



UvA-DARE (Digital Academic Repository)

The power of the Supreme People's Court

Reconceptualizing judicial power in contemporary China

Qi, D.

Publication date

2018

Document Version

Other version

License

Other

[Link to publication](#)

Citation for published version (APA):

Qi, D. (2018). *The power of the Supreme People's Court: Reconceptualizing judicial power in contemporary China*.

General rights

It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

Disclaimer/Complaints regulations

If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: <https://uba.uva.nl/en/contact>, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.

CHAPTER 1

INTRODUCTION

*The Power of the Highest Court in an
Authoritarian Legal Setting*

THE AIM OF this book is to offer a distinctive perspective on the power of the highest national court in an authoritarian legal setting by proposing an empirical inquiry into how the judicial power operates and interacts within a specific political and legal context. In recognizing that the highest court does not function in a vacuum, it is virtually impossible to discuss judicial power without referring to its environment. With this in mind, this study places the highest court in the specific context of political and constitutional dynamics and views this as a departure point for an up-to-date understanding of the power of the highest court and its evolving roles.

Little has been published in this regard, and comparative studies do not automatically create meaningful analyses because political logic and institutional structure are not always commensurable.

Recognizing that the content, format, specificity, and pace of legal development vary significantly in different jurisdictions gives rise to a set of questions. How can one assess the power of the highest court in an authoritarian legal setting? Is it true that authoritarian regimes are incompatible with constitutional theories and principles commonly recognized in the West? Do the highest courts play similar or distinctly different roles compared to those of their counterparts in well-established liberal democracies? In what aspects and to what extent do extralegal factors contribute to the exercise of judicial power? This book attempts to reflect on these concerns and tease out the complexities by reference to the case of China and its highest national court, the Supreme People's Court (the Court).

The research aim of this study was to conduct an in-depth analysis of the power of the Court based upon its recent development and emerging trends, reconceptualizing the judicial power in China and offering a rethinking and reinterpretation of how the highest court exercises its power in a context beyond that of the core Western liberal democracies. Moreover, this book is also a multidisciplinary contribution to the broader constitutional discussion on the separation of powers doctrine, offering a distinctive perspective on the legitimacy of the highest court's power under authoritarian leadership and especially on how it casts light on the understanding of the exercise of judicial power in a nondemocratic form of separation of powers. Against this backdrop, the remaining parts of the first chapter expand the background to this study and describe a coherent framework for analysis, the research methodology, and the structure of the remainder of the book.

1.1. The Power of the Highest Courts beyond the West: An Incomplete Picture

In the wake of the global expansion of judicial power,¹ increased attention is being paid to the highest national courts from a comparative perspective. Since Shapiro's first call for comparative scholarship on the power of the highest courts,² legal scholars and political scientists have made considerable progress in exploring and comparing the development of the highest courts among a variety of jurisdictions. It has been suggested that the Western supreme and constitutional courts have increasingly exerted a profound influence on political decision-making and steadily redrawn power boundaries relative to other powerful state actors.³ The growing significance of the highest courts invites inquiry into the inherent political logic of the judicial power, with a primary concern for identifying the key political and legal factors that are conducive to the development of such power.⁴

Several recent academic works suggest that a reasonably independent judiciary, armed with a well-respected and active apex court, is vital for enforcing constitutional norms and facilitating the expansion of judicial

¹ Neal Tate and Torbjorn Vallinder, eds., *The Global Expansion of Judicial Power* (New York: New York University Press, 1997), chap. 1.

² Martin Shapiro, *Courts: A Comparative and Political Analysis* (Chicago, The University of Chicago Press, 1981).

³ See Ran Hirschl, "The Judicialization of Politics," in *The Oxford Handbook of Law and Politics*, eds. Gregory Caldeira, Daniel Kelemen, and Keith Whittington (Oxford: Oxford University Press, 2008); Carlo Guarnieri and Patrizia Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy*, ed. Cheryl Thomas (Oxford: Oxford University Press, 2002); Nick Huls, Jacco Bomhoff, and Maurice Adams, eds., *The Legitimacy of Highest Courts' Ruling: Judicial Deliberations and Beyond* (The Hague: TMC Asser Press, 2009); Elaine Mak, *Judicial Decision-making in a Globalised World: A Comparative Analysis of the Changing Practices of Western Highest Courts* (Oxford: Hart Publishing 2013).

⁴ Tate and Vallinder, *Global Expansion of Judicial Power*.

power in most constitutional democracies.⁵ Indeed, emerging evidence confirms that the highest national courts have spared no effort to enhance their authority, autonomy, and impact vis-à-vis the other political actors over the past few decades, and the power of judicial review has emerged as a vital means for the highest courts to achieve this goal.⁶ As for Western scholars, especially American observers, the judicial review power, whether in the form of prior or posterior, abstract or concrete review, is considered key to creating a meaningful check on the other powerful government actors and ensuring some form of separation of powers among them.⁷

Nevertheless, this analytical lens of judicial power is somewhat incomplete and far from convincing. Not only does it hardly cover the breadth of all the constitutional development in Western democracies, it is also incapable of providing a full explanation of judicial empowerment in transformative democracies and authoritarian regimes. As to the Western types of democracies, in the United Kingdom, for example, where the judiciary is strongly linked to the notion of parliamentary sovereignty, courts seem to play a relatively limited role considering they have no capacity for judicial review of primary legislation made by Parliament although the integration of the United Kingdom into the Council of Europe and the European Union empowered courts to review the legislation for compatibility with international obligations under the European Convention on Human Rights and under EU law respectively.⁸

⁵ Martin Shapiro and Alec Stone Sweet, *On Law, Politics, and Judicialization* (Oxford: Oxford University Press, 2002).

⁶ Karen Alter, *Establishing the Supremacy of European Law* (Oxford: Oxford University Press, 2003).

⁷ Christopher Wolfe, *The Rise of Modern Judicial Review: From Constitutional Interpretation to Judge-made Law* (Lanham: Rowman & Littlefield Publishers, 1994); Martin Shapiro, "The Success of Judicial Review," in *Constitutional Dialogues in Comparative Perspective*, ed. Sally Kenney, William Reisinger, and John Reitz (Basingstoke: MacMillan, 1999).

⁸ Michael Gordon, *Parliamentary Sovereignty in the UK Constitution: Process, Politics and Democracy* (Oxford: Hart Publishing, 2015).

The Dutch Constitution does not allow the judicial review of acts of parliament against the provisions of the Constitution either, but it provides Dutch courts with the power of reviewing parliamentary legislation on the basis of the European Convention on Human Rights and Fundamental Freedoms and other directly effective treaty provisions.⁹

Meanwhile, in the context of emergent constitutional systems such as Japan, the Japanese Supreme Court is well known for its conservatism and judicial restraint in the sense that it has only occasionally engaged in judicial review.¹⁰ As for Indonesia, which has been recognized as a transformative democracy, the newly established Constitutional Court has been emerging as an independent judicial body that has actively asserted its authority since 2001, yet there is little sign of a meaningful increase in the degree of judicialization in postcolonial Indonesia considering the Indonesian government has frequently claimed the authority to ignore the court's rulings.¹¹ In addition, the practice of judicial review in authoritarian systems such as that of China is particularly rare and inactive. The absence of judicial review power seems to indicate that Chinese courts are weak and incompetent in pushing forward their influence on law or on other powerful state actors. At first glance, this impression might be true in the sense that the judicial power is relatively restricted under China's one-party setting, but this does not necessarily suggest that Chinese courts are incompetent and are unimportant actors in the exercise

⁹ Jerfi Uzman, Tom Barkhuysen, and Michiel Emmerik, "The Dutch Supreme Court: A Reluctant Positive Legislator?" *Electronic Journal of Comparative Law* 14, no. 3 (2010): 1-35.

¹⁰ The Supreme Court has intervened to declare statutes unconstitutional on only eight occasions in over sixty years since its establishment in 1947. See Norikazu Kawagishi, "Japanese Supreme Court: An Introduction," *National Taiwan University Law Review* 8, no. 1 (March 2013): 231.

¹¹ Simon Butt and Timothy Lindsey, "Economic Reform When the Constitution Matters: Indonesia's Constitutional Court and the Article 33 of the Constitution," *Bulletin of Indonesian Economic Studies* 44, no. 2 (2008): 239-262.

of power, or that they are irrelevant to the norm of Western separation of powers as has been claimed in some existing literature.¹²

The mainstream view in the West may have overlooked the evolving nature of the judicial power in an authoritarian legal setting. From an empirical point of view, however, the practice is far more complicated than is often recognized. In the case of China, it is a common practice for criticisms to use the benchmark derived from Western constitutional theories to assess the legal development in China despite a dramatic divergence between the East and the West, and between the democratic and nondemocratic legal settings, especially in terms of institutional structures and political dynamics. Likewise, the limitation of research resources and the lack of transparency in authoritarian states are likely to make such an assessment difficult, insufficient, and overly simplistic. Consequently, the uniqueness of nondemocratic forms of legal development has often been ignored, exaggerated, or misread. This research gap then is likely the result of a long-standing presumption among Western observers, who tend to view authoritarian legal settings as lacking separation of power; assume that authoritarian judiciaries remain constrained, serving as mere pawns of their rulers; or contend that their highest courts do not concern themselves with the true development of judicial independence.¹³

¹² See Randall Peerenboom, "A Government of Laws: Democracy, Rule of Law and Administrative Reform in the PRC," *Journal of Contemporary China* 12, no. 34 (2003): 45–67; Tom Ginsburg and Tamir Moustafa, eds., *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge: Cambridge University Press, 2008); Ronald Keith, Zhiqiu Lin, and Shumei Hou, *China's Supreme Court* (London: Routledge, 2014); Ronald Keith and Zhiqiu Lin, "Judicial Interpretation of China's Supreme People's Court as 'Secondary Law' with Special Reference to Criminal Law," *China Information* 23, no. 2 (2009): 223–255.

¹³ Stanley Lubman, *Bird in a Cage: Legal Reform in China after Mao* (Stanford: Stanford University Press, 2000); Ginsburg and Moustafa, *Rule by Law*; Keith and Lin, "Judicial Interpretation."

Conversely, scholars and the legal profession in China have made serious efforts to define the uniqueness of China's approach to legal development. An emerging line of legal scholars and judicial and political officials claim that it is important, indeed necessary, for China to firmly adhere to the "socialist rule of law" (*shehui zhuyi fazhi* 社会主义法治) with Chinese characteristics and to develop a distinctive mode of legal development as clearly distinguished from that in the West.¹⁴ The most striking example is the recent shift in the attitude toward judicial independence, which is regarded as a necessary condition for the Western concept of the rule of law but has been "giv[en] a death sentence" by Chinese top leadership in recent years.¹⁵ In January 2015, a politburo member, Zhang Chunxian, attacked the notion of judicial independence in the *People's Daily*:

Our nation's rule of law is different from the Western constitutionalism... Given the fact that the Western-style rule of law and separation of powers doctrine are incompatible with our rule of law, we shall not take the same road as the "judicial independence" and "judicial neutrality" in the West.¹⁶

In early 2017, the current President of the Court, Zhou Qiang, further criticized judicial independence in a speech to judicial officials,

¹⁴ This principle was first endorsed by the Chinese Communist Party at the 15th Party Congress in 1997. Since then, it has been described as a fundamental governing strategy of the ruling authority and incorporated in the revised Constitution in 1998. See Randall Peerenboom, *China's Long March toward Rule of Law* (Cambridge: Cambridge University Press, 2002), chap. 3; Ling Li, "Chinese Characteristics of the 'Socialist Rule of Law': Will the Fourth Plenum Cure the Problems of the Chinese Judicial System?" *Asia Policy* 20 (July 2015): 17–22.

¹⁵ David Bandurski, "Who Gave 'Judicial Independence' A Death Sentence?" *China Media Project*, last modified January 14, 2015, <http://chinamediaproject.org/2015/01/14/who-gave-judicial-independence-the-death-penalty/>.

¹⁶ Chunxian Zhang, "Comprehensively Carrying Forward the Reform of Rule of Law in Xinjiang Uygur Autonomous Region (*quanmian tuxing yifa zhijiang*)," *People's Daily*, January 7, 2015.

encouraging courts at various levels to combat the erroneous Western ideologies that undermine legal development in China:

We should resolutely resist the erroneous influence of Western legal principles such as “constitutional democracy,” “separation of powers” and “judicial independence.” Courts and judges need to take a clear-cut stand and dare to show the sword against Western ideologies... One must not fall into the “trap” of erroneous Western ideologies and of judicial independence, but instead unwaveringly follow the road of “Socialist Rule of Law” with Chinese characteristics.¹⁷

Zhou's statements prompted an immediate and strong reaction in and outside China. While some legal scholars viewed it as a bow to the strict political climate in the Xi Jinping era that is arguably an “enormous ideological setback for a professional judiciary,”¹⁸ others identified the Court's compromise of striking a balance between its judicial innovations and political tasks without questioning the authority of the ruling party.¹⁹

The debates on how Chinese courts play their expected role and their actual role are likely to continue. Nevertheless, the logic underlying the conclusions from both sides is questionable. One should no longer take for granted that the judicial power has remained weak and at a significant

¹⁷ Qiang Zhou, "People's Courts Must Dare to Show the Sword against the Erroneous Western Ideologies such as 'Judicial Independence' (*Yao Ganyu xiang Xifang Sifa Duli deng Cuowu Sixiang Liangjian*)," *China News*, January 17, 2017, <http://www.chinanews.com/gn/2017/01-14/8124300.shtml>.

¹⁸ Michael Forsythe, "China's Chief Justice Rejects an Independent Judiciary, and Reformers Wince," *The New York Times*, January 18, 2017; Jerome Cohen, "China's Chief Justice's Extraordinary Statement: The Most Enormous Ideological Setback for a Professional Judiciary," *Jerome A. Cohen* (blog), January 17, 2017, <http://www.jeromecohen.net/jerrys-blog/chinas-chief-justices-extraordinary-statement>.

¹⁹ Josh Chin, "Don't Call It Western: China's Top Court Unveils Version for Reform," *Wall Street Journal*, February 26, 2015, <http://blogs.wsj.com/chinarealttime/2015/02/26/dont-call-it-western-chinas-top-court-unveils-vision-for-reform/>.

distance from competence while China has been experiencing unprecedented socioeconomic transformations and in-depth legal reforms in the past decades. In fact, several academic studies generally agree that the Chinese judiciary seems to be slowly advancing toward greater professionalization, independence, and perhaps even a ray of light in terms of constitutional review and human rights protection in the face of an ambiguous but generally evolving legal environment.²⁰ What remains unclear, however, is in what ways the Court at the top of the judicial hierarchy has contributed to this positive trend, and to what extent the Court's experience is distinctive compared to the power of the highest courts in other legal settings. Yet the claims of a distinctive Chinese mode are also unsatisfying. As Liebman insightfully points out, efforts to explore the Chinese mode of legal development would be unlikely to succeed if they rely only on the mode designed from the top, with insufficient attention to the experience of everyday law in practice.²¹

Given these arguments, this book aims to provide insight into the world's largest highest court, which demonstrates unique value but has so far remained largely obscure, with an effort to see how the Court exercises power in law and in practice when officially it is claimed that separation of powers does not exist. Instead of simply accepting that the political and constitutional arrangements in a nondemocratic separation of powers context are deemed to contribute to an incompetent highest court with

²⁰ The 2001 Qi Yuling case and the 2003 Sun Zhigang incident are widely viewed as milestones in the development of right defense in China. For a detailed discussion on these two cases, see Robert J. Morris, "China's Marbury: *Qi Yuling v. Chen Xiaoqi*—The Once and Future Trial of Both Education and Constitutionalization" *Tsinghua China Law Review* 2, no. 2 (2010): 273; Keith Hand, "Using Law for a Righteous Purpose: The Sun Zhigang Incident and Evolving Forms of Citizen Action in the People's Republic of China," *Columbia Journal of Transnational Law* 45, no. 106 (2006): 114–195.

²¹ Benjamin Liebman, "Authoritarian Justice in China: Is There a Chinese Model?" in *The Beijing Consensus? How China Has Changed the Western Ideas of Law and Economic Development*, ed. Weisteng Chen (Cambridge: Cambridge University Press 2016): 225.

weak judicial authority, this study builds its arguments on the most recent developments of the Court, seeking to answer the following two main research questions:

1. How does the Supreme People's Court exercise its power in theory and in practice in China's present political and constitutional context?
2. How does the power of the Supreme People's Court contribute to the understanding of the highest courts' power in a nondemocratic form of separation of powers?

Recognizing that the Court's approach to exercising judicial power has to a great extent challenged the Western understanding of judicial power in both democratic and nondemocratic legal settings, these two questions reflect a crucial subject that deserves to be well studied, thoroughly understood, and properly respected.

1.2. How is Judicial Power Exercised in an Authoritarian Legal Setting?

The Court is a highest national court that seems to be unique in its kind. Staffed with four hundred professional judges and more than six hundred administrative officers, court clerks, bailiffs, and other court personnel,²² its size, role, and impact as the highest national court in China are difficult to ignore. In view of the phenomenon that China has been frequently labeled as a potent developing nation with speedy economic growth but that has yet to establish a strong, well-entrenched judiciary,²³ most

²² According to official statistics released by the Court, it had 1,169 staff members in 2013. See Xianming Zhang, "President Zhou's Speech on May 4th to All the Court Police (*Zhou Qiang zai zuigao fayuan wusi qingnianjie zuotan huishang jiyu qingnian ganjing*)," *People's Court Daily*, May 10, 2013.

²³ Taisu Zhang, "The Pragmatic Court: Reinterpreting the Supreme People's Court of China," *Columbia Journal of Asian Law* 25, no. 1 (Winter 2012): 1–61.

Western scholars remain skeptical about the possibility of the rule of law taking root in China. Existing scholarship indicates that the perception of the judiciary as a separate power loses any real significance while it continues to operate under enormous political and institutional constraints.²⁴ The emphasis on the Court's subordinate role under the single party's leadership seems to indicate that in many respects the Court fulfills similar functions as its counterparts in other nondemocratic jurisdictions, in which law and the courts are deployed mainly as instruments of governance rather than as an impartial and independent judicial institution.²⁵

In contrast, most Mainland Chinese scholars have chosen to avoid discussing the Court's relation to the party-state at all. There is an unspoken understanding that while the supreme authority of the Chinese Communist Party (CCP; the Party) remains exclusive, any discussion of the judicial power occurs without questioning the Leninist approach to constitutionalism "with Chinese characteristics." In other words, the judiciary has to ultimately answer to the Party's unconstrained leadership, which has been widely accepted as the "living constitution in China."²⁶ For that reason, the Chinese literature has paid only limited attention to the roles and functions of the Court through normative analysis, and scholars have tended to create a positive assessment of the judicial power

²⁴ See Peerenboom, *China's Long March*, chap. 7; Keith, Lin, and Hou, *China's Supreme Court*; Ginsburg and Moustafa, *Rule by Law*; Tamir Moustafa, "Law and Courts in Authoritarian Regimes," *Annual Review of Law and Social Science* 10 (November 2014): 281–299.

²⁵ Moustafa and Ginsburg summarize five primary functions of courts in authoritarian states: they are deployed to (1) establish social control and sideline political opponents, (2) bolster a regime's claim to "legal" legitimacy, (3) strengthen administrative compliance with the state's own bureaucratic machinery and solve coordination problems among competing factions within the regime, (4) facilitate trade and investment, and (5) implement controversial policies to allow political distance from core elements of the regime. See Ginsburg and Moustafa, *Rule by Law*, 4.

²⁶ Xin He, "The Party's Leadership as a Living Constitution in China" *Hong Kong Law Journal* 42, no. 73 (2012): 73–93.

with a focus on the significant efforts of the Court to construct and advance legal development in the reform era.²⁷

Discussions in both China and the West, however, remain primarily formalistic and thus tell us little about the roles the Court actually plays. Not to mention that far less attention has been devoted to exploring the views of judges and how their experiences contribute to the evolution of the Court. Unlike most existing academic work, this study departs from the Western analytical lens of judicial power, searching for a workable analytical framework that can enable a more sophisticated understanding of the Court from both theoretical and empirical perspectives. It also intends to capture the essence of the Court by identifying a variety of approaches the Court adopts to fit into China's current political and constitutional structures, with a special focus on exploring how the Court fulfills its primary roles in the context of reform-era China, which is characterized by tremendous legal development and social advancement.

Existing comparative studies have shown great diversity between different legal settings, and each legal system presents its own political and legal context within which the highest court can exercise its power. Consequently, the nature and extent of the highest courts' power and the institutional arrangements for realizing their primary functions vary greatly from one country to another. Despite the similarities and differences, some common features have arisen to make an accurate examination of the highest courts' power possible. In Lasser's comparative work on the three highest courts in Western liberal democracies, that is, the French *Cour de Cassation*, US Supreme Court, and the European Court of Justice, he suggests that the highest courts draw

²⁷ See Weidong Ji, "Supreme People's Court's Roles and Its Evolution (*zuigao renmin fayuan de juese jiqi yanhua*)" *Tsinghua China Law Review* 7 (2005): 11–27; Weimin Zuo, "Comparative Study on the Highest Courts: Perspective on the Functions of the Highest Courts in China and Japan (*zuigao fayuan bijiao yanjiu: yi zhongri zuigao fayuan de gongneng wei shijiao*)" *Social Science Research* 6 (2003): 73–78.

their legitimacy mainly from two dimensions: the institutional and discursive spheres. While the institutional sphere requires legitimacy regarding the external institutional arrangements of the courts, the discursive sphere is internal to the judiciary, presenting the legitimacy of argumentative practice that informs judges' interpretations and reasoning.²⁸

Expanding Lasser's theory, Loth adds the functional dimension to the existing analytical lens of judicial power, which highlights the practical role played by the highest courts in a certain legal order and in society.²⁹ Loth distinguishes the "input" and "output" factors that together contribute to the legitimacy of the courts and shape their primary roles in theory and in practice. More specifically, while on the one hand the institutional choices embedded in the specific political and constitutional context can be regarded as the input factors that initially shape the power of the highest courts, on the other hand, the functional roles played by the highest courts contribute to the output factors that eventually determine their capacity and how they fulfill their roles in practice.

It is clear that these theories would be valuable in providing us with rationales for systematically assessing the input and output factors that together contribute to the highest courts' power from two dimensions, that is, (1) the allocation of the judicial power in the specific political and legal context, and (2) its operation and interaction with other powerful actors in accordance with such power arrangement. Consistent with this analytical framework, this study explores the power of the Court from both institutional and functional perspectives, arguing that regardless of the deep-seated institutional and political constraints, Chinese courts,

²⁸ Mitchel Lasser, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy* (Oxford: Oxford University Press, 2009).

²⁹ Marc Loth, "Courts in Quest for Legitimacy: A Comparative Approach" in *The Legitimacy of Highest Courts' Rulings: Judicial Deliberations and Beyond*, eds. Nick Huls, Maurice Adams, and Jacco Bomhoff (The Hague: TMC Asser Press, 2009).

especially the Court at the top of the judicial hierarchy, should no longer be viewed as merely an instrument of governmental control. Rather, the Court has demonstrated a self-initiated and highly pragmatic interest in the exercise of judicial power by various means.

With a view to keeping the study within manageable proportions, the research relies, to a great extent, on official statistics, unstudied legal documents, speeches delivered by and perceptions of the supreme court judges, and most importantly, empirical evidence gained from two fieldwork studies. Thus, the Court presents us with an interesting case and a distinctive test ground for the further development of traditional constitutional theories in the West, to see whether and to what extent it can shed light on assessing the power of the highest courts beyond the core Western jurisdictions.

1.3. Learning from the Court's Everyday Practice

The methodology applied in this study combines constitutional legal theories, normative and case studies, and socio-legal research methods. Through its concern with the roles and functions of the highest national courts from comparative judicial politics, this study departs from the Western analytical lens of judicial power to seek a coherent analytical framework for assessing the power of the Court. The main part of this study thus builds on this framework and provides insight into the power of the Court through a combination of theoretical and empirical research. On the one hand, the analyses of the laws and regulations, academic work, and case studies are used to present a comprehensive picture of the Court concerning its power distribution and power interaction. On the other hand, through the in-depth participative observations within the Court and a series of semi-structured interviews with judges, clerks, and other judicial personnel, this book offers an insightful reflection on how the Court

operates on a day-to-day basis and especially benefits from the perceptions and experience of the supreme court judges. Further, the developing power and transformative roles of the Court demonstrate another academic motivation of this study: to echo the decade-old debate and contribute to the existing empirical base of the separation of powers doctrine, with an effort to see how the highest court fulfills its role in a nondemocratic separation of powers context.

Recognizing the lack of general knowledge on the practical functioning of the Court, the application of qualitative research methodology is particularly prominent in this book while examining the everyday practices of the Court. The empirical insights of the Court are obtained mainly through three socio-legal approaches: participant observation, informal interviews, and semi-structured interviews. More specifically, participant observation included, but was not limited to, attending court hearings, court deliberations, and internal meetings and reviewing judicial and policy documents with the aim to acquire insightful information on the practical role of the Court through a diversity of judicial and nonjudicial activities. Informal interviews with supreme court judges, court clerks, other court staff, legal scholars, and lawyers were conducted along with observations, serving to clarify doubts when it was either difficult to find answers in the existing academic work or the observation was inconsistent with explanations specified in the official documents. In addition to these two vital approaches, the fieldwork study also relied on the semi-structured interview technique to develop a better understanding of the background, processes, and motivation behind individual judges' decision-making. Because the legal reasoning in court judgments may not address the most urgent concerns that have influenced judges' deliberations, and fellow judges do not always hold the same opinions, positions, and legal values when making crucial decisions, it is of great practical significance to learning from supreme court judges who have

shown divergent legal and political backgrounds, areas of expertise, and work experiences.

In line with the research schedule, a pilot study was conducted at the Intellectual Property Division of the Court in 2012 (July 2012–September 2012). Subsequently, a formal fieldwork study took place at the Judicial Reform Leading Office of the Court in 2014 (June 2014–October 2014). During the fieldwork research, a list of questions for interviews with the supreme court judges was formulated on the basis of the existing knowledge, official documents, and previous empirical findings from the field. Interview questions ranged from the expertise and personal experiences of individual judges to their perceptions of their everyday work in terms of a number of judicial and nonjudicial activities, and toward the evolution of the Court (see Appendix I).

Considerable firsthand data and useful research materials were collected and used in the latter stages of the research, which ultimately not only bridged the gap between theory and practice but also helped to present a more nuanced picture of the Court's actual practice. This research particularly benefitted from the input of those who are directly involved in the Court's everyday practice and those who take a lead in advancing essential reform initiatives in the reform era. Through a series of semi-structured interviews with supreme court judges from different divisions, this work goes beyond the existing scholarship by drawing explicitly on judges' work and unique perspectives. Finally, the arguments in this book have been formed and developed through the impact and integration of both theoretical and empirical results, and most of the empirical findings shed light on achieving a richer and more in-depth understanding of the practical role of the Court.

1.4. Structure of the Book

The book is structured into five main chapters. **Chapter 2** provides an in-depth analysis of the Court through the lens of its institutional design. Building on the work of constitutional theorists and comparative legal researchers, this chapter introduces three layers of power allocation that help to explain how the Court has been organized and empowered. The first layer addresses the organizational and institutional features the Court adopted to fulfill its role in accordance with the constitutional arrangements. After all, the Court does not operate in an institutional vacuum, and the exercise of judicial power cannot be understood separately from its institutional and constitutional environment. The second involves the profile and management of individual judges from a micro perspective. It has been proven that the study of judicial behavior is of particular relevance to identify the specific characteristics and preferences of a court.³⁰ Therefore, a thorough discussion of the profile of the supreme court judges, focusing on their recruitment and training, decision-making, career identity, and especially their pressing concerns, is included in this chapter. Finally, the third layer encompasses the political determinants that frame and define the power boundaries of the Court. In recognizing that the discussion of the power of the Court would be incomplete without referring to the Party's oversight, the Court's relationship to the ruling authority and how it responds to the Party's ideological control, policy guidance, and adjudicative supervision are highlighted in this chapter. The investigation into the initial structure of the Court alongside its administrative management, judges' status, and inherent political logic was revealed to be the key to understanding how the Court shapes its most important power through a wide variety of input factors. More significantly, this chapter sheds light on the mysteries of the

³⁰ Hirschl, "The Judicialization of Politics"; Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge, Cambridge University Press, 2003), 75–76.

Court's concrete choices, institutional interests, and strategic considerations in terms of the exercise of power.

Chapters 3 and 4 examine the power of the Court from a functionalist standpoint. For the purpose of this analysis, a distinction between the judicial and nonjudicial functions is made at the beginning of chapter 3. Unsurprisingly, judges in many jurisdictions engage in multiple nonjudicial functions in addition to their adjudicative power, ranging from playing management roles to serving as public intellectuals.³¹ As for the Court, its involvement in judicial and nonjudicial functions are both crucial in the sense that the Court has been entrusted with important posts and that it exerts a profound impact in practice. In particular, **chapter 3** investigates the most notable judicial functions of the Court to see how it serves as an impartial adjudicator and the guardian of the law while performing as the court of last resort. It was found that the decisions of the Court have a limited impact beyond individual cases, which has generated an in-depth discussion on two other crucial judicial functions related to the Court's adjudicative power: promulgating authoritative interpretations of law and releasing a selection of representative effective judgments to guide the adjudication work of courts at all levels. Empirical evidence from this chapter suggests that despite the enormous political and institutional constraints, the Court has demonstrated self-initiated and highly pragmatic interests in developing and advancing its most crucial judicial functions.

Two major forms of nonjudicial functions are considered in the analysis in **chapter 4**, namely, the executive functions of strengthening judicial compliance within the judicial hierarchy, and the political functions of facilitating and safeguarding the ruling authorities' primary concerns. One crucial observation to note in this chapter is that in many respects the

³¹ Nuno Garoupa and Tom Ginsburg, "Judicial Roles in Nonjudicial Functions," *Washington University Global Studies Law Review* 12 (2013): 755–782.

Court operates in a manner consistent with how the rest of the bureaucracy is run, which suggests that the Court serves more functions outside the courtroom and that supreme court judges have more roles to play than simply adjudicators in practice. In fact, a series of nonjudicial roles of the Court can be glimpsed from the approaches it takes when it supervises, manages, and evaluates its subordinate courts and from a wide range of political tasks it shoulders, for example, fighting judicial corruption and appeasing litigation-related petitions. In recognizing the inherent tension and practical conflicts between the judicial and nonjudicial functions of the Court, an urgent concern before the Court and the legal profession rests upon how to strike a balance between legal rationality and political missions in the development of the Court in an authoritarian political and legal context.

In **chapter 5**, the concluding chapter, the study complements the existing scholarship by shedding light on the institutional and functional power of the Court through attempting to identify the implications that can be drawn from the previous discussions of the Court to further develop the understanding of the highest courts' power in a nondemocratic form of separation of powers. Through the lens of the separation of power doctrine that originated in the West and its implementation in and beyond the core Western democracies, three central sets of elements emerged from the comparative study on the selected highest courts in and beyond the West, which then served as the basis for broader applications: (1) normative versus functional analysis of the doctrine, (2) judicial independence versus judicial interdependence as manifested in the power distribution and power dynamics, and (3) political-centered versus legal-centered modes of operation for the highest court to fulfill its roles in the specific political and legal context. These three core aspects served as the basis for reconceptualizing judicial power in China and reinterpreting the path to legal development in the Chinese model of separation of powers in a broader analytical context. Specifically, an up-to-date understanding of

the power of the Court provided a source of inspiration for rethinking the internal logic of a distinct category of judicial power in the nondemocratic forms of separation of powers.