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### The power of the Supreme People's Court

*Reconceptualizing judicial power in contemporary China*

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# **CHAPTER 2**

## **THE POWER OF THE COURT FROM AN INSTITUTIONAL PERSPECTIVE**

### **2.1. Introduction**

AS FIRST STATED in the 1954 Constitution, and later reaffirmed in the 1982 Constitution, the Supreme People's Court of China (the Court) enjoys the highest status as the head of judicial organs in the Chinese judicial system.<sup>1</sup> It is a distinctive judicial institution, heavily influenced by the integration of China's legal traditions, Leninist notions of tutelage, and the Western constitutional experience and undergoing tremendous

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<sup>1</sup> CH Const. amend 1982, art. 127.

changes in line with the development of contemporary China.<sup>2</sup> In terms of present constitutional arrangements,<sup>3</sup> the Court is subject to the supervision of the National People's Congress (NPC) and its Standing Committee (i.e., the legislative body and its permanent organ), which creates the Court. Correspondingly, local courts at various levels are subject to the dual leadership that comes from the same level of legislative power that created them and from their direct superior courts.<sup>4</sup> Unlike the highest courts in many other jurisdictions that enjoy considerable equality in the division of state powers, existing legal arrangements have explicitly placed the Court within state structures as a subset of the NPC rather than allowing it to perform separately and independently. In addition, the emphasis on "division of labor" and "mutual coordination" among state organs<sup>5</sup> further suggests that with respect to the Court's relation to its sister agencies, cooperation and coordination are considerably more important than the checks and balances within the Chinese governance structure.

Based on these legal realities, it is conceivable that Western media and academia remain skeptical about the judicial power in China, especially in terms of the competence, prestige, and independent status of the Court under the single Party's oversight. However, these perceptions are

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<sup>2</sup> After its initial development in the 1950s, the Court went through a period of deterioration and stagnation during the 1960s and 1970s. Recovering from the Cultural Revolution and the economic reforms and the opening up of the mid-1980s played a key role in the expansion and development of the Court. See Yancheng Hu, "Study on the Functions of the Supreme People's Court (*woguo zuigao fayuan gongneng yanjiu*)," (PhD diss., Jilin University, 2008).

<sup>3</sup> The Constitution currently in effect in China was adopted in 1982 by the National People's Congress, and it is commonly known as the 1982 Constitution; further revisions were implemented in 1988, 1993, 1999, and 2004, respectively. Three previous versions of the Constitution were declared in 1954, 1975, and 1978, respectively.

<sup>4</sup> CH Const. amend 1982, art. 128.

<sup>5</sup> Article 135 of the 1982 Constitution states that the judiciary, along with people's procuratorates and public security organs, shall operate on the basis of the principle of "division of labor, mutual coordination, and mutual restriction" (*fengong fuze, huxiang peihe, huxiang zhiyue* 分工负责, 互相配合, 互相制约) in handling criminal cases.

outdated and must be updated by not merely concentrating on the formalistic roles of the Court as stated in the Constitution but rather on a thorough mapping of the institutional choices embedded in China's political and constitutional environment that together define and shape the power spectrum of the Court.

As Guarnieri and Pederzoli argue in their book *The Power of Judges*, three sets of elements may directly affect the growth of judicial power, namely, the status of judges, the organizational structure of the judicial system, and the characteristics of the political system.<sup>6</sup> Likewise, Hirschl offers a thorough comparative analysis of the judicialization of politics through three main factors of formation: institutional features, judicial behavior, and political determinants.<sup>7</sup> Despite Guarnieri and Hirschl's focus only on several liberal democratic regimes instead of nondemocratic contexts, their analytical frameworks appear to be of great value in identifying the general trends and particular features that combine to shape and determine the power spectrum of the highest courts. To understand the specific rationales behind the institutional choices that initially shape and determine the power of the highest court in an authoritarian legal setting, an institutional approach with three layers of power allocation can be highlighted to reflect the essential input factors that contribute to the power structure of the Court, namely, (1) the organizational framework concerning the court structure and personnel; (2) the profile and management of individual judges from a micro perspective, particularly their recruitment and training, decision-making means and career identity; and, finally, (3) the political determinants of the Court's exercise of power from a macro-level perspective, which in many respects reflect on its relationship to the Party. The remainder of this chapter launches an

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<sup>6</sup> Guarnieri and Pederzoli, *The Power of Judges*, chap. 1.

<sup>7</sup> Hirschl, "The Judicialization of Politics."

institutional analysis from these three crucial aspects and makes a careful study of each layer.

## 2.2. Organizational Framework

In 1993, Susan Finder noted at the beginning of her study on the Court, "Although the Court has become less secretive than before, its workings still remain largely unknown to the foreign or Chinese public."<sup>8</sup> Despite that a growing body of academic work has emerged investigating this highly-secretive judicial organ since then, our understanding of this mysterious entity remains rudimentary. Most of the existing studies on the Court concentrated on its historical development,<sup>9</sup> documentary analysis,<sup>10</sup> and specific working mechanisms<sup>11</sup> but overlooked one of its fundamental institutional features, the organizational framework of the Court, which is a crucial dimension for understanding how the Court has been organized and composed and for determining its underlying rationales in the exercise of power. Therefore, a descriptive sketch of the real-life Court is important in this regard, to provide insight into the organizational framework of the Court concerning its structure and personnel.

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<sup>8</sup> Susan Finder, "The Supreme People's Court of the People's Republic of China," *Columbia Journal of Chinese Law* 7, no. 2 (1993): 145–223.

<sup>9</sup> For instance, see Carl Minzner, "Judicial Disciplinary System for Incorrectly Decided Cases: The Imperial Chinese Heritage Lives On," in *Chinese Justice: Civil Dispute Resolution in Contemporary China*, eds. Margaret Woo and Mary Gallagher (Cambridge: Cambridge University Press 2011) 58.

<sup>10</sup> For instance, see Zhong Yu, "The Political Functions of the Supreme People's Court: Based on the Annual Working Reports of the Supreme People's Court (*lun zhongguo zuigao fayuan shiji chengdan de zhengzhi gongneng*)," *Tsinghua Law Review* 7 (2006): 35–54.

<sup>11</sup> For instance, see Keith and Lin, "Judicial Interpretation"; Xin He, "Black Hole of Responsibility: The Adjudication Committee's Role in the Chinese Court," *Law and Society Review* 46 (2012): 681–712.

### 2.2.1. Court Structure: From Form to Composition

Comparative studies show that a court organization can take various forms at the highest level. The supreme court in particular has been recognized as one of the most common forms adopted by the highest courts in many liberal-democratic states. This form of the highest judicial organization represents the supreme judicial organ that oversees the final ruling on questions of law in general types of cases.<sup>12</sup> As Bell notes, the principle of the supreme court is to give an authoritative ruling on the law, and as such it fulfills a national role rather than the regional role of appeal courts.<sup>13</sup> A notable example of this type is the Supreme Court of the United States.

The constitutional court, at the other extreme, operates outside the ordinary court system for the main purpose of safeguarding the fundamental meanings of the constitution. To accomplish this goal, the highest national courts of this form, such as the German Federal Constitutional Court (*Bundesverfassungsgericht*) and the French Constitutional Council (*Conseil Constitutionnel*), are commonly entrusted with judicial review power and solving constitutional disputes that fall within their jurisdiction. It is generally accepted that the constitutional courts play a notable role in justice and politics, and attempt to achieve a balance between the legislative, administrative, and judicial powers.<sup>14</sup>

In addition, another form of the highest national courts specifically concentrates on resolving certain categories of disputes besides

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<sup>12</sup> Elaine Mak, "Justice at a New Scale: Introducing a Conceptual Framework for the Analysis of Highest Courts' Role in a Globalised Context" (The Hague Institute for the Internationalisation of Law [HiiL] Law of the Future Conference, October 23–24, 2008).

<sup>13</sup> John Bell, "Reflections on Continental European Supreme Courts," *Legal Studies* 24, no. 1–2 (2004): 156–168.

<sup>14</sup> Yves Mény and Andrew Knapp, *Government and Politics in Western Europe: Britain, France, Italy, Germany*, 3rd ed. (Oxford: Oxford University Press, 1998).

constitutional matters. In a telling example, both of France and the Netherlands have adopted the Council of State (i.e., *Conseil de Etat* and *Raad van State*, respectively) as their supreme administrative law authorities, which serve as the highest courts of appeal for citizens against governmental decisions. It is noteworthy that the Council of States in both France and the Netherlands cannot be recognized as pure judicial bodies in the strict sense, but they have the full power to adjudicate the legality of executive acts in addition to having an advisory function to the executive in particular regarding legislative acts, and thus perform crucial roles in their respective jurisdictions.

In the case of China, the Court is the only highest authority at the top of the judicial hierarchy. It not only acts as the final appellate court but also as the major judicial policy-making organ within the Chinese court system. According to the Organic Law of the People's Courts of 1979 (as amended in 2006), the Chinese court system functions under the name of "people's court" and is vertically divided into four levels: the Court, the High People's Courts at provincial level, the Intermediate People's Courts of municipalities and prefectures, and the Basic People's Courts, established in urban districts or rural counties and that cover most local societies.<sup>15</sup> In addition, several specialized courts are established based on the authorization of the Court in charge of specific types of cases related to military, maritime, and intellectual property disputes, aiming to deliver more consistent decisions through a group of specialized judges, especially on legal issues involving complicated technological matters.<sup>16</sup> According to official statistics the Court disclosed in 2013, there were in total 3,658 courts at various levels operating across the country, with the

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<sup>15</sup> Organic Law of the People's Courts of 1979 (as amended in 2016), art. 3.

<sup>16</sup> Ibid.

Court being the largest, equipped with over 190,000 judicial and nonjudicial staff<sup>17</sup> (see Table 1).

**Table 1: Judicial Hierarchy in China (until 2013)**

LEVEL	COURT	NUMBER
NATIONAL	Supreme People's Court	1
PROVINCIAL	High People's Court	31
MUNICIPALITIES/PREFECTURES	Intermediate People's Court	409
URBAN DISTRICT/RURAL/ COUNTY	Basic People's Court	3,117
SPECIALIZED COURT	Military Court	12
	Railway Transportation Court	75
	Maritime Court	10
	Intellectual Property Court	3

Staffed with approximately four hundred professional judges and more than six hundred administrative officers, court clerks, bailiffs, and other court personnel,<sup>18</sup> the Court is enormous compared to most of its counterparts in Western legal systems. Internally, several institutional bodies were created to separate the substantive and administrative functions of the Court.<sup>19</sup> Substantive divisions are designed to fulfill the major judicial tasks of the Court on the basis of different stages of the cases, including case filing, trial, enforcement, and supervision. As of 2018, the Court has nineteen substantive divisions, including one case-filing division, four civil divisions, five criminal divisions, and one

<sup>17</sup> See the "Introduction," The Supreme People's Court of the People's Republic of China, updated July 16, 2015, [http://english.court.gov.cn/2015-07/16/content\\_21299713.htm](http://english.court.gov.cn/2015-07/16/content_21299713.htm).

<sup>18</sup> Official statistics the Court disclosed in 2013 showed that the number of permanent staff members was 1,169, with an average age of forty. See Zhang, "President Zhou's Speech."

<sup>19</sup> See the "Organization Chart," The Supreme People's Court of the People's Republic of China, updated November 3, 2015, <http://english.court.gov.cn/organization.html>.



administrative division. Six circuit tribunals of the Court were established between 2015 and 2016 to resolve administrative, civil, and commercial cases that cross administrative districts but originally fall within the jurisdiction of the Court.<sup>20</sup> Administrative divisions, designed to facilitate the operation and management of the Court, consist of twelve inner organs, including the general office department, enforcement division, research office, information office, planning and finance section, political department, and the bureau of foreign affairs.

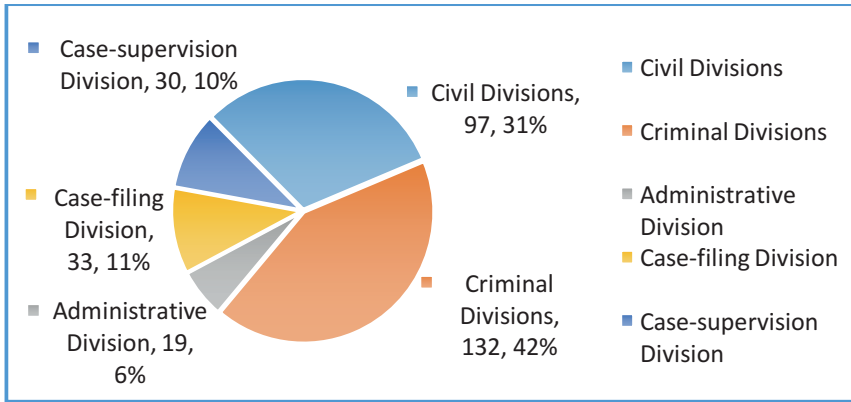
Notwithstanding the fact that the internal structure of the Court has gradually evolved during the past decades, relevant regulations on the duties of each division and staffing arrangements are generally vague. For instance, the substantive divisions are responsible mainly for establishing judicial policies in relevant fields on the basis of their expertise, but the same obligation could also be delegated to or shared with, for example, the Judicial Reform Leading Office, Trial Supervision Office, or Adjudication Committee of the Court in various circumstances. More recently, the impression of the Court as “a mysterious black box”<sup>21</sup> has gradually changed, with a strong pledge to expanding judicial openness and a commitment to pursue transparency within the judicial system. In particular, a list of the heads of its various departments and judges of substantive divisions was released by the Court in 2014 on its official website.<sup>22</sup> Since then, statistics regarding the distribution of the supreme court judges were no longer seen as “confidential information” for outsiders (see Figure 1).

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<sup>20</sup> For more discussion on the jurisdictions, functions, and impact of the circuit tribunals of the Court, see chap. 3, sec. 3.2.

<sup>21</sup> Keith, Lin, and Hou, *China's Supreme Court*, 179.

<sup>22</sup> See “Inner Structure of the Supreme People’s Court,” The Supreme People’s Court of the People’s Republic of China, accessed August 30, 2017, <http://www.court.gov.cn/jigou-fayuanbumen.html>.



**Figure 1: Distribution of the Supreme People's Court Judges in Substantive Divisions**

Although the list is far from complete and lacks basic forms of contact information, it could still be regarded as a positive sign that the Court is urging itself to move toward a more transparent and accountable judicial institution.

### 2.2.2. Court Personnel: From Composition to Ranks

Beneath the surface, the Court is bureaucratically organized through a finely differentiated hierarchy of ranks, which shares considerable similarities with its sister government institutions at the national level. The Court is headed by a president and nine vice presidents, each dedicated to one part of either the substantive or administrative matters of the Court. In addition, each division comes with one division chief and several deputy chiefs. Within each division, the judicial personnel are divided into judges and assistant judges, while the administrative personnel include judges who are assigned to administrative work, court clerks, and administrative officers. Typically, cases before the Court are handled by a collegial panel (*heyi ting* 合议庭) of three judges, one of whom is

assigned as the presiding judge and the other two as regular judges. Despite that members of the collegial panel are given equal status and required to handle cases on majority decisions, the judge with the highest administrative rank is more commonly appointed as the presiding judge and plays a role in making crucial decisions in the trial process.

For example, the Third Civil Division of the Court, which specializes in handling intellectual property cases, is composed of four sections, with five to six judges in each section. While two sections are entitled to hear patent, unfair competition, and antimonopoly cases, the other two are designed to hear copyright and trademark disputes. For every new intellectual property case assigned to the division, a collegial panel is formed with three judges from the same section to hear the case. During the trial, if there is significant disagreement on issues of law among members of the collegial panel, or the court leaders (e.g., division chiefs, the vice president, members of the adjudication committee) have reasonable reasons to disagree with the collective opinions generated by the collegial panel, the case is brought to the Adjudication Committee of the Court for further examination before the final verdict is reached. The committee members first hear an oral report from the presiding judge in charge of the case, then discuss the case on the basis of the case materials, oral report, and follow-up inquiry, and finally, each member casts an equal vote to reach a majority decision. It is a customary practice for deciding judges to follow the majority opinions or comments of the adjudication committee to make final rulings on cases.

It is worth noting that the adjudication committee, which is the central decision-making body consisting of judicial officials with the highest administrative ranking that exists in every court, has been entrusted with ultimate power and wields enormous influence on the adjudication work of the Court. Despite existing rulings making it clear that the principal task of the adjudication committee is to review and rule on complicated, controversial, and difficult cases and to summarize adjudicative

experiences,<sup>23</sup> their decisions and relevant reasons are seldom disclosed to outsiders in practice. In an empirical inquiry into the adjudicative committee of a basic-level court, He argues that the bureaucratized decision-making process of the adjudicative committee creates a black hole of responsibility between the committee and adjudicating judges, and fundamentally, the latter are by and large sacrificed by the former in terms of their decision-making authority.<sup>24</sup> In the case of the Court, although the adjudicative committee is tasked with discussing and determining cases according to relevant rules and provisions,<sup>25</sup> in practice, Court leadership has been found heavily controlling the progression and outcome of committee meetings.<sup>26</sup> In fact, the strict hierarchy of ranks of committee members is likely to blur the respective responsibilities of judges and their superiors in the decision-making process, and it makes judges increasingly dependent on their supervisors to reach final judgments.

The existing composition of court personnel raises further concerns regarding the distribution of the judicial and nonjudicial staff throughout the Court, which is another crucial feature contributing to the understanding of the Court's organizational framework. Yet this remains a missing piece of the puzzle. One likely cause of the missing data may lie in the ambiguous definition of *judges* in the Chinese context. In accordance with the definition of the European Commission for the Efficiency of Justice, a judge is a person who "decides, according to the law and following organized proceedings, on any issue within his/her

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<sup>23</sup> See Organic Law of the People's Courts of 1979 (as amended in 2016), art. 10.

<sup>24</sup> He, "Black Hole of Responsibility."

<sup>25</sup> See *Code of Practice of the Adjudicative Committee of the Supreme People's Court*, Fa Fa no. 23 (1993); *Implementation Opinions of the Supreme People's Court on Reforming and Improving the Administrative Committees of People's Courts*, Fa Fa no. 3 (2010); *Implementation Opinions of the Supreme People's Court on Judicial Responsibilities*, Fa Fa no. 20 (2017).

<sup>26</sup> Interviews SPC20140724, July 24, 2014; SPC20140805, August 5, 2014; SPC20140826, August 26, 2014.

jurisdiction.”<sup>27</sup> Unlike this common practice, however, the definition of *judge* is considerably looser in China, with judicial and nonjudicial staff members adopting the title as soon as they pass the National Judicial Examination and achieve the qualification of judge. As a result, a problem within the judiciary is that only a limited number of judges actually perform as adjudicators and decide cases in different fields of law, leaving a considerable body of nonprofessional “judges” to assume work in the fields of judicial administration, legal research, and judicial policymaking.

In response to the problematic definition of *judge* and its negative impact in judicial practice, a new quota system for judicial and nonjudicial staff was promoted by the Court in the *Fourth Five-Year Reform Outline for the People's Courts (2014–2018)*<sup>28</sup> to make a clear distinction between professional judges and other supporting personnel in the court system. The Court proposed that court personnel be divided into three categories, namely, professional judges, judicial assistants, and judicial administrative staff with respective scopes of duties. Nevertheless, matters that remained unclear in the reform outline include how to split the quota between the three categories and what criteria should be considered for making significant personnel reallocations. Although the proportion of each category of court personnel has not been determined with certainty yet,<sup>29</sup> according to He Xiaorong, the former director of the

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<sup>27</sup> European Commission for the Efficiency of Justice, *European Judicial Systems, Edition 2012 (2010 Data): Efficiency and Quality of Justice* (Strasbourg: Council of Europe Publishing, 2012).

<sup>28</sup> The Court issued its first *Five-Year Reform Outline for the People's Courts (1999–2004)* in October 1999. Since then, it has released reform outline every five years, in which it addresses a number of broad areas of reform and sets out specific timelines for completing the tasks. The full text of the Court's latest reform outline—*The Fourth Five-Year Reform Outline for the People's Courts (2014–2018)*—is available at <http://www.court.gov.cn/zixun-xiangqing-13520.html>.

<sup>29</sup> In a regional pilot reform project initiated in 2014, eight pilot courts in Shanghai attempted to limit the proportion of judges to 33% within five years, with supporting and administrative staff constituting 55% and 15% respectively. But this experimental quota system has not yet been rolled out nationwide, considering the vast territory of China and the regional differences. See Weiyang Meng, "Shanghai Launched the Pilot

Judicial Reform Leading Office of the Court, the personnel reform within the judiciary conveys essential messages of enhancing the role of professional judges and assuring their concentration on carrying out adjudication work.<sup>30</sup>

A close examination of the Court's institutional features and personnel arrangement has revealed that the Court is not merely an appellate court of final resort that makes determinate rulings only in the courtroom but rather that the Court fulfills a broad combination of judicial and nonjudicial functions and operates like no other supreme court of its kind. In recognizing that the Chinese judiciary operates in an authoritarian legal setting where the Party authority retains a dominant and leading role in the state's governing structure, it is almost impossible for the Court to adopt institutional arrangements that could be exempt from bureaucratic control. In fact, its bureaucratic nature continues to be a defining feature of the Court, and this aspect has not yet been subject to real opportunities of meaningful reform. Whereas some recent efforts have been made to separate the administrative functions from adjudicative functions within the Court,<sup>31</sup> the rigid administrative rankings of judges and the highly centralized adjudication committee within the Court suggest that under the "collective wisdom" of a strict, unwieldy court leadership and bureaucracies that are resistant to change, doubts remain about when and to what extent judges can independently and impartially "decide, according to the law and following organized proceedings, on any issue within [their] jurisdiction."

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Reform on Adjusting Specified Number of Judicial and Procuratorate Personnel (*shanghai qidong sifa gaige shidian, jiang shixing faguan jianchaguan yuan'e zhi*)," *Legal Daily*, July 14, 2014.

<sup>30</sup> Xiaorong He, "Theory, Logic and Implementation Path of the *Fourth Reform Outline for the People's Courts* (*siwu gaige gangyao de lilun jidian, luoji jiegou he shixian lujing*)," *People's Court Daily*, July 16, 2014.

<sup>31</sup> See *The Fourth Five-Year Reform Outline for the People's Courts (2014–2018)*.

## 2.3. A Profile of the Supreme Court Justices

Political science literature suggests that the exercise of judicial power can be better understood not merely through the lens of its institutional features but also from the preferences and approaches that individual judges may make use of and aggregate into institutional choices.<sup>32</sup> As Posner points out in his notable book *How Judges Think*, achieving a sound understanding of judicial behavior is the key to legal reform, in recognizing that the analysis of judges' motivations, capacities, mode of selection, professional norms, and psychology may all contribute to in-depth insights into the court system and its future path.<sup>33</sup> Indeed, judges are fundamental components of the machinery of justice and have assumed a central and decisive role in numerous judicial activities and reforms,<sup>34</sup> and this is especially true for judges that work in high positions in the highest courts. In view of the fact that the Court is a large judicial institution equipped with more than four hundred judges, a thorough discussion that focuses on the supreme court judges contributes to a rich understanding of the background, process, and motivation behind crucial decisions of the Court and of individual judges from the micro perspective. Specifically, generating an up-to-date profile of the supreme court judges on the basis of some crucial empirical findings achieved in this research is vital, and indeed necessary, to portray more complex characteristics and roles of individual judges while addressing their most pressing concerns regarding recruitment, decision-making, and career identity.

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<sup>32</sup> See Lawrence Baum, *The Puzzle of Judicial Behavior* (Ann Arbor: University of Michigan Press, 1997); David Funder, "On the Accuracy of Personality Judgment: A Realistic Approach," *Psychological Review* 102, no. 4 (1995): 652–670; Ginsburg, *Judicial Review in New Democracies*, chap. 3.

<sup>33</sup> Richard Posner, *How Judges Think* (Harvard: Harvard University Press, 2010), 8–9.

<sup>34</sup> Guarnieri and Pederzoli, *The Power of Judges*.

### 2.3.1. Recruitment

Comparative studies indicate that for most countries, the highest courts rarely serve as full authorities regarding the recruitment of their own judges.<sup>35</sup> For instance, a cooperative appointing approach can be found in the United States, where Supreme Court justices are nominated by the president and approved by the Senate. The Italian judicial system indicates a representative appointing mode, which grants the High Council of the Judiciary (*Consiglio superiore della magistratura*) to appoint two-thirds of magistrates to the Supreme Court of Cassation (*Corte Suprema di Cassazione*), while the remaining one-third is elected by Parliament. The Supreme Court of the Netherlands in the fields of civil, criminal, and tax law (*Hoge Raad der Nederlanden*), on the other hand, suggests a system of co-optation in judge selection. Supreme Court justices are appointed by royal decree, chosen from a list of three, nominated by the House of Representatives (*Tweede Kamer der Staten-Generaal*) on the basis of the Supreme Court's proposal.

In the case of the Court, Article 11 of the Judges Law states that except for the president of the Court, who is appointed and removed by the NPC, the other judicial positions of the Court, including the vice presidents, members of the adjudication committee, and judges of substantive divisions, are all appointed and removed by the NPC's Standing Committee upon the recommendation of the President of the Court. At first glance, the Court seems to enjoy the considerable privilege of appointing the most suitable professionals for court positions. But a close look at the educational background of supreme court judges and their levels of expertise may present a different story. One cannot take it for granted that at a senior and high-ranking level in the Court a candidate

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<sup>35</sup> Dennis Mueller, "Fundamental Issues in Constitutional Reform: With Special Reference to Latin America and the United States," *Constitutional Political Economy* 10, no. 2 (1999): 119.



necessarily needs to meet higher professional standards to qualify as a supreme court judge. As Li points out in her empirical study on the Chinese judicial system, “the higher the position of authority, the more political the appointment would be.”<sup>36</sup> This point was reaffirmed by an interviewed judge who had worked in both government agencies and academia before being appointed as a supreme court judge: “My job can be frustrating sometimes in view of the fact that a highly professionalized institution such as the Court cannot totally avoid being governed by laypeople.”<sup>37</sup>

There is nothing new about the above-mentioned observations and claims in view of the fact that the Court has had a long history of being criticized as “dominated by laymen” in post-Mao China.<sup>38</sup> Prior to the 1995 Judicial Law, there were barely any substantive requirements to become judges.<sup>39</sup> Most of the Court’s first batch of judges were neither educated in law nor had received sufficient specialized legal training. Particularly during the 1970s and 1980s, a number of supreme court judges were chosen from bureaucrats in sister government agencies, communist revolutionaries, and demobilized military servicemen. As one of the pioneer legal scholars in China, Professor He Weifang boldly criticized the trend of drawing demobilized servicemen into the judiciary and making them the main source of judges without any formal legal training. In particular, he compared this group of judges to lame doctors, arguing,

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<sup>36</sup> Yuwen Li, *The Judicial System and Reform in Post-Mao China: Stumbling Towards Justice* (Farnham, UK: Ashgate Publishing Limited 2014), 67.

<sup>37</sup> Interview SPC20140728, July 28, 2014.

<sup>38</sup> Weifang He, *In the Name of Justice: Striving for the Rule of Law in China* (Brookings Institution Press, 2012), 14.

<sup>39</sup> It was not until the implementation of the 1995 Judges Law that a requirement was introduced that “the selection of junior judges shall meet the substantive requirements of possessing both professional competence and political integrity (*decai jianbei* 德才兼备); the appointment of the court and divisions’ leading cadres shall be mainly determined on the basis of their working experience.”

Despite that the decisions made by medical quacks do bring severe damage to individual patients and their families, the decisions of unqualified judges are likely to bring more profound and unfavorable consequences to the society as a whole, which would inevitably undermine the process of judicial professionalism in China.<sup>40</sup>

The Court became aware of the seriousness of the problem and the undesirable consequences of incompetent judges on the bench, and in the late 1990s, implemented a set of new rules to enhance the competence and professionalization of judges. In terms of these rules, candidates must meet more stringent qualification requirements and pass relevant qualification examinations before being appointed as judges.<sup>41</sup> Since then, law graduates and legal professionals who are interested in becoming judges must have at least two years' working experience in the relevant legal areas or hold a master's or doctoral degree in law. In addition, they must pass the civil servant examinations and the National Judicial Examination to be eligible for appointment as judges and assistant judges. Meanwhile, judicial officers who have already held positions in the judicial hierarchy for years, passing the National Judicial Examination has become an essential condition for career advancement. If they fail to pass this examination, they could be transferred to administrative positions or demoted within the same court.<sup>42</sup>

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<sup>40</sup> Weifang He, "Demobilized Servicemen of the People's Liberation Army Now Serving at Courts (*fuzhuan junren jin fayuan*)," *South Weekend*, January 2, 1998.

<sup>41</sup> See the Judges Law of 1995 (as amended in 2001); Measures for the Implementation of the National Judicial Examination of 2002 (amended in 2008), Si Fa no. 11 (2008).

<sup>42</sup> Mingshan Zhu, "Speech at the National Presidential Conference of the High People's Courts (*zai quanguo gaoji fayuan yuanshang huiyi shangde jianghua*)" (speech, Beijing, December 17, 2001), <http://gongbao.court.gov.cn/Details/a01840166a45e74ac486b5826b599a.html>.

With the Court's intensified efforts to reform judicial recruitment and strengthen the professional backgrounds of supreme court judges,<sup>43</sup> the Court has gradually moved along the path to judicial professionalism and enjoyed a certain degree of autonomy in attracting, selecting, and promoting competent and experienced judges to the bench. In light of the *First Reform Outline of the People's Court (1999–2003)*, the Court made it clear that it, along with the High Peoples' Courts at the provincial level, mainly draws its judicial personnel from outstanding judges of the lower level courts, experienced lawyers, and other high-level legal professionals. It would be not at all surprising to see this group of judges becoming the backbone of the Court, mainly because their professional competence and rich legal experience make them stand out as the best-qualified candidates for posts of various substantive divisions of the Court. As argued by a judge interviewed for the study, who has rich work experience at different levels of lower level courts and the Court, working at the Court would be difficult and beyond his abilities without having gained any work experience in the local courts or with a lack of empathy and understanding for lower court judges.<sup>44</sup>

For instance, in response to China's accession to the WTO and the litigation explosion of intellectual property cases since 2000, the Court decided to establish a separate Intellectual Property Division to deal with intellectual property disputes and to ensure improved protection of intellectual property rights. Consequently, a great number of experienced judges of the lower-level courts who had expertise in intellectual property disputes were promoted to the Court and became supreme court judges.<sup>45</sup>

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<sup>43</sup> See *Several Opinions of the Supreme People's Court on Strengthening the Professional Constructions of Chinese Judges*, Fa Fa no. 10 (2013).

<sup>44</sup> Interview SPC20140818, August 18, 2014.

<sup>45</sup> Xue Li, "Witness the Evolution in a Decade: An Interview with Jiang Zhipei, the Chief Justice of the Intellectual Property Division of the Supreme People's Court (*jianzheng shinian de bianhua: zhuanfang: zhuanfang yuan zuigao renmin fayuan zhishi chanquan ting tingzhang jiang zhipei*)," *China IP Magazine*, no. 10 (2010), <http://www.chinaipmagazine.com/rsip/InfoShow.asp?id=5193&pn=0>.

Similarly, when the Court retrieved the full authority of death penalty review in 2007, it split its criminal divisions into five and recruited hundreds of judges from the high and intermediate people's courts to cope with thousands of death penalty review cases submitted to the Court every year.<sup>46</sup> More recently, the Court has also made efforts to attract reputable law professors, senior legal researchers, and practicing lawyers, as well as experienced elites from other fields, to enrich the personnel structure. Although recruiting supreme court judges directly from the ranks of the legal profession remains limited,<sup>47</sup> this group of supreme court judges may have unique advantages in view of their experience and insights from the other side of the bench. For most of them, becoming a judge, especially a supreme court judge, is nothing but "the highest ideal and the ultimate pursuit of the legal profession."<sup>48</sup>

Based on experience, an appointment to the Court can also be drawn from law school graduates and bureaucrats from other government institutions and Party organs. Unlike in the lower-level courts, where there is a high demand for law school graduates every year, positions in the Court are limited and highly competitive in essence, which allows few law school graduates, mostly those with master's and doctoral degrees, to survive

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<sup>46</sup> Although accurate statistics concerning judges working in five criminal divisions of the Court were unavailable, an in-depth investigation conducted by *South Weekend* suggests that currently there are approximately 330 judicial staff, including judges, assistant judges, and clerks, concentrating on handling death penalty review cases in the Court, and seventy judges worked in criminal divisions of the Court in 2006. See Zhongyuan Ren, "Regained Death Penalty Review for Eight Years: How the Supreme People's Court Saved Life (*sixing fuhe quan shangshou banian, zuigao fayuan ruhe daoxia liuren*)," *South Weekend*, October 16, 2014.

<sup>47</sup> A survey conducted in 2007 revealed that between 2000 and 2007, the Court successively appointed 127 supreme court judges from lower level courts, eighty-four from academia (law professors together with PhD and postdoctoral researchers), and three experienced lawyers. See Feng Liu, "Recent Reform of the Judge's Selection: 22 Lawyers and Legal Scholars became Supreme Court Judges (*linxuan zhidu gaige: 22 ming lvshi xuezhe dangshang zuigao fayuan faguan*)," *People's Daily*, February 28, 2007.

<sup>48</sup> Lina Wang, "Becoming a Supreme Court Judge (*chengwei zuigao renmin fayuan faguan*)," *Chinese Finance*, April 8, 2014.

through aggressive competition and being admitted to the Court. In contrast, it is a common practice for government officials and bureaucrats from Party organs to flow to the Court and take crucial positions in both substantive and administrative divisions.<sup>49</sup> For this group of recruits, despite that they may have little adjudication work experience or expertise in law, extensive opportunities remain for them to fill certain high-level posts in the Court. Thus, the selection and appointment of the top leadership positions of the Court largely depend on the political quality and consciousness of candidates instead of their competence and expertise in law, which reaffirms the perception of several of the judges interviewed that the Court cannot completely avoid being governed by laypeople, with key decisions being made behind closed doors.<sup>50</sup>

### 2.3.2. Decision-making

Sociologists suggest that different types of educational backgrounds and professionalization influence the way in which the bureaucracy carries out its work.<sup>51</sup> This seems to be especially true in the highest courts, where crucial judicial decisions are strongly shaped and influenced by judges' policy preferences, professional experience, and personal characteristics.<sup>52</sup> One telling example is the US Supreme Court, where the Supreme Court Justices build their reputations on the great wisdom in a list of landmark rulings that have shaped the historical outlook and have a profound impact on developing the law. In the context of China, however, supreme court judges are commonly less known for their trenchant rulings or wisdom as

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<sup>49</sup> In fact, it is a two-way process of making administrative transfers and exchanging posts between the Court and other bureaucratic organizations in the Chinese political and legal system. See Meng Hou, *Study on the Supreme People's Court: Perspective on the Judicial Impacts* (*zhongguo zuigao renmin fayuan yanjiu: yi sifa de yingxiangli qieru*) (Law Press China, 2007).

<sup>50</sup> Interview SPC20140805, August 5, 2014.

<sup>51</sup> James Wilson, *Bureaucracy: What Government Agencies Do and Why They Do It* (New York: Basic Books, 1989), 73.

<sup>52</sup> Posner, *How Judges Think*, 8.

reflected in judicial decision making. One plausible reason for that is the lack of personal independence in the process of decision-making. As explained previously, Chinese judges are not expected to decide cases independently but rather to rely on the three-person collegial panel for the ruling. Although the existing rules state that all the members of the collegial panel must participate in the trial process equally and express their legal opinions freely,<sup>53</sup> in practice the opinions and legal arguments of judges carry different weight with respect to their expertise, seniority, and most importantly, the hierarchy of ranks.

A judge interviewee with experience in both the basic-level court and the Court admitted that the court leadership or the adjudication committee members exert influence on pending cases in several ways, legally and illegally, in either explicit or implicit forms.<sup>54</sup> In practice, not only can high-ranking judicial officials express their dissenting opinions on specific cases at different stages of the trial, but they can also give instructions or make informal phone calls to deliver their concerns. Despite that most of these instructions tell judges who are in charge of specific cases to “emphasize” the cases or handle them “according to the law” rather than substantially encroaching upon the legal issues of such cases or dictating the outcome,<sup>55</sup> this practice has been criticized by legal commentators for imposing unnecessary obstacles on the adjudicating judges and their authority in the decision-making process.<sup>56</sup>

To safeguard the decision-making authority of the adjudicating judges, the Court issued a judicial document in 2009, *Five Strict Prohibitions* (五个严禁 *wuge yanjin*), in which it highlights that exerting undue influence

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<sup>53</sup> See *Several Provisions of the Supreme People’s Court concerning Further Strengthening the Function of Collegial Panel*, art. 1, Fa Shi no. 1 (2010).

<sup>54</sup> Interview SPC20140813, August 13, 2014.

<sup>55</sup> Interviews SPC20140813, August 13, 2014; SPC20140828, August 28, 2014; and SPC20140905, September 5, 2014.

<sup>56</sup> Hu, “Functions of the Supreme People’s Court; He, “Black Hole of Responsibility.”

on pending cases of fellow judges is strictly prohibited in courts at all levels.<sup>57</sup> Likewise, in another judicial document released in 2015, the Court reaffirmed the need for eliminating the interference of leading cadres, emphasizing that judicial officials should not involve themselves in the decision-making process regarding cases that have not been assigned to them.<sup>58</sup> It is noteworthy that the increased level of judicial professionalization also becomes a key factor for judges to strategically respond to undue interference on the basis of their own pragmatic concerns and professional competence.<sup>59</sup>

As Liebman notes in his empirical study of the Chinese court system, because of the increased awareness of the law and the appointment of a group of better-trained judges, judges have become more aware of the need to balance legal requirements with powerful interests and to acquire practical techniques to do so.<sup>60</sup> Indeed, it seems more likely that supreme court judges will be empowered through their own efforts to improve their technical competence and through a healthy institutional environment, which the Court provides, for judicial decision-making. Nevertheless, although several judge interviewees agreed that there are fewer “hidden rules” and that the trial procedures are generally more formalized and

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<sup>57</sup> The rules of *Five Strict Prohibitions* are composed of a prohibition on (1) accepting gifts or hospitality from parties to cases and other related parties; (2) having unlawful association with lawyers in violation of relevant provisions; (3) interfering with or inquiring into cases being handled by fellow judges; (4) participating in bribery and fraud during entrusted assessments, auctions, and related activities; and (5) disclosing secret information involved in the trial work. See the *Provisions of the Supreme People's Court on Five Prohibitions*, Fa Fa no. 2 (2009).

<sup>58</sup> See *Implementing Measures for People's Court Carrying Out the "Provisions on Recording, Reporting and Pursuing Responsibility of Leading Cadres Interfering with Judicial Activities or Tampering with the Handling of Specific Cases,"* Fa Fa no. 10 (2015); *Implementing Measures on Pursuing Responsibility in Cases of Internal Judicial Personnel Prying into Cases,* Fa Fa no. 11 (2015).

<sup>59</sup> Interviews SPC20140724, July 24, 2014; SPC20140829, August 29, 2014; and SPC20140905-2, September 5, 2014.

<sup>60</sup> Benjamin L. Liebman, "China's Courts: Restricted Reform" *The China Quarterly* 191 (2007): 638.

standardized for judges to follow at the Court's level,<sup>61</sup> they also raised concerns about the existence of a grey area where undue interference in the adjudication work seems less perceptible and somewhat unavoidable despite their professional expertise and legal rationality.<sup>62</sup>

### 2.3.3. Career Identity

It is a widespread practice for different legal systems to employ a variety of management approaches to strengthen the career identity of judges and keep them in line. While some systems grant long tenure, or life tenure, for experienced judges, others choose to guarantee judges sufficient financial support and high social status.<sup>63</sup> The career identity of judges, as that of other professions, is considered key to generating judicial reputation, safeguarding the role of judges as neutral adjudicators, and preventing them from engaging in misconduct and corruption. In the Chinese context, however, the limitation of self-realization of individual judges in terms of judicial decision-making and their inherent insecurity over a series of "hidden rules" in adjudication work has largely undermined the already fragile career identity of judges.

In fact, many judges of courts at various levels have expressed their frustration at work for a variety of reasons, including the heavy caseloads, harsh discipline standards, excessive personal liabilities, insufficient salaries and welfare support, and more significantly, a restrictive institutional environment.<sup>64</sup> These factors have combined to produce a severe "judicial syndrome" increasingly highlighted by the media and legal commentators to explain why a growing number of judges decided

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<sup>61</sup> Interviews SPC20140724, July 24, 2014; SPC20140829, August 29, 2014; and SPC20140905-2, September 5, 2014.

<sup>62</sup> Interview SPC20140813, August 13, 2014.

<sup>63</sup> Peerenboom, *China's Long March*, 300.

<sup>64</sup> See Lei Chen, "Fleeing Judges (*Faguan Zai Liushi*)," *Legal Weekend*, September 24, 2013; see also interviews SPC20140805, August 5, 2014; SPC20140829, August 29, 2014; and SPC20140905-2, September 5, 2014.



to resign in recent years.<sup>65</sup> A conservative estimate by a supreme court official suggested that more than a thousand judges of courts at various levels had left the judicial system in 2015, including several supreme court judges. This group of judges, the mainstay of courts, aged on average between thirty-five and forty-five, accounted for roughly 0.35% of the judicial personnel nationwide.<sup>66</sup> The statistics, though incomplete, reflect the insurmountable gap between the ideal and reality Chinese judges face. Regardless of how specific and perfect the detailed rulings stated in the Judges Law with respect to judges' awards, sanctions, promotions, welfare, and so forth may seem, these provisions alone cannot promote the career identity of judges in practice or serve as the reassurance needed to win back the hearts of judges who have quit.

In the case of the Court, it is hardly news that many supreme court judges, ranging from junior assistant judges struggling to attain promotions to senior judicial officials with rich work experience and profound prestige in their fields, submit their resignations every year. While some judges are appointed to Party and government organs to work as senior government officials after leaving the court system, most continue practicing law as experienced lawyers and legal counsels in similar fields. One telling example is the former press secretary of the Court, Judge Sun Jungong, who joined one of the domestic technology giants as vice chairman in 2016 after working at the Court for more than fifteen years.<sup>67</sup> When asked during the interviews what judges viewed as their top concerns as supreme court judges, surprisingly, they provided similar answers: uncompetitive

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<sup>65</sup> Yiwei Zhang, "Judges on the Run," *Global Times*, February 11, 2014; Susan Finder, "Why are Chinese Judges Resigning?" *Supreme People's Court Monitor* (blog), August 23, 2016, <https://supremepeoplescourtmonitor.com/2016/08/23/why-are-chinese-judges-resigning/>.

<sup>66</sup> Qunfeng Zhou, "Stories behind the Quitting Judges (*faguan lizhi chao beihou: naxie xiahai de faguanmen*)," *Weekly News of China*, July 24, 2016.

<sup>67</sup> Jie Zhang, "Why Does the Alibaba Group Want Judge Sun Jungong? (*ali weihe wa sun jungong?*)," *China Times*, July 9, 2016.

salaries and benefits, the intense workload and pressure, and the bureaucratic nature of judicial management.<sup>68</sup>

### *Uncompetitive salaries and benefits*

Based on the empirical findings of this research, the most significant factor that decreases job satisfaction, and even drives judges away from the judiciary, is the uncompetitive salary and benefits package. As one supreme court judge noted, with a sense of self-mockery, “The primary roles of Chinese judges are Party cadres and civil servants, and only then would they be judges.”<sup>69</sup> This remark in many respects reflects the frustration and helplessness of judges regarding the salaries and benefits they receive and the administrative ranks they deserve.

Judges are paid as civil servants and enjoy similar administrative ranks in accordance with a strictly hierarchical scale. Courts largely depend on local governments at the same level for financial support, including for judges’ salaries and bonuses, office supplies, vehicles, court buildings, and so forth, and the limited budget of courts and their reliance on local governments for funding is a significant obstacle for independent operation and providing competitive remuneration for judicial staff. As Li suggests in her empirical study on judicial corruption within the Chinese court system, these financial arrangements not only facilitate corruption in courts in the face of local protectionism but also largely undermine judges’ initiative and enthusiasm for their work.<sup>70</sup> Consequently, the widening income gap between experienced lawyers and judges has intensified the differentiation within the legal profession, eventually driving judges away from the judiciary. For instance, a former judge in a

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<sup>68</sup> Interview SPC20140805, August 5, 2014; SPC20140818, August 18, 2014; and SPC20140829, August 29, 2014.

<sup>69</sup> Interview SPC20140818, August 18, 2014.

<sup>70</sup> Ling Li, “The ‘Production’ of Corruption in China’s Courts: Judicial Politics and Decision-making in a One-party State” *Law and Social Inquiry* 37, no. 4 (February 2012): 848.

Beijing local court with more than twenty years of trial experience could earn 1 million RMB (USD 144,625) a year as a legal counsel for a large trust company—more than eight times his salary at a basic-level court in Beijing (USD 17,355). According to this judge, “Becoming a people’s judge is undoubtedly the noblest task to which I’d like to devote myself with all my heart, but the ideal can be cruelly shattered by reality.”<sup>71</sup>

Thus, junior and assistant judges work under constant pressure yet have difficulty bearing the cost of living, housing, and child rearing.<sup>72</sup> It is then no surprise that in 2014, less than one-fifth of law school graduates (with bachelor’s degrees) were reported to work as junior or assistant judges after graduation, while most of their fellow graduates became practicing lawyers or in-house counsels, or worked in a different sector.<sup>73</sup> For most new graduates, engaging in income-driven work “has nothing to do with professional ambitions but rather is a practical compromise to the reality [of life].”<sup>74</sup>

### *Intense workload and pressure*

The judges interviewed also frequently mentioned an intense workload accompanied by extreme pressure when discussing the primary factors that undermine the career identity of judges and result in the wave of resignations. With the amendment of the Administrative Procedure Law in 2014 and the adoption of new requirements for the case registration

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<sup>71</sup> Zhou, “Stories behind the Quitting Judges.”

<sup>72</sup> Statistics suggest that in 2014, the average monthly income for new graduates who went to work in Beijing courts was RMB 3,700 (USD 535) during the first-year internship. Subsequently, after passing a series of examinations and becoming formal members of the court, increased to RMB 4,400 (USD 635). In contrast, the average income for junior lawyers during the same period was RMB 8,000–20,000 (USD 1,157–2,894). See Jianxun Wang, “Resolutions to the Brain Drain of Judges (*faguan liushi de zhiben zhidao*),” *Legal Information* 6: 21–23; also see interviews SPC20140829, August 29, 2014, and SPC20140905-2, September 5, 2014.

<sup>73</sup> MyCOS Institution, *Chinese College Graduates’ Employment Annual Report (2014)* (Beijing: Social Sciences Academic Press, 2014).

<sup>74</sup> Zhou, “Stories behind the Quitting Judges.”

system in 2015,<sup>75</sup> the caseload of courts at all levels increased dramatically. The increased caseload has led to significant pressure on individual judges, who frequently have to work overtime to conclude cases and complete various judicial and nonjudicial tasks.

According to the *2017 Work Report of the Supreme People's Court*,<sup>76</sup> cases accepted by the Court surged by 42.3% during 2016 compared with the previous year, totaling 22,742 cases. Correspondingly, cases accepted by the lower-level courts rose by 18% in comparison to 2015, with cases totaling 23 million. Even after the judgments have been delivered, legally effective decisions go through retrials or reexamination of litigation-related petitions based on the existing legal provisions in several circumstances.<sup>77</sup> In practice, the lack of finality of judgment and the overemphasis on error correction have substantially increased judges' workload and strained their ability to confront their superiors, procurators, government and Party officials, the media, and so forth.

### *Bureaucratized judicial management*

The prevailing hierarchical approaches to judicial management in the Chinese judiciary is another important source of judges' dissatisfaction. In many respects, Chinese judges are appointed, evaluated, ranked, and managed in similar ways as government officials. For instance, the system of court performance management can be viewed as an administrative means of bureaucratic control that the Court has adapted to evaluate the performance of courts and individual judges, and to control them during

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<sup>75</sup> See *Opinions of the Supreme People's Court on Promoting the Reform of the Registration System for Case-filing by the People's Courts*, Fa Fa no. 6 (2015).

<sup>76</sup> See "Publication of the Work Report of the Supreme People's Court and its Appendixes", updated March 19, 2017, <http://www.court.gov.cn/zixun-xiangqing-37852.html>.

<sup>77</sup> Articles 177, 179, and 185 of the Civil Procedure Law specify the circumstances for the courts, parties, and procuracies to trigger retrials of legally defective decisions. For a detailed discussion on how the Court handles retrial cases and litigation-related petitions, see chap. 3, sec. 3.2 and chap. 4, sec. 4.3.

everyday operation.<sup>78</sup> Likewise, the lifetime responsibility system for case quality and the wrongful cases accountability system set out by the *Decision of Fourth Plenary Session of the Communist Party* in 2014 highlighted a set of internal disciplinary codes and corresponding responsibilities for judges to strictly follow.<sup>79</sup> Nevertheless, these two mechanisms generated controversy after they were introduced, and legal commentators asserted that while the overemphasis on judicial accountability could perhaps succeed in addressing a number of unjust, false, and wrongfully decided cases, it is unlikely to be the prime mechanism protecting judges against peremptoriness. As Professor Fu insightfully points out, “it does not make any sense to talk about taking independent responsibility without referring to an independent exercise of judicial power, which has not been fully embraced by Chinese courts yet.”<sup>80</sup>

Because the results of performance assessments and rankings are commonly used as the basis of judges' performance bonuses, promotions, and adjustments in ranks and salaries, it is unsurprising that judges found themselves increasingly performing a tightrope act when conducting their daily work. As one judge interviewee pointed out, the severe imbalances of their workload and salary, of growth space and promotion opportunities, of judicial accountability and autonomy, all make him and his colleagues feel they are “carrying a burden like drug dealers but earning a salary like vegetable growers.”<sup>81</sup>

In the information-led age, Chinese judges are increasingly looking into the roles judges play in other countries as they seek to define their own

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<sup>78</sup> For a detailed discussion on the system of court performance management, see chap. 4, sec. 4.2.

<sup>79</sup> See *Several Opinions of the Supreme People's Court on Improving the Judicial Responsibility System of the People's Courts*, Fa Fa no. 13 (2015).

<sup>80</sup> Yuling Fu, "Judges Should Get Promotion without Misconduct (*faguan bu fancuo jiu yinggai shengqian*)," *Economic Observers*, March 27, 2014.

<sup>81</sup> Interview SPC20140805, August 5, 2014.

positions and identities.<sup>82</sup> For most Chinese judges, especially those in top posts, their career identity is not solidly built on their roles of safeguarding and developing the law, as is the case for most of their counterparts in Western jurisdictions. Rather, the remuneration, bureaucratic ranking system, and workload become determining factors in shaping the career identity of Chinese judges. Despite supreme court judges enjoying relatively high administrative ranks and superior remuneration compared to their counterparts in lower-level courts, they shoulder a greater responsibility for strengthening the judicial authority and building up the accountability of the judicial system as a whole. In this respect, as insightfully pointed out by an interviewed supreme court judge:

Supreme court judges always seem to have the interest of all judges in mind, sparing no efforts to safeguard their professional pursuit, benefits and welfare, cultivation, and training, especially to stimulate judges' strong sense of honor and their belongingness to the legal profession. However, this wish is not promising under the current system.<sup>83</sup>

This remark is thought-provoking due to its incisive highlighting of the deep-rooted bureaucratic nature and flawed personnel management of judicial administration. In recognizing that it is generally difficult for individual judges, especially supreme court judges, to build a reputation through meaningful rulings and sophisticated decision-making—which have a limited impact beyond individual cases—judges choose to build their career identity through the roles of political actors and cadres rather than by paying due attention to their roles as neutral adjudicators and law developers. This, in turn, has intensified the bureaucratic nature of managing judicial institutions and their personnel, and how judges lay particular emphasis on different roles to achieve self-actualization.

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<sup>82</sup> Liebman, "China's Courts: Restricted Reform," 638.

<sup>83</sup> Interview SPC20140724, July 24, 2014.

## 2.4. People's Courts or Party's Courts?

The Court does not operate in an institutional vacuum; hence, the exercise of judicial power cannot be understood separately from its political and constitutional environment, especially the extent to which the Court can function with autonomy under the ruling authorities' oversight. After all, for a single-party socialist state such as China, the relationship between the Party and the judiciary is considered complex and profound, which is reflected in different respects and through various channels in the areas of ideology, policy, personnel matters, and even the trial process.<sup>84</sup> To critics, perhaps more to the point is the fact that Chinese courts act as the "Party's courts" rather than as the "people's courts" under the overall control of the Party authorities, which is generally referred to as the "living constitution" in China.<sup>85</sup> Nevertheless, it would be problematic to conclude that the Court aligns with the Party's view in every aspect or that there is no substantive room for the judicial power to develop and advance toward a more capable actor. The Court has made solid progress in promoting judicial professionalization and standardizing trial procedures in the reform era, especially in imposing strict limits on the Party's undue interference in the judicial decision-making process. Therefore, it is necessary to re-examine the relationship between the Court and the Party, especially through the various aspects of the latter's involvement in the former's everyday practice.

This section sheds light on the political determinants of the Court's exercise of power from a macro-level perspective, with a careful examination of how the Party affects judicial ideology, policy-making, court personnel management, and judicial decision-making, making

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<sup>84</sup> Peerenboom, *China's Long March*, 302.

<sup>85</sup> Hou, *Study on the Supreme People's Court*, 61; He, "The Party's Leadership."

distinctions between the Party's direct and indirect influence, abstract and concrete instructions, and their impacts in practice.

### **2.4.1. The Party's Impact on Ideology and Policymaking**

On the ideological front, the judiciary is obliged to conduct adjudication work in line with the Party's latest policies. Party-led or Party-inspired policies are usually initiated by the Party's Central Committee (*zhonggong zhongyang weiyuanhui* 中共中央委员会) or the Central Political-Legal Committee (*zhongyang zhengfa wei* 中央政法委, or CPLC) in abstract forms, focusing on advancing a series of political tasks, including promoting the Party's ideological education, fighting against corruption, maintaining social stability, and so forth. Officially, the CPLC is a powerful political actor at the top of the political-legal system, focused on overseeing the operation of the political-legal system, including the judiciary, the procuracy, and public security organs.<sup>86</sup> The Court plays a role in transmitting and incorporating the Party's latest policies and the reform directions it defines into its working plans, and more significantly, setting up detailed regulations and guidelines for the lower-level courts to follow. In a sense, it is no exaggeration to assert that the Party's leadership has set the tone of the major functions of the judiciary and decided the path for legal development in China.

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<sup>86</sup> Specifically, the CPLC takes a lead in the following aspects: (1) setting and disseminating policies in accordance with the Party's principles; (2) deploying, coordinating, and supervising the work of legal institutions, including courts, procuracies, and public security organs; (3) assisting in researching and resolving the difficult and major cases; (4) promoting the legal and judicial reform process; and (5) assisting in investigating and attacking corruption and other duty crimes of the leading cadres. See Communist Party of China, "An Introduction to the National Political Legal Committee," *News of the Communist Party of China*, accessed October 10, 2014, <http://cpc.people.com.cn/GB/64114/64135/5994757.html>.



Based on 35 annual working reports of the Court from 1950 to 2004,<sup>87</sup> Yu identifies three major transformations of the Court's major functions in accordance with the Party's leadership since the founding of the nation.<sup>88</sup> Before 1983, the primary function of the Court was to strike down "antirevolutionaries," deal with political struggles, and lead political movements. The Court actively served the needs of politician, aiming to promote the unity of the people and convict those who undermined the social order. Given that resolving disputes, especially civil disputes, was not the priority of the judiciary at the time, the Court attached more weight to judges' political consciousness than judicial professionalism during the early years under Mao.

After recovering from the Cultural Revolution (1966–1976) and recognizing the importance of law, the Court reverted to its function and began to concentrate on developing and improving its adjudication work. Based on a series of *Work Reports of the Supreme People's Courts* the Court released in the late 1990s, promoting judicial professionalism and systematically launching judicial reforms were the primary tasks of the Court as a response to the Party's call for building a socialist country ruled by law.<sup>89</sup> More recently, following the Party's latest instructions on advancing economic development and maintaining social stability, the Court has taken on more political tasks than ever before, highlighting the call for "provid[ing] strong judicial protection and qualified judicial service" to ensure the promotion of stable and rapid economic

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<sup>87</sup> Article 16 of the Organic Law of the People's Courts provides that the Court is responsible to, and reports on its work to, the NPC and its Standing Committee. Accordingly, the Court has systemically submitted its annual work reports to the NPC for its deliberation and approval since 1950. For an overview of the English translation of the *2016 Work Report of the Supreme People's Court*, see [http://www.chinahumanrights.org/html/2016/MAGAZINES\\_0919/5652.html](http://www.chinahumanrights.org/html/2016/MAGAZINES_0919/5652.html) (accessed January 15, 2018).

<sup>88</sup> Yu, "The Political Functions of the Supreme People's Court."

<sup>89</sup> The principle of the socialist concept of rule of law was first established at the Fifteenth National Congress of the Communist Party in 1997.

development<sup>90</sup> and implementing the idea of “justice for the people” (*sifa weimin* 司法为民) to satisfy the masses in terms of case filing, trial processes and execution, litigation-related petitions, and so forth.<sup>91</sup>

For the judiciary in any liberal democratic regime, it seems at odds to surrender judicial autonomy under the flag of political ideological education in any way. But a closer examination of the political slogans the Court advanced over the past few decades helps to identify the key difference in terms of the exercise of judicial power between liberal democracies and nondemocratic regimes. As Ginsburg notes in his comparative study, for most Western democracies characterized by the diffusion of political forces, a high degree of tolerance of a strong judiciary can be expected to assure the ideas of separation of powers and a government with limited power.<sup>92</sup> Under such circumstances, as Shapiro’s work indicates, the primary roles of the highest courts may be to provide uniform interpretation and application of legal rules.<sup>93</sup> Conversely, the power and autonomy of courts are rather limited and easily undermined in authoritarian regimes, within which the judiciary attempts to build a consensus on its major initiatives under the oversight of the single dominant party or military force. Against this backdrop, the highest courts of authoritarian regimes have, by and large, to serve the interests and needs of the ruling authorities, as prominently reflected in their primary functions of promoting political ideologies and incorporating major social policies.

In the case of China, Article 78 of the 1954 Constitution stated that “the people’s courts shall exercise judicial power independently, subject *only* to the law,” but this provision later changed to “the people’s courts at

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<sup>90</sup> See *Notice of the Supreme People’s Court on Conscientiously Implement the Spirit of the Party’s Central Economic Working Conference*, Fa Fa no. 58 (2010).

<sup>91</sup> See *Opinions of the Supreme People’s Court’ on Further Improving the Judicial Service to Benefit the Public*, Fa Fa no. 293 (2014).

<sup>92</sup> Ginsburg and Moustafa, *Rule by Law*, 25.

<sup>93</sup> Shapiro, *Courts*, 55.

various levels shall exercise judicial power independently in accordance with the provisions of law, and are not yet subject to inference by any administrative organ, public organization or individuals” in the 1982 Constitution.<sup>94</sup> Interpreted literally, the revised Constitution explicitly excludes interference from several external institutions but chooses to remain silent about the influence of Party organs. The judiciary cannot free itself from the political influence of the Party in terms of the exercise of power, which leads to a more crucial question that has not yet been comprehensively answered in the literature on China’s judicial system: Can the Court achieve meaningful progress in the pursuit of its own version of legal development while adhering to the Party’s overall ideological oversight, and to what extent can it do so?

Despite the Party’s continued heavy influence on the judiciary on the ideological front, the endorsement of the socialist ideas of rule of law in many respects reveals the Party’s urgent need to enhance its governing legitimacy in the era of social transformation. This trend is likely to complicate the Court’s relationship with the Party, mainly from two aspects. While on the one hand the ruling party shows a higher degree of tolerance toward judicial empowerment and provides the Court with meaningful scope for maneuvering in a variety of adjudicative work, on the other hand, it does not expect, and cannot allow, a strong and independent judicial power to emerge that challenges and checks political power. In this respect, it is conceivable that the Party attempts to keep the judiciary fettered through political ideology and general policy guidance, while at the same time selectively engages in specific judicial policymaking and adjudicative activities upon its own initiative and demand.

Regardless of the contradiction between the law and political concerns, the Court has shown a marked departure from its previous practice and

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<sup>94</sup> CH Const. amend 1982, art. 126.

made significant efforts to balance legal requirements with its responsiveness to political tasks, especially exploring innovative solutions to fulfill its own version of judicial empowerment. For instance, Hou's and Ip's studies both suggest that the Court has increasingly transformed Party-led policies into detailed and feasible judicial policies on the basis of its judicial beliefs and practical needs, rather than relying solely on the Party's ideological instructions when implementing Party-led policies.<sup>95</sup> This observation was further confirmed by a supreme court judge who participated in this study and noted that currently, in most of the Court's instructions and judicial documents that are channeled to the lower-level courts, judges are no longer told to blindly follow the Party's political ideologies in adjudicative work.<sup>96</sup> Instead, judges of lower-level courts are exhorted to adhere to the law in the handling of individual cases and to resort to abstract legal norms and political policies when reaching their verdicts only when the law and regulations are not clear enough and the Court's instructions are insufficient in guiding the adjudication work.

For example, in a judicial policy, released in 2015 and updated in 2017, on how the courts should provide convenient and effective judicial service to the "One Belt One Road Initiative" (OBOR; *yidai yilu* 一带一路),<sup>97</sup> the Court highlighted a number of controversial cross-border legal issues and provided some proposed approaches to resolving disputes arising along the construction of the land-based and Maritime Silk Roads,<sup>98</sup>

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<sup>95</sup> Hou, *Study on the Supreme People's Court*, 64; Eric Ip, "The Supreme People's Court and the Political Economy of Judicial Empowerment in Contemporary China," *Columbia Journal of Asian Law* 24, no. 2 (2011): 367–435.

<sup>96</sup> Interview SPC20140813, August 13, 2014.

<sup>97</sup> The "One Belt One Road Initiative" is a development strategy proposed by President Xi in 2013 to push forward a China-centered trading network based on the land-based Silk Road and the Maritime Silk Road. For further discussion, see China Britain Business Council, "One Belt One Road," [http://www.cbcc.org/cbbc/media/cbbc\\_media/One-Belt-One-Road-main-body.pdf](http://www.cbcc.org/cbbc/media/cbbc_media/One-Belt-One-Road-main-body.pdf) (accessed November 9, 2017).

<sup>98</sup> See *Several Opinions of the Supreme People's Court on Providing Judicial Service and Protections for the Construction of "One Belt One Road Initiative" in the Court System*, Fa Fa no. 9 (2015).

accompanied by two batches of model cases<sup>99</sup> relating to cross-border contract disputes, maritime, and free-zone-related disputes, the recognition and enforcement of foreign civil judgments and arbitrations, and so forth.<sup>100</sup> This confirms that the Court has become increasingly involved in the nation's political governance rather than demonstrating unquestioning obedience to the political agenda of the ruling authorities. Although the Court in many respects still reflects and serves the nation's primary strategies, a significantly increased degree of professional competence in the reform era is likely to result in greater functional autonomy and an enhanced capacity to transmit Party-led policies in accordance with its own pragmatic needs and professional ideologies.

#### **2.4.2. The Party's Impact on Personnel Matters**

Apart from ideological education and policymaking, the Party also plays a role in the process of selecting and promoting supreme court judges. As previously discussed in this chapter, although the existing law provides the Court with considerable leeway in determining its own professional staff, the selection and appointment of the supreme court judges for top leadership positions are political choices, with key decisions being made behind closed doors by the political force. In practice, the appointment and promotion of supreme court judges to top positions involve strict political evaluations led by the Central Party Committee based on candidates' previous posts, work achievements, seniority, professional competence, political consciousness, and so forth. The Political Department of the Court—the main overseer of the personnel matters of

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<sup>99</sup> For a detailed discussion on the application of model cases and the Court's development of the Guiding Cases System, see chap. 3, sec. 3.4.

<sup>100</sup> The full text of the second batch of model cases relating to the OBOR is available at <http://www.court.gov.cn/zixun-xiangqing-44722.html> (accessed January 16, 2018). For the English translation of a number of model cases relating to the OBOR, see <https://cgc.law.stanford.edu/belt-and-road/b-and-r-cases/> (accessed January 16, 2018).

the Court—relies largely upon the Party’s definitive opinions to decide on high-ranking appointments.

One noticeable example to illustrate this point is the appointment of Wang Shengjun, a former CPLC secretariat member, as the president of the Court in 2008. During his presidency, between 2008 and 2013, Wang’s bureaucratic leadership style in terms of both judicial work and the judicial reform agenda has been widely criticized by judges, academics, and lawyers, particularly for curtailing the liberal tendencies of the Court compared with the legacy of his predecessors.<sup>101</sup> Unlike President Xiao Yang, who made great efforts to advance judicial professionalism and trial independence during his tenure (1998–2008), Wang kept emphasizing the political role of the courts in preserving social stability and strengthening hierarchical control within the judiciary. In particular, a strong emphasis on the “Three Supremes” (*sange zhishang* 三个至上) principle, that is, the supremacy of the Party, the supremacy of popular interests, and the supremacy of the Constitution and the law, under Wang’s leadership seems to indicate that if a conflict occurs between the Party’s interests and the law, the latter would probably be sacrificed to comply with the broad vision of the nation’s political governance. Critics claim that it makes little sense for a legal professional to rank the law third in view of the “Three Supremes,” which reflects the bureaucratic approach of Party cadres to directing the operation of the Court and the Chinese court system.<sup>102</sup> Given that Wang was the only president in the Court’s history that took office without having any legal educational background or working experience in the judiciary,<sup>103</sup> it is conceivable that the appointment of Wang as the

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<sup>101</sup> Interview SPC20140805, August 5, 2014; also see Weifang He, “Who Comes First in the ‘Three Supreme’ (*sange zhishang shui zhishang*),” *He Weifang’s Blog* (blog), August 27, 2008, [http://blog.sina.com.cn/s/blog\\_488663200100atga.html](http://blog.sina.com.cn/s/blog_488663200100atga.html); Keith, Lin, and Hou, *China’s Supreme Court*, 36–41.

<sup>102</sup> He, “Who Comes First.”

<sup>103</sup> Wang Shengjun’s only formal education was a Bachelor of History conferred in 1968. Over the next forty years, he worked his way up the ladder of political leadership within the political-legal committees.

president of the Court was nothing but a demonstration of the Party's deep-rooted fear of judicial professionalism and independence.<sup>104</sup>

Since Zhou Qiang's accession to the position of president of the Court in 2013, the development of the judiciary seems to slowly be returning to the track of strengthening judicial authority and deepening judicial reform, as is shown by the slogans Zhou circulated when he became president, such as "striving to make the people feel fairness and justice in every case," advancing adjudication reform "with the trial at the center" (*yi shenpan wei zhongxin* 以审判为中心), and so forth.<sup>105</sup> Although it would be premature to conclude that Zhou's Court will perform more independently and consistent with the law and legal principles, there seems to be signs of a renewed focus on the adjudicative power of courts that are by and large essential and unique to them, as shown by Zhou's full endorsement of institutional transformation and optimizing the allocation of judicial personnel, and his promotion of judicial openness in many aspects, including open recruitment for some senior Court posts in recent years. It has been reported that five candidates—one senior lawyer, two law professors, and two senior procurators—stood out from the 195 candidates and secured senior posts at the Court in 2014. Although it was not the first time the Court recruited professional talent through open channels, the vacancies it provided were among the most high-ranking posts available, including deputy chief of the criminal division, presiding judges in the criminal and civil divisions, and chief of the Judicial Reform Office.<sup>106</sup>

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<sup>104</sup> Interviews SPC20140808, August 8, 2014, and SPC20140805, August 5, 2014.

<sup>105</sup> Qiang Zhou, "Advancing the Establishment of a Socialist Nation of Rule of Law: Learning from President Xi Jinping's Exposition of the Rule of Law (*zhou qiang: jiji tuijin shehui zhuyi fazhi guojia jianshe-xuexi Xi Jinping tongzhi guanyu fazhi jianshe de zhongyao lunshu*)," *People's Daily*, August 12, 2013.

<sup>106</sup> Tiantian Gui, "The Supreme People's Court Openly Selected Bureau-Level Cadres through Open Channels (*zuigao renmin fayuan mianxiang shehui zhaopin juchuji ganbu*)," *Beijing Youth Daily*, March 31, 2014.

Despite the Party's continued input in controlling the Court's leadership, its impact on the appointment of ordinary supreme court judges seems to be less obvious, with a generally limited scope. From a practical perspective, the level of political consciousness of a judge and his title as a Party member have been ascribed less weight in determining whether a candidate judge is competent for the position. To date, there are more than 73 million Party members in China, with more than 90% of judges being Party members.<sup>107</sup> Clearly, it is easy to overstate the importance of the Party's ideological impact and its substantive control of individual judges if one fails to consider the pragmatic concerns behind judges' choice. As suggested by Peerenboom,

being a Party member tells us little about a judge's political or legal view: one could be a reformer or conservative, in favor of rule of law or against it. It is possible that Party members may be more likely to follow the Party line more readily than non-Party members simply to avoid jeopardizing their career. But most cases turn on legal issues for which there is no Party line or no clear Party line.<sup>108</sup>

Indeed, for many supreme court judges, being Party members may simply be an opportunistic choice in terms of securing their career development.<sup>109</sup> In a sense, it can be difficult to tell exactly to what extent judges' political beliefs influence their decision-making processes and whether judges tend to handle cases in line with the Party's ideological instructions. Nevertheless, with a constant pursuit of greater professionalization within the judicial hierarchy in the reform era, it seems to be the case that the Party's role in the Court's personnel matters has

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<sup>107</sup> Pierre Landry, "Does the Communist Party Help Strengthen China's Legal Reforms?" *China Review* 9, no. 1 (2009): 45–71.

<sup>108</sup> Peerenboom, *China's Long March*, 306.

<sup>109</sup> Interview SPC20140805, August 5, 2014.



been gradually reduced, with an increasing emphasis on the competence and professionalism of individual judges.

### 2.4.3. The Party's Impact on Handling Cases

The growing autonomy of the Court in implementing Party-led policies and determining most of its judicial personnel raises questions about the Party's involvement in judicial decision-making. For veteran observers of the Chinese judicial system, the interference of Party organs or individual Party members in court cases has been a long-standing practice.<sup>110</sup> Recently, scholars have begun to shed light on this touchy subject and to investigate how the Party has been involved in the judicial decision-making process and how courts' relationships to Party authorities influence courts' day-to-day performance.<sup>111</sup> Officially, the Party may involve itself in specific cases through political-legal committees at various levels in the forms of trial coordination and trial supervision, most of which currently remains tolerated and even accepted. For instance, in a judicial document the Court issued in 2016, it highlighted the importance of "firmly uphold[ing] the Party's leadership" while providing judicial service to promote regional development of the Beijing–Tianjin–Hebei districts, requiring lower-level courts to seek support from various parties especially to "closely rely on the local political-legal committees and government institutions to coordinate and resolve policy-oriented and

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<sup>110</sup> See Peerenboom, *China's Long March*, 302–309; Harry Liu, Meg Utterback, and Simin Yu, "Court System" in *Doing Business in China*, eds. Michael Moser and Fu Yu (Huntington: Juris Publishing, Inc., 2014), 29–33.

<sup>111</sup> He, "The Party's Leadership"; Meng Hou, "Study on the Political Legal Committees: Relationship Between the Communist Party and the Political Legal System in China (*dang yu zhengfa guanxi de zhankai: yi zhengfa weiyuanhui wei yanjiu zhongxin*)," *The Jurists* 2 (2013): 1–15; Ling Li, "The Chinese Communist Party and People's Courts: Judicial Dependence in China," *American Journal of Comparative Law* 64, no. 1 (2016): 37–74.

sensitive cases.”<sup>112</sup> According to several judges interviewed for this study, it is common practice for them to turn to political-legal committees for coordination with related government and other parties, because

in specific types of cases, little progress would have been made without the participation of the Party organs in effectively solving such disputes. Under these circumstances, [judges] will actively seek support and advice from them... Whereas we know deep down inside that it is important to cooperate with the political-legal committees with a distinct boundary while keeping in mind of the bottom line of the law.<sup>113</sup>

In the wake of the socialist concept of the rule of law in modern China, the Party’s interference in individual cases has become more strictly defined in accordance with a set of recent judicial documents,<sup>114</sup> at least explicitly. But it may be too idealistic to expect a complete elimination of the Party’s involvement in specific types of cases, at least currently. As Chinese courts handle millions of cases every year,<sup>115</sup> it is important to distinguish between different types of cases before engaging in discussion on the forms of influence, the risks associated with this influence, and the extent of the influence the Party exerts in specific types of cases.

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<sup>112</sup> *Opinion of the Supreme People’s Court on Providing Judicial Services and Guarantees for the Coordination Development of the Beijing-Tianjin-Hebei Region*, Fa Fa no. 5 (2016).

<sup>113</sup> Interviews 20140724, July 24, 2014; SPC20140808, August 8, 2014; and SPC20140905-2, September 5, 2014.

<sup>114</sup> See, for instance, *Provisions of the Supreme People’s Court on “Five Prohibitions,”* Fa Fa no. 2 (2009); *Implementing Measures for People’s Court Carrying Out the “Provisions on Recording, Reporting and Pursuing Responsibility of Leading Cadres Interfering with Judicial Activities or Tampering with the Handling of Specific Cases,”* Fa Fa no. 10 (2015); *Implementing Measures on Pursuing Responsibility in Cases of Internal Judicial Personnel Prying into Cases*, Fa Fa no. 11 (2015).

<sup>115</sup> Newly released data from the Court suggests that courts at various levels handled over 23 million cases in 2016. See *Work Report of the Supreme People’s Court (2017)*.

In light of Fu and Peerenboom's search for a new analytical framework for understanding judicial independence in China, a distinction has been made between purely political cases, politically sensitive cases, and routine cases.<sup>116</sup> These three categories may include diverse forms of criminal, civil, and administrative cases. In particular, political cases are narrowly restricted to those that already violate or pose a direct threat to the authority of the regime, for example, cases concerning heretical organizations, corruption involving senior government officials, national security, and so forth. Politically sensitive cases, on the other hand, cover a wide range of cases including those that may affect sociopolitical stability, economic development, and the broad public interests. Cases falling in this category range from labor and environmental disputes, land expropriation, and compensation disputes to controversial, eye-catching cases such as death penalty cases. Finally, the third category of cases makes up the majority of cases handled by courts of various levels on a day-to-day basis, that is, routine cases. Based on this classification, we can now examine each case type and discuss how and to what extent the Party exerts influence on them.

### *Purely political cases*

Existing literature suggests that the Party's influence on this category of cases is generally systemic and consistent, which is primarily formalized through the Party's policies and discipline rather than its involvement in particular cases.<sup>117</sup> In line with the Party's regulations and specific instructions, many political cases are resolved secretly through political channels before reaching the courts. For the remainder, although they would be submitted to judges within the courtroom and go through

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<sup>116</sup> Yulin Fu and Randall Peerenboom, "A New Analytic Framework for Understanding and Promoting Judicial Independence in China" in *Judicial Independence in China: Lessons for Global Rule of Law Promotion*, ed. Randall Peerenboom (Cambridge: Cambridge University Press, 2009).

<sup>117</sup> *Ibid.*

ordinary trials in accordance with due process, the outcomes of such cases are likely to be heavily influenced by the Party beforehand. One notable example of this is the Bo Xilai Case (2013). Bo is a former Chinese politician who served as the Party secretary of Chongqing before his fall. As a top-level Party cadre, Bo was first investigated by the Central Commission for Discipline Inspection—the highest internal-control institution of the Party, in charge of toppling undisciplined senior Party cadres—for his “serious disciplinary violations” in 2012. After ten months of internal Party investigations and being expelled from the Party, Bo’s case was handed over to the procuratorate at the local level. He was charged with corruption, bribery, and abuse of power in 2013, and eventually found guilty on all charges and sentenced to life imprisonment by Jinan Intermediate People’s Court. To Western observers, this outcome was easily predicted in advance in view of the fact that Bo’s case is a political case in essence and the judiciary was unlikely and unable to make key decisions or challenge aspects of it without the Party’s approval.<sup>118</sup>

### *Politically sensitive cases*

Compared to the Party’s approach to dealing with purely political cases, its influence on politically sensitive cases tends to be much more complicated and diversified in practice. In terms of format, for instance, while sometimes Party leaders or Party members would provide direct oral instructions to presiding judges in charge of the specific cases, others use written instructions that can be channeled through the courts’ leadership to reach presiding judges’ desks. As to the content, while the Party sometimes only instructs judges to “emphasize” specific cases or “prudently” handle certain types of cases in accordance with law, Party

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<sup>118</sup> BBC News, “Bo Xilai Scandal: Timeline,” *BBC News, China*, November 11, 2013, <http://www.bbc.com/news/world-asia-china-17673505>.

officials also look for opportunities to recommend certain solutions to particular cases to cover their own interests in such cases.<sup>119</sup>

Nevertheless, as Professor He Haibo points out, the line between “coordination and supervision in accordance with the law” and “interference with adjudicative activities” is a fine one in practice, which makes the Party’s interference ambiguous and indistinct, leaving plenty of room for discretionary interpretation.<sup>120</sup> Consequently, a pattern of dualism can be found in the Party’s exercise of “supervisory power” over judicial decision-making, depending on whether a given case or specific types of cases have been flagged as politically sensitive cases by Party authorities. This may largely explain why the judges from different fields interviewed in this study have distinctly different perceptions of the Party’s interference in the handling of different types of cases. While some judges found themselves rarely affected by Party organs in handling intellectual property cases, marriage and family cases, and minor criminal cases that barely touch upon core political concerns and public interests;<sup>121</sup> some others admitted that they have been frequently put in a tough position during administrative and commercial cases involving high-profile companies, state-owned enterprises, or a large group of potential plaintiffs.<sup>122</sup> Confronting politically sensitive cases, judges are more likely to make their rulings with caution while under enormous pressure from the Party authorities and court leadership, local governments, the media, public trust, and so forth.

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<sup>119</sup> Interviews SPC20140724, July 24, 2014, and SPC20140821, August 21, 2014.

<sup>120</sup> Haibo He, "Strict Prohibitions regarding Interference and Inquires: A Remarkable Step toward Judicial Reform (*duzhu ganyu yu guowen, sigai lushang yidabu*)," *People's Court Daily*, August 21, 2015.

<sup>121</sup> Interviews SPC20140813, August 13, 2014; SPC20140821, August 21, 2014; and SPC20140826, August 26, 2014.

<sup>122</sup> Interviews SPC20140724, July 24, 2014; SPC20140818, August 18, 2014; and SPC20140821, August 21, 2014.

*Routine cases*

It has become increasingly accepted that courts are generally competent, consistent, and efficient in handling routine cases.<sup>123</sup> Regardless of the low risk of being subject to the Party's interference, in practice, the line between politically sensitive cases and routine cases is often blurred. Unlike the pure political cases that are markedly different from the other categories of court cases, routine cases may turn into politically sensitive ones if they involve elements such as multiple plaintiffs, government authorities, a large sum of money, new and difficult legal issues, and flaws during the trial process. Conversely, politically sensitive cases may also transform into routine cases if the Court or other government authorities have made efforts to fill in the gaps and provided further interpretations regarding key legal issues in specific types of cases. In a sense, it is inaccurate to assume that all court cases are listed as vulnerable to the external interference of the Party or to overstate the extent of the Party's interventions in judicial decision-making.

Moreover, as Peerenboom argues in his study, the Party's involvement in specific cases does not necessarily mean that justice is sacrificed.<sup>124</sup> Rather, as a judge interviewee points out, in view of the courts' rather weak authority within the current political and legal structure, Party organs sometimes play a positive and even crucial role to ensure that certain complicated and influential cases can be settled smoothly among all parties and that cases are eventually enforceable, with the necessary support from government authorities and other institutions.<sup>125</sup> According

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<sup>123</sup> Xin He, "Enforcing Commercial Judgments in the Pearl River Delta of China," *American Journal of Comparative Law* 57, no. 2 (2009): 419–455; Xin He, "Debt Collection in Less Developed Areas of China: An Empirical Study from Shaanxi Province" *The China Quarterly* 206 (2011): 253–275.

<sup>124</sup> Peerenboom, *China's Long March*, 308.

<sup>125</sup> Interview SPC20140724, July 24, 2014.

to the interviewee, any discussion of the Party's impact on specific cases should be subject to concrete analysis through three layers:

First, it is important to think about the ways as well as the degree of the Party's interference. Second, one should take into account how individual judges deal with such interference and work under stress. Third, what matters most is how the Party's influence is eventually reflected in the outcome of a given case.<sup>126</sup>

Through reforming the Court into a more pragmatic institution equipped with expert judges, it has become common practice for supreme court judges to form their own approaches to legal thinking in the course of adjudication, which enables judges to incorporate professional values, judicial beliefs, and political and social concerns into their preferences instead of rigidly following the Party line to adhere to the latest Party policies. Following the Fourth Plenum of the 18th Communist Party Central Committee in 2014, despite that the Court remains in many respects responding to and serving the nation's primary strategies and political concerns, recent efforts of the Court reflect its strong intention to rationalize vague political principles and bring them in line with legal principles, judicial beliefs, and its own professional pursuits. More importantly, with increasing emphasis on the role of the law and an up-to-date understanding of the Court's relationship to the Party, it is evident that the Court has taken pragmatic steps in pushing forward the core functions of the courts while at the same time integrating certain aspects of diversity and flexibility into the legal system.

## **2.5. Concluding Analysis**

The institutional environment in which the judiciary is embedded is undoubtedly an overriding factor in understanding the highest court's

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<sup>126</sup> Ibid.

primary roles and functions in the exercise of judicial power, and the Court is not an exception. Indeed, the investigation into the Court's organizational framework, personnel, and administrative management of individual judges, as well as political determinants, is the key to understanding how the Court shapes its most important power through varying input factors. The theoretical and empirical evidence presented in this chapter suggest that the Court has made significant progress in the direction of a more effective, efficient, and predictable legal institution in the era of transformation. A noticeable trend to this end is the professionalization of the Court and the increased competence of supreme court judges over the past decade. A constant pursuit of greater professionalization in many respects reflects the Court's pragmatic initiatives to enhance its institutional capacities in pursuit of greater judicial autonomy and authority under the Party's oversight. In fact, this particular vision of the Court has been supported by Party authorities through their increased tolerance of the empowerment of the Court.

Nevertheless, the extent to which the Court can exercise power independently and without interference does not automatically increase, as the Court continues performing under deep-seated institutional and political constraints. In fact, the bureaucratic management approach in the judicial institution and to its personnel carry a high risk for the Court in the exercise of power and inevitably make it vulnerable to enormous external and internal pressures, including from Party organs and high-ranking Party members, sister government agencies, court leadership, and the adjudicative committee of the court, which are further addressed in the subsequent chapters. More importantly, because judges are subject to the dual leadership of both the professional adjudicative body and the strict bureaucratic control within the court hierarchy, the long-term damage resulting from the limitation of self-realization in adjudication work and individual judges' frustration with their career identity should not be underestimated.



Despite the strenuous efforts the Court has made to promote its institutional capacities and judicial autonomy, one should remain aware of the significant challenges the Court continues to face, struggle with, and resolve, including the search for more space to develop from the Party, the lack of power to counterbalance other government actors, and the substantial steps toward a more authoritative and independent judicial institution. As He notes in his empirical study, as all the current efforts and achievements of the Court can occur only under the umbrella of the Party's leadership, under China's present circumstances, identifying the patterns of the courts' struggles and compromises in reality is significantly more important than studying the textbooks concerning the courts.<sup>127</sup> Indeed, from the standpoint of legal and sociological scholars, the reassessment of the Court's institutional power is an effort of this kind that aim to bridge the knowledge gap regarding the institutional motivations that drive the Court's judicial and nonjudicial activities, the types of institutional flexibility available to the Court so it can be better positioned to resist external influence, and drawing a line between bureaucracy and leadership, between principles and capricious.

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<sup>127</sup> He, "The Party's Leadership."