a formal legal education (henceforth, Adjudicated Case and Law-Grad Judge).<sup>2</sup> Although he conducted brief court



mediation, his style was predominantly legalistic. The case was between a couple, both in their thirties and married for eleven years, with a ten-year-old son. Both were local peasants from suburban Beijing. The wife (henceforth, Peasant Wife) sued for divorce, claiming that her husband (henceforth, Peasant Husband) avoided responsibility as a family member: he was often away from home at night, neglected their son, fought over trivial matters, and occasionally committed domestic violence. Peasant Wife requested custody of their son and demanded monthly child support from her husband of 500 CNY (about US\$76). Peasant Husband was indifferent to their marriage crisis; instead, he claimed for the expected government compensations derived from the demolition of his parents-in-law's house. Law-Grad Judge ignored Peasant Husband's request for the demolition benefit on the basis that it was legally irrelevant to divorce (it was not his house); he also rejected Peasant Wife's divorce petition. According to the judge, "the emotional relationship between the couple had not broken down" and that "there was still a chance for them to repair the relationship." Peasant Wife was so frustrated and upset by the decision that she vowed to file another divorce petition.

The third case was handled by two judges (henceforth, Two-Judge Case): one experienced (henceforth, Experienced Judge) and one junior (henceforth, Junior Judge).<sup>3</sup> The original judge, Junior Judge, mainly employed legalistic style. Experienced Judge, who used more mediation, took over before Junior Judge delivered his judgment. In the case, the husband (henceforth, Remarried Husband) and the wife (henceforth, Remarried Wife) were each in their second

marriage. After being married for just two months, Remarried Wife lost passion for her newlywed husband and petitioned for divorce. Remarried Husband agreed to divorce but demanded the wife return the 20,000 CNY (insert US\$amount) betrothal gift. Remarried Wife objected, arguing that the money had already been spent on Remarried Husband. Remarried Husband later reduced his demand to 13,000 CNY, but Remarried Wife refused to return anything more than 10,000 CNY. She also stopped attending the mediation sessions organized by Junior Judge. After the aggrieved husband threatened to escalate the dispute into a noisy appeal, the court president appointed Experienced Judge, who successfully persuaded Remarried Wife to return \$13,000 CNY, and thus settled the case.

There was no legal representation in all these cases. Due to both their limited education and experience with the judicial system, the litigants' understanding of the law and the legal system was rather restricted, as reflected in their predominantly nonlegal discourses.

With the limited scope of our data and the methodological limitation of discourse analysis, the inferences drawn in this study may not be applicable in a different region, court, or category of trial cases. We make no assertions about which is the better discourse style of judges. Instead, through analyzing original courtroom discourses, this study explores how power relations are established by various types of conversations between judges and litigants. It will provide a perspective to understand and reconsider judicial dispute resolution in rural and suburban China.

## **Mediatory and Legalistic Discourses**

Through organizing different discourses, judges exert their judicial power and ideology in different ways (Philips 1998). While overall courtroom discourses are to control and direct dispute resolution, different styles of discourses provoke different responses from the litigants. In this section, the processes and outcomes of the mediatory and legalistic styles are compared from four points of view: discourse multiplicity, discourse interchange, interruption, and dispute processing.

### *Discourse Multiplicity*

Several genres of discourses are found in the mediatory style. In the Mediated Case, for example, in response to a critical issue raised by Hardworking Wife—the idleness of Idle Husband—Ex-Military Judge spent more than five minutes educating both parties:

Excerpt 1:

To Idle Husband:

Ex-Military Judge: I think you should be realistic about your situation. If you have much wealth, you may rest for one or two years. But your family is not wealthy. Think about it. You two have worked all the way to this stage: owning an apartment and

having a career. But you now come here to divorce. So you should think more about your own shortcomings, and you should realize that they have affected your family and your spousal relationship. ... It is said that to make money is easy these days, but only for those working hard. For lazybones, it is always hard. So if you find a job, go ahead and do it. Having a job is better than being idle; working is better than doing nothing. If you are idling, you hang out with idle fellows; if you work, you mingle with hardworking people. If one job does not suit you, why don't you find a suitable one? That's what I think: that the main fault lies with the defendant.

To Hardworking Wife:

But, on the other hand, let me say a few words about you. As a lady, you should not be too aggressive. You are a couple, aren't you? If you don't give him money, he will think you look down upon him, isn't that right? ... The wife should give face to the man, right? The problem of your family, as you put it, is that you want to do good for your family and your life. I know that you are disappointed that he did not grow up, aren't

you? Your income is hardly adequate for yourself, but you devote it to your family and child. The child's education requires money, which makes your life harder. But after all, a couple is a couple, and it is a blessing if a couple can grow old hand in hand.

In this long diatribe, Ex-Military Judge stated first that the couple had successfully settled down in suburban Beijing. Implied in this statement was that the couple should treasure what they have achieved. Then he suggested that both parties should look at their own shortcomings, a tactic reminiscent of self-criticism in the traditional mode of mediation. Ex-Military Judge began with Idle Husband, who was unwilling to work and inattentive to his wife's and son's needs. Instead of scolding Idle Husband, however, the judge turned to the issue of employment. He stated that in the interests of the family, doing something is better than being idle ("If a job does not suit you, why don't you find a suitable one?"). Using both moral blame and therapeutic encouragement, the judge concluded that "the main fault lies with the defendant." Idle Husband seemed to accept that attribution.

Ex-military Judge then turned to the wife. He suggested, again in a moral discourse, that she should not be too aggressive and that she should give her husband money as well as face. He also immediately recognized her contributions and dignity by acknowledging her unhappiness ("I

know that you are disappointed that he did not grow up, aren't you?"). He turned to pragmatic discourse of some of her troubles ("the child's education requires money, which makes your life harder"). This suggests that hardship was inevitable for the family at this stage and sacrifice was unavoidable, and thus Hardworking Wife had better learn to accept it. Finally, Ex-Military Judge concluded with a therapeutic discourse: "It is a blessing if a couple can grow old hand in hand." The litigants were poorly educated, making these grassroots discourses easy for them to understand and appreciate. Additionally, as will be discussed below, Confucianism is still the main teaching in many suburban and rural areas in China, so the values conveyed by the judge's discourses were consistent with their own. Thus, Ex-Military Judge's points were accepted by both parties.

In contrast, Law-Grad Judge in the Adjudicated Case predominantly employed legal discourse throughout his hearing process. Only in two places did he move to moral discourse. The first was in the mediation session when Peasant Wife alleged that Peasant Husband was addicted to gambling, which Peasant Husband denied. Law-Grad Judge said: "If this (gambling) be true, both of you should tolerate each other for the sake of the family. After all, you are a family." However, his speech was immediately interrupted by Peasant Wife. The second time occurred when the court discussion session was almost over:

Excerpt 2:

Law-Grad Judge: According to the laws, in divorce cases, the court has to conduct mediation with both parties. After all, for marriage and divorce, both parties have to consider the situation carefully. The child is only ten, an age at which family love is needed. A broken family negatively impacts children's mental status, which is detrimental for their healthy growth. If you have issues, try to solve them through negotiation, OK? I speak these words to calm you down. Plaintiff, will you consider (mediation)?

Peasant Wife: No.

The moral persuasion of Law-Grad Judge was a cliché that could be said to any estranged family. He had not established enough authority over or gained the trust of the litigants, which may be why he was interrupted by both parties and his moral preaching was greeted by their poker faces.

### *Discourse Interchange*

A related difference lies in discourse interchange. In the mediatory style, different genres of discourse are frequently interchanged. Legal discourse is normally cloaked in nonlegal discourses and is used to persuade claimants to accept a judge's suggestions and rulings. In the legalistic style, by contrast, legal discourse dominates, serving to frame "problems" into judicial "cases" (Merry 1990, 108).

In the Mediated Case, for example, Hardworking Wife was resistant to mediation because she had already been through several rounds of it during her previous petitions; nevertheless, Ex-Military Judge successfully persuaded her into another round through the use of both moral and, more importantly, legal discourses.

Excerpt 3:

Looking at Idle Husband:

Ex-Military Judge: For marriage cases, *according to the rules of marriage law*, mediation should be carried out. We must mediate, and mediation has to be conducted throughout the whole adjudication process. So I am obligated to say a few more words. You two migrated from other places to this city with the same dream, and thus are bound together. You guys eventually settled down here after years of hard work. You have to cherish your affection. (Looking at Hardworking Wife) To fight your way here is very difficult. (Looking at both) See? Your spouse provides a telling example. She just said she worked so hard to earn this income, right? This is how I think of your spouse. For example, I just asked her why she didn't



give you some money. *This is in the law: spouses are obligated to support each other.* But a good family needs the efforts of both spouses. Idleness will erode the relationship between husband and wife. Do you want a wife reluctant to go home? Do you think your child is willing to see his parents separate? *The court thinks the fault is on you.* Tell me, what is wrong with your wife? Idle Husband, tell me? Maybe she is a bit bossy, which I can figure out. But you can and should tolerate it. (Emphasis added)

In this excerpt, the judge mentioned the Marriage Law as the basis for his mediation and strengthened his authority. He did not cite the law directly; instead, he used popular language to convey his point: “For marriage cases, according to the rules of marriage law, mediation should be carried out.” He then added, “So I am obliged to say a few more words.” To constrain the aggressive position of Hardworking Wife, he also deployed another piece of legal discourse: “This is in the law: spouses are obligated to support each other.” This was more than a decoration to his preaching: this legal discourse reinforced his legal authority. Importantly, he had captured the core disparity between the couple: the husband’s reluctance to work.

Similarly in the Two-Judge Case, the Experienced Judge inserted legal discourse in her moral

preaching to lure the resistant plaintiff back into court mediation.

Excerpt 4:

Experienced Judge: Remarried Wife, your work is important, so is your own divorce case. *Once you have filed litigation in court, you have a legal obligation to come to court and negotiate for a resolution.* (Emphasis added)

By this excerpt, it is made clear that the Remarried Wife had missed a court session and rejected negotiations with her husband. By reminding the wife of her legal obligations, the judge established her authority and cajoled the plaintiff back into mediation. Meanwhile, the situation in the Adjudicated Case was exactly the opposite. The Law-Grad Judge had tried to formalize the complex family issues into the court proceedings but in doing so ignored *legally* irrelevant facts.

Excerpt 5:

Law-Grad Judge: Do you agree to divorce?

Peasant Husband: I don't.

L-G J: Don't agree, do you? What's the reason for your disagreement?

PH: No. ... Just for the child. ... Just the problem that the kid needs a place to live. Ah ... the divorce is related to the problem of

the kid, the kid—

L-G J: (interrupting) So it is for the healthy growth of your child,  
right?

PH: Yes, yes.

L-G J: For this reason, you don't agree to divorce—

Peasant Wife: (interrupting) The reason is because the child will have no  
place to stay after he grows up. That's what he means.

L-G J: So it is because the child has no place to live after divorce,  
right?

PH: Yes, yes.

PW: Yes. Actually, he agrees to divorce.

L-G J: He does not. He has just said that.

PW: (voice rising) He just wants to find somewhere for the child (a  
place to live)—

L-G J: (interrupting, to PH) Do you agree to divorce? State your  
opinion clearly. Agree or not?

PH: Don't agree to divorce.

L-G J: He disagrees.

PH: She just irritates me so much that I disagree.

The husband's attitude toward divorce was ambivalent and ambiguous. He may have wanted to use the divorce as a bargaining chip for more economic benefits in dividing the matrimonial assets. However, the judge framed the issue raised by Peasant Husband as a legal problem, that is, the care of the child. Guiding the hearing with legal discourse only is not wrong, of course, but such legal framing may escalate the tension between the two parties. When the judge repeatedly asked whether or not Peasant Husband agreed to divorce, the husband seemed emboldened, and his position on divorce evolved from ambiguity to certainty. This occurred in the Two-Judge Case also:

Excerpt 6:

Junior Judge: (to Remarried Husband) So, what is the minimum that you could accept (of the returned betrothal gift)?

Remarried Husband: I don't know. But it has to be thirteen thousand. At least thirteen thousand, twenty thousand minus what she had already spent on us.

JJ: Is your family influenced by the loss of the money?

RH: My family is no worse than hers.

JJ: So what is your annual family income?

RH: No. You don't understand, Judge. It is not about money. She should not treat me like this. We have only been married for two months, and she ceases to be faithful. I lose both the wife and money: How

would others think of me? How about my family? I will become a joke in others' eyes. She must return the betrothal gift.

JJ: (to Remarried Wife) Now the defendant has demanded a refund of 13,000 yuan. Do you accept?

Remarried Wife: No way.

In this excerpt, the husband was concerned about his reputation in the village. However, the judge had framed the problem as a legal issue under the Marriage Law. He tried to evaluate whether the betrothal gift had made the husband's family live in difficulty according to the legal standard. Such a move, though, failed to address the personal concerns of the husband, and thus thwarted a negotiation. Additionally, a legal discourse may trigger a confrontation between the judge and the litigants who are unfamiliar with the law and the legal proceedings. This occurred in the Two-Judge Case.

Excerpt 7:

Junior Judge: Defendant, submit your evidence if you have them now. Do not talk about irrelevant matters.

Remarried Husband: You did not tell me to bring evidence here.

JJ: How could you come without evidence?

RH: You told me to come. I did not want to come.

- JJ: Listen, Defendant, passiveness is the principal of the court.  
If you are not sued, how could I ask you to come?
- RH: Stop calling me Defendant. I do not feel comfortable being called like that. I have a name. Call my name. I did nothing wrong. Why did you call me Defendant?
- JJ: We are now in a formal trial. Calm down.
- RH: I just cannot bear that you call me a defendant. What if it is me who is wronged? Am I still a defendant?
- JJ: In the court, you are the defendant. It is stipulated in the law, not out of your choice.

At this point, the judge then knocked the gavel, and the husband stopped arguing. However, he became veraciously resistant to the judge's mediation efforts. By contrast, after the Experienced Judge took over the case, she called the litigants by their first names and avoided unpopular legal terms. Throughout the process, the litigants appeared relaxed and cooperative.

### *Interruption*

As pointed out in earlier studies (Philips 1998), interruption is a basic technique in controlling court hearings. Our analysis suggests that the purpose of interruption in the two styles is different. In the mediatory style, interruption is used to suppress negative expressions that may impede reconciliation. By contrast, judges who employ the legalistic style use interruption mainly to

solicit answers to legal questions, which they need to present in the judgments. In the Adjudicated Case, for example, the Peasant Wife claimed that the two parties had already been separated for a month, leading to an exchange about property.

Excerpt 8:

Law-Grad Judge: (to the Peasant Husband) So she left on September 10 and  
came back again?

Peasant Husband: Actually, she came back quite often.

Peasant Wife: (to PH) How many times did I come back?

PH: You always (came back) when I was not at home—

L-G J: (interrupting) Does the plaintiff have premarital property?

Realizing that the separation period did not meet the legal divorce standard of two years, the

Law-Grad Judge quickly interrupted them and raised the next legal point:

Excerpt 9:

L-G J: Do you have any property that you purchased together after the  
marriage?

PW: No. (to PH) No, is it?

PH: I can hardly say no.

L-G J: What do you have?

PH: The problem lies with the old house. Because the house was demolished, her registered residence and our original residence—

L-G J: (interrupting) I am asking you, do you have any marital property that you purchased together?

PH: No.

The Peasant Husband raised his concern over the demolition benefit, which turned out to be the key issue between the couple. However, the judge considered this irrelevant and interrupted, directing the topic back to marital properties. Likewise, Ex-Military Judge interrupted three times during the Mediated Case, but it was to facilitate reconciliation. The first time occurred when the plaintiff complained about the court's repeated mediation.

Excerpt 10:

Hardworking Wife: I can understand what the judge means. We must go through the mediation process. But (you have mediated for) the first time, the second time, and the third time. It is torture to me. It is torture to the child. And isn't it torture to him (Idle Husband)—



Ex-Military Judge: (interrupting) What do you think about the kid?

In this, the judge distracted the Hardworking Wife away from complaining about court mediation and toward talking about her child. Through this, the wife followed the judge's lead into mediation. The other two interruptions happened during the court mediation:

Excerpt 11:

Ex-M J: (to defendant) Your wife just said that your lack of income has affected your family, right?

Idle Husband: Yeah.

Ex- M J: Now (the issue) is exposed.

HW: Let me say a word—

Ex-M J: (interrupting) Why do you interrupt? I haven't finished! (to Idle Husband) What are you going to do with a problem? There should be a solution.

At this, the Hardworking Wife remained silent.

Excerpt 12:

Ex-M J: (to IH) So your family has come to this stage. Do you think you are at fault?

IH: I find fault with myself.

Ex-M J: What can be done about it? Can you correct it—

HW: (interrupting) No, he can't.

Ex-M J: I am not talking to you!

HW: (lowering her voice) No, he can't.

Ex-M J: (to IH) Since you have realized your problems, can you address them?

IH: I can.

As before, the Hardworking Wife remained silent.

In these two excerpts, Ex-Military Judge bluntly interrupted the Hardworking Wife. It occurred when Ex-Military Judge was trying to guide Idle Husband to confess his mistake, an important step toward settlement. Very likely, Hardworking Wife might have said something distracting; allowing her to speak would have subverted his mediation efforts.

### *Dispute Expanding Versus Dispute Narrowing*

While the legalistic style follows the case structure and narrows disputes, the mediatory style allows the parties to expand their problems (Silbey and Merry 1986). As documented by Merry (1990) and Mather and Yngvesson (1980–81), legal professionals, and especially judges, narrow a dispute according to legal rules. When complainants come to the courthouse, they present a

series of “problems,” which the courts treat as “cases” (Merry 1990). Problems are trivial and loaded with contradictions, but when these contradictions are “labeled” as a case, only then are legally relevant issues “crystalized” out of “the wider matrix of the problem” (108). While any issue deemed irrelevant by the laws is ignored, it might be the key to resolving a dispute. This is especially true when parties’ genuine intentions are shrouded at the start of a hearing.

The difference is well illustrated in the Two-Judge Case. When the couple disagreed on the amount of the betrothal gift to be returned, Junior Judge narrowed down the problem to a legal issue: Did the betrothal gift make the Remarried Husband’s family live in difficulty? As shown in Excerpt 6, the husband refrained from talking about his economic condition, so the Junior Judge thus had no legal basis to support the husband, even if the judge believed that the betrothal gift should be even partially returned. He lost control over the Remarried Wife when he asked: “Now the defendant has demanded a refund of 13,000 yuan. Do you accept?” Clearly, the wife had no intention of following this suggestion. The Remarried Husband refused to accept a divorce without the betrothal gift being returned, and he threatened to appeal without it. Thus, a deadlock was formed. After the Experienced Judge took over, she encouraged both parties to talk about their situations. She found that Remarried Wife had a new job with a decent salary, and was most likely dating someone else. The findings became the key to resolving the case:

Excerpt 13:

Experienced Judge: I understand that you do not care about the money. You are just mad. But think about it: the money was spent in your hands. For whomever did you spend the money, it was out of your own choice. When you bought him (i.e., Remarried Husband) the suits, you were willing to do so. ... Besides, if this case lasts for three to five months, it will be a waste of your life. You are twenty-eight now. If this marriage is not working, why not get it over and marry a better man?

Remarried Wife: This was exactly what my family members told me.

EJ: Have they said so? That proves I am right. You see: the gap is only 3,000 yuan. You have such a decent income. It is nothing more than one month's salary. Take out 13,000 yuan, and we seal the deal today.

While the Experienced Judge also focused on the betrothal gift, she did not trim the problem to a legal issue. Instead, through expanding the dispute, she had found the real concerns of the Remarried Wife—to start a new life as soon as possible. This allowed the dispute to be settled successfully.

The expanding and narrowing of disputes were also observed in the other two cases. In the

Adjudicated Case, when Peasant Husband raised the issue of a future residence for his child, he claimed for the forthcoming demolition benefit on his parents-in-law's house. The Law-Grad Judge ignored this, however, because the property to be demolished did not belong to the couple.

Excerpt 14:

Peasant Husband: I have to make that clear. It was me who built the private house  
that will be demolished.

Peasant Wife: You built it? Where did you build it?

PH: I built it in your yard. Tell me, where did I build it?

PW: Whose yard is it then?

PH: Whomever the yard belongs to, didn't I build the house?

Law-Grad Judge: We are in a (divorce litigation)—

PW: (interrupting) In whose yard then?

L-G J: OK. Stop it. Now (we are in a divorce litigation)—

PH: (interrupting) You have no conscience—

L-G J: (interrupting) Stop it! (banging the gavel) We are now dealing  
with the legal relationship between husband and wife. If you  
have any interest regarding that issue, you can claim it in the  
future, OK?

The demolition benefit was crucial to the case, but the judge treated it as irrelevant because legally speaking, it could not be processed in this case. However, bound by his rigid understanding of the law, he failed to capture the core issue. Overall, the legalistic style of discourse was to prune the couple's complicated problems to a standard divorce case. The purpose was not to address the core issues but to determine all the necessary factors required for a legally sound decision.

In contrast, the mediatory style of discourse allows litigants to fully express all aspects of their problems and thus identify the major issues by common sense. For instance, Ex-Military Judge did not narrow down the dispute mechanically, though there were many issues: the husband's idleness, the wife's personality, the care of their child, and the pocket money. Only when all these issues were fully exposed did the real problem surface: the husband's idleness. The Ex-Military Judge spent time focusing on this issue, as demonstrated in Excerpt 1, and again at the end of the trial:

Excerpt 15:

Ex-military Judge: Your issue is serious, right?

Idle Husband: (Nodding)

Ex-M J: You cannot just nod. Tell me, is that right?

IH: Yes.

Ex-M J:            So what will you do about it?

IH:                Correct. I'll correct myself.

Ex-M J:            Correct with your words only?

IH:                Correct with my words, and correct with actions.

Ex-M J:            So what do you have to say about your problem? How to  
solve it?

IH:                Find a job as soon as possible.

The judge's final words did not fall into the stereotypical comments, such as spousal responsibilities, property rights, or family affection. The resolution he handed down was actually extralegal. The wife was eventually convinced to withdraw her divorce petition because after the core issue was resolved, the dispute between the parties vanished, at least temporarily. With his extralegal discourse, the judge settled the dispute with a remedy in which the law was marginalized, and yet the process and remedy met the parties' needs.

### **Rule Formalism Reconsidered**

A major criterion to assess the functioning of a civil judicial proceeding is problem solving (Kritzer 2007). It is especially true in China, in which the main function of the judiciary is to maintain social stability by resolving disputes (He 2014). Measured against this criterion, a mechanical application of the law and procedure seems problematic in rural and suburban

divorce adjudication.

Stark differences emerged between the mediatory and legalistic styles in these three cases. The mediatory style helps avoid direct confrontation in the courtroom by repressing undesired conversation between the litigants. Because any discourse that does occur between the litigating parties is mainly extralegal, it is more effective for a judge to respond with nonlegal discourse, which seems more powerful than using legal discourse alone. Allowing the parties to fully expose their frustrations and grievances is critical. As Zhu points out (2000), one important strategy for judges to maximize success and minimize vulnerability is to address what truly matters to the parties instead of only the legal matter.

This does not mean that legal knowledge is trivial. Even if the law is only implied in nonlegal discourses, it serves as constraints between judges and litigants and between opposing parties. In some instances, the mediatory style may fail to protect the rights of the weaker party. He and Ng (2013a, 2013b), for example, observe that the deployment of pragmatic discourse in court mediation failed to factor in domestic violence in divorce settlements. Therefore, some adherence to the legal framework guarantees the basic rights of the weaker party and to prevent court mediation from being carried out entirely on the basis of power disparities. In addition, while Ex-Military Judge and Experienced Judge employed various genres of discourse (and legal discourse was not the major one for either judge), legal knowledge and legal discourses were



crucial in facilitating settlements. Most notably, both of them cited the law that meditation is compulsory in divorce cases in order to bring each reluctant wife back to the negotiation table. Ex-Military Judge also cited the mutual obligation of a couple to support each other to manage the aggressive wife and to prompt the lazy husband to look for work. These strategies helped the two judges establish authority over the litigating parties, which is the first and foremost tactic of a successful mediator (Silbey and Merry 1986).

Nonetheless, legal discourse has limits. First, legal discourse alone is inadequate to address the litigants' concerns, often cloaked in multiple discourses. This is especially true when litigants are not represented by professional lawyers. When the litigating parties' concerns are related to the case but are not framed in legal discourse, it is hard to address them by legal discourse. Second, legal discourse procedurally tends to narrow the issues of a dispute and thus makes it difficult for the true concerns of the litigants to surface. That is why the legalistic style may fail to detect their key concerns and thus miss the opportunity to facilitate reconciliation. Last, a mechanical application of the law may lead to confrontation between the judge and the litigating parties. In other words, judges are not only required to follow court-hearing procedures, understand legal analysis, and locate answers for the legal questions required for a legally tenable judgment but also must hone their sensibilities. As documented by Huang (2010; citing Fujian and Wu [2007]), although a case is closed once the legal proceedings are over, the dispute may persist between the litigating parties. That is why the adjudicative approach is widely criticized for generating

postlitigation issues (Wang 2002).

The limits of legal discourse reflect the cultural expectation for substantive justice in rural and suburban China. While the official rhetoric shifts toward rule of law and legal consciousness, traditional moralities remain the basic social norms in the minds of rural and suburban people in China (see, e.g., Gallagher 2006; He, Wang, and Su 2013). A main reason is that China has a tradition that both sets the law aside and emphasizes moral qualities (De Bary 1998, 90). As mentioned earlier, local conventions that adhere to Confucianism still dominate in many suburban and rural areas, and litigants hope that a paternalistic (or in the case of the Experienced Judge, maternalistic) adjudicator could enforce their understanding of morality and substantively resolve their disputes. A judge simply ruling “right” or “wrong” based on legal rules could hardly satisfy litigants’ demands. Under such a cultural context, litigants often cannot understand and accept a literal enforcement of the law. The mediatory style of discourse, in a way, serves to bridge the traditional belief and modern legal system in China.

### **Conclusions and Implications**

By comparing the legalistic and mediatory styles of discourses in suburban Chinese courts, the conclusions drawn from this article may not be generalized to the whole country. Nonetheless, our analysis demonstrates that a combination of legal and extralegal discourses fare better than the mechanical application of the law and procedure in divorce dispute resolutions. It thus raises

questions on what type of adjudication is needed, and feasible, in rural and suburban China.

Formalism may be crucial for a unitary legal system and market economy, as claimed by law and development advocates (see Shihata 1991). However, this approach, characterized by Scott (1999, 1) as “seeing like a state,” pays inadequate attention to the expectations of the litigants and the related demands of the authoritarian state, which places social stability as its top priority. That is why problems arise when recent law graduates toe the legal framework line. Ironically, the case structure may limit their imagination, flexibility, and sensibility.

If the rigid application of laws and legal procedures is not the answer for every subfield of judicial practice, the research agenda needs be altered to answer the following:

- What role does formal legal training play in the exercise of judgecraft, especially in courts and tribunals in which both legally trained and untrained judges work?
- How does the exercise of judgecraft vary with the types of cases or levels of routinization?
- Which type of judgecraft is more compatible with the cultural expectation in a region?
- How does judgecraft develop or suppress cultural specifics, such as local traditions?
- In what ways does judgecraft depend on the larger political system, social economic conditions, and cultural context in which the judges are embedded?

Our analysis shows that greater emphasis should also be placed on appreciating the concerns, desires, and personalities of the litigating parties.

Echoing what others have found about the skills of litigation lawyers and legal advocacy, this study suggests that judgecraft is not limited to *formal* knowledge and activities of training (Kritzer 1990). In addition to legal rules and principals, judges need to master informal knowledge through adjudicating and life experiences, which involves both technical skills and interpersonal skills, or what Bensman and Lilienfeld label “habit of mind” (1991, xv). It is a kind of subtle expertise on the litigation and mediation processes that goes well beyond the mechanics of either process. The dispute resolution techniques of extralegal approaches are thus critical in improving the performance of judges. Although these techniques have long been neglected by legal professionals, they should be treated with due respect and introduced into training sessions for judges. While these techniques are hard to distill and crystalize, studying their discourse skills is a good start.

### Notes

<sup>1</sup> Ex-Military Judge, who was forty-nine years old, had worked in the court for twenty-five years. He had a junior high school diploma when discharged from the army. After becoming a judge, he earned an Associate’s degree from a college organized by the judiciary and a Bachelor’s degree in law through distance learning.

2 Law-Grad Judge, who was twenty-eight-years old, had a Master's degree in civil and commercial law. Recruited as a court clerk in 2009, he worked his way up to assistant judge in 2012, qualifying him to handle cases independently.

3 Experienced Judge, who was forty-five-years old, received a Bachelor's degree of law through distance learning, and she had been working as civil judge for fifteen years. Junior Judge, who was twenty-eight-years old, had a Master's degree of law. He had joined the court two years earlier and had served as a presiding judge only for a few months.

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