

## CHAPTER FIVE

# “MANY CASES, FEW JUDGES” AND THE VANISHING THREE-JUDGE TRIAL

For over two decades, Chinese judges have developed strategies for coping with increasingly oppressive caseloads. Since each court's allocation of judges is pegged to jurisdictional population more than to caseload, courts with acute shortages of judges have long been hamstrung with respect to appointing more. Courts disproportionately burdened with heavy caseloads therefore responded with innovative solutions. As a part of China's prosperous Jiangnan region (江南) of the Yangtze Delta, Zhejiang is one of China's most economically dynamic provinces. By contrast, Henan belongs to China's relatively poor agricultural interior (Chapter 4). Their caseloads reflect these contrasting levels of economic development. Zhejiang's courts have long been distinguished by their heavy dockets. Henan's court dockets, by contrast, have been relatively light in national perspective. Consequently, pressure on judges has been far greater in Zhejiang. Zhejiang was afflicted with the plight of “many cases, few judges” (案多人少) to a greater extent than and long before most provinces. Henan and Zhejiang represent opposite ends of the court caseload spectrum, and, as this chapter will show, the timing and vigor of their adaptive responses have differed accordingly. Zhejiang's early coping strategies, including its embrace of the divorce twofer (Chapter 6), were a bellwether for courts elsewhere as caseloads grew rapidly nationwide.

The correlation between the number of judges in courts and the number of residents in court jurisdictions has been nearly perfect. The problem for courts, of course, is that the most populous places in China do not have the heaviest caseloads. Because the supply of judges is not

calibrated according to demand for litigation, the correlation between judges and caseloads is much weaker. For well over a decade, court officials in Zhejiang have complained that “the contradiction between the surging *demand* for judicial services and the inadequate *supply* of judicial resources is tremendous” (e.g., <https://perma.cc/66HZ-TECW>, emphasis added; also see <https://perma.cc/575P-XV46>). Courts in Zhejiang were forced to innovate earlier and more aggressively than those in Henan, but Henan’s courts were catching up by 2015.

Initially, as courts became overwhelmed, judges found ways to cope within the confines of the traditional three-judge collegial panel. When a full collegial panel of three judges tried a case, only one tended to do the work while the others merely went through the motions or simply did not show up. Eventually, though, courts dispensed with the three-judge collegial panel. Courts often mobilized assistant judges – who lacked the full status of judges – and lay assessors to fill out collegial panels. Assistant judges even assumed full responsibility for trials. Additionally, simplified trial procedures were increasingly and indiscriminately applied. As court dockets became unmanageable in the late 2000s and early 2010s, the SPC, in an effort to ease judges’ burden, encouraged and even mandated greater utilization of simplified procedures (civil and criminal) and greater participation of lay assessors. To a real extent, the SPC simply formalized what courts were already doing informally. Consequently, over time, the traditional three-judge collegial panel vanished.

In the remainder of this chapter, I will first introduce the problem of “many cases, few judges” in China’s courts. I will then describe some of the informal and formal coping strategies courts developed in response. Finally, I will show that Zhejiang adopted them earlier and to a greater extent than Henan did. We will see in the next chapter that Zhejiang likewise adopted the divorce twofer earlier and to a greater extent than Henan did. This chapter thus sets the stage for the next chapter, which demonstrates that the divorce twofer belongs to a toolkit of judicial coping strategies.

## CHINA'S CLOGGED COURTS

In January 2015, when he delivered his 2014 work report to the National People’s Congress, SPC President Zhou Qiang stated, “caseloads in people’s courts continue to rise rapidly, new types of cases increase, the pressure of handling cases grows heavier, the average annual case-load of frontline judges has exceeded 300 cases in some economically

developed regions, cases are many and judges are few, and the problem of judge attrition is pronounced” (<https://perma.cc/R6W5-JKRC>). At the time, judges’ caseloads were heavier in Zhejiang than in any other provincial-level administrative unit. Zhejiang’s frontline judges averaged 187 cases per year, more than double the national average of 85 (<https://perma.cc/Y5LB-EY9V>), while those in Zhejiang’s busiest basic-level courts averaged over 300.<sup>1</sup> Zhejiang had assumed this top spot in China as early as 2007 (<https://perma.cc/YE6V-AHGX>) and held it through 2017 (<https://perma.cc/GR8M-ALCQ>), after which it was edged out by Beijing (<https://perma.cc/7B74-26TW>).

An annual average of 300 cases would seem like a bed of roses to judges in many contexts around the world, including the United States (Chen and Bai 2016:34; Zhang 2016b). Given international variation in what judges do, there is no absolute caseload threshold that would qualify a court anywhere in the world as “clogged.” This absence of a universal standard problematizes international comparisons. In China, however, the oppressiveness of 300 cases per year is incontrovertible. Prior to the nationwide conversion of assistant judges (助理审判员) into judges’ clerks (法官助理) beginning in 2015, Chinese judges were responsible for the entire litigation process (Ng and He 2017a:34). They wrote and issued summons, prepared case dossiers, met with parties, analyzed evidence, conducted trials, and wrote decisions (Ye 2004:30; Zhengzhou Municipal Intermediate Court Research Group 2014). Dramatic growth in the volume of court cases, China’s “litigation explosion,” occurred while the population of judges barely budged (K. Chen 2019:108; W. Chen 2019; Fan and Jin 2012:98; Su 2010; Zheng 2018:130; Zuo 2018, 2020). Consequently, between 2011 and 2016, the average caseload per frontline judge increased from 79 to 113 nationwide, from 52 to 125 in Henan, and from 147 to 260 in Zhejiang (Basic Level Legal Artisan 2016a; Henan Provincial Bureau of Statistics, various years; <https://perma.cc/EU2P-TVVE>; <https://perma.cc/H6CD-DLE9>).<sup>2</sup>

<sup>1</sup> Zhejiang’s basic-level courts that had exceeded 300 cases per frontline judge by 2014 include those belonging to Hangzhou’s Binjiang District (<https://perma.cc/3FHY-A88J>), Hangzhou’s Xiaoshan District (<https://perma.cc/4MNT-LPKR>), Hangzhou’s Economic and Technological Development District (<https://perma.cc/7WBM-PUAC>), Wenzhou’s Lucheng District (<https://perma.cc/2X6U-RA73>), Anji County (<https://perma.cc/MRL4-PL2U>), Cangnan County (<https://perma.cc/L68D-C684>), and Haiyan County (<https://perma.cc/AU5A-YA5U>). By 2017, Zhejiang as a whole had exceeded 300 cases per judge (<https://perma.cc/GR8M-ALCQ>).

<sup>2</sup> Because published figures are variously calculated using total judge counts and frontline judge counts, I adjusted some of the figures in this sentence by reducing counts of *all* judges to reasonable estimates of *frontline* judges according to the assumption that frontline judges accounted for 75% of all judges (Basic Level Legal Artisan 2016b).

This litigation explosion was driven first by economic development, which drove growth in the volume of cases in general and contract disputes in particular (Fan 2010:137; Zuo 2018:240–41). Second, court petitions ballooned following the implementation of the 2007 Measures of People's Courts on Collecting Litigation Fees that lowered barriers to court by cutting litigation fees by an average of 60% (Fan 2010:137; Jiang 2015:30). Procedural changes compounded the effects of this surge in caseloads. The revised 2012 Civil Procedure Law also burdened judges with new onerous pretrial and third-party claims procedures (Zhengzhou Municipal Intermediate Court Research Group 2014). In addition, court case filing reforms introduced in 2014 thwarted courts' ability to turn away cases by mandating that "cases must be filed and petitions must be tried" (有案必立、有诉必理; W. Chen 2019:18; Wang 2019b:141; Y. Zhang 2017:19). Just as observers feared, court dockets swelled by almost 30% in the first year following their implementation (Chinese Academy of Social Sciences Institute of Law Rule of Law Indicators Innovation Project Team 2017:95; C. Hu 2015:205n19; Zheng 2018:130). Judges also complained about new provisions in the amended 2014 Administrative Litigation Law (which took effect on January 1, 2015) requiring courts to accept all cases that satisfied legal requirements (e.g., <https://perma.cc/24GD-PB36> and <https://perma.cc/4XKT-GYMT>). As a work report from a basic-level court in Zhejiang put it: "Due to the implementation of the case filing reform, the new Administrative Litigation Law, and related factors, cases have surged, judicial personnel must work evenings [白加黑] and weekends [5+2], and the bitter battle endures with no end in sight" (<https://perma.cc/7TPK-4MJK>; also see C. Hu 2015:198; X. Li 2014:219; Ng and He 2017a:38; L. Xu 2012:26).

Originating in the early days of China's legal reform (Meng 1982), the phrase "many cases, few judges" had become a prominent part of public and scholarly discourse by the late 2000s. One of its earliest appearances in the *People's Daily* – the primary print news outlet of the Chinese Communist Party – was in a 2002 article profiling Zhejiang's Yiwu Municipal People's Court, one of the busiest courts in the country. It reported that this basic-level court had used local government personnel slots (地方编制 or 事业编制) to hire more judges in an effort to alleviate the conflict between "many cases and few judges" (Chen 2002), thus suggesting that personnel slots allocated by the central government were woefully insufficient. "Many cases, few judges" appeared again a few months later in another *People's Daily* article about judges in Zhejiang's Huzhou Municipal Intermediate Court

who, under the intense pressure of increasingly heavy workloads, were facing disciplinary measures for failing to meet statutory time limits for closing cases (Cai and Jiang 2002). The problems only deepened. In 2008 and 2009, three judges in Zhejiang’s Yiwu Municipal People’s Court successively won competitions for the most trials conducted in one day: over a dozen, over 20, and 35, respectively (Cai 2013:136). In 2010, this court had the distinction of closing more cases than any other court in the province (<https://perma.cc/5S2Q-DEXN>) – and therefore more cases than most courts in China. In 2011, Hangzhou’s Xiaoshan District bumped it out of the top spot in Zhejiang (<https://perma.cc/X2W2-3X4A>) and held the position of busiest court in the province through 2015 (<https://perma.cc/Q7W7-8XYK>). Indeed, according to 2010–2014 data (available with supplementary online material at <https://decoupling-book.org/>), Yiwu had the second-most closed cases in the province behind Hangzhou’s Xiaoshan District.

Oppressive caseloads were a major source of a “resignation boom” (离职潮) in basic-level courts (Chapter 3; also see Xue 2019:18). In 2011, SPC President Wang Shengjun reported that between 2008 and 2010, owing to low pay, weak professional protections, and heavy workloads, 8,781 judges in basic-level courts across China quit their jobs. Many judges reportedly suffered from poor physical and mental health, and some even collapsed at their work posts; 96 judges and bailiffs died for reasons related to their work, and another 466 judges and bailiffs suffered disabilities related to their work (Xinhua 2011). In his 2010 work report to the Provincial People’s Congress delivered in January 2011, Henan’s Provincial High Court President Zhang Liyong painted a local version of the national picture:

At the current time, the primary difficulty in courts is this: the contradiction between many cases and few judges is presently extremely pronounced, the many frontline judges whose average caseloads exceed 100 cases experience chronic overwork, and many judges collapsed from exhaustion and illness at their posts. Between 2008 and 2010, 17 judges and five bailiffs died for work-related reasons. (<https://perma.cc/4FFZ-L9XE>)

In his 2014 work report delivered in January 2015, he reported that Li Yaqin (李亚钦), the president of the basic-level people’s court of the city of Dengzhou, had died at work after years of exhausting overtime work (<https://perma.cc/HR3T-76FK>). As we are about to see, courts had a few tricks up their sleeves to deal with their heavy dockets.

## INFORMAL INNOVATIVE RESPONSES TO CLOGGED COURTS

This section examines two strategies Chinese courts have used to cope with their increasingly heavy dockets. When judges try cases using the ordinary procedure, they are required to form collegial panels. Recall from Chapter 2 that solo judges are synonymous with the simplified procedure. Chinese judges, known for engaging in “symbolic or creative compliance,” developed methods to comply with the letter if not the spirit of requirements such as this (Li, Kocken, and van Rooij 2016:62). First, because three-judge collegial panels consume scarce human resources, over time they came to exemplify “formal structure as myth and ceremony” (Meyer and Rowan 1977). Second, courts turned to assistant judges to lighten the load of associate judges.

### Faking Collegial Panels

Fake collegial panels, in which judges and lay assessors showed up only to satisfy procedural requirements, were identified at least as early as the 1990s as a strategy for dealing with the problem of “many cases, few judges” (Cai and Cai 1998:31; Liu 2006:92). In order to relieve judges of the full service commitment of collegial panel participation, collegial panels became a formalistic and ritualistic charade known as “collegial in form, solo in practice” (形合实独) and “a panel but not collegial” (合而不议), in which the presiding judge assumed sole responsibility for trying the case despite being ceremonially accompanied by two panel members (Cai 2013:134; Jia et al. 2014; Huabin Li 2014:42; Shangqiu Municipal Intermediate Court Research Team 2017:65; Xu, Huang, and Lu 2011:141; Ye 2004:30; Zheng 2018:135n1). This phenomenon has also been characterized as “one judge tries the case, two judges accompany” (一人审, 二人陪; S. Wang 2014:21) and the “solofication of the collegial panel” (合议制独任化; Jia et al. 2014; Yu 2009).

Although a judge at a trial can be seen diligently reading a case dossier, in reality it may not be the dossier for the case being tried, but rather for a different case for which he assumes primary responsibility. Although he may be present for the full duration of the trial, his mind is elsewhere. Sometimes a judge who is present at the opening of the trial will get up and leave shortly thereafter, only to return for the conclusion. Sometimes a party will not even see the other members of the collegial panel, meaning that not even the form or appearance of a collegial panel can be guaranteed. (W. Zhang 2012:89n1)

On the problem of fake collegial panels, a research team from Henan’s Sanmenxia Intermediate Court wrote: “Many litigants reported that so-and-so judge was not at the trial, or that so-and-so judge sat for a while at the trial before leaving” (Jia et al. 2014). According to an assistant judge in a People’s Tribunal attached to the Zhengzhou Municipal Huiji District Court,

Most basic-level courts operate systems whereby cases are assigned to presiding judges who assume primary responsibility for their disposal, with the other members of the collegial panel passively going along. This kind of phenomenon of collegial panels existing in name only, of soloism being the actual practice, and of three names nonetheless getting signed on court decisions has become a growing problem. (Lü 2015)

Having not read the dossier before the trial and thus being unfamiliar with the details of the case, the other two judges on the collegial panel were mere accompaniments.

Sometimes, after calling the court to order and introducing the members of the collegial panel, panel members will get up and exit the courtroom, leaving only the presiding judge to hear the case alone. Sometimes collegial panel members daydream and ignore the trial process, thinking only about their own affairs and occupying themselves with their own matters with a disinterested attitude. There are even some heads of collegial panels who do not bother notifying the other members of the panel, and, as an excuse, tell the litigants that the other panelists were unable to attend the trial and would instead deliberate together after the trial. In reality there are no collective deliberations, and the collegial panel has become a one-person show (独角戏). ... Oftentimes the head of the collegial panel writes the decision before calling a full-panel meeting to deliberate, during which the other panelists quickly skim the decision and express their agreement. This is a system of mutual backscratching: I will agree with your decision if you agree with mine. Sometimes the head of the panel will not even call a meeting, but will instead seek out the other panelists for the signatures on the decision. Some will not even seek out the other panelists, but will simply forge their signatures. (Lü 2015)

Courts also turned to lay assessors to populate collegial panels. Like the two secondary judges on three-judge collegial panels, lay assessors have also been characterized as window dressing and “lackeys.” Although, formally speaking, lay assessors’ votes and opinions count as much as those of judges, in practice they have little independent

voice (X. He 2016). The literal translation of the Chinese word for “lay assessor” is “accompanying adjudicator” (陪审员). They have been informally ridiculed as those who “accompany without adjudicating” (陪而不审; Cai 2013:133; Chen 2016a:218; Guo 2016; C. Wang 2012:80; Xu, Huang, and Lu 2011:140–41). Indeed, even when they were assigned to cases, trials were sometimes held in their absence (Cai 2013:134; Yu 2009:157). Regardless of whether collegial panels were formally composed of three judges or a mix of judges and lay assessors applying the ordinary procedure, they often operated in practice as if a single judge were applying the simplified procedure.

From an empirical standpoint, because my data derive from published court decisions, I am unable to measure the *actual* participation of members of collegial panels. I am therefore unable to assess differences between Henan and Zhejiang (or between courts within provinces) in the extent to which collegial panels were facades. I can, however, measure and assess variation with respect to the *nominal* participation of different kinds of decision-makers, including assistant judges and lay assessors.

### Deputizing Assistant Judges

Prior to recent reforms, court clerks (书记员) could work their way up to the rank of assistant judge (助理审判员) and ultimately to associate judge (审判员; Q. Wang 2015:76; Wang 2019b:137; Weng 2020:115; Xue 2019:19; Zhang 2016a:19). Assistant judges were formally regarded as “judges-in-waiting” (候补法官, who can also be thought of as judge candidates, judge apprentices, or judges-in-training) and “judges-in-reserve” (法官后备人才). According to provisions in the 1995 Law on Judges, assistant judges were *bona fide* judges, provided they passed the national judges’ examination, were formally appointed by the court’s adjudication committee, and met other applicable qualifying standards. Although they lacked the status of fully qualified judges, they were nonetheless assigned to cases as if they were associate judges by courts taking advantage of a provision in the Organic Law of People’s Courts.

Article 36 of the 2006 Organic Law of People’s Courts stipulated that assistant judges were to *support* the work of associate judges and could also *temporarily* serve as full-fledged judges in an acting function on the recommendation of the court president and the approval of the court’s adjudication committee (Article 37 in the 1979 version and Article 34 in the original 1954 version; Weng 2020:116). The intent was to allow courts to deputize assistant judges to serve, on an

ad interim basis only, as surrogate associate judges. They appear on court decisions with the “title of ‘assistant judge’ or ‘acting judge’” (代理审判员).

Courts’ creative interpretation of this statutory provision allowed them to expand the ranks of frontline judges. As a judge in Hainan wrote: “When assistant judges are appointed to serve as judges, [in practice] they assume this role without limits; the word ‘temporary’ was long ago burned to ashes” (Q. Wang 2015:74). Another judge similarly characterized “the word ‘temporary’ as itself only ‘temporary’ when the appointment of assistant judges to handle cases on a temporary basis increasingly became the norm in the wake of growing caseloads” (Ye 2016:103). A legal scholar came to the same conclusion: “in judicial practice, [assistant] judges always served in an ‘acting’ function and never in a ‘support’ function” (Xue 2019:19). Assistant judges were thus of great help to courts dealing with the crushing weight of their dockets (Chen 2016a:218–19, 2016b:122). This coping strategy was known informally as “repurposing judges” (借用法官; Fan 2010:142), and is reflected in the 2011 work report of a basic-level court in Zhejiang: “Attaching importance to the development of judges-in-reserve, five were formally appointed assistant judge and ten were provisionally appointed assistant judge in order to supplement further the force of frontline adjudicators” (<https://perma.cc/8TE6-GAB4>; also see <https://perma.cc/SC4P-EDV3>). In a 2009 work report of an intermediate court in Zhejiang, the definition of “frontline judge” explicitly includes “assistant judges” (<https://perma.cc/9W2S-QCDL>). This was a particularly common strategy among courts in economically developed areas such as Zhejiang and Shanghai with relatively heavy caseloads (Weng 2020:116–17).

Each collegial panel includes a head judge (审判长) appointed by the court president or division head. When a court president or division head participates in an ordinary procedure trial, he automatically becomes head judge of the collegial panel (Article 30 of the 2018 Organic Law of People’s Courts and Article 41 of the 2012 Civil Procedure Law). Among members of collegial panels, only lay assessors were (and remain) ineligible to serve as head judges (Anyang Municipal Intermediate People’s Court Research Team 2016:287). Courts commonly took advantage of an SPC opinion allowing assistant judges to serve as head judges on collegial panels (Q. Wang 2015:74–75; Weng 2020:116; Ye 2016:103).

We already know that assistant judges served on collegial panels with associate judges. A typical collegial panel consisted of one

associate judge designated as head judge, another associate judge, and one assistant judge. A second typical configuration was a head judge plus two assistant judges. A third typical configuration was a head judge, one assistant judge, and one lay assessor. Assistant judges even served as head judges on collegial panels that included associate judges. When they did so, they perversely outranked associate judges (Q. Wang 2015:75). At the same time, assistant judges obviated the need for associate judge trial participation. In simplified procedure cases, assistant judges could conduct trials independently as solo judges. In ordinary procedure cases, assistant judges designated as head judges could lead two lay assessors, two assistant judges, or one of each on collegial panels. In each of the foregoing scenarios, cases could be handled in the absence of any associate judges. In short, assistant judges were a boon to clogged courts insofar as they conserved judicial resources by reducing trial work for associate judges in a variety of ways.

Before a new classification system of judge titles and ranks introduced in 2015 was mostly in place in 2018, court decisions contained the names and titles of participating head judges, associate judges, assistant judges, lay assessors, and court clerks. As we will see from my Henan-Zhejiang comparison later in this chapter, court decisions can be used to measure courts' degree of reliance on assistant judges through 2016 and, in most provinces, 2017. Courts stopped using the term "assistant judge" when it was scrubbed altogether from the 2017 version of the Law on Judges (which took effect January 1, 2018) and the 2018 version of the Organic Law of People's Courts (which took effect January 1, 2019). I will now turn to formal innovative responses from the SPC.

## FORMAL INNOVATIVE RESPONSES TO CLOGGED COURTS

By the mid-2000s, collegial panels of decision-makers were decoupling from the work of judging. Although the SPC's 2009–2013 third five-year outline for court reform under the leadership of Wang Shengjun is known principally for *ideologically* promoting judicial populism (Liebman 2011b, 2014; Minzner 2011; Zhang 2016a), it also *pragmatically* promoted judicial efficiency (T. Zhang 2012). Specific measures called for or inspired by the outline include increasing the use of pretrial mediation – including "grand mediation" outside of court and case filing mediation inside of court – as a way to preempt trials; delaying judges' retirement or rehiring them after retirement; and

adjusting performance evaluations to include efficiency targets (Lü 2015; Su 2010:180–81; L. Xu 2012:26; Xu, Huang, and Lu 2011:138; T. Zhang 2012:28–29; Zuo 2020). In this section I will focus on two specific efforts of the SPC to eliminate the charade of collegial panels by bringing formal procedural rules in line with courts’ informal practices described in the previous section: first, the promotion of solo judging by expanding the scope of the simplified civil procedure and, second, the increase of lay assessor participation. I will then discuss how a quota system introduced by the SPC’s 2014–2018 fourth five-year outline for court reform may have posed a setback to courts struggling to clear their dockets.

### **Expanding the Scope of the Simplified Procedure**

The 1979 and 2006 versions of the Organic Law of People’s Courts enshrined the principle of “the primary role of the collegial panel and the secondary role of the solo judge” (合议为主、独任为辅; K. Chen 2019:107; He et al. 2012). They stipulated that solo judging was to be limited to simple civil cases and minor criminal offenses. The simplified procedure was originally intended to be used sparingly in a supplementary capacity and within a narrow scope of application (Zheng 2018:133). According to an empirical study of the utilization of the simplified civil procedure in Zhejiang’s city of Jinhua, as caseloads grew dramatically in the mid- to late 1990s, courts increasingly turned to it as a coping strategy that the authors characterized as an “abuse of the simplified procedure”:

Some courts, owing to “many cases, few judges,” objectively face a conflict between their volume of trial work and their inadequate workforce of trial personnel, and thus use the simplified procedure when they have a lot of cases; some courts erroneously use the simplified procedure as a method of clearing a backlog of cases; and some courts, lacking proper understanding, use the simplified procedure as a means of increasing their work efficiency. (Zhu and Zou 2001:51)

The authors of an earlier study from which this specific passage was apparently plagiarized continued by writing: “For this reason, in judicial practice, many cases that should be tried according to the ordinary procedure are incorrectly tried according to the simplified procedure” (Cai and Cai 1998:33).

According to another study, “there is already consensus among legal scholars and practitioners on moderately expanding the scope of solo

judging and limiting the use of collegial panels. ... These trends have undoubtedly reduced judicial costs and rationalized the allocation of courts' internal judicial resources. It has been enormously beneficial to relieving basic-level courts' problem of 'many cases and few judges'" (Chen 2016b:123; also see Cai 2013:131 and K. Chen 2019:106–07). This was particularly true in more economically developed regions such as Zhejiang, where the simplified procedure eclipsed the ordinary procedure as means of dealing with ballooning caseloads (L. Xu 2012:26; W. Zhang 2012:90). In Sichuan's provincial capital of Chengdu, eight frontline judges in a basic-level court each said that the simplified procedure cut their case disposal times in half (Zuo 2018:249n27).

This informal coping strategy from below became formalized and legitimized from above when the SPC made expanding the scope of the simplified procedure a cornerstone of its 2009–2013 third five-year outline for court reform (T. Zhang 2012:28). Under the SPC's guiding opinions on performance evaluations, which took effect nationwide in 2011, judges have been rewarded for high simplified procedure utilization rates (Kinkel and Hurst 2015:942; Shao 2015:39). A research team of legal scholars that authored a report on the revision of the Organic Law of People's Courts law recommended that the principle of the collegial panel's primacy be reversed, and that collegial panels instead be used to supplement solo judging (He et al. 2012). The drafters of the 2018 version of the Organic Law of People's Courts partially adopted this recommendation by giving equal status to solo judges and collegial panels.

Because many People's Tribunals do not even have enough judges to form collegial panels, they are often left with no choice but to "drag in lay assessors" (Lü 2015) or to apply the simplified procedure as a matter of necessity (L. Chen 2013; Yu and Gao 2015:23; Zhan 2013). The two People's Tribunals at the center of a study of divorce litigation in rural southwest China each had only two judges (Li 2015a:29). Among all 44 People's Tribunals in Henan's Luohe Municipality, the average number of judges was only 2.4 (X. Tang 2017:97). For this reason, the SPC's 2005 Resolutions on Comprehensively Strengthening the Work of People's Tribunals stipulates: "When conducting trials, People's Tribunals will generally apply the simplified procedure" (Resolution 10).

Official reform efforts to increase simplified procedure utilization rates in courts at all levels had been underway since the SPC's 1999–2003 first five-year outline for court reform. The SPC's 2004–2008 second

five-year outline for court reform called for the creation of expedited procedures (速裁程序) – which were even more simplified than the simplified procedure – for small-claims debt cases (Zhao and Jie 2008:153). The SPC’s 2003 Several Provisions Concerning the Application of the Simplified Procedure to Try Civil Cases clarified rules governing the use of the simplified procedure, including the ability of courts to dispense with the delivery of written summons in favor of faster, more flexible means of summoning litigants and the ability of litigants to choose the simplified procedure by voluntary agreement (T. Zhang 2012:26–27; Zhao and Jie 2008:154). These provisions, as well as additional ones on small-claims procedures, were incorporated into the 2012 version of the Civil Procedure Law (which took effect on January 1, 2013). By expanding the scope of the simplified procedure, they brought formal policy into closer alignment with informal practices (Xu, Lu, and Huang 2012:98; W. Yang 2014:170; T. Zhang 2012).

According to the 2012 Civil Procedure Law, the simplified civil procedure should be applied when “the facts are clear, rights and obligations are unambiguous, and the dispute minor” (Article 157); when both sides mutually agree to its application (Article 157); or when the financial value of the matter in dispute (标的额) is below a certain threshold and the case is therefore a small-claims suit (Article 162). Although Article 168 of the 1992 SPC Opinions on Several Issues Concerning the Application of the Civil Procedure Law provides guidance by defining each of these three qualifying standards, legal scholars nonetheless complain about the simplified procedure’s ambiguity and the arbitrary nature of its application. In the absence of concrete standards by which to determine case complexity, the process of designating cases as simple or complex (简繁分流) has been widely characterized as arbitrary and subjective (Li and Ye 2015:105; Tang 1996:19; Zhu and Zou 2001:48).

Any standards, regardless of how reasonable and carefully thought out they are, fail to qualify as standards if they lack sufficient clarity. ... Just as everyone attaches a different meaning to “Hamlet,” these standards have been cast aside, and the application of the simplified procedure has become enormously arbitrary and disorderly. Perhaps their original legislative intent was good. Perhaps they were intended to leave space for judges to investigate specific circumstances. However, unwarranted confidence in the quality, capacity, and moral character of China’s judges, coupled with unawareness of uncontrolled practices on the ground, left openings for their abuse. (W. Yang 2014:170–71)

Courts have exploited these vague standards by applying the simplified procedure willy-nilly to heavy dockets (Pan 2019:127). In so doing, they have sometimes deprived litigants of their due process rights (Cai and Cai 1998; K. Chen 2019:105–07, 110; Tang 2016:144–45). Perhaps members of collegial panels provide a function comparable to that of lawyers in US lower courts. In the US context, lawyers' mere presence serves to hold judges to procedural rules. In the absence of lawyer participation, lower-court judges in the United States are more likely to break court rules by, for example, failing to authenticate evidence, failing to hold litigants to statutory burden of proof, and failing to swear in parties before they provide testimony (Sandefur 2015:925). In the Chinese context, when using the simplified procedure, judges have sometimes taken procedural shortcuts. In Zhejiang's city of Jinhua, for example, judges often did not give defendants the full 15 days to which they were entitled to respond to plaintiffs' legal complaints, and sometimes even scheduled trials on the very day they issued summons to involved parties. Likewise, although the Civil Procedure Law allows plaintiffs to submit their legal complaints orally in simple cases, some courts in Jinhua used plaintiffs' failure to submit written petitions as an excuse to reject their cases (Zhu and Zou 2001:48). Without other judges or lay assessors to hold them to procedural requirements, solo judges who conducted trials according to the simplified procedure sometimes did so with excessive informality, relying on their feelings (凭感觉; Cai and Cai 1998:33) and intuition (自由心证; Yang 2012:16) and in so doing brought into play their personal prejudices (个人的偏见; Chen 2015:11). One judge argued that the collegial panel helps prevent "judicial tyranny" (司法专横) and corruption (Lü 2015). Scholars have expressed concern that "solo judging lacks collaborative discussion and supervision" (S. Wang 2014:21), and therefore that "expanding the application of simplified procedure expands space for judges to exercise free discretion" (自由裁量; Zhao and Jie 2008:154). In the same vein, two lawyers asserted that "owing to a lack of institutionalized constraints and supervision, presiding judges and solo judges have a great deal of discretion, and discretion introduces arbitrariness" (Xu and Li 2011:36).

Other legal scholars made an open plea: "do not simplify or dispense with the ordinary procedure for the sake of a higher closing rate. Procedural reform is not the same as economic reform" (Zhao and Zhao 2011:70). That train left the station around 2013. The 2012

Civil Procedure Law and SPC judicial interpretations that pertain to it have turned the ordinary procedure into a relic.

According to the SPC’s rationale, first-instance cases in basic-level courts should, in principle, be tried by a solo judge. Only important, complicated, and difficult cases, or where the law otherwise prohibits solo judging [such as administrative litigation prior to mid-2017 and public notice trials], should be tried by collegial panels. This means solo judges have become the first-choice adjudicatory body in basic-level courts, and collegial panels have become a kind of exception. (Chen 2016a:215)

The system of solo judging “is a departure from the original intent of the collegial panel system, which was to realize justice through the equal and full participation of all panel members in order to bring their collective intelligence into full play and to prevent the influence of individual subjective bias” (Ding 2016:86). Supervision over solo judges was further weakened by judicial accountability reforms that streamlined courts’ workflow in three ways: dispensing with the requirement that court presidents and division heads approve each court decision, abolishing trial judges’ common practice of seeking guidance from court authorities, and reducing the influence of the court’s adjudication committee in trial decisions (W. Chen 2019:19; UNDP 2014:15; Wang 2019b:133; Zhang 2016a:26). A corollary of improved judicial efficiency has been expanded autonomy for judges, which has been a double-edged sword. Cutting one way, it may have weakened political interference in judicial decision-making (Wang 2019a). Cutting the other way, however, judges have become even more cautious and risk-averse owing to a system of “lifetime responsibility” for incorrectly decided cases (终身负责制 and 错案责任倒查问责制) that accompanied the reforms (Song 2017; Xu, Huang, and Lu 2015). For both reasons, judges’ relatively free rein in the courtroom may weaken due process for litigants.<sup>3</sup>

Thus, the simplified procedure not only helps ease judges’ workloads by increasing judicial efficiency but also weakens supervisory checks

<sup>3</sup> A nondivorce case illustrates the costs to due process of judges’ enormous discretion to determine what qualifies as important, complicated, and difficult (Chen 2016b:123). A middle-aged couple was sued by their daughter’s ex-boyfriend for failing to repay a personal loan. The facts of the case were hotly contested because the defendants denied the existence of the loan, claiming instead that the plaintiff had forced them at knifepoint to sign a fake IOU. Although, for this reason, the case should have been ineligible for the simplified procedure, the judge nonetheless applied it and quickly ruled in favor of the plaintiff. After the filing deadline to appeal had passed, the defendants poisoned themselves to death at the courthouse entrance (Cai 2013:136).

on their rulings. We will see that because simplified procedure utilization rates were higher in divorce cases than in other kinds of civil cases, divorce litigants were disproportionately exposed to judges' biases, including their patriarchal cultural beliefs. Judges have regarded divorces as quintessentially simple cases. One judge characterized first-attempt divorce cases as those in which "the facts are especially clear and legal relationships are singular" (R. Tang 2014:79; also see Jiangsu Province Nantong Municipal Intermediate People's Court Research Team 2013:99; Tang 1996:19). In reality, of course, they involve contentious domestic violence, property division, and child custody claims, and are therefore anything but simple. Indeed, it is partly their contentious nature that makes judges so averse to grant first-attempt divorce petitions. The more contentious claims in a petition, the more likely judges were to deny it through the application of the simplified procedure (Chapter 8). In general, judges did not deny first-attempt divorce petitions because they regarded them as simple matters; they regarded them as simple matters because they were predisposed to deny them.

Most judges have regarded the choice of which civil procedure to apply as their prerogative. Even when litigants regard their disputes as serious and complex, judges often do not heed their explicit requests for the application of the ordinary procedure. Judges' impulse has been to apply the simplified procedure and to try cases alone, without collegial panels, and therefore sometimes without regard to the wishes of the involved parties (Cai 2013:136). By touting the half-price court fee associated with the simplified procedure (Chapter 2), judges may be able to mollify some plaintiffs. Indeed, courts have justified expanding the scope of the simplified procedure in terms of shortening times to outcomes – and hence of reducing litigants' "litigation fatigue" (诉累) – and in terms of reducing litigants' litigation costs (e.g., <https://perma.cc/H6CD-DLE9>; <https://perma.cc/YN4X-MZ8C>; <https://perma.cc/82X2-2HV5>). Nonetheless, because divorce cases involving domestic violence allegations, as well as those involving contested child custody or marital property claims, are often difficult and complex, many plaintiffs filing for divorce are unwilling to surrender their full due process rights. According to a judge in Jiangxi Province, many litigants are not only denied the opportunity to choose the civil procedure, but are also left in the dark concerning which procedure is chosen for them. Judges commonly try cases alone according to the simplified civil procedure without telling the

involved litigants. Then, if a judge cannot finalize his ruling within the three-month deadline, he simply adds the names of additional judges to the court decision retroactively in order to switch over to the ordinary procedure (Liu 2014).

As we will see in Chapter 6, divorce cases were far more likely than other types of civil cases to be tried according to the simplified procedure. And as we will see in Chapter 8, case complexity paradoxically increased the likelihood of the use of the simplified procedure. Under the relentlessly growing weight of caseloads, “judges rushing around in haste have no time to listen patiently to litigants’ testimony, and even incessantly interrupt and shut down litigants in order to conclude the case at hand in time for the next one on their schedule. This is why simplified procedure utilization rates are high” (Cai 2013:136). Courts have similarly expanded the scope of the simplified procedure in criminal litigation and, more recently, in administrative litigation.

### **Increasing Lay Assessor Participation**

China’s People’s Lay Assessor System (人民陪审制), which can be traced back to the Chinese Communist Party’s revolutionary base areas in the 1930s, was designed to strengthen “socialist judicial democracy” by serving as a means by which the masses can supervise the judiciary (Anyang Municipal Intermediate People’s Court Research Team 2016:287; Fu 2018:94–95; L. Tang 2017:122; Zhang 2015). Lay assessors serve on collegial panels in first-instance trials conducted according to the ordinary procedure (Chapter 2). Lay assessor participation rates are one of many indicators included in courts’ performance evaluation systems. Performance indicators are divided into three main categories: fairness, efficiency, and impact (Kinkel and Hurst 2015). Although lay assessor participation rates formally count as indicators of “fairness” in performance evaluation systems (Cai 2013:133; Fu 2018:101), they are widely recognized as serving in practice to enhance efficiency. Because lay assessors have the unique ability to occupy seats on collegial panels without occupying slots in the state personnel system for civil servants, they have become an important tool in efforts to alleviate judges’ workloads (Zuo 2018:248–50), and their numbers and participation rates have grown rapidly since 2004 (Fan 2014:51; X. He 2016:734). In mid-2013, the SPC announced a plan to double the population of lay assessors (倍增计划) within two years to about 200,000 (He and Yu 2015:245; L. Tang 2017:126;

Xu, Huang, and Wang 2014:92). This target was achieved ahead of schedule when the number of lay assessors nationwide increased from 87,000 to 209,500 between 2013 and the end of 2014 (<https://perma.cc/CZT7-ZHHC>; <https://perma.cc/6NR8-W4JT>). Henan was reportedly the first province to meet this target, and actually quadrupled its pool of lay assessors within one year to over 30,000 (<https://perma.cc/HR3T-76FK>). Some courts have even recruited retired judges to serve as lay assessors and mediators (X. Li 2014:223; Y. Zhang 2017:22; Zhengzhou Municipal Intermediate Court Research Group 2014).

### **Introducing a Quota System to Standardize the Titles and Ranks of Judges**

Beginning with the SPC's first five-year outline (1999–2003), “quota systems” (员额制) that imposed limits on numbers of judges, in part by eliminating the title of assistant judge, had been implemented in fits and starts as pilot programs in selected locations (Lin 2008; Weng 2020:109; Zhang 2019:115). Ultimately, as part of its fourth five-year outline for court reform (2014–2018), the SPC implemented a nationwide judicial appointment and classification system to standardize the titles, ranks, and corresponding responsibilities of court personnel (Q. Wang 2015; Wang 2019b; Zhang 2016a:26–28).

China likely had, and may still have, more judges than any other country (Zhang 2016b:59). SPC and government leaders diagnosed the problem of clogged courts not as a shortage of judges but rather as too many poorly qualified judges working inefficiently. Further expanding an already bloated corps of low-quality judges was an unpalatable solution (Q. Wang 2015:76), and adding more high-quality judges too expensive (Luo and Huang 2011:11). So rather than increasing the number of judges, the SPC did the opposite. Its goal was to professionalize the judiciary, to create an elite profession of specialized judges, to help China's body of judges “lose weight,” and in so doing to improve the quality of judicial work and overcome low levels of public trust in courts (Liu 2019:105; Q. Wang 2015:76–77, 80; Zhang 2016a:18–19). In support of these goals, the SPC tried to retain and recruit the best legal talent by raising the salaries of judges who entered the “quota,” which was possible in part thanks to the budgetary savings associated with denying entry to almost half of all judges (Fu 2018:93–94; Wang 2019b:133; Zhang and Ginsburg 2019:300).

Prior to the judge quota system reforms, the prevailing pathway into an associate judgeship was via a court clerkship and assistant

judgeship (Q. Wang 2015:76). Owing to spotty enforcement of qualification requirements, court clerks were often hired straight out of high school and worked their way up to assistant judge and then to associate judge (Zhang 2016a). In its work report, a basic-level court in Zhejiang described this process of promoting 15 clerks to assistant judge and putting them on the front lines in order to alleviate the “many cases, few judges” problem (<https://perma.cc/YYK4-3VA2>). Another Zhejiang work report describes the promotion of assistant judges to associate judge (<https://perma.cc/R5KD-2TSR>). In the court decisions in my samples, one can easily find clerks moving into assistant judgeships and assistant judges moving into associate judgeships. At the time, associate and assistant judges occupied around 60–70% of all state personnel slots allocated to courts (Song 2017:106). The SPC’s new quota system drastically slashed their ranks by imposing a 39% cap on judges as a share of all slots in the state personnel system allocated by the central government to political and legal affairs positions (中央政法专项编制; Chen 2016a:215; Wang 2019b:136).

Most court leaders and associate judges, with the exception of some approaching retirement, entered the quota (Song 2017:111). Meanwhile, “assistant judge” as a title and rank was eliminated (Wang 2019b:137), and assistant judges were stripped of their authority to serve as solo judges or as members of collegial panels. Their status was reduced to “support staff” (辅助人员) and their title to “judges’ clerk” (法官助理). Though they did not enter the quota as judges, most remained on the central government payroll as civil servants (Zhang 2019:112). Meanwhile, some former assistant judges and many newly recruited judges’ clerks who were hired under contract employment systems (聘用制) or local government personnel systems were never considered part of the national civil service in the first place (Zhang 2019:117). Judges’ clerks thus became a motley cohort of court personnel classified not only as civil servants, but also as ordinary staff (普通职员), temporary hires (临时用工人员), employees outside the state personnel system (编制外工作人员), and even contract workers (合同工). Judges’ clerks under these various designations have been doing the same work despite differences in status, pay, benefits, and promotion opportunities (L. Wang 2016:66; Ye 2016:110).

Paradoxically, given that it so drastically reduced the number of judges, the judge quota system was also designed to increase judicial efficiency. First, as elsewhere in the world, judge’s clerks in China, by providing clerical and administrative support to associate judges in

preparation for and the disposition of cases, were intended to allow associate judges to focus their efforts more narrowly and productively on courtroom proceedings and rulings (Chen and Xu 2018; Weng 2020:115; Ye 2016:104). Second, because court presidents, vice-presidents, division heads, and other judges with administrative titles rarely did trial work prior to the reforms, a new requirement that *all* judges handle cases was intended to maintain a relatively stable number of *frontline* judges even while the total number of judges diminished (W. Chen 2019:18; Zhejiang Provincial High Court Research Team 2019; Zhou 2014).

China's population of judges had been consistently in the 190,000–210,000 range from the early 2000s until the judge quota system reforms (Qu and Fan 2019:25). In 2012, China had 195,028 judges (Chen and Bai 2016:46). By 2017, when the label for assistant judge changed to judge's clerk, the population of judges nationwide plummeted over 40% to approximately 120,000 (W. Chen 2019:18; Qu and Fan 2019:25; Xue 2019:18; Zheng 2018:131). In early 2019, judges numbered about 125,000 (People's Court Media Office 2019). A study of courts in Zhejiang, Chongqing, and Yunnan reports that quota system reforms reduced the number of judges there by over 60% (Wang 2019b).

Scholars generally agree that the judge quota system reforms exacerbated the problem of “many cases, few judges” (Chen and Bai 2016:25, 44; Hou 2017:52; Song 2017:106; Wang 2019b; Y. Wang 2017:76–77; Weng 2020:116). Court clerks who had previously handled cases as frontline judges and expected opportunities for promotion to the rank of associate judge, found themselves relegated to positions of professional precarity (Wang 2016; Weng 2020; Zhang 2019; Zhejiang Provincial High Court Research Team 2019:58). These reforms dealt a major blow to the morale of court clerks (Chen and Bai 2016:47; Hou 2017:52; Q. Wang 2015:78; Zhang 2019; Zhu 2020:65). With limited prospects for career mobility, many have quit their jobs and left the court system, further increasing the shortage of judicial personnel (Wang 2019b:137, 143; Zhang 2019:117).

The judge quota system reforms severed traditional career pathways to judgeships. Most assistant judges who became judges' clerks no longer formed a reserve of judges-in-waiting (Hou 2017:52). While a promotion pathway to associate judge remained for judges' clerks who retained the status of civil servant, for others it disappeared (Ye 2016:104). Meanwhile, prospects for career movement from court

clerk to judge, for all practical purposes, died (Chen and Bai 2016:23–24, 46–47; Chen and Xu 2018:91; Weng 2020:115, 120; Xue 2019:19; Ye 2016:104). Critics add that, as well as fueling judicial attrition, the reforms have also narrowed the judicial recruitment pipeline by discouraging people from entering the profession (Fu 2018:96; Wang 2019b:137–38; Y. Wang 2017:71; Weng 2020; Zhang 2019:118). These challenges have been particularly acute for courts in the more economically developed parts of China that had come to rely on assistant judges to help clear their relatively heavy dockets (Hou 2017:52).

Beginning in 2016, courts in Jiangsu Province stopped using the terms “assistant judge” and “acting judge” and started including the names of participating judges’ clerks in their decisions. Most courts, however, continued to use the obsolete titles of judges in their decisions through the end of 2017 until the amended Law on Judges took effect on January 1, 2018. Assistant judges never faded from court decisions in my Henan and Zhejiang samples, which ended in December 2015 and December 2017, respectively. By the same token, judges’ clerks appeared on no divorce decisions in either sample and on only a few dozen nondivorce decisions in my Zhejiang sample, all from 2017 (out of over 600,000 nondivorce decisions).

Given the timing of its implementation, therefore, the judge quota system has no direct bearing on the findings I present in this book. Why bother discussing it, then? First, it is a hugely consequential court reform in general and a formal innovative response to clogged courts in particular, and therefore germane to the subject of this chapter. Second, after the implementation of the judge quota system reforms, some courts in Zhejiang with desperate shortages of frontline judges have surreptitiously assigned trial work to judges’ clerks – many of whom were former assistant judges – while covering their tracks by affixing on their decisions the names of bona fide judges in the quota (Wang 2019b:137; also see Zhang 2019:116). In other words, when *formal* innovations failed to alleviate – and even worsened – the enduring, intensifying problem of “many cases, few judges,” some of China’s most clogged courts responded with a new *informal* innovation: They directly contravened formal laws and rules governing the operation of courts by informally allowing judges’ clerks to function as pre-reform frontline assistant judges (Q. Zhang 2018:63).

To be sure, formal innovative responses to clogged courts are not limited to those discussed in this section. The SPC has also introduced

technological innovations to increase judicial efficiency. To much fanfare, it has promoted the development of “smart courts” (智慧法院建设) that apply artificial intelligence to computer-assisted speech-to-text transcription and the automated production of recommended verdicts and sentences through the identification of similar cases (W. Chen 2019:20–21; Liebman et al. 2020; Zuo 2018:259; <https://perma.cc/9DXY-B244>; <https://perma.cc/3W35-XJWW>). Such developments are beyond the scope of this book, however.

## THE VIEW FROM HENAN AND ZHEJIANG

In the United States, changes to federal civil procedure rules in the 1980s “to emphasize efficiency and conservation of judicial resources” and the proliferation of case management systems to help realize these priorities were associated with a decline in civil trials and an increase in summary judgments and motions to dismiss (Miller 2003:984). The upshot has been the “vanishing trial,” a process by which the full trial has given way to streamlined judicial procedures that privilege efficiency over due process (Galanter 2004; also see Engstrom 2017). China’s vanishing trial used to be a story about the rise of mediation and a corresponding decline in adjudication (Chapter 2; Fan 2008). The story began to change in the late 2000s, and did so particularly rapidly after the implementation of the 2012 Civil Procedure Law. In China, as we learned in the previous section, the rise of the simplified procedure, increased lay assessor participation, and a shrinking corps of judges, taken together, drove the story of the vanishing three-judge collegial panel. These measures to enhance judicial efficiency were facilitated by the nationwide establishment of specialized case management offices, which had been adopted by almost 40% of China’s basic-level courts by the end of 2011 (Cai 2013:132) – the same year the SPC issued a judicial opinion on strengthening case management work (Xu, Lu, and Huang 2012:102–03) – and by almost 75% of all courts by the end of 2012 (Yuan and Ding 2012).

National judicial statistics permit a partial view of the vanishing three-judge collegial panel for China as a whole. In the ten years spanning 2007 and 2016, the proportion of cases processed by three-judge collegial panels precipitously declined from 26% to 7% with respect to *all* first-instance civil cases and from 22% to 4% with respect to first-instance *family* cases (SPC 2018). Among cases processed by means other than three-judge collegial panels, some were handled by

collegial panels with lay assessors (applying the ordinary procedure) and some were handled by solo judges (applying the simplified procedure). Over the same ten-year period, the proportion of cases with lay assessor participation almost quintupled from 5% to 24% with respect to *all* first-instance civil cases and almost quadrupled from 4% to 15% with respect to first-instance *family* cases (SPC 2018).<sup>4</sup> The residual category of cases handled by solo judges applying the simplified civil procedure remained fairly stable over this time period, hovering in the 69–76% range for *all* first-instance civil cases and in the 73–81% range for first-instance *family* cases. Studies of individual courts show similarly stable simplified civil procedure utilization rates over time (e.g., Zuo 2018:249).

The foregoing patterns strongly support my story of a massive increase in lay assessor participation as a formal innovative response to clogged courts. Since lay assessors can only participate in trials conducted according to the ordinary procedure (because they must be part of collegial panels), the proportion of collegial panels in first-instance civil cases that included at least one lay assessor more than quintupled from 15% in 2007 to 78% in 2016 (SPC 2018). In contrast to my story of the expansion of the simplified procedure, however, the foregoing patterns show unexpected stability over time in simplified procedure utilization rates. The reason for this is a statistical artifact of the way the SPC and individual courts report judicial statistics. Official statistics on the application of the simplified procedure always combine case adjudications, mediations, and withdrawals. We therefore cannot disaggregate simplified procedure utilization rates by case disposal method. If we were able to isolate adjudicated cases, we would certainly see an increase in simplified civil procedure utilization rates and an even more conspicuously vanishing three-judge collegial panel because mediations and withdrawals have tended to be handled by solo judges applying the simplified civil procedure. In other words, if we were to remove mediations and withdrawals from the scope of analysis, we would certainly find an increase in the incidence of solo judging in court trials.<sup>5</sup> Indeed,

<sup>4</sup> National judicial statistics on lay assessor participation and civil procedure type do not disaggregate family cases into more detailed case types, including divorce. Divorce, however, consistently accounted for about 80% of all concluded first-instance family cases between 2010 and 2016 (SPC 2018).

<sup>5</sup> Mediation agreements and withdrawals, far more than civil adjudications, have tended to be rendered and approved by solo judges applying the simplified civil procedure. Most first-instance civil cases have been closed by either mediation or withdrawal (Chapter 2), and mediations and withdrawals have been far more likely than adjudications to be presided over

among all first-instance civil adjudications posted on China Judgements Online, the proportion in which the simplified procedure was applied more than doubled from 24% in 2009 to 52% in 2018.<sup>6</sup> As we will see shortly, I found the same pattern in my Henan sample. Zhejiang, by contrast, had already embraced the simplified procedure far earlier and to a much greater extent. Indeed, we need look no further than Henan and Zhejiang for evidence that the vanishing three-judge collegial panel was a function of the timing and severity of “many cases, few judges” problem.

Courts in Henan and Zhejiang have been at opposite ends of the caseload spectrum. In 2011, the number of judges per population in

by solo judges. Given that solo judges have been underrepresented in adjudications (relative to mediations and withdrawals), two coinciding and countervailing trends essentially canceled each other out: an increase in solo judging (which, once again, is the same as an increase in the utilization of the simplified procedure) and an increase in adjudications as a share of all first-instance civil cases (which we saw in Chapter 2). In other words, at precisely the same time that simplified procedure utilization rates (and hence solo judging) in adjudicated cases were increasing, adjudicated cases themselves as a proportion of all cases were also increasing. In official judicial statistics that combine case adjudications, mediations, and withdrawals, the latter trend surely offsets and obscures the prior trend because the scope of the simplified procedure is much smaller in adjudications than in either mediations or case withdrawals. Both of my provincial samples of first-instance civil court decisions show that withdrawals were far more likely than adjudications to have been handled by solo judges (57% versus 30% in Henan and 85% versus 63% in Zhejiang). Courts in Henan, like most courts in China, did not post mediation agreements (Chapter 4). Zhejiang’s courts, however, did post a small share of its mediation agreements. Among the roughly 40,000 first-instance civil mediation agreements in my Zhejiang sample, about 90% were presided over by solo judges. The Civil Procedure Law allows mediation to be conducted by either a solo judge or a collegial panel (Article 86 in the 1991 version and Article 94 in the 2012 version). “In practice, however, in order to increase judicial efficiency, courts almost always have solo judges carry out mediation” (Meng 2012:86; also see X. Yang 2014). Withdrawals are no different because they are so often the result of mediation. According to the Civil Procedure Law, successful judicial mediation leads to either a written mediation agreement or a request from the plaintiff to withdraw the petition. According to an SPC judicial interpretation, withdrawals, unlike mediation agreements, are not final and irrevocable; a plaintiff who withdraws a petition may file the same first-instance petition again at a later date. From the perspective of a plaintiff, withdrawing a petition provides more options – and is therefore more advantageous and desirable – than accepting a mediation agreement, which is tantamount to surrendering the right to bring the case back to court (Zhao 2017:137). In the context of divorce litigation, however, this is a false choice because mediated reconciliations generally count as withdrawals and are exempt from written mediation agreements (Article 98, Item 1 of the Civil Procedure Law).

<sup>6</sup> On December 19, 2019, I searched on China Judgements Online (<https://wenshu.court.gov.cn/>) for first-instance civil adjudications made by basic-level courts. I found 17,653,544 decisions satisfying these criteria dated between 2009 and 2018, of which 8,040,584 (46%) contained the term “applied the simplified procedure” (适用简易程序). Measured in this way, the simplified procedure utilization rate increased in each successive year: 24%, 25%, 28%, 33%, 35%, 42%, 42%, 45%, 47%, and 52%. This measure underestimates the true incidence of the simplified procedure because many court decisions do not explicitly indicate the type of procedure applied to the case. The most accurate measure, and the one I use with the decisions in my samples, is based on the composition of judges, for which there is no way to search on China Judgements Online.

these two provinces was identical: 14 judges per 100,000 residents, which was also the national figure. Meanwhile, Zhejiang’s closed cases per population outnumbered Henan’s by almost three to one (15.1 and 5.5 cases per 1,000 residents, respectively). Viewed another way, Zhejiang’s courts closed 60% more cases than Henan’s despite the fact that Henan’s judges outnumbered Zhejiang’s by over 76% (Basic Level Legal Artisan 2016a). Henan’s judges remained far more numerous than Zhejiang’s even after the implementation of the judge quota system.<sup>7</sup> In short, judges’ caseloads have been far heavier in Zhejiang than in Henan, both in absolute terms and relative to the numbers of judges.

In his 2005 work report delivered to the National People’s Congress in January 2006, SPC President Xiao Yang (肖扬) specifically singled out “basic-level courts in the east coast region” with respect to the “many cases, few judges contradiction” and in which “conditions of overwork are urgently awaiting improvement” (<https://perma.cc/AHK2-NBTN>). Exemplifying China’s “east coast region” are Shanghai, Jiangsu, and Zhejiang, the coastal provincial-level units of the Yangtze Delta. In their annual work reports, basic-level courts in Zhejiang often parroted this sort of language from the SPC about case-load pressure. Many specifically noted the toll on judges’ physical and mental health exacted by rapidly expanding caseloads (e.g., <https://perma.cc/Y75D-9D8U>; also see Chapter 3). Some extolled the spirit of heroism exhibited by court personnel who collapsed or died on the job from overwork (e.g., <https://perma.cc/HYG9-XNAP>; <https://perma.cc/8LST-G28G>).

I collected 479 work reports from 87 out of all 91 basic-level courts in Zhejiang. They cover the 2005–2016 time period, but almost all of them (96%) fall between 2008 and 2014. Only the four basic-level courts in the prefecture-level city of Zhoushan are not represented in this collection. At least one term for “judge attrition” (法官流失 or 人才流失) appeared in the work reports of 31 out of all 87 basic-level courts represented in my collection. Their heavier caseloads were an important reason for higher resignation rates in the more economically prosperous parts of China (Fang 2015). Compounding the problem

<sup>7</sup> By 2018, although the two provinces had converged in terms of numbers of cases (<https://perma.cc/6U32-23L8>; <https://perma.cc/XX52-S9ER>), and although judge populations had shrunk dramatically in both provinces, judges in Henan still outnumbered those in Zhejiang by about 50% (Henan Provincial Bureau of Statistics 2019: Table 25–20; <https://perma.cc/XX52-S9ER>).

of an unmanageable *quantity* of cases in these areas is the *quality* of those cases: commercial disputes are relatively complex, involve relatively high economic stakes, and are thus relatively labor-intensive and time-consuming for judges (Z. Tang 2014:45). Exacerbating these *push* factors driving judge attrition in China's wealthiest cities are *pull* factors in the form of higher-paying private sector jobs (Fan and Jin 2012:99; Kinkel 2015; Lü 2015; Song 2017:102–03; Wang 2019b).

Judges in Zhejiang were feeling more embattled and beleaguered than their counterparts in Henan. In both 2011 and 2015, Zhejiang's average judge caseload (110 and 218, respectively) was about triple Henan's (39 and 69, respectively; Basic Level Legal Artisan 2016a; Henan Provincial Bureau of Statistics, various years; <https://perma.cc/F5JQ-35H6>; <https://perma.cc/7D85-PSBW>).<sup>8</sup> In every year between 2014 and 2017, Zhejiang had a higher average number of closed cases per frontline judge than any other provincial-level unit in China: 187, 218, 260, and 315, at least double the national average in each year (<https://perma.cc/Y5LB-EY9V>; <https://perma.cc/F5JQ-35H6>; <https://perma.cc/H6CD-DLE9>; <https://perma.cc/GR8M-ALCQ>). The contents of their annual work reports reveal that Zhejiang's basic-level courts were universally concerned with the issue of heavy caseloads. Eighty-two out of 87 basic-level courts mentioned the specific term “many cases, few judges” (案多人少) in at least one of their work reports in my collection. Xiao Yang's specific term for “overwork” (超负荷工作) appeared in the work reports of 44 of 87 basic-level courts. “Average judge caseload” (variants of 法官人均结案) is another ubiquitous term in Zhejiang's work reports, appearing in 74 out of 87 basic-level courts. By contrast, out of 111 work reports from Henan, the term for “many cases, few judges” appeared in only two, only a few made reference to work pressure and personnel attrition, only one addressed average judge caseload, and none included the term Xiao Yang used for “overwork.”<sup>9</sup>

<sup>8</sup> These comparisons are imperfect owing to inconsistent definitions of judges. The year 2011 figures include all judges. Henan's 2015 figure includes all judges, whereas Zhejiang's 2015 figure is limited to frontline judges. Assuming frontline judges account for 75% of all judges (Basic Level Legal Artisan 2016b), Henan's estimated average number of cases per frontline judge would be 92, which is still a far cry from Zhejiang's 218.

<sup>9</sup> I am grateful to Rachel Stern for sharing copies of 111 basic-level court work reports from Henan that pertain to the year 2014. Unlike Zhejiang's courts, Henan's have not systematically published the full text of court work reports presented to local people's congresses. Because most of the work reports in this collection are short media summaries, their use in a Henan-Zhejiang comparison is not entirely fair. Shorter media versions may omit issues and topics that appear in the unpublished full reports.

Henan and Zhejiang are a study in contrast both in the extent of the problem and in their pursuit of solutions. Dramatic differences between the two provinces in judge caseloads map onto corresponding differences in three empirically observable and measurable innovative responses, all of which were far more prevalent in Zhejiang than in Henan. First, courts put assistant judges to work on trials as an informal coping strategy. Second, courts' use of solo judging (i.e., the application of the simplified procedure) was initially an informal coping strategy that the SPC subsequently institutionalized. Third, lay assessor participation on collegial panels (which are limited to ordinary procedure trials) was another formal innovative response to clogged courts. The second and third of these innovative responses gave rise to the vanishing three-judge collegial panel.

Owing to their exceptionally heavy caseloads, Zhejiang's courts began dispensing with three-judge collegial panels earlier and more aggressively than Henan's courts. As early as 1999, Zhejiang's Daishan County People's Court touted its system of taking solo judging as the primary trial method (Xu and Jiang 2009:102). In 2004, a judge in Zhejiang's Provincial High Court wrote, “basic-level courts universally face the problem of too many cases and not enough judges, and in the vast majority of cases apply the simplified procedure to try them with solo judges” (Ye 2004:29). Some courts in Zhejiang called for increasing the application of the simplified procedure by limiting public notice trials because, as we know from Chapters 2 and 4, they must be conducted according to the ordinary civil procedure (e.g., <https://perma.cc/AF38-8F7R>). Indeed, as we will see in Chapter 8, public notice trials were far rarer in Zhejiang than in Henan. In their annual work reports, some courts in Zhejiang specifically complained about the issue of limited numbers of judges. For example, the 2009 work report of the Wenzhou Municipal Ouhai District People's Court states: “In recent years, the number of cases our court has received has increased at double-digit rates, while growth in the number of judges in state personnel slots for civil servants has been slow. The result has been ubiquitous overwork and extremely pronounced health problems among court personnel” (<https://perma.cc/P8JJ-RPDQ>).

The judge from Zhejiang continued by writing: “Even when collegial panels try cases, most of them have lay assessors. It is relatively rare to try cases with collegial panels composed purely of professional judges” (Ye 2004:29). Zhejiang's courts had already reached a lay assessor participation rate of 93% (in first-instance ordinary procedure cases) in 2013 when the rest of China's courts were ramping up their lay assessor

participation rates under the SPC's national plan to double the number of lay assessors. At this time, Zhejiang's lay assessor participation rates were the highest in China (<https://perma.cc/3KZL-R34P>), 20 percentage points above the national average (Guo 2016:92n1). Indeed, Zhejiang's lay assessor participation rate had exceeded the national average by over 20 percentage points since at least 2009 (<https://perma.cc/P2YE-9VFW>). Zhejiang continued to lead the nation in lay assessor participation rates in 2015 and 2016 (<https://perma.cc/3SNC-V8T4>; <https://perma.cc/H6CD-DLE9>). By 2017, its lay assessor participation rate had reached an astonishing 97% (<https://perma.cc/GR8M-ALCQ>).

Zhejiang's courts had already adopted all three coping strategies, namely the use of assistant judges, solo judges, and lay assessors by 2009. Henan's courts, by contrast, tended to wait for signals and directives from above before adopting them. Figure 5.1 shows the sharp contrast between the two provinces in the extent and timing of their adoption of these three innovative responses to clogged courts. It depicts the composition of various configurations of decision-makers – head judges, associate judges, assistant judges, and lay assessors – participating in first-instance civil trials (Panels A and B) and all first-attempt divorce trials (Panels C and D) over time in both provinces. The top two layers of each panel in Figure 5.1 depict solo associate judges and solo assistant judges, respectively. Taken together, they depict simplified procedure utilization rates.

The four layers below solo judges depict various combinations of decision-makers on three-member collegial panels.<sup>10</sup> First, collegial panels with a “head judge + assistant judge + lay assessor” configuration consisted of precisely these three types of decision-makers. Second, a “collegial panel with lay assessor(s), no assistant judges” consisted of one head judge plus either one associate judge and one lay assessor or two lay assessors. Even when head judges of such collegial panels held

<sup>10</sup> Figure 5.1 excludes collegial panels consisting of more than three decision-makers because they were practically nonexistent. By cross-checking the names of head judges against the names of associate judges and assistant judges in other court decisions, we could infer the regular titles of some head judges. Many head judges in my samples of court decisions, however, appear solely in this role, suggesting that the role of head judge was, at least for some judges, “a permanent certified executive post” (Li 2010:110; also see Kinkel 2015:977 and Zheng, Ai, and Liu 2017: 179 on this point). Furthermore, judges who appear in some court decisions as head judges of collegial panels alternated between the various titles of assistant judge, associate judge, and head judge in other court decisions. Owing to these sources of uncertainty about the “real” titles of head judges, I preserved the titles of decision-makers as they appear in the published court decisions.

“MANY CASES, FEW JUDGES”

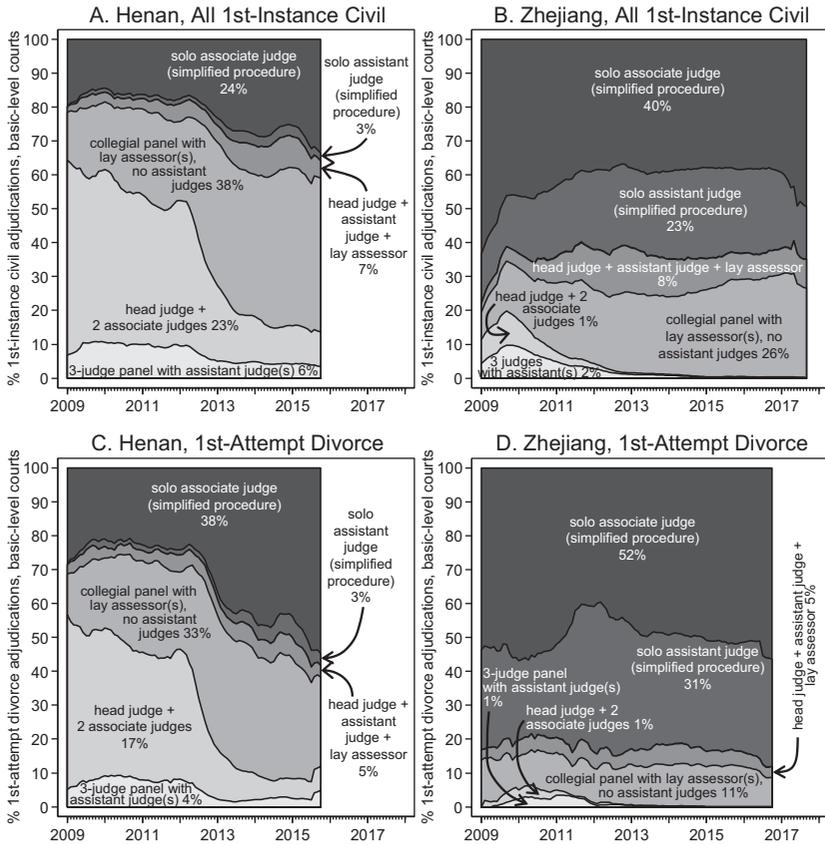


Figure 5.1 Composition of decision-makers assigned (and procedures applied) to civil cases

Source: Author’s calculations from Henan and Zhejiang provincial high courts’ online decisions.

Note: Panel A, n = 386,407; Panel B, n = 1,257,215; Panel C, n = 56,894; Panel D, n = 50,298. The sums of components do not always equal 100% due to rounding error. Smoothed with moving averages.

the regular title of assistant judge, which was relatively unusual, they were nonetheless vested with the full authority of a head judge, albeit temporarily. The same applies to head judges of, third, collegial panels composed of “head judge + 2 associate judges.” Fourth, a “3-judge panel with assistant judge(s)” consisted of a head judge plus either one associate judge and one assistant judge or two assistant judges.

Figure 5.1 showcases the stark contrast between Henan and Zhejiang in the timing and intensity of their coping strategies. It reveals Zhejiang

as an early and enthusiastic adopter of all three innovative responses to its unusually clogged courts and Henan as a more limited adopter only after innovative responses were sanctioned from above. First, compared to courts in Henan, courts in Zhejiang relied far more heavily on assistant judges as an informal coping strategy. In Henan, 3% of all first-instance civil adjudications were handled by solo assistant judges, a tiny fraction of Zhejiang's 23% (Panels A and B, respectively). In Henan, 15% of all first-instance civil adjudications were handled by either solo judges or collegial panels that included at least one assistant judge, less than half of Zhejiang's 33%.<sup>11</sup> Considering only simplified procedure cases, 10% were handled by assistant judges in Henan, less than a third of Zhejiang's 36% (Panels A and B, respectively).<sup>12</sup> Considering only ordinary procedure cases, assistant judges participated in 17% in Henan and 27% in Zhejiang (Panels A and B, respectively).<sup>13</sup> Among collegial panels with at least one assistant judge (i.e., within the category of "3-judge panel with assistant judge"), those in Henan were far less likely than those in Zhejiang to have two assistant judges (23% and 34% in Panels A and B, respectively). The foregoing differences between the two samples extend to first-attempt divorce trials (Panels C and D).

In order to put assistant judges to work on so many trials, courts in Zhejiang appointed and deputized considerably more assistant judges than courts in Henan did. I counted all unique names within each title of decision-maker (head judge, associate judge, assistant judge, and lay assessor) and within each court. They total about 32,000 in each provincial sample of first-instance civil adjudications. Of all unique names counted in this way in the Henan and Zhejiang samples, about 2,700 (9%) and 5,000 (15%) respectively, belong to assistant judges. Using this same crude method of counting unique judges, the ratio of associate judges to assistant judges in Zhejiang was less than half of that in Henan: associate judges outnumbered assistant judges in Henan and Zhejiang by ratios of 4.2:1 and 1.6:1, respectively.<sup>14</sup>

<sup>11</sup> In Henan (Panel A), all layers containing assistant judges (2.5%, 6.7%, and 6.0%) sum to 15.2%. In Zhejiang, (Panel B), all layers containing assistant judges (22.9%, 1.6%, and 8.3%) sum to 32.8%.

<sup>12</sup> In Henan (Panel A), 2.5% out of 26.3% (2.5% + 23.8% = 26.3%) represents 9.5%. In Zhejiang (Panel B), 22.9% out of 63.3% (22.9% + 40.4% = 63.3%) represents 36.2%.

<sup>13</sup> In Henan (Panel A), 12.7% (6.7% + 6.0%) out of 73.7% (6.7% + 38.3% + 22.7% + 6.0%) represents 17.2%. In Zhejiang (Panel B), 9.9% (8.3% + 1.6%) out of 36.6% (8.3% + 25.6% + 1.1% + 1.6%) represents 27.0%.

<sup>14</sup> According to data on the nearly 5,000 associate and assistant judges in Zhejiang in 2013, the ratio of associates to assistants was 1.9:1. By contrast, among all 308 associate and assistant

Second, and turning to formal coping strategies, Zhejiang’s courts were similarly ahead of the curve in terms of their reliance on solo judges and the simplified procedure. We can easily see from the top two layers of all four panels in Figure 5.1 that solo judging was far more prevalent in Zhejiang than in Henan. Among first-instance civil adjudications, Henan’s simplified procedure utilization rate (26%, Panel A) was less than half of Zhejiang’s (63%, Panel B).<sup>15</sup> The magnitude of this gap persisted in first-attempt divorce adjudications (41% and 83% in Panels C and D, respectively).

As we can see in Panel A of Figure 5.1, Henan’s courts followed suit by boosting their simplified procedure utilization rates, but only in 2013 after the amended Civil Procedure Law took effect. Between 2009 and 2012, the share of first-instance civil adjudications tried by solo judges increased modestly from 16% to 20%. Then, in 2013, it shot up to 30%, where it essentially plateaued (30% in 2014 and 33% in 2015). The same basic pattern emerges from first-attempt divorce adjudications, in which the simplified procedure utilization rate increased modestly from 23% to 27% between 2009 and 2012 before spiking to 46% in 2013, after which it continued to climb albeit at a slower rate to 50% in 2014 and 55% in 2015 (Panel C).

Third, lay assessor participation was more than twice as prevalent in Zhejiang than in Henan. In 2010, the proportion of all first-instance civil trials conducted by collegial panels composed of at least one lay assessor was 32% in my Henan sample (Panel A) and 67% in my Zhejiang sample (Panel B). By 2013, lay assessor participation had increased to 71% and 96% in each respective sample. By 2015, these estimates had increased to 78% and 99% in the two respective samples. In the three years spanning 2015 and 2017, practically every collegial panel that tried a first-instance civil case in my Zhejiang sample contained at least one lay assessor (Panel B). The same was true for first-attempt divorce cases (Panel D).

In addition to being more likely to contain *any* lay assessors, Zhejiang’s collegial panels were also far more likely than Henan’s to contain *two* lay assessors. Among all first-instance civil adjudications in my samples, the proportion of collegial panels with two lay assessors

judges in all courts in a “medium-size city” in Anhui Province, which, as a less developed interior province, more closely resembles Henan, the ratio of associates to assistants was 5.1:1 in 2014 (Zheng, Ai, and Liu 2017:180–81).

<sup>15</sup> In Henan, 23.8% (solo associate judge) + 2.5% (solo assistant judge) = 26.3%. In Zhejiang, 40.4% (solo associate judge) + 22.9% (solo assistant judge) = 63.3%.

in Henan (15%) was only about one-quarter of that in Zhejiang (59%). Within the category of “collegial panel with lay assessor(s), no assistant judges” depicted in Figure 5.1, the proportion of trials involving two lay assessors was 29% and 84% in the two respective samples. In my Henan and Zhejiang samples, the average number of lay assessors on collegial panels trying first-instance civil cases was 0.76 and 1.52, respectively. All of the preceding patterns extend to first-attempt divorce trials.

As a consequence of these patterns, the three-judge collegial panel became greatly diminished in Henan and, practically speaking, disappeared entirely in Zhejiang. In Henan, between 2009 and 2015, the proportion of first-instance civil adjudications in my sample handled by collegial panels composed of three judges – any combination of assistant and associate judges, as represented by the bottom two layers of each panel in Figure 5.1 – declined from 60% to 15%. This decline coincided with a commensurately dramatic increase in solo judging and lay assessor participation discussed earlier. In Zhejiang, the three-judge collegial panel was already a rarity in 2009, accounting for only 19% of first-instance civil adjudications in my sample. By 2014, it handled fewer than 1% – and by 2017 only 0.4% – of such cases in my sample as lay assessor participation in collegial panels became universal. As we can also see from the second-to-bottom layer of each panel in Figure 5.1, collegial panels composed of three associate judges went the way of the dodo bird in Zhejiang (Panels B and D) and were on the road to extinction in Henan, where they declined from 49% to 11% of all first-instance civil adjudications (Panel A) and from 44% to 5% in first-attempt divorce adjudications (Panel C) between 2009 and 2015.

By comparing the two sets of panels for each province in Figure 5.1, we can easily see that all three innovative responses were more prevalent among first-attempt divorce cases than in the larger category of first-instance civil cases of which they were a part. Courts treated divorce cases as relatively simple and unimportant, as less worthy of judicial resources than other kinds of civil disputes, and as an opportunity to put a dent in their dockets.

## SUMMARY AND CONCLUSIONS

In this chapter I demonstrated that civil justice became increasingly perfunctory as a response to swelling caseloads. The SPC has been reluctant to expand the ranks of judges. As the volume of

litigation mushroomed, the population of frontline judges handling cases remained stable and even declined after a judge quota reform imposed a hard cap on the number of judges a court could appoint. Aggravating the challenge of appointing judges in sufficient numbers has been the challenge of retaining judges. Insofar as judges could not be recruited in greater numbers and court cases multiplied relentlessly, judicial efficiency gains became the only way out of the problem of “many cases, few judges.”

Desperate times called for desperate measures. Chinese judges are known for their pragmatism (Ng and He 2017a; T. Zhang 2012). Like overworked Russian justices of the peace (Hendley 2017:146–54) and US federal court judges (Robel 1990), Chinese judges have developed coping strategies to close cases and clear their dockets. They delegated trial work to assistant judges and lay assessors; they dispensed with the three-judge collegial panel and tried cases by collegial panels containing lay assessors or by solo judges. The vanishing three-judge panel was the confluence of informal coping strategies from below and formal policy signals from above. Some court officials have advocated for solo judges’ application of the ordinary procedure (K. Chen 2019:110), which would likely be the final nail in the coffin of the three-judge collegial panel.

The efficiency gains for courts and judges have come at the expense of due process for litigants, particularly female litigants. In Chapter 6, I will show that justice became even more perfunctory in divorce litigation. China’s clogged courts innovated not only by deputizing assistant judges, expanding the scope of the simplified procedure, and increasing lay assessor participation but also by clamping down on divorce. Doing so simultaneously helped judges satisfy additional imperatives: namely, to support higher-level political priorities and to minimize their own professional liability. The remainder of this book demonstrates that divorces have become collateral damage of courts’ crushing dockets and that vulnerable women have in turn become collateral damage of the divorce twofers.