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The power of the Supreme People's Court

Reconceptualizing judicial power in contemporary China

Qi, D.

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APPENDICES

APPENDIX I Interview Design for the Chinese Supreme Court Judges

Time for Interviews: July 2014 – September 2014

Location: The Supreme People's Court of China, Beijing

Number of Interviewees: 12

Number of Departments of the Supreme People's Court: 6

BACKGROUND

1. 能简要介绍一下您的情况吗?
 - 教育背景
 - 工作经验
 - 专业领域
 - 在其他政府部门或高校的任职经历等

Could you give some details regarding your background? Information may include but is not limited to:

- Education and training before working in the Supreme People's Court (the Court);
- Expertise and work experience in a specific field of law;
- Other professional experiences in the government departments, academia, law firms, etc.

JUDGE'S DAILY PRACTICE

2. 能谈谈您的日常工作吗？如：

- 审判工作
- 调研工作
- 与下级法院联系
- 自身的学习、培训

What kinds of tasks/ activities do you participate in your daily work? For instance:

- Handling cases
- Conducting Research projects
- Connecting with lower courts
- Self-improving and professional education

3. 对于审判工作：

- 1) 到最高法院的案件主要都是什么类型的案件？您审理案件时通常的流程是什么样的？
- 2) 案件审理过程中会碰到院、庭领导过问案件的情况吗？您都是怎么处理的？
- 3) 您在具体案件审理中有多大的独立裁量权呢？对于上级的批示是否都需要遵从呢？

In terms of adjudication work,

- a. What types of cases do you usually handle on the daily basis? And what are the proceedings of handling these cases?
- b. Have you come across with the circumstances that some higher authorities (e.g. division chief/ vice-presidents who are in charge of

your division/ members of the adjudicative committee) step in your cases? How do you deal with it?

- c. To what extent do you make decisions based on your own conscience? And whether you are obliged to follow the instructions or comments of higher authorities?

4. 对于指导下级法院的工作：

- 1) 您在工作中是否会碰到下级法院向你们请示案件的情况呢？通常针对什么事项进行请示？
- 2) 请示之后您对案件的后续发展还会有所了解吗？下级法院会主动向最高法通报案件进展吗？
- 3) 您认为最高法院对下级法院的指导和监督方式会影响下级法院的审级独立（如剥夺当事人的上诉权）和法官独立吗？

In terms of providing guidance to the lower level courts:

- a. Do you supervise the work of the lower courts or provide guidance to them from time to time? What does this guidance talk about? (e.g. concerning the application of law/ major cases or representative cases/ political-sensitive cases/ other social factors)
- b. How do you perceive the effect of such guidance? (Even if lower courts are not obligated by law to follow the Court's guidance/ advisory opinions) Do the lower courts provide follow-up reports to the Court regarding the consulting cases?
- c. How do you perceive the judicial independence of lower courts under the Court's close guidance and supervision?

5. 工作压力：

- 1) 您觉得在您的日常工作中，主要压力来源于哪些方面？
 - 案件绩效考核、结案排名

- 选任晋升、薪酬待遇
 - 和院、庭领导的关系
 - 自身专业水准、业务水平
- 2) 下级法院的法官是否也向您反映过他们的办案压力或者其他工作压力呢？主要源于哪些方面？
- 3) 法官反映出的待遇低、压力大、缺乏法官职业尊荣感这些问题，直接导致了各级法院的法官流失日趋严重，您对此怎么看？

In terms of work pressure,

- a. When you are doing your adjudication work, how do you perceive the pressure within the Court? For instance, work pressure comes from:
- Discipline
 - Promotion opportunity and other benefits
 - Relation to the division chief and other court leaders
 - Own professional competence
- b. Do you also hear complaints from the lower level courts' judges discussing their work pressure? What kind of complaints do they commonly mention to?
- c. I heard that the rate of attrition among judges from the courts at various levels has spiked during the past years. What kind of factors do you think have contributed to this phenomenon?

COURT'S RELATION TO OTHER GOVERNMENT ACTORS

6. 法院与其他国家机关
- 1) 您审理的案件中，有碰到需要和其他机关部门打交道的情况吗？通常您会怎么处理？
- 政法委、党委

- 全国人大或人大代表
 - 行政机关
 - 检察机关、公安机关
- 2) 在您承办的案件中是否有碰到人大代表对个案进行监督的情况？您碰到这种情况是怎么做的？
 - 3) 最高法院现在由各个业务庭及研究室负责不同案件类型的司法解释、司法政策、典型案例的起草和出台。这些司法文件是否存在突破现有法律范围的情况呢？您怎么看？
 - 4) 您怎么看先前的齐玉苓教育权案、洛阳种子案中法官在个案的法律适用中突破现有法律的做法？
 - 5) 您对最高法院和行政机关的关系怎么看？您认为最高法院运用了哪些方式对行政机关造成影响？
- a. Has it happened before when the other government actors (e.g. the Party organs, the other administrative institutions, the public security and the procuracy) engage in the ongoing cases?
 - b. Have you encountered the circumstance when the deputies to the people's congresses conduct trial supervision on individual cases? What have you done in this situation?
 - c. How do you perceive the lawmaking/ policymaking power of the Court when it formulates abstract judicial interpretations and legal policies? Do you think the Court has become a norm-maker at the expense of the legislative power?
 - d. How do you perceive some judges' efforts in extending the constitutional jurisprudence in recent years? (e.g. Qi Yuling Case and Luoyang Seed Case)
 - e. How do you perceive the relation between the Court and administrative entities? What efforts do you think the Court has made to push forward its influence on the executive power?

MANAGEMENT OF JUDGES

7. 司法行政管理

- 1) （根据《法官法》第19条：“法官的等级的确定，以法官所任职务、德才表现、业务水平、审判工作实绩和工作年限为依据。”）您认为现在对法官选任、考核晋升、专项培训中更强调的是法官的哪些素质或能力？
- 2) 为什么最高法院里有些行政部门/综合行政部门的法官具有法官资格但不参与实际审判工作？您怎么看？（如在最高法院监察室、政治部、研究室等行政/综合部门工作的法官）
- 3) 您怎么看待最高法院和下级法院之间、最高法院内部的运作和管理上显现的“司法行政化”特色？（如法院内部的审委会制度、案件审批制；上下级法院间的案件请示汇报机制等）
- 4) 您认为法院系统正在进行财政和人事改革（垂直管理）对法官个人的影响是什么？
 - a. In your observation, what kinds of qualities have been highlighted or have been placed with great weight when appointing/ disciplining/ promoting judges? (e.g. actual working ability/ political integrity/ professional competence/ seniority)
 - b. What do you think is the main reason for excluding some qualified judges from working in the substantive divisions and doing adjudication work? (e.g. judges from the administrative divisions of the Court such as Inspection Office, Political Office and Research Office)
 - c. How do you perceive the “bureaucratic context” with regard to the Court’s internal management and its relation to the 2 lower courts? (e.g. the case examination and approval system within the court; the function of judicial committee; the system of requests for instructions between the higher and lower courts)

- d. How do you perceive the ongoing financial and personnel reforms within the judiciary in line with the Fourth Judicial Reform Plan of the People's Court (2014-2018) and their impact on individual judges?

ROLE OF THE COURT AND ITS REPOSITION

8. 司法改革
 - 1) 您认为在近年的司法体制改革和法院审判的实践完善和创新中，最高法院在其中扮演了什么角色？（参与者/ 主导者/ 改革对象）您认为最高法院的主要功能是什么？
 - 2) 不少法官提到近几年的司法改革方案更多地是侧重在司法机制、方法的改革，但真正设计司法机制的改革比较少。您怎么看？
 - 3) 您认为从最高法院的权力变化能够反映出中国什么样的司法前景？最高法院在我国法律发展和国家治理中的作用是否会发生变化？
 - a. What kind of role of the Court do you perceive through its efforts in a series of judicial reforms regarding the improvement of institutional arrangements as well as trial practice? What do you think are the main functions of it?
 - b. I heard some judges discussing the judicial reform progress. From their standpoint, the reforms of specific judicial mechanisms and trial methods have been placed with greater weight than institutional changes. How do you think of that?
 - c. What kind of judicial reposition do you think best reflects the power of the Court in the evolving legal development and national governance? What kind of changes do you expect?

APPENDIX II Sample of a Model Case

Top 10 Intellectual Property Protection Model Cases of the People's Courts (2010)

[Model Case No. 5]

Interfere with the Search Engine Service, An Unfair Competition Dispute¹

Beijing Baidu Technology Company Limited

v.

Qingdao Municipality Branch of China United Network
Communications Corporation Limited; Qingdao Aoshang Network
Technology Company Limited; Shandong Province Branch of China
United Network Communications Corporation Limited and Qingdao
Pengfei International Air Travel Service Company Limited
An Unfair Competition Appellate Case

[Civil Judgment of Shandong High People's Court, Lu Min San
Zhongzi No. 5-2 (2010)]

(i) Case Summary

Beijing Baidu Netcom Science and Technology Co., Ltd. (北京百度网讯科技
有限公司) (hereinafter referred to as 'Baidu Company') is a well-known

¹ The official Chinese version of this model case is *available at* <http://old.chinacourt.org/public/detail.php?id=449078>, accessed May 24, 2017.

Chinese search engine service provider. Qingdao Aoshang Network Technology Co., Ltd. (青岛奥商网络技术有限公司) (hereinafter referred to as 'Aoshang Company') cooperated with the Qingdao Municipality Branch of China United Network Communications Corporation Limited (中国联合网络通信有限公司青岛市分公司) (hereinafter referred to as 'Unicom Qingdao Company') to promote its 'Network Express' business. According to Aoshang Company, through the 'Search Know-It-All' service provided by the 'Network Express', network users within the network service provided by the Unicom Qingdao Company will forcibly see the advertising webpage of the Network Express (five-second display) when they enter keywords in the search engine dialogue box of Baidu Company. By clicking advertisements network users will directly enter a new window of the promotional website, while the original window will astronomically display the requested search results after five seconds.

Baidu Company filed the suit to the Qingdao Intermediate People's Court on the ground of the abovementioned unfair competition.

The court of first instance found that within the network service provided by the Unicom Qingdao Company, Aushang Company together with Unicom Qingdao Company intervened with the search requests made by targets of these network services on the Baidu website, causing the advertising pages that the interveners wish to release to forcibly pop up before the normal search results page appeared. The interventions used the search service provided by Baidu Company to seek benefits for the companies themselves. These acts were not only contrary to the will of the network users, which caused them to mistakenly believe that the forcibly advertising pages were the products of Baidu Company; but also negatively impacted Baidu Company's service quality and affected its legal rights and interests, which was a serious violation of the principles of good faith and fundamental business ethics. In accordance with the principles set forth in Article 2 of the Anti-Unfair Competition Law, the acts shall be in general recognized as unfair competition. In this respect, the court rules that Aoshang Company and Unicom Qingdao Company should immediately cease their acts of unfair competition and jointly pay the plaintiff 200,000 yuan as compensation

for economic losses. As the appellate court of the case, Shandong High People's Court decided to uphold the original judgment of the court of the first instance.

(ii) Typical Significance

As a new type of unfair competition disputes under the network environment, this case has aroused wide concern in the field of network industry. On the one hand, this case has involved complicated legal issues of the understanding of competition between companies in accordance with the Anti-Unfair Competition Law and the application of principled provisions; on the other hand, it also involved the difficulty of ascertaining the facts with regard to identify the subject that implemented the intervening acts. It turns out that the ruling of the case has deepened and enriched the understanding of the principles set forth in the Anti-Unfair Competition Law by further identifying the competitive relationship, which does not necessarily subject to the same industry or service type. In the course of the trial, the court of the first instance made full use of the role of expert witnesses in the field of network technology to clarify the responsibilities as well as to clear the doubts concerning the technical facts, which served as a valuable reference for guiding subsequent adjudication work. The judgment of the case has also played a leading role in standardizing the norm and order of the network competition.

APPENDIX III Sample of a Guiding Case

[Guiding Case No. 45]

Beijing Baidu Technology Company Limited

v.

**Qingdao Aoshang Network Technology Co., Ltd. Et al.,
An Unfair Competition Dispute¹**

(Discussed and Passed by the Adjudication Committee of the Supreme
People's Court, Released on April 15, 2015)

(i) Key Words

Civil; Unfair Competition; Network Service; Principle of Good Faith

(ii) Major Points of the Judgment

An act by [any] business operator engaged in Internet services that forcibly causes advertisements to pop up on the search results pages of other business operators' websites violates the principle of good faith and generally recognized business ethics, hinders the proper business operation of other business operators, and adversely affects their legal rights and interests. [Such an act] may, in accordance with the principles [set forth in] Article 2 of the Anti Unfair

¹ The English translation of this guiding case originally comes from Stanford Law School China guiding Cases Project, available at <https://cgc.law.stanford.edu/guiding-cases/guiding-case-45/>, accessed May 24, 2017. The official Chinese version of this guiding case is available at <http://www.chinacourt.org/article/detail/2015/04/id/1602323.shtml>, accessed May 24, 2017.

Competition Law of the People's Republic of China, be determined to be unfair competition.

(iii) Related Legal Provision

Article 2 of the Anti-Unfair Competition Law of the People's Republic of China

(iv) Basic Facts of the Case

Plaintiff Beijing Baidu Netcom Science and Technology Co., Ltd. (北京百度网讯科技有限公司) (hereinafter referred to as 'Baidu Company') claimed: The www.baidu.com website (hereinafter referred to as the 'Baidu website') that it owned [featured] a Chinese search engine. The three defendant: i.e. Qingdao Aoshang Network Technology Co., Ltd. (青岛奥商网络技术有限公司) (hereinafter referred to as 'Aoshang Network Company'), the Qingdao Municipality Branch of China United Network Communications Corporation Limited (中国联合网络通信有限公司青岛市分公司) (hereinafter referred to as 'Unicom Qingdao Company'), and the Shandong Province Branch of China United Network Communications Corporation Limited (中国联合网络通信有限公司山东省分公司) (hereinafter referred to as 'Unicom Shandong Company')—used Netcom's Internet access network services in the region of Qingdao, Shandong Province, to forcibly add advertisements to the search results pages of Baidu Company's website. [These] acts adversely affected Baidu Company's goodwill and economic performance and benefit, violated the principle of good faith, and [therefore] constituted unfair competition. [The plaintiff] requested that [the court] hold that:

1. The acts of Aoshang Network Company and Unicom Qingdao Company constituted unfair competition with the plaintiff and [thus, the companies must] cease those acts of unfair competition. The third party [to this case must] bear joint and several liabilities;
2. The three defendants [must] publish a statement in the newspapers [apologizing for their acts] so as to eliminate the effects of [those acts];

3. The three defendants [must] jointly pay the plaintiff 480,000 yuan as compensation for economic losses and 100,000 yuan [as compensation for] expenses reasonably incurred in this case.

Defendant Aoshang Network Company defended its position, claiming: it did not [carry out] any act amounting to unfair competition and [therefore] should not apologize or pay 480,000 yuan as compensation.

Defendant Unicom Qingdao Company defended its position, claiming: The plaintiff had no evidence to prove that [Unicom Qingdao Company] had carried out the alleged act, nor did [the plaintiff] submit evidence to prove the actual losses [the plaintiff alleged it] had suffered. The plaintiff had no competitive relationship with [Unicom Qingdao Company] and [the court] should reject all of the plaintiff's litigation requests.

Defendant Unicom Shandong Company defended its position, claiming: The plaintiff had no evidence to prove that [Unicom Shandong Company] had carried out the alleged act of unfair competition or the allegedly infringing act. [Therefore,] there was no legal basis for it to bear joint and several liabilities.

Third-Party Qingdao Pengfei International Air Travel Service Co., Ltd. (青岛鹏飞国际航空旅游服务有限公司) (hereinafter referred to as 'Pengfei Air Company') stated: this case did not actually involve Third-Party [Pengfei Air Company].

The court handled the case and ascertained: The scope of Baidu Company's business [included the provision of] Internet information services. The Baidu website, the address of which was examined and approved as www.baidu.com, primarily provided network users with Internet information search services. The scope of Aoshang Network Company's business included network engineering and construction, [the provision of] network technology application services, and computer software design and development. Its website [domain name] was www.og.com.cn. The company stated in the 'Corporate Overview' [section] of the abovementioned website that it had four websites: China Aoshang Net

(www.og.com.cn), Ouge Network Marketing Partner (www.og.net.cn), Qingdao Telephone Real Name Net (www.0532114.org), and Peninsula Talent Net (www.job17.com). When the company introduced on its website its 'Network Express' business, it stated: no need to install any plugins, advertising webpages will forcibly appear. When [the company] introduced how the product 'Search Know-It-All' performed, graphics and text were used to list the following procedures:

- Step One: enter keywords in the search engine dialogue box.
- Step Two: the space for [displaying] Network Express advertisements first appears [on the screen] (five-second display).
- Step Three: [While the advertisements appear on the screen] click the abovementioned space for [displaying] advertisements to directly enter a new window of the promotional website.
- Step Four: after five seconds, the original window automatically displays the requested search results of Step 1.

That website also used other formats to introduce the above-mentioned services.

The scope of Unicom Qingdao Company's business included [the provision of] Internet access and information services. The Qingdao Information Port ([whose] domain name was qd.sd.cn) was a website owned by [Unicom Qingdao Company]. The 'Telephone Real Name' [registration system] was a voice search business jointly operated by Unicom Qingdao Company and Aoshang [Network] Company. The website of the '114 Telephone Real Name Voice Search', whose address was www.0532114.org, indicated that the copyright owner of the website was Unicom Qingdao Company and the exclusive registration center was Aoshang Network Company. The scope of Unicom Shandong Company's business included the provision of Internet access and information services. Its website (www.sdcnc.cn) showed that Unicom Qingdao Company was its

subordinate branch. The scope of Pengfei Air Company's business included the provision of agency [services] for airline ticket sales.

On April 14, 2009, [when] logging onto the Baidu website (www.baidu.com) by accessing the Internet through Netcom in Qingdao Municipality, Shandong Province, Baidu Company discovered [the following when entering content] into the dialogue box of the website:

- When 'Pengfei Air' was entered [into the dialogue box] and 'Baidu a bit' was clicked, a page popped up displaying [the phrase] 'To Snatch Discount Plane Tickets Before Others, Dial 114'. Quickly clicking that page opened a page displaying the address, <http://air.qd.sd.cn>.
- When 'Qingdao Talent Net' was entered [into the dialogue box] and 'Baidu a bit' was clicked, a page popped up displaying [the phrase] 'To Find a Good Job, Go to Peninsula Talent Net www.job17.com'. Quickly clicking the 'Click immediately' [button] displayed on that page opened a page displaying the address <http://www.job17.com>.
- When 'Telephone Real Name' was entered [into the dialogue box] and 'Baidu a bit' was clicked, a page popped up displaying [the phrase] 'Dial 114 to Search Information, Voice Search is Even Better'. Soon after, this page directed to a corresponding page with 'Telephone Real Name' search results.

Baidu Company entrusted an agent to use a computer at a notary office to notarize the operational processes of logging onto various websites, including Baidu Search. The notarial certificate documented the above-mentioned content. After expert discussion of the evidence, it was [revealed that] the linked website (<http://air.qd.sd.cn/>) and Unicom Shandong Company's subordinate website Qingdao Information Port (www.qd.sd.cn) had the same domain [name] (qd.sd.cn). The website air.qd.sd.cn belonged to Unicom Shandong Company's subordinate website, Qingdao [Information Port].

(v) Results of the Judgment

On September 2, 2009, the Intermediate People's Court of Qingdao Municipality, Shandong Province, rendered the (2009) Qing Min San Chu Zi No. 110 Civil Judgment:

1. [The court orders] Aoshang Network Company and Unicom Qingdao Company to cease their acts of unfair competition targeted at Baidu Company immediately from the day the judgment comes into effect;10 that is, [they] cannot use technical means to cause advertising pages of Aoshang Network Company and Unicom Qingdao Company to pop up when network users log onto the Baidu website to conduct keyword searches through the Internet access service provided by Unicom Qingdao Company.
2. [The court orders] Aoshang Network Company and Unicom Qingdao Company to pay Baidu Company 200,000 yuan as compensation for economic losses within ten days of the judgment's coming into effect.
3. [The court orders] Aoshang Network Company and Unicom Qingdao Company to publish a statement on the homepages of their respective websites to eliminate the effects [of their acts of unfair competition] within ten days of the judgment's coming into effect. The period for publishing the statement should be 15 consecutive days.
4. [The court] rejects Baidu Company's other litigation requests.

After the judgment was pronounced, Unicom Qingdao Company and Aoshang Network Company appealed. On March 20, 2010, the Higher People's Court of Shandong Province rendered the (2010) Lu Min San Zhong Zi No. 5-2 Civil Judgment to reject the appeal and uphold the original judgment.

(vi) Reasons for the Judgment

In the effective judgment, the court opined: In this case, Baidu Company sued Aoshang Network Company, Unicom Qingdao Company, and Unicom

Shandong Company, demanding that they cease their acts of unfair competition and bear the corresponding civil liability. Based on this, the following steps should have been followed to determine whether the plaintiff's claim could stand: (1) whether the defendants in this case carried out the alleged acts; (2) if [they] carried out the alleged acts, whether those acts constituted unfair competition; (3) if [those acts] constituted unfair competition, how [the defendants should] bear civil liability.

1. On [the issue] of whether the defendants carried out the alleged acts

Domain names are hierarchical character identifiers [used to] recognize and locate computers on the Internet. Based on the ascertained facts, www.job17.com was the website of Peninsula Talent Net which belonged to Aoshang Network Company, and 'Telephone Real Name Voice Search' was a business jointly operated by Unicom Qingdao Company and Aoshang Network Company. The domain name, qd.sd.cn, belonged to Unicom Qingdao Company, which actually used it as the domain name of 'Qingdao Information Port'. As a subdomain of qd.sd.cn, air.qd.sd.cn was assigned and managed by its upper-level domain name, qd.sd.cn. As the holder of the domain name qd.sd.cn, Unicom Qingdao Company denied that it owned the domain name, air.qd.sd.cn, but did not provide evidence to prove this. [Therefore,] it should be determined that the user of the subdomain name was Unicom Qingdao Company at the time [evidence] was preserved by the notary's [office].

When logging onto search engines on the Internet to conduct keyword searches, the search results page of the search engine should normally appear and other pages unrelated to the search engine should not pop up. However, in the network area of the network access service provided by Unicom Qingdao Company, a [strange] phenomenon occurred, which was that advertising pages unrelated to the search results forcibly popped up [on the screen]. This kind of popping-up of advertising pages was not caused by the programs installed on the notary office's computer that was connected to the Internet. Unicom Qingdao Company neither had evidence to prove that the same situation would occur in the network areas of other network access service providers nor did it offer a reasonable explanation for the above-mentioned circumstances appearing in its

network access service area. [Therefore,] it could be determined that in the area of the Internet access service provided by Unicom Qingdao Company, [Unicom Qingdao Company] intervened with the search requests made by targets of these network services on the Baidu website, causing the advertising pages that the intervener wished to release to forcibly pop up before the normal search results page appeared.

On the issue concerning [the identity of] the subject who implemented the abovementioned intervening act: The ascertained facts showed that Aoshang Network Company's introduction to the forcible popping-up of advertisements, as stated in the introduction to the 'Network Express' business [available] on the main page [of the company website], was entirely consistent with the format preserved by the notary's [office]. In addition, the 'Peninsula Talent Net' and '114 Telephone [Real Name] Voice Search' pop-up advertising pages that appeared while [evidence] was being preserved by the notary's [office] both [were connected to] websites or business operated by [Aoshang Network Company]. Therefore, Aoshang Network Company was the beneficiary of that intervening act. Where [the company] did not provide evidence to prove that there was another subject implementing the above-mentioned act of [causing] advertisements [to forcibly pop up], it could be determined that Aoshang Network Company was the subject who implemented the above-mentioned intervening act.

On the issue of whether Unicom Qingdao Company was a subject who implemented the allegedly infringing act: The type of intervening act implemented by Aoshang Network Company was not carried out through methods such as the installation of plug-ins or programs on clients' computers, but could be carried out in specific network access service areas. Therefore, this type of act could not have been carried out without the cooperation of a network access service provider. Unicom Qingdao Company had no evidence to prove that Aoshang Network Company implemented the above-mentioned act through the intervention of its Internet access service by illegal means. At the same time, Unicom Qingdao Company was the owner of the domain name, air.qd.sd.cn. [Any] liability for infringing upon others' legal rights and interests arising from the ownership or use of a domain name is borne by the owner of the domain

name. Unicom Qingdao Company and Aoshang Network Company jointly operated a telephone real name business, which meant that Unicom Qingdao Company was also a beneficiary of the above-mentioned act. Therefore, it could be determined that Unicom Qingdao Company was also a subject who implemented the above-mentioned intervening act.

On the issue of whether Unicom Shandong Company implemented the intervening act: Because Unicom Shandong Company and Unicom Qingdao Company were both sub-branches of China United Network Communications Corporation Limited, there was no evidence to prove that the two companies had a relationship whereby one established or was established by [the other], nor was there evidence to prove that Unicom Shandong Company was involved in the implementation of the intervening act. As a subject in civil [law], Unicom Qingdao Company was eligible for bearing civil liability. Therefore, the litigation request of Unicom Shandong Company was not supported. Baidu Company listed Pengfei Air Company as Third-Party to this case. However, [Baidu Company] did not indicate in its complaint or during the trial process that Third-Party [Pengfei Air Company] had [implemented] any act of unfair competition, nor did it demand Third-Party to bear civil liability. Therefore, it was inappropriate [for Baidu Company] to list Pengfei Air Company as Third-Party, and [any litigation request related to Pengfei Air Company] should not be supported.

2. On [the issue] of whether the allegedly infringing acts constituted unfair competition

Articles 5 to 15 of Chapter Two of the Anti-Unfair Competition Law of the People's Republic of China (hereinafter referred to as the 'Anti-Unfair Competition Law') use a listing method to regulate acts of unfair competition. With respect to an act that is not listed in the specific provisions, it can be determined to be an act of unfair competition [if and] only if [the act] can be determined, in accordance with generally recognized business ethics and common understanding, to be in violation of the principles set forth in Article 2 of the [Anti-Unfair Competition] Law. In order to determine whether an act of a business operator constitutes unfair competition, the following aspects should be

considered: (1) [whether] the person who implements the act is a business operator as defined by the Anti-Unfair Competition Law; (2) [whether] the business operator, not following the principles of voluntariness, equality, fairness, and good faith when engaging in business activities, violates the provisions of the Anti-Unfair Competition Law and generally recognized business ethics; and (3) [whether] the business operator's act of unfair competition adversely affects the legal rights and interests of a proper business operator.

First, according to the provision concerning business operators as stated in Article 2 of the Anti-Unfair Competition Law, the confirmation of [a party] as a business operator does not require that [the concerned] plaintiff and defendant belong to the same industry or service type. As long as a market entity is engaged in the business operations of commodities or for-profit services, it can be a business operator. Unicom Qingdao Company, Aoshang Network Company, and Baidu Company were all market entities engaged in the Internet business and were business operators as defined by the Anti-Unfair Competition Law. Although Unicom Qingdao Company was an Internet access service business operator and Baidu Company was a search service business operator, and [thus their] service types were not entirely the same, the business act implemented by Unicom Qingdao Company that [caused] advertisements to [forcibly] pop up before the Baidu search results appeared had a competitive relationship with Baidu Company's paid search model.

Second, [if] any business operator with business relationships [involved] in market competition violates the principle of good faith and generally recognized business ethics, improperly hinders the proper business operation of other business operators, and adversely affects their legal rights and interests, [the business operator's acts] may be determined to be unfair competition in accordance with the principles [set forth in] Article 2 of the Anti-Unfair Competition Law. Although releasing advertisements and conducting business activities on the Internet are quite different from the traditional business model, the competitive advantage of business operators engaged in the Internet business should still be obtained through good faith and fair competition. They cannot use

another's services or market share to conduct business activities and thereby derive benefits without the other's permission.

The acts implemented by Unicom Qingdao Company and Aoshang Network Company took advantage of [the fact that] the search engine on the Baidu website had been widely used by Internet users in China. [Unicom Qingdao Company] used technical means to [cause] advertisement pages that were released by Aoshang [Network] Company and that were closely related to the search keywords and content to forcibly pop up before the display of the normal search results, when Internet users using the Internet access service provided by Unicom Qingdao Company logged onto the Baidu website to carry out keyword searches. These acts induced Internet users, who originally could search for corresponding information through the Baidu Company search results, to click on the advertisement pages, affecting the paid search service and promotional services provided to Internet users by Baidu Company. [These acts] used the search service provided by Baidu Company to seek benefits for [the companies] themselves. These acts not only were not consented to by Baidu Company, but were also contrary to the will of [the company's] Internet access service users. [These acts] easily caused Internet users to mistakenly believe that [the act of] causing advertising pages to [forcibly] pop up was carried out by Baidu Company and caused Internet users' assessments of Baidu Company's provision of services to become less favorable, [thereby] negatively impacting Baidu Company's goodwill and adversely affecting Baidu Company's legal rights and interests. At the same time, [the acts] also violated the principles of good faith and generally recognized business ethics and constituted unfair competition.

3. On [the issue of how the defendants should] bear civil liability

Since Unicom Qingdao Company and Aoshang Network Company jointly implemented the acts of unfair competition, [they] should, in accordance with Article 130 of the General Principles of the Civil Law of the People's Republic of China, bear joint and severable liability [for these acts]. Pursuant to Article 134 of the General Principles of the Civil Law of the People's Republic of China and Article 20 of the Anti-Unfair Competition Law, [they] should bear civil

liability for ceasing infringement, paying compensation for losses, and eliminating the effects [of their acts].

First, Aoshang Network Company and Unicom Qingdao Company should immediately cease [their] acts of unfair competition, meaning that [they] would no longer be able to use technical means to cause the two defendants' advertising pages to [forcibly] pop up when Internet users using the Internet access service provided by Unicom Qingdao Company logged onto the Baidu website to carry out keyword searches. Second, based on [factors including] the reasonable expenses incurred by the plaintiff in this case and the circumstances and duration of the acts of unfair competition [implemented] by the defendants, [the court] decided after deliberation that the two defendants [should] jointly pay [the plaintiff] 200,000 yuan as compensation for economic losses. Finally, when Internet users logged onto the Baidu [website] to carry out searches and saw advertising pages forcibly pop up, [they] would usually consider [the acts] to have been carried out by Baidu Company. Therefore, the two defendants' acts had certain negative effects on Baidu Company, and [they] should bear civil liability for eliminating [those] effects. Because those acts occurred on the Internet, and [because they] occurred in the Internet access service area provided by Unicom Qingdao Company, [the court] therefore determined that the two defendants should publish a statement eliminating the effects of [the acts of unfair competition] on the homepages of their respective websites.

APPENDIX IV Sample of Requests for Instructions

Reply of the Supreme People's Court at the Request of the Shanghai and other High People's Courts for Instructions on Cases Involving the Judicial Review of Arbitral Awards Made by the CIETAC and its Former Sub-Commissions¹

(Adopted at the 1655th meeting of the Judicial Committee of the Supreme People's Court on 23 June 2015, Fa Shi [2015] No.15)

Shanghai High People's Court, Jiangsu High People's Court, and Guangdong High People's Court:

As the China International Economic and Trade Arbitration Commission (hereinafter referred to as "CIETAC") implemented its revised Arbitration Rules on 1 May 2012 and the former CIETAC South China Sub-Commission (which has changed the name into the South China International Economic and Trade Arbitration Commission and uses concurrently the name of Shenzhen Court of International Arbitration, hereinafter referred to as "SCIA") and the former CIETAC Shanghai Sub-Commission (which has changed the name into the Shanghai International Economic and Trade Arbitration Commission and uses concurrently the name of Shanghai International Arbitration Center, hereinafter referred to as "SHIAC") have changed their names and implemented new arbitration rules, some parties have disputed over issues such as the validity of the relevant arbitration agreements and the authority of each of the above

¹ The English translation of this judicial document originally comes from China International Economic and Trade Arbitration Committee (CIETAC), available at <http://bj.cietac.org/index/news/479712f7db9e057f001.cms>, accessed April 3, 2018. The official Chinese version of this judicial document is available at <http://www.court.gov.cn/zixun-xiangqing-15003.html>, accessed April 3, 2018.

arbitration institutions to accept arbitration cases, their respective jurisdiction over arbitration cases and the enforcement of their arbitral awards, and have requested the people's courts to confirm the validity of the arbitration agreements or to apply for the setting aside or non-enforcement of the relevant arbitral awards, hence giving rise to many judicial review cases. The Shanghai High People's Court, the Jiangsu High People's Court and the Guangdong High People's Court have requested the Supreme People's Court for instructions on the relevant issues.

In order to protect the legal rights and interests of the arbitration parties in accordance with the law and fully respect the parties' autonomy, taking into account the historical relationship between CIETAC and SCIA/SHIAC, and with the view of supporting and safeguarding the healthy development of arbitration as well as promoting the establishment of alternative dispute resolution system, the Supreme People's Court hereby makes the following replies to the relevant issues after careful study:

1. Where the parties signed an arbitration agreement agreeing to submit their disputes to the "China International Economic and Trade Arbitration Commission South China Sub-Commission" or the "China International Economic and Trade Arbitration Commission Shanghai Sub-Commission" for arbitration before the SCIA changed its name into the South China International Economic and Trade Arbitration Commission or the SHIAC into the Shanghai International Economic and Trade Arbitration Commission, SICA or SHIAC shall have jurisdiction over the arbitration case. Where any of the parties requests a people's court to confirm such arbitration agreement as invalid or applies for the setting aside or non-enforcement of the arbitral award on the ground that SICA or SHIAC has no jurisdiction to arbitrate, such a request or application shall not be affirmed by the people's court.

Where the parties signed an arbitration agreement agreeing to submit their disputes to the "China International Economic and Trade Arbitration Commission South China Sub-Commission" or the "China International Economic and Trade Arbitration Commission Shanghai Sub-Commission" for arbitration after the SCIA changed its name into the South China International

Economic and Trade Arbitration Commission or the SHIAC into the Shanghai International Economic and Trade Arbitration Commission (including the date of the name change) but before this Reply takes effect, CIETAC shall have jurisdiction over such arbitration cases. However, where the claimant applies to SCIA or SHIAC for arbitration and the respondent raises no objection to the jurisdiction of SCIA or SHIAC, if any of the parties applies for the setting aside or non-enforcement of the arbitral award after it is made on the ground that SCIA or SHIAC has no jurisdiction to arbitrate, such an application shall not be affirmed by the people's court.

Where the parties sign an arbitration agreement agreeing to submit their disputes to the "China International Economic and Trade Arbitration Commission South China Sub-Commission" or the "China International Economic and Trade Arbitration Commission Shanghai Sub-Commission" for arbitration after this Reply takes effect (including the effective date), CIETAC shall have jurisdiction over such arbitration cases.

2. Where the claimant in an arbitration case requests the arbitration institution to decide on its jurisdiction over the case at the same time of applying for arbitration, and the arbitration institution has made a decision that the arbitration agreement is valid and it has jurisdiction over the case, if later before the first hearing by the arbitral tribunal, the respondent files a lawsuit with a people's court applying for confirmation of the validity of the arbitration agreement, the people's court shall accept the lawsuit and make a ruling. Where the claimant or the arbitration institution pleads that the people's court shall not accept the lawsuit pursuant to Article 3 of the Reply of the Supreme People's Court on Several Issues Involved in Confirming the Validity of Arbitration Agreements (Fa Shi [1998] No. 27) and the second paragraph of Article 13 of the Interpretation of the Supreme People's Court on Certain Issues Relating to Application of the Arbitration Law of the People's Republic of China (Fa Shi [2006] No. 7), such a pleading shall not be affirmed by the people's court.

3. Where, before this Reply takes effect, an arbitration case that should not have been accepted by CIETAC, SCIA or SHIAC according to Article 1 of this Reply but has been already accepted thereby, if any of the parties applies for the setting

aside or non-enforcement of the arbitral award after it is made on the ground that the arbitration institution has no jurisdiction to arbitrate, such an application shall not be affirmed by the people's court.

4. Where, before this Reply takes effect, the same arbitration case has been accepted by CIETAC and SCIA or SHIAC, if any of the parties to the case applies to a people's court for confirmation of the validity of the arbitration agreement before the first oral hearing by the arbitral tribunal, the people's court shall hear the lawsuit and make a ruling in accordance with Article 1 of this Reply.

Where, before this Reply takes effect, the same arbitration case has been accepted by CIETAC and SCIA or SHIAC, if none of the parties to the case applies to a people's court for confirmation of the validity of the arbitration agreement before the first oral hearing by the arbitral tribunal, the arbitration institution that first accepted the case shall have jurisdiction over the case.

This Reply is hereby given.

SUMMARY

Power of the Supreme People's Court

Reconceptualizing Judicial Power in Contemporary China

DING QI

IN THE CONTEXT of reform-era China, which is characterized by tremendous legal development and social advancement, the Chinese judiciary has been entrusted with more functions and greater autonomy in political governance than ever before. Despite Western scholars' general skepticism regarding the possibility of the rule of law taking root in China, judicial power in China has actually experienced a significant expansion of capacity, professionalization, transparency, and accountability while faced with an ambiguous but generally evolving legal environment. What remains unclear, however, is in what ways the Supreme People's Court (the Court) at the top of the judicial hierarchy has contributed to this positive trend, and to what extent the Court's experience and practice are distinctive compared to the power of the highest courts in other legal settings. Recognizing that the Court's exercise of power has to a great extent challenged the Western understanding of judicial power in both liberal democracies and nondemocratic systems, this book aims to provide insight into the world's largest highest court, which has demonstrated unique wisdom but so far remained largely obscure, offering an up-to-date understanding of the power of the Supreme People's Court and its evolving meanings in a context viewed as lacking separation of powers.

To achieve this aim, the recent development of the Court is examined to explore two main research questions:

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

This explorative sociolegal study has been carried out through a combination of theoretical and qualitative empirical research. The relevant laws and regulations, academic work, and case studies are analyzed to present a comprehensive picture of the Court concerning its power arrangements within the nation's political and legal structure. Furthermore, through two fieldwork studies conducted at the Court in 2012 and 2014, this book offers empirical insight and a reflection on the everyday operation of the Court, uniquely benefitting from the perceptions and experiences of supreme court judges. Ultimately, the arguments in this book have been formed and developed through the integration of both theoretical and empirical findings, which together shed light on the subject under discussion in a comparative context to achieving a rich understanding of the exercise of judicial power in a nondemocratic form of separation of powers.

The book is structured into five main chapters. **Chapter 1** summarizes the comparative scholarship on the power of the highest courts among various jurisdictions, highlighting the research gap between well-established democracies and nondemocratic legal settings and especially the misreading of the highest courts' power in the context of the latter. Departing from the Western analytical lens of judicial power, this chapter then describes the analytical framework adopted to assess the power of the highest court, distinguishing the input and output factors that contribute to the legitimacy of the highest courts and that shape their primary roles and functions in theory and in practice. Input factors refer to the institutional choices embedded in the specific political and constitutional environment that initially shape the power of the highest courts, while output factors highlight the practical functions of the highest courts and their everyday operation that eventually determine the capacity of the specific highest court and how it fulfills its roles in practice. Based on the analytical framework and the research methodology applied in this research, the chapters that follow make further inquiries into the power of the Court, mainly from these

two respects, seeking to answer the main research questions and to achieve an up-to-date understanding of how the Court has been organized and empowered in a nondemocratic legal setting beyond the core Western jurisdictions.

Chapter 2 investigates the power arrangements of the Court from an institutional perspective, introducing three layers of power allocation that help to explain how the Court has been organized: (1) the organizational framework concerning the Court structure and personnel; (2) the profile and management of individual judges from a micro-level perspective, particularly their recruitment and training, means of making decisions, and career identity; and, finally, (3) the political determinants of the Court's exercise of power from a macro-level perspective, which in many respects reflects its relationship to the Chinese Communist Party (the Party). The theoretical and empirical evidence presented in this chapter suggest that the Court has made significant progress in the direction of a more effective, efficient, and predictable legal institution in the era of transformation. A noticeable trend to this end is the professionalization of the Court and the increased competence of supreme court judges over the past decades, which have been largely supported by Party authorities through their increased tolerance of the empowerment of the Court.

Despite the Court's strenuous efforts to promote its institutional capacities and judicial professionalization, the deep-seated institutional and political constraints facing the Court are nothing but extraordinary. In fact, the bureaucratic style of managing the judicial institution and its personnel carries a high risk for the Court in the exercise of power and inevitably makes it vulnerable to wide-ranging external interference. Because judges are subject to both the leadership of the professional adjudicative body and to strict bureaucratic control within the court hierarchy, the long-term damage resulting from the limitation of self-realization in adjudication work and individual judges' frustration with their career identity should not be underestimated. Worse still, the investigation into the relationship between the Court and the Party in terms of judicial ideology and policymaking, court personnel management, and judicial decision-making further highlights the fact that as long as the Party's supremacy over the judicial power remains the defining feature of the Chinese legal system, the Court is

likely to render results characterized by its institutional weakness and to enjoy limited autonomy within the current party-state structure.

Chapter 3 explores the most significant judicial practices of the Court from a functionalist standpoint. The Court not only performs as the highest-level adjudicative organ and hears cases as the court of last resort but is also devoted to developing two judicial functions as vital functional supplements to the adjudicative authority: promulgating abstract judicial interpretations and regularly releasing a selection of guiding cases in response to either incomplete or imperfect law in practice. In light of the observations and arguments in this chapter, the Court has become an increasingly important adjudicator based on its own pragmatic initiatives and institutional interests in the era of transformation, and this is especially true as reflected in a series of substantive and procedural reforms the Court has promoted to safeguard the uniform application of the law and shape the development of the law.

However, the continuing emphasis on the Court's normative interpretative power has aroused concerns as to whether this quasi-legislative power is exercised at the expense of the legislative power or poses a real threat to the traditional understanding of the judicial power. In an authoritarian regime, where the Court's limited power in judicial review and inability to develop significant constitutional jurisprudence are notable, it is important for the Court to explore innovative and meaningful approaches to fulfill its judicial functions and push for a more active judicial role in accordance with its own pragmatic needs. In this respect, the practices of the Court to enrich and develop its jurisdiction through judicial policymaking and adopting a case-based approach to unify the application of the law has already become a necessary, indeed crucial, part of the Court's pragmatic choice for providing sound and detailed instructions to bridge gaps in existing law while awaiting further legislative development.

Chapter 4 lifts the veil from a different angle and reveals some of the most distinctive nonjudicial practices of the Court in its everyday practice. It should come as no surprise to learn that the Court has been linked with broader roles than merely being the top judicial organ and that supreme court judges serve more functions in practice than simply being adjudicators. In fact, evidence presented in this chapter suggests that the Court in many respects operates in a

manner consistent with how the rest of the bureaucracy is run, which is reflected in its approaches to strengthening administrative management within the judicial hierarchy and its active engagement in complying with the political agenda of the ruling authorities. From what has been discussed in this chapter, shouldering the heavy responsibility of a vast number of extralegal functions reveals the bureaucratic nature of the Court within China's current political and institutional structures, and more importantly, highlights its struggles and compromises with legal rationality when confronted with severe political challenges and conflicts among different interest groups.

Most administrative and political functions the Court carries out in practice show that a political-centered rather than a legal-centered mode of bureaucratic operation prevails in the Chinese legal system, which has greatly undermined the judicial authority and the finality of court outcomes. Yet the discussion in this chapter also underscores the fact that there are always limitations to what can and cannot be addressed by courts on their own, and thus the Court must be carefully responsive to political concerns and increasingly cautious about the policy preferences of other state actors in the exercise of judicial power. In a sense, the Court's inability and reluctance to challenge bureaucratism and politicization suggests that the call for an impartial and authoritative judicial power would continue to be placed in jeopardy as long as the Court remains operating in the shadow of the Party authority and lacking meaningful checks and balances at the institutional front.

Drawing on the case of China and especially the rich experience of the Court, **chapter 5** reflects on the decades-old debates and several deep-rooted misunderstandings regarding legal development in China, as mentioned at the beginning of this research, reconceptualizing judicial power in a nondemocratic separation of powers context with Chinese characteristics. More importantly, an up-to-date understanding of the power of the Court provides a source of inspiration for rethinking the internal logic of a distinct category of judicial power beyond core Western democracies.

Through the lens of the separation of powers doctrine that originated in the West and its diverse implementation in and beyond the core Western democracies, three sets of elements have emerged as the key to understanding the role of the

highest court in the specific context of separation of powers: (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 in the specific political and legal context.

Drawing on existing comparative scholarship and especially on the basis of three core sets of elements identified in this chapter, it is evident that the scope and impact of judicial power in China are largely determined by the political and institutional designs within the Chinese governance structure, while in many respects being shaped and restructured by the Court's initiatives in developing the law and expanding power boundaries. Although the exercise of judicial power is rather limited and restrained in accordance with the Chinese political and constitutional arrangements, one should never overlook or underestimate the Court's solid efforts and continuous striving toward greater competence, authority, and independence. Therefore, it should come as no surprise to learn that like judicial bodies in and beyond the West, the Court is likely to function as an inseparable part of political governance in China. Thus, its exercise of power is the result of, and in turn an operating condition that contributes and brings changes to, the broad political and legal context within which it operates.

Based on this study's insights and implications, the researcher concludes that, first, the Court 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 interest in pushing forward its authority and impact on and beyond the legal fields through various judicial and nonjudicial means. The Court's initiatives and actions have increasingly reflected 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 autonomy and self-interest in the era of transformation.

Second, the deep-seated institutional and political constraints noted in this study imply that there is limited space for the judiciary to act independently 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 the power spectrum in the absence of institutional changes and serious political reforms. As long as the exercise of judicial power in China can only occur and be refined under the umbrella of the Party's leadership, the call for an impartial and authoritative judiciary will continue to be placed in jeopardy in the face of inadequate institutional guarantees for justice and judicial independence. Therefore, it is conceivable that legal development in most nondemocratic systems is primarily an issue in which political considerations play a decisive role. 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 is the product of the concrete choices, institutional interests, and strategic considerations of political actors rather than the endeavors and wisdom of courts and judges.

Third, because there is no single or simple form of separation of powers that can be universally applicable in the West and East, the Chinese approach to separation of powers presented in this study is more likely to make a meaningful contribution to broadening the empirical and theoretical base of the separation of powers doctrine, especially by serving as a convincing reference for other nondemocratic regimes. Rather than viewing the cases discussed as problematic, the arguments made in this study suggest that a comprehensive understanding of the roles and power of the highest court from a nondemocratic perspective requires a thorough mapping of normative and functional analyses, judicial independence and interdependence, and reforms and restraints as reflected in the exercise of judicial power in theory and in practice. As it can be argued that 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.

Finally, the observations and discussions in this book highlight the possibility for the highest courts to strive for greater competence and authority even in the nondemocratic context of separation of powers, and the underlying circumstances of doing so. In fact, one should not dismiss the highest court's power and far-reaching influence in bringing about significant legal changes in a nondemocratic form of separation of powers. In recognizing the ruling authorities' supremacy over the judicial power in authoritarian regimes, the central and the 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. Thus, the analysis can then move on to examine the available approaches and strategies the courts, especially the highest courts, adopted within the realm of their levels of capabilities in nondemocratic legal settings. With a clear understanding of their inherent limitations and institutional constraints, courts are more likely to avoid unnecessarily frustrating attempts and to focus instead on making solid progress on advancing legal development on their own initiative, seeking to operate with greater autonomy while at the same time strategically responding to political concerns and social needs. To make meaningful breakthroughs in strengthening judicial authority and separating the role of the courts from that of other powerful state actors, it is important for the highest courts to continually create innovative solutions to balance legal requirements with their responsiveness to political assignments, creating meaningful escapes from the typical bureaucratic mode of rationalization and steadily increasing the level of judicialization, and eventually, achieving solid progress in driving judicial empowerment in the specific context of separation of powers.

Overall, the key to this study is to place the highest court in its environment and to explore and expose how the highest court exercises its most important powers in a nondemocratic form of separation of powers. China presents us with a distinctive example in this regard, and the in-depth discussion of the Court's exercise of power in this book offers an up-to-date understanding of the judicial power in China and its evolving meanings in an authoritarian legal setting. More significantly, on the basis of the Court's practice and experience, this book eventually reflects on the twists and turns facing legal development in nondemocratic separation of powers contexts and highlights the possibility for

the highest courts to strive for greater competence and authority in such contexts, and on the underlying circumstances of these endeavors, which deserves to be comprehensively studied, thoroughly understood, and properly respected.

SAMENVATTING

De macht van het Opperste Volksgerecht

*Herconceptualisering van de rechterlijke macht in
hedendaags China*

DING QI

IN DE CONTEXT van China in het hervormingstijdperk, dat gekenmerkt wordt door een enorme juridische ontwikkeling en sociale vooruitgang, heeft de Chinese rechterlijke macht meer functies en een grotere autonomie qua politiek bestuur toevertrouwd gekregen dan ooit tevoren. Ondanks het algemene scepticisme van westerse deskundigen over de mogelijke ontwikkeling van een rechtsstaat in China, heeft de Chinese rechterlijke macht een aanzienlijke uitbreiding van capaciteit, professionalisering, transparantie en aansprakelijkheid doorgemaakt, terwijl ze geconfronteerd werd met een meerduidige maar over het algemeen zich ontwikkelende juridische omgeving. Het blijft echter onduidelijk op welke manieren het Opperste Volksgerecht, aan de top van de juridische hiërarchie, heeft bijgedragen aan deze positieve trend en in hoeverre de ervaring en praktijk van dit Gerechtshof onderscheidend zijn ten opzichte van de macht van Opperste Gerechten (i.e. hooggerechtshoven) in andere jurisdicties. Terwijl erkend wordt dat de machtsuitoefening van het Opperste Volksgerecht niet goed past in de westerse opvattingen over de rechterlijke macht in zowel liberale democratieën als niet-democratische systemen, heeft dit boek tot doel om inzicht te verschaffen in 's werelds grootste hooggerechtshof, dat unieke wijsheid heeft getoond maar tot nu toe grotendeels buiten de schijnwerpers is gebleven. Het boek biedt een geactualiseerd begrip van de macht van het Opperste Volksgerecht en de constant veranderende

betekenis hiervan in een context die beschouwd wordt als een gebrek aan machtenscheiding.

Om dit te bereiken, onderzoekt dit boek de recente ontwikkeling van het Chinese Opperste Volksgerecht (“het Gerechtshof”) waarbij twee onderzoeksvragen gesteld worden:

1. Hoe oefent het Gerechtshof zijn macht uit in theorie en in de praktijk in de huidige politieke en constitutionele context van China?
2. Hoe draagt de macht van het Gerechtshof bij aan het begrip van de macht van een hooggerechtshof in een niet-democratische vorm van machtenscheiding?

Deze verkennende sociaaljuridische studie is uitgevoerd door een combinatie van theoretisch en kwalitatief empirisch onderzoek. De relevante wet- en regelgeving, academische literatuur en gevalstudies worden geanalyseerd om een volledig beeld te schetsen van het Gerechtshof wat betreft zijn macht binnen de politieke en juridische structuur van het land. Bovendien biedt dit boek empirisch inzicht en een reflectie op de dagelijkse werking van het hooggerechtshof middels twee veldwerkstudies uitgevoerd bij het Gerechtshof in 2012 en 2014. Hiermee profiteert de studie op unieke wijze van de percepties en ervaringen van de rechters van het Gerechtshof. De argumentatie in dit boek is gebaseerd op de integratie van zowel theoretische als empirische bevindingen, die samen licht werpen op het onderwerp dat ter discussie staat in een vergelijkende context met als doel tot een rijker begrip van de uitoefening van de rechterlijke macht in een niet-democratische machtenscheiding te komen.

Het boek is ingedeeld in vijf hoofdstukken. **Hoofdstuk 1** vat de vergelijkende literatuur over de macht van de hooggerechthoven uit verschillende jurisdicties samen, waarbij de aandacht wordt gevestigd op de onderzoeksleemte wat betreft niet-democratische juridische contexten en met name de verkeerde interpretatie van de macht van de hooggerechthoven daarin. Uitgaande van de westerse analytische lens van de rechterlijke macht, beschrijft dit hoofdstuk het analytisch kader dat in dit onderzoek wordt gebruikt om de macht van het Gerechtshof te beoordelen, waarbij onderscheid wordt gemaakt tussen *input*- en *output*factoren

die bijdragen aan de legitimiteit van de hooggerechtshoven en die hun primaire rollen en functies bepalen in theorie en in de praktijk. *Input*-factoren zijn de institutionele keuzes in de specifieke politieke en constitutionele context die de macht van de hooggerechtshoven bepalen, terwijl *output*-factoren de praktische functies en hun dagelijkse werking van de hooggerechtshoven benadrukken. Deze bepalen uiteindelijk de capaciteit van het specifieke hooggerechtshof en hoe deze zijn rollen in de praktijk vervult. Op basis van het analytisch kader en de onderzoeksmethode die in dit onderzoek worden toegepast, onderzoeken de hoofdstukken die volgen de macht van het Gerechtshof nader. Dit gebeurt hoofdzakelijk vanuit deze twee aspecten met als doel de onderzoeksvragen te beantwoorden en een geactualiseerd inzicht te krijgen in hoe het Gerechtshof is georganiseerd en wat zijn bevoegdheden zijn in een niet-democratisch juridisch kader dat anders is dan dat van de gevestigde westerse democratieën.

Hoofdstuk 2 onderzoekt de structuur van het Gerechtshof vanuit een institutioneel perspectief en introduceert drie bevoegdheidsdimensies, die bijdragen aan een beter begrip van de organisatie van het Gerechtshof: (1) het organisatorische kader met betrekking tot de structuur en het personeel van het Gerechtshof; (2) het profiel en het management van individuele rechters vanuit een microperspectief, met name hun werving en opleiding, mogelijkheden voor besluitvorming en loopbaanidentiteit; en ten slotte, (3) de politieke factoren die bepalend zijn voor machtsuitoefening door het Gerechtshof vanuit een macroperspectief, die in veel opzichten de relatie met de Chinese Communistische Partij (“de Partij”) weerspiegelen. Het theoretische en empirische materiaal dat in dit hoofdstuk wordt gepresenteerd, suggereert dat het Gerechtshof aanzienlijke vooruitgang heeft geboekt in de richting van een meer effectieve, efficiënte en voorspelbare juridische instelling in het tijdperk van transformatie. Een opvallende trend wat dat betreft is de professionalisering van het Gerechtshof en de toegenomen bekwaamheid van de rechters in de afgelopen decennia. Deze trend werd grotendeels ondersteund door de partijautoriteiten door middel van grotere tolerantie voor de toegenomen macht van het Gerechtshof.

Ondanks de inspanningen van het Gerechtshof om zijn institutionele capaciteiten en juridische professionalisering te bevorderen, zijn de diepgewortelde

institutionele en politieke beperkingen waarmee het Gerechtshof wordt geconfronteerd enorm. De bureaucratische managementstijl van de rechterlijke instantie en zijn personeel vormt een groot risico voor het Gerechtshof bij het uitoefenen van zijn bevoegdheid en maakt het onvermijdelijk kwetsbaar voor brede externe interventie. Omdat rechters onderworpen zijn aan zowel de leiding van het professionele beslissingsorgaan als aan strikte bureaucratische controle binnen de hiërarchie van het Gerechtshof, moet de langdurige schade als gevolg van de beperking van zelfrealisatie bij berechting en de frustratie van individuele rechters wat betreft hun loopbaanidentiteit niet worden onderschat. Erger nog, het onderzoek naar de relatie tussen het Gerechtshof en de partij op het gebied van rechterlijke ideologie en beleidsvorming, personeelsmanagement van de rechtbank en gerechtelijke besluitvorming benadrukt verder dat zolang de macht van de partij over het rechterlijk apparaat het bepalende kenmerk blijft van het Chinese rechtssysteem, het Gerechtshof waarschijnlijk resultaten zal halen die worden gekenmerkt door zijn institutionele zwakte en het beperkte autonomie zal genieten binnen de huidige partijstaatstructuur.

Hoofdstuk 3 verkent de belangrijkste juridische praktijken van het Gerechtshof vanuit een functionalistisch oogpunt. Het Gerechtshof treedt niet alleen op als het hoogste rechterlijke orgaan en behandelt niet alleen zaken als laatste redmiddel, maar legt zich ook toe op het ontwikkelen van twee rechterlijke functies als essentiële functionele aanvullingen op het rechterlijke gezag: het uitvaardigen van abstracte juridische interpretaties en het regelmatig publiceren van een selectie van zogenaamde “leidende zaken” als reactie op onvolledige of onvolkomen rechtsregels in de praktijk. In dit hoofdstuk is vastgesteld dat het Gerechtshof een steeds belangrijker scheidsrechter is geworden, op basis van zijn eigen pragmatische initiatieven en institutionele belangen in het tijdperk van transformatie. Dit geldt met name voor een reeks van inhoudelijke en procedurele hervormingen die het Gerechtshof heeft gestimuleerd om de uniforme toepassing van de wet te waarborgen en de ontwikkeling van het recht vorm te geven.

De aanhoudende nadruk op de normatieve interpretatiemacht van het Gerechtshof heeft echter de vraag doen rijzen of deze quasi-wetgevende macht wordt uitgeoefend ten koste van de wetgevende macht of een reële bedreiging

vormt voor het traditionele begrip van de rechterlijke macht. In een autoritair regime, waar de beperkte bevoegdheid van het Gerechtshof inzake rechterlijke toetsing en het onvermogen om belangrijke constitutionele jurisprudentie te ontwikkelen kenmerkend is, is het belangrijk voor het Gerechtshof om innovatieve en zinvolle benaderingen te verkennen om zijn rechterlijke taken te vervullen en te streven naar een actievere juridische rol in overeenstemming met zijn eigen pragmatische behoeften. In dit opzicht is de praktijk van het Gerechtshof om zijn rechtsbevoegdheid te verrijken en te ontwikkelen door middel van rechterlijke beleidsvorming en een casus-gebaseerde aanpak om eenheid in de rechtstoepassing te brengen, reeds een noodzakelijk en zelfs cruciaal onderdeel geworden van de pragmatische keuze van het Gerechtshof voor het verschaffen van degelijke en gedetailleerde aanwijzingen om lacunes in de bestaande wetgeving te overbruggen in afwachting van verdere ontwikkeling van de wetgeving.

Hoofdstuk 4 benadert het Gerechtshof vanuit een andere invalshoek en toont enkele van de meest onderscheidende niet-rechterlijke praktijken van het Gerechtshof in de dagelijkse praktijk. Het is niet verrassend dat het Gerechtshof een bredere rol heeft te spelen dan alleen maar het belangrijkste gerechtelijk orgaan te zijn en dat de rechters van het Gerechtshof in praktijk meer functies hebben dan alleen die van scheidsrechter. Dit hoofdstuk maakt zichtbaar dat het Gerechtshof in veel opzichten werkt op een manier die overeenkomt met hoe de rest van de bureaucratie wordt bestuurd, wat tot uiting komt in de benadering voor het versterken van het bestuurlijk management binnen de rechterlijke hiërarchie en de actieve betrokkenheid bij het naleven van de politieke agenda van de heersende autoriteiten. Uit wat in dit hoofdstuk is besproken, blijkt dat de zware verantwoordelijkheid die het Gerechtshof draagt voor een groot aantal niet-rechtsprekende functies haar bureaucratische aard binnen de huidige politieke en institutionele structuren van China blootlegt, en nog belangrijker, de strijd en compromissen met juridische rationaliteit benadrukt wanneer het met zware politieke uitdagingen en conflicten tussen verschillende belangengroepen geconfronteerd wordt.

De meeste administratieve en politieke taken die het Gerechtshof in de praktijk verricht, tonen aan dat er een politiek-georiënteerde in plaats van een juridisch-

georiënteerde wijze van bureaucratie heerst in het Chinese rechtssysteem, wat de rechterlijke autoriteit en overtuigingskracht sterk ondermijnt. Toch onderstreept het in dit hoofdstuk besprokene ook het feit dat er altijd beperkingen zijn aan wat wel en niet door gerechten zelf kan worden aangepakt. Daarom moet het Gerechtshof zorgvuldig reageren op politieke belangen en steeds voorzichtiger worden met betrekking tot de beleidsvoorkeuren van andere statelijke actoren bij de uitoefening van de rechterlijke macht. In zekere zin suggereert het onvermogen en de terughoudendheid van het Gerechtshof om de bureaucratisering en politisering aan te pakken, dat de wens naar een onpartijdige en gezaghebbende rechterlijke macht in het gedrang blijft komen zolang het Gerechtshof in de schaduw van de partij blijft opereren en het blijft ontbreken aan checks-and-balances op het institutionele front.

Zich baserende op de casus van China en met name de rijke ervaring van het Gerechtshof, reflecteert **hoofdstuk 5** op de decennia oude debatten en verschillende diepgewortelde misverstanden met betrekking tot de juridische ontwikkelingen in China, zoals vermeld aan het begin van dit onderzoek, en biedt het een conceptuele heroverweging van de idee van rechterlijke macht in een niet-democratische machtenscheiding met Chinese kenmerken. Nog belangrijker is dat een actueel begrip van de macht van het Gerechtshof een bron van inspiratie biedt voor een heroverweging van de interne logica van een aparte categorie van rechterlijke macht buiten de gevestigde westerse democratieën.

Kijkend door de lens van de doctrine van scheiding der machten die zijn oorsprong heeft in het Westen en de uiteenlopende implementatie ervan in westerse democratieën en daarbuiten, zijn drie reeksen elementen naar voren gekomen als de sleutel tot begrip van de rol van de hoogste rechter in de specifieke context van machtenscheiding: (1) normatieve versus functionele analyse van de doctrine, (2) juridische onafhankelijkheid versus juridische onderlinge afhankelijkheid zoals die tot uitdrukking komt in de bevoegdheidsverdeling en -dynamiek, en (3) politiek-georiënteerde versus juridisch-georiënteerde werkwijzen voor het hooggerechtshof in diens specifieke politieke en juridische context.

Gebaseerd op bestaand vergelijkend onderzoek en met name op de besproken drie reeksen elementen is het duidelijk dat de reikwijdte en impact van de

rechterlijke macht in China grotendeels worden bepaald door de politieke en institutionele kenmerken binnen de Chinese bestuursstructuur, in veel opzichten vormgegeven en geherstructureerd door de initiatieven van het Gerechtshof bij het ontwikkelen van de wet en het uitbreiden van de machtsgrenzen. Hoewel de uitoefening van de rechterlijke macht tamelijk beperkt is en beteugeld wordt in overeenstemming met de Chinese politieke en constitutionele omstandigheden, moeten de inspanningen van het Gerechtshof en het voortdurende streven naar grotere professionele bekwaamheid, autoriteit en onafhankelijkheid niet genegeerd of onderschat worden. Daarom zou het geen verrassing moeten zijn dat het Gerechtshof, net als gerechtelijke instanties in het Westen en daar buiten, vooral zal fungeren als een onlosmakelijk onderdeel van politiek bestuur in China. De machtsuitoefening is dus tegelijkertijd het resultaat van, en een operationele conditie die bijdraagt en veranderingen teweegbrengt in, de brede politieke en juridische context waarin het opereert.

Op basis van de inzichten en implicaties van deze studie wordt hier geconcludeerd dat het Gerechtshof meer vooruitgang heeft geboekt bij het opnieuw conceptualiseren van de rechterlijke macht in het tijdperk van transformatie dan westerse wetenschappers over het algemeen hebben erkend. Ondanks de politieke en institutionele beperkingen waarmee de juridische ontwikkeling in China gepaard gaat, heeft het Gerechtshof eigen geïnitieerde en zeer pragmatische belangen gearticuleerd om zijn gezag en invloed op juridisch gebied en daarbuiten te bevorderen door middel van verschillende rechtsprekende en niet-rechtsprekende middelen. De initiatieven en acties van het Gerechtshof weerspiegelen in toenemende mate de voorkeuren, strategieën en het professionele gedachtegoed van het Gerechtshof wat betreft het stimuleren van kernfuncties van rechtbanken, terwijl ze tegelijkertijd aanzienlijke diversiteit en flexibiliteit in het rechtssysteem integreert. In dit opzicht moet het Gerechtshof niet langer worden beschouwd als louter een bestuursinstrument voor de heersende autoriteiten, maar moet het eerder worden gezien als een pragmatische speler die streeft naar meer autonomie en eigenbelang in het tijdperk van transformatie.

Ten tweede impliceren de diepewortelde institutionele en politieke beperkingen die in deze studie worden gesignaleerd dat er beperkte ruimte is voor de

rechterlijke macht om onafhankelijk op te treden in het autoritaire juridische kader, waarbinnen de rechtbanken gehouden zijn zich in verregaande mate in dienst te stellen van de politiek in plaats van een directe bedreiging te vormen voor de heersende autoriteiten. Het ontbreken van een actieve en effectieve vorm van rechterlijke constitutionele toetsing suggereert verder dat het moeilijk is voor Chinese rechtbanken, met name het Gerechtshof, om zinvolle doorbraken te maken tot uitbreiding van het machtsspectrum bij afwezigheid van institutionele veranderingen en echte politieke hervormingen. Zolang de uitoefening van de rechterlijke macht in China alleen kan plaatsvinden en kan worden verrijkt onder de paraplu van het leiderschap van de partij, zal de wenselijkheid van een onpartijdige en gezaghebbende rechterlijke macht nog steeds in gevaar worden gebracht onder omstandigheden van ontoereikende institutionele garanties voor gerechtigheid en onafhankelijkheid. Daarom is het denkbaar dat de juridische ontwikkeling in de meeste niet-democratische systemen primair een kwestie is waarbij politieke overwegingen een beslissende rol spelen. Het pad naar juridische ontwikkeling in een niet-democratische context weerspiegelt in veel opzichten een sterke gehoudenheid aan een politiek-georiënteerde in plaats van juridisch georiënteerde benadering, die het product is van de concrete keuzes, institutionele belangen en strategische overwegingen van politieke actoren in plaats van de inspanningen en wijsheid van rechtbanken en rechters.

Ten derde, omdat er geen enkelvoudige of eenvoudige vorm van scheiding der machten is die universeel toepasbaar kan zijn in het Westen en het Oosten, levert de Chinese benadering van machtenscheiding die in dit onderzoek wordt gepresenteerd, waarschijnlijk een betekenisvolle bijdrage aan het verbreden van de empirische en theoretische basis van de doctrine van de scheiding der machten, vooral door te dienen als een overtuigende referentie voor andere niet-democratische regimes. In plaats van deze gevallen als problematisch te beschouwen, suggereert dit onderzoek dat een goed begrip van de rollen en macht van de hoogste rechtbank vanuit een niet-democratisch perspectief het in kaart brengen vereist van normatieve en functionele analyses, rechterlijke onafhankelijkheid en hervormingen, zoals weerspiegeld in de uitoefening van rechterlijke macht in theorie en praktijk. Zoals kan worden beargumenteerd dat de rechterlijke macht in het samenspel van macht en tegenwicht ligt, zal de

doctrine eerder bij uitstek een analytisch kader bieden om ons in staat stellen de essentie van de rechterlijke macht in een bredere analytische context te vatten.

Ten slotte benadrukken de bevindingen en beschouwingen in dit boek de mogelijkheid om te streven naar grotere professionele competentie en gezag in de niet-democratische context van machtenscheiding, en de onderliggende omstandigheden om dit te doen. Sterker nog, men moet het vermogen van het hooggerechtshof om vergaande invloed uit te oefenen op significante juridische veranderingen in een niet-democratische vorm van machtenscheiding niet onderschatten. Door het erkennen van de superioriteit van de heersende autoriteiten over de rechterlijke macht in autoritaire regimes, is de centrale en meest urgente kwestie niet om de legitimiteit van de dictatuur te rechtvaardigen, maar veeleer om serieus te onderzoeken of en onder welke omstandigheden er aanzienlijke ruimte is voor rechtsontwikkelingen. Op die manier kan de analyse voortgezet worden met het onderzoeken van de mogelijke benaderingen en strategieën die rechters, met name de hooggerechtshoven, gebruiken binnen hun mogelijkheden in niet-democratische juridische kaders. Met een duidelijk begrip van hun inherente begrenzings- en institutionele beperkingen, zullen rechters eerder onnodig frustrerende pogingen vermijden en zich in plaats daarvan richten op het maken van solide vooruitgang bij het bevorderen van de rechtsontwikkeling op eigen initiatief, en proberen om met grotere autonomie te werken, terwijl ze tegelijkertijd strategisch inspelen op politieke zorgen en sociale behoeften. Om zinvolle doorbraken te bewerkstelligen in het versterken van de rechterlijke macht en het scheiden van de rol van de rechter van die van andere machtige statelijke actoren, is het belangrijk dat de hooggerechtshoven voortdurend innovatieve oplossingen scheppen om de juridische eisen in evenwicht te brengen met hun mate van respons op politieke opdrachten, om op zinvolle wijze te kunnen ontsnappen aan de typische bureaucratische rationaliteit en gestaag het niveau van juridisering te kunnen verhogen, en om uiteindelijk gestage vooruitgang te boeken als drijvende kracht van de rechterlijke macht (*judicial empowerment*) in de specifieke context van machtenscheiding.

Al met al is de sleutel tot dit onderzoek het plaatsen van het hooggerechtshof in haar context en het onderzoeken en blootleggen van hoe de hoogste rechter zijn belangrijkste bevoegdheden uitoefent in een niet-democratische vorm van

machtenscheiding. China is een onderscheidend voorbeeld in dit opzicht, en de grondige bespreking van de machtsuitoefening van het Gerechtshof in dit boek biedt geactualiseerde kennis van de rechterlijke macht in China en begrip van de betekenis hiervan in een autoritaire juridische context. Op basis van de praktijk en ervaring van het Gerechtshof, reflecteert dit boek bovendien op de wendingen en ontwikkelingen met betrekking tot juridische ontwikkeling in contexten van niet-democratische machtenscheiding en benadrukt het de mogelijkheid voor hooggerechtshoven om te streven naar meer competentie en autoriteit in dergelijke contexten, en op de onderliggende omstandigheden daarvan. Deze ontwikkelingen verdienen het uitgebreid te worden bestudeerd, diepgaand te worden begrepen en op waarde te worden geschat.

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