AUTONOMY OF CHINESE JUDGES: DYNAMICS OF PEOPLE’S COURTS, THE CCP AND THE PUBLIC IN CONTEMPORARY JUDICIAL REFORM

by

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Abstract

This dissertation is the outcome of author’s observations and empirical research on judicial reform in China from the 1980s to 2015. Focusing on judicial decision making process of judges in Chinese courts, it attempts to answer the following questions: How do the Chinese Communist Party (CCP), the public, and the internal administrative power—three factors essential to Chinese judges’ judicial decision making process—influence the adjudication of individual cases in various periods of judicial reform? How do the increasingly professionalized judges respond to these institutionalized challenges? Moreover, how do the dynamics generated from the interactions among courts, the CCP, and the public shape the norms and institutional building of judges and courts, and affect judicial reform policies in China? This dissertation adopts historical analysis, documentary analysis, and qualitative analysis to seek answers to these questions. It finds that, first, direct influence of the CCP and the public to the judicial behaviours of individual judges is less evident than indirect influence through the administrative oversight in courts’ internal bureaucracy. Second, the relationships between courts, the CCP, and the public are more dynamic in fragmented China. The norms of Chinese judges’ autonomy and institutional changes in courts are constantly shaped by the expectations and compromise of powers of the CCP, the public, and courts. Finally, building independent and professional judges in dependent courts without insulation from the external influences is not achievable by current Chinese judicial reform agenda.
Preface

This dissertation is the original, unpublished, independent work of the author, Yue Liu.

The interviews conducted for the research of this dissertation have been reviewed and approved by the UBC Behavioural Research Ethics Board (BREB). The project title is *Chinese Judicial Reform*. The Certificate Approval Number is H14-01068.
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<th>Abbreviation</th>
<th>Full Form</th>
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<tbody>
<tr>
<td>CCP</td>
<td>Chinese Communist Party</td>
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<tr>
<td>CCCCPC</td>
<td>Central Committee of Chinese Communist Party</td>
</tr>
<tr>
<td>CLG</td>
<td>Central Leading Group for Comprehensively Deepening Reforms</td>
</tr>
<tr>
<td>CLG-JIR</td>
<td>Central Leading Group for Judicial Institutional Reform</td>
</tr>
<tr>
<td>CPLC</td>
<td>Central Political and Legal Committee of Chinese Communist Party</td>
</tr>
<tr>
<td>FYRP</td>
<td>Five-Year Reform Plan</td>
</tr>
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<td>IP</td>
<td>Intellectual Property</td>
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<tr>
<td>KWT</td>
<td>Kuomintang</td>
</tr>
<tr>
<td>PLC</td>
<td>Political and Legal Committee of Chinese Communist Party</td>
</tr>
<tr>
<td>PLCP</td>
<td>Central Political Legal Group</td>
</tr>
<tr>
<td>PLCPC</td>
<td>Political Legal Committee of the Political Council</td>
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<tr>
<td>SPC</td>
<td>Supreme People’s Court</td>
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<tr>
<td>SPP</td>
<td>Supreme People’s Procuratorate</td>
</tr>
<tr>
<td>SPCCC</td>
<td>Supreme People’s Court Circuit Court</td>
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<tr>
<td>TAO</td>
<td>Trial Administrative Office</td>
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Acknowledgements

Six years ago I came to Vancouver to start the journey as a Ph.D. student of law at UBC. To be honest, I was innocent of what kind of journey I was undertaking and how the experience as a graduate student studying in a foreign country with distinct legal and education systems would shape my life and affect my perspective of the world and of myself.

Six years later when I am approaching the end of this journey, I admit that I greatly appreciated that bold choice I made years ago. This journey has not only changed the way that I perceive myself, but also thoroughly enriched my life through encounters with so many amazing people who have accompanied me along the way, and without whom it would be impossible for me to complete this journey.

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Six years have not only delivered this dissertation, but also my two beautiful daughters, Yilin and Annie. I thank them wholeheartedly for the deepest love and absolute trust they have given to me, which has transformed into the greatest force to keep me moving
forward and going high. I also feel extremely lucky to have my dear parents and in-laws to visit and stay with us from time to time, taking on many responsibilities that should have been mine.

I feel gratitude, not only because I have so many amazing mentors, colleagues, friends, and family beside me, but also because I am alive for this great reformatory era in China. I’d like to give special thanks to the Chinese judges and law professors who kindly accepted my interviews, for sharing their insights and enthusiasm of judicial reform with me, and for inspiring me with their sedulous efforts to make the Chinese courts better.
Dedication

To Tian Shao
Chapter I Introduction

This dissertation focuses on Chinese courts and judges in post-Mao judicial reforms and has three goals. Firstly, the dissertation aims to examine the judges’ autonomy in judicial decision making in Chinese courts by focusing on the influence of the Political Legal Committee (PLC), the media, and the internal administrative power in courts. The second goal is to discuss how the courts and judges respond to external influences and how the dynamic among judges, the Chinese Communist Party (CCP, or the Party), and the public has been created and affected the norms and institutional building of the courts and judges. The third and final goal is to explore possible routes for China to establish its distinctive judiciary independence.

Chinese courts, as a community of judges, are normatively subjected to “the leadership of the Chinese Communist Party and interests of the people (renmin)”.\(^1\) However, it is not clear how much autonomy an individual judge has in judicial decision making, or how the reforms have shaped their autonomy. To answer these questions, this dissertation investigates the autonomy of Chinese judges in the contemporary judicial reform, and reaches the following findings: 1) Direct influence of the Party and the public over judicial behaviour of individual judges is less evident than indirect influence through the administrative oversight of the courts’ internal bureaucracy; 2) The norms and

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institutions of Chinese courts in the reform eras are shaped by the distinct expectations of the Party, the public and the judicial elites, and their consenses reached by the bargaining of power; 3) The dynamic among the community of increasingly professionalized judges, the Party, and the public shaped the characteristic of judicial independence in China. Building the independence of a panel or individual judge in Chinese court without institutional independence is not achievable in the fragmented authoritarian China by current judicial reform agenda.

This chapter begins with a historical review of Chinese judicial reform at the policy level, to initially illustrate the institutional changes of courts as state actors located between the Chinese Communist Party (CCP) from the top, and the people from the bottom. Based on the historical review, Part 2 develops the specific research questions in Chinese context—that is, how Chinese judges decide cases considering the courts’ unique position in the Party–state. Courts are not only under the leadership of the CCP, but as “people’s courts” must answer to people’s interests, both of which shape the courts’ internal structure and the judges’ professionalism. Part 3 presents the literature of Chinese courts and Chinese judicial reform. This dissertation attempts to fill the gaps and addresses the limitation in the previous literature. Part 4 discusses theoretical models that the dissertation adopts coordinately to investigate the research questions. Part 5 presents the main arguments and findings. Parts 6 and 7 describe the methodology and roadmap.
I.1  Historical Context of Chinese Judicial Reform

Judicial reform is highly topical in post-Mao China. After the judicial organizations had been rebuilt after the disastrous Cultural Revolution of the early 1980s, the nation-wide judiciary reform was officially launched in the mid-1980s. Three decades have passed and it has been advocated by the top authority in China that “the rule of Law is the basic way of governing a country, and the judiciary is the significant cornerstone of the rule of law system.” While this official claim is debatable, the Chinese courts have indeed made significant developments in the institutional building, particularly regarding the court’s infrastructure, the judges’ professionalism, and the transparency of trial proceedings.

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4 SPC, Zhongguo Fayuan De Sifa Gaige [Judicial Reform of Chinese Courts] (Beijing: Renmin fayuan chubanshe [People’s Court Publisher], 2016).

However, problems are still abundant. Criticism concerning the courts’ fairness, transparency, and efficiency have never abated, and the authority and credibility of the courts and judges from the public’s perspective are far from established. The judges tend to complain more about their heavy workload, unsatisfactory income, and increasingly high degree of responsibility.

A historical review is conducted to shed light on the reason for this huge disparity between reform efforts and unsatisfactory outcomes, which demonstrates that the judicial reform policies in China have always been constantly changing, and the goals and

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6 The number of judges has increased from 59,000 in 1979 to 195,000 in 2011. The number of judges per 100,000 people has increased from 6.08 in 1981 to 14.69 in 2004. In 1995 only 6.9% of judges had a university degree, while in 2005 60.8% had a university degree or more. Zhu Jingwen ed, Zhongguo Falü Fazhan Baogao 2011 [Report on China Law Development 2011], (Beijing: Zhongguo Renmin Daxue Chubanshe [China Renmin University Press], 2011) at 3.


10 For instance, according to SPC’s policy, judges in the adjudicative or executive tribunal (shenpan zhixing gangwei) whose spouse or children are practicing as lawyers in China must transfer to other non-adjudicative posts (renzhi huibi) or quit the courts, a rule that is highly criticized as being too harsh. “Guanyu dui peiou zinv congshi lüshi zhiye de fayuan lingdao ganbu he shenpan zhixing gangwei faguan shixing renzhi huibi de guiding [Notice of the Supreme People’s Court on Issuing the Provisions on Implementing the Office Disqualification of a Leader or a Trial or Enforcement Judge of a Court Whose Spouse or Child Practices Law (for Trial Implementation)]” (promulgated by SPC Feb. 10 2011). Online database: pkulaw.cn.
directions of the reform agenda have been even conflicted from time to time. The combination of various influences from the Party, the public, and the judicial community shapes reform policies.

I.1.1 Searching for Modern Judiciary (Before 1978)

Judicial reform is not a new term for the Chinese, not even before the People’s Republican of China (PRC) was established. The first attempt to build a modern judiciary in China was the judicial reform of the late Qing Dynasty, which was quickly terminated by the Xinhai Revolution (Hsin-hai Revolution) and ended up with most of the proposed measures unimplemented in practice.\(^{11}\) In the Republic of China before 1949, while judicial innovations emphasized the heritage of the old regime, reforms of the judicial institution continued slowly with limited achievement due to war and social turbulence at that time.\(^{12}\)


While the legislations and regulations in the Kuomintang (KMT) rein were invalidated when the PRC was newly established, the courts and judges in the KMT government were kept in place during the transition from the old regime to the new regime. However, as the new government had called an end to the war and strengthened its power, it was time to transform the judiciary and judges to further consolidate the new regime. Thus, the judicial reform started in June 1952 and lasted nine months until February 1953. It aimed to eliminate the influence of KMT’s legal institutions and cultures by transforming the ideology of the judicial organizations and reorganizing the judges’ teams.

After the reform, 5,000 judicial staff members were removed from the courts as they were believed to specialize only in old laws (KMT laws) and thus to be incapable to adjudicate according to the new laws, and some were even sentenced to prison if they didn’t embrace the campaign. To fill the vacancy, a new team of judges was selected, comprised of PLA veterans, students, workers, and staff working in government branches who were ideologically progressive (sixiang jinbu), the full fidelity to the new PRC. As it was more like a political movement to fight and destroy the old nation’s legal regimes,

14 Dong, *ibid* at 123.
this wave of judicial reform is often called a judicial reform movement (sifá gaige yundong).

The impact of sifá gaige yundong on Chinese judiciary were threefold. First, the CCP’s leadership over the judiciary was established and reinforced. Many CCP members were appointed as the leaderships or backbones in the courts, and required to report the daily work of the courts to the Party committees (dangweī) of the same level. Secondly, as the replacement and selection of the new judges put more emphasis on their political fidelity to the Party rather than their legal expertise and experience, it created a tradition of non-professionalism of Chinese judges, which has since then deeply affected the judges’ identity. Regarded as the “handle of a knife” (da bao zi), the judges started to undertake similar duties as the police and the army—that is, emphasis of maintaining social order rather than protecting individual rights. Finally, as the reform did not create new legal norms and practices to fill the gap deriving from the abolishment of old legal regime, it indirectly lead to the wide dominance of legal nihilism since 1957, further

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17 Deng Xiaoping, Deng Xiaoping Wenxuan [Deng Xiaoping Essay Selection], vol. 3 (Beijing: Renmin Press, 1993) at 73.
21 He Rikai, “Sifa Gaige: Cong Quanli Zouxiang Quanwei [Judicial Reform, From Power to Authority]” (1990) 4 Falü Kexue [Legal Science].
22 Cai Dingjian, “Dui Xin Zhongguo Cuihui Jiu Fazhi De Lishi Fansi: Jianguo Yilai Faxuejie Zhongda Shijian Yanjiu [Historical reconsideration of the smashing of the old
reinforced the populist tradition (*qunzhong luxian*), and finally resulted in the total disaster of Culture Revolution.23

I.1.2 Rebuilding of Judiciary (1978-1997)

The rebuilding of legal regimes after Cultural Revolution started in 1978, immediately after the top authority acknowledged that the abandonment of law under Mao Zedong’s leadership had been disastrous for the country. As the new leadership realized that ruling according to law instead of man was important to prevent a recurrence of the Cultural Revolution tragedy and keep the state safe and the economy grow, it was urgent to reclaim legal order, 24 therefore, the courts put great effort on the rebuilding of judicial institutions and procedures. 25

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The reform, first and foremost, reemphasized the importance of governing the state according to law, to punish and sentence criminal offenses in accordance with the newly promulgated criminal law and criminal procedure law, which were the first criminal codes in the history of PRC. A great number of laws and regulations were promulgated and effective to establish the basic legal framework for the judges to adjudicate. At the same time, with the promulgation of the Organic Law of the People’s Courts and Organic Law of the People’s Procuratorates, judicial organizations and institutions were rebuilt successively from 1978 to 1979, including courts, procuratorates, lawyer associations, and judicial executive departments.

The courts claimed to have more autonomy in the recruitment of judges and judicial staffs compared the judicial executive departments. Furthermore, while the CCP’s leadership over the judiciary kept in place, the provisions in Civil Procedure Law and Constitutional Law of the PRC stated that the judiciary should adjudicate independently

27 “Fayuan Zuzhi Fa (Organic Law of the People’s Courts of the PRC)” and “Jianchayuan Zuzhi Fa (Organic Law of the People’s Procuratorates of the PRC)” were promulgated in 1979. See pkulaw.cn.
and be not intervened by the executive branches, social organizations, and individual citizens.\(^{29}\)

The emphasis on law and an independent judiciary, initially derived from the reflection of legal nihilism lessons learned in Cultural Revolution, ignited the movement for the Chinese courts to develop and implement highly aggressive reform policies to establish the judicial institutions which started to resemble modern courts rather than executive departments.

*Establishing Rules in Trial Proceedings (from the mid-80s to mid-90s)*

As an essential part of China’s continuing efforts to promote economic reform in the early 90s,\(^{30}\) the courts were required to establish legal norms as the framework to regulate the emerging free market, and also legal mechanisms to resolve disputes deriving from the quickly growing economy. With the growth of the private sectors, courts established a number of tribunals to hear and adjudicate various types of cases, such as the economic tribunal for economic disputes and the administrative tribunal for disputes between individual or company, and the government. The trial proceedings were emphasized and

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open to the public under certain circumstances. The new Civil Procedure Law adopted Rules of Evidence (zhengju guize) and empowered more litigation rights to the litigated parties. The Judges Law that passed in 1995 also set a prologue of the forthcoming changes to judges’ professional identity. The courts at this time established distinctive infrastructures and rules and further separated their functions from other judicial executive departments. The courts under the Party’s leadership had built up their competency and autonomy to be able to proceed with more in-depth reforms.

I.1.3 Judicial Reform Led by the SPC (1999-2008)

In the late 90s, the “rule of law” was officially advocated in China by CCP propaganda and state constitution. In Jiang Zemin’s report to the Party’s 15th National Assembly in 1997, he underlined the necessity for China to adopt a “rule of Law with socialist characteristics.” In 1999, the constitutional amendments explicitly avowed to “govern the country according to law” (yifa zhiguo) and “establish the socialist country under the rule of law.” The CCP explicitly showed its determination to a legitimate governance by resorting to the norm of the rule of law, which greatly increased the progress of the ongoing judicial reform. With the support from the CCP, the SPC-supreme authority of the courts-promptly set up a national and comprehensive agenda to promote judicial reform. Reform, therefore, began to make much greater strides than before.

In 1999, the Supreme Peoples’ Court (SPC) adopted the first Five-Year Reform Plan (FYRP) with 39 reform measures, which exhibited some new characters of Chinese court reform.\textsuperscript{33} The judges became more professional and competent with the increasingly elevated judge’s selection criteria. The new National Unified Judicial Exam was established in 2001, setting identical entrance standards for judges, procurators, and lawyers, and greatly increased the professionalism of the legal community. In 2002, the SPC issued a guidance to empower the collegial panel in courts,\textsuperscript{34} which further increased the autonomy of judges as members of the collegial panel and the capacity of judges to immune from the external influences. After five years of reform, many reform initiatives were implemented and partially addressed some renowned problems in courts. The courts further constrained the internal bureaucratic structure by giving more autonomy to judges to decide cases, and the courts as institutional actors gained more political resources and authority.


In 2002, the CCP’s 16th National Congress announced further reform of the judicial mechanism. In May 2003, the CCP established a Central Party Judicial Institutional Reform Leading Group to plan and organize the judicial reform. In 2005, the second Five-Year Reform Plan was released, putting more emphasis on deepening judicial institutional reform and further promoting the realization of reform initiatives from the first FYRP by working on institutional establishment and improvement.

President Xiao Yang

The first two FYRPs were released and implemented when Xiao Yang was the president of the Supreme People’s Court of China. Yang made great efforts to build the judicial infrastructure to increase the overall capacity of the judges and courts and to increase efficiency. The court reform when he was the SPC president steered the emphasis from the previous substantive justice to procedural fairness and justice, and shift the inquisitorial system in the civil law tradition more to the adversarial system in common law tradition, which to some extent was borrowed from Western law traditions.

Based solely on the development of the court itself, reform endowed courts and judges more legitimacy, and made them more professional, responsive and accountable. However, there was a sudden surge in the number of petitions to the central authorities in Beijing in the early 2000s. In 2003, the number of petitions that the State Administration of Petitions received surpassed that of 2002 by 29.9 percent, and there was a 94.9 percent increase in the first three quarters of 2004. The courts were directly criticized for this upsurge because a large proportion of petition involved cases that were “law related” (shefa shesu). Meanwhile, courts continued to be undermined by a range of problems such as judicial corruption and inefficiency. Also, many reform measures and experiments were criticized by legal scholars as too idealist and thus ignorant of the Chinese historical and political context. There was even increasing concern that judicial reform toward Western legal ideology and tradition would eventually damage the legitimacy of the Party–state.

I.1.4 Populist Turn (2009-2013)

As a response to address the social conflicts and grievances, a new trend emerged when Wang Shengjun took over power as SPC president in 2008. In the spring of 2009, the third Five-Year Reform Plan (2009-2013) was released, which appeared to further

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develop the agendas from the first and second FYRPs by addressing the deeper mechanic issues within the courts.\textsuperscript{40} However, the third FYRP became a plan on paper.

To make it worse, during this period of time, most of the reform policies were made by the Central Political and Legal Committee (CPLC),\textsuperscript{41} which required courts and judges be primarily responsible for maintaining social stability. The judicial reform scaled back its previous professionalization efforts and instead called on judges to consider the “Three Supremes” (\textit{sange zhishang}) in their judicial decision making process. The courts and judges should “serve the interests of the Communist Party, the people and the Constitution,” which some scholars believed to be a sign that judicial reform stalled or went down the wrong path.\textsuperscript{42}

The central PLC also demanded the courts to resolve the disputes with more mediation then adjudication, and also called for judges to take a proactive role in resolving disputes instead of functioning as independent and neutral arbitrators that President Xiao Yang upheld.\textsuperscript{43} This ideology resulted in the extreme pursuit of the local courts to set up and

\begin{footnotesize}
\begin{enumerate}
  \item This trend was widely discussed by Chinese academics as either “Chinese judicial activism (\textit{nengdong sifa})” or “grand mediation (\textit{da tiaojie})”. Long Zongzhi, “Guanyu Da
\end{enumerate}
\end{footnotesize}
work towards some absurd goals such as “zero litigation.” The courts were laden with many political, economic and social responsibilities and duties which were same job of local government branches. Lawyers were criticized as troublemakers by the authorities. Judges were highly esteemed more by their ability to satisfy the public than as their legal expertise. Political discourses are dominant in judicial reform such as mass line, judicial activism, and judiciary for the people.

1.1.5  Tremendous Institutional Innovations (since 2014)

The year 2014 saw judicial reform in China gaining major momentum. The 3rd plenum of the 18th Central Committee of the CCP in October 2013 put forward an agenda to deepen reform, and the 4th plenum focused fully on the implementation of rule of law in China. The Central Leading Group for Comprehensively Deepening Reforms (CLG) was established as a policy formulation and implementation organ and set up directly.

45 ibid.
under the Politburo of the CCP, most of whose decisions are relevant to judicial reform. The SPC also pronounced the fourth FYRP in 2015. With the top-down agenda in place, the multilevel courts in China are carrying out new pilot projects, which have created unprecedented and tremendous institutional changes in Chinese courts. This has also pushed the future of Chinese courts and judges into uncertainty.

I.2 Professional Judges: Led by the Party and Responsive to the Public

From the above review, three main actors can be identified to have implicitly or explicitly affected judicial reform policies in China, and have thus influenced the norms and institutional building of Chinese courts and judges. They are the Party, the public, and the judges.

I.2.1 Party Leadership

The Party’s leadership has been dominant through the entire judicial reform process. It has been established since the formation of the people’s courts by the sifa gaige yundong in the early times of the PRC, confirmed by the rebuilding of the judiciary after the

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50 New judicial policies and institutional innovations are discussed in Chapter V in the dissertation.
Cultural Revolution, and reinforced in 2008 when the Central PLC took substantive powers in making judicial reform policy from the SPC, and finally firmly institutionalized by the setup of the Central Leading Group for Comprehensively Deepening Reform (CLG).

It is notable that judicial reform was fast-tracked whenever the Party issued major decisions on judicial reform policies or agendas (See Table 1). The earlier prime years of judicial reform began after the 15th Party Congress when the “rule of law” was recognized by the Party authority in the Congress Report. Numerous progressive developments had been made such as the professionalism of judges and the adaptation of the modern form of rule of law. The courts’ turn toward populism after the SPC’s third FYRP echoed the Party’s concern about social instability and turbulence on the one hand, and the Party’s attempts to hamper the influence of foreign rule-of-law norms among Chinese judges and legal professions on the other.

Table 1 Landmarks in Chinese judicial reform (1978-2009)
However, the Party’s leadership did not always mean that the courts had no autonomy to conduct judicial reform. The SPC played an essential role in leading the judicial reform and making institutional innovations from 1999 to 2008. Since 2013, the SPC has been taking great advantage of the CLG’s support to make reform policies, conduct experiments in pilot courts, and promote national innovations. The question is why the SPC has enthusiastically embraced the CCP’s leadership and how the Party-court dynamic functions in the Chinese courts.

1.2.2 Populist Legality

The tension between professionalism and populism has always existed in Chinese judicial reform. Populism is a revolutionary legal legacy and became a tradition in the people’s courts before the PRC was established. As populism required that the courts should make the people satisfied with the outcome of a trial, to achieve this goal, mediation and “trial by people” (gongshen) such as the “Ma Xiwu Trial Method” (Ma Xiwu shenpan) were preferred over formal trial proceedings at that time. It was even argued by Judge Ma Xiwu that the “people’s opinion is more important than law.”

While the importance of the Ma Xiwu trial model was only acknowledged in the wartime period and is no longer observed in current courts, this populist tradition has remained.

From 2009 to 2013, after ten years of effort to build modern rule of law norms and formalist legal procedure, the Chinese courts again resorted to populist tradition to address the legitimacy crisis caused by emerging social protests and severe critics of the judges’ corruption and the courts’ impartiality. However, populist legality tends to undermine the importance of law and the autonomy of the courts and the judges, and finally leads back to legal nihilism.

While it is argued that this populist turn was pushed mainly by the CCP organization-the Central Political Legal Committee, the courts still actively followed this initiative. Why did the courts and judges still resort to the populist legality while aware of its high risks? What kind of support or resource would the courts be able to get from the people or the public? Is it possible for Chinese courts to strike a balance between judicial professionalism and populism?

I.2.3 Judges’ Professionalism

Although it is still too early to assess past judicial reform, one of the reform’s achievements has been recognized as the establishment of more professionalized community of judges in Chinese courts. In 1995 only 6.9% judges had a university degree, while in 2004 51.6% had a university degree or more. In some regions, the new

recruitment standards have been set with even higher standard. For instance, since 2005 Shanghai courts at all levels have only recruited those with master’s degrees in law to work as law clerks, which is considered a pre-post of an assistant judge.55 With higher entrance qualifications, more intense competition in the entrance examination and increased occupational training, the judges’ adjudication competency has greatly improved.56 The SPC, as the supreme authority of the judge community, has been playing the inevitable role in promoting judicial reform. Therefore, the question arises as to whether the professionalized judges will ensure a fair and just adjudication, and whether the courts, as a community with increasing professionalism, will take on more responsibility in steering the judiciary reform and shaping the institutional building of the Chinese courts.

I.3 Review of Literature on Chinese Judiciary and Judicial Reform

The questions that arose in the previous section were somewhat addressed by scholarship on Chinese judicial reform. Judicial reform over the last three decades has attracted much attention from academics, both western and domestic, to identify problems in China’s judicial system and predict or suggest either a positive or negative future of the reform. The theoretical framework and methodology they adopted have also been changing greatly. This review will only focus on literature on three themes: the Party, the public, and the professional judges.

55 Interviewee 10. See Appendix One.
56 Interviewee 25. See Appendix One.
I.3.1 The Party Leadership

Ever since the beginning of the judicial reform (and particularly when the top Chinese authority advocated for establishing “rule of law”\(^57\) in the late 1990s and showed its commitment to take such rule of law as an important part of state ideology and legitimacy), there emerged a wide range of discussion from legal scholars on the Chinese notion of rule of law and the relationship between rule of law and the Party’s leadership.\(^58\) They argued that, like a bird confined by a cage,\(^59\) the legal system is only an instrument to realize the goals of Party–state.\(^60\) It is therefore concluded that judicial reform in China has in fact constituted as much of a technical response as a political


\(^{59}\) Stanley B Lubman, Bird in a Cage: Legal Reform in China After Mao (Stanford, Calif.: Stanford University Press, 1999) at 32.

one, and the tentative innovations from the SPC’s FYRPs are little more than a gleam in the eye of the politically weak SPC, since the legal infrastructure remains to be built. While optimistic perspectives highlighted the progress that judicial reform has made, particularly by selectively adapting foreign practices and experiences to modernize China’s judicial institutions, the Party’s leadership over the judiciary is still regarded as a negative factor for judicial reform, which makes judicial reform in China an uncertain path.

It is certainly true that judicial reform in China is seriously affected by the CCP’s policies and ideology, as the CCP’s leadership is a taboo that no type of reform in China, nor the judiciary, dares to touch. However, it would be such an easy pit to fall into if one hastily regards the CCP’s leadership as an unsurpassable obstacle without consulting nuanced and updated analyses. A simple and rushed conclusion attributing all the problems to the

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CCP’s leadership would certainly overlook the incremental changes that judicial reform has made in Chinese courts and upon the judges. It could also overlook the complicated judicial politics in Party–state China, a consideration that could shed light on the viable approach of clearing obstacles to judicial reform. It is therefore necessary to choose a perspective that seriously examines the Party and the courts relation.

1.3.2 Bottom-up Approach

While some scholarship analyzes the Party’s leadership over judicial institutional changes from a top-down approach, another type of scholarship evaluates Chinese courts and judicial reform from a bottom-up perspective. Skeptical of the key and proactive role the Party plays in political, economic, and social development, this scholarship would rather view the legal institution and law as an outlet for society to express grievances and therefore emphasize the roles that the public and society play in shaping the institutional development of Chinese courts.66

This scholarship works on a contextual analysis of Chinese courts and judges, investigate these social actors in a more empirical, less ideological approach, and assesses judicial reforms in a specific context.67 They concentrate not only on the state of law in text, but

also on the law in practice.68 They also study the dynamic relationship between law and society by adopting a worm’s eye perspective.69 To achieve these goals, multidisciplinary avenues integrated with qualitative and quantitative approaches. They draw upon insights from both political science and the sociology of law to study legal institutions and law in action.70 The bottom-up approach looks at the influence of societal actors, such as public opinion and mass media, on the institutional changes of Chinese courts.71 They focus on the law in action, popular perceptions of the legal system, and how the law is used in civil society to categorize and resolve everyday disputes.

I.3.3 Professionalized Community of Judges

More than the political will of the Party and the upward push from society for a more sophisticated system, the Chinese professional judicial community also plays a role in

judicial institutional changes. Indeed, more and more recent researches have regarded the legal professions as key factors in judicial reform. By observing courtroom trials and interviewing professional judges in the local courts of particular areas, socio-legal scholarship investigates the policies and problems existing in Chinese courts and therefore looks for opportunities for future reform. Various studies have covered the following issues: court finances, adjudicative committees, discretion of judges, judicial responsibility, local judicial politics, and the local courts’ caseloads. This approach emphasizes judges’ increasing role in the institutional building of the courts, as an independent institutional actor, rather than a Party-state instrument.

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The dissertation joins the conversation of this scholarship and will focus on Chinese judges’ behaviour in judicial decision making to investigate how the CCP, the public, and the community of judges influence adjudication. The reason judicial decision making is so essential as to merit special focus is itself twofold: judicial decision making is not only the Chinese courts’ focal function, but also the main agenda of the reform. The policy variation on judges’ decision making may help to understand the motivations and forces shaping judicial reform policy changes in China. Specifically, the dissertation investigates the influence of the Party, the public, and the community of judges on judges’ decision making behaviors. It also examines the influence of the Party, the public, and the community of judges on the judicial reform policy, in the ultimate effort to provide a nuanced example that contributes to the literature concerning the roles of the Party, the public and the professional judges in the institutional changes of Chinese courts.

78 The court is traditionally defined as the body with the power to decide a dispute. See Theodore Becker, *Comparative Judicial Politics: The Political Functioning’s of Courts* (Chicago: Rand McNally, 1970). A recent functionalist definition of courts suggests that courts also serve two functions besides conflict resolution: social control and lawmaking. Certainly, the other two functions are served mainly by the supreme court of each jurisdiction. See Martin Shapiro, *Courts, A Comparative and Political Analysis* (Chicago: University of Chicago Press: 1981).

79 Since 1999, every five to six years the SPC has issued a Five-Year Judicial Reform Plan (FYP), and in 2015 the Fourth FYP was published. The reform on the mechanism of judicial power has been set as a central issue in all of the FYPs. Ji Weidong, “Zhongguo Sifa Gaige Youshi Shi Feichang Dadan Chaqian [Chinese Judicial Reform is Brave and Ahead of Time]” Caijing (Aug. 8, 2014), online: http://www.chinareform.org.cn/gov/system/Practice/201408/t20140808_204392.htm. (Retrieved on May 15, 2016).

80 Xin Chunying & Li Lin, *Yifa Zhiguo yu Sifa Gaige* [Rule of Law and Judicial Reform] (Beijing: Social Science Literature Publisher, 2008).
I.4 Theoretical Framework

To understand the judges’ decision making behaviour in Chinese context, one model and two theories are in need of further clarification: the model of judicial decision making, the theory of judicial independence, and the theory of fragmented authoritarianism.

I.4.1 Models of Judicial Decision Making

The theories of judicial decision making are always one of the central endeavours of scholarship concerning the law and the courts. Three models have been established sequentially to explain how judges in common law legal systems decide cases: the legal model, the attitudinal model, and the strategic model (see Table 2). They are useful for explaining the process of judicial decision making in the common law system, but are not fully equipped to effectively explain the unique judicial decision making process in Chinese courts. However, these judicial decision models are useful for understanding that, even in a jurisdiction with a long history of rule of law, the judges’ decision making process could be willingly influenced by external factors beyond laws and facts.

Table 2 Three decision making models

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The models of judicial decision making do not consider external interventions in the judges’ decision making process as they all take the independent judiciary as a given. Judicial independence is the institutional structure upon which the judges decide cases without direct or compulsory influence.\textsuperscript{84} Therefore the judiciary’s independence, or the lack of it, certainly creates more intervening factors in the judges’ decision making process. A review of the theory of judicial independence could therefore provide a nuanced view into the Chinese legal decision making process.

I.4.2 Theory of Judicial Independence

The theories of judicial independence are widely discussed by scholars, political scientists, lawyers, policy makers and researchers in various rule of law or law and

development organizations and programs in Western democratic regimes. While many scholars agree that judicial independence is important, the concept is often poorly specified. “Judicial independence exists primarily as a rhetorical notion rather than a subject of sustained and organized study.” The reason for that partly comes from the ambiguous meaning of this concept, particularly in different political and social settings.

In well-developed democratic regimes, it is commonly recognized that the principles of judicial independence include: 1) security of judicial tenure; 2) adequate salaries for judges; and 3) immunity from suits. The underpinning of these principles is to make the judiciary independent of the executive and the legislature, and vice versa. The institutional setting to implement these principles is sophisticated, thus more attention has turned to empowering the judiciary and questioning the legitimacy of the judges’ roles and responsibilities beyond the courthouse.


However, in emerging democracies or democracies in transition, the concept of judicial independence is highly debated as a useful analytical concept, and the comparative scholarship of judicial independence confirms the daunting obstacles to developing a useful general theory of judicial independence.\(^{90}\)

More efforts have been made toward exploring the instrumental role of judicial independence to achieve some ends, such as to establish the rule of law.\(^{91}\) Thus, it is argued that the concept of independence can vary across areas of law, types of cases, and courts within a single jurisdiction.\(^{92}\) Thus, the de facto independence is investigated as a more meaningful approach than the de jure judicial independence.\(^{93}\) It is also argued that judicial independence be understood and investigated in two senses: institutional independence and the independence of the bench.\(^{94}\) There is much variation depending on whether the judiciary is institutionally independent or independent on the bench, or

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both.\textsuperscript{95} It is also possible to have independent judges with a dependent judiciary, which means the overall judiciary is subject to other pressures of the politics, executive or legislature while individuals within it are not.\textsuperscript{96}

To understand judicial decision making in Chinese courts, it is necessary to investigate not only the behaviour of individual judges, but also the institutional dimension of the judges’ autonomy, especially in a state without institutionally independent courts.

\textbf{I.4.3 Fragmented Authoritarianism}

While the decision making model and the judicial independence theory are the framework to investigate Chinese judges’ behaviour in case adjudication, the “fragmented authoritarianism” framework is useful to understand judicial policy making and implementation in judicial reform and the institutional changes in Chinese courts.

Fragmented authoritarianism was first proposed in 1988 and has been developed to better understand the bureaucratic structure and process of Chinese policy formulation, decision making, and policy implementation.\textsuperscript{97} Adopted initially in the research primarily on

economic decision making, this framework provides another research dimension that is not adequately captured in the application of a rational model and a power model. It argues that authority below the very peak of the Chinese political system is fragmented and disjointed. This fragmented, segmented, and stratified structure of the state itself is a significant determinant of the political process and policy outcomes. In this framework, to reconcile the conflicting organizational missions, ethos, structures, and resource allocations of the bureaucracies involved and to search for consensus among various organs in order to initiate and develop major projects, the importance of bureaucratic bargaining involving negotiations over resources among units that effectively have mutual veto power is highly valued. Thus, policies are not necessarily either coherent or integrated responses to perceived problems or part of a logical strategy of a leader or faction to advance power and principle. While some of those policies may result from the initiative of top leaders, others are best seen as a temporary agreement arranged by the top leaders among contending and powerful bureaucracies with diverse purposes, experiences, and resources.

I.5 Findings

This dissertation focuses on the Chinese judges’ behaviour in judicial decision making to investigate how the CCP, the public, and the community of judges have affected or influenced the judges’ decision making, and how the dynamics created by the interactions among these actors have shaped the norms and the institutions of Chinese courts and judicial independence in China.
I.5.1 Independent Judges in Dependent Courts

Is it possible to have independent judges in the dependent Chinese courts? The answers might lie in three frameworks: courts and the CCP, courts and the public, and the bureaucratic community of judges.

Courts and the CCP

The Political-Legal Committee (PLC) has been chosen as the lens through which to investigate the CCP’s influence in judges’ judicial decision making and the CCP’s leadership over Chinese courts as the PLC has been criticized of intervening in specific cases. While this dissertation focuses more on CCP’s influence to judges’ decision making in the institutional dimension, the influences from Party core group (dangzu), individual Party leaders and other Party committees are beyond the discussion in this dissertation as those type of influences are exercised in an unofficial and discrete way. This dissertation finds that the PLC’s influence over judicial decision making is limited and gradually decreasing. The PLC is only one of many apparatuses through which the CCP achieves its governance, including intervening or controlling judicial institutions. In fact, the PLC intervened in case adjudication through the leadership of the Party group (dangzu) and the internal administrative organization. The Party group, as the core of the leadership and the top authority in the judicial bureaucracy, exerts absolute power in the administrative management of the courts, including the appointment and discipline of judges, and thus influences the judges’ adjudication. However, similar to the PLC, the Party group has started to incorporate its leadership into the courts’ administrative
bureaucracy and become more visible. The court is still subject to the CCP’s rule, but the
CCP’s leadership is becoming more indirect, or at least subtle, to the outsider.

At the same time, the CCP enthusiastically supports court reform, as the CCP has to
make efforts to solve the legitimacy crisis by de-politicizing political control and
developing an apolitical and non-ideological control mechanism. The CCP’s support
greatly enhanced the autonomy of the judges and courts, and the more professional and
competent courts seek to leverage the CCP’s support to gain more resources in
fragmented, bureaucratic China.

Courts and the Public

Normally, as public opinion is mostly conveyed by the mass media, an analysis of the
media’s influence over adjudication of judges is used, as well as an analysis of how
judges respond to media input. It is acknowledged that the Chinese media is under the
leadership of the Propaganda Department of the CCCP. However, censorship works
mainly in politically sensitive areas, and for a long time, judicial issues were mostly
beyond this reach. Thus, it makes sense to investigate the influence of public opinion on
adjudication, but with a focus on the media.

This dissertation finds that the media’s monitoring of judicial decision making did exist
for a period and affected the adjudication of some types of cases, especially the high
profile felony cases or civil cases touching on the major social morality.\textsuperscript{98} These types of cases were most likely to trigger public sensation and social disturbance instability which the Party and courts feared. Also, most of these cases were initially adjudicated in the local courts, which was consistent with the agenda of the CCP to centralize its power in the local governments and thus media’s coverage was mainly tolerated at that time. It is notable that media’s monitoring was mostly indirect and mainly by the court’s internal administrative power. Without direct intervention from the higher administrative head into judges’ behaviour, the media simply could not have much influence in judicial decision making.\textsuperscript{99}

While judges regarded media as trouble makers and passively respond with various strategies in the beginning, the SPC and the judicial elites found judicial openness policy effective to make peace with media, and also prevent other external influences in the courts. The courts started to engage and coordinate actively with media to increase the legitimacy of verdicts by seeking the support of the public, and thus increase the courts’ authority and reliability.

\textit{Bureaucratic Community of Judges}

The Party and the public opinion don’t influence adjudication of judges directly, but working mainly through the internal administrative bureaucratic organization of courts.

\textsuperscript{98} Specific analysis see Chapter III Part 4.
This dissertation finally investigates decision making among judges within the courts’ bureaucratic system. It finds that while judicial reform has built up a professionalized community of judges, who have been playing important roles in courts’ institutional renovations to decrease the external influences in the courts, and thus increase courts’ authority and autonomy to the externals, it has also brought about the burgeoning expansion of internal administrative bureaucracy of courts, which triggers more problems than expected.

Compared to the external influence of the courts from the PLC and the media, the internal administrative power is the fundamental and direct force that could affect judicial decision making in the Chinese courts. The autonomy and power of the Chinese judges to decide cases independent of administrative influence is the key for Chinese judges to gain independence. However, in current Chinese political social context, it is not easy to free the judges of internal administrative influence as the administrative powers in the courts consistently grow with the professionalizing of the judges and empowering of the courts.

I.5.2 The Judiciary in Fragmented Authoritarianism

Besides empirically investigating the judges’ behaviour in the judicial decision making process, this dissertation also analyzes Chinese courts and their policy making and implementation in the “fragmented authoritarianism” framework.
Judicial decision making is a bargaining process, and judicial reform policies are made by bargaining and coordination as well. This has created dynamics among the CCP, the public and the courts. The CCP relies on the competent judiciary to enhance its legitimacy of ruling but refrains if the empowering judiciary incurs any risk to its leadership. The public also tends to mobilize laws and courts to advocate opinions and protect interests. The courts, as the weak organ in the Party–state, resort to the power of the Party and the public to gain weight and capacity in the current political system. Both of the factors made the coordination possible. However, with the support from the Party and the public, the courts actively augment their institutional capacities of being free from the endless external control, which resulted in the expansion of judicial structure and organization and rising concern from the Party and the public toward the empowering judicial power, which caused contradiction and tension.

Thus the judicial reform policies have been shifting toward various interests from the Party, the public, and the judicial elites. The institutional building of Chinese courts has constantly been shaped by the different expectation and comprise of power of the Party, the public and the judicial elites. There is a distinction between the perspective of judicial elites and political elites. Judicial elites embrace the rule of law and willingly and actively investigate and learn from foreign experience. They also innovate in the Chinese context, especially on a technical level, such as building up professional judges. They claim that the transparency and accountability of judges are superior to their counterparts in the sophisticated judiciary jurisdiction. The judicial elites’ desire to make a more
professional and competent community of judges detached from the bureaucracy is the motivation for pushing judicial reform forward.

I.6 Methodologies and Contributions

In the chapters that follow, this dissertation delves into several areas of the judicial decision making of judges in contemporary China. Each chapter will start with a historical narrative to demonstrate the gradual change in the dynamics among the courts and other influential actors, and then explore how these influential factors affect judicial decision making. The normative and institutional research will emphasize primary sources, such as legislation, Party files and policy, and government documents, with a second analysis stemming from journal articles, textbooks, and media reports mainly in Chinese. Each chapter will focus on the operational dimension of the research objectives, with the doctrinal analysis complemented by empirical research the author has undertaken in China.

All the empirical data were collected during the visits I, the author, made to China in the summer of 2014 and 2015. I visited courts of multiple levels, including the SPC, provincial courts, intermediate courts, and district courts in Beijing, Shenyang, Dalian, Ha’erbin, and other small cities in North China.\(^{100}\) I interviewed twenty-two judges with diverse backgrounds. Among the judges I interviewed, twelve judges were sitting on panels deciding cases in different tribunals, including the criminal tribunal, civil tribunal, civil tribunal, civil tribunal,

\(^{100}\) The cities and courts where the interviewees were working were randomly decided depending on the researcher’s travel convenience.
administrative tribunal, and intellectual property rights tribunal. Five judges were not
deciding cases as collegial bench, but working in the courts’ administrative departments,
responsible for administrative duties even as they held the title of judge. These
administrative departments include, but are not limited to, the Political Department, the
Adjudicative Management Office, the Research Office, and the Propaganda
Department.\footnote{See Appendix One for details accounts.}

In addition, I worked as an intern for three months in an intermediate court in the capital
city of Northeast China when I was doing my master’s degree in law in 2003.\footnote{2003 is special as it was the last year of the first five-year judicial reform plan and further changes were highly expected within the courts. Also in 2003, the outbreak of SARS in most areas of China pushed the Chinese government to be more open and transparent in policy making and implementation, especially regarding public health policy.} I clerked
for a female judge who was sitting on the trial supervision tribunal (\textit{shenjian ting}) which
hears and decides the appellate cases from the district courts, as well as closed cases
appealed or transferred from the local people’s congress and other government branches.
My observations of court proceedings and my conversations with the judges at that time
have also be used to complement the historical analysis of the research.

Theoretically, this dissertation will attempt to contribute to the literature on “judicial
decision making models,” and “judicial independence in non-democratic regimes theory”
by investigating Chinese judges and courts as case studies. The dissertation will not only
investigate “law in the books,” but also “law in action.” The research will not only review
and analyze the normative dimension of different actors in the Party–state, but also
explore the operational dimension. The dissertation will mainly focus on the Chinese judiciary in context, and how the Chinese courts and Chinese judges decide cases under the pressure of the Party, the public, and the administrative power in real life.

Secondly, this dissertation will attempt to contribute to the literature of judicial reform in contemporary China. The relevant information and data on the Chinese judiciary and the adjudication process are relatively outdated or too general, whether they are from domestic or foreign sources. For domestic legal scholars, the amount of research on judicial reform is overwhelming and plays an important role in promoting legal and judicial reform in China. However, in recent years, the attention from academics has waned for various reasons. Domestic scholars tend to be hesitant about the topic and thus silent on the discussion of topics related to the Party. The research of foreign scholars who do not concern themselves with political taboos is also limited by the data since Chinese courts and judges tend to be less open to foreign scholars, or to different theoretical perspectives which can unconsciously overlook China’s complicated political and societal context. This dissertation takes advantage of my identity as both a previous insider of the Chinese judicial system and as a current legal scholar watching from the outside.

However, there remain limitations in the research. First, due to the huge size of China’s geography and uneven economic development of different areas, the Chinese courts in the different provinces, especially the intermediate and district courts, vary greatly. Any research covering all regions of China tends to be too generalized and loses its accuracy
in specific spheres. Also, judicial reform in China is ongoing and things are changing very quickly. While this dissertation attempts to emphasize those changes and make sense of the data in the historical context, it is nonetheless inevitable for some data to lose its validity.

I.7 Organization of Chapters

Chapter Two focuses on the dynamics of the political legal committee and the Chinese courts. It first examines the PLC’s institutional changes and its evolving roles and functions, with a focus on the interplay between the PLC and the courts. This chapter endeavours to answer the following questions: Under what conditions, and to what extent, can the PLC influence the courts? How can this influence be evaluated? What implication does it have on the judiciary’s development? How do the answers contribute to the nature of Chinese judicial politics?

Chapter Three investigates the dynamics between the media and the courts. By investigating the media’s influence over several specific cases in the courts, this chapter argues that, even though the CCP is still heavily involved in media coverage in China, the media has become an effective channel for more active members of the public to express their opinions or take part in the pluralized, fragmented authoritarianism, and thus contribute to the establishment of an accountable and fair judiciary.
While the previous chapters focus on the external controls and influences over the Chinese courts, Chapter Four looks at the court itself. The courts—as a passively responsive actor that confronted such external influences at the beginning—have undergone dramatic and continual institutional changes in their internal administrative structures and mechanisms, and this has fundamentally changed the landscape of the Chinese court system. This chapter focuses on the judicial actors inside the Chinese courts and the internal structures and mechanisms shaping the judicial behaviours of each judicial actor in making judgments.

Chapter Five investigates how the Party, the public, and the internal administrative power influence or affect institutional innovations and policy changes in the Chinese courts since 2014. It also looks at how the norms and institutions have been shaped in the framework of the Party’s leadership, responsive to the public and the judges’ professionalism.

This dissertation concludes with an overall assessment of the reform agenda and an exploration of the broader implications of judicial institutional change in China.
Chapter II Political Legal Committee and Courts

I.1 Introduction

Judicial independence is always regarded as the core of the rule of law and a prerequisite for human rights protection, economic security, good government, and the proper functioning of civil society. As such, academics, judges, and practitioners on the national and international levels have widely debated its conceptual foundations, minimal normative requirements, and practical challenges \(^{103}\) upon which a wide range of international codes, standards, and principles of judicial independence have been created by several international communities. \(^{104}\) Notwithstanding all these efforts, the concepts, principles and scope of judicial independence are still disturbingly contested, particularly when they are evaluated in the context and culture of specific jurisdictions. \(^{105}\)

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However, among all the chaos and controversies, one consensus on the minimum standard of judicial independence is nonetheless made that the judiciary should keep its distance from politicians and politics. If the judiciary in one country cannot be immune to the influence of the political party, the judiciary is certainly not independent in any sense, which makes the authority of the Chinese judiciary rather questionable and leads to the broad criticism of the Chinese Communist Party’s leadership over the Chinese courts.

This criticism of the CCP’s control over the Chinese courts comes with the common belief that CCP leadership is absolutely and overwhelmingly dominant in all aspects of Chinese politics and society as the CCP’s power is plenary and ubiquitous with the potential to reach every institution and fabric of Chinese society. Also, as the CCP’s leadership has permeated all the important constitutional areas, it is acclaimed that the Party’s leadership is first and foremost a living constitution in China. The constitutional reality in China is also thus described as “Party–State constitutionalism” which recognizes the authority and the associated importance of the Party as the source of

106 Martine Valois, Judicial Independence: Keeping Law at A Distance from Politics (Markham, Ontario: LexisNexis, 2013).
an independent normative system in China. Therefore, while acknowledging that the courts and judges have been recognized with some institutional specialty and professional expertise, the courts are defined merely as an organ of the people’s dictatorship serving the CCP’s interests and thus deprived of the institutional independence and authority needed to perform its functions effectively.

In contrast to the criticism, some scholars acknowledge the positive roles that CCP has played in China’s recent judicial reform. It is argued that the CCP remains, for the better or worse, the principle—if not the sole—motor for modernizing contemporary China, including its judiciary, because only the CCP has the authority to push through difficult institutional reforms, particularly those that affect the balance of power among major state organs. It is also argued that the CCP’s oversight has worked to discourage


judicial corruption and judicial (and legal) arrogance, which are the two by-products of the judiciary’s on-going transformation.\textsuperscript{115}

A paradox has therefore arisen between the CCP and the courts. On one hand, the Chinese courts cannot continue to enhance their authority and independence without the CCP’s support for legal reform overall. On the other hand, to gain robust and sustainable power and authority, the courts must struggle to be professionalized and carve out space in the evolving political order, the effects of which would eventually harm the CCP’s authority. This paradox echoes the claims held by some scholars who have positioned themselves in the middle and who claim that although CCP leadership enjoys absolute and complete power over State affairs, absolute power does not mean absolute control because of the CCP’s own interests or its lack of ability to control effectively. However, the CCP retains the final say on issues that it regards as crucial and can always enact changes to developments.\textsuperscript{116}

Debate surrounding CCP leadership over the Chinese courts is derived from the context within which the discussants stand. If an argument adheres to conventional Western discourse to decipher the Chinese judiciary, the conclusions may be quite critical and

\begin{flushright}
\textsuperscript{116} He Xin, “Judicial Innovation and Local Politics: Judicialization of Administrative Governance in East China” (2012) \textit{China Journal}.
\end{flushright}
skeptical.\textsuperscript{117} However, if an argument emphasizes and comprehends China in its own context, the attitude may be much milder.\textsuperscript{118}

Therefore, when asked about “the CCP’s leadership on the Chinese court”, it is too simple to give an “always” or “never” answer, as both are claims about frequency, not conditions. To fully understand the CCP’s role in court adjudication, one must study the legal phenomena in context, as well as rely on nuanced investigation and analysis over the conditions of influence.

While CCP’s leadership of the courts could be investigated by various perspectives, this chapter focuses on its influence in the courts and adjudication of judges by choosing the CCP’s Political Legal Committee (hereafter PLC) as the lens, for the following reasons:

First, to understand the CCP’s dynamic leadership over the judiciary, research on the PLC provides a feasible and convincing approach. While the CCP’s leadership over the courts embodies various levels and mechanisms, the role of the PLC is unique. Unlike the Party group as the court’s internal organ (where it is difficult to distinguish the exact influence of the Party or the Party member out of individual interest), the PLC is an


external institution outside the courts, which makes it easier to distinguish its institutional or individual influence.

Secondly, as a party organ, the PLC has gone through many institutional changes during a relatively short period of time. As such, conducting a historical analysis of the PLC’s institutional changes and analyzing the mechanism on the interplay between the PLC and the courts would contribute to the knowledge of the rationales and strategies adopted by the CCP to assert its leadership over the Chinese judiciary.

Lastly, and most importantly, arbitrary judgment and innocent mystery are abundant concerning the PLC, and this requires clarification. The PLC is overwhelmingly regarded as a devil generating judicial incompetency and injustice. To make it worse, literature on the dynamics of the PLC and the courts is scarce, which is incompatible with its importance. One of the possible reasons for this is the difficulty in accessing information and data on the topic. As routine in the judicial process, the PLC’s supervision and coordination over adjudications are rarely regulated in the legislation and are only illustrated in Party documents, which are not easily accessible to the public.

This Chapter intends to examine the PLC’s institutional changes and its evolving roles and functions, with a focus on the interplay between the PLC and the Chinese courts. This is an effort to identify and define the self-styled distinctiveness as a dynamic of the
CCP and the courts as a political culture in the Chinese context. In all, this Chapter endeavors to answer the following questions: Under what conditions, and to what extent, can the PLC influence the courts? How can this influence be evaluated? What implication does it have on the judiciary’s development? How do the answers contribute to the nature of Chinese judicial politics? It adapts historical analysis and documental analysis as its main methods, complemented with empirical data from interviews with judges in China. Investigating the PLC’s history is necessary to an understanding of the PLC’s inherent deficiencies and its empowered status and role in the Chinese judiciary.

It finds that, as history has witnessed an evolving shift in the PLC’s status, function and power in the Chinese judiciary, the PLC was not a strong institution at its outset, nor is it a strong institution now. The PLC is so weak in terms of its own legitimacy and authority that it has always sought approaches to survive and grow in terms of institutional development and power entrenching. It does this by avidly occupying more political resources, such as elevating the political position of its head and intervening into judicial decision making. The PLC’s empowerment over the last decade was the outcome of

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120 For further information, see Appendix.
121 The research on the history of the PLC is mostly conducted by scholars in the field of Party history, rather than by legal or political scholars, perhaps because the subject is not “legal” enough for lawyers and not “political” enough for political scientists. This part derives mainly from the following books, journal articles and dissertations. Feng Lixia, Zhengdang Guojia Yu Fazhi- Gaige Kaifang Sanshinian Zhongguo Fazhi Fazhan Toushi [Party, State and Law- Three Decades Legal Development in China] (Beijing: Renmin Publishing, 2008); Liu Yong, Zhengfa Zhidu De Lishi Yangce [The History of Political Legal Committee] (LLM thesis, CPLU Faculty of Law, 2012). CNKI: China Masters’ Theses Full-text Database, 2010) at 6.
complex factors including China’s economic and social changes, the rhetorical rule of law agenda, and the vision shift among the political elites.

Also, in the very fragmented and bureaucratic Chinese politics, the PLC is used as a facilitator to avoid conflict with the separated institutional interests of various government departments, which has also led to the PLC’s growth and thus has easily made the PLC a scapegoat by the other judicial or executive institutions. Out of its inherent deficiencies, the PLC’s power is diminishing and is likely continuing to diminish. Looking into the ups and downs of the PLC, it is easy to see the CCP’s flexible and conflicted governing policies and strategies. The CCP’s leadership is rarely absolute in practice and is usually constrained by dynamics with other state apparatuses, the central–local relationship, and the public will and interest, which makes the interplay between the CCP and the courts vibrant and continuously evolving.

I.2 The Institutional Change of Political Legal Committee

In general, the current PLC is an internal division of the CCP meant to extend the CCP’s leadership in political and legal affairs. The CPLC has branches in the CCP’s provincial, prefectural, and county levels. Did the CCP set up the PLC in order to exercise influence on the judicial institutions and thus manipulate law implementation in China? It seems not. To be clear, this section of the Chapter investigates the history of the PLC to clarify its evolving roles throughout history. The PLC’s road of institutional change has had many twists and turns. Generally speaking, the PLC was initially meant to be an assistant
and secretary to the CCP and the government, but then developed into one of the four most important internal divisions of the CCP. 122

I.2.1 The CCP’s Think Tank

The PLC’s history can be traced back to the two organizations established even before the establishment of the PRC: the Central Legal Issue Research Committee (zhongyang falü wenti yanjiuhui), established in 1946, 123 and the Central Legal Committee (zhongyang falü weiyuanhui), established in 1948. 124 As the Party organs, the two worked as the CCP’s think tank and secretary to provide advice on law drafting and on setting up the judicial institutions.

Then, the Political Legal Committee of the Political Council (zhengwuyuan zhengzhi falü weiyuanhui, hereafter PLCPC) was established in 1949, which was a government organ rather than a Party organ. While sharing the same name with the current PLC, it was located in the executive branches of the government and was responsible for directing the work of the Department of Internal Affairs, the Department of Public Security, the Department of Justice, the Committee of Legal and Ethical Group Affairs (which included only judicial departments within the government, not the courts and

122 The other three are the Publicity Department, the Organization Department, and the Discipline Inspection Commission. See “The Internal Organization of CCCCCP”, Guangming Online, http://topics.gmw.cn/node_35594.htm. (Retrieved July 14, 2016).
procuratorates). The various governments of the greater administrative areas and the prefectural governments also set up their PLCs, respectively, to assist the transition of the newly established state regimes. When the PRC established the new political regime led by the People’s Congress, the PLCPC was dissolved as the State Council replaced the Political Council. In 1956, the CCP set up the Central Legal Committee (zhongyang falü weiyuanhuì), which was basically still a secretary organization without substantial power.

All the above organizations were only established in the central and prefectural levels. It wasn’t until the establishment of the Central Political Legal Group (zhongyang zhengfa xiaozu, hereafter PLCP) in 1958 that the sub-level branches were established in the

125 Peng Zhen, “Guanyu Shehui Zhuyi Fazhi De Jige Wenti De Jianghua [Speech On the Several Issues of the Socialist Legal Governance]” (Peng Zhen’s speech to the Central Party School in Sep. 1st, 1979) (1979) 11 Hongji [Red Flag]; Ye Zhusheng, “Zhengfahei Ganshenme Zenmegan [Political-Legal Committee: what to do and how to do it]” (2012) 8 Nan Feng Chuang [South Reviews] 42. However, it is also argued by Dong Biwu and Peng Zhen-the director and deputy director of the PLCPC-that, born the responsibility of connecting and directing the work of the courts and procuratorates within the Party, the PLCPC factually extended its function to the work of courts and procuratorates. See Hou Meng, “Dang Yu Zhengfa Guanxi De Zhankai: Yi Zhengfa Weiyuanhui Wei Yanjiu Zhongxin [the Relationship between Party and Political and Legal Institutions: Focusing Research on the Political and Legal Committee]” (2013) 2 Faxuejia [The Jurist].

126 Major Administrative Zone (da xingzheng qu), which were dissolved in 1954. See Wang Zhenmin, Zhongyang Yu Tebie Xingzhegnqu Guanxi [Central-local Government Relations] (Beijing: Tsinghua University Press, 2002) at 47.


128 As it was consisted of more non-CCP members, it was hard for the CCP to gain dominant control, and therefore a Party group was established. See Liu Zhong, “Dang Guan Zhengfa Sixiang De Zuzhishi Xingcheng (1949-1958) [The Shaping of the Thoughts of Party Governing Politics and Law in Organization History (1949-1958)]” (2013) 2 Faxuejia [The Jurist] 16.

provincial, prefectural, and county level. Also, as the first organ officially established in
the Party dealing with political legal affairs, the PLCP was commonly seen as serving to
reinstate the tradition of the Party’s leadership in the judicial branches. This included not
only coordinating relationships among the courts, the procuratorates, and the public
security departments, but also establishing that important cases be scrutinized by the
Party committee.\textsuperscript{130} Ever since, the Chinese legislation process was gradually halted, the
judicial departments such as the courts and procuratorates was abolished and finally the
PLCs were abolished.\textsuperscript{131} In 1978, the PLC was rebuilt with the same name that it had in
1958, yet vested with similar responsibilities to the 1956 organization, and functioned as
the CCP’s think tank and assistant organ within the Party system, without practical
influence on the judiciary. The limited power setup reflected the Party leaders’ concerns
over the lawlessness of the Culture Revolution.\textsuperscript{132}

I.2.2 The CCP’s Substantial Power over Legal Affairs

In 1980, the PLCP was renamed the Political Legal Committee (PLC), which has been in
use until today. The PLC has started to gain more authority as Party apparatuses
intervening in the judiciary’s legal and judicial affairs. It was regulated that “the PLC
shall connect and guide (lianxi, zhidao) the work of every political legal department.”\textsuperscript{133}

\begin{flushleft}
\textsuperscript{130} Ibid at 8. \\
\textsuperscript{131} The PLCP existed only in name in the Culture Revolution and naturally died after the
death of Xie Fuzhi, the director of the PLCP at the time. Ibid. at 10. \\
\textsuperscript{132} Liu Fuzhi, \textit{Liu Fuzhi Huiyilu} [Liu Fuzhi Memoir] (Beijing: Central Literature
Publishing, 2010) at 306. \\
\textsuperscript{133} “Zhonggong Zhongyang Guanyu Chengli Zhengfa Weiyuanhui De Tongzhi [The
Notice of the Central CCP on Establishing the Political Legal Committee]”, 1980 No. 5
\end{flushleft}
At that time, Peng Zhen emphasized that “the PLC as an assistant to the Party committee, is not a first-level (of independent standing) Party organization and its power should not be broad.”\textsuperscript{134} He also stressed that the PLC should not interfere with the specific judicial work of the Courts and procuratorates.\textsuperscript{135} From 1983-1988, the PLC was growing into a working department in the Party Committee, enjoying more influence during the anti-crime Strike Hard Campaign (\textit{yanda}).\textsuperscript{136}

In 1988, to explore China’s political reform by separating the Party organization and the government (which was an initiative in the CCP’s 13th Party Congress), the CPLC was abolished as a response to the concern of the Party leader that the PLC would severely intervene into judicial affairs. The Central Political Legal Leading Group was rebuilt with much more limited functions. However, the sub-level PLC remained as the PLC was


restored very quickly because of the Party’s desire to reclaim its political order after the Tiananmen Square Protest of 1989.\footnote{The restored PLC was still working, in general, on guiding the work of the other legal and judicial institutions, which emphasized that the cases shall be decided by each departments according with its respective legal responsibility. See Qiao Shi, \textit{Qiaoshi Tan Minzhu Yu Fazhi} [Qiao Shi’s Speech on Democracy and Rule of Law] (Beijing: Renmin Press, 2012).}

In 1990, to strengthen the CCP’s leadership in legal and judicial affairs, the CPLC was restored and rose gradually and consistently as a pronounced power in Chinese politics and judiciary. The PLC has since experienced a significant institutional enlargement. In March 1991, the Central Social Security Comprehensive Management Committee (\textit{zhongyang shehui zhian zonghe zhili weiyuanhui}) was established to maintain public order.\footnote{“Quanguo Shehui Zhian Zonghe Zhili Gongzuo Dashiji [Major Events in National Social Security Comprehensive Management]”, Fazhi Ribao [Legal Daily] (Sept. 25, 2001), online: http://news.sina.com.cn/c/2001-09-25/365090.html.} In 1999, the CCP set up the Leadership Group on Falun Gong and subsequently an Office on the Falun Gong Issue on June 10, 1999 (\textit{fangfan he chuli xiejiao wenti lingdao xiaozu bangongshi}, referred to as the “610 Office”). Also, in 2000 the CCP set up the Central Leading Group on Maintaining Stability (\textit{zhonggong zhongyang weiwen lingdao xiaozu}) and a corresponding Maintaining Stability Office (\textit{weiwen bangongshi}) to address issues involving social unrest. Other leadership groups were established later on to be in charge of fighting anti-organized crime, leading judicial reform, etc.
All these organizations operate within the PLC framework by the “heshu bangong” mechanism; that is, their offices are set up in the PLC and daily duties are processed by the PLC staffs, which indirectly increases PLC authority over many state affairs and enlarges the number of bureaucratic staff workers in the PLC. “The PLC was structurally strengthened and became a self-contained component of the Party apparatus, with offices established in local Party institutions from the provincial level down to the county level. The heads of these local PLCs have since then been granted membership in local party standing committees.”

At that time, the PLC at the province level typically consisted of the general office, the political department, the research department, the zongzhi office, the weiwen office, the law implementation department, the Party committee, as well as other affiliated offices such as the law society and the editorial office of the Party magazine.

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140 But this mechanism has been gradually changed recently, by setting up new independent institutions from the PLC to be in charge of social management work. Such as Guangdong Provincial Social Work Committee, and Lan Zhou Municipal Social Service and Management Bureau. See official website: http://www.gdshjs.org/ (Retrieved on June 27, 2016).
1.2.3 Power Expansion

Consistent with the expansion of the internal organization, the PLC has been extending its power by taking on more responsibility. In 1990, the central authority still emphasized in a regulation to recover the CPLC that “to implement the separation of the functions of the Party and the state, the PLC should work merely as the assistant and reference (zhushou & canmou) of the Party Committee, and guide and coordinate the political legal affairs in principle and ideological levels. The PLCs are working on investigation and research assignments, and avoid intervening into the specific work of the judicial institution, to ensure the independent work of the courts and procuratorates”\(^{143}\). Therefore, even the PLC’s recovery aimed to strengthen the Party’s leadership in judicial work; the PLC’s responsibilities were constrained to “macro-guidance”.

In 1994, the PLC extended its functions from five categories to seven categories by extending its responsibilities to “research and discuss the controversial major hard cases”, “organize and push forward the comprehensive governance to secure social safety”, and “investigate and coordinate the team establishment of the political legal departments.” It was an extraordinary power extension as the three new responsibilities vested the PLC with the authority to directly affect judicial adjudication and engage into the courts’ and

procuratorates’ leadership recruitment, thus making the PLC the authentic leader of the courts, the procuratorates, and other judicial departments.\textsuperscript{144}

In 1995, the PLC’s functions were expanded to ten categories once again. Its function of inter-institutional coordination was greatly emphasized. In addition, the PLC was empowered to supervise the implementation of judicial policy in the work of the judicial departments.\textsuperscript{145} Furthermore, in 1998 the PLC’s function of coordination and supervision of the judicial departments was replaced by the more powerful function of “supervision of law implementation”,\textsuperscript{146} which accomplished the PLC’s shift from a think tank (\textit{canmou}) and assistant to a leader in the judicial system in order to supervise law implementation of the political and legal order in China.

Since then, the first decade of the 21\textsuperscript{st} century has witnessed the most powerful and influential PLC than ever before. It was also during this period that the PLC was

\begin{flushleft}
\textsuperscript{146}In 1998, the CPLC issued “Guanyu Jiaqiang Dangwei Zhengfawei Zhifa Jiandu Gongzu De Yijian [Opinions on strengthening the work of PLC]” See Zhong Jinyan, “Zhengfawei Lishi Yu Yanbian De Zai Sikao [Rethinking the history and revolution of the PLC]” (2012) 12 Yanhuang Chunqiu [China Through the Ages] 50 at 50.
\end{flushleft}
seriously criticized for intervening too heavily into judicial adjudication, thereby producing many wrong verdicts, which severely hindered justice.\textsuperscript{147}

I.3 Analysis of PLC’s Growing Power

From the above historical analysis, the expansion of PLC power only happened within approximately the latest decade, before which the PLC was a weak internal organization of the Party committee without substantial political or administrative power. This relatively sudden change was possibly caused by the following reasons:

First, the PLC’s empowerment took place when the Chinese society was in the vibrant economic and social transition. The rapid economic growth for the past 20 years triggered numerous social conflicts which could not be addressed by premature social and political mechanism. China has seen numerous social conflicts derived from the bankruptcy of the SOE, environmental pollution incidents, city demolishment, and land expropriation and requisition. At the same time, “China’s leadership appealing to the rhetoric of ‘rule of law’ clearly affects social understanding and expectations, and thus empowering the citizenry’s political desires and concerns.”\textsuperscript{148} The Weiquan (Rights Protection) Movement was overwhelming in China. The protests and dissents were invoked by

ordinary people as an extraordinary means to argue their rights and caused a threat of social instability, which became the CCP’s main concern.

To effectively and expediently address such increasingly complicated social conflict and unrest, changes in legislation and normal court proceedings were not quick enough. Therefore, the PLC was empowered as a convenient apparatus for the Party to make judicial policies, coordinate various judicial and non-judicial departments to work together, and supervise or even intervene into the day to day work of the courts and other judicial departments, which will be discussed below.

Secondly, the PLC’s institutional change is a vivid reflection of the CCP’s elitist vision on how to govern the State by the Party. It is the CCP that determines whether the PLC should restrain its purview in the creation and guiding of principles and policies, or to intervene into the specific work of judicial departments. The institutional change also reflected the dynamics within the CCP, the other state apparatuses, and the public will. The ebbs and flows of the PLC depend on the CCP’s alternative choices to maintain the county’s economic momentum while maintaining Party leadership.

Before the demonstrations in 1989, the PLC had been shrinking as a result of the CCP’s attempt to explore preliminary political reform. However, such reform was abandoned over the CCP’s fear of losing control of the national leadership. Out of the CCP’s full awareness of political disturbances and the threat of Color Revolutions in other socialist regimes, the CCP reached a consensus that the PLC would be the CCP’s critical
instrument to control political and legal affairs, and was rebuilt to help the CCP guard its interests and achieve its goals. Therefore, it is the CCP that determines whether the PLC should restrain its purview in the creation and guiding of principles and policies, or to intervene into the specific work of judicial departments. The institutional change also reflected the dynamics within the CCP, the other state apparatuses, and the public will.

Thirdly, the ranking changes of those at the head of the PLC at the central and local levels partly explain the PLC’s expansion of power from 2002 to 2012. Because the PLC has far less staff and finances, and broadly defined responsibility compared to the courts and procuratorates of the same level, the ranking of PLC leaders determines its actual power. It is the previous work experience and authority within the Party and the government hierarchy of its leaders that determine its factual influence on the courts, procuratorates, and other legal institutions. Thus the growth of the PLC’s power is actually the growth of the PLC chairmen’ power.

This was well illustrated by the recent power shift between the PLC and other judicial institutions. As shown in Table 3, on the central level before 2002 and since the restoration of the PLC, the head of the CPLC was always set as the member of the Politburo of the Central Committee of the CCP or member of the Secretariat of the Politburo. However, since the 16th National Congress of the CCP in 2002, the head of the CPLC has been elevated to a member of the Politburo Standing Committee of the CCP due to the growth of the Standing Committee. After the 18th CCP National Congress in 2013, the chairman of the CPLC was downgraded to a member of the Politico Committee.
(instead of the Standing Committee) which, to some extent, explains the recent changes in the PLC.

Table 3 Heads of the Central Political and Law Group and CPLC (1980-now)

<table>
<thead>
<tr>
<th>Name</th>
<th>Term of Office</th>
<th>Rank in CCCC</th>
<th>Other Job Titles</th>
</tr>
</thead>
<tbody>
<tr>
<td>Peng Zhen</td>
<td>Mar. 1980- May 1983</td>
<td>Member, Political Bureau of the CCCC</td>
<td>Vice Chairman of Standing Committee of the NPC</td>
</tr>
<tr>
<td>Chen Pixian</td>
<td>May 1983- July 1985</td>
<td>Member of the Secretariat, Political Bureau of the CCCC</td>
<td>Vice Chairman of Standing Committee of the NPC</td>
</tr>
<tr>
<td>Qiao Shi</td>
<td>July 1985-Nov. 1992</td>
<td>Member &amp; Member of the Secretariat, Politburo of the CCCC</td>
<td>Vice-Premier of State Council, Secretary of Central Commission for Discipline Inspection of the CCP</td>
</tr>
<tr>
<td>Ren Jianxin</td>
<td>Nov. 1992-Mar. 1998</td>
<td>Member of the Secretariat, Politburo of the CCCC</td>
<td>President of the Supreme People’s Court</td>
</tr>
<tr>
<td>Zhou Yongkang</td>
<td>Oct. 2007-Nov. 2012</td>
<td>Politburo Standing Committee member</td>
<td>Chairman of the Central Committee for Comprehensive Management</td>
</tr>
</tbody>
</table>
| Meng Jianzhu | Nov. 2012-now | Member, Politburo Bureau of the CCCC | Presumably the changes are due to the shift in the role from the Standing Committee to the Central Political and Law Group.
On the provincial level, the status quo of the last ten years has been that the heads of the provincial PLC are usually members of the Standing Committees of the provincial Party Committee, equivalent to the deputy governor of the provincial government, who empower the heads in the province’s political and legal affairs. While the head of the PLC shares the same ranking with the president of the provincial courts and procuratorates, the deputy head of the PLC is equivalent to the government head, while the deputy president of the courts and procuratorates is equal to the vice director (one level lower than the PLC’s). This power hierarchy sets the dominance and balance in the overall operations of the judicial system. In short, in China’s political arena, the higher the ranking of the heads in the PLC, the more authority and influence the PLC has over other legal institutions, including the courts. The local PLCs, especially in the county level, without a strong leader, are easily distanced from the central local political power.

1.4 Evolving Functions of Political Legal Committee

Based on the above analysis, the PLC’s main functions have been consistently evolving. In addition, the CPLC and the local PLCs vary greatly in different levels in terms of their internal organs, functions, and responsibilities as the local party committee vests the local PLC with power. The CPLC is the CCP’s working department in the central committee of CCP invested with leading and administering political and legal affairs. Its main

responsibilities include: *leader* of the judicial departments to ensure the implementation of the CCP’s policies and initiatives; the CCP’s *assistant*, to make and implement political and legal policy; *coordinator*, to maintain social stability and conduct comprehensive governance of the social order; *supervisor*, to coordinate the judicial departments’ overall duties and personnel management; and *investigator*, to examine the misbehavior of senior judicial officials.\(^{151}\)

To simplify these complicated functions, this section will explore in detail the typical and controversial duties of the PLC. The PLC’s functions have been widely discussed by two papers previously mentioned. It is argued that the PLC’s core functions include legal policy making, coordinating inter-institutional relations, and decision making in individual cases.\(^{152}\) I agree with the first two categories, but prefer to revise the third function as supervising law implementation.

### I.4.1 Judicial Policy Making

The PLC has performed its function as judicial policy maker ever since it was established by assisting the CCP committee to implement its ideologies with regard to judicial issues. Generally speaking, judicial policies are norms made by legitimate authorities other than

\(^{151}\) Chou Fanyi, “Zhengfawei Gaige Jiasu, Jianshao Anjian Ganyue [The PLC Reform its Intervene into the Case Adjudication]” (Oct. 23 2014) Xinjing Newspaper.

legislators; as such, the judicial policy is not law *per se*, but could be promulgated as law by legislators. In common law countries, “judicial policy making, to put the matters most simple, is policy making by the judges.” However, in China, the authorities that make judicial policy are not only designated by the Supreme Court, but also by the CCP and its sub-level organizations, such as the PLC. Strictly speaking, judicial policy made by the PLC is the rule of the Party. Judicial policies are regarded as essential guidance to the legal political department to implement law—including adjudication—as policies can make up for any vagueness in law and easily adapt to the flexibility of CCP governance strategies.

*Shifting of the Judicial Policy Making*

Originally identified as the CCP’s assistant and think tank, the CPLC and local PLCs have always been engaged themselves in judicial policy making in order to realize the Party’s governance over judicial affairs. Most of the judicial policies on criminal offenses overwhelmingly affected the courts’ judicial decision making process, such as the well-known criminal policies of “Severe Cracking Down On Criminal Activities (yanda)”

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155 This policy aimed to quickly diminish the rampant severe criminal defenses, was commonly believed to be proposed in the CPLC’s national conference in August 1983 and initiated by the Party document released after the conference titled: “Decision on
and “Combining Leniency with Rigidity (kuanyanxiangji xingshi zhengce)”\textsuperscript{156} Driven by the *yanda* policies, the judicial departments (courts, procuratorates, and public security departments) were encouraged to work together to treat criminals harshly and efficiently, which scarified legal rules on evidence and other rules in procedure laws, and thus wrongfully decided many criminal cases at that time.\textsuperscript{157}

Recently, the PLC has deviated slightly from the previous focus (criminal policy making) of the last century and has been engaged in other areas such as intellectual property rights protection, environment protection, and food safety monitoring. All of these are more diverse and social management oriented, but still focused on criminal offenses emerging in these areas.

According to pkulaw.cn,\textsuperscript{158} the 29 regulations issued by the Central PLC\textsuperscript{159} covers a wide range of issues, including the internal work of the CPLC’s office (6 regulations), the

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\textsuperscript{156} Since 2000, another criminal policy was proposed as contemplation and correction to the controversial “Striking Hard” campaign: the criminal policy of Combining Leniency with Rigidity (kuanyanxiangji xingshi zhengce), which was first advocated as the criminal policy by Luo Gan, the then chairman of the CPLC in the National Political Legal Conference in 2005. See: Zhang Chunying & Zhang Xuefeng, “Quanmian Luoshi Kexue Fazhanguan, Jinyibu Jiaqiang Zhengfa Gongzuo [Fully Implement the Scientific Outlook on Development, Further Reinforce the Political Legal Work]” (Dec. 7 2005) Legal Daily [Fazhi Ribao].


\textsuperscript{158} Pkulaw.cn (http://en.pkulaw.cn/) is an online database from the Legal Information Center Peking University Law School that resource mainly on Chinese Laws & Regulations, Judicial Cases and Law Journals in Chinese & English.
speeches of the heads of the CPLC to the judicial departments (3 regulations), opinions on case adjudication and enforcement (3 regulations), notices or opinions on legal education and legal professional personnel exchange (10 regulations), and other legal issues in the area of IP law, civil service management, banking, labour law, legal aids, and judicial personal discipline (13 regulations). In terms of the level of authority, there are judicial interpretations (2), departmental rules (13), and group provisions (14).\textsuperscript{160}

By investigating these pieces, it is obvious that for the past ten years, judicial policies issued by the CPLC have started to touch on discipline, reward, and punishment of judicial staff in the legal and judicial departments.\textsuperscript{161} The past five years have witnessed more policies from the CPLC in solving urgent and complicated problems in the judicial departments or adjudication proceedings. In March 2015, the CPLC issued “Regulations on the Recording and Accountability of the Judicial Organ Staffs for Intervention in Cases (sifa jiguan neibu renyuan guowen anjian de jilu he zeren zhuijiu guiding)” to stop and prevent illegal or improper interference in cases by the leading staffs in the Party or

\textsuperscript{159} The pieces are obviously less than the total pieces the CPLC has issued considering the prominently small numbers in total and missing of some period of time. For example, there is only one document in 1980s and four documents in 1990s from the search result, which might also be due to the loss of validity of some documents.


\textsuperscript{161} Since 2014, the CPLC has announced 51 cases involving the judicial cadres’ behavior to violate law and discipline to public. See “Zhongyang Zhengfawei Tongbao Shiliuqi Zhengfa Ganjing Weiji Weifa Dianxing Anjian” (Feb 13, 2015) China Peace Online: http://www.chinapeace.gov.cn/2015-02/13/content_11175916.htm. (Retrieved June 27)
in government organizations. This policy is reemphasized by the Notice promulgated by the general office of the CCP Central Committee and the State Council on preventing leading cadres from interfering with judicial activities and handling specific cases, and by the SPC and SPP’s interpretations. The notice and interpretations are also regarded as a signal that the CPLC would put more efforts into policy making and leadership on judicial reform.

The CPLC has indeed gained momentum in judicial policy making since then. In particular, the CPLC and provincial PLCs began to offer advice on the design of judicial reform. It seems that the PLC adjusts its role back to the top design, focusing more on addressing major issues on the comprehensive (macro) level affecting the overall

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judiciary mechanism, such as the abolishment of labour and education, the Letter and Visits System, wrongful verdict cases, and clearing up executional cases.

The newly appointed senior officials in the CPLC also reflect this effort to better perform the policy making function, as they all have postgraduate legal degrees and rich experience in legal professions. For example, Wang Yongqing is the secretary of the CPLC and has a doctorate degree in law, and Xu Xianming is the associate director of the Comprehensive Management Office (CMO) and is a well-known law professor in China.

*How do the PLC’s Judicial Policies Work?*

Some of the judicial policies were co-issued with other government departments in the State Council and classified as departmental rules. Some were further mandated by the National People’s Congress, the courts, and the procuratorates and thus became

legislations, or were judicial interpretations that are regarded as law in practice.\textsuperscript{169} The other judicial policies are not law \emph{per se} but have authority in the courts, the procuratorates, and other legal institutions and are thus binding to the leaders and staff working in these judicial departments, and sometimes possess superior effectiveness than the laws themselves in administering judicial issues.\textsuperscript{170}

The approaches by which the PLC’s judicial policies gain legality depends on the nature of the issues regulated by the policy. For example, when the Party is advancing a particular policy and concerted actions of varied government departments are believed necessary, the PLC engages in policy making with other government departments. This was the case with the policy on campus safety which required the cooperation of the Department of Education and other judicial departments. These cases reflect the lack of the PLC’s authority in that without the support and assistance from government departments; the policies would become non-binding “gentlemen agreements.”\textsuperscript{171}

However, if the policy regulates the judicial department’s internal affairs specifically (such as the policy for the prevention of wrongful convictions), the PLC’s regulation may


\textsuperscript{170} Such as the speeches of the chairman of the CPLC on the different themed working conferences. Pkulaw database.

work alone or be further supported by the SPC or the SPP by issuing judicial interpretation.

Generally speaking, the PLC made judicial policy to give judicial departments new initiatives or guidance for their specific work. These judicial departments, such as the courts, the procuratorates, the public security departments and the justice departments, must implement the initiatives or mandates into their daily work by emphasizing more than legislation and other formal legal rules. Whether these judicial policies contradict formal legal rules or not, they do enjoy high priority as normative rules for the judges to consider when they decide cases. This reflects China’s political and legal strategy: governance by policy, rather than law.

I.4.2 Inter-institutional Coordination

The PLC’s role of inter-institutional coordination is meant to help create better and more efficient implementation of the Party’s initiatives and agendas. For example, in the “Severely Cracking Down on Crime (yanda)” movement, the courts, the procuratorates, and the police relied on the coordination of the PLC to avoid controversy when dealing with criminal cases to reach consensus easily and efficiently. Consensus mostly developed through negotiation and compromise between state organs through joint conferences and jointly issuing legal interpretations.
Indeed, the role of PLC’s inter-institutional coordination cannot be clearly separated from the PLC’s other two roles as a policy maker and law implementation supervisor. This is because some of the PLC’s coordination efforts produced policies, and sometimes the joint meeting in case adjudication was a type of the PLCs inter-institution coordination.

Therefore, rather than focus on PLC’s policy making coordination and case supervision coordination, which are also important and thus discussed in each separate part, the analysis in this part only investigates the PLC’s inter-institutional coordination in some types of the PLC’s work, such as the coordination of the PLC as representative of some or all of the judicial departments with the other government departments, the coordination in comprehensive social governance and social stability maintenance, and the coordination in personnel management.

*Coordination with Non-Judicial Departments*

The PLC conducts its role of coordination on the issues where the coordinated work is required with the other party or government departments outside the judicial departments.¹⁷² As the representative of the judicial departments, the PLC functions better than the individual judicial departments, like the courts and the procuratorates, to achieve better and more efficient outcomes when coordinating.

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¹⁷² Interviewee No. 14, see Appendix One.
For example, the PLC requires the coordination and support of the departments of social security and protection in cases of crime victims’ state compensation. The construction of the judicial departments’ workplaces also requires the approval and support from the Department of Construction and the Committee of Development and Reform. The problems of finance and personnel management in the courts and procuratorates must be resolved by coordinating with the personnel departments of the government and the Organization Department of the Party Committee. The PLC could even help the courts to execute its verdicts if the target of execution is related to other government departments. The courts and procuratorates would have difficulty dealing with these affairs without the coordination of the PLCs.

Coordination for Social Security

Since the PLC has a shared office with the newly established committees dealing with new political and legal affairs—including the Committee for Comprehensive Management of Public Security, the Leading Group of Maintaining Stability, and the Leading Group of Preventing and Resolving Cults (the 610 office)—its powers of inter-institutional coordination and leadership have been greatly enhanced. Because the offices of these committees and groups are within the PLC and the staff come from the PLC even though they have independent titles, the PLC has the authority to organize the relevant government branches (usually the membership departments) who have substantial law enforcement power to fulfill the Party’s initiatives on the administration of public
security and maintaining of social stability, such as social security management, road safety management, food safety, and social conflict resolution.

In particular, these Leading Groups focus on mass conflicts arising from issues such as rural land expropriation, urban demolition, medical disputes, environmental pollution, and “three rural” issues. Different from the courts’ dispute resolution, Leading Groups aim to coordinate different organizations to prevent the conflicts from happening. The local government offices in the village, town, and sub-district levels are equipped with at least one staff member to report to the Leading Groups’ upper level, which creates a vertical implementation framework.¹⁷³

The PLC has the authority to coordinate and supervise the other departments as long as they are within the PLC’s jurisdiction. For example, when I interviewed the judges in a district people’s court in Northeast China I stayed at the court the whole day, but the office of the administrative tribunals was empty as the judges were asked to participate in a joint meeting organized by the district’s PLC. The meeting’s purpose was to ask the staff from the various government departments to provide suggestions on government initiatives and debate some specific administrative actions—in this case, the demolition of urban resident buildings. The participants discussed, predicted, and evaluated the possible risks of such administrative behavior. The administrative judges were asked to provide advice on the potential legal risks for the government as a result of such administrative behavior.

¹⁷³ Interviewee No. 8, see Appendix One.
The PLC’s responsibility as coordinator regarding the management of social security and maintaining social stability were also recently further emphasized. In recent years, some new departments have been established to be responsible for social service and management,\textsuperscript{174} the heads of which are usually the heads of the local PLC. For example, the head of the Hainan PLC was made the head of the newly established “\textit{Qunzhong Gongzuobu} (Mass Work Group)” in 2011, which shares an office with the Department of Letters and Visits.\textsuperscript{175} While not unique, this has vested the PLC with more leverage to maintain social stability and security, which will be the PLC’s core responsibilities in the future.

\textit{Coordination of Personnel}

The third aspect of the PLC’s role as inter-institutional coordinator is its function in the recruitment and appointment of senior officers in the judicial departments. While Party documents charged the PLC with researching and establishing the political legal team and assisting the Party and the Organizational Department to investigate and supervise the heads of the political legal departments, the practicality of such mandates varies depending on the situation.

While some PLCs provide assistance in the recruitment process for senior civil servants in the courts, the procuratorates, and the public security departments, the CCP’s

\textsuperscript{174} Guangdong Provincial Social Work Committees; Lanzhou Municipal Social Service Management Bureau, supra note 137.

\textsuperscript{175} Ye Zhusheng, “Zhengfawei Ganshenme Zenmegan [Political-Legal Committee: what to do and how to do it]” (2012) 8 Nan Feng Chuang [South Reviews] at 43.
Organization Department has the final say. The PLC essentially has no power in recruiting judicial staff in any other department than its own.\textsuperscript{176} However, this function will be strengthened as the PLC begins to play its main role in the appraisal and discipline of judicial officials. For example, the CPLC has coordinated with the Department of Education to launch a mutual personnel exchange between university law schools and judicial departments such as courts, procuratorates, and justice departments.\textsuperscript{177} Also, the CPLC directed the judicial departments to learn from the role models of judges and procurators.\textsuperscript{178} On the other hand, the CPLC supervises by investigating and publicizing typical violations of discipline and law by legal and judicial officials (judges, prosecutors, officials in the justice departments, public security departments, and the courts and procuratorates).\textsuperscript{179} However, the PLC’s appraisal works more like a honor, and PLC’s discipline is supplement to the discipline of the CCP.

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\textsuperscript{177} This initiative, named “Double Thousands Plan (Shuangqian jihua)”, aims to promote the intelligent communication between legal academics and legal practitioners, by selecting 1000 law professors to work part-time in the courts or procuratorates, and 1000 judges and prosecutors to teach part-time in the law schools every year. Details see http://www.moe.edu.cn/publicfiles/business/htmlfiles/moe/s7056/201308/xxgk_155560.html. (Retrieved June 27, 2016).

\textsuperscript{178} Such as in March 2015, the CPLC gave notices to call on judicial officials to take inspiration from Zou Bihua, former deputy head of Shanghai Higher People’s Court and died at the age of 47. http://www.chinapeace.gov.cn/2015-03/03/content_11177666.htm. (Retrieved June 27, 2016).

\textsuperscript{179} Since 2014, the CPLC has announced to public four times with 51 cases in total. http://www.chinapeace.gov.cn/2015-02/13/content_11175916.htm (Retrieved June 27, 2016).
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I.4.3 Law Implementation Supervision

Since 1998, the PLC has been vested with the function to supervise the work of the courts, procuratorates, public security departments and other legal judicial departments. To be clear, Party supervision was only one of a range of supervisory methods, but when it went beyond general supervision and touched on individual case adjudication, it became a problem. The PLC’s intervention into case adjudication is controversial and seriously criticized as an inappropriate or abusive way to supervise law implementation and is the main cause for many wrongfully decided cases.\(^{180}\) While the CPLC’s leadership showed its determination to stop intervening into case adjudication, it is still worthwhile to look at this role as the PLC may be able to continue interfering in case adjudication as long as it is still mandated with supervising law implementation. Thus, PLC case intervention will be discussed in the context of the PLC as supervisor, as it is just one facet of the supervision of law implementation.

Division of Law Implementation

Case coordination is derived from the PLC’s role to supervise law implementation and is allegedly tasked with the various levels of the PLC’s internal division and named the

\(^{180}\) More and more scholars have been advocating for eliminating the role and function of the PLC played in the judiciary. Some extreme opinions acclaimed that the PLC should not exist at all. The milder one advocated that while the CPLC could be maintained playing the CCP’s leadership over the judicial institution by making plan and directions for the judicial work, the local PLCs, especially the prefectural and county level PLC should have been abolished, which are especially blamed for malpractice and wrongly decided cases. See Li Shaoping et al., “Zhuti Yantao: Shenhua Sifa Tizhi Gaige [Seminar on Deepening Judicial Reform]” (2013) 2 Huanqiu Falv Pinglun [Global Law Review] 5.
Division of Law Implementation, but in reality involves staffs from other branches. As the supervision category is quite broad, the PLC performs this function flexibly and, as such, the working mechanism varies greatly in practice.\footnote{181} Such vague regulation and huge power potential make abuse of power possible. Therefore, in this section, it is necessary to distinguish the acts of the PLC from the acts of PLC officials. In the past, some senior officials in the PLC made comments on individual cases to the president of the local courts and ended up influencing judicial adjudications by the power of internal bureaucratic authority.\footnote{182} Such comments were mostly made in the pursuit of individual interests, which certainly lacks legitimacy and is thus not investigated in the analysis of this section.

\textit{Working Mechanisms}

The PLC typically supervises judicial institutions using two mechanisms: supervising cases and coordinating cases.\footnote{183} With both mechanisms, the cases come under the PLC’s jurisdiction via three avenues: the higher party committee, senior party leaders, or the PLC itself. In the last avenue, the Party committee or judicial institutions of the same

\footnote{181} See the working mechanism of the PLCs in the provincial level in Hunan and Gansu: \url{http://www.jinchangpeace.gov.cn/study/110.html}; \url{http://www.360doc.com/content/13/0710/22/40066_299049931.shtml}. Also the PLC in countryside: \url{http://www.gxzs.gov.cn/Item/53821.aspx}.

\footnote{182} The CPLC has publicly announced five model cases on leadership interference with the judicial process. \url{http://www.chinapeace.gov.cn/2015-11/06/content_11279300.htm} (Retrieved on Nov. 6, 2015)

\footnote{183} This PLC’s function is widely discussed by the PLC in the provincial level and below, and barely mentioned by the CPLC. Li Xianwei, “Zhengfawei De Jibie Yu Ge’an Xietiao Chayi Yanjiu [The Level of PLC and Its Difference of Coordinating Individual Case]” (2011) 118:4 Journal of Shandong Police College 62.
level request the PLC to handle cases with huge influence in the area or ones that are highly controversial among the various judicial institutions, and ordinary people petition of the PLC to handle the cases that are rejected or delayed by the judicial institutions.

In terms of the types of cases, the PLCs supervise or coordinate cases involving senior officials’ duty-related crimes, organized crimes, and other crimes that have had major influence in the local regions. In general, most of the cases have a great impact on social stability and economic development, which are certainly the local party’s main concerns, and if they are not resolved well, the cases could trigger a disturbance in the party’s governance. The other category involves the cases controversially debated among the courts, the procuratorates, and the public security departments. The PLC makes effort to coordinate all three to reach a consensus on how a case is decided, which to some extent reflects the supremacy of PLC over all the judicial institutions.

The mechanisms the PLC in case supervision or coordination vary greatly depending on the region.\textsuperscript{184} The PLC can designate judicial institutions of the same level or lower levels to handle case supervision, or organize the investigation directly. Direct investigations are criticized as the PLC can thus access all documents pertaining to individual cases. With regard to case coordination, the PLC typically organizes three different kinds of joint meetings: meetings between PLC heads and staff only; meetings between heads or deputy heads of the courts involved, procuratorates, and security departments (\textit{da san zhang}); and meetings between the judges, prosecutors and police

\textsuperscript{184} Interviewee No. 2, see Appendix One.
dealing directly with the cases (xiao san zhang). Meetings between the heads of the judicial institutions have had the most harmful influence over the fair adjudication as the judges, prosecutors, and other staff who hear the cases and are responsible for the outcomes of cases do not have a say during the coordination process. Because the joint meetings on controversial cases have resulted in a number of wrongfully decided cases, it is worthwhile to investigate them a little further.

*Joint Meetings*

In the early days of the PRC, it was routine to hold joint meetings to adjudicate criminal cases, and while the Public Security Department had dominance in the adjudication of criminal cases, other judicial institutions did not have much experience and therefore did not function well.\(^{185}\) With the rebuilt of PLC in 1980 chaired by Peng Zhen, the joint meeting mechanism was imbedded in its practice and prevailed in the early 1980s as a more efficient and convenient way to combat crime in the “Strike Hard” campaign.\(^{186}\)

The typical procedure of a joint meeting for a controversial case is as follows: One or more of the judicial departments, courts, procuratorates, or public security departments submit an application to the PLC to review a controversial case. The PLC invites the

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other judicial departments involved to attend a joint meeting. Out of the joint meeting a primary position is proposed and circulated to the relevant participating judicial departments to be used only as a reference for case adjudication and is not permitted to be cited in legal documents. If any judicial department holds divergent opinions or the cases are simply too controversial to reach an agreement, the PLC does not come to a decision but rather prompts the judicial institutions to report to the higher authority. The PLC itself does not have the authority to persuade or force any party to give in.

Whether a unanimous decision can be reached depends on the prevailing political atmosphere, the relative political status of the PLC chairman, and the bargaining power of the institutions involved in the dispute. Sometimes, a coordinated opinion is reached as a result of subordinating to the political authority in the bureaucracy, especially when the head of the PLC—who enjoys more political power over the others—attends the joint meeting. Therefore, the joint meeting is a negotiation and balance of political authority and power.

*Why did the joint meetings produce wrongfully decided cases?*

First, the cases that the PLC coordinated in joint meetings were largely complicated and controversial and garnered much public attention. The public put great pressure on the

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PLC to reach a decision effectively and correctly, which was difficult because such cases usually lacked enough evidence or presented a controversial understanding of the law.

Secondly, the PLC, as a Party organ, tended to prioritize the general public’s satisfaction over the unified application of legal rules. Influenced by the obsolete judicial policies “hit crime seriously” and “don’t let any suspected evil get away”, the head of the local PLC typically held concurrent positions as head of the Public Security Department, who would prioritize his own departments’ interests, and thus tended to order the courts and procuratorates to coordinate the work of the Public Security Department. The Public Security Department preferred finding the criminals to respecting the legal procedure of the rule of law. The ignorance of procedural justice in investigation made it easier to wrongfully decide a case.

Thirdly, the PLC’s less competent staff lacked legal expertise. PLC staff are usually not law school graduates and are more politically reliable than legally capable. While the cases were efficiently decided, the PLC’s coordination greatly sacrificed procedural justice and produced many injustices. The PLC’s intervention prioritized the outcome of

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188 It was common practice from 2003 to 2010 that the heads of local PLC and the heads of local public security departments are appointed to the same person, which was driven by the internal desire of empowerment of both the public security department and the PLC. As an institution lack of substantial power, the PLC needs the police’s power to secure its political status; at the same time, the police also find the title of PLC beneficial when in need of the coordination of the other judicial departments. However, since 2010, this personnel arrangement has been greatly cancelled, and after the 18th party plenary in 2012, it has quitted in most regions. See: “Bei Xietiao De Zhengyi [The Coordinated Justice]” (March 25, 2010) Chinese News Weekly, online: http://news.sina.com.cn/c/sd/2010-03-25/135619939867.shtml (Retrieved in June 16 2016).
the cases rather than procedural justice and also undermined the mutual supervision of every department involved in each case. Also, because the decision was made collectively, it was more difficult to hold anyone responsible for wrongdoings if the case was wrongfully decided.

Recently, the PLC has made efforts to stop intervening into the adjudication of individual cases. In 2005, Luo Gan, the head of the CPLC, required that the township PLC not coordinate cases except for those concerning state security and social stability.\textsuperscript{189} At the national PLC annual meeting on January 7, 2013, Chairman Meng Jianzhu requested the heads of the lower-level PLCs to stop making written comments on individual cases and let the judiciary do their jobs independently.\textsuperscript{190} On November 12, 2013, when the SPC issued the “Opinions on Establishing and Improving the Working Mechanisms for the Prevention of Miscarriages of Justice in Criminal Cases”, it was reported by the media that the PLC would not intervene in individual case adjudication except in special cases involving foreign and military affairs.\textsuperscript{191} More robust empirical research would be required to evaluate the decrease of PLC’s actual influence.

\textsuperscript{190} Qian Haoping, “Zhengfawei Zhanxing Yinian [The One Year of PLC in Transition]” (Jan. 17, 2014) Southern Weekend, online: http://www.infzm.com/content/97558 (June 27, 2016).
\textsuperscript{191} Xing Bingyin, “zhongyang zhengfawei zhineng zhuanxing, tuoli ge’an ganyu secai zhuzhua zhengfa duiwu jianshe [The Function Shift of Central PLC, Stopping the Individual Case Intervention, Constructing the Judicial and Legal Team]” (Jan. 21, 2016) The Paper, online: http://www.thepaper.cn/newsDetail_forward_1423017 (Nov. 7, 2016).
However, things will not change much as long as the PLC still has the power to supervise or coordinate law implementation among judges and prosecutors. It is impossible for the PLC to directly intervene the everyday work of the judicial departments. However, alternative approaches may be adopted cautiously by the PLC to resolve some type of cases such as the PLC makes relevant judicial policy for addressing some type of cases, or puts greater emphasis on the supervision of the Party members in the judicial departments.

I.5 Conclusions

This chapter focuses on the PLC’s institutional change and evolving functions to investigate the PLC’s influence on the adjudication of judges and the institutional reform of the courts. The findings are concluded as below.

I.5.1 PLC’s Influence over Courts

The PLC was severely criticized with its dominant leadership and unchecked intervention in the adjudication of courts, which caused a great number of wrongfully decided cases. However, the investigation finds that the PLC’s intervention in the courts was limited.

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192 The CPLC has coordinated the judicial departments working with the other government departments to make policies and strengthen the law implementation of offenses regarding the environmental pollution, food safety and Juvenile delinquency.
Firstly, the PLC used to be only intervene in the cases by two mechanisms: joint meetings and case supervisions. While many high profile cases were acclaimed to be decided by the joint meetings, the PLC worked mostly as a coordinator rather than the decision maker at these meetings. The joint meeting was actually a negotiation and balance of political authority and power, and the wrongly decided cases were produced by a complex set of reasons. Besides, the PLC’s power to supervise cases was regulated very vaguely, and implemented less effectively in practice. As to the case supervision, it was very difficult for the PLC’s staff who lacked legal expertise and capacity to control judges to supervise the cases adjudicated by the professionalized judges with increasing legal expertise.

Secondly, while severely criticized for its “apparent” leadership over the courts, procuratorates and other judicial departments, many of the local PLCs are weak institutions with less authority and resources to lead. As the power of the PLC heavily relies on the authority and competence of its head, the local PLCs, especially in the county level, without a strong leader, are easily distanced from the central local political power. The local PLCs are commonly called “the least profitable government office (qingshui yamen).” Any ambitious politician would prefer courts, procuratorates, and public security departments over the PLC, which makes the PLC merely a place to retire. Furthermore, the recent reform has forbidden the PLC to directly influence the individual cases. Thus the PLC’s direct interfere in the adjudication of the courts has become the history.

193 Interviewee No. 14. See Appendix.
Actually, as a coordinator in the fragmented political context in China, the PLC has played an important role in the institutional building of the courts, assisting them to gain more power and authority.

Firstly, some of the judicial policies made by the PLC help the courts and judges gain more authority and independence, which has been particularly obvious in the recent round of judicial reform. All the reform measures proposed by the pilot projects in the pilot courts must submit to and be approved by the provincial PLCs. As many of the pilot projects especially regarding personnel and financial reforms, need the support and coordination of the other government branches, with the endorsement of the PLC, they would be valued more and supported easily.

Also, the PLC’s coordination in the many projects of maintaining social security and stability prevent the happening of “massive conflicts,” which used to be most difficult cases for the courts to handle. Thus the PLC’s efforts in this regard obviously reduced the courts’ pressure in the cases with high publicity. Finally, the PLC’s supervision of law implementation may expose the misconducts of judges such as corruptions, which is essential for the development of judicial profession.

I.5.2 The Rule of Policy

The PLC is not a powerful institution within the Party, compared to other judicial departments. The PLC’s empowerment existed for only a short period of time, and even
at its peak, its power was still constrained by its inherent deficiencies—the vagueness and constant changes of policies upon which the PLC builds up its legitimacy and extend its functions.

This dilemma reflects the dynamics between the policies of the Party and the laws of the State. The policies of the CCP usually regulate the organizations and activities of the Party and the rights and obligations of Party members. Due to the CCP’s leadership in the Party-state, the policies of the Party are sometimes implicitly binding to the administration of state affairs, such as state laws. The policy is sometimes preferred as a governance strategy especially when the Party-state eagers to implement some administrative agendas because of its ease to make and flexibility to change.

However, the Party policies are not as normative as state law, which creates the gaps between rules and rule applications. The constant changing of Party policies makes applications more difficult, which is prominent in the case of the PLC. As an originally marginalized and constantly changing Party organ, the PLC’s responsibilities have always been vaguely defined and thus lack the criteria of guidance, which certainly prevents the PLC from claiming its power confidently among the other judicial departments with substantial and legitimate power.

The vagueness of norms also leads to the PLC’s divergent performance on different administrative levels and regions in practice, especially in the local levels where such vagueness makes it easier for the local PLC to cross boundaries, abuse its power, or
further damage the PLC’s authority and competency. That also partly caused the phenomena that the head of the local PLC is the key actor to determine the power and influence of PLC in the local political economy.\footnote{Zhan Peng, 	extit{Zhengfawei Shuji} [the chairman of PLC] (Kunming: Yunan Renmin Chubanshe, 2009).} This conflict between the vaguely expressed Party rules and the need for precise application is difficult to resolve in China’s two current normative systems.

\section*{I.5.3 Dynamic between the Party and Courts}

It is beyond question that the CCP has monopolistic power in China, which has attracted many attacks and been perceived as the root of all social ills in China.\footnote{Fu Hualing, “Politicized Challenges, Depoliticized Responses: Political Monitoring in China’s Transitions” (April 12, 2013) University of Hong Kong Faculty of Law Research Paper No. 2013/014. Available at SSRN: http://ssrn.com/abstract=2250073 or http://dx.doi.org/10.2139/ssrn.2250073, at 28.} The advocating for rule of law and institutional reform of the Chinese judiciary in the last two decades of the twentieth century was one of the CCP’s efforts to address this legitimacy crisis by depoliticizing political control and developing an apolitical and non-ideological control mechanism.\footnote{Ibid, at 9.} However, Fearful of losing control of the increasingly independent and powerful court, the CCP tried to enhance and empower the PLC to keep effective control of the judiciary, which created the golden era of the PLC.

While the PLC went beyond its purview and interfered into the adjudication of the judiciary, the CCP faces a legitimacy crisis once again. These difficulties forced the Party
to change its strategy and shift its attention from solving the conflicts to preventing the conflicts (from crime execution to crime prevention). The recent functions that the PLC has been developing demonstrate the shift of this ideology, as the PLC—especially the local one—strives to establish grass-root systems to investigate the issues that tend to trigger social security concerns or social conflicts. The concept of social service and management has been gradually established. The PLC’s functional shift, combined with the courts’ recent reforms, could create a new dynamic between the PLC and the courts.

However, without the influence of the PLC into the adjudication of the courts, the Party’s influence of the courts is still possible, with other mechanism to lead the courts. The PLC is only one of many apparatuses through which the Party achieves its governance, including intervening or controlling judicial institutions. In fact, judicial institutions could report to the Party committee at the respective level and the members of the Party’s standing committee can mark or comment and therefore intervene into specific judicial affairs. Regarding the adjudication of cases in courts, as most of the judges are Party members, who have to obey to Party rules, it is possible for the Party to influence the cases if needed. However, compared to the PLC’s previous explicit intervention, these mechanisms have to comply with the normative rules regulating the judicial decision making, if the Party wants to avoid the legitimacy crisis again, and thus work more implicitly and are hardly detected, which would be uncovered by investigating the other influences of the courts in the following chapters.
Chapter III Media and Courts

I.1 Introduction

Chinese courts are called “people’s courts” and the SPC has always explicitly endorsed the idea that “judicial power comes from the people, belongs to the people and serves the people.”197 This self-image appears to contradict the general perception that the courts always surrender to the Party’s leadership, on the one hand, and on the other hand, “people’s court” sometimes makes the judges vulnerable to the people,198 and thus undermines the autonomy of the courts if the courts indeed “serve the people” instead of the law. Thus, an investigation on the influence of the public on the courts is not only plausible to understand the autonomy of Chinese courts, but also helps to further decipher the Party’s influence in the courts from another perspective.

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198 See especially Li Changkui Case, where the courts surrendered to media’s opinion and changed the previous suspended death penalty to death and executed immediately. For media discussion on Li Changkui Case, see “Killer’s case and death penalty dilemmas in China”, http://deathpenaltynews.blogspot.com/2011/08/killers-case-and-death-penalty-dilemmas.html#ixzz3t0luuQmB; “Moving the Mountain: China’s Struggle for Death Penalty Reform”, http://www.duihuahrjournal.org/2011/08/moving-mountain-chinas-struggle-for.html. (Retrieved on Nov. 20, 2015).
I.1.1 Puzzle in Reality

Chinese courts have actively embraced the monitoring from the media and the public. “Justice for the people” (sifa weimin) is not only imbedded in the populist legacy which has a long history in China, but has also been established as the most important principle guiding the adjudication of judges since 2003. Since then, the SPC has made a range of judicial policies to require or encourage the local courts to make institutional innovations that make the courts transparent, which would help the media and the public monitor trials and verdicts.

However, how do the judges feel about the “justice for the people” policy and the SPC fully embracing the people’s monitoring? The empirical data have shown a contradictory viewpoint. Judges complain that because of the “justice for the people” policy, they not only have to decide cases according to law, but must also ensure that the litigation

party—the ordinary people—are satisfied with the judgment, which creates a huge workload and extra pressure for the judges to decide cases.\textsuperscript{202} It is not unusual that judges encounter the intimidation or harassment from the litigation parties who are simply not happy with the verdicts made by the judges.\textsuperscript{203} The judges often claim that they have no resources to resort to stop these kind of behaviors.\textsuperscript{204}

Contrary to the SPC’s engagement with the media, most of the judges claim that media reports have no direct influence on their decision making process, and most of them even express their hostility toward journalists as they consider them as trouble makers.\textsuperscript{205} However, they have behaved self-contradictorily to the media’s monitoring in various circumstances. They rarely take the media’s coverage seriously when it comes to ordinary cases with low publicity. However, if a case has gained overwhelming media coverage and become a “high profile” case, the judges typically change their attitudes, carefully consider the media’s perspectives, and produce judicial decisions in a strategic way.\textsuperscript{206}

\textsuperscript{202} Most of the judges complained about this in the civil tribunal. Interviewee No. 5, No. 22. See Appendix.

\textsuperscript{203} A judge told me that he had to sneak into and out of the courthouse from the side entrance every day to avoid confronting the unsatisfied litigation party, and this lasted for half a year. Interviewee No. 15. See Appendix.

\textsuperscript{204} The judges in such situations complained that they have to personally take on the harassment and cannot get any substantive support beyond consolation or leverage, either in the legal framework or from the courts’ administrative authority. Interviewee No. 13. See Appendix.

\textsuperscript{205} Interviewee No. 1, No. 4. See Appendix.

\textsuperscript{206} Interviewee No. 5, No.7, No.10, No. 11, No. 15 and No. 18. See Appendix One.
Why is there such huge disparity between the individual judges’ attitudes and the ideology of the SPC on their views of “justice for people” and the media’s monitoring of the courts? What is the normative or institutional structure for the people or media to participate in the judges’ adjudication? Has the media ever influenced judges’ adjudication in the courts? If so, how does that work? Why does it happen? How do judges respond to the particular public opinion channeled by the media? How do judges decide cases to ensure justice according to the law and for the people? These are the questions this chapter will attempt to answer.

I.1.2 The Public, Media, and Courts

This section will investigate the relationship between the public, media, and courts in different types of regimes, as well as in the Chinese context.

The media’s role as the speaker of the public is debated, and in some cases, the media is even criticized as an evil that manipulates the public for some special interests. It is important to clarify that the media represents only one channel through which the public can express an opinion, and thus the media’s voice could not equal to public opinion. However, as public opinion depends on certain mechanisms (the media being an important one) to express viewpoints, it is argued that the media truly matters in

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representing public opinion in a society\textsuperscript{208} and plays an increasingly pivotal role in promoting good governance.\textsuperscript{209}

Particularly when facing an independent institutionalized actor such as the court which involves a lot of public interest, the media, as another institutional actor, has more power to act as a watchdog and an advocate compared to other non-institutionalized channels of public opinion. The media has been called the handmaiden of justice, the watchdog of the judiciary, the dispenser of justice, and the catalyst for social reform.\textsuperscript{210} Media’s coverage enhances the publicity of court proceedings, which helps ensure that people are given a fair trial. Media’s coverage also helps maintain public confidence in the judiciary and thus increases the legitimacy and effectiveness of a state’s formal social control apparatus.\textsuperscript{211} Thus, taking the media as an example to comprehend the interplay between the public and the court is still viable, while recognizing its limitations.

Such limitations are more controversial when investigating the media’s role as a public opinion channel in authoritarian regimes. Due to the traditional belief that the mass media plays an important role in regime change (such as “destabilizing authoritarian regimes” and at least contributing to “a sociocultural framework” favourable to liberal

\textsuperscript{211} Wu, Yuning, “Race/Ethnicity and perceptions of the police: A comparison of White, Black, Asian, and Hispanic Americans” (2014) 24 Policing & Society, 135
democracy), authoritarian regimes tend to restrict media freedom so that citizens cannot gain access to information that may turn them against the regime. However, the marketization of traditional media and the rise of new media (such as the internet and online social networks) have made rigid control increasingly difficult. The media has more free space, as media is acclaimed for building up “sustained authoritarianism” or “authoritarian resilience” and thus help stabilize the regime and proactively transform society to fit the authoritarian’s purpose.

I.1.3 Media in China

The Chinese media used to be a complete propaganda organ of the Party–state as the “voice of the Party.” From the 1950s to the 1970s, the state subsidized all media operations and it was held that “news is not the latest report of an event, rather it is any

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214 While many observers argue that the rise of new media creates difficulties for state information control, some studies find a mixed effect of new media usage on political awareness, depending on certain circumstances. Ibid. at 20.
information that can be used to build socialism." At that time, it was extremely controversial to argue that the Chinese media could represent public opinion in China. As institutional actors completely subject to the CCP’s leadership, the media and the courts function in the same direction and with the same interests: to bend public opinion toward the CCP’s agenda. However, with the commercialization of traditional media and the growth of new media, the political control of the media does not seem to represent the whole story in China.

Since the early 1980s to mid-90s, to address the shortage of subsidies from the state, the media has relied on multiple revenues to make up the gap, known as the “multi-channel financing” policy. The Chinese government prevented a complete privatization of the media by maintaining legal ownership over media and telecommunication infrastructures, while granting rights to managers and private investors to make use of media resources to generate profits. The Chinese media has undergone a steady process of change over the years, remolded by market forces.

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218 However, with the growth of new media (internet) and diversification of traditional media, the CCP’s political control is constrained to definite fields whose importance is valued by the CCP. See Benjamin L. Liebman, “A Populist Threat to China’s Courts?” in Woo & Gallagher eds, Chinese Justice: Civil Dispute Resolution in Contemporary China (Cambridge University Press, 2011).
Despite governmentally monopolistic control of the state media and strict news censorship, the media has become more commercialized and decentralized in present China. There is a growing number of television programs, newspaper reports, investigative internet articles, crime and corruption exposés, and criticisms of social injustice and other serious social issues, including police and judiciary misconduct.  

China has also witnessed the rapid growth of the internet. The number of people using the internet reached 668 million in 2015. The increased use of social media by netizens has created an unprecedented platform to facilitate a dialogue between users and allow people to communicate and share content in a social setting. Furthermore, rapid dissemination of information makes it difficult for authorities to restrict coverage of sensitive stories.

From the 1990s to the beginning of this century, investigative journalism made tremendous progress and made the media an empowered institution that allowed the people to voice opinions on every aspect of Chinese society and politics, which included the Chinese courts. This period of around fifteen years was called the “golden period

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of journalism.” This golden period constitutes the background for the dynamic between the media and the courts. While the reason for this loosening is debatable, this investigation on the outburst of the media’s influence on the courts could still shed light on the dynamics between the public and the media, since the Chinese media during that period became an effective channel for the public to express opinions, even under censorship. Most of the cases studied in this chapter are based on cases that took place during this period of time.

When evaluating the Chinese media’s flourishing growth in the “golden years” in the state–society context, two types of opinions stand out. Some argue that the media plays the role of a means of social mobilization adopted by ordinary people, touching on the dynamic between public opinion and political change. They believe that China’s transition to democracy can be activated by force from the root level, and thus the media plays a prominent role in leading social and political change.


During the golden years, the Party line was the prerequisite for the very existence of the media, and Chinese media in the post-Mao era can be characterized as “economic liberation without political democratization.” The media policies in China “[go] back and forth, testing the line, knowing they need press freedom and the information it provides, but worried about opening the door of the type of freedoms that could lead to the regime’s downfall.”

Others, however, argue that the media still functions as the mouthpiece of the Party–state. It is even argued that market-driven media is not democratizing forces at all, but has actually been harnessed by the Party–state as an even more effective means of controlling public debate and securing regime stability in China. The boom in investigative reports was implicitly tolerated and even supported by the ruling party, as it was expected to be the eyes and weapons for the Party to find loopholes and constrain the local officials’ administrative abusive discretion, misconduct, and illegal behaviour.

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The recent tightening in media censorship in China that started in the first decade of the 21st century seems to confirm this approach, just as the relaxation of censorship and the blooming of the media earlier was the CCP’s deliberate governance strategy. In addition, the media–court relationship represents “competitive supervision” that is fully controlled by the CCP and results in greater control of the CCP.

Thus, a nuanced analysis of the media’s influence in the adjudication of Chinese courts may provide a case study for investigating the media’s role as a channel of to convey parts of the public opinion or the Party’s mouth and eyes. What are the dynamics among the Party, the people, and the courts? This research adds to the discussion of the public, the media, and the courts by investigating the media’s influence on judges’ adjudication in China. In addition to an analysis of judges’ adjudicative behaviour, this chapter also explores the dynamics of the media and the courts as institutional actors in the Party–state.

I.1.4 Map of Research

This chapter examines the media’s coverage of the courts and explores its implications for the public’s perception of the courts and governance in China’s authoritarian regime.

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Specifically, it investigates the following areas: 1) The international conceptual framework of the courts and the media; 2) The constitutional and legal framework of the courts and the media in China; 3) The operational function of the courts and the media in China.

Research on the conditions, mechanisms, and outcomes of the media’s influence over the courts, especially its role in judges’ decision making in Chinese context are not prevalent. The existing research is either too general or located in a specialized circumstance. For example, some research contextualizes public opinion only in the area of criminal justice in China.233 Some research only emphasizes the Chinese internet, evaluating its potential for creating new forms of civic activism and social–political change.234 Thus, a full investigation on media coverage of the courts—either traditional or novel media—is necessary for a comprehensive analysis of the media’s role in the institutional changes of Chinese courts and judges, and the prospect of political change.

Before the discussion, several points are in need of particular clarification and restriction. First, the use of “media” in this chapter is restricted to the mass media—that is, covering not only traditional media (print and broadcast) but also new media (internet). It is a combination of huge divergence and diversity, but as this chapter still takes the courts as

its primary examination target and the multiple media outlets all play a role in the court’s judicial decision making, this chapter uses the media in the most comprehensive sense. Second, as the relationship between the media and the courts is quite broad and complicated, the discussion in this chapter is constrained to the media’s influence over individual cases decided by the courts. Finally, the media in China suffers from many problems such as corruption and biased reporting, which cannot be ignored but are not discussed in this chapter.\textsuperscript{235}

Furthermore, it should be recognized that public opinion can be informed to the courts through other important channels in China, such as having people assessors who engage in trial procedures, as well as the Letter and Visits System (xinfang) and other formal and informal platforms whereby the courts can hear from the people (themed roundtable discussions and seminars). However, compared to the media (which initiated the idea of court supervision, to which the courts responded passively), these other channels embrace public opinion more by actively incorporating public opinion into trials. While also important, research on these other channels may exhibit fewer dynamics than the media, and is thus beyond the exploration of this chapter.

\textsuperscript{235} This is the saying for the phenomenon that journalists write biased reports for payment: “It is better to hire a journalist than to hire a lawyer.” Benjamin L. Liebman, “Toward Competitive Supervision? The Media and the Courts” (2011) 208 CHINA Q 833 at 841.
I.2 International Norms of Courts and Media

Chinese legal scholars usually take the media’s role as a positive way for the public to monitor the system, but also as a negative in that the public’s intervention in trial proceedings could harm the judges’ abilities to decide cases independently. These two discourses exhibit some Chinese characteristics when compared to the international conceptual framework of the courts and the media, which involves a right discourse and functional approach.

I.2.1 The Rights Discourse

In legal discourse, the media–court relationship is often framed as a conflict of two basic human rights: the right to a fair trial and the right of free expression. Media monitoring derives from the right of free expression and plays an important role in protecting the right to a fair trial. However, unbounded media monitoring can jeopardize the right to a fair trial.

The right to a fair trial and the right of free expression are both identified as the basic principle of international human rights. One of the most important functions of an independent judiciary is to ensure the right to a fair trial. This obligation is enshrined in the 1985 UN Basic Principles on the Independence of the Judiciary, Article 6 of which states that the judiciary is entitled and required “to ensure that judicial proceedings are
conducted fairly and that the rights of the parties are respected.”\textsuperscript{236} The principles outlined in this article are also stated in similar language in the International Covenant on Civil and Political Rights (ICCPR),\textsuperscript{237} which provides that “everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal” in the determination of any criminal charge or in a suit at law.\textsuperscript{238}

Article 19 of the ICCPR confirms that freedom of expression is also a fundamental part of a democratic society. It elaborates on the idea that freedom of expression includes the freedom of the press and states that “everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.” It seems clear that this right as expressed would include an individual’s right, including that of a media employee, to impart information to the public via broadcast or print.

Generally, these two rights co-exist peacefully. The media uses its right to freedom of expression via comments on judicial issues, which ensures that people are given a fair trial. The media’s critical scrutiny increases the transparency of the judicial process and the accountability of the judicial power by monitoring judicial performance, limiting the

exercise of judicial discretion, and avoiding judicial misconduct and corruption. All these factors contribute to the fairness of trials. The media’s role as watchdog could also generate a mutually beneficial relationship between the media and the courts with regard to maintaining the public’s confidence in the judiciary and the media. “Without a free press, fair trials would be impossible and without fair trials, a free press would be impossible.”

Even as some judges hold resentment toward the media out of concern for the media’s potential ignorance and disrespect for the law, the media’s monitoring plays a positive role in developing an independent and accountable judiciary.

However, when the media cross a boundary and jeopardize the right to a fair trial for the parties involved, a conflict between the two rights is provoked. For instance, the media’s overwhelming and partial coverage of a criminal case before, and in the midst of, a trial can influence the jury’s attitude and therefore endanger the right to a fair trial.

Thus a clear-cut boundary between the media and the courts is in high demand. “Interests may sometimes be competing, but they do not need to be incompatible.” First, the right of free expression should be subject to certain limitations when applied in a public court trial.

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240 The freedom of speech and media are in some circumstances under no protection or limited protection, such as the speech of obscenity, or “fighting words”. See Kathleen Ann Ruane, “Freedom of Speech and Press: Exceptions to the First Amendment” (September 8 2014) CRS Report for Congress, online: https://www.fas.org/sgp/crs/misc/95-815.pdf; Libel and Slander Act, RSBC 1996, c 263. However, this kind of censorship of free speech and media is beyond the discussion of
absolute and that certain limitations on public access are necessary. Article 14(1) of the ICCPR provides that “the Press and the public may be excluded from all or part of a trial for reasons of morals, public order (or public) or national security in a democratic society, or when the interests of the private lives of the Parties so requires, or to the extent necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”

In the US, the court usually restricts the press out of certain specific concerns. First, pre-trial publication of information could bias potential jurors. Second, the publication of material the court has ruled inadmissible as evidence could come to the jury’s attention. Third, broadcast media could disturb the dignity and decorum of the court in a way that could affect trial fairness. Finally, there is concern about invasion of privacy.\(^{241}\)

Also, a consensus approach has been apparent in efforts by the bar, the bench, and the media to fashion rules and guidelines governing the release and dissemination of potentially prejudicial information.\(^{242}\) Realizing that media isolation results from judicial detachment, the courts have initiated some changes to leverage the media–court relationship. For instance, the judiciary in some European countries has launched


education programs for journalists, which aims to inform them about the judiciary and media law. The goal there is to grow respect for the judiciary from the media.\textsuperscript{243}

\subsection*{I.2.2 The Functional Approach}

The media and the courts are institutional actors in state-society dynamics.\textsuperscript{244} It is widely argued that it is an important task for the news media to cover the courts for several reasons. First, the judiciary is one of the three branches of the government, thus coverage of the courts fulfills part of the media’s watchdog function. Second, there is a great deal of public interest in what the courts do, particularly in criminal cases. The media is regarded as the channel for public opinion to get involved in court decisions, though this role is highly controversial.\textsuperscript{245} The media sometimes intrudes too much, and has now

\textsuperscript{243} In Finland they tried to launch a similar programme for journalists but there the journalists were very reluctant to participate in education programmes organized by the judiciary. The journalists are afraid they would lose their independence when they participated in an education programme organized by the judiciary. ENCJ working group, “Report of the ENCJ Working Group Judiciary and the Media” (2007), online: http://www.csm.it/ENCJ/pdf/RelazioneFinaleJudiciaryAndTheMedia-EN.pdf. (Retrieved June 16, 2016).

\textsuperscript{244} Structural Functionalism sees society as a complex system whose parts work together to promote solidarity and stability. See Gerber Macionis, Sociology 7\textsuperscript{th} Canadian Ed (Pearson Canada Inc., 2010).

\textsuperscript{245} There are three perspectives on this: First, the “no” perspective, which believes that assessment of public opinion is essentially a legislative, not a judicial, function. Nothing is more likely to undermine public confidence in judicial independence and impartiality than the idea that judges seek popularity or fear unpopularity. Second, the “non determinate” perspective believes that while courts do not have to reflect public opinion, they must not disregard it; it acknowledges that courts cannot just decide in total disregard of the circumstances around them. The last is the “determinative” perspective. See, Bob Rawlings Onghetich, “The Role of Public Opinion in Judicial Decision Making” http://bobrollings.blogspot.ca/2009/11/role-of-public-opinion-in-judicial.html (Retrieved on March 26, 2016).
been reincarnated into a public court which has started interfering in court proceedings so much that it pronounces its own verdicts even before the court does.\textsuperscript{246}

Due to the journalists’ lack of sufficient knowledge and professional ethic, the judges and journalists are often speaking different languages.\textsuperscript{247} The US Supreme Court’s internal motivations when dealing with the media create a barrier that often inhibits media scrutiny. These motivations include preserving public deference by restricting the media’s inquiry to opinions, downplaying individual differences among the Justices, and depicting the court as being guided by precedent rather than personal agenda.\textsuperscript{248}

As an independent institutional actor, the courts enjoy autonomy from other state institutions. For their part, the judges, as non-elected professionals, do not have to care about public opinion directly. However, even in democratic countries, courts and judges often take the media quite seriously.

The reason they often take the media seriously may be because courts are required to follow changes in public opinion. While judges are not directly elected by the public,

public opinion may influence which judges are nominated and confirmed.\textsuperscript{249} Furthermore, justices may care about public opinion for a host of reasons that can conveniently be labeled under the rubric “institutional legitimacy.” The implementation of court decisions may rely to some extent on voluntary cooperation from the other institutional actors whose survival depends on public opinion.\textsuperscript{250} This is probably more pronounced in settings where the court’s authority is less well established.\textsuperscript{251}

In a democratic society, it is widely recognized that a court system should operate fairly, be open to all, and function efficiently and effectively. Social media could be a useful means of both making courts more accessible and ensuring that they are responsive to the needs of users. Social media may perform an educative function and promote the general public understanding of court processes. Social media may also increase the transparency of court processes. Finally, social media may provide courts with a voice and an opportunity to counteract adverse media coverage. In all, social media can help to reaffirm public confidence in the legal system by assisting courts to build more personal relationships with individuals, thereby showing a more “human” side to the judicial system.

However, courts’ closeness with the media is accompanied by a number of challenges and hazards. First, the courts need to operate with a degree of detachment to preserve their authority. Engaging with the public through the media may reduce this detachment, thereby undermining the courts’ integrity. Second, engaging with social media may expose the courts to criticism or jeopardize the due administration of justice. Third, the use of social media may raise issues of access, equity, and technical literacy among the general population. The courts should consider the release of information to be assessed by all the expected receivers.

From the above analysis, the rights debate reflects the inherent conflict between the media and the court in their purpose to serve different interests, which requires great effort to clarify the boundary. The function debate reflects the cooperative and competing relationship between the media and the court as institutional actors, which also requires striking a balance.

I.3 Chinese Norms of Courts and Media

It is commonly acknowledged that the media and the courts develop an inherent dynamic in Western democratic counties. In authoritative countries like China, the relationship between the media and the courts takes on some distinctive characteristics that exist in doctrinal legal norms and functional approaches and have been shifting quickly when the

media and courts have undergone huge change and development. This section will first explore the relationship between the media and the court in the legal framework of the PRC.

When investigating China’s legal norms in the media’s monitoring of the court, it is natural in a civil law country to look for the legislations that have a specific focus on media regulations, such as media law, media monitoring law, and media working mechanism law. However, there is not a singular law (danxing fa) that relates to this legal field that comprehensively and systematically regulates Chinese media. All the regulations specific to Chinese media are only found in the administrative regulations issued by the state council, local regulations issued by the local legislatures, and department regulations issued by government departments such as the PRC’s State Administration of Press, Publication, Radio, Film and Television.

However, one can still find provisions in the PRC constitution and basic laws, such as PRC Criminal Law and General Principles of Civil Law that embodies legal norms

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253 The drafting of legislations on media law started in 1985 and ended in 1989 when three drafts on media law (xinwen fa), publishing law (chuban fa) and Shanghai regulation on media work (shanghai guanyu xinwen gongzuo de ruogan guiding) were formulated. After the Tiananmen Square Protest, the legislating process was suspended for more than a decade. Until now, while the making of the law on media monitoring has been advocated for over a very long time, this law is still not in place. Sun Xupei, “Sanshinian Xinwen Lifa Licheng Yu Sikao [The Media Law Making and Thinking for Three Decades]” (2012) 2 Yanhuang Chunqiu Zazhi.

254 Such as “Chuban Guanli Tiaoli [Regulations on the Administration of Publication]” (2001, revised in 2011); “Guangbo Dianshi Guanli Tiaoli [Regulations on the Administration of Broadcasting and Television]” (1997, revised in 2013), accessed from pkulaw.cn. These are mostly department regulations, which only bound within the respective department.
related to the legal field of Chinese media and its authority to monitor the court, as well as its limits in doing so.

I.3.1 Constitutional Law

How does the media cover the judiciary and judicial decision making? Is their coverage legitimate? If so, what is the source of its legitimacy? Chinese constitutional law does not directly or explicitly authorize the media to monitor the courts. The discourse of “media monitoring” (xinwen yulun jiandu), which is so commonly discussed and debated, is only mentioned in government reports and CCP congress reports.255 Rather, the media finds its authority and legitimacy only in the constitutional principles of the PRC Constitution. Article 35 of the PRC Constitution regulates that “the citizen of the PRC enjoy freedom of speech, of the press, of assembly, of association, of procession and demonstration”256 which, while its application in China has been highly questioned, is still the most important legal basis for the journalists’ rights to report. Article 41 and Article 47 provide


that the citizens have the right to criticize the state organ and its officials and engage in cultural pursuits such as writing, through which they can express their opinions.\textsuperscript{257}

While freedom of speech and of the press is a right that only requires the government to refrain from acting in certain ways, the other constitutional principles require governments and officials to oblige actions. According to Article 27 of the PRC Constitution, “all State organs and functionaries must rely on the support of the people, keep in close touch with them, heed their opinions and suggestions, accept their supervision and do their best to serve them.” This provision obliges the government and officials to accept supervision from citizens, including the media.\textsuperscript{258} There is also one constitutional provision that is quite pertinent to the discussion here: Article 22 which regulates and specifies the state’s ownership of the media in China.\textsuperscript{259}

The most relevant constitutional provision of the media’s monitoring of the court is the principle of judicial openness or the principle of open trial, which is regulated by Article 125 of the PRC Constitution: “except in special circumstances as specified by law, all

\begin{footnotesize}
\textsuperscript{257} The article 41: Citizens of the People’s Republic of China have the right to criticize and make suggestions regarding any State organ or functionary. The article 47: Citizens of the People’s Republic of China have the freedom to engage in scientific research, literary and artistic creation and other cultural pursuits. \textit{Ibid.}
\textsuperscript{259} Article 22 of the Constitution: “the State promotes the development of art and literature, the press, radio and television broadcasting, publishing and distribution services, libraries, museums, cultural centers and other cultural undertakings that serve the people and socialism, and it sponsors mass cultural activities.” Constitution of the People’s Republic of China: \url{http://www.npc.gov.cn/englishnpc/Constitution/2007-11/15/content_1372964.htm}. (Retrieved on Dec. 21, 2015).
\end{footnotesize}
cases in the people’s courts are heard in public.” The principle of open trial is further emphasized since the CCP’s 16th plenary in 2006 as vital for the establishment of a harmonized society. Judicial openness in China often refers to the openness of case filing and court trials, enforcement openness, hearing openness, document openness, and openness of trial affairs. In the context of media and court dynamics, the openness of court trials is the subject of greatest focus.

Similar to the fair trial and free press dilemma, the Chinese media’s monitoring is also constrained by another constitutional principle: the principle of independent adjudication. According to Article 126 of the PRC Constitution, the people’s court exercises judicial power independently, in accordance with the provisions of the law, and is not subject to interference from any administrative organ, public organization, or individual.

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260 Open trial is regarded as a necessity to establish a fair, effective, and authoritative judicial institution as the fair must be seen, the effectiveness must be felt, and the authority must have been recognized where media’s monitoring works. See “Zhonggong Zhongyang Guanyu Goujian Shehui Zhuyi Hexie Shehui Ruogan Zhongda Wenti De Jueding [Decision of the Central Committee of the Communist Party of China on Major Issues on constructing a harmonized society]” (Effective in 2006). http://chinalawtranslate.com/fourth-plenum-decision/?lang=en (Retrieved on March 26, 2012).

I.3.2 Basic Laws

How does the media exercise its monitoring power and what is the boundary of this power, especially in the context of the judiciary? This question must be investigated by looking at basic laws, as implementations of constitutional principles.

As mentioned above, as there is no media law in China and only administrative regulations with less validity, the current laws and regulations have provisions that are applied only when the media crosses a boundary and does something wrong, such as infringing on individual rights or state interests. Criminal law has regulated seventeen crimes that the media can be found guilty of, such as the crime of splitting the country or undermining national unification, the crime of provoking ethnic hatred or discrimination, or the crime of undermining public order with provocative and disturbing behaviours. In addition, the PRC General Principle of Civil Law includes provisions on the infringement of reputation resulting from the media’s reports. There are other judicial interpretations that provide detailed application standards in this regard.

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262 Article 103 of PRC criminal law. Pku.law.cn.
265 “Guanyu Shenli Mingyuquan Anjian Ruogan Wenti De Jieda [Answers to several issues about the Trial of Case Concerning the Right of Reputation]” fafa [1993] No.15; “Guanyu Shenli Mingyuquan Anjian Ruogan Wenti De Jieshi [Interpretation of the
Regarding the implementation of the principle of judicial openness, the relevant litigation laws have provided for special circumstances, including cases involving national secrets, personally private matters, or adolescents as criminal plaintiffs, all of which are not heard in public. Cases involving commercial secrets and civil cases involving divorce may be kept from the public by the parties’ application.\(^{266}\)

I.3.3 Judicial Interpretations and Other Norms

Judicial Interpretations that specify the principle of open trial and punishment of media misconducts, and ethical codes for the journalists are essential normative guidelines for judges and journalists, and thus play important role in the normative courts and media relationship.

*The Principle of Open Trial*

In addition to constitutional and litigation law, the principle of open trial is further embodied in the judicial interpretation of the Supreme People’s Court and the provincial people’s courts as the working mechanism within the courts. For example, in 2007, the

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Supreme People’s Court on Several Issues about the Trail of Case Concerning the Right of Reputation]’, Judicial Interpretation No. 26 [1998]; “Zuigao Renmin Fayuan, Zuigao Renmin Jianchayuan Guanyu Banli Liyong Xinxu Wangluo Shishi Feibang Deng Xingshi Anjian Shiyong Falü Ruogan Wenti De Jieshi [Interpretation of the Supreme People’s Court and the Supreme People’s Procuratorate on Several Issues concerning the Specific Application of Law in the Handling of Defamation through Information Networks and Other Criminal Cases]”, fashi [2013] No. 21. Pkulaw.cn.

\(^{266}\) See article 183 and article 274 of the criminal litigation law of PRC; Article 120 of the civil litigation law of PRC; Article 45 of administrative litigation law of PRC. Pkulaw.cn.
“Notice of the Supreme People’s Court on Issuing the Opinions on Strengthening the Work on Judicial Openness in the People’s Courts” split the open trial principle into three basic requirements: legal openness, timely openness, and full openness. Article 5 of the Notice dictates that, with valid certificates, Chinese citizens may sit in the audience in cases that are openly tried according to law, and the people’s courts shall make proper arrangement for the audience to audit the hearing. Where the issuance of audience passes is limited due to security concerns or the physical size of the courtroom, the people’s courts shall make necessary explanations.

The provincial people’s courts also issue relevant judicial interpretations for localized applications. For instance, the Guangdong Provincial Court specified the type of the cases with major social influence by live broadcasting or rebroadcasting on television, Internet and the other media. Shanghai Municipal People’s Court also has exercised similar discretion over regulations.

In 2009, the SPC issued the “Notice of the Supreme People’s Court on Issuing the Six Provisions on Judicial Openness and Several Provisions on the People’s Courts’ Exposure to Public Supervision through Mass Media” (zui gao renmin fayuan guanyu

267 Article 3, 4 & 5 of the “Zuigao Renmin Fayuan Guanyu Jiaqiang Renmin Fayuan Shenpan Gongzuo De Ruogan Yijian [Notice of the Supreme People’s Court on Issuing the Opinions on Strengthening the Work on Judicial Openness in the People’s Courts]”, No.20 [2007] of the Supreme People’s Court. Pku.law.cn.

sifa gongkai de liuxiang guiding ji guanyu renmin fayuan jieshou xinwen meiti yulun

jiandu de ruogan guiding), which details the implementation of court trial openness. This was also the SPC’s first time issuing an interpretation that specified the media’s supervision over the courts. It established many rules that guided the courts and judges in facilitating media supervision over the courts by providing venue, documents, and other ways to disseminate information to the media. The courts were then also required to establish a new mechanism such as a conference or seminar to create better communication between the court and the media.269

Overall, according to the PRC Constitution and legal regulations, the media has the authority to monitor the courts, and that when working within legal boundaries, this monitoring is tolerated and respected by the courts. However, while commercial media has extended its coverage to the legal issues and performance of the courts and become one of the most important actors in the legal system,270 the Chinese courts have responded with mixed attitudes.

269 For instance, Article 3 prescribes that for the cases to be heard openly, the correspondents of news media and the public may observe hearings. If there are not enough seats in the courtroom, priority shall be given to meet the needs of the media and close relatives of the parties. Qualified trial courts may set up seats exclusively for the media where necessary. The correspondents shall, when observing court trials, comply with the discipline of court, and shall not make audio or video recordings or take pictures without approval.

Punishment for Media Misconduct

The SPC used to be on unfriendly terms with the media’s intervention in trials. The SPC has issued several documents to restrict the media’s coverage of court trials by requiring journalists to only interview parties or report on cases with the court’s permission.\textsuperscript{271} With regard to local administrative regulations, local governments and courts have announced their own requirements of the media’s coverage over judicial cases, some of which have been highly controversial and clearly crossed the boundary of the court’s purview. For instance, in July 2003, a document issued by the Guangdong Provincial Party Committee Propaganda Department and the Guangdong Provincial People’s Court prescribed that journalists were allowed to audit trials open to the public, but were prohibited to interview or report on the case before the verdict. The media could then report the verdict as long as it showed its fidelity to the court’s judgment. Six journalists were thus forbidden to conduct interviews on judicial cases decided by all the courts in Guangdong by the end of 2003.\textsuperscript{272}

With the development of the open trial principle, the SPC invested great effort to open the court to the public and the media. However, the SPC’s judicial interpretation of Article 9 on open trial and media monitoring in 2009 still devised strict rules to avoid

\textsuperscript{271} “Renmin Fayuan Fating Guize [The Rules in People’s Court Trial Proceeding]” issued by SPC and effective in Jan. 1\textsuperscript{st}, 1994; “Guanyu Yange Zhixing Gongkai Shenpan Zhidu De Ruogan Guiding [The Several Rules On the Strict Implementation of the Open Trial Principle]” issued in March 8\textsuperscript{th}, 1998 by SPC.

media misconduct when reporting on judicial cases. Such journalist misconduct includes threatening national security and public interests, disclosing state or commercial secrets, or false or malicious reporting on a case under trial. The most notable provision is one that prescribes other circumstances that seriously damage judicial authority and affect judicial impartiality where the violators are subject to responsibility. This last provision is widely criticized for its intent to put journalists at great risk when covering judicial cases.

In addition, the ethical code for news reporters also requires reporters to respect judicial authority, report a case according to the law, not intervene in judicial procedure, and not report or comment on the crime or the sentences before the court makes its judgment.

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273 See Article 9 of “Notice of the Supreme People’s Court on Issuing the Six Provisions on Judicial Openness and Several Provisions on the People’s Courts’ Exposure to Public Supervision through Mass Media:” Where a people's court finds that the news media falls under any of the following circumstances when interviewing and reporting the work of the court, it may notify the competent department of the press, the self-disciplinary organization of journalists, the media entity, etc. and put forward suggestions. In case of a violation of law, the violator shall be subject to corresponding consequences according to the law.


I.3.4 Summary

Principles of constitutional law, rules of basic litigation law and articles on judicial interpretation constitute the norms of the Chinese media–court relationship, which are either abstract in context or vague in language. The principle of open trial authorizes the media to report a trial in public, while the principle of independent trial and other punishment rules prevent the media from crossing boundaries. There are no normative rules on how the media influences the adjudication of judges, therefore to have a full picture of the media–court dynamic requires further investigation into the media–court relationship in practice.

I.4 Media’s Influence of Judges’ Adjudication in China

To explore the media’s increasingly invasive role in the everyday functions of the judiciary and the extent of this influence, this section investigates four issues: What areas or types of cases are the media most interested in? How does the media influence the courts? Why do they influence it and what rationale is behind this influence? How do the courts respond to this influence? Using the Chinese Top Ten Litigations Selection, this section will conduct a quantitative analysis and specific case studies to answer these questions.
I.4.1 Top Ten Litigations—Quantitative Analysis

This section starts its investigation by looking at data from cases collected and coded from the Chinese Top Ten Litigations Selection, a nationwide initiative to select the top ten annual litigations that have high profiles in the public and are regarded by the media and the legal professions as the most influential cases in China. This initiative started in 2005 and has continued to the date of this dissertation. The cases are selected as representative for the following reasons.

First, the Top Ten Litigation Selection has been carried out for exactly ten years. The total number of cases is one hundred, a number that is large enough to be used as a sample for analysis. The ten cases are selected annually from a pool of more than forty high-profile cases using the criteria that the cases have generated institutional change, or are highly influential in terms of policy making, rule of law, or human rights protection.

Second, the cases are useful for analysis of the dynamics between the courts and the media, since the years from 2005 to 2014 are exactly the period when the media went

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276 For details of the Top Ten Litigations, see Wu Ge ed., Zhongguo Yingxiangxing Susong: Yingxiang Zhongguo De Shida Ming’an [High Profile Cases in China: Top Ten Litigations Influencing China] (Beijing: Law Press, 2010).

277 Such as in 2011, the pool for selection is comprised of 100 cases, the Southern Weekend selected 30 cases from the pool, and 10 cases were selected finally by an online poll and legal experts’ evaluations. Editorial Office, “2011 Nian Zhongguo Shida Yingxiangxing Susong [Chinese Top Ten Influential Litigation in 2011]” (Jan. 20, 2012) online: http://www.infzm.com/content/67747. (Retrieved by May 20, 2016).
through great development and the courts also underwent huge institutional transition.\textsuperscript{278} As such, the cases in this period are useful to reflect the changing dynamics of the media and the courts during these transitions.

Third, geographically, the cases were selected from a wide range of regions in China, not only on the mainland but also in Taiwan, Hong Kong, and Macao. With regard to jurisdiction, the cases were adjudicated in all levels of courts: the District Court, the Intermediate court, the Provincial Court, and the Supreme Court.

Fourth, the selected cases, as subjective judgments, reflect the combined opinions of the media and legal professions, which supplement the sample with some balance. The Top Ten Litigations are selected annually by a committee comprised of representatives from several newspapers, law publication presses, law schools, and law firms, combined with an online poll for the public. Because the selection process engages deeply with the legal academic, government organizations, public media, and ordinary citizens, it is to some extent representative. An analysis of the one hundred cases will be conducted using two approaches: quantitative analysis and specific cases studies.

The samples are coded using five norms: geographical location, type of case, level of courts, verdict outcome, and influence. Looking at each category, the high profile cases are quite geographically scattered and could be exposed all over the state. However, more

\textsuperscript{278} Courts were steering in an opposite direction during this time, which raised a wide range of controversies. Carl Minzner, “China’s Turn Against Law” (2011) 59:4 The American Journal of Comparative Law, 935.
are located in big cities with large populations and more media outlets and capable journalists.

Analysis of Cases

Figure 1 demonstrates the variation in the numbers of cases adjudicated over the years in criminal tribunals, civil tribunals, and administrative tribunals in the courts. Generally, criminal cases are more likely to be covered by the media and have social influence than civil cases. Particularly since 2009, criminal cases are noticeably rising in number. Civil cases have been steady over the decade. Conversely, administrative cases have been fluctuating, especially after 2008, and show a sudden drop since 2012. This figure shows that the media has constant and high interest in criminal cases and a stable level of interest in civil cases. Compared to criminal and civil cases, the media’s coverage of administrative cases seems to have been subject to a different motivation during different periods of time. This fluctuation of numbers in each type of case may show a correlation between the media’s coverage and big legislative events. For example, in 2009 criminal law was revised and thus came under greater scrutiny from the public, which may have triggered more media attention at that time.
Figure 1 Top ten litigations: allocation of each type of cases (2005-2014)

Figure 2 Top ten litigations: numbers of cases in each level of court (2005-2014)
The cases are also classified according to the courts of adjudication when the cases are exposed to the public. Some of the cases were appealed to the appellate courts (intermediate courts or provincial courts) by the litigation party and became high profile cases at that phase and were thus classified into a type of case in the appellate courts. Specifically, the first instance courts include the cases of the first instance adjudicated in the district and intermediate courts, while appellate courts refer to the cases of second instances tried in the intermediate and provincial courts. The others refer to cases that were not entered into court proceedings, including cases where the administrative departments abused their powers, cases that were solved by mediation, and cases adjudicated in the foreign court. Figure 2 shows the result of this kind of classification.

Figure 2 shows that cases in the first instance courts received the most publicity compared to those tried in the appellate courts and other tribunals. This high level of publicity is clear mostly in the earlier years from 2005-2009. At the same time, most of these high profile cases showcased the official malfeasance and social ills in the local governments, which the Central Party finds difficult to keep under control.

Cases tried in the appellate courts have been gradually gaining more attention, with the exception of 2009 and 2010 when none of the selected high profile cases were adjudicated by the appellate court. In fact, among the selected high profile cases, only one case in one hundred was adjudicated by the Supreme Court. It is notable that the

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279 Wu Ying was initially sentenced to death when convicted of financial fraud but the sentence was overturned by the SPC. Li Cao, “Ex-rich List Woman in $57m fraud”
higher level the court, the more controversy exists in the application of the law instead of in fact search and examination. The cases entered on the docket of the SPC are mostly cases controversial over the application of law rather than investigation of fact. This shows that media coverage tends to focus more on the facts of the case rather than the application of law. Attention given to cases resolved via the other channels (such as mediation and arbitration, or cases related to the government’s administrative behaviour) is increasing overall but underwent a sharp increase in 2005, 2010 and 2013.

Findings - The Types of Cases in which the Media Tends to Intervene

Looking at Figure 1 and 2 together we can see: 1) cases that are vulnerable to the media’s monitoring; and 2) the possible rationale behind this phenomenon.

First, regarding the jurisdiction, a large amount of media monitoring of high profile cases took place in the local courts as first instance cases. These types of cases in the local courts are most common cases that ordinary people encounter in daily life. At the same time, first instance cases are mainly about the adjudication of facts, which can be easily understood by ordinary people. Thus, it is quite reasonable that these cases tend to be reported by media and become high profile.

However, it is interesting to discover that the original verdicts of most of the cases by the local courts were changed by a superior court or higher authority through appellation or

petition.\textsuperscript{280} The media has played an important role in pinpointing these wrong verdicts in the lowest level courts, which would not likely have been identified by regular inter-judicial supervision. The Figures also show the constant occurrence of high profile cases derived from the local governments or judiciaries.

This discovery may demonstrate the rationale for the media’s increasing monitoring power in China. The media has not only been regarded as the mouthpiece of the central Party–state, but has also become its ears. It has always been a core problem for the Chinese central authority to monitor the behaviour of the local bureaucracy.\textsuperscript{281} Media influence to this extent is within the central Party–state’s level of tolerance, and is even encouraged by the higher authority of the Party–state. By doing so, misbehaviour and crimes of the local governments and officials were exposed. In some cases, the officials involved were disciplined or punished by the internal administrative mechanism. It may be because of this function that the Party loosened control of the media when the investigative journalists were most active.

Second, among these high profile cases, the media discuss criminal cases and those with controversial evidence the most. Conversely, administrative cases have never become the central focus of the media’s coverage, which makes sense as criminal cases are always

\textsuperscript{280} The decision or results of almost every selected case during the ten years were changed when it was exposed by the public by means of withdrawal, rehearsal, or retrial of the previous decisions according to the decision of the upper level courts.

less politically sensitive than administrative ones. Furthermore, for certain years, such as 2013, the cases dealing with the corruption of the “big tiger” showed up more in the top ten list, at the same rate as stories on the anti-corruption champion in China, which shows that the “party-controlled” media is still allied with the Party line.\textsuperscript{282}

Finally, the media’s coverage of high profile cases in either type of the Top Ten Litigation is declining This echoes the historical reviews of the Chinese media’s ups and downs in recent years. That is, it is consistent with a tightening of the media and the limited role the media has played in monitoring the courts since 2010.

The media’s decreasing supervision of the courts may also be caused by the courts’ solution to address media pressure with more openness in the proceedings, and positive interactions or even coordination with the media (such as appointing a press spokesperson in the courts).\textsuperscript{283} Furthermore, the office or political department for each level of court is the organization responsible for communicating with the media, and this cooperation between the courts and the media is more valued.\textsuperscript{284}

\textsuperscript{283} See the contact of press spokesmen in various level of the courts. “Press Spokesmen in People’s Court” (Oct. 11, 2014) online: http://www.chinacourt.org/article/subjectdetail/type/speaker/id/MzAwNExNwCSYAA A/courtId/010j00000000.shtml. (Retrieved June 6, 2016).
\textsuperscript{284} Interviewee No. 18 & 19. See Appendix.
I.4.2 Case Studies on Media’s Influence of Courts

A quantitative analysis of the top ten litigations only reveals the type of cases in which the media has interest and tends to intervene. In order to answer the other questions (about how the media has influenced the courts, why and what rationales are behind the influence, and how the courts respond to this influence), this section will choose several cases from the top ten litigations to illustrate possible answers. These cases include the “Nanjing good Samaritan” case (Nanjing Peng Yu an), the “Rape Out of Passion” case (linshixing qiangjian an), the Yao Jiaxin case, the Li Changkui case, and the Nie Shubin case. These cases are selected as the most representative cases to show the dynamics between media and courts.

How does Media Influences Courts?

From the analysis above, in the normative sense, the media has the right to observe public hearings and can supervise the procedural justice of case adjudication by reporting on any

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misbehaviour of the judges or problems with rules of procedure or problems revealed by verdicts. This media presence comprises supervision of the judges’ adjudication behaviour and thus indirectly encourages the courts to make fair verdicts.

Second, the media has another more direct and powerful way to influence adjudication, particularly case outcomes, and substantive justice. The prerequisite is to make sure the cases are high profile, which usually requires the coordination of both the traditional media and new media. As local authorities have sought to limit traditional media coverage, the cases are initially spread by new media such as blogs, social-networking services, and online discussion fora. After that, the traditional media—including newspaper and magazines—take up the stories and follow up with more detailed reports based on the original new media stories. All types of media, therefore, work together to make the case become a national sensation and thus capture the attention of the top cadres in the government. Concerned with the risk of this dissemination to social stability, the top authorities in the Party or government have issued orders orally or in writing to the court presidents. As a member of the Party committee of the courts and appointed by the local governments, the presidents would dictate this message to the tribunal heads where the case was accepted. The tribunal heads would then transfer this message to the presiding judges or judges on the presiding panel, asking them or help them to be more careful about high profile cases. All these mechanisms are demonstrated in the five cases mentioned above.

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291 Interviewee 13, see Appendix.
Why could Media Influence Courts?

The legal norms in China do not permit the media to intervene directly in the judges’ adjudication by its own authority or power, so how can the media influence the judgments of the cases?

First, judges behave cautiously out of fear for their careers. In the “Nanjing Good Samaritan” case, the presiding judges whose first instance verdict was exposed publicly and severely criticized, were relocated after the closure of that case to a sub-district office and were not permitted to adjudicate cases anymore. This represents much more severe discipline for the judges than if the case had not been widely reported by the media. The same happened in the “Rape Out of Passion” case where the judges were punished by the court’s internal administrative authority and transferred to another non-adjudicative department.

Second, judges have to be more careful due to a potential risk for their careers if they do not bow down to administrative pressure. The administrative heads have the power to determine the judges’ careers in the current judicial administrative bureaucracy, and not obeying their dictates would definitely keep a judge from being promoted to a higher level.

It is clear that the reason the media is able to influence adjudication is not because of the judges’ concerns about the media, but rather their vulnerability to the court’s administrative authority, as the presidents and tribunal heads have the power to determine
the course of the judges’ careers. The general avenue the media takes to influence the courts is as follows: The media makes the case high profile, which sparks so much public sentiment that the top cadres in the Party or government are afraid to cause social instability, and thus force the judges to consider such public sentiment when deciding cases. Thus, the judges are not afraid of media pressure, but of the media’s ability to influence Party–state superiors.\(^{292}\)

*How do Courts Respond?*

Even though it used to be that some high profile cases were decided by bowing to the public’s opinion expressed by the media, the situation becomes even more difficult now that the legal system is more sophisticated and the public’s legal awareness has markedly increased. However, the judges and the courts have worked out some strategies to strike a balance between “serving the people” and “serving the law.”

First, the judges and the courts make efforts to achieve judgments that are either consistent with the public’s expectations or perceptions about justice channeled by the media, but also legalized by appropriate application of normative legal rules.\(^{293}\) This could be applied if the case is a “hard” case and the judges have some discretion to decide, such as in criminal cases with the potential for capital punishment like the Yao

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\(^{292}\) Liebman, “Watchdog or demagogue?” at 841 ft. 39.
Jiaxin case and the Li Changjue case. However, this strategy might cause the problems as the defendants in these cases were killed by media trial.\textsuperscript{294}

Second, when the public’s perception of the cases does not fit into the current legal framework, the judges and the courts try to resolve these high profile cases by mediation, negotiation, or other so-called multiple dispute resolution mechanisms (\textit{duoyuan jiufen jiejue jizhi}), rather than adjudication. For example, in the “Nanjing good Samaritan” case the litigation parties reached a mediation agreement to settle the public controversies, as there is a huge disparity between the two parties that could not be resolved by trial. This is common in civil cases, or in criminal cases with minor offenses. Contrary to adjudication, mediation is achieved with the consent of both parties and thus extinguishes the fire set by the media coverage.

Third, the courts manage to extend the period of proceedings (\textit{yanchang shenxian}) to make judgments, to wait until the peak of media coverage and public sensation passes. Most of the time, media coverage is easily distracted by other high profile cases if no updates with the current case can be reported, such as in the Nie Shubin case. This strategy can be used if the case is appealed and accepted by the trial supervision procedure (\textit{shenpan jiandu chengxu}), which can be extended for an unlimited time with the SPC’s approval.\textsuperscript{295}

\textsuperscript{294} Franklin Zimring & David Johnson, “Public Opinion and Death Penalty Reform in the PRC” (2012) 3:2 City University of Hong Kong Law Review 189.

\textsuperscript{295} “Guanyu Shiyong Xingshi Susongfa Jieshi [Interpretation on Implementation of Criminal Litigation law]” promulgated Dec. 20, 2012 by SPC, article 173.
Finally, the judges and the courts work to respond to the public opinion by improving the procedural justice (transparent proceedings, neutral judges, protection of litigation rights, well-written and published verdicts, etc.) rather than achievement in substantive justice (the results of the trial). For example, the SPC has made great efforts to make the courts’ operations transparent and publicized. Making justice visible may be the best way to realize justice. While there is still room for further development (such as the partial disclosure on social network outlets of anti-corruption cases), this ongoing strategy to publicly expose every judicial procedure, proceeding, document, and judgment to ordinary people including the media, in turn not only protects the judges and the courts from public pressure, but also possibly shuts the door to inappropriate intervention from other organizations including the PLC and other Party or governmental organizations.

This active strategy of addressing pressure by ensuring the transparency of the courts has become the SPC’s most progressive initiative and institutional renovations. Many measures have been implemented and have greatly changed the judicial landscape, such as publicizing the judicial proceedings information and enforcement information.

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online, publicizing judgments on online databases, and broadcasting judicial hearings live via the internet or television.

I.5 Conclusions: Dynamics of the Public and Courts

Based on the above analysis, the media can influence the adjudication of judges, but only indirectly and in high profile cases. The underlining reason for this phenomena is that the high publicity of the cases triggers wide public sensation, and thus threaten the social stability of the region or the nation, which is the CCP’s top concern in China’s state-society relationship.

The media does not have direct influence on individual judges’ adjudicative behaviour, and yet it is the court president who, as a member of the local party committee, requests that the presiding judges in high profile cases be cautious with their decision making. Thus, the roots of the courts’ active responsiveness to media derived from the CCP’s concerns, since the CCP needs the public’s support to sustain legitimacy for rulings and,

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298 The SPC requires the provincial, intermediate, and district courts to upload judgments to the SPC database. While not covering all judgments, this is a huge advancement to making the court transparent. The newly updated SPC database “China Judgment Online” can be accessed here: http://wenshu.court.gov.cn/. (Retrieved by March 26, 2016).
as such, it values the public sentiments voiced by media. This legitimacy concern may create a tension between the media and the courts, but could turn to another story later on.

To manage the media and the public’s monitoring, Chinese courts and judges have to make institutional changes to confront challenges by making the court proceedings, judicial documents, and other information more open and transparent, which in part diminishes the media’s role in adjudication. However, the courts realize that judicial openness not only solves the problems with the media, but is also a powerful weapon to gain authority and autonomy in a fragmented China. The open trial makes the illegal intervention visible and detectable, which otherwise is hard for the courts to resist.

Recently, the control over investigative journalism and censorship of new media has been tightened. While this has weakened the media’s power to generate substantial monitoring of judges’ behaviours, the policy of judicial openness has not only been suspended but gains momentum to further development. When the media is constrained, the courts actually tend to collaborate more with the media to show their openness.

Most of the SPC’s recent strategies make for a more open judiciary and reflect the judicial elites’ desire to gain momentum and support from the public in order to shake up the current administrative bureaucratic system, which is closely connected to the Party’s leadership. When exploring the mechanism for the media to influence judges’ adjudication, it is clear that the internal administrative influences are the mechanisms the
media could use to intervene in the decision making of the Chinese courts, which will be discussed in the next chapter.
Chapter IV Internal Administrative Influences in Courts

I.1 Introduction

While the previous chapters focus on the external controls and influences over the Chinese courts, one actor is absent: the court itself. The courts—as a passively responsive actor that confronted such external influences at the beginning—have undergone dramatic and continual institutional changes in their internal administrative structures and mechanisms, and this has fundamentally changed the landscape of the Chinese court system. The judges seem to be more professional with higher recruitment standards and evaluation criteria, but they are encountering a surprisingly abundant number of problems.

I.1.1 Problems

When I interviewed judges in Beijing and Shenyang in the summer of 2014, most of the judges explicitly expressed their deep anxiety and insecurity about their careers.

Strangely, they all believed their careers as judges to be a high-risk occupation. The risk

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300 As early as the 1990s, the Chinese courts commenced their reform, focusing on strengthening court trial functions, expanding open trials, and promoting judicial professionalism. Since the 15th National Congress of the Communist Party of China, the SPC has launched a series of large-scale reforms in terms of court structure, judge system, litigation procedures, adjudication methods, enforcement systems, and judicial administration and issued three “Five-Year Reform Plans for the People’s Courts” in 1999, 2005 and 2009, respectively. These three FYRPs are the fundamental principles and basis for Chinese court reform prior to 2013. “White paper: Judicial Reform of Chinese Courts”, published in March 2016. http://english.court.gov.cn/2016-03/03/content_23724636.htm. (Retrieved March 4, 2016).
derived from not only the uncertainty of how the current ongoing judicial reform will change the landscape of the courts and the profile of the judges, but also the real threats to their personal and family’s safety. Most importantly, this concern arises from the prevalent phenomena in the Chinese courts—the person who writes and signs the judicial documents and is thus accountable for them is not the person who virtually decides the verdicts of the cases. This inconsistency of the decision maker and the person accountable tends to make the judges the scapegoats of wrong verdicts. When I suggested that the judges record the inappropriate administrative intervention in case adjudication, they suggested that this would be a career suicide.

While the central authority has advocated for “[letting] the people who hear the case decide the case,” as well as preventing the leading cadre in and out of the judiciary to intervene in case adjudication, the internal controls and influences are still believed to

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302 In Feb. 2016, Ma Caiyun, a female judge of the district courts in Beijing, was killed by the shooters, one of whom had been involved in a divorce case that Judge Ma had presided over. “Lack of Rule of Law Leads to Judge’s Death,” China Daily, March 1, 2016. http://www.chinadaily.com.cn/opinion/2016-03/01/content_23692104.htm. (Retrieved by March 10, 2016).
304 “Provisions on the Recording, Notification and Accountability of Intervening into Judicial Activities and in Handling of Specific Cases by Officials”, by the General Office of the Central Committee of the CCP (zhonggong zhongyang bangongting) and the General Office of the State Council (guowuyuan bangongting), March 30, 2015;
be widely represented. For ordinary judges, the internal administrative influences are said to be the main factors in their adjudication process.\textsuperscript{305} The judges showed extremely mixed attitudes toward this influence. They believed the internal administrative influences were important to address,\textsuperscript{306} as they are the channels for the external influences such as media to penetrate the courts and undermine the judges’ capacity to have independent judicial power.\textsuperscript{307} However, while having a normative consensus, some judges tend to embrace this administrative influence.\textsuperscript{308}

\subsection*{1.1.2 Internal Dimension of Judicial Independence}

Judicial independence as a general theory is normally understood as a two-dimensional relationship: external and internal.\textsuperscript{309} External judicial independence is also referred to as collective independence of the judiciary as a branch. It focuses on the relationship between the judiciary and other political and social organizations that exist outside the judiciary, such as the legislature, executive branches of the government, media, and NGOs. External independence is perceived in terms of shielding the judge from executive

\begin{footnotesize}
\begin{enumerate}
\item “Provisions on the Recording and Accountability of Judicial Organ Staffs for Intervention in Cases”, by the Central Political and Legal Committee, March 30, 2015.
\item It appears that the magnitude of administrative influence in the court varies according to different level of the courts. The higher the level (such as in the provincial and intermediate courts), the stronger the influence. Interviewee No. 11, 14 & 20, see Appendix One.
\item Interviewee No.5, see Appendix One.
\item Interviewee No. 2, see Appendix One.
\end{enumerate}
\end{footnotesize}
pressure or legislative interference.\textsuperscript{310} The internal dimension refers to the source of influence and control within the judiciary itself. From the internal perspective, it is only the individual judge or a panel of judges, not the judiciary in a collective or institutional sense, whose independence is at stake.\textsuperscript{311}

The external and internal dimensions do not necessarily exist depending on each other. In a regime where the judiciary has formal institutional autonomy from the other branches of government, the judges could also lack individual autonomy within the judicial hierarchy.\textsuperscript{312} Vice versa, external independence is not the necessity when the individual judges behave independently to some extent.\textsuperscript{313}

As for the Chinese courts and judges, is it possible to build courts where judges can behave independently even if the courts’ institutional autonomy is absent? Firstly, the internal independence of the Chinese judiciary has a normative basis. “The people’s courts exercise judicial power independently [\textit{duli xingshi sifaquan}], in accordance with the provisions of law, and not subject to interference by any administrative organ, public

\begin{itemize}
  \item \textsuperscript{310} Shimon Shetreet & Jules Deschênes, \textit{Judicial Independence: The Contemporary Debate} (Hingham, MA, USA: M. Nijhoff, 1985) at 590.
  \item \textsuperscript{312} Such as the case in Japan. O’Brien and Ohkoshi, “Stifling Judicial Independence from Within: The Japanese Judiciary” in \textit{ibid}.
  \item \textsuperscript{313} Such as the Russian judiciary, see Todd Foglesong, “Dynamics of Judicial (In)dependence in Russia”, in \textit{ibid}.
\end{itemize}
organization or individual." As the Chinese courts are created by people’s congress, responsible to people’s congress and supervised by people’s congress, the Chinese courts do not have institutional independence because of their dependency on the legislature. Secondly, the internal independence of the Chinese courts has an institutional basis. The Chinese SPC has made great efforts to design adjudicative mechanisms and personnel management systems to ensure the individual judges or collegial panels adjudicate most of the cases independently. The inconsistency of the existing problems and the institutional background generate the research questions in this chapter.

I.1.3 Research Questions

Before proceeding with my research question, it is necessary to look closely at the stereotype of the internal controls and influences. The internal influences are not always bad, but while some influences do not validate a judge’s capacity to adjudicate, some undue influence does impinge on judicial autonomy. The undue internal influence does not validate a judge’s capacity to adjudicate. A judge cannot rely on his internal independence to shield himself from guidance by the judges who are responsible for the administration of the court. See Shimon Shetreet & J. Deschenes, eds, Judicial Independence: The Contemporary Debate (Lancaster: Martinus Nijhoff, 1985) at 637.

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315 Article 3 in the Constitution of the PRC.
typically comes from two sources: judicial colleagues or superiors, and the executive control over court administration (which is not only common in the states where the judges are part of the administrative bureau, but also clearly illustrated by the American experience). 318

Therefore, two issues matter the most to China’s reality and the prospect of having internal independence. Firstly, could Chinese judges be immune from influence from their colleagues or supervisors? Secondly, does the court administration embody the executive control over adjudication? This chapter investigates the judicial actors and court administration to answer these questions.

This chapter focuses on the judicial actors inside the Chinese courts and the internal structures and mechanisms shaping judicial behaviors of each judicial actor in the making of judgments. Because the actors are judges, it is worthwhile to explore the judges’ identities first, which establishes the basic characteristics and functions of the Chinese judges. Then, to be specific, various actors are further investigated as well as the function or influence they have in the judicial decision making process. The third section focuses on different modes of court administrative mechanisms and show the dynamic among the judicial actors. The chapter concludes with the findings.

318 Until 1939, the central responsibility for court administration at the Federal level in the United States was vested with the Attorney General. In that year, this responsibility was vested in the judiciary. Ibid 592 note 4.
As always, the research in this chapter is based on the empirical data from the interviews the author has conducted in China in the summer of 2014, as well as documentary materials, which include Chinese literature (law and regulations, news and media articles, and journal articles). Chinese scholarship on this topic is highly productive in that the research topic is borne out of the reality of judicial reform in China. While the arguments of such literature are limited to an internal perspective, it serves as good raw material since it provides thorough and informed data on the landscape of the internal structure and judicial behaviors inside Chinese courts.

The research, however, has limits. Firstly, the interview-based study could not tell the whole story of the Chinese courts. Even though the author tried to travel to as many regions as possible, the number of courts and judges interviewed is still limited compared to the whole. Besides the large amount of courts, the Chinese courts are so diversified that even the municipal courts and provincial courts in the same city are distinguished from each other with respect to court administration, not to mention the extremes in court administration styles of the same level. Secondly, Chinese courts are expected to go through more intense institutional innovation, which puts the research in this chapter at risk of obsolescence.

319 Most of the efforts in judicial reform aimed to improve the internal structure and mechanism of adjudication and administration in Chinese courts, which is most practical approach in current political context. Interviewee No.10, see Appendix One.
320 The diversity of court administration models derives from the local experiments encouraged by the top authority in the judicial reform, which has been motivated by high desire of promotion of the court president and cadres of the upper levels in the hierarchy system. Gao Xiang, “Zhongguo Difang Fayuan Jingzheng De Shijian Yu Luoji [The Practice of The Chinese Local Courts Competition And The Rational Behind]” (2015) 121:1 Fazhi Yu Shehui Fazhan [Law And Social Development].
This chapter has the following findings: Firstly, while great effort and innovation have been made in the courts, internal administrative influence in the courts has decreased and increased from time to time, particularly when courts face the independence–accountability dilemma. Secondly, the rise of administrative power is not only supported by court administrators, but also embraced by subordinate judges because of occupational risk aversion. Lastly, and most fundamentally, judicial reform has made the courts more and more bureaucratic. Administrative influence has become not only unavoidable but also imperative in the bureaucratic system. However, bureaucratic traits are not comparable with the courts’ adjudication traits for achieving fair and effective judicial output. While the administration model is still needed, a possible strategy to address this incomparability may be a separation between judicial administration and court administration.

I.2 Judicial Actors in Courts

The judicial actors discussed in this section mainly refer to the judges. Chinese courts are adopting the unitary administrative model, that is, the judges not only take the responsibility of adjudication, but also play the role of administering the court. In

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321 Article 2 Judges are the judicial personnel who exercise the judicial authority of the State according to law, including presidents, vice presidents, members of judicial committees, chief judges and associate chief judges of divisions, judges and assistant judges of the Supreme People’s Court, local People’s Courts at various levels and special People’s Courts such as military courts. Judges Law of the People’s Republic of China (2001 Amendment). www.en.pkulaw.cn.

Chinese courts, there are basically two types of internal organizations: adjudicative tribunals (shenpan yewu bumen) and non-adjudicative offices (fei yewu bumen).\(^{323}\) The adjudicative tribunals are in charge of at least part of the trial proceedings\(^ {324}\) or judicial administration.\(^ {325}\) The non-adjudicative offices are responsible for the court administration, including personnel and financial management.\(^ {326}\) The staff working in these offices still have the identity as judges. However, because their daily work does not directly include case decision making, they are not included into the judges this section investigates. It is notable that even the judges who are either partially or wholly devoted to decision making have to take on administrative responsibilities more or less at the same time.

### I.2.1 Three Identities of Judges

According to the Organic Law of the PRC, the courts adopt the collegial system in the administration of justice. A collegial panel is comprised of three judges (or two judges and a people’s assessor) or a single judge who try the cases. The judicial committees

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\(^{324}\) Such as, Criminal Adjudication Tribunal, Civil Adjudication Tribunal, and Enforcement Bureau. See the organizations of the SPC: [http://english.court.gov.cn/organization.html](http://english.court.gov.cn/organization.html). (Retrieved at Mar. 21, 2016).

\(^{325}\) Such as Case Filing Tribunal and Trial Supervision Tribunal. See the organizations of the SPC: [http://english.court.gov.cn/organization.html](http://english.court.gov.cn/organization.html). (Retrieved at Mar. 21, 2016).

discuss important or difficult cases. The norms are quite simple and clear but the practice is more complicated in terms of the functions and significance every actor plays in the trial. For me, all these norms derive from the three identities of the judges in China’s political and bureaucratic system. Judges in China are not only identified as legal professionals, but also as cadres (ganbu) of the CCP and civil servants of the government.

**Judges as Cadres**

The cadre system is the personnel management system the CCP used to exercise its leadership over its members and other government staffs. The cadre system was established before the new PRC and has been historically comprised of leaders of the revolution and the masses. The cadre system has evolved dramatically and developed a less ideological and more bureaucratic meaning, but it is still widely used as the most important criteria for promotion and remuneration in the Party or among government organs, the SOEs, and public institutions.

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327 Article 10 & Article 11. Organic Law of the PRC.

328 See the principle of “dang guan ganbu [CCP’s leadership on cadres].”


331 The cadre system is classified into three categories: Party and government organs cadres (dangzheng jiguan ganbu), SOE cadres (guoyou qiye ganbu), and public institution cadres (shiye danwei ganbu). See Li Yi, Zhongguo Shehui Fencing De Jiegou Yu Yanbian [the Structure and Evolution of Chinese Social Stratification] (Lanham, University Press of America, 2005) at ch. 6.
The judges are considered cadres in the first category (in the Party or government organs) and are therefore identified and evaluated according to the same standards as other political and legal cadres in the CCP and government organs, such as the Political and Legal Committee and the Department of Justice. These standards are important as the judges can shift their positions from the courts to other Party or government organs based on their identity as cadres. This is also one of the reasons why reform on personnel management has been so challenging even within the courts, as factually giving up the identity of cadres would also yield the privilege as cadres.332

Judges as Civil Servants

Judges as civil servants are the identity by which the judges can be evaluated and relocated within the governments outside the courts. The identity as a civil servant has become more prestigious than cadres since the personnel management reform and establishment of the Civil Servant System in 1993.333 This civil servant identity is the main ranking system to determine a judge’s pay and benefits, as well as that judge’s significance in the courts.

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Chinese judges are supposed to be excluded from the adjudication of the PRC’s Civil Servant Law, but because regulation on civil servants’ classified administration has not been established, judges are still in the category of comprehensive management (zonghe guanli lei). The identification as civil servants makes the position of judge comparable to other civil servant positions, which is convenient for the relocation between various legal professions. However, the courts have fewer higher-level positions, which makes the promotion of judges within the courts extremely difficult. For example, a law graduate with a master’s degree has to spend more than five years to move from the entrance level to the second level in the courts, while in other government departments this promotion can happen much sooner. This is even worse in the district courts where some judges only move up one level during their entire careers.

Besides the difficulty of promotion, the identity of a civil servant has triggered a range of issues in the courts, such as the low remuneration compared to the heavy workload. Such issues tend to induce judicial corruption and the outflow of highly-capable judges. Thus,

335 The other two categories are professional technician (zhuanye jishu lei) and administrative law implementation (xingzheng zhifa lei). John P. Burns, & Wang Xiaoqi. “Civil Service Reform in China: Impacts On Civil Servants’ Behavior” (2010) 201 The China Quarterly 58.
336 Interviewee No. 4, see Appendix One. It is relatively easier if the judges relocate them in the non-adjudicative divisions in the courts. Many junior judges would rather give up their positions and legal expertise in the adjudicative tribunal for a quicker promotion.
337 Interviewee No.21, see Appendix One.
338 Interviewee No. 18, see Appendix One. The president of the district court is usually in the Division-head Level (chu ji), which limits the elevation within only three levels (fuchu, ke, fuke).
as leverage, the community of judges proposed a system of their own: judges as legal professionals.

*Judges as Legal Professionals*

The grading of judges was first conceptualized in the Judges Law of the PRC in 1995 and further specified by two departmental regulations in 1997 and 1998. However, until 2007 this system has been established not only in title but also with a financial benefit. According to this system, judges are labeled with four levels and twelve grades (see Table 4).

The levels are determined on the basis of the judges’ posts, their actual working ability, political integrity, professional competence, achievements in judicial work, and their seniority. However, in practice, the determination of judges’ grades is neatly connected to the judges’ levels as civil servants. Furthermore, judges only receive an allowance of about 200 yuan per month ($15 USD) for the identity as a judge, which hardly

342 The difference of allowance among various levels is slight. There is only 160-yuan difference between the highest Chief Justice and lowest grade five judges. “Notice of the Supreme People’s Procuratorate on Relaying the Notice of the Ministry of Personnel and the Ministry of Finance on Implementation of Trial Allowances for Judges”, *fa* *fa* [2007] no. 26, August 7, 2007.
improves their financial situation. Such factors render judges’ grades more like a reputational reward and play a rather limited role in judges’ real life. Thus, applying grades to judges has been suspended since July 2011, while the judges’ already obtained grades are kept in practice.343

Table 4 Hierarchy of judges as legal professions

<table>
<thead>
<tr>
<th>Chief Justice</th>
<th>Justice</th>
<th>Senior Judge</th>
<th>Judge</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Grade One Justice</td>
<td>Grade One Senior Judge</td>
<td>Grade One Judge</td>
</tr>
<tr>
<td></td>
<td>Grade Two Justice</td>
<td>Grade Two Senior Judge</td>
<td>Grade Two Judge</td>
</tr>
<tr>
<td></td>
<td>Grade Three Senior Judge</td>
<td>Grade Three Senior Judge</td>
<td>Grade Three Judge</td>
</tr>
<tr>
<td></td>
<td>Grade Four Senior Judge</td>
<td>Grade Four Judge</td>
<td>Grade Four Judge</td>
</tr>
</tbody>
</table>

Summary

The three identities of the judges, no matter the relative importance of each one, all work together to create an internal administrative hierarchy in the courts. The president is the


top layer; the vice president, the adjudicative committee special member, and the tribunal heads are the middle layers; and the presiding judges, ordinary judges, and other judicial assistant staff are the bottom layers (Table 5 Hierarchy of the Courts).

The administrative hierarchy formulates the courts’ basic structure where the norms and practices of court adjudication and management function. This system varies to some extent in different levels, but it accommodates all the actors that play roles in the judicial decision process and influences the relationships among the actors when formulating various judicial mechanisms.

**Table 5 Administrative hierarchy in courts**
I.2.2 Behaviours and Functions of Judicial Actors in Case Adjudication

This section will investigate the judicial actors who participate in case of decision making, starting from the top level of the judicial hierarchy down to the bottom layer—that is, the president, vice president, tribunal heads, adjudicative committee members, and presiding judges. It will mainly focus on the behaviours and functions of each actor in decision making. Their interactions and dynamics will be investigated in the next section.

 Presidents

The president of the Chinese court is on the top of the court bureaucracy and is usually called yibashou, similar to the title and position of the leaders in the government’s executive departments. As the head of the court, the president devotes most of his or her time on the court’s internal administrative work as governor (guanli jia) and on external communication and coordination with other government branches as a politician (zhengzhijia). As a result of these two roles, the president’s identity as a legal professional is less important than personal career path and the court’s performance administration.

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344 This role system “governor-politician-legal profession” in the current judicial practice in China is empirically investigated in this essay. Zuo Weimin, “Zhongguo Fayuan Yuanzhang Juese De Shizheng Yanjiu [The Empirical Study On the Roles of the President in The Chinese Courts]”, (2014) 1 Zhongguo Faxue [China Legal Science].

345 Interviewee No. 12. See Appendix One. The president of the court is not expected to be good judge with ample legal expertise; rather, they are expected to play more roles as governors and politicians.
The court presidents participate in trials in two different ways: directly and indirectly. Firstly, they can participate in the decision of cases when presiding over adjudicative committee meetings.\(^{346}\) As committee members, the presidents listen to oral reports from the presiding judges and do not always join the conversation but rather decide the direction of the cases if the cases are politically or socially sensitive.\(^{347}\) It is regulated that the members of the judicial committees shall objectively, impartially, independently, and equally give their opinions, and the president (as the highest rank) shall be the last one to give an opinion.\(^{348}\) The presidents’ opinions are decisive to the outcome submitted to the adjudicative committee.\(^{349}\)

Secondly, the court presidents are primarily judges who have adjudicative authority and should decide cases the same way typical judges do.\(^{350}\) The adjudicative role used to be the least important one for court presidents and it was rarely seen in practice that

\(^{346}\) Judges Law of the PRC: The adjudicative committee is comprised of the president, vice presidents, full-time committee members (zhuanzhi weiyuan), and other senior judges (heads of division and panel, and presiding judges), http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383686.htm. (Retrieved June 28, 2016).

\(^{347}\) Such as the high profile criminal cases or administrative cases whose judgments would harm the economic interests of the local governments. Interviewee No. 9. See Appendix One.

\(^{348}\) 2010 “Notice of the Supreme People’s Court on Issuing the Implementation Opinions on Reforming and Improving the Judicial Committee System of the People’s Court” pkulaw.cn.

\(^{349}\) Interviewee No. 9. The other members in the adjudicative committee tend to speculate the tone and intention of the president’s inquiries in the discussion of the cases and conjecture his preference or inclination towards judgments.

\(^{350}\) Judges Law of the PRC, article 2: Judges are the judicial personnel who exercise the judicial authority of the state according to law including presidents, vice presidents, members of judicial committees, chief judges and associate chief judges of division, judges and assistant judges of the Supreme People’s Court, local People’s Court at various levels and special People’s Courts such as military courts.
presidents accepted cases, participated in the proceedings, and issued the judgments, as it was commonly believed that the presidents did not have to be experts in law.\textsuperscript{351} In the current political structure, the courts are regarded by the authority as no different than other government branches and court presidents are no different than the executive heads of the government branches. Thus, most of the court presidents are more like government officials than legal professionals.\textsuperscript{352} However, legal and professional expertise has recently been emphasized, and presidents have been called on to adjudicate cases as presiding judges as role models for regular judges.\textsuperscript{353} In addition, the numbers of cases that the presidents preside over or participate in as part of the collegial panel are mandatory according to the recent policy.\textsuperscript{354}

\textsuperscript{351} This quite distinctive phenomenon has been formed by the courts’ relationship with the higher authority and local government. Liu Zhong, “Tiaotiao Kuaikuai Guanxi Xia De Fayuan Yuanzhang Chansheng [The Birth of the President Within the Vertical and Horizontal Framework]” (2012) 1 Huanqiu Falü Pinglun [Global Law Review].

\textsuperscript{352} See statistics of the percentage of presidents promoted or transferred from other executive positions. Zuo Weimin, “Zhongguo Fayuan Yuanzhang Juese De Shizheng Yanjiu [The Empirical Study On the Roles of the President in The Chinese Courts]” (2014) 1 Zhongguo Faxue [China Legal Science].

\textsuperscript{353} The court presidents are required to personally decide cases either as the presiding judges or members of the collegial panel. 2007 “Zuigao Renmin Fayuan Guanyu Wanshan Yuanzhang Fuyuanzhang Tingzhang Futingzhang Canjia Heyiting Shenli Anjian Zhidu De Ruogan Yijian [Notice of the Supreme People’s Court on Issuing Some Opinions of the Supreme People’s Court on Perfecting the System of Participation in the Collegial Panel and the Trial of Cases by Presidents, Vice Presidents, Tribunal Directors and Vice Directors]”; 2010 “Zuigao Renmin Fayuan Guanyu Jiaqiang Renmin Fayuan Shenpan Guanli Gongzuo De Ruogan Yijian [Notice of the Supreme People’s Court on Issuing Several Opinions on Strengthening the Administration of Trials by the People’s Courts]”; “Geji Fayuan Yuantingzhang Ban’an Jianqu Changtaihua [More court presidents participate the case adjudication]” (Jan. 29 2016) Fazhi Ribao [Legal Daily]. http://legal.people.com.cn/n1/2016/0129/c42510-28094364.html (Retrieved March 11, 2016).

Lastly, and most importantly, court presidents can influence cases indirectly as administrative leaders. As governors and politicians, they have the responsibility and authority to administer internal affairs such as cases, finances, personnel, and the external communication and coordination with other government or Party organs. These dual external and internal roles put the presidents in a position to intervene in individual cases, except in some circumstances where there are illegal motives. The subordinate judges have no choice but to obey the order.

_Vice Presidents_

In the court hierarchy, the vice presidents are the judges second to the president. While the presidents are not required to be legal experts, the vice presidents are required and are typically senior judges who have been working many years and been promoted from a junior judge or even a judicial assistant. With their recognized legal expertise, the vice-presidents are the highest legal authorities in the courts that have a say in court proceedings as long as the cases are not politically or societally sensitive.

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355 "Guanyu Wei Jiakuai Jingji Fazhan Fangshi Zhuanbian Tigong Sifa Baozhang He Fuwu De Ruogan Yijian [Notice of the Supreme People’s Court on Issuing the Several Opinions on Providing Judicial Guarantee and Services for Accelerating the Transformation of the Economic Development Mode]”, No.18 [2010]. Pkulaw.cn.

356 The corruptions of the presidents are not rare in Chinese courts. In the first decade of this century, six presidents of the provincial courts, five vice presidents of the provincial courts, and more than ten presidents of the intermediate courts, have committed duty crimes (zhiwu fanzui). See Jiang Cao, “Sanshinian Lai Zhongguo Faguan Weifa Fanzui Wenti, Yige Tongji Fenxi [Statistic On the Crime Committed by Judges for The Thirty Years]” (2010) 4 Ningxia Shehui Kexue [Ningxia Social Science].

357 Interviewee No. 19. See Appendix One.
The courts usually have several vice presidents. For instance, the SPC has eight and all are members of adjudicative committees and are grand justices of the second grade, with the exception of Executive Vice-president Shen Deyong who is a grand justice of the first rank. Each vice president is responsible for several adjudicative tribunals and non-adjudicative offices, and the division of responsibilities varies greatly in different regions and among different levels. The vice presidents are primarily responsible for case adjudication (shenpan yewu guanli) since the presidents engage less with them due to their administrative responsibilities.

Besides working as a presiding judge, a panel member (which is rare), or a member of the adjudicative committee, the vice president has power over judicial decision making by approving or disapproving of the judgments. Since they can inspect cases within their “yewu kou”, the extensive discretionary powers of the vice presidents can be seen by the corruption among them. While this administrative approval system has undergone changes, the vice presidents’ power over a particular division and over individual judges cannot be ignored.

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360 In a sample of 200 corrupt judges, 42% were presidents or vice presidents (41 presidents and 43 vice presidents). See Zheng Xiaolou, “Faguan Fubai Baogao [Judges Corruption Report]” (No. 15 2013) Caijing [Finance].
Tribunal Heads

Tribunal heads (including vice heads, hereafter all heads) are the executive leaders of adjudicative tribunals. According to my interview, the division head, as the middle layer in the court hierarchy, serves as a bridge between the higher authorities (such as the presidents, vice presidents, and the adjudicative committee members) and the regular judges in the tribunal.\(^{361}\) The division heads must not only convey policies and orders from the top to the bottom levels, but must also keep the judges motivated and mentally secured.\(^{362}\)

For example, if there is external influence over a case, judges sometimes turn to the tribunal heads for support, who mostly help them figure out a middle-of-the-road strategy that does not deviate from the executive order but adheres to laws and regulations. It used to be very common in the local courts that the tribunal heads supervised and approved all the judgments in the tribunal, even if the tribunal head was not the presiding judge or member of the collegial panel. All the verdicts had to be approved by the tribunal heads before being made public.\(^{363}\) This practice was assumed to be effective in controlling the discretion of an individual judge and not only prevent judicial corruption, but also to avoid or at least share judicial accountability for a wrongly decided verdict. To be

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\(^{361}\) Interviewee No.16, see Appendix One.

\(^{362}\) The tribunal heads are not exactly the leaders of the other judges, even if they have power to decide the promotion and discipline of the judges; rather, they work to balance the distribution of financial interests and ensure the normal function of the tribunal. Interviewee No. 1, see Appendix One.

specific, division heads can ask for case reports from the presiding judges, reconsider the cases, and then decide whether the case should be submitted to the adjudicative committee.\(^{364}\)

**Adjudicative Committee Members**

According to the Judges Law, the adjudicative committee is the highest authority to decide cases in the Chinese courts.\(^{365}\) The adjudicative committee is comprised of the president, the vice presidents, the heads of the adjudicative division, and senior judges.\(^{366}\) For example, in Guangdong Provincial Court, there are 32 members. The president and vice presidents total 9, the special members total 5, the adjudicative division heads total 13, and then there are 5 others.\(^{367}\)

\(^{364}\) Ge Wen, *ibid*.

\(^{365}\) Since 2015, the president, vice president, and tribunal heads have been forbidden to approve and sign the verdicts for cases in which they do not participate directly, with the exception of cases that have been discussed by the adjudicative committee. “Zuigao Renmin Fayuan Guanyu Wanshan Renmin Fayuan Sifa Zerenzhi De Ruogan Yijian [SPC Opinions On Improving People’s Courts’ Judicial Responsibility System]”, promulgated Sept. 16, 2015, online: http://chinalawtranslate.com/judicial-accountability/?lang=en. (Retrieved March 10, 2016).


The role the adjudicative committee has played in the decision making process has always been controversial.\(^{368}\) It has been argued that case deliberation by the adjudicative committee means that administrative power is influencing judicial decision making, as the members are the superior administrative leaders in the judicial hierarchy.\(^{369}\) Therefore, it was believed that one way to leverage this shortage was to make more senior judges adjudicative members.

The full-time committee members were established in 2006. However the endeavor did not work. The selection standards have been widely criticized,\(^{370}\) in that they tend to select judges with higher administrative titles but not the senior judges, even though the purpose is to ensure the inclusion of senior judges into the adjudicative committees. For instance, the establishment of a special member (zhuan yuan) in the adjudicative committee is linked to the candidate’s salary and level, and it used to be mandatory for the heads of the non-adjudicative tribunals to be named to the adjudicative committee according to official SPC documents, such as the heads of the Disciplinary Inspection Group (jijianzu) and the Political Bureau (zhengzhibu).\(^{371}\) The specialized judges

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\(^{368}\) Li Li, *Judicial Discretion Within Adjudicative Committee Proceedings In China A Bounded Rationality Analysis* (Dordrecht: Springer Berlin Heidelberg, 2014).


\(^{370}\) The full time committee member shall be selected from the senior judges with good political and legal expertise, and appointed as the deputy level of the respective Party organization. See “Xinyilun Sifa Gaige Beijing Xia Shenpan Weiyuanhui De Zhineng Dingwei Ji Yunzuo Fangshi Gexin [Reform Of The Role And Function Of The Adjudicative Committee In The New Judicial Reform]”, www.gdcourts.gov.cn. (Retrieved March 11, 2016).

conference was established to ensure more senior judges than officials were selected as full-time committee members. The conferences, as internal organizations within the adjudicative committee, work a consultative function for the collegial panel to address legal aspects of the cases.  

*Presiding Judges*

To eliminate the administrative influence of the presidents and the tribunal heads, and strengthen the expertise and status of the collegial panel, a new mechanism was introduced entitled the “presiding judge system”, and a new actor was introduced as the “presiding judge” (*shen pan zhang*).

The presiding judge (as a temporary position on the collegial panel) has been existed in the Chinese court for a long time, but the judge’s actual identity and function with this title have changed greatly. Before 2000, the presiding judge was only a temporary position on the collegial panel, which lead the panel on an individual case. Once the trial was finished, the presiding judge would be discharged together with the collegial panel. However, after 2000, when a new system called “*Shenpanzhang Xuanrenzhi*”

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was established, the presiding judge could be appointed independent from the collegial panel and function without the existence of the collegial panel during the typical length of three to five years.

The presiding judges are selected from among highly competent senior judges with ample adjudicative experience and have wide discretion over the cases assigned to the adjudicative team led by the presiding judges. In some regions, with the permanent position of the presiding judge, the previous temporary collegial panel that had been assigned cases are now settled by the presiding judges. In this setup, the presiding judge has absolute power over case administration. This great and unparalleled discretion makes them so-called “super judges” with the same de facto power and influence as the tribunal heads and presidents. A presiding judge is, to some extent, similar to the executive position of the vice tribunal head. With more power than the regular judges, the presiding judges have the same negative influence over a case as the executive leaders in the court and, as such, the system of presiding judges has been severely challenged and criticized.

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374 “Renmin Fayuan Shenpanzhang Xuanren Banfa [Method on the Selection of the Presiding Judge in People’s Court]” promulgated July 11, 2000. pkulaw database
376 Interviewee No.13, see Appendix One.
The Regular Judges

Within the bureaucracy of the courts, to what extent can the regular judges decide the judgments of cases? To define the discussion subjects in this section, the regular judges are those who do not have any executive titles. What are the judges’ responsibilities? What does their daily work entail? The judges have three main duties: case adjudication, adjudicative assistance, and other administrative responsibilities.

The judges’ duties are performed in the following two parts: First, the judges take part in a trial as a member of a collegial panel or try a case individually according to the law.\textsuperscript{378} This duty covers three phrases of a trial: before the trial session, during the trial session, and after the trial session.\textsuperscript{379} Before the trial, the judges organize the pre-trial meeting, host the pre-trial mediation, oversee evidence exchanges, and perform other work in preparation for the trial session. During the session, the judges organize and monitor the session, host mediations, and announce the judgment. After the hearing session, the judges deliberate the evidence, draft the verdict, and make the final judgment according to the consensus of the collegial panel.

The judges take more responsibilities and spend more time on the assistant adjudication work which, according to law, should be taken on by the judicial assistant staff. The


clerks and judicial assistants only work on labour-intensive responsibilities. Most of the judicial assistant work is still undertaken by the regular judges, as showed in the charts of the judges’ time allocations. It is clear that the judges devote more time to judicial assistant work, such as serving documents (19%), reconciliation or mediation (24%), and addressing petitions (17%) (See Figure 3).

![Figure 3](image)

Figure 3  The average working hours of the judge in district court

The other extra-adjudicative responsibilities are relevant to the judges’ identities as cadre or civil servants. The judges take on the duties of servicing the political and societal agendas of the local governments. The judges in the civil adjudicative division go to the neighborhood communities to provide legal information to the local citizens, which should be the responsibility of the local justice bureau or legal aid office, since the judges

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380 This data comes from investigation of the district court conducted in 2008. The district court is located in the economically developed northeast coastal area.

381 Interviewee No. 22. See Appendix One.
are regarded as part of the “political legal cadre”. Besides these routine extra-adjudicative responsibilities, judges are required by the local governments to conceive actively and organize events and programs, such as the judges in the juvenile division (Shaonian Fating) who share legal knowledge with the local schools.\footnote{Interviewee No. 19, See Appendix One. Also see: http://www.chinacourt.org/article/detail/2014/11/id/1491105.shtml. (Retrieved Feb. 12,2016). “Beijing Quanshi Shaonian Fating Lianxu Wunian Kaizhan ‘Liangjie Songwennuan’ Huodong [Beijing City’s Juvenile Court Undertake “Warmth in the Holiday” Activities]” (Feb. 22 2016) Legal daily.}

I.2.3 Adjudication and Judicial Administration

There are three interesting findings that arise from the above analysis of the roles and functions of each judicial actor in the hierarchy.

First, there is a very blurred boundary between adjudication and administration in the Chinese courts. The actors on the superior levels, such as the presidents, vice presidents, tribunal heads and committee members, are required to take on a wide range of administrative tasks. Therefore, even though they are competent to adjudicate, the superior judges are constrained by a busy administrative schedule so they cannot factually hear and decide many cases themselves. Even the regular judges do not take on administrative responsibilities, but spend large amounts of time on non-adjudicative or adjudicative assistant tasks. The dual responsibilities of administrative and adjudicative tasks distract the judges from adjudication, but also make the internal influences easy to penetrate.
Secondly, there exists a gap in case adjudication. As the executive leaders of various levels in the organization, the superior actors are responsible for not only management tasks but also the quality of the judicial output—that is, the judgments. However, they are not capable of hearing and deciding cases by themselves due to heavy administrative tasks. Indeed, time limits could severely undermine case quality and quantity.

Interestingly, the regular judges, who should be the ones mainly adjudicating cases, are hospitable to the administrative influences in their judging work. When judges are presiding over a complicated or difficult case, they would rather seek the support and advice of their superior officials, such as the tribunal heads, the adjudicative committees, and even the vice presidents. They also show resistance to recent reform efforts to enable judges to decide cases independently, since such independence would mean they could not defer to others to avoid or share responsibility. Besides this reason, a judge who wants to report to and seek advice from a superior is believed to be faithful to the organization, highly evaluated, and promoted easily.

To fill the gap, some mechanisms have been used to better regulate the superior–subordinate relationships in the courts, and this will be investigated in the next section.

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383 Interviewee No. 3. See Appendix. One judge in the criminal tribunal of a provincial court told me that she was very happy if the case was approved to submit to the adjudicative committees. Even if she had to prepare an oral report to the committee members and faced the possibility of challenges and critical comments in the discussion session, it was all worth it compared to the discipline of a wrongly decided case.

384 Interviewee No. 14. See Appendix.
I.3 Judicial Mechanisms and Administrative Controls

Judicial mechanisms here refer to the structure and process of how different judicial actors work together to produce judicial outputs. The judicial mechanisms in Chinese courts have been changing dramatically, and many pilot projects and experiments have been conducted by the Supreme People’s Court, as well as all the way down to the district courts or even the tribunals.

I.3.1 The Shifted Judicial Mechanisms

This section will investigate the different modes of judicial mechanism in the courts chronically.

Table 6 The shifted judicial mechanisms.

Before 2000, the year the first five-year reform plan was implemented, almost every verdict had to go through the approval of the administrative leaders such as the presidents and tribunal heads before it was announced. Such administrative approval was not only prevalent but also powerful as the administrative leaders enjoyed the discretion to change substantial aspects of the verdicts, including the facts, evidence, law application, and conclusion.385 The individual judges either in the collegial panel or otherwise had very limited say in the judgments. To make the collegial panel the real decision maker, the first five-year reform plan aimed to empower the collegial panel and the presiding judges by decreasing or limiting the authorities of the presidents, tribunal heads, and other executive leaders in the courts.

Collegial Panel Deliberation (2000-2008)

The reform advocated that the collegial panel should hear and decide cases and only submit cases to the adjudicative committee when they were complicated. The adjudicative committee only discussed the application of law in the cases.386

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of the presidents, the division heads, and the other administrative leaders was strictly constrained in order to fundamentally change the administrative approval system.

The judges were obviously not ready for this change. The incapability of the judges failed to empower the collegial panel and triggered severe and abundant judicial corruption and misbehavior. Without the administrative leaders monitoring, the judges had more discretion and lost control without the relevant disciplinary mechanism.³⁸⁷

Hesitant to return power back to the administrative leaders and disappointed with the overall poor quality of the Chinese judges, the reform turned its attention to the presiding judges. The collegial panel has played a decreasing role in the decision making process since the role of the presiding judge has been emphasized.³⁸⁸

As discussed in the previous section, institutionalizing and empowering the presiding judges triggered a revival of the administrative approval in a disguised form. To correct the deviation, two types of adjudicative mechanisms were invented and widely implemented. One was the President and Tribunal Heads Deliberation (a variation of the Administrative Approval mechanism), and the creation of the Adjudication Administrative Office.

**President and Tribunal Heads Deliberation**

This mechanism focuses on role of court president and tribunal heads in reviewing and monitoring judges’ adjudication in individual cases. The rationale for this approach derived from the unitary administrative system in the Chinese courts. The presidents and tribunal heads were to be responsible for all the work in their own reign. Under this approach, the courts were required “to further reinforce the administrative power of the president (vice) and tribunal heads (vice), specify their trial management responsibility, explore the new management mode, and achieve the further centralization and specialization of the administrative power.”

To control the judges’ abused discretion, the SPC’s second five-year reform plan reemphasized the important role of the executive chiefs as the role models and supervisors of the judges. However, it turns out that the presidents and tribunal heads were so busy with their administrative responsibilities that they were not able to supervise many trials. As such, another strategy has been widely adopted to restrict judges’ discretion: trial management.

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The Trial Management Mode

Trial management mode was originally designed to make the judges more accountable and the trial process more efficient, while preserving the independence of the judges to decide cases. However, the current developing and expanding framework of trial management has not only failed to achieve this purpose, but has also intensified the administrative influence in the courts.

Before the establishment of the Trial Administration Office (hereinafter, the TAO) of the SPC in 2010, trial management mainly referred to case flow management and the wide application of computers and information technology. Since the second five-year reform started, the practice of trial management has been developing quickly. Trial management has evolved into an independent stream from personnel management and finance management in the courts, and carves out three areas: trial procedure management, trial quality management, and trial effectiveness and efficiency management.\(^{391}\)

The TAO as a new internal organ in the courts has been established in multi-level courts. Most of the local courts have an independent TAO and, if not, the TAO is affiliated with the Trial Supervision Tribunal (shen jian ting). In the beginning, the TAO was more like a secretarial office, assisting the presidents and adjudicative committee to address

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administrative issues, but it is expanding with more responsibilities. Until now, a wide range of evaluation systems, including numerous indexes, have been established to monitor, evaluate, and rank the judges’ performances, which had become quite controversial.

In addition, since the evaluation systems are widely applied in the judges’ appraisal and promotion procedure, court management has become a new burden on the administrative hierarchy over the judges. Within this system, the judges not only continue under the administrative influence of the presidents and division heads of the courts where the judges are working, but are also confronted with influence from the higher-level courts. An alternative model of court administration featuring a great degree of judicial autonomy is in high demand.

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392 The office is responsible for managing procedures, quality appraisal, supervision and inspection of enforcement involving cases within a certain hearing time limitation heard by the SPC; supporting procedures of important cases and managing the judicial committee’s affairs, ensuring judicial openness, and summarizing trial experience. See Organization of the Supreme People’s Court of the PRC, http://english.court.gov.cn/2015-11/03/content_22357698.htm. (Retrieved on Jan. 26, 2016)


394 Quality index-efficiency index-effectiveness index –execution index, ibid.


396 The evaluation system on the supervising of judicial quality, is widely used by the superior court to supervise the adjudicative work of the subordinate court, which greatly reinforced the authority of the superior courts to the subordinate courts. Interviewee No 1. See Appendix One.
1.3.2 Stubborn Administrative Controls and Influences

From the review of the changes of mechanisms, it is clear that the Chinese courts have been making an effort to make the judges decide cases independently and to be immune from internal administrative influences. The previous approval system has been completely replaced with the collegial panel deliberation system. On the normative level, the verdicts should be made and signed directly by the collegial panel or the individual judge. Even the institutional independence of the court is not China’s case; the Chinese judges are expected to behave independently in deciding cases. This is not only prescribed in the constitution, but has been advocated in the policies of the Party–state and the SPC documents. The institutional change of the adjudicative mechanism has proven this effort.

However, the results are not promising. Chinese courts have frequently been caught in a dilemma between judicial independence and accountability. It appeared challenging to strike a balance between independent judicial behavior and accountable judicial output. Whenever the empowering of the judges’ independent judicial behavior failed to generate a fair and effective judgment and instead resulted in power-abusing and corruption, the status and power of the administrative superiors were elevated more implicitly, such as with the president and tribunal heads discussion system and the application of the court management notion. The establishment of the TAO has marked the supreme success of administrative power in the courts. Therefore, while the SPC has realized that administrative power undermined justice in adjudication and thus attempted to diminish it
in the last century, the administrative controls and influences are still prevalent in the
Chinese courts.

I.4 Conclusions

There has been a very clear agenda of judicial reform since the late 1990s until now that
ensures judges adjudicate independently and removes any internal influence in the court.
The Chinese courts have constructed and reconstructed themselves with more judicial
professionals and sophisticated adjudicative mechanisms. However, internal
administrative dominance has not diminished but has rather been reinforced to some
extent. It appears that such dominance is derived from the difficulty of striking a balance
between judicial independence and accountability. However, judicial independence and
judicial accountability are not inherently oppositional.\textsuperscript{397} It is the increasing bureaucracy
and the unitary administrative system that makes the administrative influence difficult to
eliminate.

The Chinese court system is expanding quickly with more rigid stratified grades and
levels, and with more newly established courts and tribunals.\textsuperscript{398} This trend is closely
related to the judicial reform agenda as well as natural strategies for the courts to achieve
self-empowering and institutional expansion. Consistent with the expansion of the courts’

\textsuperscript{397} Burbank SB & Friedman B, Judicial Independence at the Crossroads: An

\textsuperscript{398} Liu Zhong, “Guimo Yu Neibu Zhili, Zhongguo Fayuan Bianzhi Bianqian Sanshi Nian
[Scale and Governance: The Transformation of the Personnel Quota of China’s Court in
Past Thirties Years]” (2012) 5 Fazhi yu shehui fazhan [Law and Social Development].
institutions, the numbers of judges is greatly increasing. To leverage the lack of superior–subordinate communication, more layers had to be established, such as the permanent setting of presiding judges, as well as special committee members and the specialized judges conference. In an impersonal bureaucratic organization, it is necessary to adopt objective measurements for true evaluations of performance, which is consistent with the implementation of a new cadre evaluation system.\(^{399}\) Simply put, judicial reform has made the Chinese court a highly bureaucratic organization.

A bureaucratic organization stresses superior–subordinate relationships and arranges its offices so that order-giving and reporting roles are clearly defined.\(^{400}\) This is clearly the case of the Chinese court. The superiors have supreme authority over all the tasks in the bureaucracy. To make the bureaucratic organization function well, the supervisors (presidents, vice presidents, committee members, and tribunal heads) have to take on more management tasks, which can dominate their entire work load. However, as the leaders of the organization, they are responsible for not only the managerial tasks but also the quality of the judicial output (the judgments). This system works if the adjudications are routine work requiring little discretion, or if the complicated tasks can be routinized or bureaucratized; that is, a highly specific set of rules and procedures can be evolved to spell out how decisions are to be made.\(^{401}\) This is surely something the SPC is working

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\(^{401}\) Ibid. at 37
toward, such as the new mode of trial management, and the grading and evaluation system with a high level of sophistication.

Unfortunately, the Chinese courts do not seem to be able to survive the demands of a complex bureaucratic organization. Adjudication is usually regarded as an activity requiring high discretion, but a bureaucratic organization minimizes the discretion of its members as it needs to make written rules that spell out subordinates’ discretionary behavior. This may explain the reluctance of the Chinese judges to decide cases independently. As the evaluation system must be objective in a bureaucratic system, the judges prefer to adhere to the written rules to behave objectively, rather than conduct an adjudication creatively and subjectively. Therefore, the administrative influence naturally fills the gap deriving from the inconsistency of the bureaucracy and adjudication.

It is notable that while the term “bureaucracy” is usually used today in the pejorative sense, it is also believed to be an indispensable organizational model which is how it has reached its present level of sophistication.\(^402\) This is not to say that a bureaucracy could not function in the courts, particularly in the Chinese context where the court system is large and stratified. Indeed, the boundary between judicial administration and court administration should be clearly defined. Court administration means providing and maintaining the infrastructure for the judicial branch so judges can perform their adjudication duties. In contrast, judicial administration embraces jurisdictional,

procedural, and administrative law issues.\textsuperscript{403} Within the current structure and the internal organs of the Chinese courts, the adjudicative tribunals and non-adjudicative offices should adopt two sets of administrative models, which will possibly make the judges who adjudicated free of the internal administrative control.

Chapter V Chinese Courts’ New Move

I.1 Introduction

The previous chapters demonstrate that the Party, the public and the internal administrative influences all affect judges’ decision making process, and judges are making efforts to positively confront these challenges by institutional renovations in the ongoing judicial reform. On the one hand, the courts try to minimize the direct influence from the Party, the public, and the internal administrative power; but on the other hand, they tend to resort to the Party and public to gain their legitimacy and authority. These dynamics not only have influences on judges’ behaviors, but also affect the norms and practice of the courts. The combination of these powers sometimes promote the development of the courts, and sometimes make the courts weakened or silent. The shaping powers are still working in the recent new wave of judicial reform.

This chapter will investigate how the Party, the public, and the internal administrative power continue to influence or affect the institution innovations and policy changes in Chinese courts since 2014, and how the norms and institutions have been shaped in the framework of the Party’s leadership, responsive to public and judges’ professionalism.

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The chapter explores this issue in four parts. The first part explores the new policies and initiatives advocated in this wave of judicial reform. The parts followed respectively investigate the influences on the institutional changes of the courts from the Party, the public and internal administrative power, and the rationales behind in the reform. Then will be the conclusion.

I.2 New Policies

Almost every judicial policymaking and implementation were initiated by the Party documents. It is not distinct for the current situation. The new wave of judicial reform stems from the Party document “Decision of the Central Committee of the Communist Party of China on Some Major Issues Concerning Comprehensively Deepening the Reform (hereafter as 3rd Plenum Decision)” formed in the 3rd Plenum of the 18th Central Committee of CCP Central Committee in Nov. 12, 2013 (Table 7).

Table 7 Timelines of judicial reform policies since 2013

<table>
<thead>
<tr>
<th>Event</th>
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<tbody>
<tr>
<td>Nov. 2013: 3rd Plenum of 18th CCP</td>
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<tr>
<td>July 2014: SPC Fourth FYRP Outline</td>
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<tr>
<td>Oct. 2014: 4th Plenum of 18th CCP</td>
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<td>Feb. 2015: Fourth FYRP</td>
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</table>
I.2.1 The 3rd Plenum Decision

The 3rd Plenum Decision has set the agenda to comprehensively deepen the reform, the purposes of which are to improve and develop the socialist country with Chinese characteristics and promote the modernization of national governance mechanism and ability. The decision sets a blueprint for the reform, including the reform of economic, political, cultural, societal, environmental and party building aspects with 336 important reform measures.  

In part 9 “Advancing The Construction Of Rule Of Law In China”, the Dicision sets that the guiding principle of judicial reform is to “deepen reforms of the judicial system; accelerate the establishment of a fair, highly efficient and authoritative socialist judicial system; maintain the people’s rights and interests, and let the masses feel fairness and justice from every judicial case.” In article 30, it emphasizes the protection of the authority of the Constitution and laws; Article 31 mentions the deepening reform of the administrative law enforcement system and Article 34 states improving the judicial system to protect human rights. The most important parts of the judicial reform are the article 32 and 33.

As usual, the Party documents tends to use general political statements and slogans. In the 3rd Plenum Decision, one of the stereotypical phrases is “governing accordance with

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law (fazhi)” (8 times), specifying in the phrases as “governing China accordance with law (fazhi China)”, “governing the country with law (fazhi country)”, “governing the government with law (fazhi government)” and “governing the society with law (fazhi society)”. Another frequently mentioned words is “the people (renmin)” (7 times), which normally goes with “rights and interests,” mass (2), police (2), juror and supervisor.

However, some new phrases are exceptionally notable in the Decision as following: (1) provincial administration of personnel and finance (sheng tongguan); (2) jurisdiction system detached from administrative regions; (3) judicial personnel managed by category; (4) let the adjudicator decide, and let the decider be responsible. These new phrases in the Decision are targeting on the specific problems in the current courts and also manifest with the general principles to address these problems. With the reform principles advocated by the Party, the courts have worked out details in SPC Fourth FYRP.

I.2.2  SPC Fourth Five-Year Reform Plan

The Supreme People’s Court published the main contents of its Fourth Five Year Reform Plan on July 9th, 2014, and issued the full version of the Reform Plan on Feb. 4, 2015. The plan addresses eight key areas by putting forward 45 reform measures. As a specific

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implementation to the 3rd Plenum Decision, the Plan clarified the measures outlined in the Decision.

Measure one is the reform of judicial appointment and personnel administration. The judges are conventionally appointed and remunerated as civil servants, the reform intends to: (1) establish judicial selection committees at the provincial level, (2) establish a separate administrative system for judges, judicial assistance clerk and judicial executive staffs, (3) establish a quota system on numbers of judges to make the most excellent judges focus on the adjudication and lesson their administrative burden by increasing the number of clerks, (4) improve systems for judicial ranking and periodic promotion to ensure the competent judges without the administrative titles get promoted to the superior ranking.

Secondly, the reform will explore separating administrative regions and court jurisdiction. The steps will be taken such as (1) ensure the fair trial of administrative cases, cross-regional civil and commercial cases and environmental protection cases by jurisdiction at a higher or designated court; (2) bring the forestry and agricultural reclamation courts into the national judicial administration system; (3) establish mechanism for superior courts to adjudicate in circuit courts; (4) promote to establish IP courts in areas with intense IP cases.

The reform also aims to improve the operation of the judicial function by letting the hearer decides and letting the adjudicator be responsible, improve the protection of
human rights, increase judicial transparency, clarify the roles of the four levels of the courts, improve judicial administration, and promote reforms relating to petitioning.

The Fourth Five Year Reform Plan embodies many issues that have been discussed within the Chinese legal community for years and also draw on international expertise as well. While drafting this reform plan has been a tremendous undertaking, its implementation promises to be even challenging. In order to better implement these principles, another Plenum Decision was issued with a focus mainly on the judicial reform.

I.2.3 The Decision of the 4th Plenum

On Oct. 23, 2014, the 4th Plenum of the 18th Central Committee of the CCP promulgated the CCP Central Committee Decision Concerning Some Major Questions in Comprehensively Promoting Governing the Country According to Law (the 4th Plenum Decision). This Decision has embarked numerous debates both in the academics and popular media.

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The Decision further emphasized China’s persistence in building its unique form of “rule of law”-Socialist rule of law with Chinese characteristics. This concept is still ambiguous in content and certainly will be further defined with the development of Chinese legal practice. However, it demonstrates Party–state’s determination to governing with law, by drawing more from the Chinese culture and learn from the foreign rule of law concepts selectively. The party’s leadership and dominant position of the people are repeatedly emphasized in the Decision.

The fourth part of the Decision proposed many measures to increase judicial fairness, in the sense that the courts should “strive to make the people feel fairness and justice in every judicial case.” Here the judicial credibility is closely connected with the views of the ordinary people regarding the concept of fairness, which reflects the Public’s influence in the courts.

It is notable as well that the authority decides to eliminate the inappropriate intervention from the Party cadre to the judicial decision making by “establish a system for recording, reporting, and investigating the responsibility of instances wherein leading cadres interfere in judicial activities or get involved in the handling of certain cases.” This system aims to make the illegal interference visible and investigable. “Party or administrative disciplinary action will be imposed where there is interference in a judicial case. If it results in an unjust, false, and erroneous case, or other severe outcomes,

criminal responsibility will be investigated according to the law.” Thus two levels of disciplinary and punishment mechanism are set up to promote this effort.

The Decision includes various specified measures to address the problems in the current judicial system. For instance, the courts will change their way to accept cases filed by the litigators, by changing the case filing review system to a case filing registration system. Meanwhile, a disciplinary system will be established to make the judges responsible for the quality of cases in their lifetime, and a comprehensive mechanism will be set up to make the judicial process open and transparent. In all, the 4th Plenum Decision prescribed more than 180 nuanced reform measures, showing the Decision is not all political propaganda and slogans, or even meaningless feel-good language.410

The three documents proposed the principles and outlines for the new judicial reform. The SPC plan has actually embodied many measures obviously borrowed from the rule of law countries or traditions, especially on the configurations of courts and selections of the judges. However, the Party Decisions’ unequivocal confirmation on the socialist rule of law further strength the leadership role of the Party and dominant status of the people in the Chinese legal and judicial system. At the same time, the SPC showed its determination to eliminate the administrative influences in Chinese courts.

I.3 Party’s Leadership

While the previous judicial reforms were initiated by the CCP Party decision, and organized and promoted by the party organization PLC, it was mainly the SPC that designed detailed reform measures and kept push them forward. Though the judiciary had made significant progress towards greater professionalism and efficiency, most of the reform plans could not be implemented in practice, especially those required supports and cooperation from the other government branches. In this sense, the major challenges for the judiciary arose from the outside forces: local government, the procuratorate, the public security department, the people’s congress, the media and public. The judicial reform since 2013 is so different that the reform measures are implemented very rapidly, which has reflected the reinforced leadership of the Party in the reform.

The Party’s leadership has been reinforced since 2013 by the newly established Central Leading Group for Comprehensively Deepening Reform, which is the top decision maker of the judicial reform policies. This part will investigate how the Party’s reinforced leadership to the judiciary continues shaping the various institutions of Chinese judiciary and will analyzed the reason for these constant dynamics between the Party and the courts.

I.3.1 Institutionalization of the Party’s Leadership

Three organizations are playing dominant roles in the reform policy making and implementation-the Central Leading Group for Comprehensively Deepening Reforms...
(CLG), the Central Leading Group for Judicial Institutional Reforms (CLG-JIR), and the SPC Judicial Reform Leading Group.

Central Leading Group

CLG was established in 2013 and set up directly under the Politburo of the CCP, as an apparatus in charge of the formulation, coordination, implementation and supervision of the policies to comprehensively deepening the reform. With Xi Jinping as the leader, and Li Keqiang, Liu Yunshan and Zhang Gaoli as deputy leaders, all of whom held highest ranks in the Party–state, the CLG is composed of key Party leaderships with the highest ranks who oversee broad and various aspects of the Party and the state.

While the CLG formulates and implement policy guidelines to foster a comprehensive reform in economic, political, cultural, ethical and other various aspects, it made the judicial reform as the breakthrough in 2014. For instance, among the 19 meetings held by CLG, 12 meetings focused on the judicial reform and 25 pieces of documents on judicial reform were passed and issued (For the titles of these documents, see Table 8).
Table 8 Judicial reform policies issued in CLG Meetings (2013-2015)

<table>
<thead>
<tr>
<th>Date</th>
<th>Meeting</th>
<th>Policy</th>
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<tbody>
<tr>
<td>Feb. 2014:</td>
<td>Second Meeting</td>
<td>Opinions And Collaborative Implementation Plans Concerning The Deepening Of Judicial Mechanism And Social Mechanism</td>
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<tr>
<td>June 2014</td>
<td>Third Meeting</td>
<td>Opinions on the Frames of the Judicial Mechanism Reform Pilots</td>
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<td>Working Plan Concerning Shanghai’s Judicial Reform Pilot</td>
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<td>Plan Concerning the Establishment of Intellectual Property Rights Court</td>
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<tr>
<td>Dec. 2014</td>
<td>Seventh Meeting</td>
<td>Pilot Plan on the Establishment of Supreme People’s Court Circuit Court</td>
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<td>Pilot Plan on the Establishment of Cross-administrative People's Court and People’s Procuratorate</td>
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<tr>
<td>Dec. 2014</td>
<td>Eighth Meeting</td>
<td>Opinions on Further Regulate the Settlement of Money and Items Involved in the Criminal Litigation</td>
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<tr>
<td>Jan. 2015</td>
<td>Ninth Meeting</td>
<td>Plan to Implementation of the Fourth Plenum on Further Reforming the Judicial and Social System</td>
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<tr>
<td>Feb. 2015</td>
<td>Tenth Meeting</td>
<td>Provision on the Recording, Notification and Accountability of Intervening into Judicial Activities and/or Handling of Specific Cases by Officials</td>
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<td>Plan for Deepening the Reform of People’s Supervisor System</td>
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<td>April 2015</td>
<td>11th Meeting</td>
<td>Pilot Plan on Reform of People’s Jury System</td>
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<td>Opinion on Reform of File Registration of People's Court</td>
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<tr>
<td>May 2015</td>
<td>12nd Meeting</td>
<td>Pilot Plan on Reform of Public Interests Litigation Filed by People's Procuratorate</td>
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<td>Opinion on Improving Legal Aid System</td>
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<td>June 2015</td>
<td>13th Meeting</td>
<td>Opinion on Improving the National Uniform Legal Profession Qualification System</td>
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<td></td>
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<td>Opinion on Recruiting Assistant Judges and Assistant Prosecutor</td>
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<td>Regulation on Interaction between Judges and Litigators, lawyers, Closed Person and Agent</td>
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<td>Aug. 2015</td>
<td>15th Meeting</td>
<td>Opinion on Improving Judicial Responsibility of People’s Court</td>
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<td></td>
<td>Opinion on Improving Judicial Responsibility of People's Procuratorate</td>
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<tr>
<td>Sept. 2015</td>
<td>16th Meeting</td>
<td>Pilot Plan on the Separate Management of the Judges and Prosecutors</td>
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<td>Pilot Plan on Reform of Remuneration of Judges and Prosecutors</td>
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<td>Opinion on Deepening Reform of Layer System</td>
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<tr>
<td>Oct. 2015</td>
<td>17th Meeting</td>
<td>Opinion on Improving Government Participation in the Administrative Litigation</td>
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<td>Opinion on Improving Diversified Mechanism on Conflicts Resolutions</td>
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<td>Dec. 2015</td>
<td>19th Meeting</td>
<td>Request on Implement the Pilot Projects to National Courts</td>
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Among these documents, the first two documents have set up the blueprints of the reform with overall directions, principle and schedules of the reform, and the other four mainly focuses on the specific pilot projects. The pilot projects are conducted to explore various reform plans which could fit into the current judiciary and jurisdiction. Although the reform policies are designed by the top, they would be tested in the pilot courts, before expanding to national implementation.\textsuperscript{411} The full texts of most of the documents have not been released to the public, and remain elusive, with similar reason on the delayed publication of the Fourth FYRP. However, the reform measures are implemented very promptly, which triggered some concerns on reckless decisions and premature models without deliberate contemplation and full preparation.

\textit{Central Leading Group for Judicial Institutional Reform (CLG-JIR)}

The Central Leading Group for Judicial Institutional Reform (CLG-JIR) was established in 2003 by the CPLC to be responsible specifically for the judicial reform, and it was headed by Luo Gan, a member of the Politburo Standing Committee. Zhou Yongkang succeeded Luo in 2007 and then retired in 2012. Compared with the CPLC, the primary functions of which are to coordinate and conduct routine inspection over political-legal institutions, the CLG-JIR enjoys the highest decision making authority in judicial system

\textsuperscript{411} Seven provinces or Direct-Controlled Municipalities (including Shanghai, Guangdong province, Jilin province, Hubei province, Hainan province, Qinghai province and Guizhou province) have been firstly selected as the pilot regions to test the new reform policies. The Pilot regions have been expanded twice until now. “Sifa Gaige Shidian 2016nian Jiangzai Quanguo Tuikai [The Judicial Reform Pilot Will Be Implemented In The Nationwide In 2016]” (Dec. 10, 2015) Caixin online: http://china.caixin.com/2015-12-10/100884360.html? t t t=0.333325226791203. (Retrieved June 11, 2016).
related policies. While the CPLC’s mandates are limited to courts and other law
enforcement institutions, the CLG-JIR drew its members from a much wider range of
institutions including the CPLC, the SPC, the SPP, the Ministry of Public Security, the
Legal Affair Office of the State Council, the Central Party Bianzhi Commission Office
(which is involved in administering the ranking system), and the Internal-Affairs
Committee of the National People’s Congress. Its authority extends far beyond
“coordination” between the political-legal institutions by including the coordination
between political-legal institutions with other state institutions, such as the legislature,
treasury and personnel regulatory authorities.412

The PLC in the provincial level is also acting as a supervisor and coordinator when the
people’s courts in the two levels are making pilots plans. The people’s courts submitted
their pilot plans to the political-legal committee, and if approved, the plans will be
forwarded to the CPLC. And every Pilot project made by the province has to get
approvals from the CPLC before the court launches the Pilot plan in the provincial
level.413

412 Li Ling, “The Chinese Communist Party and People’s Courts: Judicial Dependence in
While the Central Leading Group and CLG-JIR have higher authority than the SPC Leading Group, the SPC Leading Group is the think tank of the judicial reform. It makes and proposes the reform agendas, work plans and implementation strategies for the CLG-JIR, and promote the implementation of these policies in all the courts. Judicial Reform Leading Groups have been also established in the provincial courts, which are taking on the roles as the supervisors and coordinators at the province level.414

The three organizations form the top-down model of decision making and implementation, which has kept the judicial reform in the fastest track ever. Furthermore, it reflects the essential role of the Party in fragmented China where the making and implementation of the cross-institutional policies is the outcome of negotiation, bargaining and coordination of a wide range of organizations. In fact, many reform measures have been advocated by legal scholars before but has been experimented or implemented so quickly only since this wave of reform. This momentary pace would be impossible without these three newly established coordinated organizations and the firm support of the Party behind. While it is easy to understand that SPC would like to gain authority from the Party, it is interesting to investigate why the Party was so enthusiastic with judicial reform.

1.3.2 Centralization of the Party’s Power

The answers to the recent Party’ enthusiasm towards legal reform lie in the CCP’s concerns of the current politics and economy in China. Before the opening of the 3rd plenum, debates about whether China should further deepen reform were prevalent. Finally, the 3rd plenum embraces the policy of comprehensively deepening reform, which demonstrates the consensus reached by the leaderships at the central level of the Party-state. However, the implementation of the policy of comprehensively deepening reform is not an easy task in China, which is at a crossroad as pointed out by the 4th plenum decision.415

At this crucial stage, the judicial reform is regarded as a breakthrough for the reforms in other aspects of the state. A fair and efficient judiciary could regulate the market behaviors, constrain and undermine the special interests and obstacles hindering the deep economic and social changes. To further promote the economic reform, the Party–state also requires a legitimate instrument to overthrow the political rivals and dominating interest groups. Judicial reform is a shortcut with minimum cost, a most efficient tool to commence the rule of law reform or even political reform.416 The CCP also has to appeal to the norm of “socialist rule of law with Chinese characteristics” to consolidate its power

and establish China’s soft power internationally. Therefore, the CCP tends to view the judiciary as part of the bureaucracy, an ally of the Party in improving governance and strengthening its internal management rather than as the people’s advocate against the party.

The CCP expects that the courts are reformed to be competent to carry out the law, as an expansion of the state to be more responsive to the people and checking on the corrupt bureaucratic officials especially in the local level. The centralization of judicial power is an efficient way to shatter the local protectionism and centralize the decentralized powers.

*Judicial Centralization by Shattering Local Protectionism*

The local courts, which are theoretically regarded as “the courts sent to certain regions by the central court,” in reality have become “the courts of the regions” as the result of localizing of the judiciary power. Chinese judiciary was always criticized as the judiciary of local governments, rather than the judiciary of the central government. The Policy of Reform and Opening Up has built up China as a more fragmentation authoritarian nation, with local governments enjoying more authority and freedom in making and implementing local policies. As the courts’ personnel and finance

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management are administered by the local government, the courts have to engage as an integrated organization of the local government and have to play roles as the other government administrative branches in developing local economy, keeping social stability and implementing other political, social, economic goals assigned by the local governments. Similar to the competitions between various local governments, courts in different administrative regions began to compete regarding trial quantity and quality, institutional renovation and contribution to the local governance. The localization of the Chinese courts has caused many judicial injustices and unfairness.

In the reform plan, “the focus of rule of law is aimed at reducing the power of local government officials.” The 4th Decision also mentioned that “All level of Party and government bodies and leading cadres must support the courts and procuratorates in exercising their functions and authorities independently and fairly according to the law.”

To change the localization of the courts, the reform focuses on three aspects.

_Cross-administrative Region Courts and New Tribunals_

On August 31st, 2014, the National People’s Congress passed the decision to establish intellectual property (IP) courts in Beijing, Shanghai and Guangzhou. On Nov. 3, SPC issued regulations on the selection of IP courts judges and the jurisdictions of the newly

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established intellectual property rights courts respectively in Beijing, Shanghai, Guangzhou. Beijing IP Court formally opened on November 6th, 2014 and appointed 22 presiding judges selected from all three levels of courts in Beijing. Guangzhou and Shanghai IP Courts opened formally on December 16th and 28th respectively. The experience of IP courts is expected to be beneficial to explore the cross-administrative region courts.

On December 28th, 2014, China’s first cross-administrative region court, namely Shanghai No.3 Intermediate People’s Court and No.3 Branch of Shanghai People’s Procuratorate were established. Two days later, Beijing No.4 Intermediate People’s Court and No.4 Branch of Beijing People’s Procuratorate of the same kind were established. The establishment of cross-administrative region courts is regarded as essential to eliminate the influence on the judiciary from the local governments and hinder local protectionism. Moreover, the cross administrative courts could help make a balance between the unified legal and judicial norms and disparity of economic and cultures in different geographical areas of China.

On Dec. 28, the NPCSC appoint the president for each of first and second SPCCCs and four vice presidents. Then, on Jan. 28, 2015, the SPC issued “Regulation On the Jurisdiction of SPC Circuit Tribunal”, and then on Jan. 28, 2015, No. 1 SPC Circuit Tribunal opened in Shenzhen Guangdong province, and on Jan. 31, No. 2 SPC Circuit Tribunal opened in Shenyang, Liaoning province. SPCCC’s anticipated functions have both short term and long term targets. In the short run, it aims to increasing the public
credibility of the judiciary and reducing the high volume of petition from the public regarding the judicial injustice and unfairness, by rehearing high profile cases which have been possibly intervened from the local governments. Meanwhile, in the long run, the new circuit courts aim to unifying the performance of local courts in the nation wide, by overcoming local protectionism and reducing controversial adjudications. Furthermore, the new circuits are expected to gradually establish the “de facto valid” model cases by solving new and important legal problems in adjudication.

Provincial Administering of Judges and Finance

Firstly, personnel reform will be conducted to change the personnel management of local courts, and consolidate the personnel power in the intermediate courts, district courts and other local courts to the provincial level. The specific measures in the pilot projects include the establishment of the selection and discipline committees in the provincial level which will be responsible for recruitment, promotion and discipline of the judges, and thus make the separation of the management of judges from other civil servants to step away from the traditional model of judges as cadre.

Meantime, the finance and infrastructure of the courts below the SPC will be integrated to the provincial level. However, the specific measures in the pilot projects are still yet clearly defined. According to Shanghai Pilot, all district and county have unified budget

management system at the city level. The ownership of all assets of district and county court are transferred to the city level, where a municipal bureau will manage the entire city’s judicial assets, design and implement the mechanisms which allow for management and distribution. 422

I.4 Responsive to the Public

As discussed in previous chapters, besides relying on the Party’s political support and resources, courts also make efforts to seek legitimacy basis from the public. Especially since 2013, many reform measures on promoting judicial openness and “justice for the people” have been identified as priorities in the reform agenda and seriously implemented for better responses to the public. This has been supported by the Party and the SPC to “let the people feel fairness and justice in every judicial case”. 423

I.4.1 Judicial Openness


mentioned discourse in the SPC propaganda and SPC does make full use of information technology and multimedia means to promote judicial openness.

The SPC has established four online platforms to make the judgments, trial proceeding and law enforcement information open to the public. Established in Nov. 2013, China Judgment Online has 14 million judgments issued by 3499 courts with hundred million clicks.\textsuperscript{424} The second platform is China Judicial Process Information Online, where the litigation parties can log in to check their case timelines, accept the documents, contact judges and make appealing.\textsuperscript{425} An online platform for open law enforcement has also been established for the litigation parties to find information on case enforcements.\textsuperscript{426} Recently the public can subscribe and watch the live court proceeding at another online platform called \textit{Zhongguo Tingshen Gongkai Wang}, where only a very small portion of court proceeding in the courts of various level are assessable.\textsuperscript{427} All the online platforms reveal the SPC’s efforts to make judicial information more accessible to the public, in the expectation to boost the fairness of the trail and authority of the courts. Besides these online platforms, SPC has used multimedia means to provide public access to judicial proceedings, such as the Twitter-like Weibo, the social networking application WeChat

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and other news application apps. All efforts have shown that the courts are actively embracing judicial openness by improving communicating with various types of media.

It is interesting to notice that the SPC prefers the usage of “openness (gongkai)” to “transparency (touming).” Linguistically, whereas “tou ming” implies a stronger result-oriented tone, and thus emphasizes the status of being “transparent”; “gong kai” has a narrower meaning of “openness” and emphasizes the action of “disclosing” or “revealing”, one way to lead to real “openness”. The choice of the word not only exhibits the vigilant attitude of Chinese reformers in choosing their own terminology over the global norm, but is also consistent with the reform measures implemented by the SPC, which emphasizes the action of opening rather than the transparency outcome.

I.4.2 From Case Acceptance System to Case Registration System

It used to be difficult to file some special types of case in courts, as the courts used the case filling review system to filter some types of cases. Courts’ discretion and the flexibility in accepting cases is one of the strategies by that courts can retain an advantageous position in the power relation with the government, by avoiding the institutional constraints, that is, in some cases, the courts do not have the power to enforce their judgments.428

However, this has been changed by the reform of the case acceptance system: from case filling review system to case filling registration system. By the case filling registration system, all cases that should be accepted by the courts accordance with the law must be registered by the courts. The case filling registration system was effective since May 2015, and the cases accepted by the courts in the national wide have been increased by 28.44% compared to last year until March 2016 (the administrative cases has been increased by 60.97%).

However, the courts’ embracement of the public through these striking institutional innovations has in practice caused some problems. For example, the judges are burdened with overwhelmingly heavier workload than before. They adjudicate more cases that have been accepted into the docket with the new case filling registration system, and at the same time, they must be more cautious with the trial proceeding and writing of verdicts, which would be publicized online. This heavy workload has become much worse when the number of judges is decreasing because of the reform on quota of professional judges.

I.5 More Independent and Accountable Judges

As discussed in previous chapter, the important direct intervention in the adjudication of judges come from the judicial bureaucracy. In the past, the judges in the panel were

430 Interviewee No. 1. See Appendix.
not necessarily the true decision makers in deciding the cases, especially in complicated or sensitive cases. The typical routine was: if the case was complicated, the judge discussed the cases with the tribunal head and asked for opinions of the verdicts. If the cases were more complicated and tribunal head was not sure to issue opinion, the judges reported the cases to the judicial adjudicative committees, which is comprised of superior officials and judges in the courts. The judicial adjudicative committees reached a consensus on verdicts of cases. In this case, even though the final decision was drafted and signed by the presiding judge, the opinion virtually was crafted accordance with the decision from judicial adjudicative committee. This bureaucratic process of internal multi-level approval for the case decision has produced more setbacks than breakthroughs.

This reform intended to let the individual judges enjoy more autonomy by changing the current relationship between the presiding judges, the tribunal heads and other leaderships within the courts, such as administrative committee members and court president. The 4th plenum decides to establish professional judges with more independence, more competency, and more responsibilities by breaking the previous internal supervision and inspection mechanism.

1.5.1 Independent Judges

To be free from the internal administrative influence, the internal structure of the courts has been reformed to be less stratified and more decentralized (bianping hua). The panel
is expected to be composed of one judge, one assistant judge and one clerk (1+1+1, or 1+n=n). The presiding judge in the simplified procedures and principal judge in a collegial panel have full responsibility for the entire adjudicative process, and don’t submit the verdicts for approval from the bureaucratic leaders. Rather, court leadership (president, vice president, tribunal heads, and vice tribunal heads) shall participate directly in case handing as a principal judge. The adjudicative committees will not provide guidance in the individual cases, but offer guidance in the categories of cases, law application, and other major issues in trial work.\textsuperscript{431} The old case assessment indexes have been abolished. All these measures are in place to ensure the judges hear and decide case independently from the internal administrative influences.

Also, courts are reformed to classify court personnel into three categories: judges, trial assistant personnel and administration personnel. Judges are expected to be removed out of the category of the civil servant and thus evaluated and promoted by unique standards, which aims to eliminate the bureaucratic influence in the courts. Within new system, it is expected that the court president, tribunal heads and other superior judges in the courts will not have the power to affect judges’ evaluation and promotion. Moreover, to address the tension between judicial accountability and judicial independency and eliminate judges’ misbehaviors and corruptions, the judges will be selected based on a higher standard that theoretically should make them more competent.

1.5.2 Selection of Judges

When the three categories of judges, judicial assistant and administrative staffs are set up, it is essential to make the criteria to select the fixed numbers of judges from the current huge group of judges.

Selection of Judges

The qualified judges will be selected by the Judges Selection and Discipline Committees which has been established in the pilot courts. The number of the judges in a court should be determined by the judicial workload, the population in the jurisdiction and the prosperity of the local economy. The junior judges are recruited uniformly by Provincial People’s Courts, and are initially appointed as judges in the courts at the grass-root level without exception. At the same time, senior judges of the courts at the higher level are generally selected from the excellent judges from courts at the lower levels. At the same time, judges could be recruited from exceptional and experienced lawyers and law professors.432

Shanghai has established Disciplinary and selection committees for judges and procurators at the provincial level, which will be responsible for considering procedures and requirements for promotion. The committee has 15 members: 7 special members are the heads of Shanghai political legal committee of CCP, Shanghai Organization

Department of CCP, Shanghai Discipline Inspection of CCP, Shanghai People Congress, Shanghai Civil Servant Department, Shanghai High Court and Shanghai procuratorate; 8 expert members are selected from senior members from legal academics, legal experts and lawyers.

*Quota System (yuan’er zhi) and Entrance Exams*

Quota System means that ratios of judge, judicial assistant personnel (*sifa fuzhu renyuan*) and administrative personnel (*xingzheng renyuan*) should be fixed by a percentage applied in courts of the same province. For instance, the quota for judges is 33% in Shanghai. This system is very controversial regarding its evaluation criteria and selection process, and has huge influence of the career of individual judges. Most of the current judges must pass the entrance exams of quota system to be appointed as judges, and if fail, would lose the posts as judges and transfer to the posts as judicial assistants or administrative staffs. The purpose of quota system is not only to select the most competent judges, but also reduce the number of judges and subsequently increase the remuneration for them, as the adequate salary is a key component for judicial independence accordance with the international norms.

**I.5.3 Discipline and Removal**

At the same time, the judges will be increasingly scrutinized for their judicial decisions, by establishing an extensive judicial supervision and evaluation system, such as the
lifetime responsibility system for case quality and the accountability system for wrongly verdict cases.\textsuperscript{433} While the increasing accountability is clearly confirmed, the promised increased remuneration for judges is still not reached. One judge from local courts named Wang Wei posted a blog online about his decision to quit from the court, which is not a case of rare occurrence, but a recurring and increasing phenomena in the courts of the national wide various levels.\textsuperscript{434} The quitting of judges took place when the new judicial personnel plan to improve the wellbeing of judges is about to be implemented, which makes the reasons for the judges to quit are very thought provoking. Some judges quitted because of the imbalance between more responsibilities and accountabilities that the judges are going to take on as result of the reform and the worse-off financial situation and career path of the judges.\textsuperscript{435}

I.6 Conclusions

As most of the reform efforts are taking place in the pilot courts, it is too early to evaluate their merits. However, as the central agenda of the reform is to ensure the judges adjudicate independently and be responsible independently, the intervention in the adjudication of the judges has been decreasing, at least for now, either from the Party or the public. Also, as many reform measures aim to break the administrative influence from the local governments, the autonomy of courts is increasing.

\textsuperscript{435} Interviewee No. 6. See Appendix.
In addition, the ongoing institutional renovations and changes of the Chinese courts are constantly shaped by the expectation of the Party, the public and the community of judges. The SPC continues looking for the leadership of the Party and the legitimacy from the public support to implement its reform agenda and measures. However, besides the Party’s authority, the SPC overtly resorts to the public to legitimatize its reform efforts, and negotiate with other stakeholders in the reform.

By this process, the judges are becoming more independent and competent. This pattern repeatedly reflects the picture of the bargaining and negotiation process within the judicial area of the fragmented China. The norms and institutions of Chinese courts in the reform eras are shaped by the distinct expectations of the Party, the public and the judicial elites, and the compromise of their coordinated and contradicted powers. The dynamic among the body of increasingly professionalized judges, the Party, and the public determines the characteristic of judicial independence in China.

One characteristic of the recent reform is the rise of the SPC and the community of judges, who are taking the lead to conduct institutional renovations and establish their autonomy from the other institutional actors. What is its implication to the autonomy of judges? As it is the judicial elites (the top in the judicial bureaucracy) who design and implement these reform efforts, and undoubtedly they are eager to empower their political powers and institutional capacity through reform, which again leads to the

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436 The SPC of PRC has been actively engaging with mutual visits, education exchange and experience sharing with the supreme court in the other jurisdictions. [http://english.court.gov.cn/2016-06/14/content_25707273.htm](http://english.court.gov.cn/2016-06/14/content_25707273.htm). (Retrieved July 15, 2016).
expansion of the internal administrative bureaucratic structures in the courts. How could the self-empowering judicial elites give up their internal administrative power? It is the main dilemma for the Chinese judges to establish their autonomy in the ongoing judicial reform.
Chapter VI Conclusions

The judicial independence in China is highly controversial, given that China remains an effectively single-party socialist authoritarian state, and is widely reported for the prosecution of political dissidents. While Chinese courts do not enjoy considerable collective independence as a branch in current political context, this dissertation focuses on the autonomy of the individual judge or a panel of judges in their adjudication of cases, and investigate the possibility of establishing the individually independent judges in institutional dependent courts. Thus the dissertation contributes to the literature of judicial independence in general and in China.

The second contribution is that the dissertation draws on the literature of fragmented authoritarianism and tests this framework in a broader context in China. While previous literature in this framework mainly touch on the economic decision making process, this dissertation uses this framework to analyze and understand the phenomena of bargaining and dynamics of the judicial decision making and policy making in the “cluster” of legal and judicial bureaucracies in the reform era of Chinese courts.

Thirdly, this dissertation focuses on the Political Legal Committee, the media, and the internal administrative power as lens to investigate how the external and internal institutional actors influence the adjudication of judges, and how much autonomy the judges have in China. The research provides not only a portrayal of Chinese courts

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beyond Western news headlines regarding the rampant corruptions and severe subjection to the Party, but also a snapshot of the Chinese courts in the state-society relations at the moment of great dynamism and uncertainty, which contributes to the empirical data of Chinese courts and judges for the latest three decades.

The dissertation has the following findings.

*The Autonomy of Chinese Judges*

The autonomy of judges in judicial decision making has been greatly approved in the institutional dimension by three decades of judicial reform, and is not an pressing issue in most of the cases, especially in economic and civil cases. However, when the cases are politically or ideologically sensitive, likely to trigger social security concerns or social conflicts, or with complicated facts and law application, judges’ autonomy could be greatly undermined by the other influential forces, such as the Party, the public and the internal administrative bureaucracy. However, the dissertation finds that the direct intervention by the Party and the public into the adjudication of individual cases are less evident than the indirect influence through the administrative oversight of the internal administrative bureaucracy in the courts. In most of the cases, it is the internal administrative power within the increasingly bureaucratic courts that facilitate and channel the interventions of external institutional actors such as the PLC and the media, and thereby influence judges’ judicial decision making behaviour.
As analyzed in the above chapters, the reasons of the less direct influences of the external institutional actors are complex. As argued in the case of the PLC, while having the dominant leadership of the courts, the Party normally hesitates to abuse its power to intervene the cases directly. To address its legitimacy crisis, the Party needs to build up the courts as depoliticized and non-ideological branches, and therefore is unwilling to undermine courts’ autonomy by intervening individual cases in most of cases. Also, the Party is constrained by its normative system- rule of policy. The Party policies are not as normative as state law, which creates the gaps between rule and rule application.

Chinese media can influence the adjudication of judges, but only indirectly and in high profile cases. The media lacks a clear legal framework to directly monitor the courts, and therefore could only influence some of the high profile cases in indirect and implicit way. The great publicity of high profile cases created by the coverage of media would become the concern of the leadership of the Party or government, who dictates the court presidents or the other senior members in the courts to instruct presiding judges to make judicial decisions carefully, and avoid the verdicts contradicted with the public sensation. Thus the courts are not directly influenced by the media but rather by their internal administrative power.

The recent judicial reform has made the external influence such as the PLC and the media in the adjudication of judges more difficult, as the courts proceeding are further legalized and judges are more professionalized. However, the internal administrative dominance has not been eliminated but reinforced to some extent. Such dominance is derived from
the difficulty of striking a balance between judicial independence and accountability in Chinese courts. It also reflects the SPC’s agenda to empowering itself to lead the reform by capacity building and institutional expansion.

While recent reform is making an effort to break the bureaucratic structure in the courts, the internal administrative power is not declining. Without external institutional independence, the courts have to gain political power and resource to bargain and reconcile with the other institutional actors in the fragmented China. As the power of a state organization in China is closely linked to the complexity of the internal structure and composition of staffs, the SPC has made great efforts to scale up the courts’ internal structure and increase the number of judicial staffs. At the same time, to keep the integrity of the increasing judicial community, the SPC needs to centralize its power by setting up more bureaucratic structures. In this way, the empowering of the courts inevitably caused the expansion of judicial bureaucracy, which demonstrates the dilemma of establishing independent judges in the dependent courts in China.

*Chinese Courts-Between the Party Line and the Bottom Line*

The dynamic among courts, the Party, and the public in China affects not only the judicial decision making of judges, but also the policy making of judicial reform and the institutional changes of Chinese courts. Empowering by these dynamics, the Chinese judges, as increasingly professional institutional actors, are playing more important roles in the policy making and implementation in the judicial cluster in China.
As demonstrated in the dissertation, the courts, while fully aware of the potential hazard of external influences in the adjudication of judges, yet still actively embraced the leadership of the Party and the monitoring of the public, as the courts need the support of the Party and the public to gain power and authority in the fragmented authoritarian China. However, the supports from the Party and public are constrained, as the Party is striking an balance of addressing the legitimacy crisis by empowering the courts, and keeping the leadership of judiciary by supervising the courts. To address this dynamic, multi-mechanisms are adopted by the Party to monitoring the empowering of the courts, such as increasing the power of the PLC and loosening of the monitor of the media.

The courts sometimes embraced the monitor of media or the public, as the courts relied on the support of the public to legitimize the judicial reform measures advocated by the SPC and increase their authority and autonomy in the competition with other institutional actors. The policy of judicial openness is an effective strategy for courts to resist intervention of the other external influence, and thus gain powers and resources in fragmented bureaucratic China. However, this dynamic between courts and the public is also constrained by the dynamics with the Party. For instance, when media plays its role for the public to voice social contestation, which created explosive flow of public

the tension among the courts, the Party and the public is rising. The cencorship is tightening up. The courts monitor the misconducts of media seriously. The dynamics of the courts, the Party and the public has shaped the institutional building of the Chinese courts and will continue its influence in the ongoing judicial reform.

*Future Work*

Besides the PLC, media and the internal administrative powers in the courts, other external institutional factors might also have influenced the adjudication of judges, and thus might shed light to further understanding the autonomy of Chinese judges. This research has not been able to test these factors, partly due to the data availability and the limits of volumes. With the improvement in data availability and by taking advantage of the latest development of Chinese courts, future researches should investigate these other external influences to the courts more thoroughly. Also, as demonstrated in this dissertation, the professional judges are playing more important role in shaping the institutional change of Chinese courts, and thus more efforts could be made to further investigate the role of judges in the judicial reform in China.

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## Appendix One

List of Interviewees
Including Pseudonym, Position, Affiliation

<table>
<thead>
<tr>
<th>No</th>
<th>Name</th>
<th>Position</th>
<th>Tribunal</th>
<th>Level of Court</th>
<th>Length of Judicial Career</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>YX</td>
<td>Assistant Judge</td>
<td>IP</td>
<td>Intermediate</td>
<td>8 years</td>
</tr>
<tr>
<td>2</td>
<td>CH</td>
<td>Judge</td>
<td>Criminal</td>
<td>Provincial</td>
<td>9 years</td>
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<tr>
<td>3</td>
<td>YLH</td>
<td>Judge</td>
<td>Civil</td>
<td>Provincial</td>
<td>8 years</td>
</tr>
<tr>
<td>4</td>
<td>ML</td>
<td>Assistant Judge</td>
<td>Adjudicative Management Office</td>
<td>Intermediate</td>
<td>8 years</td>
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<tr>
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<td>LYC</td>
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<td>Civil</td>
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<td>10 years</td>
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<td></td>
<td>District</td>
<td>14 years</td>
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<tr>
<td>8</td>
<td>PB</td>
<td>Assistant Judge</td>
<td>Criminal</td>
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* UBC BREB Number: H14-01068.
** Interview time: June-July in 2014, and follow up in 2015.