Introduction

> Right now a violent Japan is peddling its propaganda that China is a "nonmodern" state to the world in an attempt to deceive foreign powers and accomplish its design to dismember [China]; what our country needs is the aid of international public opinion, and what international public opinion will aid are "modern" states [*xiandai shi zhi guojia*]. The so-called modern state is defined not only by whether it is independent and unified, capable of protecting its own people and fulfilling international obligations, but also, as one of the main conditions, by whether it is a state of "the rule of law." If we destroy the rule of law ourselves, that would be no less than to provide evidence for Japan's international propaganda! The impact of this would go much further than just bringing [China's] national reputation down!
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> —Shi Lianfang, *Falü pinglun* (Law Review [Beijing]), June 5, 1932[1]

Shi Lianfang's remarks reflected the logic of the modern world history underpinned by the rise of the West. Western conquest of and dominance in non-Western countries was accompanied and justified by a discourse on the backwardness of "uncivilized," "traditional," "premodern" conditions in those countries. In order to be free of colonial and semi-colonial shackles, a non-Western country had to demonstrate that it had become "modern" and was "ready" for self-determination. By the early 1930s, of course, Japan had long since achieved the status of being "modern" or sufficiently westernized and joined the imperialist club as an "honorary white" nation.[2] For obvious reasons, judicial modernity (that is, a Western-style judiciary and judicial practices) was

one of the key markers by which a country was measured as modern or less than modern. Japan's judicial system and penal regime were among the first institutions to be reformed after the Meiji restoration, precisely because the previous Japanese methods of punishment were identified as barbaric and cited as justification for the unequal treaties signed between Japan and Western powers. Toward the end of the nineteenth century, after reforming its penal system and qualifying as a quasi-modern nation, Japan succeeded in getting the treaties revised.[3] In the early 1930s, in its attempt to colonize the Chinese mainland, Japan was deploying the same discourse as Western colonial powers did. Shi Lianfang's poignant comments pointed out the discursive power China had to deal with and the urgent task China faced of reforming its judiciary in order to make the country a modern nation-state and an equal member of international society.

Notably, in Chinese official discourse (official communications) on judicial reform in the New Policy decade (1901–1911) and the Beiyang era (1912–1927), reform-minded officials cited Western models by referring to "countries in the world" (*shijie geguo*), "countries in the East and the West" (*dongxi geguo*), "all countries" (*wanguo*), or simply "various countries" (*geguo*). By these terms, the officials meant the Western nations and Japan, which came to be identified with the world and thus universalized. Such an equation of the West (and Japan) with the world became a standard formula in the official discourse on reform, especially prior to the Nanjing decade (1927–1937). The equation revealed a particular conceptualization of the modern world that the Chinese had accepted owing to China's traumatic experiences since the Opium War: the modern world was a club, to which only countries that had modernized could belong. It was into this club that educated Chinese hoped China would qualify to enter through successful modernization. Although in the Nanjing decade, Guomindang (GMD) officials began to take some exception to the supposed universality of Western models, they continued to aspire to a modern Chinese judiciary as a ticket qualifying China to enter that club. In essence, the task was to transform traditional laws and judicial practices (*jiufa, jiulü*) into ones similar to their Western counterparts (*xinlü, xinzhi*) so that China would be considered "ready" for judicial sovereignty—the abolition of extraterritoriality. This was the international dimension of the underlying historical context of China's judicial reform in the early twentieth century.

The guiding principles of the judicial reform were the rule of law, ju-

dicial independence, and due process. To Chinese reformers, the rule of law would mean legal equality for all, with even government officials being held accountable to the law that was in force. Judicial independence was widely understood as (1) the judiciary being separate from state administration at all levels, and (2) judges adjudicating independently, free of interference by any authority.[4] Due process of law would ensure the rights of the accused and the impartial and fair resolution of civil disputes and criminal prosecution through established rules and open procedures.

Under those principles, from the final years of the Qing dynasty through the Nanjing decade, the reform agendas consistently included the establishment of the following: (1) a set of substantive and procedural laws that would separate criminal and civil proceedings, (2) a multi-level court system across the country that would allow for two appeals after the first trial, (3) a trained and disciplined corps of judicial officers such as procurators, judges, and prison administrators, (4) due process underpinned by criminal and civil procedural laws and checked by a regulated legal profession, and (5) humane punishments for crimes, with a reformed prison system in accordance with prevailing penal and criminological theories and practices in the West.

These reform goals and the principles behind them involved some fundamental reconceptualizations of the judicial functions of the state, as well as unprecedented measures of institutional construction and reforms that were part of modern state building. In traditional Chinese thought on statecraft, applying law and administering justice were considered the last resort in governance, implying a failure in moral suasion and virtuous rule on the part of the state; by the same token, resorting to litigation in civil matters or being charged and punished for crimes would mean a failure in moral rectitude and virtuous living on the part of ordinary people. By the time of the New Policy reforms, however, those notions of law and justice had changed to a new conception informed by Western models. Judicial institutions and processes were perceived as a necessary part of modern state functions and the appropriate venue for resolving disputes and punishing crimes. The typical Qing official mentality that took a negative view of all litigation and attributed case backlogs at yamens to people's litigiousness and pettifoggers' incitation no longer prevailed in the official discourse during 1901–1937.[5] Although legal scribes known as "litigation masters/sticks" continued to exist and case backlogs at all levels continued

to be a fact of life and considered a serious problem, it was a problem now attributed, not to those who brought civil suits and caused criminal prosecutions, but to the inadequacy of the judiciary and the failings of judicial personnel. In a word, judicial modernity was considered the solution to all the problems in judicial process.

This book examines what judicial modernity actually meant to the Chinese state and society—to administrative officials and judicial officers at all levels, county magistrates and their staff, civil litigants and criminal defendants, and elite and nonelite people in local society. It looks into what intellectual and institutional innovations and adjustments were involved when reform initiatives were envisioned by the central government, how such agendas were received and responded to at the provincial and county levels, and how administrative and judicial institutions functioned and interacted with one another and with local society during the course of the reform. Other questions need to be asked. What impact did the reform have on local society? How far did it change social dynamics and power relations there? How did Chinese, elite and nonelite alike, make use of the increasingly accessible judicial system in their contests for resources or dominance? In short, the study explores what occurred when, in the course of the reform, the dynamics and logic of state institutions came to intersect and interact with those of local society, where the state efforts at modernizing—penetrating, regulating, and reforming—local society were manifested, resisted, and negotiated on a daily basis.[6]

It might be expected that the judicial reform, a daunting task in its own right under any circumstances, would encounter many problems and difficulties, and that it would inevitably have unintended consequences. Given the accumulated weight of official legal tradition (laws and judicial practices) and popular legal culture (litigation strategies and behavior), what was accomplished in the reform during 1901–1937 was remarkable, albeit falling well short of the goals set by the central government. In addition to documenting the strenuous efforts made by the reformers and their partial successes, however, this book also analyzes the reasons for the many defects and failures of the reform. The problems may easily be attributed to financial difficulties and resultant institutional inadequacies, which were often cited by contemporaries to account for the shortcomings of the reform. That is certainly a very important reason, and it is examined in some detail, but the financial woes do not tell the whole story. Although the reform achieved measurable

progress under unfavorable conditions, including financial constraints, given the social environment of China at that time, the judicial modernity pushed by the central government created its own problems at the provincial and county levels, which had paradoxical consequences. To further conceptualize and contextualize the reform and its successes and failures, several analytical themes are outlined, as follows.

Judicial Modernization as Formalization

To capture the essence of what reformers tried to accomplish, one may define judicial modernity as formal justice, and judicial modernization as the formalization of legal institutions and procedures in accordance with uniform standards and modern techniques.

When the Qing dynasty (1644–1911) began to embark upon an ambitious project of modernization known as New Policy at the turn of the twentieth century, judicial reform was part of the project. One of the prominent features of a modern state that Chinese reformers accepted as necessary and pursued persistently was the rationalization and expansion of the state system and its functions. This was especially true of the judiciary, and the reform was to build institutions and lay down rules and procedures by which judicial functions would be performed in proper institutional settings.

To achieve judicial modernity, the reform focused on formalization, standardization, and bureaucratization. Ever-more-minute and elaborate rules and regulations were prescribed for institutions and procedures in the judiciary. All manner of norms and forms were spelled out in laws, ordinances, rules, regulations, directives, and orders, literally thousands of which were enacted, amended, issued, reiterated, repealed, and reinstated during 1901–1937. To be sure, in traditional China, the state bureaucracy also relied on rules and procedures. But at that time, the rules and procedures in adjudicating litigation and administering punishments were simpler, because the judicial functions of chief officials at the provincial level and below were not separate from the administrative ones. In contrast, the procedures, rules, norms, and forms that resulted from the reform greatly surpassed those of earlier times, being much more specific, comprehensive, and numerous. In the Republican era, for instance, litigants had to choose from among no fewer than fourteen kinds of judicial forms to fill out when they

wanted to engage the state's judicial functions in any way. A fee was to be paid by litigants for each form they used, and each payment was to be documented, reported, and accounted for. Breaches in any of the formal rules were considered failures in achieving judicial modernity. And all rules and procedures were to be followed in formal institutional settings—courts, procuracies, prisons, and judicial administrative offices.

In short, the entire judicial reform can be viewed as a continuous effort to produce norms and forms and turn them into formal, *working* institutions and procedures at all levels of the judicial system, and the state system as a whole. Consequently, the project of achieving judicial modernity as performance of formality entailed a host of institutional and social ramifications in the history of early-twentieth-century Chinese judicial practices. These included continuous state expansion, massive paperwork within the state system, rising financial costs, and deviations from formalized practices, due to the limited effect of reform discourse and to local practices rooted in social environment—all this resulted in the ultimate paradox that the modernizing judicial system forever failed to reach the goals it set for itself.

Judicial Formalization and State Expansion

The formalization agenda had crucial implications for state expansion. First of all, it demanded centralization and uniformity in establishing and enforcing norms and forms. From the beginning, at the time of the New Policy, the Qing government aimed at centralization of state power, while allowing some incentives and expressions of provincial and local interests, in an attempt to "connect the country's territory, the people, and the state" (Chapter 1). The successive Republican governments largely inherited the centralization agenda, especially in the judicial field, but took provincial and local interests less into account, and thus faced more resistance from those interests. For reformers, centralization and uniformity were institutional prerequisites for an impartial and fair judiciary; indeed, without some uniform standards, there would have been no credible judicial system to enforce the rule of law, judicial independence, and due process. Centralization was therefore vigorously and persistently pursued in the judicial field throughout the Republican era.

Analysis of the institutional and procedural formalization as state

expansion in Republican China involves the notion of "the reach of the state."[7] This book will show that during 1901–1937 the laws, rules, regulations, orders, and directives issued from the national capital reached and were followed within the judicial system at the provincial level and down to the county level where district courts and their branches were established. The matter was more complicated, and the patterns were diverse in counties where no courts were established and county magistrates performed judicial functions. In those places, the reform initiatives of the central government were followed to a larger degree in procedural formalization, though not consistently and universally, and to a much lesser degree in institutional formalization. The noncompliance in institutional formalization occurred, not because county officials would normally choose to ignore or shortchange the mandates from the central and provincial authorities, but because they lacked the necessary resources to carry out the mandates. In such cases, it would be inaccurate to conclude that the central government failed to "reach" the county level.

Theoretically, therefore, this study tries to convey a more complex understanding of the state in Republican China and its reach at the provincial and county levels than has hitherto been available.[8] The understanding requires a conceptualization of the state system and its reach in multiple dimensions and as *multiple hierarchies* that overlapped at lower levels. The judiciary was one of those dimensions and fields within the state system. The judicial field was composed of a hierarchy of judicial institutions at national, provincial, and county levels. At the same time, the judicial system was institutionally interacting with the administrative bureaucracy—another field of the state system with its own hierarchy, including counties at the lower level. Because the court system failed to be established in most counties, counties without courts were part of the hierarchy of the judicial field but were also part of the administrative field and subject to the provincial government. The administrative and judicial fields and their respective functions, therefore, overlapped and often conflicted at the county level. As the provincial governors were given powers to supervise judicial matters, the two fields further overlapped and interacted at the provincial level. Under those circumstances, the judiciary and its functions were subject to the influence of and interference from the administrative field. To complicate the matter further, in the Nanjing decade, an additional field—the GMD organization, with its own hierarchy—interacted with

both the administrative and judicial fields. With different priorities and agendas, administrative officials (and GMD cadres) often acted in ways that distorted and subverted centralization, uniformity, and formalization in the judicial system, especially in places where formal courts were not established and county magistrates were under the stronger sway of the provincial government in judicial matters. As a result, the reach of the central government, the Ministry of Justice (MJ) in particular, manifested in different ways in different places, depending on the varying degree of the formalization of state judicial functions in those localities and the interaction between the judicial and administrative (and GMD) institutions.

To trace and understand the reach of the state in the course of the reform, this book addresses the tensions between the MJ and other agencies at the national capital, between the central government and provincial governments, between judicial officials and administrative officials at the provincial level, between provincial officials (judicial as well as administrative) and county officials, between county government offices and party organs at the county level, and between all the above and local people. As it turned out, the prominent theme in all those tensions was a constant contestation for financial resources. And our understanding of the said tensions is gained in the documents left behind by the formalization efforts.

Judicial Formalization and Documentation

In a sense, a drive for documentation or representation of policies being implemented and rules followed in a system or organization was a hallmark of modernity, or modern society. In a significant departure from the traditional practices, the reform mandated that every procedure and all institutional activities in the judiciary, from a case accepted for litigation or prosecution to its final resolution, were to be recorded, reported, categorized, and compiled in endless cycles of paperwork throughout the judicial system and beyond. These documents were material witnesses to a modernizing project, and they were literally part of that modernity in the making.

Although the interest of the central government in obtaining information from lower levels of the state system was nothing new, the scale and magnitude of paperwork resulting from the formalization agenda

was unprecedented.[9] While the quantity of the information that the Republican state was collecting exceeded what the imperial state tried to get, a significant break between the two periods was in the nature and quality of the data that the state collected. The kind of information in which the Qing emperor was interested was essentially anecdotal (however vital it might have been to the emperor), whereas the Republican state wanted *statistical* and impersonal data about the state *system*. "From its inception," the sociologist Anthony Giddens observes, "the collation of official statistics has been constitutive of state power and of many other modes of social organization also. The coordinated administrative control achieved by modern governments is inseparable from the routine monitoring of 'official data' in which all contemporary states engage."[10] In this light, it is not surprising that as early as the New Policy decade, reform-minded officials spoke of "judicial statistics" and "prison statistics" as part of the judicial system to be established. Thus judicial modernity that included the formalization of data collection within the judiciary was a concrete aspect of modern state building in Republican China.

Besides a penchant for documenting, and accounting for, all institutional activities as a visible mark of being modern, the practical purpose of all paperwork was to inform the higher authorities about how the established norms and forms were followed or breached at lower levels. The norms and forms included the rules and procedures of making periodic reports to the higher authorities, as well as those of operating the judiciary. The MJ took great care to make sure all paperwork was in order and up to date. In 1917, when Minister of Justice Zhang Yaozeng found clerical errors in the reports on inmate deaths from the county jails in Wu and Huai'an in Jiangsu province, he brought each instance to the attention of the chief of the Jiangsu High Procuracy (JHP) and demanded elimination of such errors in the future.[11] In 1921, when the MJ found that the reports from the JHP did not indicate who was in charge of statistical documents collected in the province, it wanted an answer. When the JHP responded that three officials had successively been in charge of the task since February 1916, Minister of Justice Dong Kang immediately handed down disciplinary actions against these officials for having misfiled statistical documents (one of the three was simply fired, because his appointment did not have MJ approval), and the JHP chief was given a warning for failing to provide the statistics to the MJ in a timely fashion and to supervise his subordinates.[12] The

ministry's attention to, or obsession with, complete and accurate data on the judiciary was driven by the need to know what transpired at the lower levels of the system. The MJ would routinely use the systemwide flow of documents to communicate reform initiatives to all officials and relied on the statistical data and written reports from below to monitor their implementation at the provincial and county levels. This was part and parcel of state expansion.

Judicial Formalization and Financial Costs

The project of judicial formalization was predicated on a rejection of the traditional notion of a minimalist state and an acceptance of an expansionist state, in terms of its functions and related expenditures. In a way similar to other New Policy projects (local self-government and new schools in particular), the formalization of judicial institutions and procedures entailed increasing financial costs that would not have been incurred with the traditional judicial practices. The costs included expenses at least on the following: training and selecting judges, procurators, court clerks, and prison officers through tests with specified standards; paying salaries to judicial personnel down to county jail guards at specified scales; building and operating courts, prisons, and detention houses with specified designs and standards; feeding prison and detention house inmates with specified rations; manufacturing, and enforcing the use of, formal complaint forms in a specified format; delivering court documents (summonses, warrants, court decisions, and sentences) to criminal defendants, civil litigants, and witnesses following specified procedures; escorting criminal defendants on appeals to higher jurisdictions for second or third trials within specified time limits; compiling and binding into books all reports, records, files, journals, and statistics of judicial activities and procedures in specified formats and at specified intervals; and so on and so forth. The word "specified" is repeated deliberately, since compliance with uniform standards in all institutional activities was what judicial modernity required, and it was pursued persistently by the central government, with rising financial costs.

The costs were not always justified by an increase in the efficiency and effectiveness of the state in performing judicial functions. Take documentation of judicial activities, for example. By the early 1930s,

each formal court was to submit no fewer than 134 kinds of reports and journals annually, in addition to several dozen books and journals kept at the court. At the Jinhua District Court (DC) in Zhejiang province, a total of more than 180 kinds of reports and books were compiled. Deputy Minister of Justice Zheng Tianxi, who inspected the judiciary in Fujian and Zhejiang provinces in 1932, considered many of the reports, journals, and books "redundant, without scientific and statistical value."[13] Zheng was also of the opinion that procedural laws should suit the conditions of the economy, transportation, and the people's education level in a country, and that the Chinese procedural laws based on Western models might not be appropriate to China's conditions. The result was that redundant litigation procedures cost too much time and labor. He cited one example: a civil lawsuit with a target remedy of ¥450 was tried and closed after five months and the court prepared and printed more than 200 sheets of documents, costing the state more than ¥450.[14] Yet the costs of documenting and following procedures could not even begin to compare to those of building and operating a formal court system and a prison system.

In connection with the issue of cost-effectiveness, the formalization agenda also raised the issue of procedural/formal justice versus substantive justice. Simply put, the issue refers to the situation where in spite of, or even because of, a quest for procedural justice by following the established rules in proceedings, victims (and their loved ones) in criminal and civil litigations who had been injured in a variety of ways might not obtain justice in the sense of equity, restitution, compensation, and punishment of the wrongdoers. The issue may be deemed universal in all judicial systems and practices in all countries. The point here is that in the pursuit of judicial modernity, Chinese reformers did not even address the issue squarely; and only occasionally were some concerns voiced about it. In 1915, after the judicial retrenchment of 1913–1914, President of the Republic Yuan Shikai issued at least two directives scolding judicial officers for being overly concerned with procedures and much too indifferent toward the people's sufferings caused by case backlogs due to procedural technicalities.[15] "I have high regard for judges and great expectations of judicial independence. But [judicial] independence cannot be forced. I would have nothing to say if adjudication were fair, the people felt at ease with it, and the whole country happily accepted the role of the judiciary. It is putting the cart before the horse, however, if, in seeking judicial independence, we

spend money only to benefit irresponsible officials, copy formalities [from foreign models] without officials understanding the principles, and leave the people boiling with resentment."[16]

Yuan Shikai may have been trying to justify the retrenchment of the court system, but what he said did reflect a sentiment shared by some judicial officials, especially those in the Nanjing decade such as Zheng Tianxi, cited above. Hong Lanyou, another judicial official, opined as late as 1937 that the civil and criminal procedural laws were not entirely suitable to China's societal needs, and that overelaborate procedural formalities burdened both the system and the people. Not only did ordinary people fail to understand the formalities, but judges considered them restrictive, unnecessary, and conducive to case backlogs:

> It often happens that a case goes through several trials, only to have more side issues spring up, or a case that could be decided in one word ends up dragging on for years. Since the civil procedural law stresses procedures, no matter the result of a trial, as long as procedures are found faulty, the case has to be sent back for retrial. So cunning and litigious types file lawsuits at both the court and the procurator's office to tie down the defendant, or file appeal after appeal to keep the case unresolved for a long time. People who have gone bankrupt owing to entanglement in litigation are everywhere, while judges are worn out and exhausted by dealing with procedures, detention houses are left overcrowded, and mountains of backlogged cases pile up—nothing hurts the people's livelihood more than this.[17]

Similarly, Ju Zheng, the head of the Judicial Council (*sifa yuan*) (JC), and another legal commentator believed that the three-trial system contributed to the dilatoriness of the judiciary.[18] It is important to note, however, that these criticisms did not categorically reject procedural formalization borrowed from the Western model; they merely questioned whether or not such procedural formalities suited China's social conditions at that time and best served substantive justice. And even such discussions were rare.

Financial costs and institutional inefficiency inherent in the formalization agenda were not uniquely Chinese and might be expected in modern judicial systems or bureaucratic organizations in any country. What is historically significant is that the requirements of being "modern" left Chinese reformers no choice but to stick to the formalization agenda; and with the exception of some GMD officials, cited above, no alternatives were seriously contemplated—anything less than the planned formalization was considered a failure. But for Republican China, where social and economic development was lacking and the

state's priorities lay elsewhere, the enormous costs of institutional and procedural formalization in the judicial system were simply prohibitive. Consequently, the plan for establishing courts, procuracies, detention houses, and new prisons in all counties across the country was never realized. In a sense, the institutional formalization—a prerequisite for judicial modernity—was destined to fail given that it was not backed by the necessary resources.

Judicial Formalization and Deviations

Separate from building institutions, procedural formalization entailed a normalizing process. The norms and forms that were established by the reform legitimized desirable practices and behavior, and at the same time, practices that did not conform to the norms and forms became officially illegitimate, as irregularities, abuses, corruption, and miscarriage of justice in a spectrum from minor infractions to criminal acts. Yet, for reasons discussed below, acts contrary to the norms and forms were routinely committed and tolerated, while being routinely criticized and blamed in public discourse and official discourse for all sorts of problems in judicial process. Precisely due to more and more rules and regulations proscribing behavior that was commonplace in county government offices (CGO) across the country, practices that were officially chastised but practically accommodated multiplied. This accounts to a large degree for the criticisms of the Republican-era judiciary that one encounters in the sources.

The state itself also engaged in practices that did not align with the formalization agenda. Aside from the GMD practice of punishing politically defined offenses, even after the new criminal code and criminal procedural law had been enacted, the Republican state repeatedly resorted to special criminal laws to deal with robbery and banditry and other common crimes. Another example of informal practices was that the central and provincial governments allowed and encouraged petitions on judicial matters and individual lawsuits by people in all walks of life. These two informal practices were used as tools supplementary to the formal institutions and procedures, which were found inadequate even in places where county-level courts were established, and they were more widely used where formal institutions and procedures were absent. This fact points to the transitional nature of the Chinese judi-

ciary, which was moving from a traditional pattern where fewer norms and forms existed to a "modern" pattern where, along with building institutions, it was imperative, albeit problematic, to design elaborate norms and forms and enforce compliance with them.

As far as procedural formalization was concerned, a profound paradox was that, on the one hand, where procedures were ignored or compromised, usually in low-level jurisdictions, the legal rights of litigants and defendants were infringed upon, that is, formal justice was not fully delivered; and on the other hand, where procedures were implemented and adhered to, they tended to contribute to trial delays and case backlogs, so that substantive justice was not fully served. In the end, both outcomes existed, and neither was satisfactory either to the state or to the people.

The Logic of Local Practices

Judicial modernity as performance of formality met with resistance in the form of various deviations from rules and procedures. Deviations at the county level especially undermined the reform agendas in no small measure. Irregularities, abuses, corruption, and injustice were familiar stories when it came to the behavior of local officials and county staff in late imperial and Republican China, and some such stories are recounted in this book. Instead of looking at such behavior as individuals' moral failures, it would be instructive to take a systemic view and analyze that behavior as a local and localized reaction to the impersonal national agenda of modernization that did not take into account varied local geographic, political, economic, and sociocultural conditions.

Since the project for judicial modernity was ultimately driven by external forces, as opposed to internal development, the intellectual outlook, political institutions, social structures, economic conditions, and cultural practices in local society were ill-prepared for the required transformation. High officials in the national capital, and perhaps in many provincial capitals as well, accepted notions about a modern judiciary as part of a modern state and the way it was supposed to function, and attempted to build institutions and formalize practices accordingly. Such understandings and commitments, however, were not equally shared across the country. Even in places where courts were set up and judicial officers were appointed, there were still irregulari-

ties, abuse, corruption, and miscarriages of justice. Those deviations from formalized rules were not entirely due to the shortage of judicial funding per se; they had to do with the overall economic conditions and survival strategies of all those involved. In a fundamental sense, therefore, there was a disjunction between the national agenda and local practices or a conflict between the logic and dynamics of a modernizing state and those of local society. The former were typically the impulses to seek formalization, standardization, and uniformity from the top down, while the latter, rooted in particularistic interests, were typically manifested in transgression, infraction, and informal degradation of officially sanctioned norms and forms.

When the logic and dynamics of the state and those of local society intersected in judicial processes, at least two social ramifications would emerge. First, by setting up formal procedures as norms, the reform agenda destabilized and delegitimized the customary informal process of dispute resolution that was shaped and defined by the sociopolitical environment of local society, that is, the local power structure and power relationships. Local power holders would try to resist the state agenda or, failing that, to adapt to the changing situation to turn it to their own advantage. In the wake of the 1911 Revolution, some local elites felt threatened by courts built in their locales that were independent of the local power structure, and others tried to control or influence judicial appointments at the county level. After the building of county-level courts was abandoned in 1913–1914, local elites reclaimed a larger social space and possessed a stronger political leverage to interfere, as they had done in the imperial era, with the judicial functions of the county magistrate and the trial officer (a new position created by the reform), who were outsiders to local society.

A noteworthy development during and after the New Policy decade was the proliferation of volunteer associations, either sanctioned by the state or declared by their founders as public bodies, representing the people or certain segments thereof, reflecting public opinion, and advancing the public good.[19] A variety of such local associations appeared at the county level and below after local self-government was proposed in the New Policy decade and pursued intermittently in the Republican era. Our archival sources show that in defense of local group and personal interests, organizations such as county assemblies, township assemblies, township associations, local militias, county chambers of commerce, and native-place associations often interacted with county

magistrates, judicial institutions, and provincial and national governments on judicial matters and in individual cases.

The rise and active interaction with the state of such institutions in local society in the early twentieth century signaled the changing composition and strategy of local elites that were more than traditional gentry.[20] The term "local elites" includes complex social elements that did not always have the same interests in mind. The new elites were as powerful as the traditional type in local society but were often engaged in new lines of endeavor created by the New Policy projects, such as local self-government, Western-style schools, a new police force, the anti-opium campaign, and so on. Reflecting the new composition and social status of local elites in the Republican era, besides the familiar designations "gentry" and "gentry-merchant," newer terms were created by ordinary people and county magistrates to identify the new local elites. The terms included "outstanding elders and well-learned gentlemen" (*qiying shuoshi*), "powerful gentry-manager" (*quandong*), "evil gentry-manager" (*liedong*), "evil manager-litigation stick" (*liedong songgun*, and, of course, "local bully and evil gentry." The last term, not insignificantly, was used by ordinary people before the GMD state began to crack down on the local powerful in this category (see Chapter 3). These newer terms reflected sociopolitical changes in modern China in which the traditional gentry were joined and transformed by newer social elements and political institutions in local society. In the context of this study, certain local elites were called "outstanding elders and well-learned gentlemen" when the state wanted chambers of commerce to mediate commercial disputes, or when the state wanted to enlist local elites to donate money for and participate in prison reform at the county level. The other negative terms appear in reports from county magistrates and petitions from ordinary people that describe local elites who used their positions, connections, and powers to harm local people.

One of the ways local elites commonly exercised power was through the interaction of their organizations with the government authorities on judicial matters to advance or defend their interests. On quite a few occasions, such actions were denounced by the authorities as interference with judicial independence. But since judicial independence was never fully institutionalized, that is, most county magistrates as administrative officials continued to adjudicate litigation, local elites were not prepared to relinquish their role in the county judicial process, which

became an increasingly important power arena because of its increasing accessibility, thanks to the reform. Critically, wherever the state mandated a new function but failed to perform to the standards it set for itself, societal forces would by default come to fill the space and perform the function in some way, shape, and form, which was often contrary to what the state agenda intended to bring about.

The second ramification of the intersection of the national and the local was that when the social environment, and the praxis rooted in it, did not change substantially, the new norms and forms that the state mandated to regulate judicial institutions and practices were not as functional and productive as they were designed to be. When old ways were yet to be completely replaced by new practices, there were many motivations and opportunities for social actors to undermine or deviate from the new practices. Old patterns of behavior and customs among county staff continued to operate with their own logic and dynamics, which made more sense to local actors than the official discourse on the reform. County functionaries did not hesitate to take advantage of their positions to benefit themselves by bending or violating official norms and forms, because to do so was reasonable from their perspective. The project of formalizing judicial institutions and practices tended to provide opportunities for abuse, undermining the effect of the reform. Thus each reform measure had its own downside. Supposedly new solutions to old problems only begot new problems of irregularities and rule-violations. For instance, the rule of avoidance in the appointment of adjudicating county magistrates, which was designed to minimize corruption, created a situation where the county magistrate had to rely on corrupt local clerks and runners in judicial proceedings, simply because as an outsider to local society, the magistrate did not speak the local dialect, and litigants did not speak Mandarin. Similarly, the procedures for delivering and copying judicial documents mandated by the formalization agenda became new avenues for county functionaries to squeeze money from litigants. Both—county magistrates relying on local clerks and functionaries squeezing litigants—were officially proscribed but were routinely tolerated.

In short, judicial institutions and judicial officials at the national and provincial capitals operated above and almost apart from local society, which had little in common with the national agenda of judicial reform and functioned with its own logic and dynamics, grounded in its social environment. County magistrates and trial officers, and even

district courts and their branches, tended to reckon with and yield to such logic and dynamics, while attempting to manage some semblance of carrying out the reform and delivering justice. The motivation, the vision, and the passion that drove the reform initiatives at the national level did not penetrate local society in any significant way, even though local actors learned to use the vocabulary and discourse of the reform and were more than ready to resort to judicial process in pursuit of their own interests. Thus a wide gap obtained between what was promoted as judicial reform at the national (and provincial) level and what was practiced as judicial process at the county level. While the achievements of the reform reflected the commitment of a modernizing state, its defects and failures may be understood at least in one dimension as symptoms of a structural incongruence between the logic of modern state building and that of local social environment, and the resulting institutional dysfunction.

Reform Discourse and Its Limits

In connection with the disjunction between the national and the local, this book pays due attention to how government officials and social actors appropriated the reform discourse and vocabulary in a variety of situations. The phrases often invoked during 1901–1937 were "the rule of law," "judicial independence," "protecting human rights," "legal sovereignty," "dignity of the judiciary," "authority-credibility of the judiciary," "maintain a code of conduct for officials," and so on. In addition, the goal repeatedly announced by the state of abolishing extraterritoriality was frequently cited to criticize perceived or real misconduct of judicial officers and miscarriage of justice. The fact that those vocabularies came into fashion as codes of positive moral values was a significant indication that the traditional notion of litigation as moral failure was no longer the orthodox one.

Yet why was it that although such vocabularies and discourses were invoked frequently, legal culture and litigation behavior did not change in local society, or why did the discourse not penetrate the mind of local actors, both litigants and county functionaries? For one thing, it would take more than reciting the words for people to understand, internalize, and practice what was invoked and for discourses to be turned into actual values and social practices and praxis. A crucial fact, how-

ever, was that almost all instances of invoking the vocabularies that were of political currency appeared either in official communications or in petitions and legal plaints written by lawyers and legal scribes for people involved in judicial process. In local society, especially in counties where no courts existed and therefore no lawyers could appear at county trials, legal scribes were indispensable, and more so in the Republican era than in the imperial era, precisely due to the reform that broadened access to judicial process. Not surprisingly, a scribe such as Cheng Wenhao of Liyang, Jiangsu province, was still active at the age of seventy-five.[21] In the late imperial era, the act of countering local elite power on the part of the weaker actors by bringing lawsuits beyond the local power arena took place with the aid of legal scribes.[22] This continued to be the case in the Republican era; and by that time, there was no longer any specific law to define and prosecute legal scribes as pettifoggers. The regulations on lawyers vaguely prohibited incitation to litigation, but this was difficult to enforce, because the proscribed behavior could not be easily defined or proven in court (see Chapter 7).

Legal scribes, then, along with lawyers, were able to play an important role in the judicial process and catch hold of what was fashionable and therefore persuasive in the political and legal discourses of the time and use it to increase their odds of winning for their clients and thus enhance their own marketability, notwithstanding the drag on them of traditional concepts and vocabularies, as shown in some of the complaints they wrote. That is to say, it was through the filter of scribes and lawyers that average Chinese citizens haphazardly learned the workings of the judicial institutions and procedures brought forth by the reform, at a time when the institutions were not established everywhere and the procedures were not always faithfully followed. Local people were far removed from what was driving the reform nationally, and hardly appreciative of what it should and would mean to them locally. All they saw was the same age-old litigation game for all to play, with some new rules added, such as filing lawsuits with official complaint forms for a fee that was state-mandated, or having a court decision notice or summons delivered to their homes, which was also state-mandated, for a fee that was often extralegal. The same outlook applied to county functionaries who copied criminal and civil complaints or delivered judicial documents—the new services meant opportunities for them to make money or make a living. Ideas about the rule of law, the people's rights, and so forth remained words invoked by litigants

(or the scribes they hired) as discursive strategies in their litigation struggles, or by county magistrates and functionaries seeking to show themselves in conformity with state mandates, with very little bearing on how judicial functions were performed at the county level. This was an important aspect of the disjunction between the national agenda and local practices.

The Paradox of Judicial Modernity

A striking feature of the judicial reform during 1901–1937 was the continuity and consistency in the motivations and goals of the central government throughout the period, notwithstanding the peculiar ideological thrust and political agenda of the GMD. This was the case because the reform was part and parcel of a secular trajectory of modern state building in early-twentieth-century China. For all the setbacks and problems, the trajectory projected a general upward curve, tracing the tortuous and haphazard expansion of the Chinese state horizontally and vertically. This was especially true of the judicial system.

Did the institutional expansion of the Chinese state and the judicial system mean real development, in the sense of growing effectiveness and efficiency? Prasenjit Duara sees "state involution" at least in the area of revenue collection in the Republican era, while Julia Strauss identifies "strong institutions in weak polities" in the case of several national-level organizations under the GMD that grew in effectiveness, if not in efficiency, such as the Ministries of Foreign Affairs and of Finance, in addition to the formerly foreign-controlled Salt Administration.[23] This book documents a steady rise in the number of lawsuits and a growing capacity of the judiciary to handle them in the Republican era, which may be seen as a relative increase in the effectiveness, if not efficiency, of the modern Chinese state.

On the other hand, even the growth of institutional capacity was never adequate to meet the growing societal demand for more effective and efficient judicial performance by the state. The perennial case backlogs, which government officials and ordinary people alike deplored, were a widely cited indicator of the failure or inadequacy of the judiciary. Because the expansion of the judicial capacity to handle civil and criminal cases was in essence an expansion of the state, the problem of case backlogs was an issue, not only of delivering justice and ensuring

social stability, but also of confirming the legitimacy of the state. Hence the serious concerns over the issue and strenuous efforts to wrestle with it on the part of the state. In the Republican era, every minister of justice, upon assuming the office, proclaimed his concerns over heavy case backlogs, deplorable prison conditions, and other unfulfilled reform goals. Such announcements were rhetorical exercises, to be sure, but they also reflected a real and deep anxiety over the disappointing statistics that seemed to discredit the judicial system and undermine the state's legitimacy.

That kind of anxiety need not, however, be taken as a truthful reflection of the conditions or the nature of what was happening. Societal demand for better judicial performance by the state was partly created and fostered, paradoxically, by the increasing accessibility to the judicial process as a result of the reform. Studies of Qing legal practices show that the Qing state discouraged litigation and encouraged informal resolution of disputes in the local community, while local disputants would try to break out of a local power arena dominated by their stronger opponents by taking cases to higher authorities.[24] In contrast, while the Republican state encouraged settlement of disputes outside the formal judicial process in order to reduce the burden on institutional and financial resources, the essence of the judicial reform was to broaden the access to formal judicial process and formalize it with new institutions and procedures. Inasmuch as people were more willing than before to resort to litigation, the newly established judicial system was financially hard pressed and tended to be overwhelmed, resulting in case backlogs in all jurisdictions.

In short, although case backlogs give the impression of systemic failure, this may not be historically accurate. In comparison with, say, the Indian judicial system in the 1970s, which one scholar has described as pathological, or the judicial system and process in Western societies today, the judiciary in Republican China would appear quite respectable.[25] Instead of taking case backlogs merely as an indication of the failure of the judiciary, one may regard them as a result of the state system being weighed down by its own commitment to judicial modernity, a commitment not supported by the necessary resources. This was the case because the ambitious, unrealistic goals were externally compelled or induced, not internally driven and prepared. In the final analysis, the paradox of modern state building in early-twentieth-century China was that while the state apparatus was expanding, it always

fell short of what would be considered adequate in performing its functions as designed or desired, because the process itself would create more societal demands for ever more state functions and services, for which institutional and financial resources were always inadequate, especially given the overall developmental conditions in which China found itself.