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The power of the Supreme People's Court

Reconceptualizing judicial power in contemporary China

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CHAPTER 3

THE JUDICIAL PRACTICE OF THE COURT

3.1. Introduction

IN CHAPTER 2, we investigated three layers of power allocation in China's Supreme People's Court (the Court) to obtain an institutional perspective and determine how the Court has been organized and empowered. However, this alone is of little interest to functionalists without reference to how the Court operates and fulfills its roles in everyday practice. From the discussion in chapter 2, it seems judicial power is relatively restricted in China's one-party setting, and the absence of the power of judicial review has reinforced the impression that the

Court has been left with little substantive room to advance toward becoming a more capable and independent actor.

Nevertheless, it would be an oversimplification to conclude that the Court is an incompetent actor or enjoys no functional autonomy at all in the exercise of power. Rather, existing scholarship has begun to recognize that through engaging in an extensive range of judicial and nonjudicial activities, from resolving disputes and making abstract judicial interpretations to serving the promotion of economic development and ensuring social stability, the Court has shown increased pragmatic incentives and autonomy in advancing legal development and promoting judicial reform.¹ Although scholars have thoroughly studied several specific mechanisms of the Court and examined how they work in practice,² little systematic study has been conducted thus far concerning how the judicial and nonjudicial functions together shape and contribute to the evolution of the Court's power. As the contents, methods, and technical means the Court adopted to push forward its impact on and beyond the legal fields significantly differ from those of its Western counterparts, and the motivations behind its decision-making remain largely unknown, this chapter, along with chapter 4, explores the practical roles of the Court through various output factors that work and interact with the judicial and nonjudicial fronts.

Existing scholarship suggests that understanding the development of the highest courts can be achieved by examining two aspects of their judicial roles: first, their function as guardians of the law, including the guarantee of the uniform application of the law and the protection of fundamental rights, and second, their contribution to the development of the law

¹ Eric Ip, "The Supreme Court and the Making of Public Policy in Contemporary China," *The Michigan Journal of Public Affairs* 7 (Spring 2010): 1–15.

² See Keith and Lin, "Judicial Interpretation"; Nanping Liu and Michelle Liu, "Justice without Judges: The Case Filing Division in the People's Republic of China," *Journal of International Law and Policy* 17, no. 2 (2011): 343; Yu, "The Political Functions of the Supreme People's Court"; Peerenboom, *China's Long March*.

through clarifying the law and filling in gaps between the law and practice.³ In light of this classification, the primary judicial functions of the Court can also be derived from its most important roles as adjudicator and impartial interpreter of the law, roles closely associated with the adjudicative activities exercised by judges inside the courtroom. Yet in addition to fulfilling a series of judicial functions, judges in many jurisdictions also engage in activities outside the courtroom, dedicating themselves to semi-judicial functions and nonadjudicative functions, including advising legal reformers and politicians, serving as public intellectuals or interim executives, and responding to public opinions and concerns.⁴ In particular, Moustafa identifies a number of nonjudicial functions that are commonly shared among courts in authoritarian states, including advancing administrative discipline within state institutions, maintaining cohesion among various factions within the ruling coalition, facilitating market transitions, and bolstering regime legitimacy.⁵

For the purpose of our analysis, a rough distinction between the judicial and nonjudicial practice of the Court is made on the basis of the following framework: judicial practice includes judicial functions that are adjudicative in nature and semijudicial functions that are closely associated with the adjudicative activities, while nonjudicial practice is further divided into functions that advance administrative management within the judicial hierarchy and functions that reflect the ruling state's political and social concerns. This chapter focuses on the most significant judicial practices of the Court, whereas the next chapter examines the Court's nonjudicial practice. Together these two chapters seek rational explanations for the pragmatic choices and practical compromises of the Court with a view to fulfilling its own version of judicial empowerment.

³ Elaine Mak, *Judicial Decision-making in a Globalized World: A Comparative Analysis of the Changing Practices of Western Highest Courts* (Hart Publishing, 2013), chap. 4.

⁴ Garoupa and Ginsburg, "Judicial Roles in Nonjudicial Functions."

⁵ Moustafa, "Law and Courts."

3.2. Is the Court a Court of Last Resort?

Among all its judicial activities, one essential task of the Court is to perform as the highest-level adjudicative institution and hear cases that fall within its jurisdiction. In line with the Organic Law of the People's Courts and three major procedure laws that govern civil, criminal, and administrative cases respectively, the Court is entitled to take or review:

- (i) cases of first instance either assigned by laws that decree to its jurisdiction or decided by the Court itself that it deems shall be tried;
- (ii) cases of appeals and of protests lodged against decisions of high people's courts and special people's courts;
- (iii) all death sentences; and
- (iv) cases of retrial from legal effective judgments with definite errors as stated in the relative laws.

Despite that the Court enjoys a broad jurisdiction over first-instance cases, evidence suggests that it rarely acts as the court of first instance in practice.⁶ The Court's choice to rarely hear first-instance cases can be viewed as a consistent approach to ensuring the implementation of the right of appeal in every case. According to the principle of "second instance being the final instance" (*er'shen zhongshen zhi* 二审终审制),⁷ only one appeal is allowed to be made to the next level superior court in the four-level court hierarchy, and the case must undergo an examination in both factual and legal aspects before an effective decision is reached. With few exceptions, the trial process is initiated in basic-level courts or one level above, depending on the type, significance, complexity, and

⁶ Hu's study on the historical development of the Court suggests that there were only a few cases where the Court was given original jurisdiction, for instance, the trial of John Tomas, who stood accused of jeopardizing national security (1954); the trial of Keiko Suzuki, who was charged with war crimes (1956); and the trial of the "Gang of Four," accused of being counterrevolutionary criminals (1980). See Hu, "Functions of the Supreme People's Court."

⁷ Organic Law of the People's Courts of 1979 (as amended in 2016), art. 12.

amount of the claim, for cases under various governing procedure laws.⁸ Technically, decisions made by the Court are final and non-appealable,⁹ so the Court tends to act as the court of appeal or retrial.

Through this initial design of power allocation within the judicial hierarchy, the judiciary intends to ensure that most cases are heard and resolved below the provincial high court levels, which in turn leaves the Court with sufficient time and energy to concentrate on other important tasks, including unifying the application of law, conducting adjudication supervision, and dealing with judicial administration matters. However, being exempt from taking first-instance cases has not relieved the Court of the tremendous burden of handling cases on a day-to-day basis. Official statistics suggest that the Court has borne a fast-growing caseload of appeals, retrials, and death penalty review cases in the past two decades (see Figure 2), which distinguishes it from many of its counterparts in the West.¹⁰

⁸ China has three major procedural laws that stipulate a systematic set of rules in terms of civil, criminal, and administrative litigation procedures respectively: the Civil Procedure Law of 1991 (as amended in 2012), the Criminal Procedure Law of 1979 (as amended in 2012), and the Administrative Procedure Law of 1989 (as amended in 2014).

⁹ Organic Law of the People's Courts of 1979 (as amended in 2006), art. 12.

¹⁰ For instance, the Supreme Court of the United States accepts approximately 7,000–8,000 cases every year, according to <https://www.supremecourt.gov/about/justicecaseload.aspx>, accessed March 28, 2017.

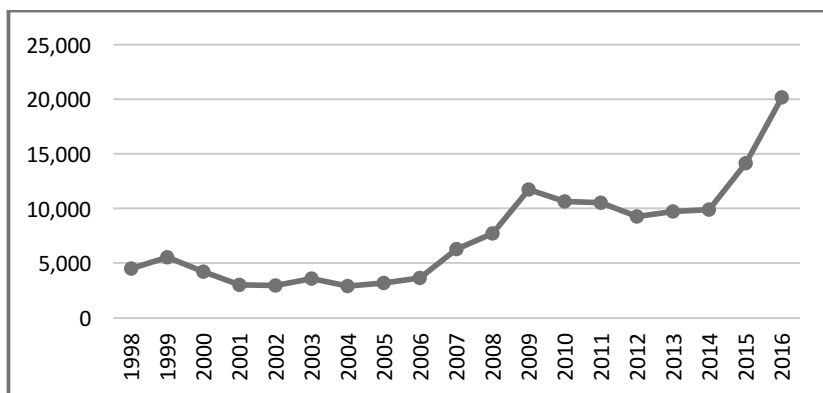


Figure 2: Caseload of the Supreme People's Court (1998–2016)

Few official statistics on the caseload of the Court is available for public access, except a limited amount of judicial statistics the Court disclosed in its annual work reports to the NPC and its Standing Committee. Although it is difficult, or even impossible, for outsiders to verify the authenticity of the official statistics, it is certain that the data does provide a distinct impression of, and several persistent observations on, the adjudication work of the Court, which remains largely carried out behind a veil of secrecy. In view of the absence of more detailed figures on the distribution of cases heard by the Court, Figure 2 at least indicates some crucial features regarding the Court's recent adjudication work and its trend of development. It appears from Figure 2 that the Court has been under growing pressure from the adjudication work, with two sharp rises in its caseload in 2008 and 2014, which raises questions about the types of cases that reach the Court for trial or review, the factors that contributed to the sharp increases in the Court's caseload, and, more significantly, considering the number cases heard by the Court every year, the value these cases add to, and their impact on, legal development in China. Consequently, this section sheds light on some of the distinctive features of the Court concerning its adjudicative activities and provides some answers to the above questions.

3.2.1. Case Types, Distribution, and Caseload

As previously noted, despite that the Court has made sustained efforts to disclose key judicial statistics through its annual work reports to the NPC, existing reports of the Court seem to primarily contain summaries of the major achievements of the judicial system as a whole rather than information about its own adjudicative practice. For instance, the *2017 Work Report of the Supreme People's Court* sets out the statistical distribution of cases heard by the Chinese courts at various levels in 2016, as reflected in Figure 3.

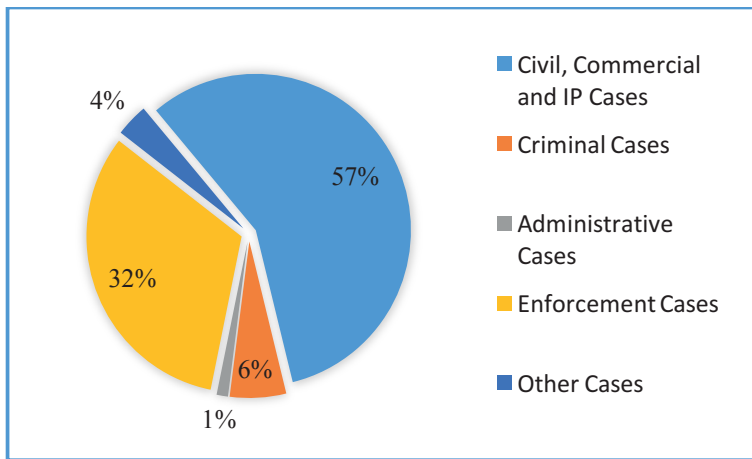


Figure 3: Cases Heard by the Chinese Courts at Various Levels (2016)

However, the same report fails to reveal specific numbers related to the distribution of cases heard by the Court over the same period. In fact, with a few exceptions regarding certain types of cases,¹¹ the Court has failed to disclose any specific statistics concerning its own adjudication work to

¹¹ For instance, the Court has steadily released a series of white papers concerning the protection of intellectual property rights since 2010, in which it has disclosed the caseload of different types of intellectual property-related cases heard by the Court in the previous year. For instance, see the White Paper of *Intellectual Property Protection by Chinese Courts (2016)*, The Supreme People's Court of the People's Republic of China, updated April 27, 2017, <http://www.court.gov.cn/zixun-xiangqing-42362.html>.

the public in over ten years. Yet the Court's annual work report from 2008, the last report the Court published, reveals that between 2003 and 2007, the Court heard 3,196 civil appellate cases, 4,802 criminal appellate cases, and 1,556 administrative appellate and state compensation cases, and it reviewed 9,860 applications for retrial reviews of all types, with approximately 33% resulting in retrials (see Figure 4). In addition, the same report highlights the Court's heavy workload in terms of nonjudicial activities, including coordinating and supervising 1,038 transregional civil enforcement cases and handling 719,000 litigation-related petitions.

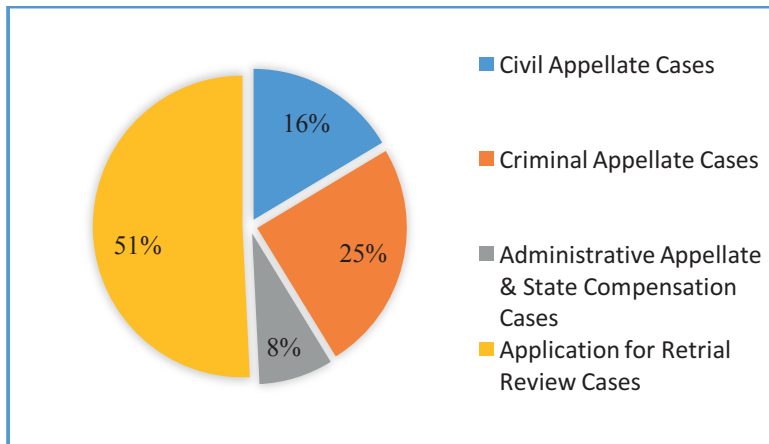


Figure 4: Case Distribution of the Supreme People's Court (2003–2007)

Although the older data may no longer represent the current state of the Court's judicial practice, the distribution of cases heard by the Court, as shown in Figure 4, might provide historical reference for its current judicial practice. Undoubtedly, these statistics, along with several empirical findings of this research, can be contributed to a thorough understanding of the Court's adjudication work.

Retrial cases

The most notable observation from Figure 4 is that more than half the Court's workload involved conducting adjudication supervision through reviewing legally effective judgments of the lower-level courts in all fields, including civil, criminal, and administrative fields. In fact, the sharp rise in the Court's caseload around 2008 can be partly attributed to the reform of the Civil Procedure Law of 1991 in the same period, which significantly extended the scope of applying for retrial reviews and ultimately resulted in a flood of retrial cases accepted and conducted by the Court. Legally effective judgments may come before the supreme court judges for reexamination through three principal channels. The Court can

- (i) launch a review [of] a legally effective judgment of the lower courts on its own initiative;
- (ii) accept the protests that come from the Supreme People's Procuratorate to lodge an appeal; [or]
- (iii) use discretionary supervisory power to decide on whether to reconsider the petition requests presented by interested parties through the "letters and visits" (*xinfang* 信访) system.¹²

According to a judicial opinion the Court released in 2009, supreme court judges commonly reach their decisions on the basis of the original trial files, materials submitted by the relevant parties, and their written opinions. The parties or people concerned were questioned and hearings were organized only when judges felt the need to do so.¹³ In practice, few

¹² The "letters and visits" system, also known as the petition system, serves as an important extrajudicial channel for Chinese citizens to file complaints and seek redress for grievances. The Court's role in the petition system is further elaborated in chapter 4 while studying the nonjudicial practice of the Court; see chap. 4, sec. 4.3.

¹³ *Several Opinions of the Supreme People's Court on Accepting Applying for Civil Retrial Review Cases*, art. 13, 17, and 18, Fa Fa no. 26 (2009).

cases the Court reexamines result in retrials,¹⁴ with the Court either hearing matters itself or directing lower courts to conduct retrials. Although the available statistics do not provide the ratio of reviews to retrials heard by the Court as well as that of the lower courts, it is clear that the Court, along with the provincial high people's courts, was the main review body for most retrial review applications across the country. According to Gong Ming, the director of the Trial Supervision Division of the Court, the Court, together with the provincial high people's courts, reviewed 136,286 applications for retrial review cases in 2008,¹⁵ which slightly declined to 116,000 in 2013, as suggested by the Court's 2014 work report.

The significant caseload related to retrial review applications suggests that the Court has been under an enormous burden of receiving and processing retrial reviews for some time. Despite the Court's remarkable achievements in correcting numerous judicial errors through retrial procedures,¹⁶ its extensive adjudication supervision power has attracted wide criticism. Critics question whether a putatively final judgment can be defined as "final," as it is still subject to the Court's reexamination and open to challenge at any time.¹⁷ In fact, this concern to a large extent consolidates the prevalence of the traditional ideas of "substantive justice outweighs procedure" (*zhong shiti, qing chengxu* 重实体，轻程序)

¹⁴ According to a judge interviewee, around 10–20% of legally effective judgments are reopened for retrial, depending on the types of cases; see interview SPC20140813, August 13, 2014.

¹⁵ Ming Gong, "The Amended Civil Procedure Law and Its Impact on Retrial Practice (*Minshi Susong Fa Xiugai dui Zaishen Shiwu de Yingxiang*), CCCL (blog), December 19, 2011, <http://old.civillaw.com.cn/article/default.asp?id=54521>.

¹⁶ One of the most striking examples is the Nie Shubin case, which was reheard by the Second Circuit Tribunal of the Court in 2016. The Court overturned the original conviction because Nie's original trial did not include sufficient objective evidence. See Katie Hunt, Serenitie Wang, and Steven Jiang, "'My Son is Innocent': Chinese Man Exonerated 21 years after Execution," *CNN*, updated December 2, 2016, edition.cnn.com/2016/12/01/asia/china-executed-man-found-innocent-nie-shubin/.

¹⁷ Keith, Lin, and Hou, *China's Supreme Court*, 104; Peerenboom, *China's Long March*, 287.

within the Chinese judiciary, despite modest progress being made toward procedural justice and rule of law concepts in recent years. As a supreme court judge interviewed for the study noted:

Whether an effective judgment can reach the courtroom for retrial review before the supreme court judges; whether the Court would decide to initiate the retrial procedures and; whether the Court would eventually decide to overrule the original judgment and reach a new verdict all depend on specific circumstances. Therefore, in some circumstances, there may be a requirement for the due process or other legal factors to give way to political and social factors in determining the outcome of a given case.¹⁸

In the face of an increasing number of petitions and a startling rate of retrials, the Court operates in the shadow of the ruling party's political slogan of "striving to make the people feel fairness and justice in every case"¹⁹ and its urgent need to maintain social stability. This partly explains why the Court at times places more weight on achieving substantive justice at the expense of due process and the finality of court decisions. To some extent, that can also be understood as one of the reasons the Court has increasingly highlighted the correctness of erroneous judgments in its annual work report while selectively disclosing the numbers and ratios of its retrial cases.

Appellate cases

In addition to the Court's crucial role in trial supervision, it fulfills the key role of highest-level appellate court. In practice, the Court has jurisdiction over a wide range of civil, administrative, and criminal cases as the court of appeals. With the fast-paced economic development that has taken place in China over the past few decades, the rapid growth in the number

¹⁸ Interview SPC20140805, August 5, 2014.

¹⁹ Zhou, "Advancing the Establishment."

of commercial appellate cases is as an inevitable consequence of the litigation explosion in the same period. Against this backdrop, the Court has been actively involved in establishing and standardizing a healthy market economy through deciding numerous civil appeals, especially cases involving technical complexity, significant social impact, innovation, foreign entities or influence, and considerable monetary value.

In a 2005 judicial interpretative document, for example, the Court placed great emphasis on fulfilling the function of civil adjudication, pointing out that courts at all levels will “effectively adjust property, credit and contractual relations between equal entities, and strictly apply sanctions against acts of infringement of intellectual property rights, fraud management and malicious evasion of debts,”²⁰ which highlights the Court’s subordinate role in providing an efficient and direct response to the central government’s call for accelerating economic development. Similar requirements can be found in another judicial document the Court released in 2014,²¹ in which it emphasized the importance of “strengthen[ing] the function of adjudicating civil cases and safeguard[ing] an open and fair trading order of the economic market.” In particular, four types of civil disputes have been highlighted in this document, namely, contract disputes, labor disputes, bankruptcy and liquidation disputes, and intellectual property–related disputes, with a primary purpose of providing a healthy economic environment for the diversity of market entities.

Another remarkable trend observed in the Court’s handling of civil appeals is the solid growth of intellectual property cases in recent years. In response to China’s accession to the WTO in 2001 and the nation’s

²⁰ *The Notice of the Supreme People’s Court on Fulfilling the Function of Adjudication through Actively Participating in Rectifying and Standardizing the Market Economic Order*, Fa Fa no. 58 (2005).

²¹ *The Opinions of the Supreme People’s Court on Providing Equal Protection of Law of Non-Public Economy and Promoting a Healthy Economic Growth*, Fa Fa no. 27 (2014).

increased attention to the protection of intellectual property rights, the Court intensified efforts to provide better protection of intellectual property rights in the past decade. According to a judge interviewee who has worked in the Intellectual Property Division of the Court for more than eight years, their rulings on civil appeals, although limited in number, have a profound impact on guiding the trial practice of lower-level courts and on providing practical guidelines for a wide range of audiences.²² According to the *White Paper on Intellectual Property Protection by the Chinese Court (2015)*, in 2015 the Intellectual Property Division of the Court accepted and processed thirty-seven civil and administrative appeals,²³ with an annual per judge rate of four cases.²⁴ Among them, nine cases were designated and published as the “Top 50 Intellectual Property Model Cases of 2015,”²⁵ which to a large extent reflected the Court’s trial strategies and innovative methods of concentrating on new, difficult, and complex intellectual property cases.

In terms of administrative appeals, although the Court deals with fewer administrative cases compared to its thriving adjudicative activities in other fields, the trend is worthy of mention in view of the general lack of judicial review power of the Court. For most legal scholars in Western democracies, especially American observers, the power of exerting judicial review over primary legislation and administrative acts is recognized as the core of the highest national courts that creates a key

²² Interview SPC20140813, August 13, 2014.

²³ This calculation includes appeal cases that originally fell under the jurisdiction of the high people’s courts but that the Court decided to add to its docket.

²⁴ This calculation is based on the understanding that appellate cases are generally decided by a collegial panel of three judges and twenty-seven judges officially work in the Intellectual Property Division of the Court, as disclosed in the official statistics.

²⁵ Since 1985, the Court has designated certain effective cases where judgments are made by itself or the lower level courts as “model cases (*dianxing anli* 典型案例)” and published them in the *Supreme People’s Court Gazette*. These cases serve as an important reference for courts at all levels when they try similar cases in the future. For more discussion on model cases and the Guiding Cases System of the Court, see chap. 3, sec. 3.4.

check on the other two branches of government.²⁶ In the case of China, however, the Court seems relatively weak in recognizing that it can neither strike down the law nor interpret the Constitution in the process of adjudication.²⁷ Although the Administrative Procedure Law of 1989 (as amended in 2014) was set with the primary purpose of “restricting the executive power in the cage” (*ba quanli guanjin longzi li* 把权力关进笼子里), it has demonstrated to have a rather limited scope of review jurisdiction by providing that only “concrete” administrative acts that have specific targets and cannot be recurrently performed could be challenged by citizens, legal persons, and other organizations.²⁸ In other words, existing laws and abstract administrative regulations are beyond administrative judges’ power of examination. In the last few years, the Court has taken tentative and modest steps to drive its power in advancing administrative and constitutional jurisprudence,²⁹ but most achievements have been channeled mainly through the Court’s abstract judicial interpretations and its instructions regarding the lower-level courts’ requests on specific cases³⁰ rather than drawing directly from the administrative cases it deals with in everyday practice.

It is plain to many that the limited access to legal remedies and the difficulties in reaching final decisions in administrative cases could be

²⁶ Wolfe, *The Rise of Modern Judicial Review*, 8.

²⁷ Ip, “The Supreme Court.”

²⁸ Administrative Procedure Law of 1989 (as amended in 2014), art. 12 and 13.

²⁹ For instance, in terms of article 53 of the Administrative Procedure Law of 1989 (as amended in 2014), courts may for the first time review the legality of a normative document when reviewing an administrative act, to determine whether it is compatible with existing laws and regulations. A subsequent judicial interpretation of the Court, *The Interpretation of the Application of the Administrative Procedure Law* (Fa Shi no. 9, 2015), in article 21 adds that a judge shall set out his reasoning in the judgment when considering a normative document incompatible with law or regulation, and the corresponding court of the effective judgment shall formulate a proposal with regard to this normative document to its enacting authority.

³⁰ For a detailed discussion on the abstract judicial interpretative power of the Court and the judicial mechanism of request for instructions, see chap. 3, sec. 3.3 and chap. 4, sec. 4.2.

contributed to the Court's artificial restrictions to meet practical needs.³¹ As Judge Li Guangyu, the Deputy Chief of the Administrative Division of the Court, previously pointed out, the problem of "difficulty in filing cases" (*li'an nan* 立案难) tends to occur in administrative disputes that are more likely to develop into political conflicts or to involve multi-stakeholders.³² A judge interviewee, with more than fifteen years of work experience dealing with administrative cases, suggested that the following reasons may contribute to judges' refusal to docket administrative cases in practice:

- (i) fear of offending powerful governmental authorities;
- (ii) a perception that accepting cases might trigger new political conflicts or bring instability to the society; and
- (iii) awareness of the difficulty of carrying out rulings even with effective judgments.³³

Considering that the case filing divisions are designed in many other judicial systems primarily to weed out nonmeritorious suits before they progress very far,³⁴ such power is generally exercised on the basis of arguments and evidence from both sides of disputes. Contrary to common practice, the case filing divisions of Chinese courts have been entrusted with the broad power to make the initial determination of the merits of cases and to deny parties the opportunity to present their cases before a trial judge.³⁵ Whereas such refusals seem to have prevailed among the

³¹ Haibo He, "Litigations without a Ruling: The Predicament of the Administrative Law in China," *Tsinghua China Law Review* 3 (2011): 258–281.

³² Supreme People's Court, "Supreme People's Court Released *The Interpretation of the Application of the Administrative Procedure Law* (*zuigao renmin fayuan fabu xingzheng susong fa sifa jieshi*)," April 27, 2015, <http://www.court.gov.cn/zixun-xiangqing-14295.html>.

³³ Interview SPC20140724, July 24, 2014.

³⁴ Donald Clarke, "Case Acceptance in Chinese Courts," *Chinese Law Prof Blog* (blog), March 24, 2012, http://lawprofessors.typepad.com/china_law_prof_blog/2012/03/case-acceptance-in-chinese-courts.html.

³⁵ Liu and Liu, "Justice without Judges."

basic- and intermediate-levels people's courts, it is no surprise that the vast majority of significant, controversial, and complicated administrative cases do not reach the courtroom for trial before a supreme court judge. Arguably, this limited access to administrative adjudication decelerates the Court's opportunity for self-empowerment through judicial review and jeopardizes its efforts to address limitations in administrative jurisprudence.

Death penalty review cases

Social and economic development alone would not be sufficient to explain the significant increase in the caseload of the Court, especially over the past decade. In fact, two significant surges of the Court's caseload, as reflected in Figure 2, are closely linked to the Court's reform on death penalty review in 2007, when the Court regained exclusive jurisdiction of the final review and approval of death penalty cases. Since then, the Court began dealing with an enormous volume of death penalty review cases every year. In the 1980s, Article 13 of the Organic Law of the People's Courts required the Court to delegate its authority to review certain types of death penalty cases, that is, murder, rape, robbery, the criminal use of explosives, and any other severe crimes that would undermine social security and public order, to the provincial-level high people's courts when necessary. Although this provision was established in response to the increased workload resulting from the nationwide campaigns to "take severe measures against criminal activities" (*yanda* 严打) in practice, inconsistent review standards and the lack of due process had given rise to a considerable number of wrongful convictions for capital offenses and related executions for a long time. For instance, in a widely publicized case of wrongful conviction, the Nie Shubin Case, a twenty-year-old farmer in Hubei Province was sentenced to death and executed in 1995 for raping and killing a woman. A decade later, another defendant confessed to Nie's crime, which eventually triggered the Hebei High

People's Court to reexamine the case.³⁶ In 2016, the case was reheard by the Second Circuit Tribunal of the Court, which overruled the original sentence on the basis of the reasoning that Nie's original trial did not obtain sufficient objective evidence.³⁷ Thus, Nie was cleared of the crime—more than twenty years after his execution. The Nie Shubin Case is an example of the abuse of death penalty power in the Chinese criminal justice system, which has drawn considerable criticism in and outside of China.³⁸ Against this backdrop, the Court reconsidered the necessity of restricting the use of the death penalty and eventually decided to reinstate full death penalty review power in 2007.

In response to the profound shift in death penalty reform with an unprecedented surge in the criminal caseload, the Court expanded its criminal jurisdiction in 2007 by adding three new criminal divisions to the existing two. The Court expanded its staff base by appointing experienced lawyers, legal scholars, and criminal judges of the lower-level courts to guarantee the quality of review.³⁹ One of the few empirical studies on the Court's death penalty power indicates that currently more than three hundred supreme court judges work in the five criminal divisions and annually handle thousands of death penalty cases for final review.⁴⁰ Considering that the Court's final review of death penalty cases is indeed a life-and-death decision, a major functional adjustment was made within the criminal divisions of the Court by shifting the emphasis from a combination of handling criminal appeals, determining criminal judicial policies, and providing guidance to lower-level courts to exclusively

³⁶ Steven Jiang, "Mother's Fight to Exonerate Executed Son Galvanizes China," CNN, updated October 20, 2011, <http://edition.cnn.com/2011/10/19/world/china-mother-executed-son/>.

³⁷ See Hunt, Wang, and Jiang, "My Son is Innocent."

³⁸ For further discussion of the legality of the death penalty, see Taochen Wang, "Power of Death Penalty Reviews in the Last 20 Years: A Return to Respect for Life (*sixing fuhe quan 20 nian de fangyushou*)," *Morning Post in Law*, November 19, 2006; Keith, Lin, and Hou, *China's Supreme Court*, chap. 4.

³⁹ Interview SPC20140825, August 25, 2014.

⁴⁰ Ren, "Regained Death Penalty Review."

exerting its mandatory review power.⁴¹ Since then, a growing number of reports on overturned death penalty verdicts seems to indicate a significant reduction in death penalty sentences, with the Court's initiative of keeping to the principle of "kill[ing] less and mak[ing] decisions more cautiously" (*shaosha, shensha* 少杀, 慎杀).⁴² However, these are only projections, as statistics relating to the Court's practice of reviewing death penalty cases have been excluded from the Court's annual work reports to date, and little has thus far been known about the behind-the-scenes activities of the Court's death penalty review practice. In a sense, the overall lack of openness, consistency, and predictability in the Court's dealing with death penalty review cases suggests that stricter lines on criminal procedures should be promoted until justice is served and due process is achieved.

In summary, the Court generally lacks discretionary power in selecting and accepting cases that fall within its jurisdiction. Not only has it been under the burden of reviewing a significant number of applications for retrial review, but it has also taken over almost every appeal in thirty-one high people's courts that originally tried cases as first-instance courts and acted as the exclusive authority in reviewing death penalty cases. Unlike judicial practice in the United States, where the appellate courts accept the trial court's findings of fact and hear only disputes on legal concerns, supreme court judges in China are entitled to conduct a *de novo* review of both facts and law in every case at hand. This likely results in an ever-increasing workload related to reviewing relevant facts and the application of the law, which is time and energy intensive. In view of this, some

⁴¹ According to a judge in the criminal division of the Court, the other crucial judicial functions related to the field of criminal law have been assigned to other substantive departments of the Court; see interview SPC20140825, August 25, 2014.

⁴² This principle was established in 2007 by the former President of the Court, Chief Justice Xiao Yang, to ensure that the death penalty applies to only a handful of extremely serious criminal offenses. See Lei Zhao and Yang Xiao, "President Xiao Yang: The Last Time inside the Supreme People's Court (*xiao yang: zai dongjiao minxiang 27 hao de zuihou shiguang*)," *South Weekend*, March 5, 2008.

supreme court judges who were interviewed self-deprecatingly indicated that they do manual labor while hearing most routine cases, despite the highly technical nature of their job.⁴³

Moreover, the Court has shown a considerable amount of leeway in deciding whether to accept and docket specific cases, especially in terms of administrative disputes or when such cases involve political and social concerns. The limitation of access to justice in China, especially at the highest level, reflects a dilemma facing the Court, which has to choose between legal rationality and political concerns, between principles and capricious. With the reform of the case filing system initiated in 2015, the Court announced that within the first five months since new docketing procedures went into effect, there was a 58.39% jump in the number of cases it accepted.⁴⁴ Through this reform, the Court intends to provide an effective approach to resolving, or at least largely relieving, some serious conflicts related to the difficulty of filing cases and the difficulty of seeking legal remedies in court cases, but it also seems to suggest that the Court has gained more initiative in the handling of cases while having to deal with the ever-growing caseload and increasing stress to meet the needs of the public.

3.2.2. The Court's Impact beyond Individual Cases

For the highest courts, the power of applying the law to resolve disputes and protect individual rights as the last line of defense is central to their nature, and this has been regarded as the core function of the highest

⁴³ Fan He, 'Discussion on the Power Distribution between Higher- and Lower-Level Courts (*Lun Shangxiaji Fayuan de Zhiquan Peizhi*),' *Journal of Law Application* 8 (2012): 15–19.

⁴⁴ Shuzhen Luo, 'Notice of the Supreme People's Court on the Implementation of the Case-Filing Reform (*zuigao fayuan tongbao lian dengjizhi gaige shishi qingkuang*),' *People's Court Daily*, November 16, 2015.

national courts in most societies.⁴⁵ Considering that the highest courts are commonly engaged in the final resolution of disputes by either quashing or reexamining cases where the law has been applied incorrectly by the lower courts,⁴⁶ their power of providing authoritative interpretations of the law and definitive rulings based on individual cases is nothing but extraordinary. Consequently, the decisions of the highest courts generally constitute the last word in the application of the law and have a significant impact within the judicial systems. Even for some European continental law countries where the highest courts' rulings do not create precedents for future court decisions, decisions made by their highest courts are more likely to be followed by lower-level courts in judicial practice.⁴⁷

The three layers identified in Shapiro's study on the US Supreme Court have been adapted in this study to assess the impact of the supreme court from the micro to macro levels. These layers are the impact of (1) a single Supreme Court decision on the parties, (2) the whole pattern of the Supreme Court's decision-making on the political and social spheres, and (3) the Supreme Court's opinions on developing legal doctrines and public policies.⁴⁸ Since its establishment, the US Supreme Court has participated in deciding a list of milestone cases, including *Marbury v. Madison* (1803), *Brown v. Board of Education* (1954), *Miranda v. Arizona* (1966), and *Roe v. Wade* (1973), which have not only shaped the historical and political

⁴⁵ Martin Shapiro, *The Supreme Court and Public Policy*, ed. Martin Shapiro (Glenview, IL: Scott, Foresman, 1969); Shapiro, *Courts*, 51–52.

⁴⁶ Bell, "Reflections on European Supreme Courts," 168.

⁴⁷ Janneke Gerards, "Legitimacy of European Court of Human Rights Judgments: Procedural Aspects" in *The Legitimacy of Highest Courts' Rulings*, eds. Nick Huls, Maurice Adams, and Jacco Bomhoff (The Hague: TMC Asser Press, 2009); Kees Loonstra and Jeroen Quist, "The Dutch Supreme Court Versus the Lower Courts: Summary Dismissal and the Catalogue of Viewpoints" in *The Legitimacy of Highest Courts' Rulings*, eds. Nick Huls, Maurice Adams, and Jacco Bomhoff (The Hague: TMC Asser Press, 2009).

⁴⁸ Martin Shapiro, "The Impact of the Supreme Court Decisions: The Supreme Court Speaks...and What Happens?" *Journal of Legal Education* 23, no. 1 (1971): 77–89.

outlook of the United States but also have had a notable impact on developing the law and establishing new legal principles.

In marked contrast to US practice, decisions of the Court carry far less weight for future reference, not to mention the limited role of these decisions in developing the law in the Chinese legal system. In extreme cases, the Court's final rulings could be rather short-lived, especially when cases involve power conflicts with other government authorities or substantial obstacles are encountered in the enforcement of the judgments. This then raises further criticisms of the Court, as it frequently "decide[s] without eventually solving problems" (*pan'er bujue* 判而不决) and "reach[es] final judgments without drawing disputes to a close" (*zhongshen buzhong* 终审不终). Worse still, this specific feature of the Court's effective judgments also contributes to the root cause of the massive number of repeated appeals, applications for retrials, complaints, and petitions in practice.⁴⁹ Arguably, the lack of autonomy and consistency in the handling of retrial cases, administrative appeals, and death penalty review cases can be seen as a major contributor to the limited impact of the Court beyond individual cases, as it participates in solving only a restricted selection of disputes assigned to it instead of developing the law in a series of representative decisions upon its own initiative and demand.

In aware of the the necessity to strengthen its judicial authority and make an impact on and beyond the courts, the Court has attempted to promote its adjudicatory impact through two main strategies.

⁴⁹ Xudong Zhao, "Study on the Function and Value Concerning the First-Instance Trial in Civil Procedures (*minshi susong diyishen de gongneng shenshi yu jiazhi tixian*)," *China Legal Science* 3 (2011): 50–61.

Procedural Reforms and Institutional Restructuring

The Court has implemented a series of procedural reforms to enhance efficiency and justice in trials. In response to the fast-growing caseload, in 2015 the Court formulated new measurements for ranking jurisdiction based on the economic growth level of different regions, with a view to narrowing the scope of civil appeals and retrial cases that fall within its own jurisdiction.⁵⁰ For instance, prior to reform, the Beijing High People's Court had jurisdiction over civil cases of the first instance with an amount in dispute not less than RMB 200 million.⁵¹ Since 2015, a substantial increase of the amount to RMB 500 million has been adopted to meet the acceptance criteria of the same high people's court.⁵²

Furthermore, in 2015, the Court implemented institutional restructuring. In particular, two experimental circuit tribunals of the Court were established in Liaoning and Guangdong Provinces in 2015, with four more being added a year later, aiming to share part of the Court's caseload, especially administrative, civil, and commercial cases crossing administrative districts but originally falling within the Court's jurisdiction, with these circuit tribunals. Given that circuit tribunals are simply inner branches of the Court instead of a new layer of the judicial organ within the existing judicial hierarchy, their decisions are equivalent to final judgments of the Court.⁵³ In fact, the president of the Court, Chief Justice Zhou Qiang, set a high expectation for these circuit tribunals in his report to the NPC on the annual work of the people's courts in 2015:

⁵⁰ *Notice on Adjusting Jurisdiction for High People's Courts and the Intermediate People's Courts over Civil Cases of First Instance*, Fa Fa no. 7 (2015).

⁵¹ *Standards for Jurisdiction of the High People's Courts and the Intermediate People's Courts over Civil Cases of First Instance*, art. 1, Fa Fa no. 10 (2008).

⁵² *Notice on Adjusting Jurisdiction for High People's Courts and the Intermediate People's Courts over Civil Cases of First Instance*, art. 1, Fa Fa no. 7 (2015).

⁵³ *Provisions of the Supreme People's Court on Several Issues concerning the Hearing of Cases by the Circuit Tribunals*, art. 2, Fa Shi no. 3 (2015).

The Circuit Tribunals of the Supreme People's Court serve as “experimental plots” and “pioneers” in the deepened judicial reform. In many respects, they represent the intensified efforts of the Court to facilitate a better access to justice at the grassroots level and the urgent need to fight against judicial localization. Meanwhile, they also reflect a shift of emphasis of the headquarters of the Court to concentrate on making judicial policies and handling cases that have profound significance in unifying the application of the law.⁵⁴

After a period of experimental trials, the procedural reforms and the institutional restructuring of the Court appear to have effectively reduced the workload of the Court. Reallocating its limited adjudicative resources and judicial personnel on demand, while strengthening its adjudicatory authority, was a practical decision that has led to the improved delivery of justice.

Mechanisms that Complement Court Functions

In addition, the Court has devoted itself to developing two crucial, complementary judicial functions to strengthen its adjudicative authorities: promulgating abstract judicial interpretations and regularly releasing a selection of typical or representative judgments originally rendered by the Court or in lower courts. In the face of a fast-changing society and the constant need for legal innovation, abstract judicial interpretations are in wide use to provide unified and definite rulings on the application of the law. This could be seen as a normative interpretative power of the Court that has a general binding effect and can be cited by judges of courts at various levels in their judgments. Furthermore, the system of publishing guiding cases is designed to provide guidance on dealing with subsequent similar cases and to further unify the application of the law over time.

⁵⁴ *Work Report of the Supreme People's Court* (2015).

Unlike judicial interpretations, guiding cases have only advisory value for the lower-level courts instead of being explicitly binding in terms of specific legal issues. In view of the fact that the Chinese legal system does not adhere to case law traditions, and most supreme court decisions have a relatively limited impact, and thus lack significance, these two approaches provide the Court with attractive alternatives to facilitate its adjudicatory competence, consistency, and authority. To achieve a complex understanding of the judicial practice of the Court, the following two sections investigate each mechanism respectively.

3.3. Does the Court Interpret or Establish Law?

The findings of comparative studies indicate that, in addition to applying the law and resolving disputes, the fundamental roles of the highest courts also extend to developing the law and promoting social development and historical progress.⁵⁵ It is generally recognized that judicial power to develop the law differs significantly from that of the legislature, as the judiciary clarifies the law and fills the gaps in law through decisions in particular cases. Through judicial interpretation on a case-to-case basis, the progressive concept of the highest courts' supplementary and interstitial lawmaking has been generally acknowledged in both common law and civil law traditions.⁵⁶ Whether the highest courts should act as judicial policymakers and what strategies should be implemented to establish the boundary between the courts as interpreters and makers of law in terms of the exercise of power⁵⁷ remain controversial, yet the

⁵⁵ Nicholas W. Barber, "The Separation of Power and the British Constitution," *Oxford Legal Studies Research* 3 (2012).

⁵⁶ Martin Shapiro, *Freedom of Speech: The Supreme Court and Judicial Review* (Englewood Cliffs: Prentice-Hall, 1966); *Ibid.*

⁵⁷ Lasser, *Judicial Deliberations*, chap. 11.

practice of lawmaking is likely to continue, although in varying forms in different countries.

Unlike the common practice of interpreting laws on a case-to-case basis, in the context of China, the Court has been entrusted with exclusive authority to issue abstract rulings known as “judicial interpretations” (*sifa jieshi* 司法解释), and it is actively engaged in creating new legal norms that are not always consistent with the law.⁵⁸ Article 32 of the Organic Law of the People’s Courts stipulates that the Court is entitled to provide authoritative interpretations on questions concerning the specific application of the law and of decrees in trials. In practice, however, in responding to the gaps in law and to meet the demands of China’s dramatic economic and social changes, the Court has been found frequently expanding its power of judicial interpretation to supplement and extend incomplete or imperfect provisions in the existing law. For instance, following the NPC’s promulgation of the revised Criminal Procedure Law in 2012, the Court handed down a set of comprehensive judicial interpretations in the same year.⁵⁹ Observers point out that on the basis of 290 provisions of the Criminal Procedure Law, the Court provided almost twice the number of interpretative provisions, that is, 548 in total, to detail, exceed, and even offer new grounds for replacing the original intentions in the primary legislation.⁶⁰

This is but one example of the kind of action the Court takes to publish judicial interpretations in the face of a wide range of concrete legal

⁵⁸ As stated in a legislative document of the NPC in 1981, the Court and the Supreme People’s Procuratorate are entitled to issue judicial interpretations either solely or jointly when confronted with concrete issues they need to explain in their daily activities. See *Decision of the Standing Committee of the National People’s Congress on Strengthen the Work of Law Interpretation (1981)*, art. 2.

⁵⁹ *The Interpretations of the Supreme People’s Court on the Application of the Criminal Procedure Law*, Fa Shi no. 21 (2012).

⁶⁰ Haiyan Wang, “Legislationization of Judicial Interpretations: A Dilemma Facing Judicial Interpretations on the Criminal Procedure Law (*lifa shi jieshi: woguo xingshi susong fa jieshi de kunju*),” *Tribune of Political Science and Law* 6 (2013): 69–79.

issues,⁶¹ which raises critical questions concerning the role the Court plays regarding its distinctive normative interpretative power and whether this “quasi-legislative” power is exercised at the expense of the traditional understanding of judicial power. To address these questions, several distinguishing features of judicial interpretation in the Chinese context are examined before investigating the essence of the Court’s normative interpretative power and how it should be evaluated in practice.

3.3.1. Distinguishing Features

Classifying the interpretative power of the Court into any existing categories of judicial power in comparative work seems difficult. In common law systems, judges play an active role in sustaining and developing law through their extensive discretion in individual cases. Accordingly, judgments made by the highest courts have been ascribed immense value and should be cited as binding precedents when courts decide subsequent cases with similar issues.⁶² In contrast, civil law judges are restricted to rulings based on strict application and interpretation of the law, as their decisions are applicable only to specific cases and binding between the parties. In a sense, there has never been a formal system of stare decisis in civil law traditions because decisions of the highest courts are not binding on future application of the law.⁶³ Following the continental legal traditions, the Chinese legal system does not adhere to

⁶¹ In accordance with statistics collected by China Law Info, a leading legal database established by Peking University Law School, the Court has promulgated 5,974 judicial interpretations since 1949, and 4,702 are currently effective documents; available at <http://vip.chinalawinfo.com/>, accessed February 16, 2015.

⁶² James Fowler and Sangick Jeon, "The Authority of Supreme Court Precedent," *Social Networks* 30, no. 1 (2008): 16–30.

⁶³ Although in some civil legal systems where the highest courts’ rulings act as guidance for the future application of the law in practice, for instance in Sweden, there has never actually been any system of stare decisis. See Jean Carbonnier, "Authorities in Civil Law: France, from the Role of Judicial Decisions and Doctrine," in *Civil Law and in Mixed Jurisdictions*, ed. Joseph Dainow (Baton Rouge: Louisiana State University Press, 1974) 96.

the doctrine of stare decisis, and court decisions do not have any binding effects on future cases.

Unlike in most common law and civil law systems, however, the Court's abstract interpretative power reveals its unique features. In fact, this distinct form of the Court's authoritative interpretations is not necessarily triggered by the need for judicial discretion in individual cases supreme court judges encounter. Rather, the practice of judicial interpretation commonly occurs at the initiation of the Court and serves as general rules to fill in the gaps in laws, establishing clear and detailed definitions of vague provisions when the Court feels the need or pressure to do so.⁶⁴

Format

Judicial interpretations of the Court can be presented in various formats, including:

- Interpretation (*jieshi* 解释)
- Provision (*guiding* 规定)
- Decision (*jueding* 决定)
- Reply (*pifu* 批复)
- Opinion (*yijian* 意见)
- Notice (*tongzhi* 通知)
- Report (*gonggao* 公告)
- Measure (*banfa* 办法)
- Official letter (*gonghan* 公函)
- Conference summary (*jiyao* 纪要)

⁶⁴ Chenguang Wang, "Law-making Functions of the Chinese Courts: Judicial Activism in a Country of Rapid Social Changes," *Frontiers of Law in China* 1, no. 4 (2006): 524.

These titles and their varying effects have often caused confusion and controversy in practice.⁶⁵ In 1997, to restore order to these formats, the Court implemented a set of rules to formalize the practice of judicial interpretation,⁶⁶ in which it highlighted three formats for judicial interpretations: interpretation, provision, and reply. In the *Provisions of the Supreme People's Court on the Work Concerning Judicial Interpretation*,⁶⁷ also known as the *2007 Provisions of the Court*, the Court further unified the proceedings of exerting judicial interpretative power and adopted “decision” as the fourth officially recognized format of judicial interpretations. Table 2 clarifies the distinctions between the four authorized formats of judicial interpretations as set out in the existing rules.

⁶⁵ Jingwei Liu, "Judicial Interpretations: Study on Civil Disputes in the Chinese Judicial Process (*Dangdai Zhongguo Sifa Jincheng Zhong de Minshangshi Sifa Jieshi*)," *The Jurists*, 2 (2012): 85–99.

⁶⁶ *Several Provisions of the Supreme People's Court on the Work Concerning Judicial Interpretation*, Fa Fa no. 15 (1997).

⁶⁷ Fa Fa no. 12 (2007).

Table 2: Different Forms of Judicial Interpretations

FORM	MAIN FUNCTION	EFFECT	EXAMPLE
INTERPRETATION (<i>JIESHI</i> 解释)	To clarify how to implement a piece of law or particular rules in certain types of cases or general issues that arise in adjudication work	Binding effect and eligible to be cited in judgments	<i>The Interpretations on the Application of the Law in the Handling of Civil Environmental Public Interest Litigations</i> (2015)
PROVISION (<i>GUIDING</i> 规定)	To provide procedural rules with general enforceability concerning adjudicative proceedings	Binding effect and eligible to be cited in judgments	<i>The Provisions on Several Issues Concerning Case Filing</i> (2015)
REPLY (<i>PIFU</i> 批复)	To respond to inquiries raised by the high people's courts and military courts concerning the application of the law in specific cases	Triggered by specific cases and achieved with general effect on future similar issues; cannot be cited in judgments	<i>The Official Reply of the Supreme People's Court on Issues concerning the Application of Article 64 of the Criminal Law</i> (2013)
DECISION (<i>JUEDING</i> 决定)	To amend or abolish existing judicial interpretations	With general applicability, but cannot be cited in judgments	<i>The Decision of the Supreme People's Court on Amending the Provisions on Several Issues concerning the Application of the Company Law</i> (2013)

As reflected in Table 2, each type of judicial interpretation has unique features to fulfill distinct functions. In particular, interpretations can be further divided into two categories—comprehensive interpretations regarding the implementation of law, and interpretations regarding the application of rules to specific legal issues that arise in adjudication work. While the first category of interpretations generally are released shortly

after the NPC's promulgation of major legislation, the second category only comes into force when the Court feels it necessary to provide an interpretation of specific legal issues associated with legal rules or certain types of cases. For instance, the 2015 *Interpretations on the Application of the Law Concerning Civil Procedure Law*⁶⁸ can be viewed as comprehensive interpretations of the Court, released three years after the amendment of the Civil Procedure Law in 2012. It comprises 552 provisions to cover twenty-three categories of issues that arise in the Civil Procedure Law, including jurisdiction of the courts, evidence, first- and second-instance procedures, and enforcement measures. Accordingly, the 2015 *Interpretations of Several Issues on the Application of the Law in the Trial of Environmental Civil Public Interest Litigations*⁶⁹ is a particular interpretation provoked by the Court to govern adjudication work, especially in environmental civil public interest litigation.

Provisions tend to provide detailed procedural rules concerning judicial operations rather than interpretations on statutes or legal rules. An example of this kind of judicial interpretation is the 2001 *Several Provisions on Evidence in Civil Procedures*,⁷⁰ which arose from the original 1991 Civil Procedure Law, setting forth essential procedural rules of evidence in civil litigation. Since its promulgation, this set of provisions has performed as a vital supplement in guiding the adjudicative process of evidence collection, evidence production, the exchange and cross-examination of evidence, and examination of the effect of evidence.

In contrast to the wide use of interpretations and provisions that cover the vast majority of judicial interpretations in practice, replies and decisions have a relatively limited scope of application based on their applicable conditions. Replies intend to respond to inquiries raised by lower-level courts in specific cases, for example, the 2013 *Reply on Whether Maritime*

⁶⁸ Fa Shi no. 5 (2015).

⁶⁹ Fa Shi no. 1 (2015).

⁷⁰ Fa Shi no. 33 (2001).

Courts May Apply Small Claims Procedures;⁷¹ in contrast, decisions are designed to announce the amendment or abolition of judicial interpretations, for example, the 2015 *Decision on the Amendment of Several Provisions on the Application of the Law Concerning Patent Disputes*.⁷²

In practice, however, the Court's interpretative power is not limited to these four formal forms. Rather, it also encompasses "judicial interpretative documents" (*sifa jieshi xing wenjian* 司法解释性文件), including opinions, notices, measures, official letters, and conference summaries that have similar legal effects as formal judicial interpretations but a more widespread application among courts of various levels. Although these normative documents do not fit the strict legal definition of formal judicial interpretations because they do not interpret statutes or legal rules, they act as a major supplement to formal judicial interpretations by setting up detailed instructions and guidance for lower courts in specific fields regarding both judicial and nonjudicial activities. For instance, the Court frequently transmits the latest Party policies as judicial policies through opinions and notices, for example, the 2014 *Opinion on Further Strengthen Ideological and Political Education of the People's Courts*⁷³ and the 2010 *Notice on Issuing Several Opinions on Providing Judicial Guarantee and Services for Accelerating the Transformation of the Economic Development*.⁷⁴ Moreover, measures tend to provide procedural rules relating to the operation of courts, such as the 2012 *Measures for the Handling of Judicial Documents of the People's Courts*,⁷⁵ while conference summaries summarize and highlight the latest judicial policies for subsequent adjudication work, for example,

⁷¹ Fa Shi no. 16 (2013).

⁷² Fa Shi no. 4 (2015).

⁷³ Fa Fa no. 17 (2014).

⁷⁴ Fa Fa no. 18 (2010).

⁷⁵ Fa Fa no. 22 (2012).

the 2015 *Conference Summary of the Adjudication Work of the People's Courts Concerning Drug Crimes*.⁷⁶

Legal effect

Since the founding of the People's Republic of China (the PRC) in 1949, the Court has released more than 4,800 judicial interpretations and judicial interpretative documents compared to the 239 laws enacted by the NPC and its Standing Committee.⁷⁷ Despite their distinctive features and varying applications, it is clear that judicial interpretations and judicial interpretative documents constitute two important legal resources for Chinese courts, judges, and legal professionals. Empirical evidence suggests that in practice, judges of courts at various levels have been found to rely heavily on these two categories of legal sources when deciding cases.⁷⁸ While formal judicial interpretations have legally binding force, in terms of the *2007 Provisions of the Court*,⁷⁹ the legal effect of judicial interpretative documents is rather vague and undefined, although the latter has frequently been compared to the former and bears similar implausible effects in practice. In fact, the strong persuasive authority reflected in judicial interpretative documents such as opinions and conference summaries makes it almost impossible for judges to avoid

⁷⁶ Fa Fa no. 129 (2015).

⁷⁷ Yandan Yi, "Fundamental Roles and Functions of the Interpretative Power of the Supreme People's Court (*zuigao renmin fayuan sifa jieshi de fayuan diwei*)," *Journal of Shanghai University Political Science and Law* 6 (2011).

⁷⁸ Interviews SPC20140813, August 13, 2014, and SPC20140825, August 25, 2014.

⁷⁹ The legal basis of judicial interpretations is controversial because the Court endows the legal effect of judicial interpretations in its own judicial documents instead of the legal effect deriving from the legislative authorities. It was not until the amendment of the Legislation Law of 2000 in 2015 that the issue was clarified for the first time, with the law recognizing the legal effect and the practical necessity of judicial interpretations. Yet it remained vague on the effective hierarchy of judicial interpretations that conflict with existing law. See Cheng Wang, "Study on the Legal Effectiveness of the Judicial Interpretations of the Supreme People's Court (*zuigao fayuan sifa jieshi xiaoli yanjiu*)," *Peking University Law Journal* 1 (2016): 263-279.

applying them while seeking legal grounds for rulings.⁸⁰ However, unlike judicial interpretations that are required to be made public and are eligible to be cited as the basis of judgments,⁸¹ most judicial interpretative documents remain internal regulations within the court system and are not available to the public and other participants in legislation.⁸² The imbalance of information between adjudicators and litigation participants is likely to result in distrust of and dissatisfaction with the judiciary, as some litigants find themselves excluded from crucial legal resources that although not official still play a role in shaping judges' decisions. According to observers who pay close attention to legal development in China, this concern is more likely to appear in new types of cases and politically sensitive ones, in which the governing law seems vague and courts might rely on some "secret legal grounds" provided by higher authorities in deciding cases.⁸³

Formulation process

It is generally accepted that the NPC has delegated part of its interpretative authority to the Court in the face of China's socioeconomic transition and the practical need for the Court to enrich the content of the law.⁸⁴ However, the NPC has rarely exercised its interpretative power in practice, which leaves the Court with sufficient room to drive its normative interpretative power as a crucial supplement to the existing laws and regulations. In general practice, judicial interpretations of the Court have been widely accepted as the "official documents with red titles" (*hongtou wenjian* 红头文件) within the court system, which indicate that they bear the same

⁸⁰ Interview SPC20140825, August 25, 2014.

⁸¹ See *Provisions of the Supreme People's Court on the Work Concerning Judicial Interpretation*, art. 25 and 27, Fa Fa no. 12 (2007).

⁸² Interview SPC20140905-1, September 5, 2014.

⁸³ Susan Finder, "The Supreme People's Court: Interpretations of Law as a form of Official Document," *Supreme People's Court Monitor* (blog), June 4, 2013, <http://supremepeoplescourtmonitor.com/2013/06/04/>.

⁸⁴ Finder, "The Supreme People's Court of the People's Republic of China."

formats as those administrative documents widely used among legislatures, administrative agencies, and Party organs.⁸⁵ Likewise, the process of producing judicial interpretations has for decades followed a similar track of that of legislation. For a long time, the Court was frequently criticized for making judicial interpretations without careful examination of the existing law or legal foundations for such interpretation.⁸⁶ It was not until 1997, when the Court reformed its judicial interpretation practice, that many important procedural requirements were introduced to standardize the judicial interpretation process.⁸⁷ In 2007, the Court produced a revised version of governing rules to replace the old ones.⁸⁸ Under the new arrangement, the Court identifies five essential stages, with at least twenty interpretive strategies, in the judicial interpretation process, ranging from initiating, drafting, consultation, and deliberation to the promulgation of judicial interpretations.

It is noteworthy that the Court has not specified consistent methods in the creation of judicial interpretations but rather pragmatically employed varying standards of interpreting the law in different forms. Specifically, the formulation of judicial interpretations could be either initiated directly by the Adjudication Committee of the Court or launched at the proposals of a number of initiating agents, including the substantive divisions of the Court, the provincial-level high people's courts and military courts, the NPC, various state ministries and departments, social organizations, and individual citizens.⁸⁹ In practice, the substantive divisions of the Court shoulder the major responsibility of drafting judicial interpretations and

⁸⁵ See *Notice of the Supreme People's Court on Promulgating "Measures on Handling Official Documents of the People's Courts,"* Fa Fa no. 22 (2012).

⁸⁶ Wang, "Law-making Functions," 524.

⁸⁷ *Several Provisions of the Supreme People's Court on the Work Concerning Judicial Interpretation,* Fa Fa no. 15 (1997).

⁸⁸ *Provisions of the Supreme People's Court on the Work Concerning Judicial Interpretation,* Fa Fa no. 12 (2007).

⁸⁹ *Provisions of the Supreme People's Court on the Work Concerning Judicial Interpretation,* art. 10, Fa Fa No. 12 (2007).

promoting their implementation. For instance, specialized judicial interpretations, such as the interpretations on trademark disputes, are generally produced by the Intellectual Property Division of the Court.⁹⁰ In contrast, for integrated judicial interpretations on primary legislation, such as the *Interpretations on the Application of the Law concerning Civil Procedure Law*⁹¹, multiple drafting authorities might have participated in the drafting process, including various civil divisions, case filing divisions, the adjudication supervision organ, the executing bureau, and the Research Office of the Court.⁹²

A vital role of the Research Office of the Court is to coordinate with various divisions and other relevant departments to draft integrated judicial interpretations, which requires collective input from all parties and an accurate division of labor based on specialization, and to manage the drafting process. Once the draft has been fully validated by the Research Office and the Adjudication Committee of the Court, which perform as gatekeepers and closely examine the drafts before they are finalized, the judicial interpretations come into force from the day of promulgation. A notable change in accordance with the *2007 Provisions* is that the decisions of the Adjudication Committee might vary depending on the overall quality of the draft and other special considerations as specified in the new standards. After full consideration, the draft would be either (i) fully adopted, (ii) adopted but requiring further revision, or

⁹⁰ For examples, see *The Interpretations of the Supreme People's Court Concerning the Application of the Law in the Trial of Civil Cases regarding Trademarks*, Fa Shi no. 32 (2002); *The Interpretations of the Supreme People's Court on Several Issues Concerning the Application of the Law regarding Well-known Trademark Cases*, Fa Shi no. 3 (2009).

⁹¹ Fa Shi no. 5 (2015).

⁹² According to Sun Youhai, the director of the Special Leading Office in charge of drafting *The Interpretation on the Application of the Law concerning Civil Procedure Law*, seventeen departments of the Court and more than a hundred supreme court judges were engaged in drafting this integrated judicial interpretation. See Weigang Zhang, "Supreme People's Court Issued Judicial Interpretation on Civil Procedure Law (*zuigao renmin fayuan fabu minshi susong fa sifa jieshi*)," *People's Court Daily*, February 5, 2015.

(iii) classified as holding, suspending, or withdrawing the proposal.⁹³ An excellent example of this is a recently promulgated judicial document, *Interpretations on the Application of the Law concerning Civil Procedure Law*, which has been approved by the Adjudication Committee of the Court only after five rounds of discussions and comprehensive consultations.⁹⁴

With respect to the Court's reform of its practice of judicial interpretations, the drafting process has become more specialized, transparent, and democratic than in the past. Previously, judicial interpretations were commonly produced behind closed doors, but the Court has now begun drawing on diverse sources and allowing different opinions to be presented before launching new judicial interpretations. In particular, the Court has widely solicited input from lower level courts, legislatures, associate government departments, and professional scholars at the consultation stage, and increasingly released late-stage drafts of judicial interpretations to the public for comments before their official promulgation. For instance, the Court released an announcement on *People's Court Daily* and sought opinions on an exposure draft of the *Provisions of the Supreme People's Court on Several Issues concerning the Application of the Company Law (IV)* in April 2016:

To identify the possible defects in the exposure draft and to further improve the quality of the judicial interpretation; to be more consistent with the original designs of the legislation and to find appropriate solutions for practical legal issues in the application of the Company Law; to effectively protect the legal rights and interests of companies, shareholders and other relative parties and to steadily promote the social and economic development, the Supreme People's Court hereby seeks for comments through the

⁹³ *Provisions of the Supreme People's Court on the Work Concerning Judicial Interpretation*, art. 24, Fa Fa no. 12 (2007).

⁹⁴ Zhang, "Supreme People's Court."

associated press. We are open to comments and suggestions of any kind, especially welcoming legal scholars from law schools and legal research institutions nationwide to put forward their views and provide collective comments on specific issues regarding the judicial interpretation.⁹⁵

3.3.2. Do Abstract Interpretations Lead to Judicial Activism or Judicialization?

Increasing evidence shows that the Court has become more receptive and transparent than ever before in the exercise of normative interpretative power, actively engaging in advancing the legal landscape and creating new legal norms through a growing number of judicial interpretations. Nevertheless, the Court's widespread use of judicial interpretations has led to concerns over the boundaries between judicial and legislative powers. On the one hand, critics question the quasi-legislative character of judicial interpretations in terms of their format, production processes, and legal effect, raising particular concerns about the risk of the Court's growing judicial activism as a *de facto* lawmaker. On the other hand, supporters seek rationality for judicial interpretations on the grounds that the exercise of normative interpretative power reflects the necessity that the Court respond to incompetent legislation in a timely manner and keep the judiciary up to date with international practice. As Keith and Lin note in their study on the judicial interpretations of the Court, despite that problems in law can be readily resolved through timely judicial interpretations, there has always been tension over where the law stops and interpretations begin.⁹⁶ In addition to numerous examples that can be cited to demonstrate how the Court's interpretative power has at times

⁹⁵ The Supreme People's Court of China, "The Announcement on Seeking for Comments on the Exposure Draft of the Provisions of the Supreme People's Court on Several Issues Concerning the Application of the Company Law (IV)," *People's Court Daily*, April 12, 2016.

⁹⁶ Keith and Lin, "Judicial Interpretation."

moved beyond technical matters to supplement the law itself,⁹⁷ observers also note that the Court's judicial empowerment as reflected in abstract judicial interpretations sometimes fails to conform to the principles and original intentions of the legislation. This observation has further been confirmed by several judge interviewees, who agreed that the Court's exercise of normative interpretative power has given rise to new controversies rather than providing satisfactory solutions to existing problems in a number of cases.⁹⁸

For instance, a 2003 interpretation on how to handle personal injury compensation cases issued by the Court⁹⁹ provides that compensation in case of death should be twenty times the urban per capita disposable income or twenty times the rural per capita net income, depending on which district the victim comes from. This interpretation admitted that different types of people should be compensated differently, even for victims from different districts who died in the same accident. Moreover, the wide gap in compensation between urban and rural residents promptly sparked hot debates on whether it was consistent with constitutional principles by "tagging life with different prices" (*tongming butong jia* 同命不同价).¹⁰⁰

In another telling example, a series of judicial interpretations associated with the 2001 Marriage Law have provoked controversy because of the

⁹⁷ For instance, the Court drafted an expanded interpretation regarding drug possession, divorce standards, security pledges, shareholder liability in company operation, and so forth. See *Ibid*; Liu, "Judicial Interpretations."

⁹⁸ Interviews SPC20140724, July 24, 2014; SPC20140808, August 8, 2014; and SPC20140825, August 25, 2014.

⁹⁹ *The Interpretations of the Supreme People's Court on Issues concerning the Application of the Law for the Trials of Personal Injury Compensation Cases*, Fa Shi no. 20 (2003).

¹⁰⁰ Statistics show that the average annual disposable income of urban residents was RMB 11,759 (USD 1,878) in 2006, while the average annual per capita net income of rural residents was RMB 3,587 (USD 573), resulting in a gap of RMB 160,000 (USD 25,564) for death compensation. See Xinhua, "China to Change Controversial Death Compensation Rule," *China Daily*, March 14, 2007.

date of entry into force. Against the backdrop of China's fast-paced economic development, soaring housing prices have not only exacerbated commercial disputes but also accelerated the pace of divorce. As a result, the courts at all levels have faced enormous social pressure in handling marriage and family disputes, especially those involving the division of marital property.¹⁰¹ In an effort to clarify the varying applications of the Marriage Law and to provide a strong legal basis for courts to resolve marriage and family disputes, three significant judicial interpretations associated with the Marriage Law came into force between 2001 and 2011.¹⁰² However, this set of judicial interpretations, especially the third, released in 2011, drew fierce criticism from the academic and legal circle.

The most controversial aspect, according to critics, is that the Court placed considerable restrictions on the scope of marital property instead of safeguarding community property and joint benefit within families. In particular, the Court set a rule on the appreciation of individual property, providing that any appreciation in value of the individual property should be considered as individual property rather than jointly owned property after marriage.¹⁰³ Another provision stipulates that if one spouse purchases real estate with a down payment prior to marriage, the real estate should

¹⁰¹ According to Sun Jungong, the former press secretary of the Court, 1,374,136 first-instance cases concerning marriage and family disputes were accepted by courts throughout the country in 2010, an increase compared to 2009 (1,231,029 cases) and 2008 (1,286,437 cases). In particular, the 2010 statistics included 1,164,521 divorce cases, 50,499 family law cases, 24,020 child-rearing related cases, and 24,676 marital contract property cases. See Supreme People's Court, "The Supreme People's Court Released the Third Judicial Interpretation on the Marriage Law (*zuigao renmin fayuan fabu hunyin fa zuixin sifa jieshi*)," Zhengyi Net, August 12, 2011, http://news.jcrb.com/jxsw/201108/t20110812_591106.html.

¹⁰² See *Interpretations of the Supreme People's Court on Several Issues concerning the Application of the Marriage Law (I)*, Fa Shi no. 30 (2001); *Interpretations of the Supreme People's Court on Several Issues concerning the Application of the Marriage Law (II)*, Fa Shi no. 19 (2003); *Interpretations of the Supreme People's Court on Several Issues concerning the Application of the Marriage Law (III)*, Fa Shi no. 18 (2011).

¹⁰³ *Interpretations of the Supreme People's Court on Several Issues concerning the Application of the Marriage Law (III)*, art. 3, Fa Shi no. 18 (2011).

be considered individual property in divorce proceedings. If the other spouse contributes to mortgage payments after marriage, he or she may recover those payments at a fair and reasonable ratio from the owner of the real estate but has no claim to the title of such property.¹⁰⁴ Professors of marriage law immediately expressed their concerns about the legal and socioeconomic effects of such judicial interpretations, arguing that not only do the provisions fail to comply with the general principles of the Marriage Law, they also conflict with Chinese historical and cultural customs that generally recognize marital property as a “biding force” within families.¹⁰⁵ As Professor Qiang Shigong, a leading legal scholar from Peking University Law School, boldly states,

While the major function of the legislature is to provide guidance to the public through presetting certain behavioral expectations, the major function of the judiciary should be designed to solve the known problems associated with the law. Therefore, according to the ways of how the Court leads the public through its judicial interpretations on the application of the Marriage Law, one can expect a changing mode of marriage and family in the near future, i.e. the re-feudalization of marriage.¹⁰⁶

Because judicial activism has at times replaced judicial restraint in regulating social and economic orders, which has had a profound impact on people's lives, any form of judicial empowerment should be taken seriously. Whether existing judicial interpretations associated with the Marriage Law could succeed in helping judges sort through complicated legal issues in marriage disputes or prove to be an undue step of

¹⁰⁴ *Ibid.*, art 10.

¹⁰⁵ Zhang, "The Pragmatic Court."

¹⁰⁶ Shigong Qiang, "Chinese Families under Judicial Activism: Discussion on the Judicial Interpretations of the Supreme People's Court Concerning Marriage Law (*sifa nengdong xia de zhongguo jiating: cong zuigaofa guanyu hunyinfa de sifa jieshi tanqi*)," *Beijing Culture Review* 2 (2011).

oversimplifying family values and underrating the complexity of the family bond as the basis for decisions is food for thought.

Regardless of the advantages and disadvantages, the Court's practice of circulating judicial interpretations is likely to continue. The Court's interpretative authority undeniably reflects a positive interaction between the judiciary and legislature by directly responding to deep social changes and actively participating in legal affairs. Judicial interpretations provide the Court with a crucial means to sequentially participate in the process of judicialization, and a growing number of interpretations have laid the foundations for future legislation or acceptance into subsequent legislative amendments.¹⁰⁷ Nevertheless, it is worth debating whether the Court resorting to prolonged judicial activism in the drafting of judicial interpretations will inevitably come at the expense of legislative power. In an authoritarian regime where courts are notable for their limited power in judicial review and their inability to develop significant constitutional jurisprudence, it is crucial that the Court continues to explore innovative and meaningful approaches to fulfilling its own version of judicial empowerment. The exercise of authoritative interpretative power can be regarded as an effort of this kind through providing sound and detailed instructions to patch leaks in existing law while awaiting further legislative development.

¹⁰⁷ For instance, the legislation on the Contract Law of 1999 and the Tort Law of 2009 both drew on previous trial experience and incorporated judicial interpretations into their drafts. See Angran Gu, "Explanations on Drafting the Contract Law of the P. R. China (*guanyu zhonghua renmin gongheguo hetong fa caoan de shuoming*)," *Bulletins of the Standing Committee of the National People's Congress* 2 (1999); Shishi Li, "Report on the Main Issues Concerning the Draft of the Tort Law of the P. R. China (*guanyu zhonghua renmin gongheguo qinquan zeren fa caoan zhuyao wenti de huibao*)," *Bulletins of the Standing Committee of the National People's Congress* 1 (2010).

3.4. Are Guiding Cases Guidance or Compulsory Instructions?

Because decisions of the Court generally carry limited weight for future reference, the Court has developed another judicial mechanism alongside abstract judicial interpretations to complement and strengthen its adjudicative authority: regularly releasing a selection of representative judgments as an important reference to courts nationwide. Whereas abstract judicial interpretations provide mandatory instructions with general applicability that are legally binding on courts at various levels, the adoption of prior decisions as a convincing guide to subsequent cases suggests a seemingly *stare decisis* approach to providing case-based interpretations on the application of the law. From a practical perspective, the case-based approach to improving general consistency in trial work seems appealing to the Court due to the numerous similar cases of ascribing different price tags to life and the common practice of failing to treat like cases alike, as previously discussed.

As part of its response, in the 1980s, the Court began to identify distinct cases as “model cases” (*dianxing anli* 典型案例) and to publish them in the *Gazette of the Supreme People's Court* (*Zuigao Renmin Fayuan Gongbao* 最高人民法院公报). Model cases selected by the Court, which could come from effective cases of any level court, serve as a nonbinding but persuasive reference on which judges can draw in framing their legal reasoning, and as an educational tool for training inexperienced legal participators and enlightening the public. For several decades, despite that the issuance of model cases has not been officially codified in any existing regulations, in practice, they have been widely applied among courts as a vital supplement to legislation.

In the light of objectives set out in the *Second Five-Year Reform Outline for the People's Courts (2004–2008)*,¹⁰⁸ a nationwide Guiding Cases System (*zhidaoxing anli* 指导性案例) was launched in 2010. The promotion of the Guiding Cases System aims at incorporating valuable cases to “fill substantive gaps in judicial doctrines and standardize the exercise of judicial discretion.”¹⁰⁹ At no point has the Court declared guiding cases to be case precedent or adhere to the Western *stare decisis* doctrine, so the promotion of guiding cases should be viewed as a pragmatic strategy of the Court to flexibly react to ambiguities and gaps in existing law without openly challenging the relationship between the judiciary and legislative power.

The distinction between guiding and model cases is not self-evident, or at least not intuitively obvious. Since the launch of the Guiding Cases System, the Court has managed to transform fifteen of 319 model cases published between 2005 and 2010 into guiding cases in line with relevant provisions.¹¹⁰ A convincing example is Guiding Case No. 45¹¹¹ regarding an unfair competition dispute, which was transformed from one of the “Top 10 Significant Intellectual Property Model Cases of 2010” and selected to serve as a guiding case in early 2015 (see Appendices II and III). To clarify the differences between guiding cases and model cases, we examine their distinguishing features, specifically their formats, authorizing bodies, and legal effect.

¹⁰⁸ For an overview of the English translation of the *Second Five-Year Reform Outline for the People's Courts (2004-2008)*, see <http://cecc.gov/resources/legal-provisions/second-five-year-reform-program-for-the-peoples-courts-2004-2008-cecc>, accessed January 18, 2018.

¹⁰⁹ Shuzhen Luo, “The Supreme People's Court Released Detailed Rules on Guiding Cases (*zuigao renmin fayuan chutai anli zhidao gongzuo shishi xize*),” *People's Court Daily*, June 3, 2015.

¹¹⁰ *Provisions Concerning Work on Guiding Cases*, art. 9, Fa Fa no. 51 (2010).

¹¹¹ Guiding Case No. 45, *Beijing Baidu Technology Company Limited v. Qingdao Aoshang Network Technology Co., Ltd. et al.*, *An Unfair Competition Dispute*.

3.4.1. Distinguishing Features

Format

It is evident that the Court adopts different formats in producing guiding and model cases. A guiding case commonly comprises six parts: (i) keywords, (ii) major points of the judgment, (iii) related legal provision(s), (iv) basic facts of the case, (v) results of the judgment, and (vi) reasons for the judgment. In comparison, a model case does not set out the original judgment or incorporate detailed case analysis, but rather includes two brief parts: (i) case summary and (ii) typical significance. The differences in formats may be used to explain why the Case Guidance Work Office of the Court, the internal organ of the Court in charge of selecting, examining, and submitting guiding cases for approval, has placed greater weight on guiding cases by requiring the recommended courts to fully prepare and explain the guiding character of candidate guiding cases. According to an empirical study conducted by the Stanford Law School China Guiding Cases Project, an examination of eighty-seven guiding cases¹¹² suggests that the basic facts of the case and reasons for the judgment on average account for 80% of the total content of a guiding case.¹¹³ For instance, in Guiding Case No. 30,¹¹⁴ the basic facts and the reasons sections account for 33% and 53% of the total, while in Guiding Case No. 33,¹¹⁵ the same parts account for 42% and 44%. It is clear that

¹¹² Statistics until March 2017 indicates that since 2011, the Court has released sixteen batches of fifty-six guiding cases that cover a wide range of civil, criminal, and administrative disputes.

¹¹³ Mei Gechlik, "Guiding Cases Analytics," *Stanford Law School China Guiding Cases Project* 4 (May 2015), <http://cgc.law.stanford.edu/guiding-cases-analytics><https://cgc.law.stanford.edu/guiding-cases-analytics/issue-4/?lang=en>.

¹¹⁴ Guiding Case No. 30, *Lan Jianjun and Hangzhou Suremoov Automotive Technology Company Limited v. Tianjin Xiaomuzhi Automobile Maintenance and Repair Services Co., Ltd. et al., A Trademark Infringement and Unfair Competition Dispute*.

¹¹⁵ Guiding Case No. 33, *Cargill International S.A. v. Fujian Jinshi Vegetable Oil Producing Co., Ltd. et al., A Foreign-related Dispute over Contracts Affirmed to be Invalid*.

the distinctive value of guiding cases can be reflected in the detailed and well-summarized facts, which allow judges to better distinguish similar facts or legal issues in subsequent cases, and in providing convincing explanations of reasons for the judgments, which encourages judges to take the initiative in developing and framing their own legal reasoning on the basis of applicable guiding cases.

Authorizing body

Guiding cases can also be distinguished from model cases through their authorizing bodies. Existing rules make it clear that the Court is the exclusive authorizing body entitled to provide guidance on adjudication work through guiding cases.¹¹⁶ In other words, any court other than the Court has no authority to issue guiding cases, which enables the Court to exercise centralized power to promote the uniform application of the law within the judicial hierarchy. Conversely, the Court shares the authority of issuing model cases with its inferior courts. According to a 2010 regulation concerning the work relations between superior and inferior courts, the Court authorized provincial high people's courts to issue model cases for reference within their respective jurisdictions.¹¹⁷ Although this regulation remains silent on whether intermediate- and basic-level people's courts are entitled to the same power, it was reported that in practice, some of them have been actively involved in devising and experimenting with their own model cases systems in recent years.¹¹⁸

¹¹⁶ *Notice of the Supreme People's Court on Issuing the Several Opinions on Regulating the Adjudicative Relations between the People's Courts at Various Levels*, art. 1, Fa Fa no. 61 (2010).

¹¹⁷ *Ibid.*, art. 9.

¹¹⁸ Yunteng Hu, "Study on Certain Controversial Issues Concerning Guiding Cases System (*anli zhidao zhidu ruogan zhongda yinan zhengyi wenti yanjiu*)," *Chinese Journal of Law* 6 (2008): 3–24; Susan Finder, "Using Model Cases to Guide the Chinese Courts," *China Policy Institute, University of Nottingham* (blog), April 7, 2014, <https://blogs.nottingham.ac.uk/chinapolicyinstitute/2014/04/07/using-model-cases-to-guide-the-chinese-courts/>.

Legal effect

Regardless of the similarities and functional overlap between these two categories of leading cases, in practice, the Court has repeatedly emphasized that guiding cases are substantially different from model cases or any kind of legal precedent in common law jurisdictions.¹¹⁹ The most prominent feature of guiding cases relates to their legal effect, as judges are obligated to use guiding cases for reference and explicitly cite them in their legal reasoning while deciding later similar cases.¹²⁰ Conversely, model cases do not have a clear binding force, and judges do not need to state convincing reasons or bear any legal liability when deciding not to follow applicable model cases.¹²¹

Although guiding cases cannot acquire the status of a formal source of law or be endowed with the same quasi-legislative effect as that of judicial interpretations, they have a de facto binding effect in practice. As Zhang points out in his study on China's Guiding Cases System, the de facto binding force of guiding cases suggests that when lower-court judges are reluctant to follow applicable guiding cases and eventually reach results that conflict with applicable guiding cases, their next-level superior courts will likely reverse these decisions in the appellate or retrial stages.¹²² From this perspective, it is conceivable that guiding cases take the top spot on the ranking list with regard to which Chinese cases are most persuasive, as lower courts are generally reluctant to take the risk of having judgments

¹¹⁹ See Jianwei Zhang, "Major Functions of Guiding Cases and Their Legitimized Future (*zhidaoxing anli de gongneng dingwei yu panlihua qianjing*)," *Guangming Daily*, January 29, 2014.

¹²⁰ *Provisions Concerning Work on Guiding Cases*, art. 9, Fa Fa No. 51 (2010).

¹²¹ Wei Zhou, "Several Concrete Issues on the Creation of the Guiding Cases System (*tongguo anli jieshi falu: zuigao renmin fayuan anli zhidao zhidu de fazhan*)," *Contemporary Law Review* 3 (2009): 139-146.

¹²² Zhang, "Major Functions of Guiding Cases."

overturned by their superiors unless they have convincing reasons to reach conflicting decisions.

3.4.2. Limited Role and Impact of Guiding Cases

The introduction of guiding cases has in many respects reflected the Court's ambition in driving its authority and impact as the highest adjudication institution in China. Nevertheless, it may be too optimistic to expect the existing Guiding Cases System to play a key role in safeguarding and developing the law in the Chinese context. In light of existing study and debate among judges, legal scholars, and other legal professionals, it seems that the Court's hard work has been ineffective due to several intrinsic defects of the Guiding Cases System.

It is clear that a limited number of guiding cases is insufficient to satisfy the practical reference needs of courts at various levels. Although in practice the lower courts have increasingly turned to guiding cases for solid and convincing reasons for judgments,¹²³ the low number of guiding cases (i.e., eighty-seven guiding cases had been published by March 2017) selected throughout the country would hardly be able to serve as guidance in every field of the law. Scrutiny of the existing guiding cases has revealed that the Court primarily uses guiding cases to promote its innovative judicial policies, especially in the fields of contract law,¹²⁴

¹²³ Interview SPC20140826, August 26, 2014.

¹²⁴ For instance, Guiding Case No. 1, *Shanghai Centaline Property Consultants Limited v. Tao Dehua, An Intermediation Contract Dispute*; Guiding Case No. 9, *Shanghai Cunliang Trade Co., Ltd. v. Jiang Zhidong, Wang Weiming et al., A Sale and Purchase Contract Dispute*.

patent law,¹²⁵ competition law,¹²⁶ and food safety law,¹²⁷ and to highlight fighting specific types of crimes such as corruption,¹²⁸ bribery,¹²⁹ and particular violent crimes.¹³⁰ The increase in the number of guiding cases is neither statistically significant nor extends to every crucial legal field. Worse still, judges infrequently refer to guiding cases, despite instructions from the Court, issued in 2015) to explicitly quote the major points of the judgments in guiding cases as part of the explanations for their legal reasoning.¹³¹ A study conducted by the Legal Information Center of Peking University in 2015 (the 2015 PKU study) identifies 241 cases in which judges quoted guiding cases in their legal opinions. In particular, twenty-five of fifty-six guiding cases (until November 2015) had been applied to subsequent cases, with the highest citation rate of 103 (Guiding Case No. 24),¹³² leaving almost half the guiding cases with a zero rate of reference.¹³³

Furthermore, the process of formulating guiding cases is generally time-consuming and lacking systematic consistency. As an empirical study conducted by the Stanford Law School Guiding Cases Project discloses,

¹²⁵ For instance, Guiding Case No. 29, *Shenzhen Siruiman Fine Chemicals Co., Ltd. v. Shenzhen Kengzi Water Supply Co., Ltd. and Shenzhen Kangtailan Water Treatment Equipment Co., Ltd., An Invention Patent Infringement Dispute*.

¹²⁶ For instance, Guiding Case No. 45, *Beijing Baidu Technology Company Limited v. Qingdao Aoshang Network Technology Co., Ltd. et al., An Unfair Competition Dispute*.

¹²⁷ For instance, Guiding Case No. 23, *Sun Yinshan v. Nanjing Auchan Hypermarket Co., Ltd. Jiangning Store, A Sale and Purchase Contract Dispute*.

¹²⁸ For instance, Guiding Case No. 11, *Yang Yanhu et al., A Corruption Case*.

¹²⁹ For instance, Guiding Case No. 3, *Pan Yumei and Chen Ning, A Bribe-Accepting Case*.

¹³⁰ For instance, Guiding Case No. 12, *Li Fei, An International Homicide Case*; Guiding Case No. 13, *Wang Zhaocheng et al., An Illegal Trading and Storage of Hazardous Substances Case*.

¹³¹ *Rules for the Implementation of Provisions Concerning Work on Guiding Cases*, art. 19, Fa Fa no. 130 (2015).

¹³² Guiding Case No. 24, *Rong Baoying v. Wang Yang and Alltrust Insurance Co., Ltd. Jiangyin Branch, A Motor Vehicle Traffic Accident Liability Dispute*.

¹³³ *The Annual Report of the Application of Guiding Cases of the Supreme People's Court*, available at http://www.chinalawinfo.com/AdHtml/20151224/fulltext.html#_ftnref5, accessed March 10, 2017.

the average time that elapsed between original rulings and the issuance of guiding cases is two years. In extreme cases, more than a decade may be spent on selecting, examining, and releasing guiding cases.¹³⁴ This is likely to raise concerns about whether and to what extent the Court is can use guiding cases to supplement ineffectual legislation and respond to unprecedented economic and social changes, and in a timely manner. Although the Court has encouraged broad participation in the recommendation stage and made significant efforts to diversify its sources of guiding cases,¹³⁵ it has been found to be relying on a strictly hierarchical approach in terms of case selection and approval.¹³⁶ The Court has allowed more candidate cases with guiding characteristics to be considered, yet the 2015 PKU study suggests that in practice, the Court fails to adopt a consistent selection method subject to a set of sound and workable criteria on the basis of case types, jurisdictions, court hierarchy, and so forth. Technically, any effective case that meets at least one of the following screening criteria could be considered by a variety of recommendation authorities and be recommended to the Case Guidance Work Office of the Court for selection.¹³⁷ A case should be considered if it

- (i) has aroused widespread concern in society;

¹³⁴ For instance, for Guiding Case No. 38 and Guiding Case No. 41, sixteen and eleven years have passed, respectively. See Gechlik, “Guiding Cases Analytics.”

¹³⁵ *Provisions of the Supreme People’s Court Concerning Work on Guiding Cases*, articles 4 and 5 (Fa Fa no. 51 [2010]) stipulate that while intermediate- and basic-level courts may recommend their effective decisions via their next level superior courts all the way up to the Case Guidance Work Office of the Court, related interested parties may either submit their recommendations to the courts that rendered the effective decisions or refer to the Case Guidance Work Office of the Court directly.

¹³⁶ According to a judge interviewee, candidate cases with guiding characteristics have to go through the recommendation, scrutiny, and the final approval stages rank by rank, beginning with the courts that rendered the effective decisions of such candidate cases, until they reach the Case Guiding Work Office of the Court; see interview SPC20140826, August 26, 2014.

¹³⁷ *Provisions of the Supreme People’s Court Concerning Work on Guiding Cases*, art. 2, Fa Fa no. 51 (2010).

- (ii) concerns circumstances where related laws only provide principled provisions;
- (iii) is representative of similar cases;
- (iv) touches upon difficult, complicated legal issues or new types of cases; and
- (v) has other guiding characteristics.

Regardless of how perfect the existing screening criteria look on paper, in practice, the general protection clause (v) as shown above provides the Court with considerable discretion to promote guiding cases in any categories without serious discourse. As an interviewed supreme court judge suggested, in practice, the Court leadership, and supreme court judges of the substantive divisions, have an overwhelming impact on steering the selection and promoting any legally effective decision to the rank of guiding cases on their own initiatives.¹³⁸ Consequently, a lack of systematic consistency can be found between each batch of guiding cases, which reflect varying policy orientations of the Court and different priorities, although they apply a unified system from selection to approval and eventually are released under the name of the Adjudication Committee of the Court. More notably, according to another judicial official of the Court, controversial candidate guiding cases or politically sensitive cases are most likely to be discarded during case selection, as guiding cases should commonly be selected on the grounds that “the reasoning of the judgment is clear and the conclusion is correct, which is conducive to clarifying misunderstandings in practice.”¹³⁹

Regardless of the deficiencies, the newly established Guiding Cases System is undeniably an impressive and meaningful accomplishment of the Court in the reform era. As Zhang argues in his study on the Court, the pursuit of the Guiding Cases System reflects a deep-seated desire of the

¹³⁸ Interview SPC20140826, August 26, 2014.

¹³⁹ See Hu, “Functions of the Supreme People’s Court.”

Court to strengthen its institutional competence and its control over lower courts.¹⁴⁰ However, the evidence presented in this section also demonstrates that the Guiding Cases System does not intend to develop toward, and has not yet become, the key to the Court's judicial empowerment at this stage. Rather, for a limited but sustainable growing number of guiding cases published to date, their primary role is to supplement the adjudicating and interpretative power of the Court in specific types of cases rather than becoming a foundational ruling base for the adjudication work in an all-around manner. Arguably, a rather strict hierarchical approach regarding case selection and the reluctance of handling controversial or politically sensitive cases suggest that the Court acts with utmost caution in developing and promoting the Guiding Cases System while maintaining the right direction and the best interests of the ruling Party.

3.5. Concluding Analysis

Like many highest courts in other legal settings, the Court is meant to play a crucial role in safeguarding the unity of the law and shaping legal development in China. For an extended time, many foreign observers have overemphasized the institutional defects of the Chinese legal system instead of paying due attention to its legal development and meaningful advancements. In reform-era China, the Court has proven to push for a more active judicial role as the court of last resort, which challenges Western scholars' prevailing perception of the exercise of judicial power in an authoritarian legal setting. Evidence presented in this chapter suggests that the Court has become an increasingly important adjudicator and developer of law based on its own pragmatic initiatives and institutional interests. Through the development of judicial interpretations and the Guiding Cases System, the Court has further strengthened its

¹⁴⁰ Zhang, "The Pragmatic Court."

adjudicative authority by providing flexible alternatives and vital supplements in response to either incomplete or imperfect law.

Although the Court's efforts have been undertaken within enormous institutional constraints, as revealed in chapter 2, this does not necessarily suggest that the Court has no autonomy to achieve judicial empowerment or that there is no room for the Court to pursue its own version of legal development. Instead, the investigation into the Court's advancing judicial practice in this chapter serves to illustrate that pragmatism is an important component when discussing and understanding the power of the Court from a practical perspective. From what has been discussed so far, the Court has strengthened its institutional competence and its control over lower courts largely through a series of procedural reforms and institutional restructuring in adjudication work. At the same time, it intensified efforts to promote its adjudicatory impact beyond individual cases through two crucial strategies that complement court functions: promulgating abstract judicial interpretations and regularly releasing a selection of guiding cases.

Nevertheless, the Court's approach of aggressively exploring innovative solutions to fulfill its own version of judicial empowerment have sparked new controversies in practice. In particular, the distinctive features of judicial interpretations and guiding cases have raised concerns about whether the quasi-legislative value reflected in these two judicial functions is consistent with the overall functional designs and adjudication work of the Court. After all, the exercise of adjudicative power is generally recognized as the most fundamental function that shapes the legitimacy of the courts in accordance with the separation of powers doctrine. To the contrary, the continuing emphasis on the Court's normative interpretative power seems to suggest a distinctive approach of the Court in creating new legal norms and gradually expanding its legal landscape at the expense of the legislative power. But regardless of the controversy, the judicial practice of the Court to enrich and expand its

jurisdiction in accordance with its own pragmatic needs and institutional interests will continue to evolve within the tolerance zones of the ruling authorities. Because the current efforts and achievements of the Court to promote judicial empowerment can occur and be refined only under the umbrella of the Party's leadership, they nevertheless reflect the modest but meaningful progress of the Court in consolidating its role as the highest adjudication organ and driving its most essential judicial functions that shape the legitimacy of the Chinese judiciary.