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Reconceptualizing judicial power in contemporary China

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CHAPTER 5

THE POWER OF THE SUPREME PEOPLE'S COURT

Rethinking and Reinterpretation

5.1. Introduction

THE INSTITUTIONAL AND FUNCTIONAL power of the Court referenced in previous chapters is closely related to several important topics in constitutional discussions, including the exercise of mixed functions, judicial independence, judicial activism, and checks and balances. However, the observations and discussion in previous chapters have in many respects challenged the Western understanding of judicial power in liberal democratic legal systems, which requires a clear division

of responsibilities among different state actors in the exercise of power. Because the Court is subject to the supervision of the legislative power (i.e., the National People's Congress, or NPC) and the Party authority's oversight, one might be curious about what these key terms implicate when discussing and understanding the power of the Court in a comparative context and under what circumstances ample scope exists for legal development within the authoritarian legal setting. Efforts to articulate the nondemocratic forms of separation of powers are relatively limited and undeveloped in contrast to rich scholarship on Western democracies,¹ yet these concerns yield insight into the other central question of this research, which has been largely overlooked in the literature on China's judicial system: how does the Court's exercise of power contribute to the understanding of the highest courts' power in a nondemocratic form of separation of powers?

To answer this question, the rest of this chapter departs from the separation of powers doctrine and its diverse implementation in both West and East, identifying three core sets of elements that emerged from comparative study as the basis for reconceptualizing the power of the Court in a broader analytical context, that is, (1) normative versus functional analysis of the doctrine, (2) judicial independence versus judicial interdependence as manifested in the power distribution and power dynamics, and (3) political-centered versus legal-centered modes of operation for the highest court to fulfill its roles in a specific political and legal context. Drawing on the case of China and especially the rich experience of the Court, this chapter also broadens the empirical and theoretical base of the separation of powers doctrine, rethinking and reinterpreting the internal logic of a distinct category of judicial power beyond Western liberal democracies that has been largely overlooked and much misunderstood in the existing scholarship. The chapter closes with

¹ For a general discussion, see Ginsburg and Moustafa, *Rule by Law*, chap. 1.

a summary of the main findings of the study and the conclusion of this research.

5.2. Highest Courts in a Separation of Powers Context: Comparative Analysis

Despite that the functioning of the highest courts varies greatly in different legal settings, most appear to unfold similarly in terms of general theories of the distribution of power. Western literature on judicial power has largely focused on the proper role of courts in the separation of power context, which represents one of the cornerstones of modern constitutionalism and democratic political theory.² Indeed, the separation of powers doctrine has been highlighted in a growing body of comparative literature for providing a critical analytical framework of assessing judicial power and serving as a benchmark to examine whether a legal system meets the inherent requirements of this doctrine and of rule of law ideas.³ However, existing literature on authoritarian courts has commonly classified these legal settings as without separation of power, assuming that judicial power is ineffective and lacking independence within a personal-, party-, or military-dominated authoritarian regime.⁴ These observations provide an incomplete picture of courts in authoritarian

² David Haljan, *Separating Powers: International Law before National Courts* (The Hague: TMC Asser Press, 2013), 31.

³ See Christoph Moellers, *The Three Branches: A Comparative Model of Separation of Powers* (Oxford: Oxford University Press, 2013); E. de Groot-van Leeuwen and Wannes Rombouts, eds., *Separation of Powers in Theory and Practice: An International Perspective* (Nijmegen: Wolf Legal Publisher, 2010); Barber, "The Separation of Power"; William Brent Gwyn, *The Meaning of the Separation of Powers: An Analysis of the Doctrine from Its Origin to the Adoption of the United States Constitution* (New Orleans: Tulane University, 1965).

⁴ Tate and Vallinder, *The Global Expansion of Judicial Power*, 28; Gretchen Helmke and Frances Rosenbluth, "Regimes and the Rule of Law: Judicial Independence in Comparative Perspective," *Annual Review of Political Science* 12, no. 1 (2009): 345–366.

settings by taking for granted that the exercise of judicial power demands strict adherence to constitutional texts and a rigid form of power distribution that runs counter to the separation of powers doctrine. Because the separation of powers doctrine can hardly be defined as classic, exclusive, and fixed,⁵ which reveals significant divergences among countries with different typologies and development patterns, it seems reasonable to proceed from the existing Western perspective and conclude that this critical doctrine may be possible to provide a point for wider application and inspiration even for authoritarian regimes.

To keep the study within manageable proportions, the comparative study in this chapter is limited to a select number of legal systems in the West and East. The choice here presents a fair mixture of different constitutional traditions and institutional arrangements that can shed light on the separation of powers doctrine from both democratic and nondemocratic perspectives. Benefiting from the experience in and beyond the West, this section identifies general trends and particular features as the basis for reconceptualizing the power spectrum of the highest courts in a broader analytical context.

5.2.1. Separation of Powers: The Western Perspective

In 1689, Locke, in his *Two Treatises of Government*, became the first modern ideologist in the West to discuss and distinguish state functions into legislative, executive, and federative powers, with the latter concerning foreign policy.⁶ Locke asserts that different powers should be placed in different hands to achieve balance, thus making a fundamental

⁵ See Martin Rogoff, "Fifty Years of Constitutional Evolution in France: The 2008 Amendments and Beyond," *Jus Politicum* 6 (2011); Haljan, *Separating Powers*; Moellers, *The Three Branches*.

⁶ Richard Ashcraft, *Locke's Two Treatises of Government* (Allen & Unwin Press, 1989), 12–13.

contribution to the principle of the division of powers.⁷ Montesquieu refined the division of power to the separation of power in his *De l'esprit des lois*, which highlights a separation of functions within the state between the legislative, the executive, and the judicial branches.⁸ In accordance with Montesquieu's definition, each branch of the government must be confined to the exercise of its own function and must not be allowed to encroach upon the functions of the other branches.⁹ For three centuries, the threefold classification of state powers has retained its influence as one of the most important guiding principles of modern power distribution, which has been and is still performing its value-reinforcing role in the evaluation of constitutional governance in Western liberal democracies. Nevertheless, the original tripartite vision of separation of powers, also widely known as the "pure" vision of the doctrine, has been criticized by Vile as "unable to accurately reflect, explain, or legitimize the way in which the organs of the state exercise their power" because it calls for a strict delineation of function between the legislature, the executive, and the judicial branches.¹⁰ Recognizing that it is almost impossible to achieve the inherently distinguishable and absolute institutional independence of three branches in accordance with the traditional theory, it became a common practice for different countries to elaborate their own versions of separation of powers according to how different regimes divide government powers and encompass different constitutional traditions.

Comparative studies have shown great diversity in terms of the implementation of the separation of powers doctrine by well-established democracies. Likewise, the scope of power exercised by the judiciary and

⁷ *Ibid.*, 15.

⁸ David Wallace Carrithers, ed., *The Spirit of Laws by Montesquieu. A Compendium of the First English Edition* (Berkeley: University of California Press, 1977), 40–44.

⁹ MJC Vile, *Constitutionalism and the Separation of Powers* (Oxford: Clarendon Press, 1967), 14.

¹⁰ Eoin Carolan, *The New Separation of Powers: A Theory for the Modern State* (Oxford: Oxford University Press 2009), 44.

the typologies of the highest courts in particular legal settings vary greatly in the different separation of powers contexts. For instance, the United States is widely accepted as the first modern state that consciously and expressly built the separation of powers doctrine into its constitutional framework.¹¹ In brief, the Constitution allocates a certain and limited power to the legislature, the executive, and the judiciary in its first three articles. All three these branches may only exercise certain defined power within the boundaries prescribed by the Constitution. The significance of the US model of separation of powers can be highlighted in its concentration on the preservation of the crucial inter-institutional balance, with a view to ensuring that no single body assumes a disruptive position of excessive power. Nevertheless, it is interesting to see that the US Constitution does not explicitly create a system of checks and balances between the three branches it identifies, but rather reserves enough room for officials to develop the details and interpret it in broad lines to suit modern conditions.¹² The creation of remarkable judicial review power in the precedent-setting *Marbury v. Madison* in 1803 by the US Supreme Court proves the best illustration of this point. From then on, it became the responsibility of the courts, especially the Supreme Court at the top of the judicial hierarchy, to play a significant role in ensuring the separateness and interdependence, autonomy, and reciprocity of different branches.¹³ As constitutional observers note, the application of the separation of powers doctrine in the United States is, to a great extent, driven by the Supreme Court.¹⁴

Benefiting from its constitutional traditions with various revolutionary and evolutionary phases, the French system explicitly demonstrates a

¹¹ See Gwyn, *The Meaning of the Separation of Powers*; Victoria Nourse, "Toward a Due Foundation for the Separation of Powers," *Texas Law Review* 74, no. 3 (1996): 447.

¹² Vile, *Constitutionalism and the Separation of Powers*, chap. 6.

¹³ Guarnieri and Pederzoli, *The Power of Judges*, 136.

¹⁴ Haljan, *Separating Powers*, 69.

strict form of separation of powers. Adhering to the principles set out by the 1958 Constitution, the role and relevant functions of each branch is clear and explicitly delimited: the government is charged with the administration of the state,¹⁵ and Parliament with passing legislation and monitoring the actions of the government¹⁶ and an independent judiciary.¹⁷ Furthermore, the French model of separation of powers reflects a good balance between rigidity and flexibility. The most distinctive feature of the French judiciary is the creation of two streams of court hierarchies in addition to ordinary courts. While administrative courts, led by the *Conseil d'Etat* as their supreme administrative court, have jurisdiction over administrative affairs and function as an important overseer on the exercise of executive power, the *Conseil Constitutionnel* is the highest constitutional authority to review the constitutionality of legislation before it is passed. However, only in 2008 did constitutional amendments finally introduce the procedure of the *question prioritaire de constitutionnalité* (the preliminary question of constitutionality, QPC) and empower the *Conseil Constitutionnel* to decide constitutional questions arising in ongoing litigation in front of the ordinary or administrative courts.¹⁸ The application of posteriori constitutional review power highlights the role of the *Conseil Constitutionnel* as the guardian of the law and the explicit embracing of the constitutionalism of the courts. Compared to the United States, where courts claim a right to actively engage in reviewing legislation and executive acts for constitutional compliance, the power of the *Conseil Constitutionnel* demonstrates an alternative example of the empowerment of the highest court and its ability to adapt to changing democratic conditions and values.¹⁹

¹⁵ FR Const. amend 2008, art. 20, 21, and 49.

¹⁶ *Ibid.*, art. 24, 34, 53, 67, and 68.

¹⁷ *Ibid.*, art. 64.

¹⁸ Rogoff, "Fifty Years of Constitutional Evolution."

¹⁹ *Ibid.*

It is ironic that the United Kingdom, which furnished the initial blueprint and provided the inspiration for Montesquieu's separation of powers doctrine by the eighteenth century, has shown a strong tendency of legislative supremacy rather than compliance with strict separation of powers. From the historical perspective, the apparent merger of the executive and the legislature resulted in an implicit form of separation of powers. For centuries, the balance of power in the UK system remained one between lawmaking and law-enforcing powers as originally perceived by Montesquieu, and judicial power was considered an extension of the executive branch.²⁰ Unlike the highest courts of most other democratic regimes, the highest appellate court in England possesses no power of judicial review, which leaves with Parliament extensive power to interpret the law and set the boundaries of a series of fundamental rights. In recent years, however, the incorporation of a series of Europe-wide acts, including the European Communities Act 1972, the Human Right Act 1998, and the European Union Act 2011, refined the boundaries of the UK system and altered the strong role played by the concept of parliamentary sovereignty.²¹

More importantly, the establishment of the UK Supreme Court as the court of last resort in 2009 clearly represented a shift in the relationship between the judiciary and the legislature, and it has symbolically underlined the personal independence of the justices.²² According to constitutional observers, despite that the UK Supreme Court has demonstrated growing activism in checking government acts since its establishment, the power of the courts to strike down a parliamentary statute remains absent.²³ In practice, the Supreme Court possesses only the

²⁰ Vile, *Constitutionalism and the Separation of Powers*, chap. 2.

²¹ See Gordon, *Parliamentary Sovereignty in the UK Constitution*.

²² Andrew Le Sueur, "From Appellate Committee to Supreme Court: A Narrative" in *The Judicial House of Lords: 1876-2009*, eds. Louis Blom-Cooper QC, Brice Dickson, and Gavin Drewry (Oxford: Oxford University Press, 2009).

²³ Moellers, *The Three Branches*, 23.

power to overturn secondary legislation if it is found to be ultra vires of the powers in primary legislation or to make a declaration of incompatibility of the legislation in accordance with the Human Rights Act 1998, regarding either primary or secondary legislation.²⁴ The UK model of separation of powers implies that a balance of powers among the various branches does not necessarily represent complete equality in the division. Rather, the measure of balance may rest upon a fair number of significant factors ranging from political compromise to the confluence of international law and national law in a domestic legal system. In line with Jennings' observation, the English system prefers a more flexible and reflective manner in allocating different powers, rather than being strictly restricted to the notion of how, and to which organs, state powers should be assigned.²⁵

A brief comparative study on the separation of powers in three different democratic legal settings reveals the diverse implementation of the doctrine, especially as to how it shapes and affects the power of the highest court in the specific context. Drawing on these distinct models of separation of powers in the West, two core sets of elements have emerged as the key to understanding and assessing the major roles of the highest courts and how they exercise judicial power in distinctly different political and constitutional contexts.

The first is the normative versus functional analysis of the specific context of separation of powers and the role of the highest court. The three Western models discussed above highlight the fact that although they all derived from the traditional separation of powers theories, the doctrine ultimately provides various reference points for countries to explore their

²⁴ In the United Kingdom, while primary legislation can take the form of acts of Parliament, council orders, and Church of England measures, secondary legislation commonly includes statutory instruments, special procedure orders, and hybrid instruments; see Le Sueur, "From Appellate Committee to Supreme Court."

²⁵ Ivor Jennings, *The Law and the Constitution*, 5th ed. (Cambridge: University of London Press, 1964), 20.

own functional boundaries and lay particular emphasis on power interactions. The well-known distinction between law in books and law in action suggests that paying exclusive attention to the normative framework is more likely to yield misleading conclusions or a partial understanding.²⁶ Likewise, as Van Leeuwen notes, although the constitution formally announces a strict separation of powers, a deeper analysis may show a clear divergence from the letter of the law.²⁷ The evidence presented in the comparative study demonstrates that through the lens of the separation of powers doctrine, it is vital to use the legal framework as a starting point for examining the exercise of judicial power while at the same time fully considering the actual operation of the highest court. Because the highest court does not operate in an institutional vacuum, the exercise of judicial power cannot be understood separately from its environment or without referring to empirical evidence of how it develops in and interacts with its surroundings in practice. In a sense, the normative and functional analyses together provide us with rationales for systematically assessing the power of the highest courts, especially the efforts they have made to fit in with the evolving political conditions and pluralistic social demands in the specific context, such as the rise of the constitutional courts, the boom of various institutional agents, the proliferation of judicial review, and the increasing use of international law.

The second core set of elements in understanding the role of the highest courts is judicial independence versus judicial interdependence, as manifested in the specific context of separation of powers. The comparative study underlines the fact that there is no particular ideal form of separation of powers that can be exclusively applied to all legal systems. Rather, from the ways different powers are merged and achieve their own equilibrium in the specific context of separation of powers, one may

²⁶ Roscoe Pound, "Law in Books and Law in Action," *American Law Review* 44 (1910): 12–36.

²⁷ De Groot-van Leeuwen and Rombouts, *Separation of Powers in Theory and Practice*, 6.

recognize the importance of seeing the doctrine as a dynamic process of power engagement. In fact, the engagement between the legislative and executive powers has been a much-discussed theme in Western literature, with a focus on conflicts and power grabs in various legal settings.²⁸ From a different perspective, although judicial power is an inevitable part of a specific political and legal system, what makes it stand out from the rest of the state powers is that it must be exercised with a certain degree of institutional independence and functional autonomy. In essence, the requirement of judicial independence ensures that courts and judges are strong enough to resist pressure from outside forces in decision-making, providing judges with adequate protection for performing impartially and discreetly.

Moreover, the separation of powers doctrine also helps to remind us that the exercise of judicial power is found not only in the courts' independence but also in their interdependence with other state powers. In light of Ginsburg's comparative study, courts are considered rational actors and assumed to maximize their substantive values in their interactions with other state actors, while at the same time bearing in mind the policy preferences of other branches and the tolerance zones left for them to operate with autonomy.²⁹ The exercise of judicial power and its significance in political governance are, by and large, determined by a set of institutional guarantees aimed at assuring judicial impartiality, and its capacity and competence to reinforce checks and balances or even challenge the core interests of political forces. To this end, the struggles and compromises of the highest courts in terms of the exercise of power would generally reflect their pragmatic approaches and actions in pursuit of a certain degree of independence while strategically interacting with the rest of the system over time.

²⁸ See Moellers, *The Three Branches*; Carolan, *The New Separation of Powers*.

²⁹ Ginsburg, *Judicial Review in New Democracies*, 66–67.

Considering these two sets of elements goes some way to explaining cases in well-established Western democracies, allowing us to identify general trends and particular features that shape and affect the highest courts' power in the specific context of separation of powers. Consequently, the separation of powers doctrine allows us to investigate the major roles and powers of the highest courts in a broader analytical context. But can this doctrine, which has largely been explored and developed in rich democracies, also refer to cases beyond the core Western democracies and provide a point for wider application in a broader analytical context based on the same evaluation criteria? Is this doctrine applicable to the case of China in assessing the judicial power in an authoritarian context, and if it is, to what extent? To provide some answers to these questions, it is equally necessary to shift the focus beyond the West to determine how newly transplanted democracies and authoritarian legal settings intertwine with the concepts and experiences of separation of powers.

5.2.2. Separation of Powers: Experience beyond the West

Following the "third wave" of democratic transitions proceeding around the globe, the idea of democratization has expanded beyond liberal democracies and made extensive progress in systems where the separation of powers doctrine was previously alleged not to exist. However, the general limitation of research sources and the lack of transparency in some cases were likely to result in insufficient or unsatisfactory findings in terms of the exercise of state power, some of which simply classified the nondemocratic regimes as having no separation of powers.³⁰ It was not until recently that law and courts in transplanted democracies and

³⁰ For instance, see Bruce Ackerman, "The New Separation of Powers," *Harvard Law Review* 113, no. 3 (2000): 633; Stephanie Balme and Michael Dowdle, eds., *Building Constitutionalism in China* (Basingstoke: Palgrave Macmillan, 2009).

authoritarian regimes have received considerable attention within the field of comparative judicial politics.³¹

The comparative analysis here shifts its focus to Asia, primarily because the Asian experience can be highly valuable and relevant when discussing the case of China. Furthermore, Asia has been called the home of “illiberal democracy” and represents perhaps the most difficult regional context for establishing the rule of law.³² While the transplantation of Western concepts and experiences of constitutionalism has been found to be successfully integrated with local circumstances and resulted in stable forms of rule in some cases (e.g., Japan), in other cases, nations are struggling to achieve liberal constitutional democracy when confronted with challenges posed by postcolonialism or postauthoritarianism (e.g., Indonesia and Taiwan). Furthermore, in authoritarian regimes (e.g., China), the current constitution reflects the influence of a mix of a Leninist approach to constitutionalism and the supreme authority of the single-party state structure, representing an interesting variant of legal development with a distinctive political philosophy. In view of this, this section focuses on constitutional development in Japan, Indonesia, and Taiwan to determine whether the Western separation of powers doctrine is compatible with legal practice beyond the core Western democracies, and how the two core sets of elements identified above are reflected in assessing the power of the highest courts and their evolving roles in a broader analytical context.

Japan was the first Asian country to adopt the Western-style liberal constitutionalism under the government of the Meiji emperor (1868–1912). The hybrid constitutional practice in the first half of the twentieth century highlighted the supreme status and authority of the divine emperor

³¹ For instance, see Ginsburg and Moustafa, *Rule by Law*; Ginsburg, *Judicial Review in New Democracies*.

³² Daniel Bell, David Brown, Kanishka Jayasuriya, and David Jones, *Towards Illiberal Democracy in Pacific Asia* (Houndmills: Palgrave Macmillan, 1995).

rather than the Western notion of popular sovereignty,³³ which ultimately ended in the rise of the military government of authoritarian rule in the name of the emperor. With Japan's defeat at the end of World War II, the Constitution of Japan came into effect in 1947 based on three fundamental principles—popular sovereignty, pacifism, and the advocacy of fundamental human rights. Although the Constitution retained the emperor system, perhaps the oldest continuing hereditary monarchy in the world,³⁴ the emperor is now no more than “the symbol of the State and of the unity of the people.”³⁵ Within the British style of parliamentary government system the Constitution adopts, the activities of the national government are divided into the legislative, executive, and judicial organs, among which the legislative branch, the Diet, is the highest organ of state power.

In terms of judicial power, Japan has a unified court system in which the Supreme Court acts as the final appellate court and the last resort for judicial review. Despite that the Constitution has entrusted Japanese courts with judicial review power, the Supreme Court is well known for its conservatism and judicial restraint in the sense that it only occasionally engages in judicial review.³⁶ Constitutional scholars note that the conservatism and the cautiousness of the judiciary is an inevitable result of a combination of political and institutional factors. On the one hand, courts have been and are continuously immersed in a conservative political environment, where the Liberal Democratic Party (LDP), which is actually the conservative party, had held power almost without

³³ Albert H. Y. Chen, "Pathways of Western Liberal Constitutional Development in Asia: A Comparative Study of Five Major Nations," *International Journal of Constitutional Law* 8, no. 4 (2010): 849–884.

³⁴ Richard Parry, "Japan Desperate for Male Heir to Oldest Monarchy," *Independent*, March 1, 1996.

³⁵ JP Const., art. 1.

³⁶ The Supreme Court has intervened to declare statutes unconstitutional on only eight occasions over sixty years since its establishment in 1947. See Kawagishi, "Japanese Supreme Court."

interruption for more than fifty years until 2009. On the other hand, institutional arrangements such as the strategy and frequency of appointing justices and the bureaucratic nature of judicial administration play a role in determining which direction the Supreme Court will take in the decision-making process.³⁷ Nevertheless, the situation has gradually changed since the beginning of the twenty-first century, with the Supreme Court assuming a more active role in judicial review, as reflected in a number of remarkable decisions.³⁸ As observers note, it seems that the Japanese Supreme Court has assumed an increasingly active role in judicial review and has become more liberal in response to social and political changes.³⁹ However, it is too early to conclude that the Japanese approach to judicial review is evolving toward affirmative constitutional interpretation like that of its Western counterparts and allows free expression of fundamental values for the democracy.

Contrary to Japan's story of the successful transplantation of Western democratic principles to domestic conditions, Indonesia is considered a newly liberal-democratic regime in Asia that has experienced a series of hurdles in the transformation from authoritarianism to democracy. In the course of modern history, the struggle for independence has been the defining characteristic of Indonesia, with its sense of shared identity, unity, and nationalism.⁴⁰ After Dutch decolonization and the Japanese invasion during World War II, Indonesia experienced, due to the implementation of its 1945 Constitution, a turning point in the creation of an Indonesian identity⁴¹ and the establishment of a number of key institutions, including

³⁷ David Law, "The Anatomy of a Conservative Court: Judicial Review in Japan," *Texas Law Review* 87, no. 7 (2009): 1545.

³⁸ For instance, the Postal Law Case 56 Minshu 1439 (Sup. Ct., GB, Sept. 11, 2002); the Overseas Voting Case, 59 Minshu 572 (Sup. Ct., GB, Sept. 14, 2005); and the Nationality Act Case, 62 Minshu 1367 (Sup. Ct., GB, June 4, 2008).

³⁹ Kawagishi, "Japanese Supreme Court."

⁴⁰ Chen, "Pathways of Western Liberal Constitutional Development."

⁴¹ Anthony Smith, "Indonesia: Transforming the Leviathan" in *Government and Politics in Southeast Asia*, ed. John Funston (Cambridge: Cambridge University Press, 2001), 75.

a legislative body known as the People's Consultative Assembly (*Majelis Permusjawaratan Rakjat*, or MPR), the executive branch led by the president, and the judiciary led by the Supreme Court. Although the separation of powers doctrine had been adopted by colonial Indonesia in the nineteenth century without raising serious doubts, whether to empower the Supreme Court with the authority to review the constitutionality of legislation sparked great controversy and was eventually rejected by the constitutional drafting committee. As observers point out, the lack of power of the Supreme Court to balance legislative and administrative powers in many respects restricted the role of the judiciary in the exercise of its functions, and at times made the judiciary subject to political control, with a limited degree of independence.⁴²

It was not until 1998 that Indonesia reconstructed its Constitution on Western-style liberal democratic principles after President Suharto's fall.⁴³ Suharto had dominated the country for more than three decades through authoritarian rule and military dictatorship in his New Order regime (1965–1998). Following constitutional amendments between 1999 and 2002,⁴⁴ significant reforms that steer the country toward democratization eventually took place in Indonesia. In particular, state powers were redistributed horizontally through the creation of a strong Constitutional Court in accordance with the third constitutional amendment in 2001. Since then, it has functioned as an independent judicial body separate from the ordinary court system that actively engages in reviewing the constitutionality of laws, resolving disputes of

⁴² Stewart Fenwick, "Administrative Law and Judicial Review in Indonesia: The Search for Accountability" in *Administrative Law and Governance in Asia: Comparative Perspective*, eds. Tom Ginsburg and Albert H. Y. Chen (New York: Routledge, 2008); Sebastiaan Pompe, *The Indonesian Supreme Court: A Study of Institutional Collapse* (New York: Cornell Southeast Asia Program Publications, 2005).

⁴³ Tim Lindsey, "Indonesia: Devaluing Asian Values, Rewriting Rule of Law" in *Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France and the U.S.*, ed. Randall Peerenboom (New York: Routledge, 2004), 286.

⁴⁴ *Ibid.*

constitutional jurisdiction between different government branches, determining disputes on the results of general elections, and has the final say in any impeachment proceedings when necessary.⁴⁵ According to observers, the Constitutional Court has gradually emerged as a professional and determined guardian of the Constitution through a number of high-profile cases and consistently asserted its authority in the postauthoritarian government.⁴⁶ Regardless of its positive role in striving for increased accountability and democracy in the post-Suharto era, what remains unsolved is the jurisdictional conflicts that emerged between the Constitutional Court and the Supreme Court,⁴⁷ and more significantly, the struggle of the judiciary to better realize some of the prominent features of the separation of powers doctrine and demonstrate a considerable increase in the degree of judicialization in this postcolonial regime.⁴⁸

Like Indonesia, Taiwan was also subjected to Japanese colonial rule for half a century (1895–1945). In Taiwan's case, the most distinctive feature of its constitutional development lies in its progressive transition into a liberal democracy, combined with modern Chinese constitutional thought and the Western constitutional experience. Taiwan is conventionally viewed as a Confucian society that is heavily influenced by Chinese cultural and legal traditions. The current Constitution of Taiwan (also

⁴⁵ Ind. Const. amend 2002, art. 24; Law 24/2003 on the Constitutional Court (the *Mahkamah Konstitusi* Law), art. 10.

⁴⁶ Mohammad Mahfud Mahmodin (a.k.a. Mahfud MD), "Separation of Powers and the Independence of Constitutional Court in Indonesia," (2nd Congress of the World Conference on Constitutional Justice, Rio de Janeiro, Brazil, January 16–18, 2011).

⁴⁷ Article 24 of the Constitution of Indonesia states that the Constitutional Court has jurisdiction to review the constitutionality of statutes, whereas the Supreme Court exercises jurisdiction over reviewing other types of laws below the level of statutes, for example, governmental and ministerial regulations. Such division of review jurisdiction has been regarded as problematic and controversial in practice mainly because the Supreme Court has not exercised its judicial review power regularly or vigorously, which resulted in the government's preference for regulations over statutes to circumvent the Constitutional Court's intervention in its legislative program. See Butt and Lindsey, "Economic Reform."

⁴⁸ Fenwick, "Administrative Law and Judicial Review."

known as the 1947 Constitution of the Republic of China, or ROC) was drafted in Mainland China by the Kuomintang (the Chinese Nationalist Party, or KMT) government of the ROC in 1946 and went into effect in 1947, at a time when the KMT still had nominal control of Mainland China.⁴⁹ In response to the challenges of the West and the overlay of Leninist notions of tutelage, Sun Yat-sen, the founding father of the ROC, proposed a five-power scheme as the fundamental structure of the 1947 Constitution. Instead of adopting a typical Western tri-power scheme based on the work of Montesquieu, the five-power Constitution stipulates that while the government powers are exercised through the traditional legislative, executive, and judicial branches, they are also manifested in the control and examination branches as fourth and fifth powers, inspired by the bureaucratic system of imperial China. In particular, the control branch, also known as the Control Yuan (監察院 *Jiancha Yuan*), is responsible for monitoring the integrity and efficiency of government officials. The examination branch, also known as the Examination Yuan (考試院 *Kaoshi Yuan*), is in charge of administering the selection of bureaucrats.

Although the Constitution formally contained elaborate provisions on separation of powers and established a German-style constitutional court, known as the Council of Grand Justices (CGJ) of the Judicial Yuan, to interpret these provisions, the president remained at the center of government with concentrated and unrestricted authority over other powers.⁵⁰ According to observers, the judicial authority of the CGJ was

⁴⁹ After its defeat by the armed forces of the Chinese Communist Party in the civil war, the KMT government retreated from the mainland to the island of Taiwan in 1949. On the history of Taiwan, see Denny Roy, *Taiwan: A Political History* (Ithaca: Cornell University Press, 2003).

⁵⁰ As the dominant party in power for more than forty years, the KMT has combined characteristics of Leninism, personalism, and military rule. Judicial power was also considered an instrument of government control for a long time. The presidency remained in the hands of the Chiang Kai-shek family for decades, until 2000, when the leader of the Democratic Progressive Party (DPP), Chen Shui-bian, won the

rather fragile because it was capable of engaging only in abstract review and never had the opportunity to review any laws or regulations in practice.⁵¹ It was not until the late 1980s, as the process of political liberalization and democratization began to germinate in Taiwan, that the CGJ became more actively engaged in constitutional review, and it has since slowly expanded its power spectrum by safeguarding constitutional rights and placing real constraints on the performance of the government.⁵² In the course of its evolution, the CGJ appears to be prudently but systematically removing the barriers imposed by the old system and gradually contributing to a new constitutional scheme through a series of remarkable interpretations on questions of separation of powers.⁵³ Yet the Taiwanese model of separation of powers presents a distinctive example of a pluralistic and complex legal setting that emerged under the direct influence of both Western liberal ideas and Chinese legal thinking. By drawing from a broader range of modern legal legacy in the spirit of the rule of law, Taiwan has experienced unprecedented transitions from authoritarianism to liberal democracy fully and peacefully. Unsurprisingly, Taiwan has been accepted as the first successful instance

presidential election of that year. See Ginsburg, *Judicial Review in New Democracies*, chap. 5.

⁵¹ The only exception to this is Interpretation No. 86 of 1960, in which the CGJ declared unconstitutional the arrangement whereby the lower courts were administratively under the Ministry of Justice of the executive branch. However, this decision was later invalidated by the government. See Albert H. Y. Chen, "A Tale of Two Islands: Comparative Reflections on Constitutionalism in Hong Kong and Taiwan," *Hong Kong Law Journal* 37 (2007), 647.

⁵² Ginsburg, *Judicial Review in New Democracies*, 107.

⁵³ The most remarkable decision of the CGJ was made in 1990, as reflected in Interpretation No. 261, in which the CGJ overturned an earlier council case (Interpretation No. 31) and called for new elections for all seats in parliamentary institutions; see JY Interpretation No. 261 (1990/6/21), with an English translation available at http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=261, accessed November 6, 2016. For more significant interpretations of the CGJ (e.g., Interpretations No. 371 and 572), see the official website of the Judicial Yuan at <http://www.judicial.gov.tw/constitutionalcourt>, accessed November 6, 2016.

in the history of Chinese civilization that has brought modern constitutionalism into existence.⁵⁴

The examples of Japan, Indonesia, and Taiwan demonstrate sophisticated schemes of separation of powers beyond the core Western liberal democracies. Although there are institutional variations among these three Asian cases, the evidence presented so far suggests that one might expect the separation of powers doctrine that originated in the West to provide a source of inspiration and a selection of institutional designs for reference in a broader analytical context. What we saw in the three Asian cases is that there is not a distinctive "Asian model" of separation of powers that has universal adaptability for all Asian countries and regions, although some of the neighboring territories are likely to share similar legal traditions and constitutional norms. Rather, the investigation into the above cases suggests that the highest courts apply varying approaches to interpreting and developing the doctrine in accordance with their own institutional designs and political needs.

Despite the disparity between Eastern and Western approaches to legal development, especially among well-established liberal democracies, new transformative democracies, and authoritarian regimes, the normative and functional analyses are nevertheless important to the Asian cases for providing a basis for understanding the roles and power of the highest courts in different contexts. This is particularly true in instances where courts function or previously struggled under the control of colonial and authoritarian rules. In the case of Indonesia, for instance, although the regime transplanted some Western-style democratic principles into its constitutional framework and established a powerful Constitutional Court in the postauthoritarian era, to what extent the judiciary can implement and realize the prominent features as reflected in the separation of powers

⁵⁴ See Linda Chao and Ramon Myers, *The First Chinese Democracy: Political Life in the Republic of China on Taiwan* (Baltimore: Johns Hopkins University Press, 2002); Chen, "A Tale of Two Islands."

doctrine is worth further discussing, as the power conflicts between the Supreme Court and the Constitutional Court remain severe and the judicial authority in Indonesia is rather weak compared to other powerful state actors in the postcolonial era.

Moreover, the independence and interdependence of the judicial power can also be recognized as a distinguishing feature manifested in various Asian models of separation of powers. These three Asian cases, alongside the previous Western experience, reveal an increasingly convincing point: notwithstanding the political constraints and considerable institutional instability the highest courts have to face in different political and legal contexts, a dynamic approach is to be expected when assessing the power of the highest courts and their evolving relationship with other powerful state actors. In Taiwan's case, for example, where the judiciary operated passively under dictatorship, numerous pressures existed against the independent exercise of judicial power, despite its Constitutional Court (i.e., the Council of Grand Justices of the Judicial Yuan) officially claiming the power to check the legislative branch. It was not until 1986 that the ongoing process of democratization in Taiwan and the subsequent political liberalization refined the boundaries of judicial power and a new constitutional review scheme, placing some meaningful constraints on the legislative and administrative branches. In recognizing the possible limitations of judicial power and insufficient institutional guarantees of judicial independence, this may partly explain why the highest courts are generally prudent and self-restrained in the process of building judicial power step by step, with due diligence in expanding the power boundaries while considerable political and legal constraints prevent them from doing so.

In addition, these three Asian cases highlight the third set of elements that can be incorporated into our analytical framework, namely, political-centered versus legal-centered modes of operation for the highest courts. As Montesquieu argued more than two centuries ago, the role envisaged

for the separation of powers is a means of promoting political liberty and preventing the “enactment of tyrannical laws or the execution of them in a tyrannical manner.”⁵⁵ This rationale has continued to be identified as the cornerstone of the doctrine to this day and has become an integral aspect of preventing the abuse of power in Western political thought.⁵⁶ In practice, it is evident that different systems embrace political liberty to varying degrees, with different levels of judicialization. While the political-centered mode of operation is characterized by a high level of involvement in political functions and relatively little room for the judicial power to maneuver, the legal-centered mode emphasizes the autonomy of the judiciary and its capability to facilitate the diffusion of power among different branches. For instance, the US understanding of the doctrine and its active exercise of judicial review power can be viewed as a typical example to illustrate the legal-centered mode of operation for the highest court. Conversely, the exercise of judicial power in Japan suggests a political-centered mode of operation, where the Supreme Court attempts to avoid any political conflicts and institutional risks in a conservative political environment, although it is formally entrusted with judicial review power and allowed to strike down the legislation as unconstitutional.

This classification is inadequate and not clearly definable in the sense that the political factors could exert a profound influence on the legal-centered mode of operation for the highest courts, while the political-centered mode of operation could also tolerate or even encourage a certain degree of judicialization, within limits. The point is to place varying emphasis on the power and law in this core set of elements while investigating the

⁵⁵ De Montesquieu, *The Spirit of the Laws*, 6.

⁵⁶ See Vile, *Constitutionalism and the Separation of Powers*; Eric Barendt, "Separation of Powers and Constitutional Government," *Public Law* (Winter 1995): 599; Kate Malleson, "The Rehabilitation of Separation of Powers in the UK, Separation of Powers in Theory and Practice," *Separation of Powers in Theory and Practice: An International Perspective*, eds. in E. de Groot-van Leeuwen and Wannes Rombouts (Nijmegen: Wolf Legal Publishers, 2010).

operational modes of the highest courts, which in many respects contribute to the understanding of the degree of judicialization versus politicization in the specific context. Even though nondemocratic regimes are commonly recognized as negative examples where the ruling authorities are likely to place extremely unnecessary and unreasonable restraints on the exercise of judicial power, the key is not to question the legal basis of their operational modes but rather to rethink the rationales for such choices and the meaningful scope for the judicial power to maneuver within certain political and institutional restraints.

Drawing from a variety of separation of powers models from both the Western and Eastern perspectives, the previous assumptions have been further supported by the fact that this critical doctrine that originated in the West can actually shed light on the Asian cases on the basis of some key features for reconceptualizing the power of the highest courts in a broader analytical context. These comparative findings can be particularly important for China, where the direction and pace of constitutional transitions are rather uncertain over time, and courts are likely to act with caution and prudence when facing an ambiguous but gradually evolving legal environment. Against this backdrop, the next section shifts its focus back to the case of the Court, relying on the three core sets of elements identified above to see how the previous theoretical and empirical findings of the Court contribute to the understanding of a distinctive form of separation of powers with Chinese characteristics.

5.3. Separation of Powers with Chinese Characteristics

The ways in which the judiciary exercises its power within either a democratic or an authoritarian regime highlight the openness and pluralism different highest courts present in a variety of separation of powers contexts. The aim of discussing these models above is not to

question or critique the legitimacy of particular models but rather to suggest that it is necessary, indeed vital, to place China within the same analytical framework to reconceptualize the internal logic of the judicial power in an authoritarian context. Despite that the Chinese judiciary has incorporated some elements of Western constitutionalism and acts in some ways similar to its Asian counterparts, most existing models of separation of powers seem to have limited applicability to China, where courts are continuously subordinate to the single party's oversight and perform as a subset of the legislative power. Nevertheless, the three core sets of elements identified in the comparative study allow us to investigate the power of the Court in a broader analytical context, providing a more thorough mapping of how the highest court fulfills its primary roles in an authoritarian political and legal context. This section then discusses the details of the three core aspects in turn, specifically to determine how the key elements associated with each aspect are reflected in assessing the power of the Court and its evolving roles in an authoritarian separation of powers context.

5.3.1. Normative versus Functional Analysis

The Constitution of China explicitly places the Court within the governmental structures as a subset of the NPC and its Standing Committee, unlike the highest courts in many other jurisdictions. The institutional arrangements of the Court, as discussed mainly in chapter 2, suggest that the exercise of judicial power is relatively restricted under the Party's oversight and that the Court has not yet developed a meaningful approach to counterbalance the other powerful state actors. In fact, it is also one of the common impressions of the Chinese courts shared by most Western scholars until now. From the functional analytical perspective, however, one might place different emphasis on the analysis of the power of the Court and arrive at different conclusions on the same subject. In recognizing the distinct difference between the power arrangements of an

institution and pragmatic means it adopts for realizing them, this research has so far unfolded and developed its core arguments on the basis of both normative and functional analyses, especially drawing from empirical findings to determine how the Court has been organized and empowered in the era of transformation and to examine the efforts it has made in reality to fit in with the evolving political and legal environments.

Before the mid-1980s, Chinese courts had little room to maneuver. The Court performed as merely a governmental instrument for political movements and anticriminality campaigns, with disturbing features such as a disregard for due process, arbitrariness of punishment, and the direct contravention of human rights.⁵⁷ The situation began to change in the late 1980s as economic reforms and opening up began to take off and China's leadership advocated for building a "socialist nation ruled by law." This became the turning point for the transition of the judicial system with respect to its primary functions, authorities, and the major tasks.⁵⁸ In fact, the evidence presented in previous chapters, along with a growing volume of literature,⁵⁹ suggests that the Court has made significant progress in the direction of a more effective, efficient, and predictable legal institution in the era of transformation. In particular, following the Fourth Plenum of the 18th Party Central Committee in 2014 and President Xi Jinping's full endorsement of the socialist rule of law with Chinese characteristics, clear signs emerged of the strengthening of the legal system and a significant expansion of judicial competence and authority. From the functional analytical perspective, it would no longer be accurate to assume the Court is an incompetent or unimportant state actor that merely performs as a governmental instrument. Rather, the evidence presented in chapters 2 and

⁵⁷ Amnesty International, "China: The Death Penalty in China: Breaking Records, Breaking Rules," August 1, 1997, <http://www.refworld.org/pdfid/45b84b772.pdf> (accessed February 9, 2018).

⁵⁸ Pixiang Gong, *The Modernization of China's Legal System* (Beijing: The China University of Politics and Law Press, 2004), 627.

⁵⁹ For instance, see Liebman, "China's Courts: Restricted Reform," 638; Liebman, "Authoritarian Justice in China."

3 suggests that the Court has demonstrated an increased level of technical competence and judicial professionalization in pursuit of its own version of judicial empowerment by various means.

First, as the highest authority at the top of the judicial hierarchy, the Court's role in safeguarding consistency in the application of the law is by no means to be neglected. After all, adjudicative power is commonly accepted as one of the most fundamental functions that shape the legitimacy of the judiciary. In contrast to many other highest courts, however, the authority of the Court does not manifest itself through a list of milestone court decisions that have shaped the historical outlook and have an impact on developing the law. Rather, observations and discussions in chapter 3 indicate that cases of great significance would seldom reach the courtroom for trial before the supreme court judges because the Court lacks the discretion to review specific cases or impose powerful checks on legislation.⁶⁰ In view of the limited impact of its own rulings, the Court has developed two other judicial mechanisms related to its adjudication work as vital functional supplements to expand impact beyond individual cases, that is, the promulgation of abstract judicial interpretations as mandatory instructions with general applicability, and the timely release of a selection of guiding cases as persuasive reference with case-based interpretations to guide trial practice.

Although some critics question the quasi-legislative characteristics of the Court's normative interpretative power and assert that it would encroach on the law-making power of the NPC,⁶¹ the Court's normative power has proved to be of great practical importance in coping with dramatic social change and filling gaps left by the law. It has been proven that the Court has effectively become a law- and policymaking body and adopted

⁶⁰ For further discussion on the jurisdiction of the Court, see chap. 3, sec. 3.2.

⁶¹ See Keith and Lin, "Judicial Interpretation"; Wang, "Law-making Functions," 524.

judicial interpretation as its major form of policy output.⁶² The continuing emphasis on making judicial policies in many respects reflects a pragmatic approach of the Court in pursuit of greater authority and autonomy, which succeeds in expanding its legal landscape at the expense of other powerful actors. Moreover, a careful selection of guiding cases also serves as an important supplement to strengthen the role of the Court as the highest adjudicative institution. Although the Chinese judiciary does not adhere to the *stare decisis* doctrine, this does not prevent lower courts from heavily relying on guiding cases for solid and convincing reasons in their judgments, which in turn creates the *de facto* binding force of guiding cases and enables the Court to tighten its control over lower courts with respect to discretion in the decision-making process.

As argued in chapter 3, the practice of providing judicial interpretations and guiding cases has largely reflected the Court's intensified efforts to consolidate its judicial power as the highest adjudication organ with a certain degree of autonomy in the exercise of power. Regardless of the judiciary's subordinate position to the legislative power and its dependency on executive support in various forms, a clear awareness of the need to enhance its own institutional competence within the current power separation structure seems to be the key motivation behind the Court's ambitious policymaking power and the promotion of the Guiding Cases System, which allows the Court to prudently test power boundaries and expand its jurisprudence in accordance with its own institutional interests and pragmatic needs.

As the head of the judicial system, the Court also plays a leading role in initiating judicial reform plans devoted to advancing long-term legal development and seeking constant judicial innovations. In light of a series

⁶² Ip, "The Supreme Court"; Yahui Song, "The Incorporation of Public Policies into the Adjudication Process: Discussion on the Abstract Judicial Interpretation of the Supreme People's Court (*gonggong zhengce ruhe jinru caipan guocheng: yi zuigao renmin fayuan de sifa jieshi weili*)," *Studies in Law and Business* 6 (2009): 111–121.

of five-year reform outlines for the people's courts and the Court's annual work reports to the NPC, the most noteworthy reform initiatives of the Court in recent years include promoting reforms on a broad range of public and private law topics to bring China into line with international practice; refining three major procedural laws concerning civil, criminal, and administrative cases; monopolizing the power of final review and approval of all death penalty cases; facilitating the creation of a number of specialized courts and circuit tribunals to achieve a proper allocation of resources and judicial personnel on demand; and the endorsement of the open trial system and a renewed focus on procedural justice with greater transparency and accessibility. In particular, the professionalization of courts and the increased competence of judges have been highlighted in chapter 2 as the most distinguished accomplishments of judicial reform over the past thirty years. Being keenly aware of the profound and unfavorable consequences that resulted from having unqualified judges in the 1980s,⁶³ the Court had intensified efforts to improve the overall quality of the judiciary, including taking steps to reform judicial training and examination programs, distinguishing between judges and other judicial personnel, and upgrading judicial disciplinary methods to evaluate judges' performance and the daily operation of courts. The evidence presented in chapter 2 suggests that the growing judicial competence has, on the one hand, boosted the capacity of individual judges in delivering impartial and fair outcomes in accordance with the law, and, on the other hand, served as a vital means of judicial empowerment for courts at various levels to fend off undesirable external interference.⁶⁴

⁶³ In the 1980s, it was widespread practice for demobilized military servicemen and former government officials without any legal background to up office in courts, with some being promoted to court leadership positions or put in charge of key court divisions. For further discussion, see chap. 2, sec 2.3; also see He, "Demobilized Servicemen."

⁶⁴ For a detailed discussion on judicial competence and its impact on individual judges and the court system as a whole, see chap. 2, sec. 2.3.

Ironically, legal professionalism was not always in line with the ruling authority's top national strategies in the era of transformation. Although the earlier judicial reforms in the 1980s and 1990s largely focused on developing judicial professionalism, a broad shift from professionalism to populism in dispute resolution patterns has been found since the late 1990s, with a general trend of de-emphasizing the function of courts as impartial adjudicative authorities by the Chinese top leadership.⁶⁵ A notable example is the Court's commitment to "activist justice" (*nengdong sifa* 能动司法) under President Wang Shengjun's leadership (2008–2013) and his call for the judiciary to primarily "serve the need of the Party and popular demands,"⁶⁶ which significantly rolled back the liberal tendency of the judiciary and his predecessor Xiao Yang's efforts to advance judicial professionalism and trial independence.

Nevertheless, the Court did not easily yield to populist pressures in a hostile yet politically conservative environment. Rather, in line with the global trend toward judicialization, a growing public demand for the rule of law in China created incentives for the Court to strengthen the institutional capacity of courts in accordance with its own professional ideologies and policy preferences. In fact, evidence presented in chapter 2 demonstrates that with the Court's unremitting efforts, the judiciary has become increasingly organized and staffed with better-qualified judicial personnel in the reform era, which has led to more consistent adjudication, well-reasoned judgments, and the embracing of professional identity, which help to distinguish courts from other government institutions. More significantly, the expansion of the judicial power that originated within

⁶⁵ See Carl Minzner, "China's Turn against Law," *The American Journal of Comparative Law* 59, no. 4 (2011): 935–984; Björn Ahl, "Retaining Judicial Professionalism: The New Case Guiding Mechanism of the Supreme People's Court," *The China Quarterly* 217, no. 3 (2014): 121–139.

⁶⁶ The Wang Court adopted "Three Supremes" (*sange zhishang* 三个至上) as its official motto, which emphasized the need to address social stability concerns rather than adherence to the law. For a detailed discussion on the Party's ideological control over the judiciary, see chap. 2, sec. 2.4.

courts also serves as a protection mechanism to shield against certain forms of extra-legal interference and as practical solutions to combat judicial corruption and prevent the loss of talent.⁶⁷ In this respect, one can cogently argue that the exercise of judicial power in China has increasingly reflected the pragmatic interests and rational choices of the Court in pursuit of its own beliefs, preferences, and motivations toward greater capacity and authority.

5.3.2. Judicial Independence versus Judicial Interdependence

The Court's efforts to optimize the technical competence of the judiciary is no doubt extraordinary, but it tells only part of the story about the roles the Court actually plays under the Chinese model of separation of powers. From what has been discussed in the last section, the scope and impact of judicial power are, by and large, shaped by a set of institutional guarantees of judicial independence and the degree of power engagement between courts and other powerful state actors, especially in the evolving political and constitutional dynamics. A rational highest court must always recognize the strengths and limitations of its power, and more importantly, bear in mind the policy preferences of other state actors and how they may affect the independent exercise of judicial power. In the case of the Court, the institutional guarantees of the independent exercise of judicial power have proven to be a fragile illusion within the Chinese judiciary in consideration of insufficient financial support, intense workloads, and bureaucratic forms of judicial management. As argued in chapter 2, all these insufficiencies combined have caused a severe judicial syndrome that undermines the career identity of individual judges and affects their

⁶⁷ Interviews SPC20140805, August 5, 2014; SPC20140829, August 29, 2014; and SPC20140905-2, September 5, 2014.

job satisfaction and turnover rate.⁶⁸ Consequently, the independent exercise of judicial power in the Chinese political and legal context is often threatened by external interference from Party organs, people's congresses, administrative agencies, the procuracy, and so forth, and judges are sometimes placed in the unenviable position of "fighting battles with one hand behind their backs."⁶⁹ This is particularly true in the handling of politically sensitive cases, where courts have to struggle to fulfill the demands of different interest groups and search for a balance between legal requirements and political concerns before reaching verdicts.⁷⁰ The authority of the judiciary is further weakened by its high dependence on the executive branch for financial support and personnel management, its vulnerability to strictly hierarchical control in both judicial and nonjudicial activities, and most seriously, its ideological commitment to the ruling authority in terms of fulfilling political functions.⁷¹ Arguably, these key factors work together to limit the tolerance zones within which the Court can operate with autonomy and independence, resulting in severe harm to the impartiality, prestige, and identity of the judiciary as a whole.

In the meantime, the degree and extent to which the Court is capable of challenging and limiting state conduct and Party authorities through the experience of its everyday justice are also worth stressing in this research, as it serves as a valuable indicator of assessing the power of the Court in the Chinese model of separation of powers. For most legal scholars in Western democracies, judicial review of primary legislation and administrative acts has been considered as a core element of judicial power that creates a key check on the powers of the other two branches of

⁶⁸ For a detailed discussion on the institutional restraints of the Court that undermine the career identity of supreme court judges, see chap. 2, sec. 2.3.

⁶⁹ Peerenboom, *China's Long March*, 281.

⁷⁰ For a detailed discussion on how the Court handles politically sensitive cases, see chap. 2, sec. 2.4 and chap. 3, sec. 3.2.

⁷¹ For a detailed discussion on these aspects, see chap. 2, sec. 2.3 and 2.4, and chap. 4, sec. 4.2 and 4.3.

the state.⁷² Despite that the formalist judicial review is not a necessity to ensure judicial empowerment, scholars have noted a spread of judicial review power in well-established liberal democracies and new democracies.⁷³

In contrast to the practice in and beyond the West, Chinese courts are notable for their limited power of judicial review and inability to develop significant constitutional jurisprudence. In line with the discussion in chapter 3 and a growing body of academic work, the Chinese judiciary has demonstrated only a narrow commitment to judicial review, and the Court has been largely ineffective in providing redress for individuals against the state power under the existing Administrative Procedure Law of 1989 (as amended in 2014).⁷⁴ Thus, the lack of systematic checks and balances is likely to result in public discontent and the generally low level of trust in formal legal channels, driving the increase in legal grievances flooding petition channels in search of relief from injustice. In light of the empirical findings of chapter 4, this problem is particularly acute at the Court's level, where the caseload of litigation-related petitions the Court accepted has soared over the years, while a progressive decrease in petitions has been witnessed as the general trend of courts at various levels.⁷⁵

Additionally, without any power of using the Constitutional Law as the basis of judicial decision-making, the Court has not yet begun to function

⁷² Wolfe, *The Rise of Modern Judicial Review*, 8.

⁷³ Rett R. Ludwikowski, "Constitution Making in the Countries of Former Soviet Dominance: Current Development," *Georgia Journal of International and Comparative Law* 23, no. 2 (1993): 155; Ginsburg, *Judicial Review in New Democracies*.

⁷⁴ Although the 2014 amendments to the Administrative Procedure Law slightly expanded the scope of reviewable administrative acts, which applied to normative documents ranking below regulations that conflict with higher-level legal provisions in specific cases (Articles 53 and 64), laws, administrative regulations, and the decisions of Party committees remain immune from challenge under the revised law. For a detailed discussion on the jurisdiction of the Court, see chap. 3, sec. 3.2.

⁷⁵ For a detailed discussion on litigation-related petitions, see chap. 4, sec. 4.3.

as significant in constructing constitutional rights and defending public interests.⁷⁶ Although attempts at expanding constitutional jurisprudence have been vividly illustrated by a limited number of pioneer cases in grassroots courts, such as the Qi Yuling Case (2001)⁷⁷ and the Luoyang Seed Case (2003),⁷⁸ which had largely been endorsed and highlighted by the Court at the time, the Court has made little substantive progress in making breakthroughs in expanding judicial power to meet Western standards.

Clearly, it would be unwise to expect a strong judiciary with an active form of judicial review power within China's current political and constitutional structure. This can be achieved only through a set of fundamental institutional changes and a restructuring of power distribution among different state actors in future reforms. Nevertheless,

⁷⁶ See Liebman, "China's Courts: Restricted Reform," 638; Qianfan Zhang, *The Constitution of China: A Contextual Analysis* (Hart Publishing 2012), chap. 7.

⁷⁷ In the Qi Yuling Case (2001), a friend of Qi Yuling used her name while enrolled in a local commercial school in Shandong Province and continued using Qi's name after entering the workforce. Qi claimed that her friend's actions had violated her constitutional right to receive an education. To provide guidance to the lower-level court in how to handle this case with respect to the constitutional rights claim, the Supreme People's Court promulgated a judicial interpretation and declared that civil liabilities will be borne for infringement upon a citizen's basic right of receiving an education. In this respect, Qi's constitutional right is under the protection of the judiciary. See Morris, "China's Marbury."

⁷⁸ In the Luoyang Seed Case (2003), the presiding judge, Li Huijuan, at Luoyang Intermediate People's Court in Henan Province, almost lost her job for explicitly declaring a provincial regulation invalid in her ruling when facing a conflict between standards for seed pricing set out in local regulations and the National Seed Law. Although the Supreme People's Court supported Judge Li's decision in its reply concerning the Luoyang Seed Case, the Luoyang Intermediate People's Court revoked the decision to punish Judge Li. This case provides a local-level example of the ongoing struggle to expand judicial power and its boundaries in China. However, this event also reflects the restricted court power that China's judiciary faces. See Jim Yardley, "A Judge Tests China's Courts, Making History," *The New York Times*, November 28, 2005; Zhe Han, "Establishing a Sound Adjudication Mechanism for Conflicts of Law (*jianli falu chongto de liangxing jie jue jizhi*)," *21st Century Economic Report*, November 24, 2003; Xiangjun Kong, "The Choice for the Judges When Facing Conflicts of Law (*faguan zai falu guifan chongtu zhongde xuanze shiyong quan*)," *Legal Daily*, December 1, 2003.

this does not mean that there is no meaningful room left for the Court to maneuver or explore innovative approaches to judicial empowerment. Contemporary trends in judicial reform suggest that with the deepening of social transformation and the emergence of rule of law values in China, the Court has been more aware of the possible limitations of its power and has prudently pushed forward its influence in and beyond the legal fields in accordance with its own pragmatic needs and institutional interests. For instance, reform measures such as the unification of adjudication standards in the application of the law, the expansion of the scope of cases accepted by courts and the review scope of administrative cases, the emphasis on the finality of judgments and procedural justice, and the promotion of the Guiding Cases System⁷⁹ have all been implemented by the Court as safeguard measures to ensure that courts are strong enough to resist pressure from outside forces and that judges are less likely to be swayed by nonlegal factors in the judicial decision-making process.

In addition, evidence presented in this research suggests that the Court has intensified centralized control within the judicial hierarchy through various judicial and nonjudicial means, ranging from appeals and case reviews to adjudication supervision, personnel appointment, and court performance management,⁸⁰ to build a more cohesive and unified judicial system without directly challenging the authority of the Party-state. Despite that the tension between the higher and lower-level courts continues to be present in the judicial system and that the Court strictly oversees lower courts' diversity of practice, which remains within the ruling authority's oversight, the Court still provides considerable incentives and flexibility for lower courts to consolidate their power in reaching impartial and fair outcomes in accordance with the law, and more importantly, to ensure their effective participation in facilitating judicial

⁷⁹ For a detailed discussion on these aspects, see chap. 2, sec. 2.3, and chap. 3, sec. 3.2 and 3.4.

⁸⁰ For a detailed discussion on the abovementioned judicial and nonjudicial functions of the Court, see chap. 2, sec. 2.3; chap. 3, sec. 3.2; and chap. 4, sec. 4.2.

reform and making integral contributions to a unified judicial system with greater competence and authority. In this respect, the constant silence regarding incorporating an active form of judicial review is understandable, as the Court, as a pragmatic political actor, is generally consciously in search of appropriate roles and strategically responding to other state powers in the process of building judicial power step by step, especially in the face of considerable risks and restraints in a nondemocratic form of separation of powers.

5.3.3. Political-Centered versus Legal-Centered Operation

Through controversial debates on power distribution and interaction in different political and legal contexts, the separation of powers doctrine is frequently used as the basis for studying and explaining the level of judicialization and political significance of courts. In practice, the operational modes of the highest courts are largely shaped by institutional and political restraints as stipulated in the specific separation of powers context, and in turn, they may also exert a profound influence on a given system through various judicial and nonjudicial means. In the case of the Court, a continued commitment to the Party's leadership and a political-centered mode of operation can be found in terms of the Court's judicial and nonjudicial practice, as fully discussed in chapters 3 and 4. For a single-party socialist state such as China, one cannot afford to overlook the relationship between the Party and courts while discussing the exercise of judicial power and the path to legal development in the Chinese context. Evidence presented in chapter 2 suggests that the Party's impact on the judiciary is inevitably complex and profound, and it can be channeled through various judicial and nonjudicial means, including adjudication work, policymaking, ideological education, and personnel matters.⁸¹

⁸¹ For a detailed discussion on the Party's impact on these fronts, see chap. 2, sec. 2.4.

Although the Party's role in day-to-day judicial practice has been substantively reduced and better standardized than in the past,⁸² it should come as no surprise to learn that the bottom line remains unchanged regarding courts' subordinate status to the Party. As has been highlighted in the *2014 Plenum Decision of the 18th Party Central Committee*, although the party-state has shown a full endorsement of a more authoritative judiciary and highlighted some meaningful achievements of separating judicial functions from other party-state functions,⁸³ still, it is clear that the Party's leadership has defined and will continue to set the tone of legal development in China, and courts in many respects have to reflect and serve the nation's primary strategies of furthering economic development and ensuring social stability.

In line with this notable trend, chapter 3 has demonstrated clear signs of the intensified political functions of the Court in complying with the political agenda of the ruling authorities, ranging from fighting judicial corruption to reducing legal grievances relating to petitions.⁸⁴ Another notable trend associated with the highly centralized political power is the strict bureaucratic control within the judicial hierarchy. Empirical evidence from this study suggests that the Court in many respects operates

⁸² For instance, the direct interference of the Party organs and individual party members in the trial activities has been restricted as a result of improved judicial transparency, better record keeping, and strictly regulated trial procedures. See *The Notice of the Supreme People's Court on Issuing the Implementation Measures for People's Courts Carrying out the "Provisions on Recording, Reporting and Pursuing Accountability of Leading Cadres Interference with Judicial Activities or Tampering with the Handling of Specific Cases,"* Fa Fa no. 10 (2015).

⁸³ President Xi Jinping has fully endorsed a more authoritative judiciary in the ruling party's governing structure since he took office in 2012 by, for example, calling for advancing court adjudication reform "with the trial at the center," as stated in the *Decision of the Fourth Plenum of the 18th Communist Party Central Committee* in 2014. This represented the Party-state's revived emphasis on judicial professionalization and legal specialization after a shift away from judicial professionalism to Maoist-era ideals of judicial populism that began in 2005. For further discussion, see Carl Minzner, "Legal Reform in the Xi Jinping Era," *Asia Policy* 20, no. 1 (2015): 4–9.

⁸⁴ For a detailed discussion on the political functions of the Court, see chap. 4, sec. 4.3.

in a manner consistent with how the rest of the bureaucracy is run, which can be seen in the forms it takes to issue judicial policies, how it is involved in judicial appointments and promotions, and the management methods it adopts to supervise and discipline the lower-level courts.⁸⁵ Although these efforts can be viewed as crucial steps toward judicial centralization, especially to facilitate judicial efficiency and to combat local protectionism, clearly they are not always consistent with the inherent requirements of the judicial profession or the independent exercise of judicial power. Even worse, they have further blurred the boundary between legal and nonlegal actors operating under the Party authorities' ideological oversight and bureaucratic control. Admittedly, there is nothing unique about the judiciary serving more functions than simply adjudicating and about judges being regarded as government administrators or bureaucrats.⁸⁶ What is distinctive to China is the continuous overemphasis on political, economic, and social needs in a series of judicial and nonjudicial tasks without paying due respect to law and rights, especially imposing on courts intensive political tasks despite occasional conflicts with legal requirements. One telling example of this kind is the resurgence of court-annexed mediation and soaring mediation ratios between 2004 and 2011, which reflected a top-down authoritarian response motivated by social stability concerns rather than emphasizing the role of law, litigation, and courts as the center of resolving disputes.⁸⁷

The harm caused by a highly centralized and powerful dominant party to the judicial system cannot be underestimated, especially in an authoritarian legal setting. The political-centered mode of operation of the judiciary has placed greater weight on power than the law, which is

⁸⁵ For a detailed discussion on these issues, see chap. 2, sec. 2.3; chap. 3, sec. 3.3; and chap. 4, sec. 4.2.

⁸⁶ Wilson, *Bureaucracy*, 279–282.

⁸⁷ Minzner, "China's Turn against Law"; Yedan Li, "In the Name of Mediation: An Empirical Inquiry into the Chinese Court Mediation Practice," (PhD diss., Universiteit van Amsterdam, 2015); Ginsburg, *Judicial Review in New Democracies*.

unlikely to promote tolerance of a powerful highest court and instead creates unnecessary or unreasonable political restraints on the independent exercise of judicial power. In line with observations and discussions in this research, the bureaucratic style of judicial operation and management carry a real risk for Chinese courts, and it has not only weakened the capacity of courts to respond to external pressures but also resulted in inconsistent trends in China's legal development. In recognizing the Party authority's supremacy over the judicial power, the central and most urgent issue is not to justify the legitimacy of the dictatorship but rather to make a serious inquiry into whether and under what circumstances there is considerable scope for legal development, especially for the Court to exercise power independently within certain political and institutional restraints.

In view of this point, chapters 3 and 4 have identified the Court's compromises on legal rationality when confronted with the ruling party's core interests and institutional aims in terms of both judicial and nonjudicial practices, ranging from implementing Party-led judicial policies and refusing to docket specific types of politically sensitive cases to launching anticorruption campaigns and reducing legal grievances relating to petitions.⁸⁸ In the meantime, however, the Court's efforts to advance trial procedures, optimize the allocation of judicial personnel, abolish irrational performance indicators, and ensure judges have better status and financial support in recent years are remarkable, and they have largely reduced the application of a series of "hidden rules" in judicial practice.⁸⁹ Admittedly, the Court is still far from completely eliminating the Party's impact on the exercise of judicial power in the short term, and the depoliticization and deadministrativization of the judiciary reflect the

⁸⁸ For a detailed discussion on these issues, see chap. 3, sec. 3.2 and 3.3, and chap. 4, sec. 4.3.

⁸⁹ See *White Paper on China's Judicial Reform* (2016), with an English translation available at http://english.court.gov.cn/2016-03/03/content_23724636.htm, accessed January 6, 2017.

long-term goal of improving Chinese courts' methods of operating by introducing greater functional autonomy and institutional independence. Nevertheless, this again stresses the importance for the Chinese judiciary, especially for the Court, to base itself on the inherent nature of the judicial power and exploit the adjudicative power unique to judicial institutions while searching for the most suitable mode of operation.

In summary, the investigation into the recent development of the Court in this book suggests that it has achieved considerable success in striving for technical competence and judicial professionalization while encouraging a certain degree of autonomy and flexibility in the exercise of judicial power. However, judicial independence in China has been undermined by deep-seated institutional and political constraints and the limited capability of the Court to counterbalance state conduct and even challenge Party authorities. Furthermore, the political-centered mode of operation implies that there is limited scope for the Court to evolve under the current strict hierarchical control and authoritarian leadership. By placing the Court in a broad comparative context and drawing from its rich experience within a distinctive form of separation of powers, it is evident that judicial empowerment in China is not a spontaneous process but rather the result of a conscious effort of the Court to break away from rigid power distribution to explore judicial innovation and all the possibilities for power expansion. In this respect, the lack of judicial review power in the Chinese judiciary should never overshadow the Court's genuine achievements, especially its modest but meaningful steps toward judicial empowerment in the Chinese model of separation of powers.

5.4. Rethinking Separation of Powers from the Experience of the Supreme People's Court

Drawing on the Court's institutional and functional practice, the exploration into the three core sets of elements indicates that the scope and impact of judicial power are largely determined by the political and institutional designs within the Chinese governance structure and in many respects influenced and restructured by the Court's initiatives in developing the law and expanding the power boundaries. Although judicial empowerment in China is limited because the exercise of judicial power is part of the product of the power distribution and power dynamics within the Chinese political and legal context, one should never overlook or underestimate the Court's efforts and continuous struggle toward greater competence, authority, and independence. Because the highest court is likely to function as an inseparable part of the specific political and legal system, its power evolvement is the result of, and in turn an operating condition that reacts to, the specific separation of powers context. Therefore, like the practice in and beyond the West, the exercise of judicial power in China is part of the product of interactions and counterbalances between the judiciary and other powerful state actors and political forces in a distinctive form of separation of powers. In this respect, efforts to rethink the inherent logic of the power of the Court reaffirmed the assumptions proposed in chapter 1 that the Western norm of separation of powers can actually provide a reference for wider application and inspiration even in an authoritarian legal setting. Regardless of the complexity of the subject under discussion, what seems more interesting is a departure from the experience of the Court to explore the possibility of broadening the empirical and theoretical base of the separation of powers doctrine, reconceptualizing a certain category of

judicial power in the nondemocratic context that has been largely overlooked and much misunderstood in the existing scholarship.

First, when it comes to discussing the separation of powers can occur in a nondemocratic legal setting, the answer should not be a simple yes or no. As Liebman insightfully points out, placing China's legal development in the comparative context highlights the fact that there is no single form of or path to legal development and that nonconvergence with Western modes of legality may be as likely as convergence.⁹⁰ In this study, significant effort has been devoted to identifying the uniqueness of the Court's exercise of power under China's political and institutional structures, especially its relation to Party authorities and how the latter affect the exercise of judicial power from both institutional and functional perspectives. Nevertheless, a continued commitment to the Party's leadership and a political-centered approach to legal development in China, as manifested in the Court's judicial and nonjudicial practice, cannot be used to deny the role of the judiciary as an essential political actor and the Court's efforts toward greater competence and authority. Although the case of China falls short when measured against the "pure" mode of power separation that requires a complete and rigid division of powers among different state powers, the political and legal philosophy reflected in the separation of powers doctrine has undoubtedly affected the approaches the Court adopts to fulfill its judicial and nonjudicial functions, inform the ideological values it exports, and influence its responses to the preferences of other state actors and that of the ruling authorities.

In fact, one of the first lessons learned from this comparative study is that the essence of the separation of powers doctrine relies on its pragmatic nature and its diversified adaptabilities to changing constitutional and

⁹⁰ Benjamin Liebman, "Legal Reform: China's Law-Stability Paradox," *Daedalus* 143, no. 2 (2014): 96–109.

political needs. In recognizing the ruling authorities' supremacy over the judicial power in most authoritarian regimes, the central and the most urgent matter is not to justify the legitimacy of the authoritarian approach to legal development but rather to investigate whether and under what circumstances there is considerable scope for the exercise of judicial power. After all, the roles and functions of courts in any particular legal setting are not solely governed by law and regulations but also are affected by a broad convergence of practical conditions, including the updating of constitutional values, political concerns, and social needs. Thus, the analysis can then move on to examine how the courts, especially the highest courts, use available approaches and strategies within the realm of their levels of capabilities in the nondemocratic form of separation of powers. With a clear understanding of their inherent limitations and institutional constraints, courts are more likely to avoid unnecessarily frustrating attempts and instead will focus on making solid progress on advancing legal development on their own initiative, seeking to operate with greater autonomy while strategically responding to political concerns and social needs. In recognizing that there is not a single or simple form of separation of powers that can prove to be universally applicable, the Chinese approach to the separation of powers as presented in this study is more likely to make a meaningful contribution to broadening the empirical and theoretical base of this crucial doctrine, especially by serving as a convincing reference for other nondemocratic regimes.

Second, authoritarian regimes take varying approaches to the separation of powers, where the highest court can play a role in advancing legal development variously in the specific context. Existing scholarship suggests that courts in the nondemocratic legal settings are frequently portrayed as fragile and lacking independence, largely based on the assumption that they are incapable of exerting profound influence at the expense of other state actors.⁹¹ This argument is partly true, as it reveals

⁹¹ See Ginsburg and Moustafa, *Rule by Law*; Hirschl, "The Judicialization of Politics."

the major flaws of nondemocratic legal systems and rigid political and institutional constraints, yet it seems inadequate to categorize them as problem cases of the separation of powers doctrine. Instead of being viewed as problem cases, arguments made in this research suggest that a comprehensive understanding of the roles and power of the highest court from a nondemocratic perspective requires a thorough mapping of the normative and functional analyses, judicial independence, and judicial interdependence, and reforms and restraints as reflected in the exercise of judicial power in theory and in practice. Because judicial power lies in the power interplay and counterbalance on these fronts, the doctrine is more likely to provide a remarkable analytical framework and allow us to capture the essence of judicial power in a broader analytical context.

More importantly, one should not dismiss the potential far-reaching impact the highest court can have on bringing about significant legal changes to a nondemocratic form of separation of powers. Despite that the Chinese judiciary does, undoubtedly, operate within severe institutional and political constraints, the evidence presented in this research in many respects illuminates how the ambitious highest court has at times taken pragmatic approaches toward judicial empowerment while facing barriers to judicial professionalism, opportunities and challenges related to judicial reforms, and struggles and compromises imposed by legal and nonlegal factors. In search of the appropriate roles and possible development path of Chinese courts in the reform era, the Court has been more aware of the possible limitations of its power and has become prudent in the process of building judicial power step by step. Most of the Court's reform initiatives have been proven to be effectively boosting judicial competence and professionalization, and to be successfully fending off undesirable external interference and internal bureaucratic restrictions. These efforts in many respects reflect the long-term interests of the Court to develop a solid legal system rather than to demonstrate an ideological commitment to the ruling party's political and social concerns.

Based on the experience of the Court and that of legal systems in Asia and elsewhere, the power and impact of the highest court in a nondemocratic setting should not be underestimated. Neither should they be denied the opportunity of careful examination in terms of their operational modes, capacity for counterbalancing other powerful state actors, willingness to challenge the ruling authorities, and so forth. After all, the power and authority of the highest courts are not manifested through a complete equality in the distribution of power between state actors, at least in most cases, but rather rest upon various internal and external conditions combined to shape and constrain the tolerance zones left for the judiciary to fulfill its role in the political governance.

Third, the path to legal development in nondemocratic systems appears to be an issue in which political factors have the final say. The previous examples of the models of separation of powers in Japan, Taiwan, and Indonesia demonstrate that it is a common practice for emerging democracies and transformational legal systems to incorporate Western constitutional theories into their institutional designs to keep in step with international practice. Likewise, Chinese courts have at times borrowed from their foreign counterparts and selectively drawn on the experiences of Western democratic legal systems to add authority and legitimacy to Chinese judicial power in the reform era. Efforts of this kind include the adoption of the people's assessors into the trial process as a vital input mechanism, the creation of the Guiding Cases System that serves similar functions as legal precedents in common law jurisdictions, attempts to expand the scope of judicial review, and efforts to gradually construct constitutional rights.

Nevertheless, open-minded reformers must always keep in mind that Western constitutional theories are largely products of Western liberal democracies, which may lead to varying degrees of adaptability and have limited practical relevance for advancing the rule of law on foreign soil. This is particularly true in cases where courts operate or operated under

the control of colonial or authoritarian rules. In the case of Taiwan, for instance, judicial power under a distinct five-power separation pattern was fragile because it was reduced to an instruction of governmental control under the strict leadership of the Chinese Nationalist Party (KMT), with highly centralized and unrestricted political control for decades, until the late 1990s.⁹² As for nondemocratic regimes such as China, the strong bureaucratic nature of the administration of justice, the highly politically driven functions to fulfill in courts' everyday practice, and a continuous ideological commitment to the supremacy of the ruling authorities may all undermine the effectiveness of transplanted separation of powers concepts and their original value. Thus, it can be argued that legal development in most nondemocratic systems is primarily an issue in which political considerations play a decisive role.

Moreover, the path to legal development in nondemocratic settings in many respects reflects a strong commitment to a political-centered rather than a law-centered approach, which ultimately proves to be the product of the concrete choices, institutional interests, and strategic considerations of political actors rather than the endeavors and wisdom of courts and judges. In the case of China, the deep-seated institutional and political constraints noted in chapter 2 imply that there is limited space for the judicial power to maneuver in the authoritarian legal setting within which courts continue their commitment to intensive political functions instead of posing a direct threat to the ruling authorities. The absence of an active and effective form of judicial review power further suggests that it is difficult for Chinese courts, especially the Court, to make meaningful breakthroughs in expanding judicial power without reference to institutional changes and serious political reforms. Because limitations always exist to what can and cannot be addressed by courts on their own, they must become increasingly cautious about the policy preferences of

⁹² For a detailed discussion on the Taiwanese model of separation of powers, see chap. 5, sec. 5.2.

other state actors and carefully responsive to political concerns in the exercise of judicial power.

Overall, however, the call for more serious political reforms is a necessity rather than a choice for pragmatic highest courts in search of greater authority and independence in the nondemocratic form of separation of powers, with a view to addressing chronic institutional defects facing the judiciary and eventually altering the major roles and functions of the judiciary in a reshuffled balance of power. Only by doing so can judicial power be expected to become a powerful counterweight to the other state powers and the ruling authorities, and the highest courts can then play greater and more meaningful roles in advancing rule-of-law values on their own initiative. Although it may take decades to compel the ruling authorities of nondemocratic regimes to subject their political power to constitutional supremacy—and especially for courts to achieve a rational equilibrium of power with greater authority and autonomy—it remains truly worthwhile for all highest courts to take steps to restrain the abuse of power on these fronts.

5.5. Conclusion

As an old proverb says, Rome was not built in one day. The evolution of judicial power is certainly not a linear process for any system in the world but rather a rocky path strewn with unexpected frustrations and challenges. As explored in detail in this book, China proposes a unique case for investigating a nondemocratic form of the highest court's power and how it is exercised in a given context, which appears to be too chaotic to fully capture as can be done elsewhere in the world. Drawing on the experience and everyday practice of the Court, this research identifies the input and output factors that together contribute to the power spectrum of the Court, assessing its major roles and functions in an authoritarian context to provide answers to the main research questions set forth at the beginning

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

Based on the insights and implications of the study, it can be concluded that the Supreme People's Court of China, which sits at the top of the Chinese judicial hierarchy, has made more remarkable progress in reconceptualizing judicial power in the era of transformation than Western scholars have generally recognized. Notwithstanding the political and institutional restraints facing legal development in China, the Court has demonstrated self-initiated and highly pragmatic interests in pushing forward its authority and impact on and beyond the legal fields through various judicial and nonjudicial means. To a substantial extent, the Court's initiatives and actions increasingly reflect its preferences, strategies, and professional ideologies in driving core functions of the courts while at the same time integrating considerable diversity and flexibility into the legal system. In this respect, the Court should no longer be deemed a mere governance tool for the ruling authorities but should rather be viewed as a pragmatic actor in pursuit of greater institutional independence and functional autonomy in the era of transformation. Moreover, as long as legal development in China remains dependent on a strong commitment to a Party-centered rather than a law-centered approach, the call for an impartial and authoritative judiciary will continue to be in jeopardy in the face of inadequate institutional guarantees for justice and judicial independence.

These findings could be especially beneficial for rethinking and reinterpreting the power of the highest courts in the nondemocratic separation of powers contexts, where judicial power is an inseparable part of the specific political and legal system within which its evolvement is the result of, and in turn an operating condition that reacts to, the specific

separation of powers context. Drawing on the case of China, and especially the rich experience of the Court, the observations and discussions in this book highlight the possibility of the highest courts to reach greater competence and authority in the nondemocratic form of separation of powers, and the underlying circumstances influencing this goal. To make meaningful breakthroughs in strengthening the judicial authority and separating the role of the courts from that of the other powerful state actors, it is important for the highest court to continually create innovative solutions to balance legal requirements with its responsiveness to political assignments, making its ways out of the typical bureaucratic quagmire of rationalization and steadily increasing the level of professionalization and judicialization to eventually achieve solid progress in pushing forward its own version of judicial empowerment in the specific context of separation of powers.

As Professor Zhu Suli, a leading legal scholar in China, pointed out in his most ambitious work, *Sending Law to the Countryside*,

Some institutional and practical designs in China's judiciary exist for a reason, which may have its rationales and respond to a certain need. It thus has a prima facie legitimacy within its social context, and as such deserves to be studied, understood or even respected.⁹³

For those who are curious about how courts provide access to justice in an authoritarian legal setting or those who have shown an interest in tracing the transition roadmap of Chinese courts, this argument was indeed insightful. While this book reflects on the twists and turns facing legal development in present-day China and offers an up-to-date understanding of the power of the Court and its evolving meanings, it also reminds us that the struggle for justice in nondemocratic settings is no less

⁹³ Suli Zhu, *Sending Law to the Countryside: Research on China's Basic-Level Judicial System* (*songfa xiexiang: zhongguo jiceng sifa zhidu yanjiu*) (Beijing: Chinese University of Political Science and Law Press, 2000), 90.

important than any arduous undertakings in Western democracies. Despite that it may be difficult to finally provide a perfect solution for empowering the Court with greater authority and institutional independence, the reconceptualization of the Chinese judicial power in this book compels us to reconsider and redefine the rationale of the roles and functions of Chinese courts, and that of a certain category of judicial power that has been largely overlooked and much misunderstood in the existing scholarship.

Nevertheless, this book is only a minor move toward unveiling the mystery of and shed light on some of the Court's concrete choices, institutional interests, and strategic considerations in terms of the exercise of power, which deserve further study, exploration, and recognition in search of a workable, predictable, and rational process on the path to legal development in China. In future research, broader concerns should be placed on the series of judicial and nonjudicial mechanisms of the Court that ensure the realization of the core functions of the courts and contribute to judicial empowerment, serious endeavors of the Court that drive the separation of power and power dynamics in accordance with its own institutional interests and pragmatic needs, and the true progress of the Court in advancing legal development and judicial empowerment in an authoritarian legal system with greater competence, authority, and independence.