

The Execution of Civil Judgments in China*

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When judgments are not executed, the law is worth nothing. – “The masses”¹

It is a staple of Chinese legal literature that the judgments of Chinese courts in civil and economic cases are plagued by a worryingly low execution rate. This perception should be taken seriously. When the President of the Supreme People’s Court devotes significant space to it in his report to the National People’s Congress, as did Zheng Tianxiang in 1988² and Ren Jianxin in subsequent reports, clearly something interesting is going on. Yet it would be a mistake to accept all reports at face value. A critical examination of the claims and the evidence can yield a richer picture of reality than has been presented by the literature so far.

The issue of whether court judgments can be enforced is important for a number of reasons, among which is its bearing on the relationship between the legal system and the economic system. Laws, courts and court judgments are part of the institutional framework within which economic reform is being carried out in China. Obviously, the rules of the game have to change. But the move from a hierarchically administered economy to a primarily market economy means more than just changing the content of the rules. It implies a whole new way of rule-making and rule-enforcing.

This article explores one particular way of making the rules mean something: the enforcement of a court decision that the implementation of a particular rule requires the performance of a particular act – typically, the delivery of money or goods. How does a court make A give something to B? If court decisions cannot be enforced, then the rules that they purport to implement will have little significance,³ and this has crucial implications for the direction of economic reforms.

It is important to stress what this article is *not* about. First, it is concerned only with civil judgments of the type outlined above. Because I am trying to look at cases in which there is no perceived direct threat to governmental authority, I do not discuss the enforcement of judgments in criminal matters or the enforcement of administrative decisions. Secondly, I do not discuss the process by which the judgment to be enforced

*I would like to thank the Committee on Scholarly Communication with China, the Committee on Legal Education Exchange with China and the University of Washington School of Law for the funds and leave time that made possible the research on which this article is based. Court officials, academics, lawyers and others interviewed in China who were promised anonymity are identified in the notes only by profession.

1. Quoted in Liu Yong, “Tantan shen zhi fenli de biyaoxing” (“A discussion of the need to separate adjudication from execution”), *Fazhi jianshe* (*Construction of the Legal System*), No. 3 (1984), p. 46.

2. Zheng Tianxiang, “Zuigao renmin fayuan gongzuo baogao” (“Supreme People’s Court work report”), *Zuigao renmin fayuan gongbao* (*Supreme People’s Court Gazette*) (hereafter *SPCG*), No. 2 (20 June 1988), p. 8 (hereafter “Supreme People’s Court work report 1988”).

3. As will be shown later, however, there are some interesting ways in which even an unenforced and unenforceable court judgment can have significant real-world consequences.

is produced. This is a key part of any full account of the enforcement of rights in China. A powerful opponent may be able to scare a weaker party out of bringing suit. Once suit is brought, many obstacles stand in the way of a correct judgment: judicial ignorance of the law and corruption, to name two, as well as the many factors detailed in this article that stand in the way of execution, such as favouritism of local enterprises.⁴ This article deals only with what happens after the judgment is issued.

Why Look at Court Decisions?

A focus on courts does not depend on the assumption that courts in China possess anything like the power and prestige they command in common-law countries. It is instead the particular relationship among economic reforms, rules and institutions that suggests a focus on court decisions and their enforcement.

The transition from a plan-centred to a market-centred economy requires an appropriate set of corresponding legal institutions, the most important feature of which is *general applicability*. The essence of the planned economy is production according to directives from above. A production directive to a firm, to be meaningful, must take into account the particular characteristics of the firm (for example, its production capacity). Firms producing in a competitive market, on the other hand, operate under a set of constraints common to all firms in their sector: prices, demand, environmental and labour regulations, and so on. If law in China is to be used in support of market institutions, it must apply indifferently to large numbers of economic actors. Otherwise the system will revert to the kind of specific directives and *ad hoc* bargaining whose inadequacies led to the drive for reform in the first place.⁵

A system of uniformly applicable rules needs an institution ready and able to undertake the task of enforcing it. For a number of reasons, the courts in China are the most likely candidate for this task. First, individual courts, not just the system as a whole, have the putative authority to issue orders cutting across bureaucratic and territorial boundaries provided that jurisdictional requirements are satisfied. A judge sitting in a Hunan county and appointed by the county People's Congress could, in the proper circumstances, legitimately order a state-owned, city-run handicrafts factory in Harbin to pay a sum of money to a collectively-owned, township-run sandalwood supplier in Guangxi.⁶ This type of

4. For more on the factors that go into the production of a court decision, see Phyllis L. Chang, "Deciding disputes: factors that guide Chinese courts in the adjudication of rural responsibility contract disputes," *Law and Contemporary Problems*, Vol. 52, Nos. 2 & 3 (Spring & Summer 1989), pp. 101–142, and Donald C. Clarke, "What's law got to do with it? Legal institutions and economic reform in China," *UCLA Pacific Basin Law Journal*, Vol. 10, No. 1 (Fall 1991), pp. 58–64.

5. I make this argument more fully in Donald C. Clarke, "The law, the state and economic reform," in Gordon White (ed.), *The Chinese State in the Era of Economic Reform: The Road to Crisis* (London: Macmillan, 1991), pp. 190–211.

6. As will be shown, whether that order would be obeyed is quite a different matter.

formal authority is remarkable in China. No other institution, including the Communist Party, has it. The traditional way to solve disputes in post-1949 China has been to find the common superior with jurisdiction over both parties. But this method invariably involves the problems of particularism and bargaining that economic reform was intended to move away from.

Secondly, norms enforced by courts can be less subject to dilution than norms enforced by other bureaucracies. Any authority system faces the problem of ensuring that policy formulated at the top is carried out properly below. The key advantage of court-enforced policy over bureaucratically implemented policy is that, if the system works properly, it minimizes the number of layers between policy making and policy implementation. A court can resolve a dispute between parties by direct reference to the original text of policy issued by the relevant policy-maker, which could for example be the central government. In this case, there is only one intermediate layer between the central policy-makers and the regulated parties. Thus, court enforcement of rules has the potential to provide a much greater degree of uniformity and consistency than enforcement by other bureaucracies – provided the courts can actually command obedience and have a system for ensuring consistent enforcement.

A consistently enforced system of rights-granting rules of property and contract is often thought necessary for economic development.⁷ Nobody who was in China at the beginning of the reform era can doubt the reality of the tremendous rise in prosperity that has occurred since that time. Can well-defined property and contract rights – particularly property rights – reasonably be said to exist? Are rights of property and contract, however well defined, in fact reliably enforced? An examination of the enforceability of court decisions about rights can contribute to the discussion of the relationship between property and contract rights and economic development by providing a richer understanding of just what it means in practice to have a right in China.

Scope of the Execution Problem

The issue of *zhixing nan* (difficulty in executing judgments) has received prominent coverage in the Chinese legal press for the last few years. From scattered complaints in the 1950s,⁸ it has grown to become a regular feature of Supreme People's Court reports to the National

7. See e.g. Douglass C. North and Robert Paul Thomas, *The Rise of the Western World* (Cambridge: Cambridge University Press, 1973); Douglass C. North, *Institutions, Institutional Change, and Economic Performance* (Cambridge: Cambridge University Press, 1990).

8. See e.g. Tai Yingjie, "Tantan women fayuan de zhixing gongzuo" ("A discussion of our court's work in execution"), *Renmin sifa gongzuo* (*People's Judicial Work*), No. 3 (1957), p. 20 (reporting complaints that courts could only talk, not act).

People's Congress since 1988.⁹ How bad are things really? It turns out that good statistics are simply not available on this matter. An extensive review of the literature failed to turn up a single serious study using well-defined categories.

In his 1988 report to the National People's Congress, Supreme People's Court president Zheng Tianxiang said that 20 per cent of judgments in economic cases went unenforced in 1985 and 1986, while about 30 per cent went unenforced in 1987.¹⁰ Other authors say that of judgments having executable content in civil, economic, criminal and administrative cases, about 30 per cent are not enforced,¹¹ while still another puts the number at over 50 per cent.¹²

All statistical evidence in this area must be used with extreme caution. First, it is simply not known how much execution would constitute a good rate. If the marginal cost of execution rises as one approaches 100 per cent, at some point it may not be socially worth it any more. Secondly, the numbers given for "unexecuted judgments" typically include cases where the defendant is simply insolvent. Business is risky; bad debts happen. Failure to execute a judgment where the debtor is insolvent bears no relation to court power or state capacity. Thirdly, for a number of reasons a judgment may simply not be issued against a defendant where it would be difficult to execute. Court officials have traditionally been expected to dispose of about 80 per cent of their caseload through mediation.¹³ A policy that pressures courts to find a settlement gives an advantage to the stubborn party; it could artificially raise the execution rate because defendants would refuse to agree to a settlement that they were not prepared to carry out voluntarily. Moreover, court officials have an incentive not to issue judgments that they foresee will be difficult to execute. They are assessed in part on the number of cases they handle. Because a case is not considered completed until successfully executed, their record looks bad if cases drag on and on. Thus, the perception of executability influences the judgment to be executed. An article praising a local court for having achieved a 95.5 per cent execution rate explained how they did it: "The Lianhu court first of

9. A mere 13 characters ("Some judgments and rulings have not been executed") were allotted to the problem in Zheng Tianxiang's 1987 work report – a far cry from the three long paragraphs he devoted to it the following year, when he called it "the most outstanding problem in economic adjudication." See Zheng Tianxiang, "Zuigao renmin fayuan gongzuo baogao" ("Supreme People's Court work report"), *SPCG*, No. 2 (6 June 1987), p. 12; Zheng Tianxiang, "Supreme People's Court work report 1988," p. 8.

10. *Ibid.* Presumably the sample consisted of judgments that called for the defendant to do something, not all judgments regardless of who won, but as Zheng did not say so we do not know for certain.

11. Gu Lianhuang and Zhu Zhongming, "Qianghua zhixing gongzuo, weihe falü zunyan" ("Strengthen execution work, uphold the dignity of the law"), *Renmin sifa* (*People's Judicature*), No. 4 (1989), p. 3. The authors provide no source for this number.

12. Qian Yongchang, "Lun shen zhi fenli, zhixing fenliu" ("On the separation of adjudication from execution and the separate process of execution"), *Fazhi jianshe*, No. 1 (1990), p. 16.

13. Academic interview L (1992); Court interview F (1992). The 1982 Law on Civil Procedure's formal requirement of "stressing mediation" (Art. 6) was dropped in the 1991 revision.

all... considers execution problems at the time of adjudicating the case, and exercises strict control over the acceptance of cases (*yange bahao li'an guan*)."¹⁴ In other words, if the court foresees execution problems, it may not even give the plaintiff a chance to plead his case, let alone issue a favourable judgment.

Analysis of the Problem

Despite the uncertainties of the statistics, it seems clear that there is a problem of some importance. It is therefore useful to understand why it might occur. Because of space limitations, the following discussion is far from exhaustive and can highlight only the most important areas.

General problems of enforcement. Some obstacles to execution are common to all cases. For example, primary and secondary sources on execution reveal a striking fact: courts and other wielders of state power are simply very reluctant to use coercive measures in civil cases, especially when it appears that the defendant is not entirely morally wrong. In one case, a woman's disappointed suitor, having unsuccessfully demanded the return of over 1,000 *yuan* worth of gifts, kidnapped her baby as a debt hostage. After five months of unsuccessful attempts by the go-between, the village committee and "judicial departments" to persuade him to return the child, he was finally arrested.¹⁵ If it took five months to arrest a known kidnapper, one can imagine how long it would take to impose coercive measures against someone who simply owed money. Behind this reluctance is, of course, an idea that this is not *really* a criminal kidnapping. It is instead an admittedly deplorable development in what is essentially a messy domestic dispute. There is a very strong feeling among court personnel that coercive measures are simply not appropriate in civil cases – in Maoist terminology, contradictions among the people, not between the enemy and the people.

It would be a mistake to underestimate the continuing ideological force in China's legal system of the Maoist dichotomy between non-antagonistic and antagonistic contradictions. Coercion, like dictatorship, is something that one applies to the enemy; among the people, one uses persuasion and education.¹⁶ In the words of one writer: "Economic cases fall within the category of disputes among the people and should usually be resolved by means of persuasion and education."¹⁷ The same philosophy was applied to the execution of court judgments when the defendant refused to perform:

14. "Lianhu fayuan renzhen jie jue 'zhixing nan' " ("The Lianhu court conscientiously resolves the problem of difficulties in execution"), *Fazhi zhoubao* (*Legal System Weekly*), 9 October 1990, p. 1.

15. "Ci an gai ding he zui?" ("What crime was committed in this case?"), *Zheng fa luncong* (*Miscellany of Politics and Law*), No. 1 (1992), p. 17.

16. I discuss this issue at greater length in Donald C. Clarke, "Dispute resolution in China," *Journal of Chinese Law*, Vol. 15, No. 2 (Fall 1991), pp. 286–88.

17. Fei Deping, "Jingji shenpan zhixing gongzuo qianlun" ("A brief discussion of execution in economic adjudication"), *Faxue pinglun* (*Jurisprudence Review*), No. 1 (1986), p. 64.

Because economic disputes belong to the category of contradictions among the people (*renmin neibu maodun*), ... then as long as the court strengthens its educational work, patiently guiding the execution debtor (*bei zhixing ren*), ... an execution debtor that is able to repay will generally change his attitude and voluntarily perform.¹⁸

The reluctance of courts to take coercive measures is compounded by the fact that execution of judgments has not traditionally been a matter of great concern for them. Their main duty has been criminal adjudication. The execution of the sentence was in the hands of the other bodies such as the police and prison administration, so it was never an issue. In addition to stressing criminal over civil cases, courts and scholars have traditionally stressed substantive law over procedural matters, which are considered less a matter of law than of work style (*zuofeng*). Civil execution has thus lost out both ways.

Although the great majority of basic level and intermediate level courts do now have a specialized branch concerned with execution – the execution department or chamber (*zhixing ting*)¹⁹ – they are not technically required to have one. The relevant law requires only that particular personnel be placed in charge of execution work. The execution chamber is administratively equal to the other chambers (*ting*) in charge of hearing cases in particular subject-matter areas, and its officers are on the same bureaucratic ladder as judges.²⁰ Very few, however, have worked as such or have received specialized legal education, and the prestige of the execution chamber is lower than that of the adjudicatory chambers.²¹

The very internal organization of courts reflects their priorities: the president takes charge of criminal adjudication, the vice-president takes charge of civil adjudication, and the vice-president's assistant takes charge of execution. When the adjudication committee discusses cases,

18. *Shenzhen jingji tequ shenpan shijian* (*The Practice of Adjudication in the Shenzhen Special Economic Zone*) (Beijing: Renmin fayuan chubanshe, 1990), p. 138.

19. China has four levels of courts: basic, intermediate, higher (at the provincial level), and supreme. Execution chambers are most necessary at the basic and intermediate level, because they have original jurisdiction over almost all cases and are thus in charge of execution of the judgment whether or not it is appealed.

20. It is this bureaucratic identity that leads me to use the parallel but unpleasant sounding "execution chamber" instead of "execution department."

21. Beijing Shi Zhongji Renmin Fayuan Zhixing Ting (Beijing Intermediate Level People's Court Execution Chamber), "Wei zhixing gongzuo de liangxing xunhuan gajin women de gongzuo" ("Improve our work to achieve a virtuous cycle in execution work"), p. 2, in *Di'er ci quanguo shenghui chengshi zhongji renmin fayuan zhixing gongzuo yantaohui huiyi cailiao* (*Materials from the Second National Conference of Intermediate Level People's Courts from Provincial Capitals on Execution Work*) (June 1992) (hereafter *Conference Materials*); Xi'an Shi Zhongji Renmin Fayuan Zhixing Ting (Xi'an Intermediate Level People's Court Execution Chamber), "Qiantan zhixing gongzuo de diwei he zuoyong" ("A brief discussion of the position and role of execution work"), pp. 4–5, in *Conference Materials*. According to one court source, the chief of the execution chamber is, unlike the chiefs of the other chambers, often not on the court's Adjudication Committee (*shenpan weiyuanhui*), the organ of collective leadership in the court. To add insult to injury, execution chambers are apparently the last to get access to a car. Their officers have to ride about on bicycles. *Ibid.* p. 6.

criminal cases are at the top of the agenda. Problems in executing judgments come last – if there is any time left.²²

It is worth noting that sometimes the plaintiff itself may not put a high priority on execution. An enterprise manager in a traditional state firm with an expectation of subsidies is more concerned with allocation of responsibility than with the bottom line. A judgment even for an uncollectable debt serves a purpose: the manager can explain to his superiors that a shortfall in revenues is not his fault. As one lawyer explained “In the end it’s all about justifying yourself” (*zuihou shi ge jiaodai wenti*).²³

In addition to the self-imposed obstacles noted above, there are a number of external factors blocking effective execution. Of these, local protectionism (*difang baohuzhuyi*) is by far the most frequently mentioned in the literature.²⁴ It manifests itself when officials in region A prevent the execution of a judgment in favour of a plaintiff from region B against a defendant from region A. Sometimes the court in region A will have rendered the unfavourable judgment only to find that it is not supported by other local government organs. More frequently – because a local court is less likely than an outside court to render a judgment unwelcome to the local leadership – the judgment will have been rendered by a court in region B, and it will be attempting to execute it either directly or by entrusting execution to local court in region A.²⁵

It is not simply some vague notion of respect for local leaders that makes courts reluctant to go against their wishes. There is a very specific institutional basis: the dependence of local court personnel upon local government at the same level for their jobs and their finances. As one article noted: “Every aspect of local courts, including personnel, budgets, benefits, employment of children, housing and facilities, is controlled by local Party and government organs, as are promotions and bonuses.”²⁶ A judge in Fujian who executed a judgment against a local enterprise found his daughter transferred the next day by her employer, the county, to an isolated post on a small island.²⁷

Both direct execution and entrustment present their own problems. The chief problem with direct execution is that outside courts tend to lack the local influence needed to get their judgments enforced. Local police may be unwilling to co-operate; a defendant’s work unit might refuse to

22. *Ibid.* pp. 4–5.

23. Lawyer interview R (1992); a similar point is made in Lawyer interview X (1992); Academic interview M (1992); Academic interview C (1992).

24. The citations are too numerous to list here. See generally Clarke, “Dispute resolution in China,” pp. 67–69.

25. Article 210 of the 1991 Law on Civil Procedure provides that where the person or property to be executed against is outside a court’s geographical jurisdiction, it may entrust (*weituo*) execution to the court of the relevant region. It is not required to do so, and retains the option of sending its own officials to execute.

26. Chen Youxi and Xue Chunbao, “Zaocheng fayuan zhixing nan de san da jiben yinsu” (“Three basic causes for the courts’ difficulties in execution”), *Zhejiang fazhibao* (*Zhejiang Legal System Daily*), 16 August 1990, p. 3.

27. Tang Dehua (ed.), *Minshi shenpan ruogan lilun yu shijian wenti* (*Several Practical and Theoretical Problems in Civil Adjudication*) (Changchun: Jilin renmin chubanshe, 1991), p. 391.

garnish wages. Some banks in Shenzhen, for example, apparently had – and may still have – internal rules requiring that any freeze on customer accounts by an outside court be approved by a Shenzhen court,²⁸ although such a requirement is specifically prohibited by a regulation issued jointly by the Supreme People's Court and the People's Bank of China.

The main problem with entrusted execution is that the entrusted court is unlikely to devote a great deal of effort to it. First, for the local protectionist reasons outlined above, they may simply not wish to help. In the face of determined stonewalling, the court wishing to execute may have little remedy – one county court refused to help enforce an outside judgment despite two specific orders from the Supreme People's Court to do so.²⁹ Secondly, even a friendly court may not dare to go against the wishes of local leaders. In one case, a sympathetic court president asked the outside court for understanding on the grounds that he was building a house and would never get it finished if he offended the county government.³⁰ Finally, a court that is neither hostile nor afraid of local government may simply deem it too much of a bother to spend resources on executing the judgments of other courts when it may be hard pressed to execute its own.

As noted above, the principal cause of local judicial protectionism appears to be the combination of the local government's direct interest in the financial well-being of local enterprises with its power over court personnel and finances. Consequently, local protectionism could be expected to be less pronounced where either of these factors is weakened or absent. Indeed, lawyers and court officials interviewed suggested that local protectionism was much less of a problem with intermediate level and higher level courts, where the connection of the corresponding level of government with local finance was much more tenuous.³¹ It could also be expected to decline if the dependence of courts on local government could be reduced. On the financial side, this could be done by funding courts from the Centre instead of from various levels of local government.³² At present, with the central government short of funds, there is no indication that such a reform is in the works.

On the personnel side, the picture is a little different. The general rule is that court presidents and vice-presidents owe their jobs to local

28. "Dangqian jingji anjian weihe zhixing nan?" ("Why is there a current execution problem in economic cases?"), *Shanghai fazhi bao*, 2 October 1989, p. 1.

29. Chen Shibin, "Dawu xian fayuan jianchi difang baohuzhuyi, tuoyan sannian ju bu xiezhu zhixing waidi panjue" ("Dawu county court persists in local protectionism; after delaying three years, still refuses to assist in execution of an outside judgment"), *Fazhi ribao* (*Legal System Daily*), 4 June 1988, p. 1.

30. Liu Jian and Mu Xiaoqian, "Zhixing zhong de wu da nanti – Guangdong sheng jingji jiufen anjian diaocha zhi san" ("Five major problems in execution – part three of an investigation into cases of economic disputes in Guangdong"), *Fazhi ribao*, 19 April 1988, p. 3.

31. Lawyer interview R (1992); Court interview K (1992).

32. Some in the legal community have made proposals to this effect. See, e.g., Chengdu Shi Zhongji Renmin Fayuan (Chengdu Intermediate Level People's Court), "Dizhi he kefu difang baohuzhuyi de tantao" ("An exploration into how to resist and overcome local protectionism"), p. 13, in *Conference Materials*.

people's congresses at the same level – in practice the local Party organization. Since late 1988, however, a small-scale experiment has been going on in Heilongjiang, Zhejiang, Fujian and Inner Mongolia whereby superior courts have more say in appointments to inferior courts.³³ The spread of this reform would mean greater independence for courts from local government.

For the time being, the best that courts seem able to do is to enter into what are essentially treaties of reciprocity with other courts. Under such agreements, each court party to the agreement promises to execute the judgments of the other signatories. Courts are already, of course, statutorily required to execute the judgments of other Chinese courts, and the Supreme People's Court has specifically denounced the practice of requiring reciprocity.³⁴ Nevertheless, such agreements do exist and are even hailed as positive achievements in the press.³⁵ On the other hand, they have no real legal force, and will last only as long as the parties deem it in their interest to continue co-operating.

A second external obstacle to execution can be the insolvency or dissolution of the defendant. Failure to execute a judgment here might have nothing to do with the adequacy of legal remedies or the strength of courts. The strongest legal system in the world cannot prevent bad debts. On the other hand, the picture becomes more complicated when it is realized that failure to execute against an insolvent corporate defendant also means failure to hold anyone else – investors, for example, or an administrative superior – accountable for the debt. If someone else should, by some standard, be held accountable, then the failure to execute is significant. It is important to examine this question because insolvency or dissolution of the debtor enterprise appears to account for a very large proportion of unexecuted judgments – according to one estimate, 30 to 40 per cent.³⁶ In many cases, however, it may be that somebody else should be made responsible and is somehow escaping responsibility.

Government agencies, for example, sometimes go into business with undercapitalized “briefcase companies” (*pibao gongsi*) and then close them down to avoid creditors when losses start to mount up. Several

33. For details, see Zuigao Renmin Fayuan Renshi Ting (Supreme People's Court Personnel Department), “Gaige ganbu tizhi, jiaqiang guanli gongzuo, baozheng renmin fayuan yi fa duli shenpan” (“Reform the cadre system and strengthen supervisory work; guarantee the people's courts' independent adjudication according to law”), *Renmin sifa*, No. 9 (1990), pp. 16–17.

34. Zuigao Renmin Fayuan (Supreme People's Court), “Guanyu zai shenli jingji jiufen anjian zhong renzhen banhao waidi fayuan weituo shixiang de tongzhi” (“Notice on conscientiously carrying out tasks entrusted by courts from other areas in the course of trying cases of economic disputes”) (20 January 1988), in Sun Changli, *Handbook on Execution Work*, pp. 265–66.

35. See e.g. “Xiang-E liushisi jia fayuan lianshou gongpo yidi zhixing nan guan jian xiao” (“Sixty-four courts in Hunan and Hubei join hands, achieve results in overcoming the problem of executing judgments in other regions”), *Fazhi ribao*, 24 July 1991, p. 1 (reporting mutual execution agreement among courts of several cities along the Yangtze).

36. Xue Chunbao, “Dui dangqian fayuan panjue huo caiding de jingji anjian zhixing wenti de pouxi” (“An analysis of current problems in execution of court judgments or rulings in economic adjudication”), *Zhejiang faxue* (*Zhejiang Jurisprudence*), No. 2 (1989), p. 25. Other sources very roughly corroborate this figure.

regulations have attempted to deal with this problem, essentially providing that the superior administrative department or approval agency is responsible for the debts of a failed subordinate enterprise where the former is in some sense at fault – for example, for having negligently approved the establishment of the company. In the face of these regulations, government agencies have come up with a new tactic: instead of closing the company down, which would expose them to liability, they leave the company formally in existence as an empty shell with no substantial assets. As long as the company exists, the entity that approved it is not responsible for its debts. The company itself is, but its liability is limited to the property it has been given to manage – which has been largely stripped away. Although it is probably possible to impose liability on the administrative superior where the subterfuge is obvious, the superior's liability remains limited by regulation to its extrabudgetary funds (*yusuanwai zijin*). These are unlikely to be ample.

Specific problems of enforcement. In addition to the obstacles common to all cases, executability may also be affected by various case-specific factors. The most significant of these are the nature of the defendant and the method used to execute.

While it is reasonable to think that defendants of different status will have differing abilities to resist execution, the sources do not always tell an unequivocal story. According to some sources, execution against large state-owned enterprises is generally not a problem.³⁷ They are less likely than small enterprises to be short of ready cash. On the other hand, when they do not have the money or for some other reason do not wish to pay, execution can be very difficult. It seems clear from interviews and published sources that in 1992 (and probably still) courts were to show special solicitude for large and medium-sized state-owned enterprises when asked to execute a judgment against them.³⁸ In particular, seizing their fixed assets in satisfaction of a debt was, and probably remains, virtually forbidden.³⁹ As a general rule, courts are not supposed to stress execution “one-sidedly” to the neglect of other factors:

When adopting coercive legal measures to resolve economic cases, we must never pay attention only to finishing up the case; we must at the same time pay attention to unity and stability in society, to stabilizing relations of socialist ownership, and to developing the socialist economy.⁴⁰

37. Lawyer interview H (1992); Academic interview G (1992).

38. Lawyer interview O (1992); Lawyer interview H (1992); Academic interview J (1992); Guangzhou Shi Zhongji Renmin Fayuan Zhixing Ting (Guangzhou Intermediate Level People's Court Execution Chamber), “Chongfen fahui zhixing gongzuo de zhineng zuoyong, genghaode wei shehui anding he jingji fazhan fuwu” (“Give full play to the function of execution work, serve social stability and economic development even better”), p. 4, in *Conference Materials*. I know of no statutory basis for this policy.

39. Lawyer interview A (1992) (“Normally, one doesn't execute against means of production; one executes against circulating funds”). This appears to be a “customary” rule with no basis in statute.

40. Wang Changying (President, Shenzhen Intermediate Level People's Court), “Zhengque yunyong shenpan jingji anjian de qiangzhi cuoshi” (“Correctly use coercive

In practice, this means “don’t execute where it will mean closing the defendant enterprise and throwing workers on to the street.”⁴¹

Among state-owned enterprises, those run by the military are particularly resistant to execution. One court went so far as to call execution against the military “impossible.”⁴² Courts are generally reluctant to seize or seal their property because of a fear of interfering with military production. The best hope for courts in these cases is to go through the enterprise’s administrative superior.⁴³

Finally, it is worth saying a few words about individuals subject to execution. Individuals have long had a limited immunity from execution when money or property is sought. A number of local court rules from the 1950s as well as Article 171 of the 1982 Law on Civil Procedure and Article 222 of its 1991 revision all provide that courts must leave judgment debtors with sufficient funds and property for their livelihood and that of their dependents. This exemption is not necessarily interpreted generously: in 1989, a Shenzhen defendant was allowed to keep only 150 *yuan* per month from his income in order to support himself, his mother and his daughter – less than two *yuan* per day per person at a time of significant inflation.⁴⁴

It is a different story entirely with individuals subject to judgments for eviction. Such judgments can be among the most difficult to execute of all.⁴⁵ Primary and secondary sources agree that “coercive measures are undertaken only when the execution debtor genuinely has a place to move to and still refuses to move.”⁴⁶ In virtually all cases, a person with no

footnote continued

measures in the adjudication of economic cases”), *Shenzhen fazhi bao*, 23 July 1990, p. 7. This is not to suggest that courts in common law systems never take practical consequences into account when rendering judgment or undertaking execution. The difference – and it is a significant one – is that they must never admit to doing so, while Chinese courts are urged to. *Fiat justitia, ruat cælum* is not a maxim of the Chinese legal system.

41. For a case where a court refused to enforce its own judgment against an enterprise on precisely these grounds (“The township government leaders don’t approve of its being put to death; we must consider the matter from the standpoint of what’s advantageous to economic development”), see Zhang Yiping, “Thoughts on local protectionism.”

42. Nanning Shi Zhongji Fayuan (Nanning Intermediate Level People’s Court), “Guanyu kaizhan anjian zhixing huizhan de yixie zuofa he tihui” (“Some methods and experience gained in conducting execution campaigns”), p. 13, in *Conference Materials*.

43. Academic interview G (1992).

44. “Fayuan yao baoliu bei zhixing ren de shenghuo feiyong ma?” (“Does the court need to preserve an amount for the execution debtor’s living expenses?”), *Shanghai fazhi bao* (*Shanghai Legal System News*), 18 December 1989, p. 7. Compare this stingy immunity with that of the bankruptcy laws of, say, Florida, which exempt from seizure among other things *all* wages and the debtor’s personal residence, regardless of its value. As one bankruptcy judge complained, “you could shelter the Taj Mahal in this state and no one could do anything about it.” Larry Rohrer, “Rich debtors finding shelter under a populist Florida law,” *New York Times*, 25 July 1993, p. 1.

45. On housing cases generally, see Fuzhou Shi Gulou Qu Fayuan (Gulou District Court, Fuzhou), “Dui zhixing shoufang anjian ruogan wenti de tantao” (“An investigation into several problems in executing cases involving the restoration of housing [to an owner]”), in *Conference Materials*.

46. Cheng Cheng, Liu Jiaxing and Cheng Yanling, “Guanyu woguo minshi zhixing zhong de jige wenti” (“Some issues in civil execution in our country”), *Faxue yanjiu* (*Studies in Jurisprudence*), No. 1 (1982), p. 43.

place to go is immune from execution.⁴⁷ One court went so far as to blame “execution difficulties” on landlords who obstinately insisted on getting their property back in accordance with the judgment. In such cases, wrote the court, “we should resolutely suspend execution in accordance with the provisions of Article 234, Paragraph 5 of the Law on Civil Procedure.”⁴⁸ Although the legal community is unanimous in confirming the existence of this immunity, I have been unable to find any documentary basis for it outside a 1955 set of internal rules of the court of Xuanwu district in Beijing. It appears to be one of those things that everyone “just knows.”

While executability can vary by defendant, it can also vary by the methods available to obtain performance. What threats can a court bring to bear when a person or organization does not obey a court order?

When the person subject to the order is the defendant (as opposed, for example, to the defendant’s bank or employer), the court can attempt to impose both administrative and criminal sanctions. But these sanctions must have a specific statutory basis; unlike Anglo-American courts, Chinese courts have no general contempt power. Article 102 of the Law on Civil Procedure allows a court to fine or detain (*juli*) for up to 15 days any person (including the responsible person of an organization) who refuses to carry out a legally effective judgment or ruling of the court. This detention is considered administrative in nature and is imposed by the court president without the necessity of any sort of hearing.

Execution measures directed against the person, as opposed to the property, of the defendant are politically very sensitive in China. It is an article of faith among Chinese legal scholars and officials that, unlike in the pre-Communist era, courts may not execute against the person of the defendant. In the 1982 Law on Civil Procedure, mere refusal by a defendant to carry out a judgment, without more (such as threatening or beating court personnel) was not grounds for detention – although, curiously, mere refusal by a *non*-party such as a bank manager to co-operate in execution was.⁴⁹ An authoritative textbook from 1985 explains:

To detain the debtor, making him suffer in order to force him to perform his duty to pay off the debt, is a method used by the exploiting classes to oppress the working people.... If a party does not use violence or similar methods to resist execution, and

47. This policy appears to apply only to cases deemed to be “internal contradictions” and thus can be waived in the case of political dissidents and their families. The wife and daughter of Ren Wandong, gaoled both in the late 1970s and the late 1980s for human rights advocacy, found the door to their flat nailed shut with all their belongings still inside upon arriving home one afternoon. Sheryl WuDunn, “Wife of jailed China dissident is left homeless by eviction,” *New York Times*, 19 April 1992, p. A7.

48. *Ibid.*, “Housing cases,” p. 11. The relevant paragraph allows a court to suspend execution when it deems it “necessary” to do so for any reason.

49. See Articles 77 and 164 of the 1982 Law on Civil Procedure. This interpretation is supported by “Dui bei zhixing ren de zhei zhong xingwei gai zenme ban?” (“What should be done in the face of this kind of behaviour by the execution debtor?”) (Letter to the Editor), *Renmin sifa*, No. 4 (1990), p. 48.

merely refuses to perform [his duty], the execution officer (*zhixingyuan*) ... cannot use force with respect to his person.⁵⁰

Academic sources consistently distinguished detention under the 1982 Law on Civil Procedure from detention under Republican law by holding that the detention was imposed not for the failure to carry out the judgment, but for some other act. Although Article 102 of the 1991 Law on Civil Procedure seems to have destroyed the viability of this distinction, it appears that in general the mere passive refusal to carry out a judgment will in practice result in nothing more than a fine, even though detention is technically possible.⁵¹

Although passive resistance is at least in theory now grounds for administrative detention, there is disagreement about whether mere refusal to perform is by itself enough to justify *criminal* sanctions. Article 157 of the Criminal Law allows for the imposition of punishment including imprisonment upon anyone who “by means of threats or violence obstructs state personnel from carrying out their functions according to law or refuses to carry out judgments or orders of people’s courts that already have become legally effective.” Unfortunately, the original Chinese is arguably ambiguous on the issue of whether “by means of threats or violence” applies to refusal to carry out judgments as well as obstructing state personnel. According to some sources, it does not: passive refusal to perform cannot be criminally punished.⁵² Other sources, including court officials, disagree: no threats or violence are required.⁵³

In practice, of course, the views of courts count for more than the views of academics because it is the former that have the power to sentence, and one can in fact find a few reports of courts sentencing defendants under Article 157 for the non-violent refusal to perform a judgment.⁵⁴ Thus, although proposals during the latest revision of the Law on Civil Procedure to spell out that mere refusal to perform could be

50. Chen Yanling, Yang Rongxin, Liu Jiaying, Zhao Huifen, Tang Dehua and Cheng Cheng (eds.), *Minshi susong fa shixing wenti tantao* (*Investigation of Issues in the Implementation of the Law on Civil Procedure*) (Beijing: Falü chubanshe, 1985), p. 231.

51. Academic interview S (1992); Lawyer interview R (1992).

52. Academic interview S (1992); Li Junjie, “Lun ju bu zhixing panjue zui de fanzui goucheng” (“On the constituent elements of the crime of refusing to carry out judgments”), *Hebeifaxue* (*Hebei Jurisprudence*), No. 1 (1992), pp. 32–34; Chang Yi, *Qiangzhi zhixing lilun yu shiwu* (*The Theory and Practice of Compulsory Execution*) (Chongqing: Chongqing chubanshe, 1990) (hereafter Chang Yi, *Compulsory Execution*), p. 27 (who views this limitation as a weakness).

53. Court interview F (1992); Court interview E (1992); Wang Wei, “Ju bu zhixing renmin fayuan panjue caiding zui ji qi shenli chengxu de tantao” (“An exploration of the crime of refusing to carry out court judgments and rulings and the procedure for its adjudication”), *Renmin sifa*, No. 10 (1990), p. 16 (viewing violence and threats as aggravating circumstances instead of necessary elements).

54. See e.g. “Wang Zhanshu bei juliu fakuan” (“Wang Zhanshu detained and fined”), *Beijing fazhi bao* (*Beijing Legal System News*), 23 May 1990, p. 1.

a crime were defeated,⁵⁵ some courts seem to be going their own way and making it one regardless.⁵⁶

Because of the difficulty of forcing a defendant to perform a specific act such as paying an amount of money owing under a judgment, the court can try to take funds owned by the defendant but held by others. To this end, Article 221 of the Law on Civil Procedure allows a court to freeze funds held in a defendant's bank account and to have them transferred to a judgment creditor. This measure is most useful against enterprises and other organizational defendants subject to rules requiring them to keep their funds in banks, often in a single account. Nevertheless, these rules are often violated, making it hard for creditors to find all the defendant's funds.⁵⁷

The 1991 revision of the Law on Civil Procedure saw a significant strengthening of procedures for freezing and seizure. Whereas under the 1982 law courts could only freeze, but not transfer, funds in banks outside their geographical jurisdiction,⁵⁸ the 1991 revision and subsequent interpretation make it clear that this disability has been abolished in law.⁵⁹ Nevertheless, it appears to persist in practice at least in some places, where banks continue to insist on an order from the local court before consenting to transfer funds.⁶⁰

Despite its potential for circumventing a defendant's resistance to execution, the freezing or seizure of bank deposits faces a number of obstacles. First, as noted, it is difficult to prevent parties anticipating litigation from keeping their funds in several bank accounts, some of them secret. Secondly, banks themselves now operate under a much more competitive regime and are anxious to avoid offending customers. To this end, they will often drag their heels and in other ways attempt to block the efforts of courts to take their customers' money. Moreover, in many cases banks will have outstanding loans to the debtor. Thus they may attempt to ensure that their own loan is repaid before they freeze any funds, although this practice has been forbidden.⁶¹ Thirdly, local govern-

55. Academic interview P (1992).

56. Space limitations preclude discussion here of the fascinating issue of who is supposed to prosecute in such cases.

57. Luan Yixin, Peng Yingjie and Shi Heping, "Dui dangqian shenli jingji jiufen anjian youguan chafeng, dongjie, kouhua kuanxiang de diaocha yu tantao" ("Investigation and exploration into sealing, freezing and seizing funds in current adjudication of economic dispute cases"), *Hebei faxue*, No. 1 (1992), p. 26.

58. Zuigao Renmin Fayuan, Zhongguo Renmin Yinhang (Supreme People's Court, People's Bank of China), "Guanyu chaxun, dongjie he kouhua qiye shiye danwei, jiguan, tuanti de yinhang cunkuan de lianhe tongzhi" ("Joint notice on investigating, freezing, and levying on bank accounts of enterprises, institutions, organs, and organizations") (28 December 1983) (hereafter "Joint notice on freezing accounts"), in Sun Changli (gen. ed.), *Zhixing gongzuo shouce* (*Handbook on Execution Work*) (Beijing: Renmin fayuan chubanshe, 1988), pp. 695-97.

59. Court interview F (1992); Art. 80, Zuigao Renmin Fayuan (Supreme People's Court), "Guanyu shiyong 'Zhonghua renmin gongheguo minshi susong fa' ruogan wenti de yijian" ("Opinion on several issues regarding the application of the 'People's Republic of China Law on Civil Procedure'"), *SPCG*, No. 3 (20 September 1992), p. 91.

60. Court interview U (1992).

61. "Joint notice on freezing accounts."

ments in some areas have formal or informal rules forbidding the forcible transfer of funds from local parties to outside parties.⁶² Although such rules are technically unlawful, local banks must in practice obey them. Finally, banks remain sensitive to their status and will not easily take orders from courts, whom they perceive to be just another parallel bureaucracy with no more authority over them than the Post Office. Nor is this perception necessarily wrong. The regulations that really count when it comes to co-operation between bureaucratic “systems” (*xitong*) are those to which all the relevant parties have signed on as co-issuers.⁶³

Thus, banks can sometimes ignore court orders with impunity.⁶⁴ The one weapon courts had against banks – the power to impose administrative detention on recalcitrant bank personnel – was actually taken away from them in the 1991 revision to the Law on Civil Procedure.⁶⁵

Conclusion

This article began with the proposition that some but not all court judgments and decisions are difficult to execute, and that this affects the practical significance of economic and other rights apparently granted by law. The available evidence, while often contradictory, suggests certain patterns. It will be difficult, for example, to execute against a large and locally-important but cash-poor state-owned enterprise in a poor province. All eviction cases against individuals will be difficult, but there is no special difficulty in evicting organizational tenants.

One of the main sources of difficulty in execution stems from the failure of legal reform to keep up with economic reform. What used to work is no longer so effective as before. For example, when virtually all urban residents worked within an organization responsible to the state, a good deal of enforcement could be carried out within the organization. When the income of most defendants is in the form of a wage, then support payments can be deducted from the wage. On the other hand,

62. Court interview E (1992).

63. See e.g. Zhongguo Renmin Yinhang, Zuigao Renmin Fayuan, Zuigao Renmin Jianchayuan, Gong'an Bu, Sifa Bu (People's Bank of China, Supreme People's Court, Supreme People's Procuracy, Ministry of Public Security, Ministry of Justice), “Guanyu chaxun, tingzhi zhifu he moshou geren zai yinhang de cunkuan yiji cunkuan ren siwang de cunkuan guohu huo zhifu shouxu de lianhe tongzhi” (“Joint notice concerning investigating, stopping payments from, and confiscating funds of individuals held in banks as well as the procedures for making payments from or transferring ownership over funds belonging to deceased depositors”) (22 November 1980), in Sun Changli, *Zhixing gongzuo shouce*, pp. 686–89.

64. See Pan Dingqu and Luo Shifa (Changsha Intermediate Level People's Court), “Qiantan zhixing huanjing” (“A brief discussion of the execution environment”), p. 6, in *Conference Materials*.

65. Compare Article 77 of the 1982 Law on Civil Procedure (allowing detention or criminal prosecution of those with an obligation to assist the court in a civil case who fail to do so) with Article 103 of the 1991 Law on Civil Procedure (allowing only a fine of bank personnel who refuse to assist courts). According to one high-level court official I interviewed, this weakening of court powers was the result of strong lobbying during the revision process by the People's Bank, which did not want courts to be able to lock up bank officials. Court interview B (1992).

garnishing wages is completely ineffective as an execution measure against individual businesspeople (*getihu*) who have no wages to garnish.

Another reason for the apparent increase in execution difficulties is the change in the nature of cases heard by courts. Divorce cases were traditionally the mainstay of civil litigation. The divorce declaration itself needed no execution, and the amount of property to be redistributed was small. With the progress of economic reform, courts have found themselves called on to do what they had almost never been called on to do before: enforce judgments against state enterprises. At the same time, however, they remain under the *de facto* control of the same power that controls local enterprises. Moreover, in an increasingly debureaucratized economy, courts remain, and are perceived as, just one bureaucracy among many. They are conceded their own sphere of authority, but they do not have the overarching authority of courts in common-law and, to a lesser extent, continental European legal systems.

If the functioning of courts fits less and less well with the realities of China's changing economy, it is also true that transactions in that economy that require, or at least work better with, effective court enforcement of rights are going to suffer. The question is whether this is a major problem. The evidence so far suggests that economic development in China has not been significantly hampered by the lack in some circumstances of effective enforcement of rights.⁶⁶ This suggests either that the popular connection drawn between economic development and the effective protection of rights is mistaken, or that the Chinese system does indeed provide such protection where it counts.

The answer may be something of both. First of all, the news on execution of judgments is not all bad. On the one hand, courts still do not have a great deal of general power to impose their will. On the other, in a number of well-defined circumstances, they are not the paper tigers that some of the literature makes them out to be. Secondly, a great deal of business can be done on the basis of trusted go-betweens and the desire for a long-term relationship. In such circumstances, legally enforceable rights are simply not very important. Court-enforced rights are most needed in the case of one-off transactions between strangers. But how important are such transactions to an economy? Even what might seem the paradigmatic example of such a transaction, anonymous buying and selling on the stock market, takes place within an institution (the stock exchange) that has an interest in repeat transactions by buyers and sellers and may thus have its own regulatory system.

In short, the reality of what Chinese courts do and don't do is simply too messy to provide neat answers to the questions posed at the beginning of this article. Furthermore, it is important to recognize that this article has *not* studied the problem of what goes into getting a judgment in the first place, and thus cannot be a complete account of how well rights granted on paper are enforced in practice.

66. Of course, we will never really know, since it is possible that China's economy would have developed even faster *with* such effective enforcement.

In one sense, however, the ambiguity and inconsistency of the answers does tell us something. Courts do not seem to have a great deal of institutionally-based power – that is, power based simply on the fact that they are courts. On the other hand, they may have power for other reasons: the social and political status of their personnel, for example. Reforms in the staffing of courts, long promised and long delayed, may be the key to their genuine institutionalization, although reforms in the way courts are financed – reforms that have *not* been promised – are indispensable as well.

From a broader perspective, this study of executability confirms at a fine level of institutional detail the impression of many observers that the central government faces serious problems in making its writ run in the provinces. Interviews and published sources all make clear that a good part of the execution problem stems from the willingness and ability of local governments simply to ignore central regulations and directives when it suits them. Even when the central authorities are directly aware of the problem, they seem in some cases unable to do anything about it. The plight of courts is in this case a symptom, not a cause, of this larger problem.