

# THE SUPREME PEOPLE'S COURT AND THE POLITICAL ECONOMY OF JUDICIAL EMPOWERMENT IN CONTEMPORARY CHINA

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## Abstract

This article explores the transformation of the Chinese Supreme People's Court ("Court") from a state security agency into a relatively autonomous policy-making organization. Beginning in the mid-1990s, the Court has reinterpreted virtually every major legislative act, made rules in numerous substantive law and regulatory fields, instructed lower judges to suspend *ultra vires* local enactments, appointed its own justices, and initiated nationwide judicial reform. This article addresses questions of why this court came to exercise such expanded powers and how this happened without the encouragement of the Leninist state. It argues that the Court's empowerment originated from the entrepreneurial choices of senior justices. A new judicial ideology that combines activist and professional values emerged under the auspices of entrepreneurs. By encouraging pro-empowerment preferences within the Court, supporting the interests of influential business actors, and reforming local courts in line with its ideology, the Court succeeded in constructing support bases for judicial empowerment. Increasingly fragmented political authority, breakneck economic development, and considerable legislative underperformance have all furthered the Court's aggrandizement. However, Chinese judicial empowerment is qualified by the inter-subjective perceptions of China's rulers regarding the proper boundaries of judicial power.

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## INTRODUCTION

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## INTRODUCTION

Courts around the world increasingly exert influence over political decision-making.<sup>1</sup> If the pursuit of power is the greatest attraction of politics, why would rulers permit the empowerment of judges, especially relatively autonomous ones, who might put an additional check on them?<sup>2</sup> This explanatory challenge is even more acute in cases of judicial empowerment in authoritarian settings, where courts are typically regarded as “the pawns of their regimes” with “no standard of due process.”<sup>3</sup>

The contemporary evolution of the Supreme People’s Court (“SPC” or “Court”) of the People’s Republic of China (“PRC”), the highest court of the world’s most populous state, presents an intriguing case of judicial empowerment.<sup>4</sup> Throughout the past two decades, and especially since the death of paramount leader Deng Xiaoping in 1997, the SPC has steadily expanded its power and autonomy at the expense of other important political actors. Its so-called Judicial Interpretations, now a principal source of law in daily litigation, have often departed significantly from original statutory provisions.<sup>5</sup> Behaving like a legislative body, the SPC has invented legally

<sup>1</sup> See generally THE GLOBAL EXPANSION OF JUDICIAL POWER (C. Neal Tate & Tobjorn Vallinder eds., 1995); ALEC STONE SWEET, GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE (2000); CARLO GUARNIERI, PATRIZIA PEDERZOLI & C.A. THOMAS, THE POWER OF JUDGES: A COMPARATIVE STUDY OF COURTS AND DEMOCRACY (2002); Patricia J. Woods & Lisa Hilbink, *Comparative Sources of Judicial Empowerment Ideas and Interests*, 62 POL. RES. Q. 745 (2009).

<sup>2</sup> See J. Mark Ramseyer, *The Puzzling (In)Dependence of Courts: A Comparative Approach*, 23 J. LEGAL STUD. 721 (1994); Mathew C. Stephenson, *When the Devil Turns...: The Political Foundations of Independent Judicial Review*, 32 J. LEGAL STUD. 60 (2002).

<sup>3</sup> TAMIR MOUSTAFA, THE STRUGGLE FOR CONSTITUTIONAL POWER: LAW, POLITICS, AND ECONOMIC DEVELOPMENT IN EGYPT 1, 19 (2007).

<sup>4</sup> The SPC has received less scholarly attention than it deserves. For one of the most recent journal articles offering comprehensive coverage of the Court, see Susan Finder, *The Supreme People’s Court of the People’s Republic of China*, 7 J. CHINESE L. 145 (1993). For the most up-to-date book on the SPC, see NANPING LIU, JUDICIAL INTERPRETATION IN CHINA (1997). The Court is one of the least understood Chinese legal institutions. For instance, it was mentioned only twice in the significantly edited work introducing the PRC legal system, UNDERSTANDING CHINA’S LEGAL SYSTEM: ESSAYS IN HONOR OF JEROME A. COHEN (C. Stephen Hsu ed., 2003). SPC scholarship from Mainland China is more substantial, although Chinese scholars typically concentrate on one dimension of the Court’s actions (e.g., judicial interpretations) at the expense of other equally important ones. And only three books adopting empirical approaches can be identified. 最高人民法院研究 [SUPREME COURTS IN PERSPECTIVE] (左卫民 [ZuoWeimin] ed., 2004); JI CHENG, JUDICIAL INTERPRETATION OF THE SUPREME COURT (2006); 侯猛, 中国最高人民法院研究 [HOU MENG, A STUDY OF THE CHINESE SUPREME PEOPLE’S COURT: A PERSPECTIVE FROM THE INFLUENCE OF THE JUDICIARY] (2007). In an attempt to supplement this limited literature, this article addresses the long-separated subjects of SPC issued judicial interpretations and SPC led judicial reform programs.

<sup>5</sup> See Finder, *supra* note 4, at 169; Ji, *supra* note 4, at 91.

binding rules in virtually every conceivable area of social and economic policy.<sup>6</sup> As this article will illustrate, the SPC has consistently widened the scope of its own power and the powers of other courts to review administrative actions and has encouraged judges to suspend local legislation enacted *ultra vires*. The SPC has remolded the PRC's Socialist Civil Law system to embrace doctrines drawn from or inspired by the Common Law. It initiated a nationwide judicial reform program that raised barriers against bureaucratic and legislative interference with local courts. And despite the non-justiciability of the PRC Constitution, the SPC has issued rulings conducive to the rights of rural self-rule, bringing suit against the state, fair and open trial, trial by jury, and privacy, life, education, and more.

These developments contrast starkly with the SPC's previous position as a repressive and, at times, insignificant state security agency,<sup>7</sup> as well as with the current legal policies of the Chinese Communist Party ("CCP") central state. Beginning in November 1950, the early SPC operated alongside the police and the procuracy as one constituent of the security apparatus, in charge of punishing dissidents, prosecuting criminals, and supporting CCP ideological campaigns.<sup>8</sup> A majority of the SPC's first judges were not educated in the law, and its first president was chosen from Mao Zedong's executive cabinet.<sup>9</sup> During the Cultural Revolution, the Court ceased to exist in all but name.<sup>10</sup> Blacklisted by the Gang of Four as "bourgeois bureaucratic enemies of Chairman Mao," judges of the SPC were purged and sent to the distant countryside.<sup>11</sup> After its restoration in 1978 by the new regime of Deng Xiaoping, the SPC became increasingly engaged in the resolution of social and commercial disputes. But the central state's perception of the SPC as primarily a politicized punitive organ has remained largely intact even to the present day.

The PRC's "Socialist Rule of Law" reform program does not intrinsically entail independent courts.<sup>12</sup> All four constitutional revisions since 1982 have left the provisions about the SPC untouched. In 2000, the NPC by statutory

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<sup>6</sup> Randall Peerenboom, *Courts as Legislators: Sup. People's Ct. Interpretations and Procedural Reforms*, in *REGULATING ENTERPRISE: THE REGULATORY IMPACT ON DOING BUSINESS IN CHINA* (Found. for L., Just. & Soc'y ed., 2008), available at <http://www.fljs.org/uploads/documents/Peerenboom.pdf>; Wang Chenguang, *Law-making Functions of the Chinese Courts: Judicial Activism in a Country of Rapid Social Changes*, 4 *FRONTIERS OF LAW IN CHINA* 545 (2006).

<sup>7</sup> See Frederick C. Teiwes, *The Chinese State during the Maoist Era*, in *THE MODERN CHINESE STATE* (David Shambaugh ed., 2000).

<sup>8</sup> FU ZHENGYUAN, *AUTOCRATIC TRADITION AND CHINESE POLITICS* 245 (1993).

<sup>9</sup> 何永军 [He Yongjun], 最高法院法官：一个初步的历史考察 [Justices of the Supreme Court: A Preliminary Historical Study], in 最高法院研究 [SUPREME COURTS IN PERSPECTIVE] 247-248 (左卫民 [Zuo Weimin] ed., 2004).

<sup>10</sup> Ji, *supra* note 4, at 11.

<sup>11</sup> He, *supra* note 9, at 252.

<sup>12</sup> MOUSTAFA, *supra* note 3, at 223.

enactment distributed differing degrees of constitutional review power to governments and congresses at both central and local levels, to the conspicuous exclusion of the judiciary as a whole. Unchanged since the 1950s, the contemporary SPC remains under the formal supervision of the CCP agency responsible for security and intelligence. This article seeks to answer the following question: how has the SPC come to exercise the broad powers it currently enjoys in a risky authoritarian political environment despite its lack of Party-State patronage?<sup>13</sup>

Dominant models of judicial empowerment in the positive political economy literature, which emphasize the primary role of self-interested authoritarian rulers as the suppliers of judicial power and courts as devices that minimize political transaction costs, appear to be unhelpful in explaining the Chinese case.<sup>14</sup> Consider Moustafa's seminal study of the empowerment of

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<sup>13</sup> Recognizing that it is very difficult to provide an exact definition of the term "power," this article takes a flexible approach to the notion of "judicial empowerment" as a process leading to the relative enhancement in the capacity of a court to act autonomously from other actors and/or to influence other actors. This article concentrates on the changing relationship between the Court and other state political actors. It does not purport to offer a complete theory that explains every single aspect of SPC empowerment. Also, it does not claim either that the Court has already become a powerful and liberal actor or that the Court's empowerment process is necessarily desirable for building the rule of law.

<sup>14</sup> For example, the "hegemonic-preservation" thesis suggests that the strong interest of the ruling elites in preserving their hegemony is the primary motivator of judicial empowerment. Ran Hirschl, *The Political Origins of Judicial Empowerment through Constitutionalization: Lessons from Israel's Constitutional Revolution*, 33 L.S.I. 315 (2000); RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* 16 (2004). Similarly, "political insurance theory" claims that judicial empowerment results from an endangered government's response to the uncertainties of the political game. Nancy Maveety, *Comparative Judicial Studies*, in *EXPLORING JUDICIAL POLITICS* 300 (Mark C. Miller ed., 2009); Hootan Shambayati & Esen Kirdis, *In Pursuit of 'Contemporary Civilization': Judicial Empowerment in Turkey*, 62 POL. RES. Q. 768 (2009). Ruling elites will incur the relatively lower costs of empowering judges in exchange for their long-term interest in having some decisions of rival successor governments overruled in the future. See Stephenson, *supra* note 2. Thus, in environments where political competition is rigorous and rival parties alternate holding office, judicial power is likely to be more robust. See generally George Tridimas, *Constitutional Judicial Review and Political Insurance*, 29 EUR. J. L. & ECON. 84 (2010). In a study of judicial empowerment in the former authoritarian states of Taiwan, Korea, and Mongolia, Ginsburg argued that autonomous courts are unlikely to exist under monolithic administrations. Tom Ginsburg, *The Global Spread of Constitutional Review*, in *OXFORD HANDBOOK OF LAW AND POLITICS* 90 (Kenneth E. Whittington, R. Daniel Keleman & Gregory A. Caldeira eds., 2008). Secured rulers usually have little incentive to purchase "insurance" in the form of judicial empowerment, which is "a solution to the problem of political uncertainty at the time of constitutional design." *Id.* at 90. Accordingly, Taiwan's democratization enabled utility-maximizing constitutional judges of the Judicial Yuan to strategically expand their power. TOM GINSBURG, *JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN EAST ASIAN CASES* 249 (2003).

the Egyptian Supreme Constitutional Court.<sup>15</sup> Following his reasoning, authoritarian states are unable to win the confidence of private investors, keep control of local administrative agents, or promote economic development because arbitrary decision-making styles are built into what may be regarded as their "institutional DNA." The need to eliminate these costs motivates even authoritarian rulers to grant courts broad authority to enforce economic commitments and rein in lower-level bureaucrats.<sup>16</sup> Moustafa summarily extends this argument to the PRC's case. He correctly notes that "two of the most urgent political problems facing the Chinese central government today are rampant corruption by local government officials and tenuous control over the periphery."<sup>17</sup> He further argues that the abuse of local power resulted in a doubling of public protests between 1997 and 2004, and to the development of judicial review under the Administrative Litigation Law ("ALL") (1989).<sup>18</sup> The 1400 specialized administrative courts that have been instituted since the late 1980s have become "an increasing priority for the central government" because they allow the government to (1) ease political pressures without liberalizing the political system and to (2) promote market rationality and property rights.<sup>19</sup> However, theorists who subscribe to dominant "rulers-as-suppliers" models might rejoin that this evidence instead supports the contention that the ALL was merely an act of power preservation through cessions to the judiciary because it was promulgated only two months before the June Fourth incident in 1989.

In fact, a prototype of the ALL had been previously implemented through some 130 statutes and regulations in the early to mid-1980s, which was when the new Deng regime was consolidating power and local protests had not reached their current intensity.<sup>20</sup> In systematizing these provisions, the ALL only symbolically granted courts the power to review administrative conduct that infringed upon the private individual's body and property. More importantly, a system of administrative courts has never existed separately from the ordinary courts, and administrative judges do not make decisions independent of their superiors in the ordinary courts. Even these relatively new tribunals were not established by the decree of a threatened central state but originated in modest experiments initiated by the SPC two years before

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<sup>15</sup> See MOUSTAFA, *supra* note 3.

<sup>16</sup> *Id.* at 230, 236–7.

<sup>17</sup> *Id.* at 28–9.

<sup>18</sup> *Id.* at 24.

<sup>19</sup> *Id.* at 30.

<sup>20</sup> Heng Liu, *The History, the Current Status and the Future Development of the Institution of Administrative Litigation in the People's Republic of China*, in CROSS-STRAIT, FOUR-REGION: LAW DEVELOPMENTS IN TAIWAN, CHINA, HONG KONG AND MACAU, 1 CONSTITUTIONAL REVIEW AND ADMINISTRATIVE LITIGATION 338 (Dennis T.C. Tang & P.H. Wang eds., 2007).

the ALL went into effect.<sup>21</sup> Beijing's response to growing social instability at the turn of the millennium was to enact the Administrative Review Law (1999), which granted powers of review to higher-level bureaucratically-run panels, rather than to revise the ALL.

Moreover, there is no compelling need for expansive judicial lawmaking in the PRC. Independent courts can be notoriously unpredictable and costly to control. The CCP has not faced any credible political opposition that would justify insuring itself strategically through the SPC. Under the static institutional parameters of one-party rule and congressional supremacy, the optimal strategy of a risk-averse SPC might be to loyally enforce the state's will through routine adjudication, as during the Mao and Deng eras. Any step beyond that would invite political backlash that could obliterate any trace of judicial autonomy. Thus, contrary to Moustafa's predictions, the Chinese state did not put its trust in the courts; instead, it placed its trust in the State Council, the NPC, and their local equivalents. All this suggests that although the SPC's jurisprudence, like many central government directives, may not be obeyed by local bureaucrats in many cases, real changes have taken place; the fact that the SPC reinvented itself and disagreed with other dominating authoritarian political actors is a phenomenon worth studying in its own right.

After all, the SPC, which is exceptional in many ways, differs from the ideal-type of judiciary that existing models were designed to explain. It is not a constitutional court in the ordinary sense. It rarely uses rights-based reasoning to justify its disagreements with other political actors. It issues rulings in the absence of concrete cases or even government petition for abstract review. It is comprised of more than 340 judges and 450 supporting personnel who do not enjoy constitutionally guaranteed independence.<sup>22</sup> This article attempts to resolve the research puzzle with an entrepreneurial model of judicial empowerment based on the assumption of bounded rationality.<sup>23</sup> The model suggests that Chinese judicial empowerment originated from within the Court itself; entrepreneurial senior justices were the primary suppliers of empowerment initiatives. It addresses the problem that the current public choice literature has yet to devote sufficient attention to—the origins and malleability of actors' preferences in public law—and argues that judicial entrepreneurs exerted considerable influence over the formation and development of dominant ideologies.<sup>24</sup> Their willingness to take risks played a

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<sup>21</sup> See 最高人民法院关于建立行政诉讼庭的通知 [Sup. People's Ct. Notification on Establishing Administrative Law Tribunals] (promulgated by the Sup. People's Ct., Jan. 14, 1987), available at [http://www.law-lib.com/law/law\\_view.asp?id=4070](http://www.law-lib.com/law/law_view.asp?id=4070) (last visited Aug. 27, 2011).

<sup>22</sup> He, *supra* note 9, at 257.

<sup>23</sup> It is assumed that political behavior is generally rational to a limited degree. See generally Bryan D. Jones, *Bounded Rationality*, 2 ANNUAL REV. POL. SC. 298 (1999).

<sup>24</sup> Daniel A. Farber & Anne Joseph O'Connell, *Introduction: A Brief Trajectory of Public Choice and Public Law*, in RESEARCH HANDBOOK IN PUBLIC CHOICE AND PUBLIC LAW 7 (Daniel A. Farber & Anne Joseph O'Connell eds., 2010); DOUGLASS C. NORTH, UNDERSTANDING THE PROCESS OF ECONOMIC CHANGE (2005).



crucial role in shaping collective decisions and changing the status quo.<sup>25</sup> The contingent choices of judicial entrepreneurs, which led to the emergence of a new judicial ideology that combines activism with professional values of the SPC, has been crucial in promoting differences between judicial preferences and those of other political actors. The activist-professional ideology offered a set of efficient heuristics and communicative devices that has minimized uncertainty within the judiciary.<sup>26</sup> Through encouraging pro-empowerment preferences within the SPC and subsequently supporting the interests of influential business actors with incentives and restructuring local courts in line with its own values, the SPC managed to construct bottom-up support bases for its empowerment. Against this background, the rising levels of political fragmentation, rapid economic development, and considerable legislative underperformance have all furthered the Court's aggrandizement. However, the SPC's initiatives are restricted by the inter-subjective perceptions of China's rulers regarding the proper boundaries of judicial power.

The article is organized as follows: Section II sheds light on how SPC judicial entrepreneurs and expert judges initiated self-empowerment; Section III examines the increasing influence of the judiciary on economic policies and the judiciary's interactions with major political and commercial actors; Section IV investigates how SPC judges extended their control over local judicial and bureaucratic behavior; Section V looks at how the Court has made constitutional choices in a risky political environment; and Section VI provides a conclusion to the discussion.

## **I. FROM PROLETARIANS TO PROFESSIONALS: JUDICIAL ACTIVISM WITH CHINESE CHARACTERISTICS**

In the PRC, the police, the procuracy, and the judiciary are thought of and named as one entity, the *gongjianfa* ("公检法").<sup>27</sup> Traditionally, the staffs of these three institutions worked side by side in the same environment and socialized with each other.<sup>28</sup> Personnel transfer and job rotation among them was usual. Today, they still form the core of the CCP Political-Legal System of state security bureaucracies. The Political-Legal System's proper role is to maintain public order and collect intelligence, not to formulate law and policy.

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<sup>25</sup> See Donald T. Wargo, Norman A. Baglini & Katherine A. Nelson, *What Neuroeconomics Informs us about Making Real-World Ethical Decisions in Organizations*, in *NEUROECONOMICS AND THE FIRM* 62 (Angela A. Stanton, Mellani Day & Isabell M. Welpe eds., 2010).

<sup>26</sup> See Mark Peffley, *Elite Beliefs and the Theory of Democratic Elitism*, in *THE OXFORD HANDBOOK OF POLITICAL BEHAVIOR* 65 (Russell J. Dalton & Hans Dieter Klingemann eds., 2007).

<sup>27</sup> SUSAN TREVASKES, *COURTS AND CRIMINAL JUSTICE IN CONTEMPORARY CHINA* 70 (2007).

<sup>28</sup> Jean-Pierre Cabestan, *The Political and Practical Obstacles to the Reform of the Judiciary and the Establishment of a Rule of Law in China*, 10 *J. CHINESE POL. SC.* 56 (2005).

In Chinese political discourse, the term “judicial system” consistently encompasses both the procuracy and the judiciary. The coupling of the two mirrors the long-standing CCP ideological bias that courts are fundamentally punitive organs. The PRC legal vocabulary contains only the narrow term “adjudicative organ” to describe the courts. Article III of the Organic Law of the People’s Courts (2006) defines the purpose of the adjudicative function as to “safeguard the dictatorship of the proletariat” and “educate citizens to be loyal to the socialist motherland.”

However, it is now unrealistic to dismiss the SPC as an excessively controlled and uncritical instrument of the Party-State. The Party-State was not the supplier of judicial empowerment. The shift in the SPC’s collective preference to capture more political decision-making opportunities did not occur without effort. Rather, empowerment was brought about contingently by a very small group of judicial entrepreneurs within the SPC. New forms of judicial behavior emerged from the waxing sense of autonomy and professionalism held by entrepreneurs and their expert judge appointee-collaborators. SPC judicial entrepreneurs have adopted several strategies to entrench the nascent activist-professional ideology, including selection, reinforcement, and internalization. In turn, this distinctive set of beliefs held the SPC together, increased the authoritativeness of its decisions, rendered it more distinguishable from the rest of the state, indirectly bolstered the force of its claims to greater autonomy, and constituted much of its preferences in extending control over legal development and judicial reform.

#### A. The Ideological and Constitutional Underpinnings of Chinese Judicial Power

Before the 1990s, the Chinese judiciary was known in Marxist terms as the “sword hilt of the proletariat dictatorship.”<sup>29</sup> As Marx himself repeatedly asserted, law and courts as “superstructural” political institutions are inevitably determined by the way economic production is organized.<sup>30</sup> Law merely embodies the will of the ruling class, which controls the economic system through dominating production relations.<sup>31</sup> Similarly, Mao Zedong held that legal institutions are inherently “violent” instruments to be used against the enemies of the proletariat and its allies.<sup>32</sup> Despite all the materialist ideological pretensions, the institutional design of courts in the early PRC was

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<sup>29</sup> 趙明 [Zhao Ming], 政治與司法：轉型時期的當代中國 [Politics and the Administration of Justice: Contemporary China in Transition], in 政治學新探：中華經驗與西方學理 [NEW EXPLORATIONS IN POLITICAL STUDIES: CHINESE EXPERIENCE AND WESTERN THEORIES] 250 (鄭宇碩、羅金義 [Joseph Cheng & Kamyi Law] eds., 2009).

<sup>30</sup> KARL MARX, A CONTRIBUTION TO THE CRITIQUE OF POLITICAL ECONOMY 20–21 (1859).

<sup>31</sup> CHRISTINE SYPNOWICH, THE CONCEPT OF SOCIALIST LAW 36 (1996); PETER HOWARD CORNE, FOREIGN INVESTMENT IN CHINA: THE ADMINISTRATIVE LEGAL SYSTEM 42 (1997).

<sup>32</sup> 毛澤東 [Mao Zedong], 論人民民主專政 [On People’s Democratic Dictatorship], in 《毛澤東選集》第四卷 [SELECTED WORKS OF MAO ZEDONG, VOL. IV] 476 (1949).

clearly a product of politics. Marxist-Leninist doctrine provided the Mao regime with ample justifications for transforming the judiciary into an oppressive "superstructural" apparatus in the hands of those "loyal to the state, the people, and the cause of socialism."<sup>33</sup> The result was that courts became indistinguishable from administrative organs.<sup>34</sup> The politicized nature of the early judiciary was summarized by Shen Junru, the founding SPC President, in his 1951 address to the legislature, "the people's courts must complement the police and the procuratorate in their work; demonstrate the might of adjudicative power in the suppression of the anti-revolutionaries; punish illegal landlords; safeguard production and construction; fight against corrupt and wasteful acts; [and] consolidate the people's democratic dictatorship."<sup>35</sup> Modeled after the typical organizational structure of central bureaucracies, the SPC clearly did not possess an independent judicial identity.<sup>36</sup> Indeed, the establishment of the CCP government led to the demise of the republican era of the judicial profession.<sup>37</sup> Non-legally trained state security bureaucrats, Communist revolutionaries, and military commanders dominated the judiciary for decades.

The present Constitution, ratified in 1982, reflects paramount leader Deng Xiaoping's belief that law would serve to support his economic modernization program. Although this Constitution contains a relatively liberal bill of rights, much of it remains a little more than an "authoritative ideological statement and communicative act."<sup>38</sup> Constitutionally, the SPC is one of four state institutions officially subordinated to the NPC. Article 127 of the Constitution designates the SPC as the "highest adjudicative organ of the state," but this is qualified by Article 128, which makes the SPC answerable to the NPC. The principle of "independent adjudication," enshrined in Article 126 of the Constitution as well as Article 4 of the Organic Law of the People's Courts, in practice, means that courts may act "independently" in individual cases. They must accept the superintendence of the legislature and ultimately the CCP in order to continue to enjoy that independence.<sup>39</sup>

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<sup>33</sup> Zhao, *supra* note 29, at 250.

<sup>34</sup> See Finder, *supra* note 4.

<sup>35</sup> See 沈钧儒 [Shen Junru], 最高人民法院院长 [President, Sup. People's Ct.], 政协全国委员会第一届第三次会议的发言 [Speech at the Third Meeting of the First Chinese People's Political Consultative Conference] (Oct. 28, 1951).

<sup>36</sup> See Finder, *supra* note 4.

<sup>37</sup> 李汉昌和王海鸿 [H. Li & H. Wang], 论法官职业及其特徵 [On the Career and Characteristics of Judges], in 改革司法: 中国司法改革的回顾与前瞻 [REFORMING THE JUDICIARY: THE RETROSPECT AND PROSPECTS OF JUDICIAL REFORM IN CHINA] 402 (张明杰 [Zhang Mingjie] ed., 2005).

<sup>38</sup> ZACHARY ELKINS, TOM GINSBURG & JAMES MELTON, THE ENDURANCE OF NATIONAL CONSTITUTIONS 172 (2009).

<sup>39</sup> 陈尧 [CHEN YAO], 当代中国政府体制 [THE GOVERNMENT STRUCTURE OF CONTEMPORARY CHINA] 226 (2005).

The NPC, consisting of some three thousand delegates, heads the formal constitutional structure. Article 67 mandates that the NPC Standing Committee ("NPCSC"), a one-hundred-fifty person presidium, which exercises much of the NPC's authority when it is not in session, shall supervise the interpretation and implementation of the Constitution.<sup>40</sup>

NPCSC member Xin Chunying portrays relations between the legislative, executive, and judicial branches of the Chinese polity by the analogy of "One Mother and Two Sons."<sup>41</sup> The NPC, as the "mother," has paramount and unchallengeable authority over all other branches, the "sons." In other words, formal legislative-judicial relations resemble the relationship between parents and children in traditional Chinese culture—the latter must obey, respect, and support the former. A Chinese political scientist has even theorized that the SPC has no right to question the NPC, which is supreme.<sup>42</sup> Indeed, the PRC Constitution sets no separation of powers, but only a division of labor under the NPC's overarching domination.<sup>43</sup> It is thus clear that the SPC was not intended, at least by constitutional designers, to play an important role in legal or constitutional interpretation.

#### B. The Supreme People's Court and the Chinese Communist Party

Any discussion of Chinese judicial power would be incomplete without analyzing the relations between the SPC and the CCP. One must be very cautious in using the term "Chinese Communist Party," because it denotes neither a unitary actor nor an omnipotent power exerting exogenous control over the state.<sup>44</sup> Multiple sources of empirical evidence confirm that Party power has "eroded" in many areas of social life under recent economical reforms.<sup>45</sup> As the CCP has retreated into the realm of general political guidance, much of actual policy design and implementation of policy has

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<sup>40</sup> See Thomas E. Kellogg, *Constitutionalism with Chinese Characteristics? Constitutional Development and Civil Litigation in China*, 7 INT'L J. CONST. L. 215 (2009).

<sup>41</sup> CHUNYING XIN, CHINESE COURTS: HISTORY AND TRANSITION 99 (2004).

<sup>42</sup> See Zhao, *supra* note 29, at 252.

<sup>43</sup> ALBERT CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA 132 (2004).

<sup>44</sup> Kenneth Lieberthal, *The Fragmented Authoritarianism Model and Its Limitations*, in BUREAUCRACY, POLITICS, AND DECISION MAKING IN POST-MAO CHINA 1-30 (Kenneth Lieberthal & David M. Lampton eds., 1992).

<sup>45</sup> See MURRAY SCOT TANNER, THE POLITICS OF LAWMAKING IN POST-MAO CHINA: INSTITUTIONS, PROCESSES, AND DEMOCRATIC PROSPECTS 51-71 (1999); HUNG-MAO TIEN & YUN-HAN ZHU, CHINA UNDER JIANG ZEMIN (2000); Michael W. Dowdle, *Of Parliaments, Pragmatism, and the Dynamics of Constitutional Development: The Curious Case of China*, 35 N.Y.U. J. INT'L L. & POL. 1 (2002); TONY SAICH, GOVERNANCE AND POLITICS OF CHINA: CULTURE, REPRODUCTION, AND TRANSFORMATION 204-205 (2nd ed., 2004); DAVID SHAMBAUGH, CHINA'S COMMUNIST PARTY: ATROPHY AND ADAPTATION (2008).

fallen into the hands of the formal state institutions. The rubric of “erosion,” however, does not imply the demise of the Party’s domination over government agencies. Rather, it characterizes the phenomenon that CCP leaders are increasingly acting through their constitutional identities as government officials rather than as Party cadres. State and CCP personnel remain in many ways fused, and the practical distinction between the two can be very difficult to discern. Today’s CCP comprises over seventy-three million members—more than the population of France.<sup>46</sup> The utility functions of the members of such a vast and diverse body are not necessarily aligned with those of the elites running the Central Committee and its Politburo.<sup>47</sup> Factional disagreements among the Communist Youth League-clique, the “Shanghai clique,” and the “princelings” (descendants of Party elders) are an open secret.<sup>48</sup>

Since the SPC’s founding, it has been a constituent of the CCP Central Political-Legal Commission (“CPLC”) and its predecessors. The CPLC is the top coordinating organ of the Political-Legal System.<sup>49</sup> The Political-Legal System is so “large, wide ranging, and powerful” because at any given time its affiliated committees encompass most Chinese judges, prosecutors, the labor camp managers, and secret police forces.<sup>50</sup> It offers CCP leaders intelligence information about popular political attitudes and security issues, and it has been considered by some as the “backstage of dramaturgical politics,”<sup>51</sup> where courts are commanded to fulfill their duties in support of current CCP policies.<sup>52</sup> During paramount leader Jiang Zemin’s rule, the CPLC has continued to play a key role in transmitting CCP ideological messages to judges.<sup>53</sup>

The CCP’s *Decision on Further Strengthening the Construction of the Political-Legal Team* (1999) holds the Political-Legal System as the functional department responsible for the management of political-legal work at all levels.<sup>54</sup> In a 2007 speech delivered to senior judges and procurators, CCP

<sup>46</sup> YONGNIAN ZHENG, *THE CHINESE COMMUNIST PARTY AS ORGANIZATIONAL EMPEROR* 4 (2010).

<sup>47</sup> Pierre F. Landry, *Does the Communist Party Help Strengthen China’s Legal Reforms*, 9 CHINA REV. 46 (2009).

<sup>48</sup> See WILLY WO-LAP LAM, *CHINESE POLITICS IN THE HU JINTAO ERA: NEW LEADERS, NEW CHALLENGES* (2006).

<sup>49</sup> KENNETH LIEBERTHAL, *GOVERNING CHINA: FROM REVOLUTION THROUGH REFORM* 218 (2d ed. 2004).

<sup>50</sup> *Id.* at 224.

<sup>51</sup> *Fu*, *supra* note 8, at 250.

<sup>52</sup> See XIN, *supra* note 41, at 99.

<sup>53</sup> RANDALL PEERENBOOM, *CHINA’S LONG MARCH TOWARD RULE OF LAW* 303 (2002).

<sup>54</sup> 关于进一步加强政法干部队伍建设的决定 [Decision on Further Strengthening the Construction of the Political-Legal Team] (promulgated by the Communist Party Central Committee, Apr. 15, 1999, effective Apr. 15, 1999).

General Secretary Hu Jintao stressed that political-legal work must develop in accordance with the Chinese socialist cause, that is, serve the state, safeguard the rule of the Party, defend national security, protect the interests of the people, and ensure social stability.<sup>55</sup> He urged political-legal personnel to uphold the "Three Supremes," namely, "the Supremacy of the Party's Cause, the Supremacy of the People's Interests, and the Supremacy of the Constitution and the Law."<sup>56</sup> However, in another a speech to the Central Party School that same year, Hu called for bureaucrats to perform what is normally regarded as the judiciary's duty: to implement the fundamental strategy of governing the state in accordance with law, to spread the spirit of the rule of law, and to defend social justice and fairness.<sup>57</sup>

Former CPLC Chief Secretary Luo Gan cited the punishment of criminals as the "most important" dimension of the judiciary's work.<sup>58</sup> He denounced law as an instrument potentially available to "enemy forces" to "undermine and divide China."<sup>59</sup> The only correct choice for the legal department was to stand "where the Party stands." Incumbent Chief Secretary Zhou Yongkang, a former Minister of Public Security, used less repressive language than his predecessor. He urged the Political-Legal System to safeguard "social stability in the long term,"<sup>60</sup> a phrase practically synonymous however, with the maintenance of the CCP-dominated status quo at all costs. The contemporary membership of the CPLC continues to reflect the wisdom that courts are merely one functional constituent of the state security system, not superior to

<sup>55</sup> 胡锦涛同全国政法工作会议代表和全国大法官、大检察官座谈会发表重要讲话 [The Important Speech of Hu Jintao Addressing the Nation's Grand Justices and Grand Procurators in the National Political-Legal Work Conference], 新华网 [XINHUA NEWS] (Dec. 25, 2007), [http://news.xinhuanet.com/photo/2007-12/25/content\\_7312412.htm](http://news.xinhuanet.com/photo/2007-12/25/content_7312412.htm).

<sup>56</sup> See 王胜俊 [Wang Shenjun], 叁个至上是法官始终坚持的指导思想

[*The Three Supremes is the Guiding Ideology that the People's Courts Should Forever Uphold*], 法制日报 [LEGAL DAILY], Jun. 23, 2008, [http://news.xinhuanet.com/legal/2008-06/23/content\\_8420938.htm](http://news.xinhuanet.com/legal/2008-06/23/content_8420938.htm).

<sup>57</sup> See 何勤华 [He Qinhu], 改革开放三十年与中国的法治建设 [*Thirty Years of Reform and Opening and the Construction of Rule of Law in China*], in 两岸四地: 法律发展与互动 [THE DEVELOPMENT AND INTERACTION OF LAW IN MAINLAND CHINA, TAIWAN, HONG KONG, AND MACAO] 6 (张宪初、顾维遯 [Zhang Xianchu & Gu Weixia] eds., 2009).

<sup>58</sup> 李薇薇、田雨 [Li Weiwei & Tian Yu], 罗干强调发挥刑事审判职能维护稳定促进和谐 [Luo Gan Maintains that the Exercise of Criminal Adjudication Functions is Instrumental to Achieving Social Stability and Harmony], 新华网 [XINHUA NEWS] (Nov. 7, 2006), [http://news.xinhuanet.com/politics/2006-11/07/content\\_5301046.htm](http://news.xinhuanet.com/politics/2006-11/07/content_5301046.htm).

<sup>59</sup> See RICHARD MCGREGOR, THE PARTY: THE SECRET WORLD OF CHINA'S COMMUNIST RULERS 25 (2010).

<sup>60</sup> 周永康 [Zhou Yongkang], 周永康: 保障社会公平正义维护社会和谐稳定 [Speech of Zhou Yongkang at the National Political-Legal Work Conference: To Deeply Implement the Concept of Scientific Development, Facilitate Relatively Rapid Economic Development, Safeguard Social Stability and Justice], 新华网 [XINHUA NEWS] (Feb. 1, 2009), [http://news.xinhuanet.com/politics/2009-02/01/content\\_10743854.htm](http://news.xinhuanet.com/politics/2009-02/01/content_10743854.htm).

or fundamentally different from the police or the procuracy. CPLC Chief Secretaries, being state security specialists, usually have little experience in the administration of justice, legal adjudication, economic regulation, or the settlement of commercial disputes. In almost all matters except sensitive political cases, CPLC leaders have little influence over the judiciary's stance. It is now undeniable that the CPLC's current work respecting judicial affairs is confined to ideological education and not adjudicative decision-making. As in most other social, economic, or political organizations in the PRC, a "Party Group" is attached to the SPC to monitor compliance with the CCP's latest central policies. Elsewhere, Party Group chief secretaries are normally more powerful than those who hold the formal positions. By contrast, the Presidents of the SPC have always been Chief Secretaries of the Court's Party Group and the Group's contemporary Deputy Secretaries are always chosen from among the SPC's Vice Presidents. Much of the Party Group's membership interlocks with that of the Judicial Committee of the SPC, the Court's principal decision-making organ. Consisting typically of the President, nine Vice Presidents, a Grand Justice responsible for judicial discipline, a small number of regular Grand Justices, and the presiding judges of the specialist Tribunals, the Judicial Committee is "the most professionalized" of all legal institutions in the PRC.<sup>61</sup> It approves all Judicial Interpretations and case judgments it deems significant, monitors the work of the SPC's several Tribunals, and designates which cases lower courts shall treat as binding precedent.<sup>62</sup> The nearly identical membership of the Party Group and the Judicial Committee evidences that exogenous CCP constraints on the SPC have ceased to exist in all but name.

### C. Activism and Professionalism: A New Judicial Ideology

#### 1. Judicial Entrepreneurs and the Making of the Contemporary Court

Early SPC Presidents were politicians, bureaucrats, or veteran military leaders who contributed to the formation of the Communist state. Only the first two had received degree-level legal education. Ren Jianxin, who initiated much of the SPC's transformation and retired in 1998, was a chemical engineer by training, but spent his entire career in the Political-Legal System, working from the 1950s onwards in the CPLC and the State Council's Justice Department. Under Ren's leadership, the percentage of Vice Presidents who had received tertiary-level legal educations rose to seventy-five percent in

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<sup>61</sup> Zhu Suli, "Judicial Politics" as State-Building, in *BUILDING CONSTITUTIONALISM IN CHINA* 27 (Stephanie Balme & M.W. Dowdle eds., 2009).

<sup>62</sup> See 最高人民法院关于印发《关于改革和完善人民法院审判委员会制度的实施意见》的通知 [Notice of the Sup. People's Ct. on Issuing the Implementation Opinions on Reforming and Improving the Judicial Committee System of the People's Court] (promulgated by the Sup. People's Ct., Jan. 11, 2010), available at [http://www.law-lib.com/law/law\\_view.asp?id=312469](http://www.law-lib.com/law/law_view.asp?id=312469).

1998.<sup>63</sup> Ren also effectively championed for the Judges Law (1995), which endowed judges with a unprecedented separate professional status, and promulgated the Several Rules on Judicial Interpretation (1997), which asserted that judicial interpretations have binding legal effect.

In 1998, the Jiang Zemin government appointed Xiao Yang to succeed Ren. Xiao's appointment was not surprising. Originally a county police cadre and propaganda officer, he was promoted in the 1980s to the position of senior procurator in Guangdong Province. But like Ren, he proved to be an active Political-Legal System reformer. Against rampant corruption, he set up the PRC's first anti-corruption agency within Guangdong's Provincial Procuratorate in 1989. He was swiftly promoted to the SPP in 1990, and after leaving the SPP Vice Presidency in 1993, he became Minister of Justice. There he contributed immensely to the formation of the PRC's new legal aid system. Apart from his track record of innovation, Xiao differed from most of his predecessors in at least two aspects: he had (1) received a law degree (from Renmin University) and (2) taught law at the Chinese University of Political Science and Law and the National Procurators Training Center. His legal background likely had a strong role in the professionalization policies he promoted. In 1999, Xiao was joined by Professor Cao Jianming, former Chancellor of the East China University of Political Science and Law, as Vice President. Cao was an established authority on international trade law and had authored numerous academic papers.<sup>64</sup>

## 2. Selection

By the letter of the Constitution, the NPCSC appoints and dismisses SPC judges. Undoubtedly, some form of *nomenklatura* exists in judicial appointments.<sup>65</sup> The Court recommends its preferred candidates for senior Judicial Committee and Tribunal positions to the CCP Central Organization Department for approval.<sup>66</sup>

The final decision is then sent to the NPC for formal approval. In practice, the SPC enjoys the special privilege of recruiting most of its judges based on its own preferences. In-group biases thus affect the way that judges are selected; current selection processes are disproportionately tilted towards experienced

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<sup>63</sup> See 大法官名单 [List of Grand Justices], 中国法院网 [CHINA COURT], <http://www.chinacourt.org/dfg/index.php?id=112> (last visited May 29, 2010).

<sup>64</sup> 成凯 [Cheng Kai], 最高法院院长: 一个初步的阐释 [*President of the Supreme Court: An Introduction*], in 最高法院研究 [SUPREME COURTS IN PERSPECTIVE] 305 (左卫民 [Zuo Weimin] ed., 2004).

<sup>65</sup> MINXIN PEI, CHINA'S TRAPPED TRANSITION: THE LIMITS OF DEVELOPMENT AUTOCRACY 70 (2006).

<sup>66</sup> Hon S. Chan, *Cadre Personnel Management in China: The Nomenklatura System, 1990-1998*, 179 CHINA Q. 724-28 (2004).



judges, senior professional lawyers, and reputable professors of law.<sup>67</sup> Between 2000 and 2007, the SPC appointed 197 judges, 127 from local courts and 70 from academia.<sup>68</sup> When Kong Xiangjun, now Presiding Judge of the SPC's Intellectual Property Tribunal, applied to the Court in 2000 as a recent graduate, he was not formally eligible in terms of age and work experience.<sup>69</sup> Disappointed, he wrote a letter to Chief Justice Xiao detailing his great interest in becoming a judge. With Xiao's assistance, Kong was allowed to take the two-stage recruitment examination and subsequently became a member of the SPC's Administrative Tribunal. His promotion to the position of Deputy Presiding Judge one year later, at the age of thirty-seven, highlights the substantial autonomy enjoyed by the Judicial Committee to manage the SPC's human resources. According to Xiao, the Court's elitist selection policy was justified on two grounds: (1) it strengthened intra-judiciary connections and (2) introduced cutting-edge legal scholarship into judicial practice.<sup>70</sup>

Additionally, the SPC has the power to appoint and dismiss associate judges without CCP involvement. At the discretion of the Judicial Committee, associate judges may exercise the full powers of regular judges. Because the President and Vice Presidents are themselves perceived as agents of the CCP in controlling the SPC, they are given substantial freedom from other Party departments in recruiting for the SPC. As of June 2010, five out of nine Vice Presidents of the Wang Court have a Ph.D. in law, and all hold LL.M. degrees.<sup>71</sup> Six were law professors or academic researchers before appointment. In addition, many holders of senior SPC positions have matriculated in or researched in leading Anglo-American law schools. The international training of these judges has added significant Western elements into the SPC's activist-professional judicial ideology.

Factionalism has played a role in selecting the Chief Justice. In 2008, Vice President Justice Cao Jianming was perceived by some to be the natural choice for the SPC Presidency.<sup>72</sup> Yet the Party-State continued its tradition of

<sup>67</sup> See Qianfan Zhang, *The People's Courts in Transition: The Prospects of Chinese Judicial Reform*, in *DEBATING POLITICAL REFORM IN CHINA: RULE OF LAW VS. DEMOCRATIZATION* 138–63 (Suisheng Zhao ed., 2004).

<sup>68</sup> 刘锋 [Liu Feng], 遴选制度改革 22 名律师学者当上最高法院法官 [22 Lawyers and Academics Become Supreme Court Judges], 人民日报 [PEOPLE'S DAILY], Feb. 28, 2007.

<sup>69</sup> 李蒙 [Li Meng], 孔祥俊: 法官应有大智慧 [Kong Xiangjun: Judges Should Possess Great Intelligence], 9 民主与法制 [DEMOCRACY & LEGAL INSTITUTIONS] 29–33 (2009).

<sup>70</sup> 陈永辉 [Chen Yonghui], 肖扬: 改革完善法官遴选制度: 推进职业化建设 [Xiao Yang: Reforming and Improving the System of Selecting Judges, Advancing the Construction of Professionalism], 人民法院报 [PEOPLE'S CTS. DAILY], Feb. 28, 2007.

<sup>71</sup> List of Grand Justices, *supra* note 63.

<sup>72</sup> See 江泽民爱将任检察长: 肖扬、贾春旺退下最高司法机关换人 [Jiang Zemin's Favourite Protégé to Serve as Procurator-General: Xiao Yang and Jia Cunwang Retire, Personnel Changes in the Supreme Judicial Organs], 明报 [MINGPAO], Mar. 3, 2008, <http://specials.mingpao.com/cfm/News.cfm?SpecialsID=150&Page=1&News=ddff2a22a214003bffcenod6064002bf7cc181b1c23003bf6d58b1b4b620056>.

selecting the Chief Justice from outside of the judiciary—CPLC secretariat member Wang Shengjun was appointed to succeed Xiao as President. Wang's relative neutrality as a career civil servant may explain the general acceptance of his appointment among major CCP factions, but unlike his SPC colleagues, Wang had neither received formal legal training nor previously worked as a judge, procurator, lawyer, or law professor.

Outside the courtroom, the SPC conducts itself more like a cosmopolitan academic institute than the highest court of a Leninist state. Since 1989, it has ran a nationwide judicial conference, which in a typical year, debates roughly 1300 research papers submitted by SPC and local judges throughout the PRC.<sup>73</sup> In 2005, the SPC hosted an international meeting on "The Rule of Law and a Harmonious International Society."<sup>74</sup> Invited participants included justices from the European Court of Justice, the Federal Constitutional Court of Germany, and the Supreme Court of the United States. This probably represented the SPC's collective ambition to upgrade its reputation within the international judicial community. In 2008, the SPC and Yale Law School jointly organized a seminar on sentencing reform. The event was attended by PRC provincial judges, Chinese and American legal academics, U.S. federal and state judges, and over eighty SPC judges.<sup>75</sup> As we shall see, the SPC's contact with the West is important in understanding the dynamics of the Court.

### 3. Reinforcement

In an unprecedented move, Xiao made the guiding norms and values of the SPC explicit and promoted discussion about them within the judiciary. These efforts represented a "modest attempt" to transform courts into more neutral forums for dispute resolution.<sup>76</sup> In 2001, the SPC adopted "Justice and Efficiency" as its official motto, a phrase that differed significantly in tone and content from its predecessor, "Defeat the Crazy Offence of the Enemies [of the Proletariat]" or "Strictly Combat Criminal and Sinful Activities."<sup>77</sup> According to Xiao, "justice" was chosen to indicate the Court's determination

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<sup>73</sup> 全国法院学术讨论会历年情况概论 [An Overview of the Annual National Courts Academic Conference], 中国法院网法律博客 [CHINA COURT LAW BLOG], MAY 18, 2010, <http://blog.chinacourt.org/wp-profile1.php?author=263&p=188412>.

<sup>74</sup> 中国法律年鉴 [LAW YEARBOOK CHINA] 66 (2006).

<sup>75</sup> 法研所举办中美量刑改革国际研讨会 [SPC Applied Law Institute to Hold Sino-American Sentencing Reform Seminar], 中国法院网 [CHINA COURT] (Oct. 24, 2008), <http://yyfx.chinacourt.org/public/detail.php?id=123> (last visited Aug. 27, 2011).

<sup>76</sup> Benjamin J. Liebman, *China's Courts: Restricted Reforms, in CHINA'S LEGAL SYSTEM: NEW DEVELOPMENTS, NEW CHALLENGES* 73 (Donald C. Clarke ed., 2008).

<sup>77</sup> 喻中 [Yu Zhong], 论最高人民法院实际承担的政治功能: 以最高人民法院历年工作报告为素材 [On the Actual Political Functions of the Supreme People's Court: From the Perspective of the Working Reports of the Supreme People's Court], 7 清华法学 [TSINGHUA L.J.] 35 (2006).

to actualize the constitutional principle of “equal justice under law,” while “efficiency” symbolizes its resolution that “justice delayed is justice denied.”<sup>78</sup> Justice Su Zelin suggested that values like “fair justice,” and “judicial efficiency” had become entrenched as a result of the SPC’s ideological campaigns.<sup>79</sup> Justice Zhang Jun asserted that judges ought to “uphold legal standards,” and “be responsive to social needs.”<sup>80</sup>

The Wang Court, which placed great weight on Hu Jintao’s abovementioned “Three Supremes” doctrine, nevertheless declared its commitment to “activist justice” as its latest contribution to the general line of judicial ideology first inaugurated by Xiao.<sup>81</sup> For Wang, the Chinese way of judicial activism is a “service-oriented, progressive, and efficient” activity of the courts in facilitating socioeconomic development; it is the “inevitable choice” of courts under the nation’s recent transformations. “Activist justice” philosophy should, however, be grounded on “justice, integrity, and public service”—the “bedrock values of the judiciary.”<sup>82</sup> Justice Jing Hanchao urged courts to “proactively” deliver just and efficient outcomes in the management of social affairs.<sup>83</sup> Justice Xi Xiaoming averred that judges should bear the “important legal responsibility to stabilize the economy with effective judicial safeguards.”<sup>84</sup> “Activist Justice” is “a long-term strategy,” if not also the

<sup>78</sup> 崔丽 [Cui Li], 司法审判的宪法原则：法律面前人人平等 [The Fundamental Principle of Judicial Adjudication: Equal Justice under Law], 中国青年报 [CHINA YOUTH DAILY], Dec. 3, 2001.

<sup>79</sup> Su Zelin, Sup. People’s Ct. Justice, The Situation, Achievements, and Prospect of Judicial Reform in China, International Conference and Showcase on Judicial Reform held at the Shangri-la Hotel, Makati City, Philippines (Nov. 28, 2005), available at [http://jrn21.judiciary.gov.ph/forum\\_icsjr/ICSJR\\_China%20\(Su%20Zelin\).pdf](http://jrn21.judiciary.gov.ph/forum_icsjr/ICSJR_China%20(Su%20Zelin).pdf) (last visited Aug. 27, 2011).

<sup>80</sup> 张军 [Zhang Jun], 公正与效率是我们努力的方向 [Justice and Efficiency are the Goals for which We Ought to Strive], 人民法院报 [PEOPLE’S COURT DAILY], Mar. 29, 2001, <http://www.chinacourt.org/public/detail.php?id=180468>.

<sup>81</sup> 凌捷 [Ling Jie], 司法能动主义的改革方向 [The Reform Direction of Judicial Activism], 法制日报 [LEGAL DAILY], Mar. 17, 2010, available at [http://www.chinapeace.org.cn/palt/2010-03/17/c\\_13214094.htm](http://www.chinapeace.org.cn/palt/2010-03/17/c_13214094.htm).

<sup>82</sup> 罗书臻 [Luo Shuzhen], 营造崇尚先进学习先进争当先进良好氛围推进三项重点工作重点促进法院工作科学发展 [Building Advanced Learning, Advanced Struggle, and Advanced Environment Conducive to the Promotion of the Three Important Operations and Enhancing the Scientific Development of the Judiciary’s Work], 人民法院报 [PEOPLE’S COURTS], Apr. 27, 2010, [http://www.court.gov.cn/xwzx/fyxw/zgrmfyxw/201004/t20100426\\_4542.htm](http://www.court.gov.cn/xwzx/fyxw/zgrmfyxw/201004/t20100426_4542.htm).

<sup>83</sup> 沈峥嵘 [Shen Zhengrong], 人民法院能动司法论坛 5 日在江苏盐城举办 [People’s Court Activist Justice Forum Held in Jiangsu on the Fifth], 新华日报 [XINHUA DAILY], May 6, 2010, [http://big5.xinhuanet.com/gate/big5/news.xinhuanet.com/legal/2010-05/06/c\\_1276974.htm](http://big5.xinhuanet.com/gate/big5/news.xinhuanet.com/legal/2010-05/06/c_1276974.htm).

"historical mission" of the PRC judiciary.<sup>85</sup> The *Legal Daily* (法制日报) blamed the unresponsiveness of the legislative process as the key reason for the need to "protect civil rights from administrative authorities" through judicial activism.<sup>86</sup> It acknowledged American judicial activism, which according to its view, refers to "the expansive use of judicial power to promote equality, individual liberty, and fairness, independent from and critical of other state organs," as a source of the SPC doctrine.

It is easy to overstate the differences between the liberal tendencies of the Xiao Court and the populism of the Wang Court. In 2005, Xiao told Yale University students that PRC judges should strive for the "organic integration of legal and social consequences."<sup>87</sup> Similarly, a Xiao Court opinion required judiciaries to "produce good legal and social outcomes."<sup>88</sup> The inability of Wang to break away from the norms of the Xiao Court indicates that any significant change to this idea will likely to be resisted by a large number of expert judges now on the bench. Unsurprisingly, expert judges do not necessarily hold identical views; yet, their opinions on the role of courts are without a doubt markedly different from their Mao and Deng era predecessors, as well as from their colleagues in the other branches of government. For example, Judge Gong Ming expressed the moderate view that "just and integral" judges must "through adjudication enhance social development," in addition to being politically loyal to the CCP.<sup>89</sup> In contrast, Judge Song Jianli

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<sup>84</sup> 文涛、申楠 [Wei Tao & Shen Nan], 专访奚晓明:通过司法保障降低金融危机对企业影响 [An Interview with Xi Xiaoming: Effective Judicial Safeguards for the People and Rapid Development of a Stable Economy], 新华网 [XINHUA NEWS], Mar. 3, 2009, [http://big5.xinhuanet.com/gate/big5/news.xinhuanet.com/legal/2009-03/03/content\\_10932616.htm](http://big5.xinhuanet.com/gate/big5/news.xinhuanet.com/legal/2009-03/03/content_10932616.htm).

<sup>85</sup> 郭士辉、王明新、娄银生、丁广宇 [Guo Shihui, Wang Mingxin & Ding Guangzi], 探求能动司法的规律、规则和规范 [Exploring the Law, Rules, and Norms of Activist Justice], 法制网 [LEGAL DAILY WEB], May 15, 2010, <http://www.hafwx.cn/Article/dwjl/201005/152283.html>.

<sup>86</sup> Ling, *supra* note 81.

<sup>87</sup> 肖扬 [Xiao Yang], 中国司法: 挑战与改革 [Justice in China: Challenges and Reform], 1 人民司法 [PEOPLE'S JUDICATURE] 6 (2005).

<sup>88</sup> 最高人民法院关于正确审理企业破产案件为维护市场经济秩序提供司法保障若干问题的意见 [Sup. People's Ct. Notification on the Full Exercise of Adjudicative Functions and Proactive Participation, Fixation, and Regulation of the Order of the Market Economy] (promulgated by the Sup. People's Ct., June 12, 2005) SUP. PEOPLE'S CT. GAZ. (P.R.C.).

<sup>89</sup> 坚定正确理念保持公正廉洁继续推动审监工作科学发展——审判监督庭党支部书记宫鸣同志讲授党课 [Firm and Correct Values in Safeguarding Justice and Integrity, Constant Promotion of Supervision Work and the Concept of Scientific Development—Party Cell Group Chief of the Judicial Supervision Tribunal Gong Ming Lectures on Party Theories], 最高人民法院网站 [SUP. PEOPLE'S CT. WEB] (Feb. 22, 2010), [http://www.court.gov.cn/spyw/spjd/201002/t20100222\\_1525.htm](http://www.court.gov.cn/spyw/spjd/201002/t20100222_1525.htm) (last visited Aug. 27, 2011).

disapproves of China's "insufficient commitment to [political] culture based on the Rule of Law" and regards the assumptions of "some politicians" that "the judicial process should bow to current political priorities" is "to some extent" an "impediment to the achievement of true judicial independence."<sup>90</sup> Despite the varying degrees of weight attached to the notion of judicial independence, expert judges seem to agree that the idea is in principle worth pursuing.

The new ideology reflects how SPC judges have come to explicitly advocate a general line of beliefs that remarkably resemble judicial values fundamental in Western legal systems. The new paradigm indicates that the SPC may conduct affairs differently from its past practices. Most SPC judges have no experience in state organs other than public universities and provincial high courts. They tend to exhibit a stronger sense of autonomy, with an emphasis on appealing to higher forms of knowledge in the law.

#### 4. Internalization

The Xiao Court lavished attention on judges in order to distinguish them from other employees of the state. Historically, Chinese judges wore uniforms closely resembling that of soldiers, police officers, and other state security officials. In 2000, the Xiao Court announced that judges would thereafter wear Western-style black judicial robes. In public appearances, they would stick lapels pins that depicted the SPC's crest onto their suit jacket. Featuring a pair of golden scales and a traditional Chinese-style pillar at the center of a red circular shield, the judiciary's symbol is instantly recognizable as different from all other state organs. According to the Court, the new judicial attire symbolizes independent judgment and fidelity to law.<sup>91</sup>

The Xiao Court also made changes to the titles for individual judges. Formerly, judges had been ranked solely by their administrative position and were unimpressively titled "adjudicative officers." The term *faguan* (法官), a closer translation of "judge," was only used informally. In 2002, the Xiao Court endowed its own members, as well as senior judges from provincial high courts, with more prestigious judicial titles. The SPC President would be known as Chief Justice, and other senior judicial members as First-Rank Grand Justices or Second-Rank Grand Justices. Justice Zhu Mingshan, having served in the judiciary for four decades, praised the new ranking system as "something more than personal honor, which gives recognition to the noble and sacred duties of judges as the guardians of the people's interests."<sup>92</sup> In

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<sup>90</sup> Jianli Song, *China's Judiciary: Current Issues*, 59 MAINE L. REV. 147 (2007).

<sup>91</sup> 中国法官将更换制服身着法官袍或专用西服 [Chinese Judges to Change Uniforms: The Judicial Gown and the Special Suit], 新华社 [XINHUA NEWS AGENCY] (Mar. 8, 2000) available at <http://bbs.sjtu.edu.cn/bbscon/board,law,file,M.952484258.A.html> (last visited Aug. 27, 2011).

<sup>92</sup> 首批大法官在京获颁证书标志我国法官制度正式确立 [Our Country Unprecedentedly Appoints Grand Justices and Grand Procurators], 中国网 [CHINA WEB] (Mar. 22, 2002), <http://big5.china.com.cn/chinese/PI-c/122132.htm> (last visited Aug. 27, 2011).

2009, Chief Justice Wang also awarded the title "National Judicial Expert" to forty-five judges.<sup>93</sup>

These symbolic acts helped judges internalize the SPC's activist-professional values into their own preferences. Judges now consolidate themselves into a distinct profession with its own purposes. Courts would no longer dutifully carry out the wishes of other actors, not even the NPC. The SPC would apply the law in accordance with its own expert judgment, not the preferences of other state organs. It is now customary for SPC judges to draw inferences from foreign law in the process of reaching their decisions.<sup>94</sup> The judiciary considers itself the guardian of the public interest, rather than state intelligence officers.

#### D. Analysis

The Party-State neither imposed new limitations nor eliminated existing inhibitions on the SPC. To adequately understand the Court's multidimensional transformation, one must take shifting judicial beliefs into account. Without the existence of some causal mechanism to create the SPC's activist-professional ideology, the spread of self-empowerment would not have been possible.<sup>95</sup> The emergence of reform-minded judicial entrepreneurs was indeed fortuitous.

Judicial entrepreneurship is risky because it entails the undermining of existing norms and practices.<sup>96</sup> The few political entrepreneurs who are willing to take on the risks tend to be highly charismatic and talented.<sup>97</sup> The two major SPC entrepreneurs, Chief Justices Ren and Xiao, were political appointees picked from outside the judiciary. Both were CCP members promoted from the state security apparatus as well as former executive branch officials. It was largely unpredictable that they would have gone so far in steering the Court towards greater autonomy and authority.

Contemporary SPC judges generally pay greater attention to procedural issues, if not rights issues as well, than their bureaucratic counterparts. But this alone is insufficient to explain the change in the Court's collective functions. Whether advocating for "Justice and Efficiency" or "activist justice," entrepreneurs of the Court have made it clear that they no longer perceive

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<sup>93</sup> 张亮 [Zhang Liang], 学习学习再学习成为某一领域的专家 [*Learn, Learn, and Learn: Become an Expert in a Certain Field*], 法制日报 [LEGAL DAILY] (Dec. 23, 2009), [http://www.legaldaily.com.cn/zfb/content/2009-12/23/content\\_2016727.htm?node=20609](http://www.legaldaily.com.cn/zfb/content/2009-12/23/content_2016727.htm?node=20609) (last visited Aug. 27, 2011).

<sup>94</sup> Zhaoxiang Wu, The Application of Comparative Law in Judicial Interpretations, Paper presented at the Conference on the Chinese Judge and International and Comparative Law at the University of Hong Kong (Nov. 2, 2007), available at <http://www.hku.hk/ccpl/pub/conferences/documents/judgeWu-zhaoxiangpaper.pdf>.

<sup>95</sup> CRAIG PARSONS, HOW TO MAP ARGUMENTS IN POLITICAL SCIENCE 30 (2007).

<sup>96</sup> ERIC A. POSNER, LAW AND SOCIAL NORMS 32 (2000).

<sup>97</sup> *Id.*

themselves as ordinary constituents of the *gongjianfa*. The intensified contacts between Chinese and Western judges have also affected the way the SPC frames its jurisprudence. Even Wang, an outsider who was presumably appointed to roll back the liberal tendencies of the Xiao Court, contributed ideas to the judicial orthodoxy which bore great resemblance to previously prevalent ones. The extensive circulation of activist-professional beliefs within the SPC community helped reinforce the new paradigm.<sup>98</sup> The ongoing internalization of pro-empowerment beliefs promoted group identification and exacerbated belief-based confirmatory biases,<sup>99</sup> in-group biases,<sup>100</sup> and imitation heuristics within the Court.<sup>101</sup> We have seen that the more elaborate the system, the more costly it is for other actors to attempt to downplay the role of legalistic preferences in judicial decision-making. Interpreting the world through the activist-professional cognitive framework, SPC judges are prepared to assert that their scope of concern is much broader than that of the police and the procuracy.

Economic reforms and political fragmentation created structural incentives and risks that opened the path to judicial empowerment. However, the SPC could have "sensibly" adhered to its predecessors' well-established passive judicial philosophy and served as a submissive instrument of the proletarian state in spite of macroeconomic changes. Instead, SPC judges under the leadership of Chief Justices Ren and Xiao took the initiative and steered the courts in a more activist and autonomous direction.

## II. THE JUDICIALIZATION OF THE ECONOMY

Since the mid-1990s, the SPC's wide-ranging jurisprudence has emerged as a critical influence in the regulation of social exchanges and the promotion of economic development in the PRC. It has diverged significantly from the

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<sup>98</sup> Common beliefs, even false ones, can become increasingly plausible in the minds of agents when they are repeated and reinforced in the public discourse as availability cascades. Timur Kuran & Cass R. Sunstein, *Controlling Availability Cascades*, in *BEHAVIORAL LAW AND ECONOMICS* 372 (Cass R. Sunstein ed., 2000).

<sup>99</sup> Confirmatory bias is at work when people deny, discredit, reinterpret, or forget information that is contradictory to their prior beliefs. BRUCE E. WEXLER, *BRAIN AND CULTURE: NEUROBIOLOGY, IDEOLOGY, AND SOCIAL CHANGE* 180-81 (2006).

<sup>100</sup> People exhibiting the in-group bias tend to cooperate more with fellow group members than with individuals who are not part of their group. Mari Rege & Kjetil Telle, *The Impact of Social Approval and Framing on Cooperation in Public Goods Situations*, 88 J. PUB. ECON. 1625 (2004). Group-based normative beliefs can potentially generate in-group altruistic behavior. MICHAEL BACHARACH, *BEYOND INDIVIDUAL CHOICE: TEAMS AND FRAMES IN GAME THEORY* 114 (2006).

<sup>101</sup> People seem to conform to the social environment and follow what others believe, think, and do, exhibiting the imitation heuristically. JONATHAN BENDOR, *BOUNDED RATIONALITY AND POLITICS* 179 (2010).

traditional constitutional doctrine that only the NPC can create law.<sup>102</sup> How has the SPC become an authoritative law and policy-making institution? As we shall see, the Court is at the forefront of a distinctive process of judicializing social and economic policies. If we take “judicialization” strictly in the sense of replacing political decision-making with judicial proceedings in courtrooms,<sup>103</sup> then the SPC’s lawmaking, which in many ways is entirely abstract, would bear little resemblance to the term. Therefore, for practical purposes, this section will adopt a flexible understanding of Hirschl’s summary of “judicialization” as an “umbrella term” for three main ideas: (1) the infiltration of judicial language and norms into state decision-making, (2) the extension of the power of judges into public policy-making, and (3) the increased dependence of other actors on judges to decide questions of “mega-politics” in controversies that define the polity. The ongoing transformation of the SPC incorporates Hirschl’s first two ideas as shown in Part VI of this article; the third idea is present as well, although limited by restrictions.

#### A. Legalizing National Governance

The contemporary Chinese market economy has witnessed an intensification of commercial disputes, corruption, economic crimes, unemployment, popular protests, and rural poverty, as well as the spread of HIV and other infectious diseases.<sup>104</sup> One of the Party-State’s responses was to build up a regulatory infrastructure that consists of comprehensive statutes, competent lawyers, and professional legal officials.<sup>105</sup> Deng Xiaoping once declared, “There must be laws to rely on and to be obeyed, the enforcement of laws must be strict, and the breaking of laws must be punished.”<sup>106</sup> However, while the Dengists unquestionably rejected Maoist lawlessness, they strongly preferred using legal reforms to strengthen their own political power and legitimacy to importing Western-style constitutionalism.<sup>107</sup> Like economic restructuring, legal reforms were seen as an instrumental path to state-building that would exclude political liberalization.

<sup>102</sup> STANLEY B. LUBMAN, *BIRD IN A CAGE: LEGAL REFORM AFTER MAO* (1999).

<sup>103</sup> Colin Scott, *Agencification, Regulation, and Judicialization: American Exceptionalism and other Ways of Life*, in *ADMINISTRATIVE LAW AND GOVERNANCE IN ASIA: COMPARATIVE PERSPECTIVES* 46–48 (Tom Ginsburg & Albert H.Y. Chen eds., 2009).

<sup>104</sup> Chris X. Lin, *A Quiet Revolution: An Overview of China’s Judicial Reform*, 4 *ASIAN-PAC. L. & POL’Y REV.* 255 (2003); Vivienne Shue, *Legitimacy Crisis in China?*, in *CHINESE POLITICS: STATE, SOCIETY, AND THE MARKET* 41–42 (Peter Gries & Stanley Rosen eds., 2010).

<sup>105</sup> Suisheng Zhao, *Political Liberalization without Democratization*, in *DEBATING POLITICAL REFORM IN CHINA: RULE OF LAW VS. DEMOCRATIZATION* (Suisheng Zhao ed., 2006).

<sup>106</sup> 邓小平 [DENG XIAOPING], 邓小平文选 [COLLECTED WORKS OF DENG XIAOPING] 146 (1983).

<sup>107</sup> Pierre F. Landry, Yangqi Tong & MingMing Shen, *Introduction: Markets, Courts and Leninism*, 9 *CHINA REV.* 1 (2009).



State-backed legal policies were twofold: (1) to increase the quantity and quality of statutory rules and (2) to strengthen the capacity of the *gongjianfa* to loyally enforce these rules.<sup>108</sup> The NPC and the State Council were mandated to produce, on a massive scale, economic legislation and regulations that would create “an investment environment that is economically and politically safer.”<sup>109</sup> In September 1997, seven months after Deng’s death, the Fifteenth CCP Congress declared “Governing the State in accordance with Law” as a fundamental policy of the Party-State. Jiang Zemin, who had taken over many of Deng’s duties since the early 1990s, conceived of law as a vehicle of national stability, economic development, social order, and central government authority. The 1999 constitutional revision constitutionalized the prepotency of law as a cardinal principle in governance. Article 5 of the Constitution stipulates: “The People’s Republic of China shall govern the country in accordance with law and construct a Socialist Rule of Law country. The state shall defend the unity and dignity of the socialist legal system. No organization or individual shall be allowed to possess the special privilege of overriding the Constitution and the law.”<sup>110</sup>

However, after four revisions in 1988, 1993, 1999, and 2004, constitutional provisions on the judiciary and the procuracy remained identical to how they stood in 1982. Reform programs were focused on the betterment of NPC and State Council decision-making rather than the empowerment of courts. Since the legal reforms, while the NPC has not become a legislature powerful enough to exert robust control over the other branches of government, it has developed an “impressive array of resources and strategies” applicable to lawmaking.<sup>111</sup> Direct involvement of the Party in actual legislative operations has shown signs of “erosion.” Consequently, executive authorities now take the threat of dissent by NPC delegates “very seriously.”<sup>112</sup> For example, a proposed amendment to the Criminal Law (1997) which would have granted public security officials immunity from prosecution for acts performed while on duty had to be abandoned due to the strong disagreement of delegates.<sup>113</sup>

As Saich points out, the ideals of “Socialist Rule of Law State” are radically different than liberal democratic understandings of the rule of law, in that it is:

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<sup>108</sup> See Yongshun Cai & Songcai Yang, *State Power and Unbalanced Legal Development in China*, in *DEBATING POLITICAL REFORM IN CHINA: RULE OF LAW VS. DEMOCRATIZATION* (Suisheng Zhao ed., 2006).

<sup>109</sup> *Id.* at 179.

<sup>110</sup> 宪法 [CHINA CONST.] art. 5.

<sup>111</sup> See TANNER, *supra* note 45.

<sup>112</sup> See Dowdle, *supra* note 45.

<sup>113</sup> 中华人民共和国第八届全国人民代表大会刑法修订案 [Proposed Criminal Law Amendment Bill of the 8<sup>th</sup> National People’s Congress of the People’s Republic of China] (Nat’l People’s Cong., 1997).

[A] process of regularization that demonstrates Jiang Zemin's stress on the need to build a "rule of law" that is meant to replace the arbitrary and uncertain legal environment in the Cultural Revolution. The fact that it is a socialist legality meant that the Party is to hold the major role in deciding what is, and is not, permissible under the law."<sup>14</sup>

Throughout the 1990s the NPC was revising arbitrary and outdated provisions of the Criminal Law (1979), Criminal Procedural Law (1979), the Company Law (1993), and the Securities Law (1998).<sup>15</sup> By 2008, the PRC possessed as many as 229 national primary legislation, approximately 600 administrative regulations, 7000 local regulations, and 600 autonomous regional rules.<sup>16</sup> Contemporary Chinese lawmaking became a "serious, politically sophisticated process, which no longer can be thought as a unified, top-down policy-making system."<sup>17</sup> It transformed into a "multi-stage, multi-arena" process, with numerous actors involved in agenda setting, inter-agency review, top leadership decision-making, congressional debates, and implementation.

Most, if not all, of the legislative efforts to enhance the status, autonomy, and powers of the judiciary, including the Judges Law (1995) and the 2006 Amendment of the Organic Law of the People's Courts were carried out under the influence of SPC's campaigns. By contrast, the Civil Servants Law (2005), which was drafted by the State Council, maintained the classical subordination of judges to the state civil service. Twenty-first century Chinese courts, like Maoist judicial institutions, continued to be constituents of the Political-Legal System and dependent on local governments for operating funds. The Party's increased reliance on constitutional institutions to govern has not meant that reformed laws will bind local and central ruling elites as much as they bind citizens or businesses. Chinese Socialist law has a heavy "educational" dimension in "inculcating the masses with communist ethics."<sup>18</sup>

## B. Judicialization Through Interpretations

### 1. The Costs of Adjudicative Judge-Made Law

In 1955 and 1981, the NPCSC issued two decisions that attempted to restrict the SPC's legal interpretive powers to the extent that they could only

<sup>14</sup> See SAICH, *supra* note 45, at 139.

<sup>15</sup> Albert H.Y. Chen, *One Country and Two Systems: The First Decade*, in *THE FIRST DECADE: THE HONG KONG SAR IN RETROSPECTIVE AND INTROSPECTIVE PERSPECTIVES* 161-88 (Yue-man Yeung ed., 2007).

<sup>16</sup> He, *supra* note 9, at 6-7.

<sup>17</sup> See TANNER, *supra* note 45, at 219.

<sup>18</sup> CARLOS W. LO, *CHINA'S LEGAL AWAKENING: LEGAL THEORY AND CRIMINAL JUSTICE IN DENG'S ERA* 10 (1995).

be exercised in the adjudication of concrete cases.<sup>119</sup> Article 32 of the Organic Law reiterated the same limitations: only “in the course of judging” can the Court interpret primary legislation in relation to “issues about the application of law.” Clearly, the legislature expressed its view that the Court should not interpret laws abstractly in the absence of specific cases. The SPC alone heard as many as 20,293 cases between 1998 and 2002, and 10,553 cases in 2008.<sup>120</sup> The enormous caseload, time pressure, and lack of guidance on the application of precedent rendered the articulation of sophisticated judge-made, case-based doctrines expensive.<sup>121</sup>

Recognizing these costs, the Ren Court unilaterally held in 1997 that (1) the SPC has the exclusive right to issue abstract rulings known as Judicial Interpretations; (2) lower courts must cite Judicial Interpretations in their judgments where appropriate; and, most importantly, (3) Judicial Interpretations carry the effect of law.<sup>122</sup> This holding literally contradicted the Organic Law and NPCSC decisions. And as affirmed in the Legislative Law (2000), only Legal Interpretations enacted by the NPCSC carry the effect of law.<sup>123</sup> The legality of the holding is thus questionable.<sup>124</sup> Nevertheless, the Xiao Court reaffirmed essentially the same principles in 2007.<sup>125</sup> This landmark decision formalized a new procedural regime for producing Judicial Interpretations. The SPC's Judicial Committee was thereafter obligated to

<sup>119</sup> 全国人民代表大会常务委员会关于解释法律问题的决议 [National People's Congress Standing Committee Decision on Problems Related to Legal Interpretation] (promulgated by the Standing Comm. Nat'l People's Cong., June 23, 1955), available at <http://law.lawtime.cn/d539615544709.html> (last visited Aug. 27, 2011); 全国人民代表大会常务委员会关于加强法律解释工作的决议 [National People's Congress Standing Committee Decision on Strengthening the Work of Legal Interpretation] (promulgated by the Standing Comm. Nat'l People's Cong., June 10, 1981) STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (P.R.C.).

<sup>120</sup> See 最高人民法院院长肖扬 [Xiao Yang, President, Sup. People's Ct.], 最高人民法院工作报告 [Work Report of the Sup. People's Ct.] (promulgated by the Sup. People's Ct., Mar. 11, 2003), available at <http://www.law-lib.com/fzdt/newshtml/22/20050822215434.htm> (last visited Aug. 27, 2011); 最高人民法院院长王胜俊 [Wang Shengjun, President, Sup. People's Ct.], 最高人民法院工作报告 [Work Report of the Sup. People's Ct.] (Mar. 17, 2009), available at [http://www.gov.cn/test/2009-03/17/content\\_1261386.htm](http://www.gov.cn/test/2009-03/17/content_1261386.htm) (Aug. 27, 2011).

<sup>121</sup> HOU, *supra* note 4, at 89.

<sup>122</sup> 最高人民法院关于司法解释工作的若干规定 [Several Rules on Judicial Interpretation Work] (promulgated by the Sup. People's Ct., June 23, 1997), available at [http://www.smjy.com.cn/dzts/4/Law/constitution\\_nation/17\\_LawMaking/17\\_LawMaking1494.htm](http://www.smjy.com.cn/dzts/4/Law/constitution_nation/17_LawMaking/17_LawMaking1494.htm) (last visited Aug. 27, 2011).

<sup>123</sup> *Jl*, *supra* note 4, at 83.

<sup>124</sup> See JIANFU CHEN, CHINESE LAW: TOWARDS AN UNDERSTANDING OF CHINESE LAW, ITS NATURE, AND DEVELOPMENT (1999).

<sup>125</sup> 最高人民法院关于司法解释工作的规定 [Rules on Judicial Interpretation Work] (promulgated by the Sup. People's Ct., Mar. 9, 2007).

annually disclose its Judicial Interpretation agenda. Importantly, in the name of "judicial democratization," the Court allowed state organs, social groups, and even citizens the right to apply for Interpretations on specific issues, especially those not presently regulated by primary legislation.<sup>126</sup>

## 2. The State of Judicial Interpretations

From 1949 to 1978, the SPC, as a state security agency obsessed with propagating "mass line" Maoist political campaigns, had little or no role in social or economic policy-making.<sup>127</sup> Barely three Interpretations issued by the SPC during this period might be classified as economic law.<sup>128</sup> While the post-Mao Court handed down as many as 542 Interpretations from 1983 to 1998,<sup>129</sup> these documents were not legally binding, released to the public, or jointly issued with executive agencies or the procuracy.<sup>130</sup>

Between 1998 and 2009, the period that marked the emergence and consolidation of the activist-professional ideology, the SPC handed down 264 publicly accessible and binding Judicial Interpretations.<sup>131</sup> All areas of substantive law were covered (including contracts,<sup>132</sup> torts,<sup>133</sup> corporate,<sup>134</sup>

<sup>126</sup> See Kui Shen, "Democratization" of Judicial Interpretation and the Supreme Court's Political Function, 29 SOC. SCI. CHINA 33 (2008).

<sup>127</sup> 侯猛 [Hou Meng], 经济体制变迁中的最高人民法院 (1949-1978 年) [The Supreme People's Court Under the Transition of the Economic System (1949-1978)], 23 政法论坛 [TRIB. POL. SCI. & L.] 69 (2005).

<sup>128</sup> *Id.*, *supra* note 4, at 277.

<sup>129</sup> 成巧云、王夏玮 [Cheng Qiaoyun & Wang Xiawei], 中国司法解释制度研究 [A Study of the Institution of Judicial Interpretations], 12 TIME EDUC. 153 (2006).

<sup>130</sup> 董嗒 [Dong Hao], 新中国司法解释六十年 [Sixty Years of Judicial Interpretations in New China], 5 岭南学刊 [LINGNAN J.] 48 (2009).

<sup>131</sup> The total for the years 1998 to 2003 is based on the researcher's summation of data regarding judicial interpretations from Cheng & Wang, *supra* note 129. For years 2004 to 2007, see Work Report of the Sup. People's Ct. (2008), *supra* note 131. For the year 2008, see Work Report of the Sup. People's Ct. (2009), *supra* note 120. For the year 2009, see 最高人民法院工作报告 [Work Report of the Sup. People's Ct.] (promulgated by the Sup. People's Ct., Mar. 11, 2010), available at <http://www.dffy.com/sifashijian/ziliao/201003/2010031163408.htm> (last visited Aug. 27, 2011). The SPC does not maintain official statistics on the exact number of interpretations it has issued.

<sup>132</sup> See 最高人民法院关于适用《中华人民共和国合同法》若干问题的解释 (二) [Sup. People's Ct. Interpretation on Problems Related to the Contract Law II] (promulgated by the Sup. People's Ct., Apr. 24, 2009, effective May 13, 2009), available at [http://www.court.gov.cn/qwfb/sfjs/201002/t20100210\\_1051.htm](http://www.court.gov.cn/qwfb/sfjs/201002/t20100210_1051.htm) (last visited Aug. 27, 2011).

<sup>133</sup> See 最高人民法院关于审理名誉权案件若干问题的解释 [Sup. People's Ct. Interpretation on the Adjudication of Cases Related to the Right to Reputation] (promulgated by the Sup. People's Ct., July 14, 1998, effective Sept. 15, 1998) SUP. PEOPLE'S CT. GAZ. (P.R.C.).

criminal,<sup>135</sup> administrative,<sup>136</sup> and family law<sup>137</sup>), and the Court handed down rulings in nearly all important regulatory fields as well (including housing and property,<sup>138</sup> the stock exchange,<sup>139</sup> intellectual property,<sup>140</sup> maritime disputes,<sup>141</sup> internet governance,<sup>142</sup> securities regulation,<sup>143</sup> listed companies,<sup>144</sup> Taiwan-

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<sup>134</sup> See 最高人民法院关于适用《中华人民共和国公司法》若干问题的规定(二) [Sup. People's Ct. Interpretation on Problems Related to the Application of the Company Law (II)] (promulgated by the Sup. People's Ct., May 12, 2006, effective May 19, 2006) SUP. PEOPLE'S CT. GAZ. (P.R.C.).

<sup>135</sup> See 最高人民法院关于执行《中华人民共和国刑事诉讼法》若干问题的解释 [Sup. People's Ct. Interpretation on Problems Related to the Enforcement of Criminal Procedural Law] (promulgated by the Sup. People's Ct., June 29, 1998, effective Sept. 8, 1998), available at [http://www.law-lib.com/law/law\\_view.asp?id=397](http://www.law-lib.com/law/law_view.asp?id=397) (last visited Aug. 27, 2011).

<sup>136</sup> See 最高人民法院关于当前形势下做好行政审判工作的若干意见 [Sup. People's Ct. Several Opinions on Improving Administrative Adjudication Work under the Present Circumstances] (promulgated by the Sup. People's Ct., June 26, 2009, effective June 26, 2009), available at <http://www.dffy.com/sifashijian/ziliao/200907/20090706113530.htm> (last visited Aug. 27, 2011) [hereinafter *Several Opinions on Improving Administrative Adjudication Work*].

<sup>137</sup> See 最高人民法院关于适用《中华人民共和国婚姻法》若干问题的解释(一) [Sup. People's Ct. Interpretation on Problems Related to the Application of the Marriage Law (I)] (promulgated by the Sup. People's Ct., Dec. 25, 2001, effective Dec. 27, 2001) SUP. PEOPLE'S CT. GAZ. (P.R.C.).

<sup>138</sup> See 最高人民法院关于审理商品房买卖合同纠纷案件适用法律若干问题的解释 [Sup. People's Ct. Interpretation on the Application of Law to Contractual Disputes in Cases Related to the Buying and Selling of Commercial Housing] (promulgated by the Sup. People's Ct., Mar. 24, 2003, effective June 1, 2003) SUP. PEOPLE'S CT. GAZ. (P.R.C.).

<sup>139</sup> See 最高人民法院关于审理期货纠纷案件若干问题的规定 [Sup. People's Ct. Rules for the Adjudication of Stock Exchange Disputes] (promulgated by the Sup. People's Ct., May 16, 2003, effective July 1, 2003) SUP. PEOPLE'S CT. GAZ. (P.R.C.).

<sup>140</sup> See 最高人民法院关于审理商标民事纠纷案件适用法律若干问题的解释 [Sup. People's Ct. Rules for the Application of Law in Civil Disputes Involving Trademarks] (promulgated by the Sup. People's Ct., Oct. 12, 2002, effective Oct. 16, 2002) SUP. PEOPLE'S CT. GAZ. (P.R.C.).

<sup>141</sup> See 最高人民法院关于审理海上保险纠纷案件若干问题的规定 [Sup. People's Ct. Rules for the Adjudication of Cases Involving Maritime Insurance Disputes] (promulgated by the Sup. People's Ct., Nov. 23, 2006, effective Jan. 1, 2007) SUP. PEOPLE'S CT. GAZ. (P.R.C.).

<sup>142</sup> See 最高人民法院关于审理涉及计算机网络域名民事纠纷案件适用法律若干问题的解释 [Sup. People's Ct. Interpretation on the Application of Law in Cases Involving Internet Uniform Resource Locator Disputes] (promulgated by the Sup. People's Ct., July 17, 2001, effective July 24, 2001) BEIJING HIGH PEOPLE'S CT. BUS. STUD. RESOURCES (P.R.C.).

<sup>143</sup> See 最高人民法院关于依法审理和执行被风险处置证券公司相关案件的通知 [Sup. People's Ct. Notification on the Trial and Enforcement of Cases Related to the

related litigation,<sup>145</sup> antitrust,<sup>146</sup> insurance,<sup>147</sup> alternative dispute resolution,<sup>148</sup> labor disputes,<sup>149</sup> state compensation,<sup>150</sup> market regulation,<sup>151</sup> environmental pollution,<sup>152</sup> collective litigation rights,<sup>153</sup> corruption control,<sup>154</sup> capital

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Securities Companies under Risk Disposal] (promulgated by the Sup. People's Ct., May 29, 2009, effective May 29, 2009) SUP. PEOPLE'S CT. GAZ. (P.R.C.).

<sup>144</sup> See 最高人民法院关于冻结、拍卖上市公司国有股和社会法人股若干问题的规定 [Sup. People's Ct. Rules for the Freezing and Auction of Shares of Listed Companies Owned by the State and Social Legal Persons] (promulgated by the Sup. People's Ct., Sept. 21, 2001, effective Sept. 30, 2001), available at [http://www.law-lib.com/law/law\\_view.asp?id=16336](http://www.law-lib.com/law/law_view.asp?id=16336) (last visited Aug. 27, 2011).

<sup>145</sup> See 最高人民法院关于人民法院认可台湾地区有关法院民事判决的补充规定 [Sup. People's Ct. Supplementary Rules for the Recognition of Civil Judgments issued by Courts in the Taiwan Region] (promulgated by the Sup. People's Ct., Apr. 24, 2009, effective May 14, 2009) SUP. PEOPLE'S CT. GAZ. (P.R.C.).

<sup>146</sup> See 最高人民法院关于审理不正当竞争民事案件应用法律若干问题的解释 [Sup. People's Ct. Interpretation on Several Issues Related to the Application of Law in Unfair Competition Civil Cases] (adopted by the Sup. People's Ct. Jud. Committee, Dec. 30, 2006, effective Feb. 1, 2007) SUP. PEOPLE'S CT. GAZ. (P.R.C.).

<sup>147</sup> See 最高人民法院关于适用《中华人民共和国保险法》若干问题的解释（一） [Sup. People's Ct. Interpretation of Several Issues Related to the Application of the Insurance Law (I)] (promulgated by the Sup. People's Ct., Sept. 21, 2009, effective Oct. 1, 2009) SUP. PEOPLE'S CT. GAZ. (P.R.C.).

<sup>148</sup> See 最高人民法院关于适用《中华人民共和国仲裁法》若干问题的解释 [Sup. People's Ct. Interpretation of Several Issues Related to the Application of the Arbitration Law] (promulgated by the Sup. People's Ct., Aug. 23, 2006, effective Sept. 8, 2006) SUP. PEOPLE'S CT. GAZ. (P.R.C.).

<sup>149</sup> See 最高人民法院关于审理劳动争议案件适用法律若干问题的解释(二) [Sup. People's Ct. Interpretation on Adjudication of Labor Disputes] (promulgated by the Sup. People's Ct., Aug. 14, 2006, effective Oct. 1, 2006) SUP. PEOPLE'S CT. GAZ. (P.R.C.).

<sup>150</sup> See 最高人民法院关于审理人民法院国家赔偿确认案件若干问题的规定（试行） [Sup. People's Ct. Rules (Interim) for the Adjudication of Cases involving the Confirmation of State Compensation] (promulgated by the Sup. People's Ct., Aug. 10, 2004, effective Oct. 1, 2004) SUP. PEOPLE'S CT. GAZ. (P.R.C.).

<sup>151</sup> See 最高人民法院关于审理扰乱电信市场管理秩序案件具体应用法律若干问题的解释 [Sup. People's Ct. Interpretation on the Adjudication of Cases Related to the Breaking of the Telecommunications Market Order] (promulgated by the Sup. People's Ct., Apr. 28, 2000, effective May 24, 2000) SUP. PEOPLE'S CT. GAZ. (P.R.C.).

<sup>152</sup> See 最高人民法院关于审理破坏森林资源刑事案件具体应用法律若干问题的解释 [Sup. People's Ct. Interpretation on the Adjudication of Criminal Cases Concerning the Destruction of Forests] (promulgated by the Sup. People's Ct., Nov. 17, 2000, effective Dec. 11, 2000) SUP. PEOPLE'S CT. GAZ. (P.R.C.).

<sup>153</sup> See 最高人民法院关于村民小组诉讼权利如何行使的复函 [Sup. People's Ct. Reply on the Usage of Village Groups Litigation Rights] (July 14, 2006), available at <http://www.dffy.com/sifashijian/ziliao/200810/20081004171557.htm> (last visited Aug. 27, 2011).

punishment,<sup>155</sup> and international trade).<sup>156</sup> This figure does not include the vast number of other SPC statements, such as responses to lower courts through informal telephone inquiries that can exert strong persuasive authority over local courts' decision making.<sup>157</sup> For instance, in 2005 alone, the SPC issued 15 formal Interpretations, 443 informal answers to lower courts, 71 statements in response to NPC and State Council directives, 35 news bulletins, and 28 judicial guidelines on a wide array of social and economic concerns, such as armed robbery, illegal gambling, rural land use, state compensation for land takings, food and medicine quality, deceptive advertising, commercial fraud, and the rights of creditors.<sup>158</sup>

As a general practice, each major civil or criminal code promulgated by the NPC is reviewed in a comprehensive SPC Judicial Interpretation.<sup>159</sup> The SPC's competence to issue abstract Interpretations on primary legislation, a power not enjoyed even by the highest courts of many other jurisdictions, effectively usurped the legislative function and the supremacy of the NPC.<sup>160</sup> Interpretations typically reworked statutory principles by detailing vague provisions, excluding certain statutorily permissible claims, and offering new grounds for judicial decision making not found in the primary legislation.<sup>161</sup>

The making of Judicial Interpretations involves multiple production stages. The SPC has not adopted a consistent method for drafting Interpretations. Ji

<sup>154</sup> See 最高人民法院关于审理贪污、职务侵占案件如何认定共同犯罪几个问题的解释 [Sup. People's Ct. Interpretation on the Adjudication of Cases Concerning Corruption, Abuse of Power, and the Definition of Joint Enterprise] (promulgated by the Sup. People's Ct., June 30, 2000, effective July 8, 2000) BEIJING HIGH PEOPLE'S CT. BUS. STUD. RESOURCES (P.R.C.).

<sup>155</sup> See 最高人民法院关于统一行使死刑案件核准权有关问题的决定 [Sup. People's Ct. Decision on the Unification of Death Penalty Approval Power] (promulgated by the Sup. People's Ct., Dec. 28, 2006, effective Jan. 1, 2007) SUP. PEOPLE'S CT. GAZ. (P.R.C.).

<sup>156</sup> See 最高人民法院关于审理国际贸易行政案件若干问题的规定 [Sup. People's Ct. Rules for the Adjudication of International Trade-Related Cases] (promulgated by the Sup. People's Ct., Aug. 27, 2002, effective Oct. 1, 2002) SUP. PEOPLE'S CT. GAZ. (P.R.C.).

<sup>157</sup> See Wang, *supra* note 6.

<sup>158</sup> *Id.* at 536-41.

<sup>159</sup> See Randall Peerenboom, *A Government of Laws: Democracy, Rule of Law, and Administrative Law Reform in China*, in *DEBATING POLITICAL REFORM IN CHINA: RULE OF LAW VS. DEMOCRATIZATION* 58 (Suisheng Zhao ed., 2006) [hereinafter *Government of Laws*].

<sup>160</sup> 金振豹 [Jin Zhenbao], 论最高人民法院抽象司法解释 [On the Supreme People's Court's Power to Make Abstract Interpretations], 2 比较法学 [COMP. LEGAL RES.] 55 (2010).

<sup>161</sup> Nicholas C. Howson, *Judicial Independence and the Company Law in the Shanghai Courts*, in *JUDICIAL INDEPENDENCE IN CHINA: LESSONS FOR GLOBAL RULE OF LAW PROMOTION* 150 (Randall Peerenboom ed., 2010).

identifies at least twenty interpretive strategies.<sup>162</sup> Judges and research assistants affiliated with the Court's Research Office routinely visit relevant government departments, legislatures, experts, lawyers, and private business actors to collect opinions before drafting a final Interpretation for approval by the Judicial Committee. For example, the drafting of a single intellectual property rights (IPR) Interpretation required SPC researchers to visit five provinces, meet with representatives of fifteen provincial high courts, discuss proposals with eleven central government agencies, and gather views from the European Commission and a U.S. non-governmental organization.<sup>163</sup> In another instance, the Rules for the Adjudication of Corporate Reform Cases of 2002 were fiercely debated among leading academics, professional experts, and senior judges in a SPC-organized seminar before being approved.<sup>164</sup> Rent-seeking by interest groups such as large law firms and insurance companies is common.<sup>165</sup>

The Court has played an immense role in modernizing Chinese IPR law within a business environment contaminated by severe trademark and copyright piracy.<sup>166</sup> Under the traditional statutory regime, IPR cases had been divided into administrative, civil, and criminal categories, each handled by judges from the respective tribunals, who may not have necessarily possessed any expertise in intellectual property issues. Pursuant to a 2009 Interpretation, claimants who are discontent with the decisions of the State Administration for Industry and Commerce no longer have to appeal to generalist judges; instead, the SPC's Intellectual Property Tribunal and two other Beijing-based IPR courts, staffed by some of the nation's top IPR experts will hear their cases.<sup>167</sup> SPC-picked IPR judges are typically "highly competent" and "unlikely to be corrupt or suffer from political interference."<sup>168</sup> The Intellectual Property Tribunal also established specialized IPR tribunals around the country to exercise unified jurisdiction over all three types of IPR cases.<sup>169</sup>

<sup>162</sup> *Ji, supra* note 4, at 181–97.

<sup>163</sup> *Id.* at 29.

<sup>164</sup> *HOU, supra* note 4, at 81.

<sup>165</sup> *Id.* at 100.

<sup>166</sup> See Peter Ganea, *Introduction*, in *INTELLECTUAL PROPERTY LAW IN CHINA* (Peter Ganea, Thomas Pattloch & Christopher Heath eds., 2005).

<sup>167</sup> See 最高人民法院印发《关于专利、商标等授权确权类知识产权行政案件审理分工的规定》的通知 [Rules on the Division of Work in the Adjudication of Administrative Intellectual Property Cases Involving Patent, Trademark and Other Authorization and Ownership Determination Issues] (promulgated by the Sup. People's Ct. Jud. Committee, June 22, 2009, effective July 1, 2009) SUP. PEOPLE'S CT. GAZ. (P.R.C.).

<sup>168</sup> MARTIN K. DIMITROV, *PIRACY AND THE STATE: THE POLITICS OF INTELLECTUAL PROPERTY RIGHTS IN CHINA* 257 (2009).

<sup>169</sup> Jing Xu & Hairuo Zhang, *Unification of Jurisdiction in IPR-Related Civil, Criminal and Administrative Cases in China*, CHINA L. INSIGHT, Aug. 6, 2009, <http://www.chinalawinsight.com/2009/08/articles/intellectual-property/unification-of-jurisdiction-in-ipr-related-civil-criminal-and-administrative-cases-in-china>.



The drafting of IPR Interpretations involves borrowing judicial doctrines from the European Union and U.S. courts.<sup>170</sup> Further, the SPC claims regulatory responsibility for IPR tribunals that went beyond the constricted parameters of judicial power set by the Party-State. Lower courts are directed to take proactive steps to “promote a brand economy, stimulate spending and create demand, strive for economic growth, and increase the competitive edge of Chinese enterprises domestically and internationally.”<sup>171</sup>

The Court has on several occasions relaxed certain provisions in the PRC's typically repressive statutes. In 2003, the Liaoning Provincial High Court referred to the SPC the question of whether a man, who unknowingly had consensual sexual intercourse with a girl under the age of fourteen, had committed rape. Article 236 of the Criminal Law punishes an individual who has intercourse with a girl under the age of fourteen only if he is aware of the victim's age. In its Reply, the SPC established a concept similar to the Anglo-American judge-made doctrine of *mens rea*: to be convicted, the accused must have had the intention to commit an offense. Therefore, the Court dismissed the charge of rape.<sup>172</sup> This decision has indirectly changed bureaucratic policy towards the protection of young females.<sup>173</sup>

SPC Interpretations has brought parts of judicially enforceable law closer to international practice. For example, a 2007 Interpretation<sup>174</sup> narrowed the gap between the Chinese arbitration framework and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) by allowing the nullification of portions of awards contrary to arbitration agreements.<sup>175</sup> Although the New York Convention permits courts in signatory states to refrain from enforcing foreign arbitral awards that breach domestic “public policies,” Vice President Justice Wan E'xiang noted in 2008 that no

<sup>170</sup> Ji, *supra* note 4, at 191.

<sup>171</sup> See 最高人民法院关于当前经济形势下知识产权审判服务大局若干问题的意见 [Sup. People's Ct. Opinions on Several Problems Related to how Intellectual Property Rights Adjudication can Serve the Grand Situation under the Current Economic Circumstances] (promulgated by the Sup. People's Ct., Apr. 21, 2009, effective Apr. 21, 2009) SUP. PEOPLE'S CT. GAZ. (P.R.C.).

<sup>172</sup> Ronald C. Keith & Zhiqiu Lin, *Judicial Interpretations of China's Sup. People's Ct. as “Secondary Law” with Special Reference to Criminal Law*, 23 CHINA INFO. 237 (2009).

<sup>173</sup> See 肖仕卫 [Xiao Shiwei], 最高法院司法解释的逻辑及影响: 兼论司法解释的功能与合法性问题 [The Logic, Impact, Function, and Legitimacy of the Judicial Interpretations of the Supreme Court], in 最高法院研究 [SUPREME COURTS IN PERSPECTIVE] 346 (左卫民 [Zuo Weimin] ed., 2004).

<sup>174</sup> See 最高人民法院关于适用《中华人民共和国仲裁法》若干问题的解释 [Sup. People's Ct. Interpretation on Several Issues Related to the Application of the Arbitration Law] (promulgated by the Sup. People's Ct., Aug. 23, 2006, effective Aug. 8, 2006) SUP. PEOPLE'S CT. GAZ. (P.R.C.).

<sup>175</sup> See Clyde & Co, *Arbitration in China—A Welcome Clarification* (Sept. / Oct. 2007), [http://www.clydeco.com/attachments/published/1862/Arbitration%20in%20China%20\(Sep%2007\).pdf](http://www.clydeco.com/attachments/published/1862/Arbitration%20in%20China%20(Sep%2007).pdf) (last visited Aug. 27, 2011).

award has ever been refused on this ground.<sup>176</sup> In fact, the SPC has never upheld any of these rulings.

In 2007, the SPC injected into the nascent statutory antitrust regime additional rules on what constitutes false advertising—for example, belittling competitors, asserting half-truths, misrepresenting facts and scientific evidence, and using ambiguous language. While exaggerated advertising is not *prima facie* illegal, the Court obligated lower courts to consider an advertisement's target audience, content, impact on daily business, and the extent of public attention before determining whether it constitutes unfair competition.<sup>177</sup> These factors served as clear legal guidelines for companies preparing to advertise their products.

Judicial Interpretations even fill gaps in the law during a state of emergency. In 1999, recognizing the impracticability of immediate NPC action to provide a legal basis for a nation-wide crackdown on a sizeable religious sect, the *Falun Gong* (法轮功), the SPC issued jointly with the Supreme People's Procuratorate ("SPP") an Interpretation that expanded the legal definition of "cult" to encompass a wide spectrum of behaviors absent in Article 300 of the Criminal Law.<sup>178</sup> During the severe acute respiratory syndrome ("SARS") epidemic of 2003, the SPC guided lower courts on dealing with new types of criminal offenses, such as the production of fake medicine and the intentional spreading of infectious diseases.<sup>179</sup>

In light of the 2008 global recession, the SPC demanded that lower-level judges "promote the international reputation and open-minded image of the government and businesses," "steer the government toward administering in accordance with law," and "pioneer new enforcement methods for financial cases."<sup>180</sup> Local courts were directed to protect national financial bonds and

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<sup>176</sup> Henry Chen & Ted Howes, *The Enforcement of Foreign Arbitral Awards in China*, 2 BLOOMBERG FIN. L. P. (2009), available at [http://mwe.com/info/pubs/BLR\\_1109.pdf](http://mwe.com/info/pubs/BLR_1109.pdf) la (last visited Aug. 27, 2011).

<sup>177</sup> Yvonne Chua & Grace Wong, *New Judicial Interpretation of PRC Anti-Unfair Competition Law Issued*, 2 J. INTELL. PROP. L. & PRAC. 443 (2007).

<sup>178</sup> See 最高人民法院最高人民检察院关于办理组织和利用邪教组织犯罪案件具体应用法律若干问题的解释(二) [Sup. People's Ct. Interpretation of Several Questions in Law Concerning Criminal Cases of Organizing and Using Evil Cult Organizations] (promulgated by the Sup. People's Ct. & Sup. People's Procuratorate, Oct. 9, 1999, effective Oct. 9, 1999) SUP. PEOPLE'S CT. GAZ. (P.R.C.).

<sup>179</sup> See 最高人民法院关于在防治传染性非典型肺炎期间依法做好人民法院相关审判、执行工作的通知 [Sup. People's Ct. Notification on the Betterment of Adjudication and Enforcement Work of the People's Courts in the Prevention of the Severe Acute Respiratory Syndrome (SARS)] (promulgated by the Sup. People's Ct., June 11, 2003) SUP. PEOPLE'S CT. GAZ. (P.R.C.).

<sup>180</sup> See 最高人民法院关于为维护国家金融安全 and 经济全面协调可持续发展提供司法保障和法律服务的若干意见 [Sup. People's Ct. Notification on Protecting National Financial Security and the Coordination of Whole-Population Sustainable Economic Development through Judicial Safeguards and Legal Services] (promulgated by the Sup. People's Ct., Dec. 3, 2008, effective Dec. 3, 2008) SUP. PEOPLE'S CT. GAZ. (P.R.C.).

state-owned property, prohibit debt evasion and illegal fund-raising, safeguard privately-owned businesses and foreign investment interests, stabilize the securities market and settle corporate debt disputes, and readily accept company settlement cases.

Judicial Interpretations has also given rise to new legal doctrines unintended by the NPC or the Party-State. Much of the SPC's jurisprudence reflects the sensitivity of the activist-professional judges to social and economic demands. The Court has been relatively open-minded; in the course of crafting innovative decisions, it has consistently borrowed models from a wide range of sources, ranging from the rulings of foreign courts to the opinions of local businesses. Judicial Interpretations also reflect the SPC's self-positioning to become an active participant in the policy process.

### C. Judicial Interpretations and Inter-Branch Politics

The inflexible division of labor among the CCP's central bureaucracies has created an environment conducive to the SPC. Since the 1990s, the ongoing diversification of the SPC's work has rendered timely external CCP monitoring and control infeasible. Owing to a lack of both expertise and interest, Political-Legal System state security officials play little practical role in the SPC's social and economic policy-making activities.<sup>181</sup> Unlike State Council ministries, the SPC is not a constituent of the CCP Financial and Economic System.

The Court's broad powers expanded in the interstices of the organizational arrangements between the central organs of the CCP; they have slipped past both the Financial and Economic System and the Political-Legal System due to the former's lack of jurisdiction and the latter's limited focus. Judicial Interpretations rarely explicitly challenge the authority of other state organs,<sup>182</sup> but the SPC has consistently shown independent judgment on major governance problems.<sup>183</sup>

The Court has justified expansive Judicial Interpretations on the grounds that they are more helpful than the NPC's vague statutes in guiding provincial high courts in settling major controversies, promoting consistency of legal principles, and structuring lower court discretion.<sup>184</sup> The NPC's unwieldy size and infrequent sessions practically preclude it from exercising the ultimate legal interpretive authority enshrined in Article 42 of the Legislative Law.

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<sup>181</sup> PEERENBOOM, *supra* note 53, at 305.

<sup>182</sup> See Liebman, *supra* note 76.

<sup>183</sup> 宋亚辉 [Song Yahui], 公共政策如何进入裁判过程: 以最高人民法院的司法解释为例 [The Entrance of Public Policy into the Adjudication Process: A Discussion of the Supreme People's Court's Judicial Interpretations], 134 法商研究 [L. & BUS. STUD.] 116 (2009).

<sup>184</sup> See Wu, *supra* note 94.

In 2004, the Court instructed all judges to adopt a purpose approach to statutory interpretation.<sup>185</sup> Lower courts were directed to look at contextual factors and principles when ascertaining statutory meaning and to construct laws adaptively. A senior SPC justice noted that the Court is uniquely positioned to improve the quality of legislation.<sup>186</sup> Presiding Judge Song Xiaoming of the SPC's Civil Tribunal II complained before an international audience that the imperfection, irrationality, inadequacy, and poor workability of primary legislation rendered SPC Interpretations almost inevitable.<sup>187</sup> These views, never reflected in the cautiously drafted Judicial Interpretations themselves, run contrary to the fiction that Chinese courts uncritically defer to the legislative will of the NPC.

Many Interpretations do not even have a clear foundation in the statutes that they were supposed to be interpreting. The *Interpretation on the Application of Law to the Adjudication of Cases Concerning Commercial Housing Contractual Disputes* (2003) barely even referred to the General Principles of Civil Law (1987), Contract Law (1999), and City Housing Management Law (1994) as its legal basis.<sup>188</sup> Superficial references to primary legislation are more or less facades that downplay the fact that the SPC is creating policies.

The state's initial apathy towards judicial law and policy-making is observable in the way it ignored the opportunity afforded by the new Legislative Law to rein in Judicial Interpretations.<sup>189</sup> Not until 2005 did the NPCSC enact the Procedures for Filing and Examining Judicial Interpretations of Law ("2005 Procedures"). Under the new arrangement, every Judicial Interpretation must be sent to the NPCSC for "reference" within a month of being handed down. On sufficient grounds, State Council agencies, civil society organizations, business enterprises, and even individuals can apply to the NPCSC for review of the constitutionality or legality of Judicial Interpretations.

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<sup>185</sup> See 关于审理行政案件适用法律规范问题的座谈会纪要 [Meeting Minutes on Problems Related to the Application of Legal Norms in the Adjudication of Administrative Cases] (promulgated by the Sup. People's Ct., May 18, 2004) SUP. PEOPLE'S CT. GAZ. (P.R.C.).

<sup>186</sup> See 最高法院副院长万鄂湘：上班时先上网查负面新闻 [Sup. People's Ct. Vice President Wan Exiang: Surfing for Negative News in the Internet During Office Hours], 国际在线 [INTERNATIONAL ONLINE] (Mar. 3, 2009), [http://zhuanli.youth.cn/2009/09lh/yyjr/200903/t20090310\\_874948.htm](http://zhuanli.youth.cn/2009/09lh/yyjr/200903/t20090310_874948.htm).

<sup>187</sup> Xiaoming Song, The Court's Role in the Proceedings of Enterprise Bankruptcy and Restructuring and the Problems that need to be Solved, Paper presented at the Fifth Forum for Asian Insolvency Reform, Beijing, China (Apr. 27, 2006), available at <http://www.oecd.org/dataoecd/42/60/38184314.pdf>.

<sup>188</sup> HOU, *supra* note 4, at 73.

<sup>189</sup> 曹海晶 [CAO HAIJING], 中外立法制度比较 [A COMPARATIVE STUDY OF LEGISLATIVE SYSTEMS IN CHINA AND BEYOND] 514 (2004).

Counter-intuitively, the 2005 Procedures reveals the empowerment of the SPC in several ways. It reflected the NPC's recognition of the tremendous rulemaking powers wielded by the SPC and the political necessity of applying an external check to the Court's increasingly autonomous decision making. Interestingly, the final draft of the Procedures was itself a product of substantial bargaining with the SPC. The 2005 Procedures bars NPCSC committees from striking down Judicial Interpretations prior to consulting with the Court. It is important to note the NPC has yet to declare any Judicial Interpretation unconstitutional.<sup>190</sup>

Ironically, lawmakers have petitioned the SPC for more Interpretations on several occasions.<sup>191</sup> A recent example is NPC delegate and Beijing procurator Zhou Guangquan's public request to the SPC to issue a Judicial Interpretation limiting the scope of the "defamation of public authority" offense, a sanction available to government officials who wish to purge political dissidents.<sup>192</sup>

#### **D. The Economic Effects of Judicial Interpretations**

Judicial Interpretations have become so important that if they were to disappear, "the legal system would grind to a halt."<sup>193</sup> According to a Peking University legal scholar, there is an academic consensus that SPC Interpretations have become an indispensable part of China's social and economic transformation.<sup>194</sup> A 2003 survey reports that the aforementioned commercial housing interpretation has become one of the three most influential sources of law in the regulation of real property sales and exchanges.<sup>195</sup> The Court is clearly aware of its macroeconomic powers, as Vice President Justice Su Zelin has suggested that an effective judiciary is necessary for the "sound, healthy, and orderly" development of the market economy.<sup>196</sup>

Thus far we have seen that fragmentation at the top of the Party-State and vague legislative rules are conducive to the emergence of a relatively independent and sustainable judiciary. In addition, the emergence of interpretations could not have been possible without judicial entrepreneurs. The SPC's new jurisprudence is a result of confident activist-professional

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<sup>190</sup> PEI, *supra* note 65, at 61.

<sup>191</sup> See JI, *supra* note 4.

<sup>192</sup> 彭美 [Pang Mei], 人大代表周光权: 应对“诽谤官员罪”出台司法解释 [National People's Congress Delegate Zhou Guangquan Argues that Judicial Interpretations Must be Issued on the "Official Defamation" Offense], 南方都市报 [S. METROPOLIS DAILY], Mar. 8, 2010, at A20.

<sup>193</sup> Peerenboom, *supra* note 6, at 3.

<sup>194</sup> Shen, *supra* note 126.

<sup>195</sup> HOU, *supra* note 4, at 79.

<sup>196</sup> Su, *supra* note 79.

judges who approached the judicial function very differently from traditional judges.

Business actors have likely found the SPC's coherent and commercially-aware interpretations less costly and more predictable than the imprecise primary legislation passed by the NPC. It is now commonly agreed among academics, lawyers, and judges that without Judicial Interpretations, parts of the Company Law (2006) would be virtually inoperable.<sup>197</sup> Local judges have openly refused to implement the Bankruptcy Law (2006) before a SPC Interpretation has been issued.<sup>198</sup> These new support bases, consisting of business and local state actors, have buttressed the Court's confidence in shaping legal and economic developments. However, the SPC's growing prominence in the economy alone is likely to persuade central and local rulers to take judicial power more seriously. The supremacy of SPC jurisprudence, even within the judicial system, has been challenged by certain local jurisdictions well-endowed with resources, such as the Shanghai High Court. Situated in the PRC's wealthiest and most internationalized city, the Shanghai judiciary, like the SPC, was known for being more independent, professional, competent, and efficient than most other courts.<sup>199</sup> The growth of autonomous Shanghainese courts is not necessarily undesirable; it is simply the outcome of a successful and rare replication of the SPC model at the local level.

#### E. Analysis

The evidence presented in this Section suggests that a national court dominated by judges who internalized an activist-professional ideology are more likely to act inconsistently with the preferences of bureaucracies and legislatures, especially on issues related to legal interpretation and the boundaries of judicial power. The SPC has shared with the NPC and the State Council many preferences regarding the substantive purpose and outcome of economic policies, but there are disagreements on how statutes ought to be interpreted. Widespread dissatisfaction with the utility of statutory rules has reinforced expanded judicial lawmaking. The state's compulsion to secure economic development has not been the source of the national court's empowerment; rather, it has been the reliance on the SPC's timely and pragmatic judicial interpretations by businesses, legislators, and local authorities that has motivated legislators to accommodate judicial empowerment.

An ideologically unified court may be better suited to make coherent policy than divided bureaucracies and legislatures, but the SPC's involvement in policy-making is limited by the Party's perception of the threat this poses to

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<sup>197</sup> See Howson, *supra* note 161.

<sup>198</sup> *Id.* at 151.

<sup>199</sup> Minxin Pei et al., *A Survey of Commercial Litigation in Shanghai Courts*, in JUDICIAL INDEPENDENCE IN CHINA: LESSONS FOR GLOBAL RULE OF LAW PROMOTION 221-33 (Randall Peerenboom ed., 2010).

its fundamental interests. Prolonged judicial activism in social and economic regulation implies that the SPC has managed to frame the emergence of an independent, expert-run, and policy-oriented national court as being consistent with the best interests of the CCP. The SPC has achieved this by emphasizing the utility of judicial empowerment as a means of reducing the high political transaction costs of the Party-State in ruling a populous and fragmented polity.

### III. THE RESTRUCTURING OF THE LOCAL JUDICIARY

For the judicial interpretations of the SPC to be effective nationwide, there must be certain promulgation and implementation mechanisms that reach beyond the capital. It is plainly insufficient for the Court to hand down decisions on its own, unobserved by local political actors, including lower courts. However, two impediments afflict the PRC: (1) the Socialist system of Civil Law formally denies judicial supremacy in statutory interpretation, not to mention that it lacks the doctrine of *stare decisis*; and (2) many local courts, the natural enforcers of SPC rulings, are themselves plagued by severe problems such as corruption.

In spite of the CCP's very recent interest in improving adjudication, it is the SPC that is the original architect and the most active proponent of a nationwide judiciary-restructuring program. Seeing itself as the "foremost and all-embracing" actor in judicial reform,<sup>200</sup> the Court has taken measures that have obliged local judges to internalize values of professionalism and autonomy embedded in its activist-professional ideology. Many of the SPC's acts in weakening the local government's control of lower courts did not result from express delegation by the Party-State. Rather, it was the Court's own convictions that motivated its intervention in incompetent local courts.

#### A. An Anatomy of the Chinese Judiciary

There are approximately 3568 courts and 12,000 basic-level tribunals in the PRC.<sup>201</sup> Lacking an independent judicial identity, these courts often operate like typical Chinese bureaucracies.<sup>202</sup> Many judges have been handed tasks that are difficult to fulfill even from the viewpoint of their Western

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<sup>200</sup> 董瑞丰 [Dong Ruifeng], 法院新改革的标准: 最高人民法院党组副书记、常务副院长沈德咏接受本刊专访 [Standards of the New Judicial Reform: An Interview with Shen Deyong, Vice President and Deputy Party Secretary of the Supreme People's Court], 瞭望新闻周刊 [OUTLOOK WKLY.] (Mar. 30, 2009), [http://lw.xinhuanet.com/htm/content\\_4531.htm](http://lw.xinhuanet.com/htm/content_4531.htm) (last visited Aug. 27, 2011).

<sup>201</sup> Stephanie Balme, *Ordinary Justice and Popular Constitutionalism in China*, in BUILDING CONSTITUTIONALISM IN CHINA (Stephanie Balme & Michael W. Dowdle eds., 2009).

<sup>202</sup> See Finder, *supra* note 4.

counterparts.<sup>203</sup> On one hand, they are expected to punish crimes of all sorts in a society in flux and make “fair and just” decisions, but on the other hand, they are expected to defer to powerful administrative agencies and deliver judgments consistent with the CCP’s interests.

The local judiciary’s dependency on local bureaucracies has prevented them from developing strong networks with same-level and higher-level judges.<sup>204</sup> When local judges rule against bureaucrats, they put themselves at risk of losing their salaries.<sup>205</sup> Local administrative officials interfere with the courts’ work much more than CCP leaders.<sup>206</sup> In certain controversial “hard cases,” even the SPC has to take a highly deferential stance. The SPC has strategically kept lower courts out of political controversies. For example, in 2005, the Court instructed lower courts to stay away from civil claims against the government’s demolition of private homes for economic use.<sup>207</sup> The SPC did not provide reasoning for its instruction, but mandatory demolition, which has provoked a great deal of public discontent, is an established policy backed by powerful bureaucratic interests. Unfavorable judicial orders might provoke retaliation from local governments and business sectors. In this situation, the Court had few choices but to relieve junior judges from making decisions that are practically unenforceable.<sup>208</sup>

The local system has also struggled with corruption. Money laundering, bribery, nepotism, and other inappropriate behavior are not uncommon among judges.<sup>209</sup> In 1999 Chief Justice Xiao Yang reported that as many as 1654 judges had been given administrative penalties and another 637 had been punished in accordance with Party rules.<sup>210</sup> Unprofessional members of the

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<sup>203</sup> See Zhang, *supra* note 67, at 139.

<sup>204</sup> See Balme, *supra* note 201.

<sup>205</sup> See Zhang, *supra* note 67.

<sup>206</sup> See Peerenboom, *supra* note 6.

<sup>207</sup> 最高人民法院关于当事人达不成拆迁补偿安置协议就补偿安置争议提起民事诉讼人民法院应否受理问题的批复 [Sup. People’s Ct. Reply on Whether People’s Courts Shall Hear the Civil Litigation on Compensation and Relocation Disputes where the Parties Concerned Fail to Agree on Compensation and Relocation in Relation to House Demolishment and Relocation] (promulgated by the Sup. People’s Ct., Aug. 1, 2005, effective Aug. 11, 2005) SUP. PEOPLE’S CT. GAZ. (P.R.C.).

<sup>208</sup> See Peerenboom, *supra* note 6, at 164.

<sup>209</sup> Ting Gong, *Dependent Judiciary and Unaccountable Judges: Judicial Corruption in Contemporary China*, 4 CHINA REV. 47 (2004).

<sup>210</sup> See 最高人民法院院长肖扬 [Xiao Yang, Sup. People’s Ct. President], 最高人民法院工作报告 [Work Report of the Supreme People’s Court] (Mar. 10, 1999), available at <http://www.law-lib.com/fzdt/newshtml/22/20050817160116.htm> (last visited Aug. 27, 2011).



judiciary readily abuse their authority in interpreting laws to the advantage of their economic patrons, including private businesses.<sup>211</sup>

In 2002 alone, the SPC received 152,557 citizen's petitions regarding improper behavior by judges.<sup>212</sup> In November 2009, the Court's Center for Judicial Misconduct Complaints reported that it had received as many as 20,000 complaints in less than six months.<sup>213</sup> Between 1997 and 2001, about forty percent of NPC delegates disapproved of the performance of the judiciary, which was an "unprecedented display of dissatisfaction."<sup>214</sup> Delegate Chen Shu confirmed that judicial misconduct constituted one of the major factors driving the NPC's denunciation of judicial performance.<sup>215</sup>

## B. Judge-Led Judicial Reform

### 1. The Supreme People's Court as Engineer of Judicial Reform

The SPC generally justifies its judicial reform program as a materialization of the CCP's "Governing the State in Accordance with Law" national strategy. However, its actions more accurately reflect the beliefs, preferences, and biases of its expert judges rather than those of legislators, bureaucrats, and Party cadres. According to Vice President Justice Su Zelin, the SPC's reforms are intended to produce a new batch of "elite judges with Chinese characteristics," who treat the administration of justice as a "dignified and honorable mission."<sup>216</sup> The SPC established the first professional academy for judges in 1988, campaigned for the *Judges Law* in 1995, and delivered the *First Five-Year People's Courts Reform Program* in 1999. The first and second five-year programs were aimed at the development of judicial competence and adjudicative fairness, as well as the elimination of impediments to the implementation of

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<sup>211</sup> See Robert W. Jagtenberg, *Comments on Liu Junhai's Legal Reforms in China*, in GOVERNANCE, DECENTRALIZATION AND REFORM IN CHINA, INDIA AND RUSSIA (Jean-Jacques Denthier ed., 2000).

<sup>212</sup> Peerenboom, *supra* note 159, at 164.

<sup>213</sup> 探访最高法举报中心：不拒匿名举报法官违法违纪 [Sup. People's Ct. Center for Judicial Misconduct: Do Not Reject Anonymous Reports of Illegal Judicial Misconduct], 人民日报 [PEOPLE'S DAILY] (Nov. 17, 2009), [http://news.xinhuanet.com/legal/2009-11/17/content\\_12471342.htm](http://news.xinhuanet.com/legal/2009-11/17/content_12471342.htm) (last visited Aug. 27, 2011).

<sup>214</sup> Zhao, *supra* note 29, at 48.

<sup>215</sup> 千古洲 [qianguzhou Blog], 他们为什么投了“两高报告”的反对票？ [Why Did They Say No to the Working Reports of the Court and the Procuratorate?], (Mar. 24, 2009, 11:19 CST), <http://blog.legaldaily.com.cn/blog/html/81/2441181-2163.html>.

<sup>216</sup> 苏泽林 [Su Zelin], 走有中国特色的精英法官之路——写在新修改的《法官法》实施之际 [Judicial Elites with Chinese Characteristics: A Note Before the Implementation of Judges Law], 中国法院网 [CHINA COURT] (June 26, 2002), <http://www.chinacourt.org/public/detail.php?id=5672>.

central policies.<sup>217</sup> The Court endorsed a nationwide judicial examination and enabled provincial high courts to lay off sitting judges who failed the test.

In 2002, the SPC ruled that candidates for local judgeships must pass the National Judicial Examination and be approved by the provincial high court.<sup>218</sup> By 2005, fifty percent of Chinese judges had earned undergraduate degrees, a sevenfold increase from 1995.<sup>219</sup>

Members of the SPC's Judicial Committee have even travelled across the country to gain first-hand knowledge of the actual workings of local judiciaries. Between 2001 and 2005, Justice Su Zelin visited more than one hundred trial courts to understand the "real situation."<sup>220</sup> Possibly with a view to weakening the control of local bureaucracies, the Court suggested in its second judicial reform program the establishment of a system of job rotation and the centralization of rural court appointments.<sup>221</sup> The third program, delivered by Chief Justice Wang Shengjun, called for modest improvements in the internal structure of the courts, protection of judicial funds, and greater transparency in adjudicative proceedings.<sup>222</sup>

The SPC was very active in publicizing its reform programs to the rest of the government, most notably to the legislature. In 2002, the Court entertained more than 1140 cases involving judicial misconduct.<sup>223</sup> A specialized office responsible for maintaining regular contacts with NPC delegates was established. In 2008, members of the Court attended thirty-four unofficial judicial-legislative conferences and invited NPC delegates to observe trial proceedings.<sup>224</sup> In 2009, the Court visited and received 483 NPC delegates and reviewed 766 written petitions from the delegates.<sup>225</sup>

<sup>217</sup> 人民法院第一个五年改革纲要（1999-2003） [First Five-Year People's Courts Reform Program (1999-2003)] (promulgated by the Sup. People's Ct., Oct. 20, 1999) SUP. PEOPLE'S CT. GAZ. (P.R.C.).

<sup>218</sup> 最高人民法院关于加强法官队伍职业化建设的若干意见 [Sup. People's Ct. Opinions on Enhancing the Construction of a Professional Team of Judges] (promulgated by the Sup. People's Ct., July 18, 2002) SUP. PEOPLE'S CT. GAZ. (P.R.C.).

<sup>219</sup> Liebman, *supra* note 76, at 71.

<sup>220</sup> 沈冰 [Shen Bing], 专访中国最高法院副院长苏泽林 [An Interview with Sup. People's Ct. Vice President Su Zelin], CCTV INTERNATIONAL (Mar. 10, 2005), <http://big5.cctv.com/gate/big5/news.cctv.com/china/20070228/103657.shtml>.

<sup>221</sup> 人民法院第二个五年改革纲要（2004-2008） [Second Five-Year People's Courts Reform Program (2004-2008)] (promulgated by the Sup. People's Ct., Oct. 26, 2005, effective Oct. 26, 2005) SUP. PEOPLE'S CT. GAZ. (P.R.C.).

<sup>222</sup> 人民法院第三个五年改革纲要（2009-2013） [Third Five-Year People's Courts Reform Program (2009-2013)] (Mar. 17, 2009) SUP. PEOPLE'S CT. GAZ. (P.R.C.).

<sup>223</sup> 左卫民, 冯军 [Zuo Weimin & Feng Jun], 寻求规范与技术的合理性: 最高法院与全国人大的关系研究 [In Search of the Rationality of Norms and Technicalities], in 最高法院研究 [SUPREME COURTS IN PERSPECTIVE] 229 (左卫民 [Zuo Weimin] ed., 2004).

<sup>224</sup> See Work Report of the Sup. People's Ct. (2009), *supra* note 120.

<sup>225</sup> See Work Report of the Sup. People's Ct. (2010), *supra* note 131.

## 2. The Party-State's Role

The Party-State did not elevate “the advancement of judicial system reform” to the national policy agenda until 2002. It was only in 2003 that the Political-Legal System established a Judicial Reform Leadership Group to coordinate various judicial reform offices within the judiciary and the procuracy. According to a Peking University law professor who closely followed developments at the time, the Xiao Court had demanded that the CCP permit more wide-ranging judicial remedies for citizen petitions and a three-tier appellate system that offers an additional chance for claimants to have incorrect judgments reversed.<sup>226</sup> These proposals were ruled out by the Judicial Reform Leadership Group, demonstrating the Party-State's reluctance for judicial reform at the time.

The CCP's release in 2008 of the *Opinions on Deepening Reform of the Institutions and Working Mechanisms of the Judicial System* (“Opinions”) simply reiterated what the SPC had been arguing for since the mid-1990s. The *Opinions* called for a “just, efficient, and authoritative socialist judicial system” by eliminating the obstacles to the proper exercise of power by judges and the administration of justice.<sup>227</sup> Specifically, it advocated for a more balanced criminal justice policy, greater financial security for courts, and high quality judicial personnel. In a way, recognition of the SPC's work over the previous decade represented a change in the mentality of Party rulers.

### C. The Dynamics of Judicial Reform

#### 1. Common Law with Chinese Characteristics?

The Individual Case Guiding System (“ICGS”) is a recent SPC innovation. In 2002, the Court required lower court judges to justify to provincial high courts their opinions that differed from the legal doctrines laid down by higher court decisions.<sup>228</sup> In 2007, Chief Justice Xiao pledged before the NPCSC that the SPC would “fully develop the superintendent power of classic cases, summarize a concrete vision of the application of law, and instruct lower courts how to apply laws correctly.”<sup>229</sup>

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<sup>226</sup> 陈瑞华 [Chen Ruihua], 在中国政法大学的演讲：司法体制改革的困境与出路 [Talk at the China University of Political Science and Law: The Perils and Solutions of Judicial Reform] (Sept. 19, 2009), available at <http://view.news.qq.com/a/20090914/000023.htm>.

<sup>227</sup> 李斌、隋笑飞、陈菲、邹伟 [Li Bin et al.], 中央今年将出台 30 项左右司法体制改革实施意见 [This Year, the Center to Introduce Approximately Thirty Implementing Opinions on Judicial Reform], 人民网 [PEOPLE'S DAILY ONLINE], Feb. 22, 2010, available at <http://www.miluo.gov.cn/theory/zyzx/29642.html> (last visited Aug. 27, 2011).

<sup>228</sup> J1, *supra* note 4, at 139.

<sup>229</sup> 最高人民法院院长肖扬 [Xiao Yang, Sup. People's Ct., President], 最高人民法院关于完善审判工作监督机制促进公正司法情况的报告 [Sup. People's Ct. Report on the State

According to a professor at the SPC's National Judges College, the ICGS refers to an arrangement by which "sample cases" approved and published in the SPC *Gazette* are vested with "high persuasive power" in the judging of similar cases.<sup>230</sup> Justice Su Zelin believed that the ICGS can "compensate for the inadequacies of statutory law, effectively integrate and coordinate judicial resources, improve the efficiency of adjudication, resolve social conflicts, and promote social harmony," but he cautioned against "uncritically copying the doctrine of precedent in Western states, which is fundamentally incompatible with the legal system of our country."<sup>231</sup>

SPC Research Chief Judge Shao Wenhong remarked that the practical distinction between the civil law system and the common law system has become "increasingly meaningless" and that the mutual borrowing of legal ideas has become a "global trend."<sup>232</sup> In 2008, the SPC sent a research delegation to Hong Kong and found that the territory's "Anglo-American style of adjudication is transparent and independent" because of "the high authority, quality, and accessibility of binding case law."<sup>233</sup> Activist-professional judges were clearly interested in emulating elements of common law as part of the initiative.

Even before the ICGS, judgments approved by the SPC have been received by the entire judiciary as *de facto* binding.<sup>234</sup> Generally, high court "precedents" have been rigidly adhered to by lower courts handling similar cases.<sup>235</sup> Despite local legislatures' keenness to interfere in judicial affairs, they normally lack the professional capacity to interpret laws to any meaningful extent.<sup>236</sup> As a result, lower-level judges generally uphold the SPC's expert decisions in order to fend off undesirable interference.<sup>237</sup>

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of the Improvement of Adjudication Work and Supervisory Mechanism in Pursuit of Fair Justice] (Oct. 26, 2007) STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (P.R.C.).

<sup>230</sup> Zhao, *supra* note 29.

<sup>231</sup> Su, *supra* note 79.

<sup>232</sup> 最高人民法院研究室主任邵文红与网友在线交流 [Shao Wenhong, Head of the Supreme People's Court Research Office, Interacts with Netizens Online], 中国法院网 [CHINA COURT] (Mar. 8, 2007), available at [http://news.xinhuanet.com/legal/2007-03/08/content\\_5816705.htm](http://news.xinhuanet.com/legal/2007-03/08/content_5816705.htm) (last visited Aug. 27, 2011).

<sup>233</sup> 最高人民法院案例指导制度考察团 [Sup. People's Ct. ICGS Delegation], 香港判例制度、澳门统一司法见解制度考察报告 [Hong Kong Case Precedent and Macao Unified Judicial Opinions Study Report], 15 人民司法 [PEOPLE'S JUDICATURE] 41-44 (2008).

<sup>234</sup> See Wang, *supra* note 6.

<sup>235</sup> Nanping Liu, "Judicial Review" in China: A Comparative Perspective, 14 REV. SOCIALIST L. 246-50 (1988).

<sup>236</sup> See XIN, *supra* note 41.

<sup>237</sup> See Keith, *supra* note 172, at 241.

## 2. Internalizing Activist-Professional Values in Local Courts

The SPC has adopted many methods to encourage local judges to internalize its ideology. These include an impressive array of publications, examinations, and training programs. The SPC's publications are increasingly diverse in their coverage. The *People's Court Daily* ("Daily") (人民法院报) has become regarded by judges as the major channel through which they learn new information and communicate with each other.<sup>238</sup> The *Daily* retains its position in the top ten newspapers most popular among judges that are published by central authorities. In addition, the SPC practice publications such as the *Selections of Judicial Documents* and the *Judicial Handbook* have become popular and convenient toolboxes for judges to use in handling their complex daily work.

As some of the most oft-cited legal academic authorities in China, SPC judges frequently publish research essays that widely circulated within judicial circles. Publications are typically pluralistic in methodology and receptive to legal developments elsewhere in the world. For instance, Judge Kong Xiangjun did not cite in his 2007 *People's Judicature* article Marxist jurists; rather, he cited U.S. Supreme Court Justice Oliver Wendell Holmes Jr. in support of his vision of judicial pragmatism in weighing legal, political, and policy choices.<sup>239</sup> The academic reputation and institutional authority of SPC judges have also likely played a role in helping the Court gain recognition and respect from lower courts.

The SPC has placed a high priority on training. The Judicial Training Rules (2006) restated its goal to constantly raise the political, operational, and ethical qualities of judges to meet the development of adjudication work.<sup>240</sup> Judges evading training during their term of office without valid justification will be penalized. Founded in 1997, the National Judges College offers training courses to senior local judges. In 2006, the enrollment in all training courses numbered around 230,000.<sup>241</sup> And every year the Court sponsors judges to visit, study, and practice abroad.<sup>242</sup> In 2005, 258 SPC judges and 116 lower court judges visited the United States, Europe, and other regions.<sup>243</sup> In 2009, the SPC signed a tripartite agreement with the City University of Hong Kong School of

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<sup>238</sup> Zuo, *supra* note 223, at 442.

<sup>239</sup> See 孔祥俊 [Kong Xiangjun], 裁判中的法律、政策与政治—以知识产权审判为例 [*The Law, Policy, and Politics of Adjudication: Using Intellectual Property Adjudication as an Example*], 13 人民司法 [PEOPLE'S JUDICATURE] 24-27 (2008).

<sup>240</sup> 最高人民法院、中华人民共和国 法官培训条例 [Supreme People's Court, Judicial Training Rules of the People's Republic of China] (2006).

<sup>241</sup> 最高人民法院工作报告 [Work Report of the Supreme People's Court] (2007).

<sup>242</sup> See Y. Cheng, *Juridical Protection of Intellectual Property in China*, 9 DUKE J. COMP. & INT'L L. 267-73 (1998).

<sup>243</sup> 中国法律年鉴编辑部 [CHINA LAW ASSOCIATION], 中国法律学年鉴 [LAW YEARBOOK OF CHINA] 66 (2006).

Law and Columbia Law School to provide training to approximately thirty Chinese judges.<sup>244</sup>

Although a notice issued by Chief Justice Wang urged judges to improve their political discipline and training in Marxism-Leninism,<sup>245</sup> Vice President Justice Jiang Bixin clarified that “it is plainly inadequate for judicial officials to possess political awareness only; they must have complete legal awareness and form the habit of thinking legally. They must defend the Constitution and avoid neglecting their rightful judicial duties in the course of adjudicating procedurally and substantively.”<sup>246</sup> Despite the Chief Justice’s attempts to highlight the populist or political component of judging, expert judges appear to remain committed to activist-professional values.

### 3. Strengthening Judicial Autonomy

Judicial Committees advise local judges on how to conform to the current policies of the Party.<sup>247</sup> They are typically dominated by court presidents, who are normally chosen through the *nomenklatura* system and appointed by the legislature at the corresponding level. Presidents may reassign a case from one collegial panel to another or bring it to a Judicial Committee for review. Oftentimes, the judges who rule on cases are not the same ones who originally heard the litigants’ pleadings.

This mode of operation has proven to be problematic. In response, the SPC in 2000 consolidated the system of “presiding judges and independent judges” as a credible alternative to Judicial Committee dominance.<sup>248</sup> Collegial panels enable talented young judges to play a more prominent role in judicial governance.<sup>249</sup> A 2002 SPC decision endeavored to preserve the independence

<sup>244</sup> Colum. L. Sch., Judges from China Learn to Study American Legal System at Columbia Law School, Colum. L. Sch. Website (June 5, 2009), [http://www.law.columbia.edu/media\\_inquiries/news\\_events/2009/june2009/ChineseJudges](http://www.law.columbia.edu/media_inquiries/news_events/2009/june2009/ChineseJudges).

<sup>245</sup> 最高人民法院 [Sup. People’s Ct.], 人民法院工作年度报告 (2010 年) [Work of the People’s Courts: Annual Report (2010)] (May 25, 2010), [http://www.court.gov.cn/qwfb/sfsj/20105/t2010525\\_100996.htm](http://www.court.gov.cn/qwfb/sfsj/20105/t2010525_100996.htm).

<sup>246</sup> 江必新 [Jiang Bixin], 论处理司法与政治关系的基本准则 [On the Basic Rules for the Management of the Relationship between the Administration of Justice and Politics], 人民法院报 [PEOPLE’S CT. DAILY] (Sept. 15, 2009), available at <http://chinacourt.org/public/detail.php?id=373781>.

<sup>247</sup> Tahirih V. Lee, *Exporting Judicial Review from the United States to China*, 19 COLUM. J. ASIAN L. 152 (2006).

<sup>248</sup> 人民法院审判长选任办法 (试行) [Sup. People’s Ct. Measures for the Election of Chief Judges (Trial Implementation)] (promulgated by the Sup. People’s Ct., July 28, 2000) BEIJING HIGH PEOPLE’S CT. BUS. STUD. RESOURCES (P.R.C.).

<sup>249</sup> See 最高人民法院常务副院长祝铭山接受新华网专访 [Sup. People’s Ct. Permanent Vice President Zhu Mingshan Interviewed by Xinhua News], 中国法院网 [CHINA COURT] (Apr. 2, 2002), <http://www.chinacourt.org/public/detail.php?id=1159>.

of the collegial panel from Judicial Committee interference.<sup>250</sup> This was followed eight years later by another decision that decreed the “mandatory and equal participation” of every member of a collegial panel across the multiplicity of trial proceedings.<sup>251</sup> Court presidents and Party secretaries were ordered not to revise panel decisions unless collegial judges voluntarily refer their cases to the Judicial Committees. Five years since the promulgation of the first five-year program, the number of cases decided by Judicial Committees has fallen to less than five percent of all cases.<sup>252</sup>

#### 4. Upgrading Judicial Discipline

In 1998, the SPC ventured to safeguard “fairness and justice in the judicial process” by detailing conduct judges ought to eschew when performing their duties.<sup>253</sup> The Court elaborated on the rule against bias in 2000, holding that judges must recuse themselves when they are related to the parties or attorneys, have personal interests at stake, were previously involved in the case in any capacity, or have conflicting interests with any of the litigants.<sup>254</sup> The SPC published a *Basic Code of Judicial Ethics* (2001), which enjoined judges from trying cases in which they may be required to act in an extrajudicial capacity—as private citizens or adjunct professors, for example.<sup>255</sup> All existing disciplinary provisions were systematically summarized in one concise seven-article code, the *Disciplinary Rules for People's Courts Personnel* (2010). Moreover, the SPC assigned approximately 27,750 anti-judicial corruption officers to each of its specialist tribunals and 2914 lower courts to enforce

<sup>250</sup> 最高人民法院关于人民法院合议庭工作的若干规定 [Sup. People's Ct. Rules for the Work of the Judicial Panels of the People's Courts] (promulgated by the Sup. People's Ct. Jud. Committee, July 30, 2002) SUP. PEOPLE'S CT. GAZ. (P.R.C.).

<sup>251</sup> 最高人民法院关于进一步加强合议庭职责的若干规定 [Sup. People's Ct. Rules for Advancing the Work Responsibilities of Collegial Panels in the People's Courts] (adopted by the Sup. People's Ct. Jud. Committee, Dec. 14, 2009, promulgated Jan. 11, 2010, effective Feb. 1, 2010) SUP. PEOPLE'S CT. GAZ. (P.R.C.).

<sup>252</sup> 郭欣阳、张李丽 [Guo Xinyang & Zhang Lili], “公检法联合办案”机制检讨 [Rethinking the Mechanism of Public Security-Procuratorate-Judiciary Joint Operations], 中国检察官 [CHINESE PROCURATORS] 50 (2009), available at <http://cnki.com.cn/Article/CJFDTotat-JCSJ200911022.htm> (last visited Aug. 27, 2011).

<sup>253</sup> 人民法院审判人员违法审判责任追究办法（试行） [Measures on Holding Judges of the People's Courts Liable for Illegal Adjudication (Trial)] (promulgated Aug. 26, 1998, effective Aug. 26, 1998) BEIJING HIGH PEOPLE'S CT. BUS. STUD. RESOURCES (P.R.C.).

<sup>254</sup> 最高人民法院关于审判人员严格执行回避制度的若干规定 [Sup. People's Ct. Rules for the Strict Implementation of the System of Judicial Recusal] (promulgated by the Sup. People's Ct., June 15, 2000) SUP. PEOPLE'S CT. GAZ. (P.R.C.).

<sup>255</sup> 中华人民共和国法官职业道德基本准则 [Basic Code of Judicial Ethics of the People's Republic of China] (promulgated by the Sup. People's Ct., Oct. 18, 2001, amended and re-promulgated Dec. 6, 2010) SUP. PEOPLE'S CT. GAZ. (P.R.C.).

disciplinary regulations. As Zhang Youlian observed, the Court is behaving more and more like a “guardian” of the local judiciary.<sup>256</sup>

### 5. Regulating Local Legislative and Bureaucratic Interference

The SPC has expressed strong disapproval towards the abuse of power to protect local interests. Chief Justice Xiao has also condemned lower courts as “participants in local protectionism.”<sup>257</sup> Justice Cao Jianming has censured judicial-executive collaborations at the local level as destructive to “judicial neutrality.”<sup>258</sup> In a conversation with anonymous Internet users, Justice Liu Jiashen asserted that judges should not only punish the criminals, but also their collaborators in the local governments.<sup>259</sup>

To shut off other channels of undue bureaucratic and legislative influence, the SPC has instructed lower-level judges to decide cases within seven days of receiving applications for trial.<sup>260</sup> If they fail to do so, the claimant may appeal to a higher court. Today, trial judges often turn to provincial high courts, and ultimately the SPC, for binding guidance. Due to heavy costs in ruling against authorities of the same level, local judges often detail the grounds for appeal on behalf of the losing parties to signal to higher courts whether the initial judgment should be overturned.<sup>261</sup> The defendants, county-level assemblies and bureaucracies, normally have less influence on provincial-level courts.<sup>262</sup>

In 2008, the Wang Court issued a notice requiring judges to accept “supervisory power” in lieu of direct control of the local people’s congresses.<sup>263</sup>

<sup>256</sup> 张友连 [Zhang Youlian], 论最高人民法院公共政策创制形式及选择 [*The Form and Choice of Public Policy Formation in the Supreme People’s Court*], 法律科学 [LEGAL SCI.] 43 (2010).

<sup>257</sup> Work Report of the Supreme People’s Court (1999), *supra* note 210.

<sup>258</sup> 冯玉国 [Feng Yuguo], 地方保护主义损害市场经济基 [*Local Protectionism Destroys the Foundations of the Market Economy*], 上海证券报 [SHANGHAI SEC. NEWS] (Apr. 5, 2010), available at [http://news.xinhuanet.com/comments/2007-04/03/content\\_5927154.htm](http://news.xinhuanet.com/comments/2007-04/03/content_5927154.htm) (last visited Aug. 27, 2011).

<sup>259</sup> 高法负责人表示, 地方保护主义和腐败是两大绊脚石 [*According to the Supreme People’s Court, Local Protectionism and Corruption are the Two Stumbling Blocks*], 新华网 [XINHUA NEWS] (Mar. 10, 2002), <http://news.sina.com.cn/c/2002-03-10/2202502437.html> (last visited Aug. 27, 2011).

<sup>260</sup> SARAH BIDDULPH, LEGAL REFORM AND ADMINISTRATIVE DETENTION POWERS IN CHINA 306 (2007).

<sup>261</sup> See Landry, *supra* note 47, at 57.

<sup>262</sup> Kevin J. O’Brien & Li Lianjiang, *Suing the Local State: Administrative Litigation in Rural China*, 51 CHINA J. 85–86 (2004).

<sup>263</sup> 王胜俊 [Wang Shengjun], 始终坚持“三个至上”实现人民法院工作指导思想的与时俱进 [*Adopt the “Three Supremes” as Guiding Thought: Efforts to Create a New Era of the People’s Courts’ Operations*], 人民法院报 [PEOPLE’S CT. DAILY] (Sept. 10, 2008), available



Courts were asked to promptly send their reports to the standing committees of local congresses. However, the SPC did not mention the need for judges to comply with the legislatures' ICS. It merely repeated the legal position of the courts as stated in existing legislation without adding any new requirements. This decision may have encouraged local courts to manipulate legislative supervision in controversial cases so that the legislature would shoulder the blame for unpopular decisions.

## **6. Extending Control over the Provincial Courts**

In recent years, the SPC has been tightening its control over the personnel and management of provincial high courts. Provincial CCP committees must now negotiate with the SPC Party Group, more or less equivalent to the SPC's Judicial Committee, before appointing presidents of provincial high courts.<sup>264</sup> The Court regularly promotes members of provincial high courts to its own specialist tribunals, and sometimes, SPC judges are assigned to lead provincial courts. For example, President Qian Feng of the Chongqing High Court and President Sun Huapu of the Guizhou High Court were both former presiding judges of SPC tribunals. Clearly, this measure has gone beyond the mere construction of judicial independence; the powers of local courts are being increasingly transferred to the provincial courts and the SPC.

## **7. Enhancing Judgment Enforcement**

Local courts are responsible for enforcing their own judgments, but judicial officers in the enforcement division are often the least trained staff.<sup>265</sup> Recognizing the institutional deficiencies that have given rise to the existing impediment to judgment enforcement, the SPC has continually reallocated important enforcement powers from lower tribunals to provincial high courts. In 2000, the SPC conferred on high courts the power to centrally coordinate enforcement of judgments.<sup>266</sup> They may command at their own discretion the resources of every local court within their jurisdiction. Also, they may impose enforcement deadlines and punish incompetent enforcement personnel. In exchange for this authority, high courts are required to strictly enforce any judgment that the SPC designates as important.

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at [http://news.xinhuanet.com/legal/2008-09/10/content\\_9891670.htm](http://news.xinhuanet.com/legal/2008-09/10/content_9891670.htm); Work Report of the Sup. People's Ct. (2008), *supra* note 131.

<sup>264</sup> *Id.* at 74–80.

<sup>265</sup> See PEERENBOOM, *supra* note 53, at 288.

<sup>266</sup> 最高人民法院关于高级人民法院统一管理执行工作若干问题的规定 [Sup. People's Ct. Rules for the Unification of Management and Enforcement Work of the High People's Courts] (promulgated by the Sup. People's Ct., Jan. 14, 2000) BEIJING HIGH PEOPLE'S CT. BUS. STUD. RESOURCES (P.R.C.).

## 8. Outcomes

Senior SPC justices have conceded that not every judge throughout the PRC's vast territories understood the measures of the judicial reforms.<sup>267</sup> Even so, initial responses to the judicial reforms were generally positive.<sup>268</sup> For example, courts in Sichuan Province launched a two-year campaign to eradicate corrupt personnel, and a quarter of the judges in Tianjin Municipality were removed because they failed their judicial professional exams.<sup>269</sup> Although national judgment enforcement rates remain low, one study has shown that they have improved from twenty-four percent in 1992 to around thirty-five percent to forty-five percent between 2005 and 2006.<sup>270</sup>

The measures associated with the ethical rules were said to have led to a 53.42% decrease between 2003 and 2007 in the number of judges being arrested for misconduct.<sup>271</sup> In 2010 alone, Chief Justice Wang reported that the SPC-appointed anti-corruption officers contributed to the detention of 795 corrupt judges.<sup>272</sup> While judicial corruption persists in spite of the reforms, rural judges are taking increasingly activist roles in light of the political, economic, and social oppression.<sup>273</sup> Once described as little different from the post office, local courts are now occasionally able to stand up to the people's congresses, the procuracy, the police, and wealthy businesses.<sup>274</sup> Bureaucratic intermeddling has decreased.<sup>275</sup> Additionally, as revealed by a 2004 survey, local courts are outperforming administrative agencies and the police in winning public trust.<sup>276</sup> The ability of local courts to increase their legitimacy and independence within just four years after the first judicial reform program was launched may be partly due to the SPC and its reform efforts.

However astonishing the fiscal scale of the judicial reform measures may seem, the SPC has seldom been able to depend on significant budgetary

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<sup>267</sup> 最高人民法院政治部主任李克就《法官行为规范（试行）》的制定答记者问 [Sup. People's Ct. Head of Department of Politics Li Ke Responds to Media Enquiries in relation to the Draft Normative Rules for Judicial Behavior], 法制动态 [LEGAL NEWS] (Oct. 25, 2005), available at <http://www.law-lib.com/fzdt/newshtml/21/20051025204718.htm> (last visited Aug. 27, 2011).

<sup>268</sup> See Zhao, *supra* note 29, at 110.

<sup>269</sup> *Id.*

<sup>270</sup> Zhu, *supra* note 61.

<sup>271</sup> Work Report of the Sup. People's Ct. (2008), *supra* note 131.

<sup>272</sup> Work Report of the Sup. People's Ct. (2010), *supra* note 131.

<sup>273</sup> Balme, *supra* note 201, at 197.

<sup>274</sup> See PEERENBOOM, *supra* note 53, at 183.

<sup>275</sup> He, *supra* note 57, at 149.

<sup>276</sup> Pierre Landry, *The Institutional Diffusion of Courts in China: Evidence from Survey Data*, in RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES CONFERENCE ON COURTS IN AUTHORITARIAN REGIMES 212 (Tom Ginsburg & Tamir Moustafa eds., 2008).

support from the state. Indeed, reform initiatives have proved profitable enough to sustain the SPC's ambitions virtually without proactive support of the Party-State. In 2009, the Court collected at least sixty-nine million RMB,<sup>277</sup> roughly seven times more than the estimated annual expenditure of an average Chinese court (approximately ten million RMB),<sup>278</sup> and it spent only 163 million of its 257 million budget for the year. The budget was not particularly impressive in the context of overall state spending; nevertheless, the SPC was quite prudent in managing its resources; by the end of 2009, its cumulative budgetary surplus stood at 219 million RMB. Major sources of income for the SPC include fees from degree-level and professional programs, the sale of periodicals, practice handbooks, and trade newspapers to lower courts, law firms, law schools, and businesses, and income generated by rental properties.<sup>279</sup>

#### D. Analysis

The SPC has substantially transformed the operations of lower courts. It has successfully persuaded lower courts to follow its decisions. The effectiveness of judicial reform is strongly correlated to the reputation of the SPC as a central government organ run by legal experts and the strength of provincial courts. Today, after decades of reform efforts, provincial courts have considerable incentives for advancing the Court's initiatives. Better-qualified provincial judicial officers have likely internalized the SPC's activist-professional belief system and imitated the behavior of the Court's members. Nonetheless, despite to provincial courts' replication of SPC norms, they remain constrained by local Party-State agents.

#### IV. THE CONSTITUTIONAL JURISPRUDENCE OF THE SUPREME PEOPLE'S COURT

According to the Constitution of the PRC, the powers of constitutional interpretation and supervision belong to the NPC and the NPCSC. Before the rise of Chief Justices Ren and Xiao, in at least two oft-cited rulings from 1955 and 1986, the SPC had forbidden lower courts from interpreting the Constitution.<sup>280</sup> Formal constitutional review mechanisms are virtually non-

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<sup>277</sup> 国家测绘局 [St. Bureau Surveying & Mapping], 2009 年度预算执行情况和其他财政收支情况审计结果 [2009 Budget Implementation and Other Financial Income and Expenditure Audit Results] (June 23, 2010), available at [http://www.gov.cn/zwggk/2010-06/23/content\\_1635483.htm](http://www.gov.cn/zwggk/2010-06/23/content_1635483.htm) (last visited Aug. 27, 2011) [hereinafter 2009 Budget].

<sup>278</sup> Donald C. Clarke, *Politburo Proposes to Centralize Court Funding*, 郭丹青的中国法律博客 [DONALD CLARKE'S CHINA L. BLOG] (Dec. 7, 2008 15:24), [http://blog.sina.com.cn/s/blog\\_5bc42a990100ber5.html](http://blog.sina.com.cn/s/blog_5bc42a990100ber5.html).

<sup>279</sup> 2009 Budget, *supra* note 277.

<sup>280</sup> 最高人民法院关于在刑事判决中不宜援引宪法作论罪科刑的依据的复函 [Sup. People's Ct. Reply on the Inappropriateness of the People's Courts in Using the

existent. Despite Article 88 of the Legislative Law (2000), which invested varying degrees of power to strike down unconstitutional or illegal legislation and administrative rules, the judiciary is powerless to act. Therefore, without any power of constitutional judicial review in the PRC's civil law system, courts could only apply well-settled law but could not reinterpret the law in light of the Constitution.<sup>281</sup> Additionally, many Chinese constitutional theorists believe that the people's congresses, as the supreme embodiment of the people's will at all levels of governance, may not be checked.<sup>282</sup> Tong Zhiwei, Vice Chairman of the Constitutional Law Branch of the Chinese Law Society, argues that a Socialist legal system would descend into chaos if courts were allowed to implement the Constitution, a power exclusively held by the NPC.<sup>283</sup>

Contrary to ideological orthodoxy, the SPC has in practice promulgated a considerable number of decisions that have altered the allocation of authority among state organs and the relationship between the state and its citizens. Currently, much of the SPC's docket is full of cases involving large monetary claims and disputes over facts rather than genuine constitutional disputes.<sup>284</sup> The vast majority of political conflicts are resolved under the original jurisdiction of local courts and may be appealed only to the immediate superior court for final review. In other words, the SPC has elaborated its constitutional decisions mainly through abstract judicial interpretations.

The coupling of activist and professional values in the Court's autonomous ideological system has promoted discrepancies between judicial preferences and the preferences of other political actors. The judiciary's self-perception as active participants in policy-making and as authoritative interpreters of law has encouraged the SPC to rule against local actors. Central to the sustainability of judicial empowerment will be the Court's ability to frame its expanded policy-making activities as an advancement of the Party-State's interests.

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Constitution as the Legal Basis of Criminal Adjudication] (promulgated by the Sup. People's Ct., July 30, 1955), available at [http://www.law-lib.com/law/law\\_view.asp?id=1011](http://www.law-lib.com/law/law_view.asp?id=1011) (last visited Aug. 27, 2011); 最高人民法院关于人民法院制作法律文书如何引用法律规范性文件的批复 [Sup. People's Ct. Reply on the Creation and Quotation of Standardized Legal Documents by the People's Courts] (promulgated by the Sup. People's Ct., Oct. 28, 1986) BEIJING HIGH PEOPLE'S CT. BUS. STUD. RESOURCES (P.R.C.).

<sup>281</sup> See Zhu Guobin, *Constitutional Review in China: An Accomplished Project or a Mirage?*, 43 SUFFOLK U. L. REV. 627, 630 (2010).

<sup>282</sup> 马岭 [Ma Ling], 违宪与违宪审查及其相关问题研究 [A Study of Unconstitutionality, Constitutional Review, and Related Problems], 11 清华法学 [TSINGHUA L.J.] 131 (2007):

<sup>283</sup> Zhiwei Tong, *A Comment on the Rise and Fall of the Supreme People's Court's Reply to Qi Yuling's Case*, 43 SUFFOLK U. L. REV. 673 (2010).

<sup>284</sup> See Xiao, *supra* note 173.

## A. The Supreme People's Court and Judicial Review

### 1. Keeping Local Laws in Line with National Jurisprudence

The economic reforms of the 1980s and 1990s have shifted considerable decisional powers from the central state to the localities.<sup>285</sup> The deaths of strongmen like Mao and Deng, as well as ongoing fiscal decentralization, have accelerated political fragmentation throughout the PRC. While the center retains control over the military, the general ideology, major provincial appointments, and important financial and natural resources, provincial leaders have expanded their powers, which include the appointment of cadres, the provincial budget, local salary levels, and legislative enactments.<sup>286</sup> Many localities now behave in ways that are fundamentally inconsistent with Beijing's policies.

Although members of the public have the formal right to complain about local misconduct to the NPC, there is no evidence that any law has ever been invalidated in through this method.<sup>287</sup> The NPCSC has been consistently reluctant to exercise its formal constitutional review powers.<sup>288</sup> In comparison, since the 1980s, the SPC has increasingly encouraged lower courts to exercise their *de facto* power to review local laws with the purpose of combating corruption and abuses of power. In 1985, the Court handed down a decision that challenged the constitutionality of certain local economic ordinances, which were perceived as hampering regional economic development.<sup>289</sup> After reiterating the usual stance that lower courts should examine local ordinances closely, the Court opined that "[i]f some local laws are found to contravene the Constitution, primary legislation, and administrative regulations, they should be reported to the people's congress of the province and its standing committee."<sup>290</sup> The word "report" has a special meaning in the PRC, which "nearly all Chinese legal scholars" would agree signals a demand that courts refrain from giving force to acts they have found to be unconstitutional or illegal.<sup>291</sup>

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<sup>285</sup> See PEERENBOOM, *supra* note 6.

<sup>286</sup> See Murry Scot Tanner & E. Green, *Principals and Secret Agents: Central versus Local Control over Policing and Obstacles to 'Rule of Law'*, in CHINA'S LEGAL SYSTEM: NEW DEVELOPMENTS, NEW CHALLENGES 114 (Donald C. Clarke ed., 2008).

<sup>287</sup> C. FRED BERGSTEIN ET AL., CHINA: THE BALANCE SHEET 69 (2006).

<sup>288</sup> Sanzhuan Guo, *Implementation of Human Rights Treaties by Chinese Courts: Problems and Prospects*, 8 CHINESE J. INT'L L. 171 (2009).

<sup>289</sup> 最高人民法院关于加强经济审判工作的通知 [Sup. People's Ct. Notification on Strengthening the Work of Economic Adjudication] (promulgated by the Sup. People's Ct., Dec. 9, 1985) SUP. PEOPLE'S CT. GAZ. (P.R.C.).

<sup>290</sup> Liu, *supra* note 235, at 245–246.

<sup>291</sup> *Id.* at 246.

In 1993, the SPC declared a Fujian Province ordinance that granted provincial authorities excessive and arbitrary powers to seize fishing vessels to be "inapplicable in the judicial process."<sup>292</sup> A 1994 decision reaffirmed the position that whenever courts encounter local ordinances inconsistent with national laws, they are bound to follow the latter.<sup>293</sup> In 1995, the Court circumscribed the Sichuan government's powers to manage highways by declaring that Article 5 of the provincial congress's Public Roads Management Ordinance was inapplicable.<sup>294</sup> In 1996, the Court affirmed a lower court ruling that prohibited the police of Hohhot City, in the Inner Mongolia Autonomous Region, from confiscating scrap metal for their own profits.<sup>295</sup>

In light of the proliferation of commercial transactions, the Court decided in 1999 that local ordinances and regulations, which too often privilege provincial interests, would no longer serve as a legal basis for rescinding contracts.<sup>296</sup> In 2008, the SPC ruled that courts will fight against "local protectionism" by reporting local legislative and administrative acts whenever they obstruct the implementation of judicial decisions, and will supply the competent CCP disciplinary body with evidence to undercut regional defiance.<sup>297</sup>

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<sup>292</sup> 最高人民法院关于人民法院审理行政案件对地方性法规的规定与法律和行政法规不一致的应当执行法律和行政法规的规定的复函 [Sup. People's Ct. Reply on the Solution to the Inconsistencies between Local Regulations, Administrative Regulations and Laws in the Course of Administrative Adjudication] (promulgated by the Sup. People's Ct., Mar. 11, 1993) BEIJING HIGH PEOPLE'S CT. BUS. STUD. RESOURCES (P.R.C.).

<sup>293</sup> 最高人民法院关于人民法院审理行政案件对缺乏法律和法规依据的规章的规定如何参照问题的答复 [Sup. People's Ct. Reply on the Situations in which there were Inadequate Laws for the People's Courts to Rely on during the Course of Administrative Adjudication] (promulgated by the Sup. People's Ct., Jan. 13, 1994), available at [http://www.law-lib.com/law/law\\_view.asp?id=10144](http://www.law-lib.com/law/law_view.asp?id=10144) (last visited Aug. 28, 2011).

<sup>294</sup> 最高人民法院关于公路路政管理机构行政主体资格及有关法律适用问题的答复 [Sup. People's Ct. Reply on the Application of Law Related to the Public Roads Management Organization] (promulgated by the Sup. People's Ct., Jan. 15, 1995, effective Jan. 15, 1995).

<sup>295</sup> 最高人民法院行政审判庭关于《呼和浩特市废旧金属管理暂行规定》的效力问题的答复 [Sup. People's Ct. Admin. Tribunal Reply on the Effectiveness of the Hohhot City Provisional Measures for the Management of Used Metals] (promulgated by the Sup. People's Ct. Admin. Tribunal, Sept. 23, 1996), available at <http://www.chinabaike.com/law/zy/sf/fy/1337404.html> (last visited Aug. 28, 2011).

<sup>296</sup> 最高人民法院关于适用《中华人民共和国合同法》若干问题的解释（一） [Sup. People's Ct. Interpretation on Several Problems Related to the Application of the Contract Law (I)] (promulgated by the Sup. People's Ct., Dec. 19, 1999) BEIJING HIGH PEOPLE'S CT. BUS. STUD. RESOURCES (P.R.C.).

<sup>297</sup> 最高人民法院关于为维护国家金融安全 and 经济全面协调可持续发展提供司法保障和法律服务的若干意见 [Sup. People's Ct. Notification on Protecting National Financial Security and the Coordination of Whole Population Sustainable Economic Development through Judicial Safeguards and Legal Services] (promulgated Dec. 3, 2008) SUP. PEOPLE'S CT. GAZ. (P.R.C.); 熊红祥 [Xiong Hongxiang], 最高法院新闻发言人

In 1997, the SPC's Administrative Tribunal struck down portions of a Baotou City regulation on the grounds that it was "not supported by national laws and administrative regulations," and thus could not confer legality on the defendant agency's action.<sup>298</sup> Established in 1988, the Administrative Tribunal has been influential in shaping the development of inter-branch politics. It has original jurisdiction over administrative cases of national significance and appellate jurisdiction over all provincial high court decisions. In the past decade, the work of the Administrative Tribunal has become increasingly diverse.<sup>299</sup>

The Administrative Tribunal is now led by some of the nation's top legal experts. Presiding Judge Zhao Daguang was formerly a member of the Jilin Provincial High Court. He holds a Juris Master from Renmin University, Chief Justice Xiao's *alma mater*. His deputy, Judge Yang Linping, is a former Tsinghua University constitutional law professor who earned a Ph.D. from the Chinese Academy of Social Sciences. Both express activist propensities. According to Zhao, the Administrative Tribunal as a whole believes in the expansion of judicial regulation of government actions.<sup>300</sup> Judge Yang previously argued that "judges, as the final interpreters of the Constitution and the law . . . should faithfully execute their constitutional and legal duties and enforce the general principles of the Constitution," "focus on philosophical and institutional innovation," and "explore the possibilities of creating a constitutional litigation system with Chinese characteristics."<sup>301</sup>

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详解若干意见 [Sup. People's Ct. Media Spokesperson on the "Several Opinions"], 人民法院报 [PEOPLE'S CT. DAILY] (Dec. 5, 2008.), available at [http://news.xinhuanet.com/legal/2008-12/05/content\\_10461224.htm](http://news.xinhuanet.com/legal/2008-12/05/content_10461224.htm) (last visited Aug. 28, 2011).

<sup>298</sup> 最高人民法院行政审判庭关于对包头市人民政府办公厅转发《包头市城市公共客运交通线路经营权有偿出让和转让的实施办法》中设定罚则是否符合法律、法规规定问题的答复 [Sup. People's Ct. Admin. Tribunal Reply on the Baotou City People's Government General Office's Measures on the Transfer of Baotou City Public Transport System Operation Rights] (promulgated by the Sup. People's Ct. Admin. Tribunal, June 2, 1997), available at <http://www.chinabaike.com/law/zy/sf/fy/1337510.html> (last visited Aug. 28, 2011).

<sup>299</sup> See 最高人民法院行政审判庭关于工商行政管理部门对保险机构不正当竞争行为是否有权查处的答复 [Sup. People's Ct. Admin. Tribunal Reply on the Competence of Business Administrative Management Departments in Regulating Inappropriate Competition between Insurance Companies] (promulgated by the Sup. People's Ct. Admin. Tribunal, Feb. 24, 2010), available at [http://www.court.gov.cn/spyw/xzspgjpc/201002/t20100224\\_1823.htm](http://www.court.gov.cn/spyw/xzspgjpc/201002/t20100224_1823.htm) (last visited Aug. 28, 2011).

<sup>300</sup> 赵大光 [Zhao Daguang], 最高人民法院行政审判庭庭长 [Sup. People's Ct. Administrative Tribunal Presiding Judge], 在全国法院优化行政审判司法环境经验交流会上的总结讲话 [Speech at the National Courts System Exchange Conference on the Improvement of the Judicial Environment of Administrative Adjudication] (Nov. 30, 2005).

<sup>301</sup> 杨临萍 [Yang Linping], 法官的宪法理念 [Constitutional Ideas for Judges], 4 国家法官学院学报 [NATIONAL JUDGES C. J.] 35-36 (2003).

The SPC issued one of its most significant decisions on the judicial review of local ordinances in 2004.<sup>302</sup> On May 27, 2003, Judge Li Huijuan of the Luoyang Intermediate People's Court invalidated the Henan Province Agricultural Seeds Management Act on grounds of inconsistency with the national Seeds Law (2001). Deeply provoked by this unexpected move, the provincial legislature denounced judicial review of legislation as unconstitutional. Under pressure from the Henan People's Congress, the court's party group decided to remove Judge Li and Vice President Judge Zhao Guangyun from their positions.

Li took her case to the SPC. On March 30, 2004, the Court issued a reply stating that pursuant to Article 79 of the Legislative Law, primary legislation overrides both local laws and administrative regulations. While the SPC avoided the politically sensitive issue of whether judges have authority to strike down provincial legislative acts, it unequivocally affirmed that when provincial laws contradict national ones, judges should rely only on the latter. Judges Li and Zhao were restored to their original positions. However, the Henan Provincial Court overturned Li's ruling on remand, a compromise between the central and local governments.

The SPC restated its position during an internal seminar. According to the lengthy meeting minutes which were later included in a binding judicial interpretation, the local judiciary is responsible for ensuring that local laws are consistent with national ones.<sup>303</sup> When inconsistencies arise, judges must rely only on primary legislation to decide the case. If the court is uncertain whether local laws contradict State Council administrative regulations, they must petition the SPC for clarification.

## 2. Expanding Judicial Power beyond the Administrative Litigation Law

The enactment of the Administration Litigation Law ("ALL") in 1999 was arguably the first serious attempt in Chinese history to put a working form of judicial review into practice. The ALL's eleven chapters cover such issues as the scope of reviewability, the standing of applicants, the burden of proof, evidence admissibility, case filing, implementation, and damages.

However, the ALL does not constitute a genuine commitment on the part of the central state to expand judicial power. For example, pursuant to Article 11, the scope of reviewable "concrete" administrative acts extends no further than to torts claims against private persons' bodily and property rights. Administrative regulations and applicable statutes are all beyond the ALL's ambit.<sup>304</sup> Decisions of Party committees and local people's congresses remain

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<sup>302</sup> Zhe Han, *Reflection on the Routine of Interrogation in Violation to the Constitution: From the Event of Disciplinary Action against Judge Li Huijuan and Zhang Guangyun*, 4 J. CHINA YOUTH C. POL. SCI. 111 (2004).

<sup>303</sup> Minutes of the Seminar on the Application of Legal Norms in the Adjudication of Administrative Cases, *supra* note 185.

<sup>304</sup> See Cai & Yang, *supra* note 108.



immune from challenge under the ALL. Its provisions were drafted ambiguously to the advantage,<sup>305</sup> and as of 2010, no amendments have been made to expand its jurisdiction.

Contrary to the ALL's limitation of judicial review to minor acts, the landmark SPC interpretation, *Interpretation of the Application of the Administrative Litigation Law* (2000), expressly provides in broad and inclusive terms that citizens may initiate judicial review if discontent with the administrative behavior of any organ of state that has national administrative responsibilities. The Court established a two-part test for the identification of a concrete administrative acts: (1) the act must have specific targets and (2) the act cannot be recurrently performed. On its face, this interpretation is in line with the ALL, but in practice, it has been qualified by an Administrative Tribunal clarification that states (1) the number of persons affected by an administrative act is not determinative, (2) the recurrent performance of an administrative act in relation to the same persons does not necessarily bar its reviewability, (3) the way administrative authorities label their acts plays no role in determining the acts' concreteness or abstractness, and (4) judges should accept that most administrative acts are both abstract and concrete in nature so that a clear-cut distinction is difficult to make.<sup>306</sup> Courts were instructed to presumptively review all cases involving administrative contracting, administrative promises, freedom of information, social security, and state-funded healthcare, and to explore the reviewability of public interest litigation cases.

In 2008, the SPC further expanded the scope of the ALL by ruling that administrative inaction is a ground for review. The Court condemned the behavior of executive authorities in "failing to discharge their legal duties; not permitting what should be permitted, not prohibiting what should be prohibited, and not punishing what should be punished."<sup>307</sup> Lower courts were encouraged to review administrative inaction and provide remedies to plaintiffs.

Additionally, Judge Zhao of the SPC's Administrative Tribunal hinted that the Court would support the reviewability of abstract administrative acts and the inclusion of public interest grounds for complaints in future amendments to the ALL.<sup>308</sup> In an attempt to broaden the powers of judicial review, the SPC

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<sup>305</sup> *Id.* at 22-23.

<sup>306</sup> 最高人民法院行政庭负责人谈反垄断法适用问题 [Supreme People's Court Administrative Tribunal Leader Discusses the Application of the Anti-Monopoly Law], 人民法院报 [PEOPLE'S CT. DAILY] (Nov. 3, 2008), available at [http://news.xinhuanet.com/legal/2008-11/03/content\\_10299026.htm](http://news.xinhuanet.com/legal/2008-11/03/content_10299026.htm) (last visited Aug. 28, 2011).

<sup>307</sup> Sup. People's Ct. Notification on Protecting National Financial Security and the Coordination of Whole Population Sustainable Economic Development through Judicial Safeguards and Legal Services, *supra* note 297.

<sup>308</sup> 最高人民法院行政庭庭长赵大光与网友线上交流 [Supreme People's Court Administrative Tribunal Presiding Judge Zhao Daguang Interacts with Netizens], 新华网

has deemed almost every kind of concrete governmental act reviewable, and made an effort to distinguish "concrete" acts from "abstract" administrative acts.<sup>309</sup>

The SPC's efforts received a positive response from the state. Through a 2007 State Council administrative regulation, the Party-State finally took the initiative to endow courts with greater authority to review governmental failures of information disclosure.<sup>310</sup> Subsequently, judicial review cases in this area rose dramatically. In 2009, 199 such cases passed through the Shanghai local courts.<sup>311</sup> Administrative Tribunal member Judge Li Guangyu admits that the Court has been inclined to confer standing on private citizens to initiate review proceedings whenever their freedom of information requests are rejected, for whatever reason.<sup>312</sup>

### 3. WTO and Judicial Review

The Chinese government has demonstrated only a narrow commitment to international standards of judicial review. Following the World Trade Organization ("WTO") standards, the PRC has done nothing significant to enlarge the authority of the judiciary vis-à-vis the Party-State,<sup>313</sup> but the SPC has issued three judicial interpretations concerning anti-dumping, anti-subsidy, burden of proof, jurisdiction, procedural safeguards, and other issues.<sup>314</sup> The SPC's path-breaking *Rules for the Adjudication of International Trade-Related Cases* (2002) states a number of judge-made principles previously absent from the ALL and sets out considerations that judges are to take into account in deciding WTO cases. These considerations include whether (1) the

[XINHUA NEWS] (Mar. 9, 2007), [http://news.xinhuanet.com/legal/2007-03/09/content\\_5824584\\_11.htm](http://news.xinhuanet.com/legal/2007-03/09/content_5824584_11.htm) (last visited Aug. 28, 2011).

<sup>309</sup> 罗豪才、湛中乐 [LUO HAOCAL & ZHANG ZHONGLE], 行政法学 [ADMINISTRATIVE LAW] 486 (2d ed. 2006).

<sup>310</sup> 中华人民共和国政府信息公开条例 [Regulation of the People's Republic of China on the Disclosure of Government Information] (promulgated by the Sup. People's Ct., Jan. 17, 2007, effective May 1, 2008), art. 33, ST. COUNCIL GAZ. (P.R.C.).

<sup>311</sup> 王斗斗 [Wang Doudou], 最高法回应政府信息公开诉讼困局疑问 [Supreme People's Court's Response to Uncertainties in Relation to Government Information Disclosure Litigation], 法制日报 [LEGAL DAILY] (Mar. 4, 2010), available at <http://www.law-lib.com/fzdt/newshtml/fzjd/20100304085946.htm> (last visited Aug. 28, 2011).

<sup>312</sup> *Id.*

<sup>313</sup> See Karen Halverson, *China's WTO Accession: Economic, Legal, and Political Implications*, 27 B.C. INT'L & COMP. L. REV. 319, 352-57 (2004).

<sup>314</sup> 最高人民法院关于审理反倾销行政案件应用法律若干问题的规定 [Sup. People's Ct. Rules for the Application of Law in Anti-Dumping Administrative Cases] (promulgated Sept., 11, 2002, effective on Nov., 21, 2002); 最高人民法院关于审理反补贴行政案件应用法律若干问题的规定 [Sup. People's Ct. Rules for the Application of Law in Anti-Subsidy Administrative Cases] (promulgated Sept., 11, 2002, effective Jan., 1, 2003).

evidence is real and sufficient, (2) the application of law is appropriate, (3) there is compliance with legal procedures, (4) the administrative act is *ultra vires*, (5) there has been an abuse of power, (6) the administrative penalty is fair, and (7) all legal responsibilities have been fulfilled. When conflicts of interpretation arise in the course of applying national laws, judges are instructed to choose the interpretation most consistent with the PRC's international treaty obligations.

Vice President Justice Li Guoguang noted that "nearly all areas of administrative decision-making, such as trademarks, patents, anti-dumping, customs tariff[s], and other international trade-related administrative issues, will be subject to judicial review."<sup>315</sup> When WTO and PRC laws are in conflict, local courts have been instructed to give priority to WTO rules in civil cases involving foreign parties. The actual effect of the new SPC's decisions on national administrative behavior will depend heavily on the ability of individual courts to enforce their judgments against the relevant agencies and trade managers.<sup>316</sup>

It is evident that the SPC has made great strides to expand judicial review to meet internationally accepted standards. According to Justice Li, the SPC should adopt three requirements in drafting interpretations: (1) consistency with the PRC Constitution, (2) consistency with WTO rules, and (3) consistency with international treaties that the PRC has signed onto.<sup>317</sup> Interestingly, Li did not mention the need to conform to the directives of the NPC and the State Council or the will of the CCP.

#### 4. Judges as Governors of the Policy Process

In 2009, the Wang Court required judges to "protect the lawful interests of the people from the harm of illegal power," "safeguard the interests of businesses, fair competition, government honesty," and "strike a balance between national, public, and individual interests."<sup>318</sup> In addition, judges were ordered to "protect the rights of citizens to know, to participate, and to express their views on public issues."<sup>319</sup> Courts were also required to "advance openness in public affairs and the disclosure of all government information, except for that related to national security, economic security, and social security."<sup>320</sup> In short, the SPC ordered judges to impose rigorous public management standards on government operations to guarantee that the

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<sup>315</sup> Lin, *supra* note 104, at 291–92.

<sup>316</sup> See M. Ulric Killion, *China's Amended Constitution: Quest for Liberty and Independent Judicial Review*, 4 WASH. U. GLOBAL STUD. L. REV. 43 (2005).

<sup>317</sup> Lin, *supra* note 104, at 292.

<sup>318</sup> Several Opinions on Improving Administrative Adjudication Work, *supra* note 136.

<sup>319</sup> *Id.*

<sup>320</sup> *Id.*

interests of the citizen are duly protected. The rulings reflected the SPC's ambition to turn judicial officers into supervisors of the public policy process.

## B. Constructing Constitutional Rights

In the past two decades, the conventional wisdom that the PRC judiciary is constitutionally impotent has undergone a "fundamental, if excruciatingly slow, shift."<sup>321</sup> Responding to the ever-changing needs of a vibrant economy, and informed by relatively progressive judicial beliefs, the Court has regularly constructed new rights and enforced others already present in the Constitution by using savvy issue-framing techniques. The objectives of the Court's new constitutional jurisprudence have been succinctly summarized by Chief Justice Xiao: "[T]he life of the Constitution rests in its implementation. . . . [T]he goal of implementing the Constitution is to safeguard human rights and equal participation in the management of national public affairs. . . . [T]he Party should take the lead in obeying the Constitution. . . . [T]he strength, status, and authority of the judicial system directly determine the success of constitutional implementation."<sup>322</sup>

### 1. The Right to Political Participation in Rural Governance

Grassroots political reform is a crucial constitutional issue in the PRC. As of late 2009, 53.4% of the population, organized in numerous villages scattered around the country, still lived in rural areas.<sup>323</sup> How this population is governed matters a great deal to social and political stability. Pursuant to the Organizational Law of the Village Committees (1987), directly-elected self-governing village committees are responsible for the management of a variety of issues concerning construction, business, and dispute resolution.<sup>324</sup> Village elections have opened up avenues of political participation and changed the way rural institutional structures and control mechanisms are organized.<sup>325</sup> Yet

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<sup>321</sup> Kellogg, *supra* note 40, at 218.

<sup>322</sup> 肖揚 [Xiao Yang], 论宪法的实施: 纪念宪法颁行 25 周年 [On the Implementation of the Constitution: Twenty-Five Years after the Promulgation of the Constitution], 人民法院报 [PEOPLE'S CT. DAILY] (Dec. 4, 2007), available at [http://www.chinapeace.org.cn/ldhd/2007-12/04/content\\_35393.htm](http://www.chinapeace.org.cn/ldhd/2007-12/04/content_35393.htm) (last visited Aug. 28, 2011).

<sup>323</sup> 夏宇華 [Xia Yuhua], 社科院: 中国城镇人口 2008 年末 6.07 亿 [Academy of Social Sciences: China's Urban Population Reaches 0.607 Billion by the End of 2008], 中国人口与发展研究中心 [CHINA POPULATION AND DEVELOPMENT INFORMATION CENTER] (June 16, 2009), [http://www.cpdrc.org.cn/news/rkxw\\_gn\\_detail.asp?id=10684](http://www.cpdrc.org.cn/news/rkxw_gn_detail.asp?id=10684).

<sup>324</sup> Elizabeth J. Perry & Merle Goldman, *Introduction: Historical Reflections on Grassroots Political Reform in China*, in GRASSROOTS POLITICAL REFORM IN CONTEMPORARY CHINA 2-19 (Elizabeth J. Perry & Merle Goldman eds., 2007).

in practice, committee decisions are often misguided by corrupt village leaders and interference from Party committee and township governments.<sup>326</sup>

In one published case, *Shima Village Committee (Lecheng Town, Leqing City, Zhejiang Province) v. Zhejiang Shunyi Property Development Limited*,<sup>327</sup> the SPC held that all village committee decisions involving the general interests of villagers, such as the residential development of property, must be scrutinized and approved by the villagers' conference, which consists of at least half of all villagers above the age of eighteen. It is uncertain whether and how this highly symbolic ruling can be implemented throughout the immense territories of the PRC, but it does represent an attempt to assert constitutional principles through case law as opposed to judicial interpretations.<sup>328</sup> In a 2008 Interpretation, the SPC instructed lower courts to defend the "democratic rights of peasants to know, participate, express, and superintend" with all available means of adjudication.<sup>329</sup> In addition, the Court suggested a number of measures that local judiciaries could take to broaden the scope of village autonomy, improve peasants' legal awareness, and make the judicial process more accessible to those in need.

## 2. The Right to Sue the State

Article 41 of the Constitution guarantees the civil right to bring suit against the state and report the illegal conduct of state organs.<sup>330</sup> However,

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<sup>325</sup> Tan Qingshan, *Deliberative Democracy and Village Self-Government*, in *THE SEARCH FOR DELIBERATIVE DEMOCRACY IN CHINA* 211 (Ethan J. Leib & Baogang He eds., 2006).

<sup>326</sup> See Teresa Wright, *Tenuous Tolerance in China's Countryside*, in *CHINESE POLITICS: STATE, SOCIETY, AND THE MARKET* (Peter H. Gries & Stanley Rosen eds., 2010); John James Kennedy, *The Implementation of Village Elections and Tax-for-Free Reform in Rural Northwest China*, in *GRASSROOTS POLITICAL REFORM IN CONTEMPORARY CHINA* 48–74 (Elizabeth J. Perry & Merle Goldman eds., 2007); Richard Levy, *Village Elections, Transparency, and Anticorruption: Henan and Guangdong Provinces*, in *GRASSROOTS POLITICAL REFORM IN CONTEMPORARY CHINA* 20–47 (Elizabeth J. Perry & Merle Goldman eds., 2007).

<sup>327</sup> 浙江省乐清市乐城镇石马村村民委员会与浙江顺益房地产开发有限公司合作开发房地产合同纠纷案、民一终字第 59 号 [Sup. People's Ct., Civil Tribunal I No. 59] (2006) SUP. PEOPLE'S CT. GAZ. (P.R.C.).

<sup>328</sup> 侯猛 [Hou Meng], 最高人民法院年度分析报告 (2008) [Annual Analysis of the Supreme People's Court (2010)], 侯猛工作室 [HOU MENG'S WORKSTATION] (Feb. 1, 2010), <http://flhshkx.fyfz.cn/art/578663.htm>.

<sup>329</sup> 关于为推进农村改革发展提供司法保障和法律服务的若干意见 [Sup. People's Ct. Several Opinions on Pushing Forward the Reform and Development of Peasant Villages with the Provision of Judicial Safeguards and Legal Services] (promulgated by the Sup. People's Ct., Dec. 4, 2008) SUP. PEOPLE'S CT. GAZ. (P.R.C.).

<sup>330</sup> 最高人民法院关于确定民事侵权精神损害赔偿责任若干问题的解释 [Sup. People's Ct. Interpretation on Problems Related to the Confirmation of Compensation Liability for

fears of offending the dignity of powerful officials have driven many judges to decline hearing administrative cases.<sup>331</sup> In response, the SPC has taken away the courts' authority to decline administrative litigation filings without sound legal justifications.<sup>332</sup> In addition, the SPC has given provincial high courts the power to rectify improper dismissals of judicial review applications by lower courts.<sup>333</sup> Judges are bound to hear legitimate cases, even if the claimants have failed to apply for judicial review within the statute of limitations.

### 3. The Right to Open Trial

In 2005, the SPC ruled that courts must excuse underprivileged citizens from paying litigation fees.<sup>334</sup> These citizens include the disabled, orphans, the elderly, peasants, public interest litigants, and pension claimants.

In addition, in 1999, the SPC commanded that all courts must not only conduct trials openly, but must also examine evidence and announce judgments in language that is intelligible to members of the general public.<sup>335</sup> These decrees corresponded to Article 125 of the Constitution, which provides that trials must be conducted publicly. To facilitate public access to judicial information, the Court has set up a telephone hotline dedicated to receiving media inquiries. Lower courts have followed suit, and this ultimately has evolved into the spokesperson system now in use.<sup>336</sup>

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Psychological Detriments in Civil Torts] (adopted by the Sup. People's Ct. Jud. Committee, Feb. 26, 2001, promulgated Mar. 8, 2001) BEIJING HIGH PEOPLE'S CT. BUS. STUD. RESOURCES (P.R.C.).

<sup>331</sup> See PEERENBOOM, *supra* note 53.

<sup>332</sup> See 最高人民法院关于依法保护行政诉讼当事人诉权的意见 [Sup. People's Ct. Opinion on Protecting the Rights of Administrative Litigation Claimants] (promulgated by the Sup. People's Ct., Nov. 9, 2009, effective Nov. 9, 2009) SUP. PEOPLE'S CT. GAZ. (P.R.C.).

<sup>333</sup> See 最高人民法院关于当前形势下做好行政审判工作的若干意见 [Sup. People's Ct. Opinions on Improving Administrative Adjudication Work under the Present Circumstances] (promulgated by the Sup. People's Ct., June 26, 2009) SUP. PEOPLE'S CT. GAZ. (P.R.C.).

<sup>334</sup> 最高人民法院关于对经济确有困难的当事人提供司法救助的规定 [Sup. People's Ct. Rules for the Provision of Judicial Remedies to Claimants with Economic Difficulties] (promulgated by the Sup. People's Ct. Jud. Committee, Apr. 5, 2005) SUP. PEOPLE'S CT. GAZ. (P.R.C.).

<sup>335</sup> 最高人民法院关于严格执行公开审判制度的若干规定 [Sup. People's Ct. Several Rules Concerning Strict Implementation of the Open Trial System] (promulgated by the Sup. People's Ct., Mar. 8, 1999, effective Mar. 8, 1999) SUP. PEOPLE'S CT. GAZ. (P.R.C.).

<sup>336</sup> Lin, *supra* note 104.

Another SPC ruling has made case filings, trials, enforcement, hearings, and paperwork more transparent.<sup>337</sup> As a result, many lower courts have allowed live broadcasts of their trials.

#### 4. The Right to Trial by Jury

For much of its existence, the Chinese jury has suffered from undue external influences. The SPC has issued a succession of decisions strengthening the selection and training of jurors.<sup>338</sup> As a result, the contemporary jury system has achieved considerable success in certain regions of the country. For instance, jurors from Fujian Province alone participated in over 80,000 cases, including 52.1% of all criminal cases.<sup>339</sup> Overruling the practice that jurors are only be used in appellate cases, the SPC decided in 2010 that the jury must be utilized in civil, criminal, and administrative cases of first instance as long as the case involved the public interest.<sup>340</sup> Public involvement in judicial decision making reflects the SPC's aspirations of fostering a "judicial democracy." Indeed, the involvement of jurors in adjudication is not formally framed as the right of defendants to be tried by their peers, but as a policy that encourages public oversight in the judicial process.<sup>341</sup>

#### 5. The Right to Privacy

On a number of occasions, the SPC has elaborated a right to privacy without invoking Article 40 of the Constitution, which guarantees the privacy of citizens' correspondences. In 1986 and again in 1993, the Court held that the

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<sup>337</sup> 最高人民法院关于司法公开的六项规定 [Sup. People's Ct. Six Rules for Judicial Openness] (promulgated by the Sup. People's Ct., Dec. 8, 2010) SUP. PEOPLE'S CT. GAZ. (P.R.C.).

<sup>338</sup> See 最高人民法院关于人民陪审员选任、培训、考核工作的实施意见 [Sup. People's Ct. and Ministry of Just. Opinions on the Implementation of the Selection, Training, and Examination of People's Assessors] (promulgated by the Sup. People's Ct. & Ministry of Just., Dec. 16, 2004, effective Dec. 16, 2004) SUP. PEOPLE'S CT. GAZ. (P.R.C.); 最高人民法院关于人民陪审员管理办法 (试行) [Sup. People's Ct. Measures on the Management of People's Assessors] (promulgated by the Sup. People's Ct., Jan. 6, 2005, effective Jan. 6, 2005) SUP. PEOPLE'S CT. GAZ. (P.R.C.).

<sup>339</sup> 何晓慧 [He Xiaowei], 福建: 人民陪审员 5 年参与审案 8 万余件 [Fujian Province: People's Assessors Participated in 80,000 Cases in 5 Years], 人民法院报 [PEOPLE'S COURT DAILY] (May 7, 2010), available at <http://www.chinacourt.org/html/article/201005/06/407616.shtml> (last visited Aug. 28, 2011).

<sup>340</sup> SPC Rules for Several Problems Related to the Participation of People's Assessors in Adjudicative Activities, *supra* note 318.

<sup>341</sup> See Yue Liling, *The Lay Assessor System in China*, 72 REVUE INTERNATIONALE DE DROIT PENAL 51 (2001).

unauthorized disclosure of private activities or belongings is an infringement of the statutory right to reputation, from which the right to privacy is derived.<sup>342</sup> A 2001 interpretation reaffirmed the right to privacy as a component of the higher-level right to individual personality.<sup>343</sup> However, since the right is still strictly a right in tort, the prospect of utilizing it to protect the private realm from public interference remains uncertain.

## 6. The Right to Life

In the *Second Five-Year People's Courts Reform Program* the SPC announced its intentions of reforming capital punishment review procedures, including the right to review and approve all death penalty decisions made by lower courts. In mid-2006, two vice presidents were appointed to manage the increasing demands of penal adjudication. Three new criminal tribunals were set up and staffed with experts from lower courts, academia, and Ph.D. and LL.M. graduates.<sup>344</sup>

In his explanation to the NPCSC regarding the Court's right to review capital sentences, Vice President Justice Shen Deyong, an expert on death penalty law, noted that the new arrangements would "uphold the unity of the law and ensure that death penalties are ordered cautiously and fairly."<sup>345</sup> On October 31, 2006, the NPCSC amended the Organic Law of the judiciary in accordance with the Court's wishes. The original statute allowed lower courts to order executions of defendants convicted of crimes threatening the public order such as homicide, rape, and robbery. Now, every decision of this class must be forwarded to the SPC for final approval. Hu Jinguang of Renmin University considers this ruling as one of the "ten major constitutional incidents" of the past decade.<sup>346</sup>

<sup>342</sup> 最高人民法院关于贯彻执行《中华人民共和国民事诉讼法通则》若干问题的意见（试行）[Sup. People's Ct. Opinions on the Implementation of the General Principles of the Civil Law (Trial)] (promulgated by the Sup. People's Ct. Jud. Committee, Jan. 6, 1988) SUP. PEOPLE'S CT. GAZ. (P.R.C.); 最高人民法院关于审理名誉权案件若干问题的解答 [Sup. People's Ct. Reply on the Adjudication of Right to Reputation Cases] (promulgated by the Sup. People's Ct., Aug. 7, 1993) SUP. PEOPLE'S CT. GAZ. (P.R.C.).

<sup>343</sup> 最高人民法院关于确定民事侵权精神损害赔偿责任若干问题的解释 [Sup. People's Ct. Interpretation on Problems Related to the Confirmation of Compensation Liability for Psychological Detriments in Civil Torts] (promulgated by the Sup. People's Ct. Jud. Committee, Mar. 8, 2001) BEIJING HIGH PEOPLE'S CT. BUS. STUD. RESOURCES (P.R.C.).

<sup>344</sup> 董瑞丰 [Dong Ruifeng], 死刑复核权上收“盘点”专访最高法院副院长姜兴长大法官 [A Review of the Concentration of Death Penalty Approval Power: An Interview with Supreme People's Court Vice President Grand Justice Jiang Changxing], 瞭望 [OUTLOOK WKLY.] (Sept. 4, 2007), available at <http://www.law-lib.com/fzdt/newshtml/fzjd/2007090411011.htm> (last visited Aug. 28, 2011).

<sup>345</sup> 胡锦涛 [HU JINGUANG], 中国十大宪政事例研究 [A STUDY OF TEN CONSTITUTIONAL INCIDENTS IN CHINA] 71-76 (2009).

<sup>346</sup> *Id.*



Lower courts often cause controversy by issuing a large number of erroneous capital punishment sentences. By contrast, the SPC's professionalized review has resulted in a ten percent drop in the number of death sentences in the first five months of 2007 compared to the same period in the previous year.<sup>347</sup> For the first time, the number of suspended capital sentences exceeded the number of executions. Chief Justice Xiao quoted human rights protection, substantive justice, and procedural justice as the main objectives of the new system of review.<sup>348</sup>

## 7. The Constitutional Judicialization Experiment<sup>349</sup>

In 2001, the SPC issued a controversial Reply to the Shandong Provincial High Court in the case of *Qi Yuling v. Chen Xiaoli et al.*<sup>350</sup> This decision, grounded directly in the Constitution, violated the Court's own doctrine that statutory remedies should be exhausted before constitutional provisions are invoked.<sup>351</sup> The plaintiff and the defendant were both female students from Shandong Province. In 1990, both of them took the college entrance examination. The plaintiff scored well while the defendant did not. After the examination, the defendant improperly appropriated the plaintiff's admission notice; with her father's assistance, the defendant stole the plaintiff's identity and enrolled in the university that had admitted the plaintiff. The plaintiff did not discover the identity theft until eleven years later. The lower court ruled for the plaintiff, citing as a general rule the right to personal name and reputation, despite the fact that it is not explicitly present in the General Principles of the Civil Law (1986). Dissatisfied with the awarded damages, the plaintiff appealed to the provincial court, which referred the case to the SPC. In its reply, which served as the provincial court's final decision, the Court

<sup>347</sup> Keith, *supra* note 172, at 248.

<sup>348</sup> 吴兢 [Wu Jing], 肖扬: 死刑案件须做到“杀者不疑、疑者不杀” [Xiao Yang: *Capital Punishment Cases must be Managed in a Way that “You Don't Execute People with Suspicion and Suspicious People would not be Executed”*], 人民网 [PEOPLE'S DAILY-WEB] (June 9, 2007), available at <http://politics.people.com.cn/GB/1026/5842386.html> (last visited Aug. 28, 2011).

<sup>349</sup> See Yu Xinzong, *Western Constitutional Ideas and Constitutional Discourse in China, 1978–2005*, in *BUILDING CONSTITUTIONALISM IN CHINA* 119 (Stephanie Balme & M.W. Dowdle eds., 2009). The “judicialization of the Constitution” differs conceptually from the term as discussed in Section IV. In the current usage, it refers only to the process by which courts explicitly interpret and implement the constitutional text.

<sup>350</sup> 最高人民法院关于以侵犯姓名权的手段侵犯宪法保护的公民受教育的基本权利是否应承担民事责任的批复法译(2001)25号司法解释 [Sup. People's Ct. Reply Regarding the Infringement of Personality Rights as a Violation of the Constitutionally Protected Right to an Education] (promulgated by the Sup. People's Ct., July 24, 2001, effective Aug. 13, 2001), available at [http://www.china-laws.net/sh\\_11\\_show.asp?id=1100&flag=11&cid=2](http://www.china-laws.net/sh_11_show.asp?id=1100&flag=11&cid=2) (last visited Aug. 28, 2011).

<sup>351</sup> See CHEN, *supra* note 43.

cited Article 46 of the Constitution, which guarantees the right to an education.

Academic debate regarding this case centered on the normative question of whether the Constitution could or should be judicialized.<sup>352</sup> The importance of the *Qi Yuling* decision rests not in the reply itself, but instead, in the extrajudicial statements made by Huang Songyou, Presiding Judge of SPC Civil Tribunal I. In an article published in the *People's Court Daily*, Huang openly admitted that the *Qi* reply was intended to set an example for all PRC judges of explicitly using the Constitution in legal reasoning.<sup>353</sup> Huang's explanation, which was backed by Chief Justice Xiao, sought to eliminate the "ideological obstacle to the application of the Constitution."<sup>354</sup> This is by far the most conspicuous example to date of judicial entrepreneurs testing the political limits of their power.

Huang asserted that the *Qi* reply established a precedent for judicial enforcement of the Constitution. He understood that it would be a critical decision in the protection of constitutional rights; henceforth, judges may apply civil law remedies, in lieu of criminal or administrative ones, to vindicate fundamental rights.<sup>355</sup> Huang justified his decision on Marxist legal theory, but he also cited the U.S. Supreme Court decision *Marbury v. Madison* to support his contention that judicialization is a long-standing international trend that the PRC should follow.<sup>356</sup>

Some Chinese jurists censured the SPC for distorting the public-private law distinction by inappropriately applying the Constitution to a tort case.<sup>357</sup> One academic went so far as to condemn SPC judges for being "self-interested judicial elites" who exploited their existing privileges to usurp the powers of other state agencies.<sup>358</sup> In any case, the *Qi* decision was "repealed" seven years later by the Wang Court. The exact reason for *Qi*'s downfall is unknown.<sup>359</sup> Why should rulers disallow courts from citing the Constitution in private cases, given that the Court did not claim any right to enforce the Constitution against the state? Beijing's response to constitutional judicial review in Hong Kong may shed some light on this question.

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<sup>352</sup> See HU, *supra* note 345, at 236.

<sup>353</sup> See 黄松有 [Huang Songyou], 宪法司法化及其意义 [The Judicialization of the Constitution and its Implications], 人民法院报 [PEOPLE'S CT. DAILY] (Aug. 13, 2001), available at <http://www.yadian.cc/paper/3623/> (Aug. 28, 2011).

<sup>354</sup> Kui Shen, *Is it the Beginning of the Era of the Rule of the Constitution? Reinterpreting China's 'First Constitutional Case'*, 12 PAC. RIM L. & POL'Y J. 199 (2003).

<sup>355</sup> See Killion, *supra* note 316, at 69.

<sup>356</sup> *Marbury v. Madison*, 5 U.S. 137 (1803).

<sup>357</sup> See Sanzhuang Guo, *Implementation of Human Rights Treaties by Chinese Courts: Problems and Prospects*, 8 CHINESE J. INT'L L. 173 (2009):

<sup>358</sup> Zhao, *supra* note 29, at 262.

<sup>359</sup> See Thomas E. Kellogg, *The Death of Constitutional Litigation in China?*, 9 CHINA BRIEF 4 (2009).

By statute, the NPCSC allowed the Hong Kong Court of Final Appeal to exercise the power of final adjudication, not the power of final interpretation of the Basic Law. The Basic Law does not expressly allow courts to strike down primary legislation, but the PRC promised that the post-British Hong Kong judiciary would at least be permitted to interpret the Basic Law in relevant cases. The Hong Kong Court of Final Appeal has consistently expanded this interpretive power into full-fledged constitutional review,<sup>360</sup> invalidating important statutes and government policies by citing the Basic Law and International Covenant on Civil and Political Rights.<sup>361</sup> It has even asserted the power to review NPCSC decisions in what might be regarded as Hong Kong's *Marbury* decision.<sup>362</sup> The drafters of the Basic Law and a large number of mainland legal scholars have sharply questioned the constitutionality of Hong Kong constitutional review,<sup>363</sup> but as constitutional litigation continues to flourish in Hong Kong, the government has been forced to amend laws. The Hong Kong case has likely alerted Party-State rulers to the possibility that if the SPC were allowed to interpret the Constitution, the same phenomenon might also spread to other parts of the PRC.

Had the SPC not overconfidently<sup>364</sup> framed the case as a *Marbury* moment, it may have been able to institutionalize constitutional judicial interpretation without provoking Party-State rulers to interpret the Court's decision as a threat to the political supremacy of the CCP.<sup>365</sup> Even though the Court has failed to utilize the Constitution as a concrete basis of judicial decision-making, it has clarified and enforced many constitutional-level rights which could potentially provide lower courts with guidance in public law rulings.

### C. Analysis

Chinese courts, including the SPC, are often seen as wholly inactive in constitutional politics. This study has shown that the conventional wisdom of judicial inaction in constitutional development is unfounded. In fact, the SPC, due to its activist-professional values, is likely to (1) intervene in local

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<sup>360</sup> Laifan Lin & Minkang Gu, *Can Courts in Hong Kong Examine the Constitutionality of the Legislative Conduct of the PRC?*, in *HONG KONG IN TRANSITION: ONE COUNTRY TWO SYSTEMS* (Robert F. Ash et al. eds., 2003).

<sup>361</sup> See Chen, *supra* note 115.

<sup>362</sup> Ng Ka Ling v. Director of Immigration, [1999] 1 H.K.L.R.D. 315 (C.F.A.).

<sup>363</sup> See NORBERT C.Y. FAN, *THE ELECTORAL SYSTEM OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION* (2006).

<sup>364</sup> Rational individuals exhibit the overconfidence bias when they underestimate the probability of failure and overestimate their own ability in relation to others. This bias is often guided by inaccurate beliefs about self-capacity and others' mental states. See Cass R. Sunstein, *Introduction*, in *BEHAVIORAL LAW AND ECONOMICS* 4 (Cass R. Sunstein ed., 2000).

<sup>365</sup> See KEYUAN ZOU, *CHINA'S LEGAL REFORMS: TOWARDS THE RULE OF LAW* 59-60 (2006).

governance when there are high political transaction costs and (2) disagree with other major agencies on legal and procedural issues.

The emergence of judicial review of local ordinances coincided with the rise of the judicial entrepreneurs. Expert judges, especially those on the Administrative Tribunal, have played a pivotal role in skillfully expanding the scope of judicial review and WTO-related powers. Over time, the SPC differentiated itself from bureaucratic and legislative actors, not only on regulatory matters, but also on constitutional interpretation. The Court achieved considerable success in breaking down the rigid statutory distinction between "concrete" and "abstract" administrative acts.

The SPC's growing constitutional jurisprudence was largely due to self-empowerment. If the Party-State had actively allowed the Court to decide sensitive constitutional issues, the level of judicial empowerment would have been much greater.

It is important to note here that by most standards the SPC is not a credible protector of human rights. The Court's decisions strongly reflect collectivist attitudes that view rights as state-granted. Since the Court generally prioritizes state interests over individual interests, it is still not an effective arbiter of state-civil society conflicts. However, there is reason for hope. Decisions perceived as "provocative" today may not necessarily be rejected by future generations of PRC leaders. After all, the amplification of judicial review would never have been acceptable under Maoist rule.

## CONCLUSION

In order to explain the Chinese case of judicial empowerment, researchers must examine the origins of pro-empowerment judicial beliefs and the role of entrepreneurs in promoting these beliefs in the face of considerable risks and uncertainties.

We have observed that the PRC Party-State is generally apathetic towards judicial power and particularly skeptical of independent judicial review. Incentives such as the state's rule-of-law reforms or the emergence of international economic pressures are insufficient to explain the SPC's self-empowerment. A notable example is the state's inaction towards enhancing judicial review powers to conform to WTO standards. To understand judicial empowerment in the PRC, it is necessary to study the courts themselves as the source of the transformation. It is worth noting that not all dimensions of judicial transformation have been guided by ambitious judicial beliefs. Neoliberal impulses to facilitate market developments, egoistic incentives to enhance personal reputation and maximize the court's budget, or traditional cultural norms may have also played significant roles in shaping the Court's decisions.

Structural incentives and professional expertise alone have seemed insufficient to trigger judicial self-empowerment. Judicial organizations do not necessarily have a tendency to maximize their powers. A bench entirely packed with judges committed to the beliefs of judicial restraint, strong executive powers, or strict constitutional departmentalism is unlikely to

aggrandize judicial power, regardless of whether it is professional and independent or whether the polity is undergoing economic and political transition. The SPC's increasingly autonomous ideology, rooted in the distinct utilitarian functions and tastes of entrepreneurial justices, served as the fortuitous catalyst of the empowerment process. At most, CCP rulers played a passively enabling or acquiescent role.

The current system reflects elements of professional and activist norms and a preference for interacting with the existing legal-political institutional framework in accordance with commitments to Western legal values. Thus, the new judicial character differs significantly from the Court's former role as a security agency. Judicial entrepreneurs have played a critical part in designing the new parameters of judicial power. Their work has been significantly expanded and modified by the expert judges that they have carefully recruited.

Many contemporary SPC judges have been trained in leading Western law schools. Others have been heavily exposed to Western legal scholarship and practices. Having acquired many of their beliefs from Western academia, SPC members exhibit numerous preferences, heuristics, and biases that were not shared by CCP cadres, bureaucrats, and legislators. The SPC is no longer an uncritical instrument of the central Party-State.

Despite acknowledging the importance of independent courts, the Party-State has yet to give up its ultimate control over the judiciary. Evidence suggests that it will most likely intervene in two situations. The first is where the SPC cannot satisfactorily resolve the issue, such as judicial corruption. The Party-State has established an office to coordinate reform efforts within the department of police, the procuratorate, and the court. The second is where the SPC oversteps its political boundaries.

However, as long as the SPC manages to convince the Party-State that it is operating within the cardinal rules of the PRC political game—the unquestionable nature of one-party rule and congressional constitutional supremacy—there is substantial room for the Court to maneuver. But the SPC's transformation is not free from tension. After the failure of the Qi experiment, it is clear that any SPC attempt to erect express constitutional judicial review mechanisms is unlikely to succeed in the foreseeable future. Moreover, the Court lacks the willpower to address the power of CCP committees or the claims of rights-protecting social movements. Lacking support from the coercive arm of the government, judicial reform programs have been defied, compromised, and marginalized in many parts of the country.

But these shortcomings are insufficient to warrant dismissing the SPC's self-empowerment as irrelevant. The most impressive achievement of the Court lies not in obtaining compliance from CCP authorities with judicial rulings; what has truly been significant is the SPC's entrepreneurial rejection of its former identity as an uncritical servant of powerful political and economic actors. The Court has extensively remodeled the legal landscape based on its distinct activism. It has boosted the professionalism of local courts, and it has achieved moderate success at advancing constitutionalism. However, as long as the rulers of the Party-State remain convinced that explicit independent judicial review is a threat to its interests, it is unlikely that the SPC will experience any groundbreaking change to its constitutional powers.

