Smart courts, smart justice? Automation and digitisation of courts in China

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Chapter Two: The Dual Nature of Law and Courts in China : Judicial Reform and the Role of Political Oversight[1]

2.1 Introduction

The PRC's legal and judicial system is relatively young compared to other jurisdictions. China's current political-legal system dates from the late 1970s (Hsu 2003). It was only after the death of Mao Zedong in 1976 that developing a coherent and functioning legal system became a priority of PRC leadership (Lubman 1999; Chen 2015). The priority lay with economic laws in the 70s and 80s to expand international economic cooperation and technological exchange. From the 1990s until the 2000s, the PRC reoriented towards a market economic system, which required the development of basic civil and commercial law (Su 2009). Ongoing reforms under Xi Jinping have introduced significant changes to its political-legal system (Yu 2021).

This chapter gives an overview of Chinese judicial reform in the past decade to contextualise the developments of SCR. With judicial reform, I primarily refer to the reform of courts, although the People's Police and People's Procuratorates are considered also to be part of the PRC's judicial system. This chapter examines the courts' role and position within the broader political-legal system. Chinese courts have been the object of study by numerous Chinese law scholars and legal practitioners (see, e.g., Leng and Chiu 1985; Trevaskes 2007a; Yuwen 2016; Ng and He 2017). In addition, they have served as a case study for multiple socio-legal studies on the role of courts in authoritarian regimes (see, e.g., Ginsburg and Moustafa 2008; Cheesman 2015; Hurst 2018). Based on a short review of these two strands of literature, this chapter builds a theoretical framework to examine Chinese courts' role and function, how this affects their operation, decision-making, and the implications for reform. This review will help us to understand better how PRC conceptions of law and courts as governance tools shape SCR, which is the focus of chapters 6 and 7.

The first section of this chapter focuses on the dual role of law and courts in Chinese governance and the consequences of this role on the position of legal courts in China's broader political-legal system. It argues that courts maintain a dual identity: they are both a legal and a political task. The latter is more important than the former. Political priorities put courts in a weak position to

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adjudicate legal disputes as a neutral arbitrator, especially in cases involving other administrative institutions. This weak position has also negatively affected their legitimacy among citizens because law and courts cannot sufficiently protect citizens' legal rights against encroaching government action. The second section explores some of the most important judicial reforms since 2013. It argues that judicial reform under Xi Jinping has aimed to improve the status of courts *vis à vis* other political institutions and increase their legitimacy *vis à vis* the general public.

2.2 The Dual Nature and Purpose of Law and Courts in the PRC

Courts are an integral component of state governance, including in authoritarian regimes. Ideally, a court entails an independent judge applying pre-determined legal norms after adversary proceedings to achieve a decision where one party was assigned the legal right and the other found wrong. Fundamentally, a court functions as a neutral third party to resolve a conflict between two parties (Shapiro 1981: 1). Authoritarian regimes also benefit from a well-functioning legal and court system: they, among others, provide channels to exercise state power, monitor local administration, and maintain regime legitimacy (Moustafa 2014: 283; Dong and Voigt 2022). The PRC is similar in that it benefits from maintaining a well-functioning court system. They function as information-gatherers (Shapiro 1981), resolvers of principle-agent problems between the centre and periphery (Peerenboom 2009), as well as enforcers and legitimators of government policies (Stern 2013; Chen and Li 2020b).

However, although law and courts have a clear instrumental function, they are not straightforward executive institutions that advance state interests. Courts in authoritarian regimes "serve as dual-use institutions, paradoxically opening new […] avenues for activists to challenge the state" (Moustafa 2014: 287). In this sense, they sometimes create a site of contention between state and society (Diamant et al. 2005; Balme and Dowdle 2009). Therefore, authoritarian regimes must constantly reassess how they want to shape the role of law and courts.

In addition, Chinese courts are "self-interest maximising" institutions, meaning that courts pursue their institutional interests, such as expanding their mandate (Ip 2011), improving their position *vis à vis* other state institutions (Zhang 2012), and protecting themself against political encroachment (Ahl 2014). Although firmly part of the Chinese party-state's governance apparatus, the judiciary has interests that might not align with that of the party-state.

This ambiguous situation of law and courts poses a dilemma for authoritarian regimes. In China, "political ambivalence" exists towards law and courts due to the double-edged nature of a well-functioning legal and court system (Stern 2013). On the one hand, courts are an efficient instrument of political control, legitimisation, and economic growth. On the other hand, they produce consequences that may undermine the long-term stability and legitimacy of authoritarian governance (Gallagher 2017: 31). These are the costs and benefits encapsulated in the framework of authoritarian legality.

Authoritarian legality, therefore, refers to a system encompassing the coexistence of contradictory requirements for legal rationality, such as the institutionalisation of conflict resolution, predictability, and certainty, and authoritarian rule, such as flexibility, discretion, and pragmatism. Authoritarian legality entails the dual function of law and courts in authoritarian regimes and gives space to the authoritarian core of the Chinese party-state (Fu and Dowdle 2020).

A dual state consists of a normative system with legal rules that coexists with a prerogative state where politics trumps law (Fraenkel 2017). The legal order has a bounded role, and "zones of exception" exist within this order (Sapio 2010; Li 2023). Certain legal mechanisms, processes, and institutions exist to suspend the normative state and allow the prerogative state to intervene within this normative framework. Consequently, many types of unevenness exist across all areas of the legal system, where the law is largely irrelevant or a form of legalised repression (Fu 2019; Creemers 2020: 48). The law is not meant to be a neutral arbiter of disputes or guarantor of rights but a supporting pillar for the party to maintain power and realise its goals. At any time, the party-state may decide to suspend the normative and exercise its prerogative through procedures or simple political power. Therefore, the prerogative does not exist outside China's political-legal system. It is inherently part of it (Sapio 2010: 23-26).

Important to remember is that these are not aberrations, inconsistencies, or exceptions, but rather the system "working as intended" (Clarke 2003, 2020). In contrast, Clarke (2022) argues that the dual state framework is not helpful in understanding China's political-legal system. More specifically, he argues that there exists no normative state that complements the prerogative state, mainly because the PRC had no pre-existing normative state before the disrupting arrival of the prerogative state. Second, a requirement to identify a dual state is that legal norms and institutions provide sufficiently meaningful tools to oppose the arbitrariness of the prerogative state. Clarke

(2022) argues that China's law and courts provide no such meaningful resistance. Lastly, he argues that no institutional and human basis exists to distinguish a duality: the state's prerogative is exercised by the same people and institutions that operate the normative state.

It might be more prudent not to speak of a normative "state" per se but rather a system of rules and norms within the prerogative state, to which the party-state has decided to outsource certain aspects of governance. This system exists only at the discretion of the prerogative and is heavily circumscribed. However, we do not follow the argument Clarke (2022). The law is a powerful and effective tool within it, both as a tool of internal discipline and for right-seeking citizens (O'Brien and Li 2004; Stern 2013; Gallagher 2017). In addition, although physically indistinguishable from the prerogative state, its agents are motivated to maintain and expand the normative system (Ahl and Sprick 2018). Therefore, in contrast to what Clarke (2022) argues, this dissertation argues that the cognitive separation between law and politics *is* relevant because it testifies to the existence of a separate normative system. It exists *within* the prerogative state. Law is, therefore, not the constraining factor, but sovereign power is (Sapio 2010).

Therefore, I maintain this framework of authoritarian legality in a dual state because it does not diminish the dual function that legal courts need to maintain as part of authoritarian legality. The next section examines how this affects courts' position within the broader political-legal system.

2.2.1 Between a Rock and a Hard Place: The Judiciary's Position

The dual nature of Chinese courts has a range of implications. On the one hand, they are a legal institution with its own agency, offering institutionalised mechanisms for dispute resolution (Fu 2019; Li 2019). On the other, they are a political agent that executes the political will of the party-state in the form of stability maintenance, implementing central policies, and enhancing regime legitimacy (Li 2019; Chen and Li 2020b). The judiciary is embedded within the prerogative state and, therefore, must consider the consequences of its decisions for the broader political and administrative context (Ng and He 2017). This duality explains Chinese courts' historical preference for discretion and informality: to effectively fulfil these dual tasks; courts require substantial discretion and flexibility (Woo 1999).

This dual nature of courts and the subordination of legal rationality to the prerogatives of the party-state means that courts are generally weak compared to other political-legal institutions. While

courts are authorised to apply the law, they lack the authority to compel compliance with the law by other political-legal institutions of equal or higher rank in the power hierarchy (Li 2016a). In addition, because of their political and financial dependence, courts were easily captured by other political and economic interests, leading to many corruption scandals in the past (Gong 2004; Li 2012, 2016a, 2019).

The duality of their institutional character has influenced and guided judicial practice since the Chinese courts' establishment (He 2014). Especially in the first decade of post-Mao China, courts mainly fulfilled their political task to create order through the administration of criminal justice (Trevaskes 2007a). Administrating criminal law was the primary way to exercise the state's coercive power. It also helped in creating the necessary stability for economic growth to take place in the 1980s. China's legal system was virtually non-existent, and its civil and administrative law was not adequate to provide the framework necessary for economic growth. Therefore, criminal justice was deployed to deter activities detrimental to economic growth (Lewis 2014).

Later, as China's society and economy became increasingly complex, courts became important public spaces where Chinese citizens could legitimately air their grievances and make demands against the state, as well as each other (He 2013; Stern 2013; Gallagher 2017). However, as part of a political system that greatly emphasises social stability, courts have been sensitive to the threat of unrest. This sensitivity has made protesting, petitioning, or simply the threat to do so "a successful means for litigants to pressure courts to rule in their favour or to alter decided cases" (Liebman 2011).

The dynamics of this precarious balance between normative and prerogative are especially visible in administrative litigation, where courts are caught between stronger administrative agencies and the law (O'Brien and Li 2004; He 2007), and criminal justice, where principles of due process are sacrificed for swift and severe justice (Trevaskes 2007b; Wang 2020c). Similar dynamics exist in family law, where a political ideology emphasising family preservation and stability concerns trump legal considerations (He 2021a; Michelson 2022), as well as commercial law, where private firms leverage their political connections or economic power to win court cases (Gong 2004). However, judicial protectionism of economic interests has diminished significantly because of judicial budgetary reforms (Long and Wang 2015; Zhang et al. 2022).

Due to these dynamics, whether in criminal, civil, or commercial law, legal technicalities might be of secondary importance (Ng and He 2017: 18-19). Courts find themselves between a rock and a hard place: the tension between, on the one hand, fulfilling their political tasks and, on the other hand, using the law undermines their governance capacity to maintain law and order and popular confidence in and support of courts (He 2014: 55-56).

In addition, courts are underfunded, understaffed, and overworked (He 2009; Wang 2013). This situation has also contributed to corruption, miscarriages of justice (Miao 2013; Xiong and Miao 2018), ineffective enforcement, and courts being susceptible to populist pressures (Su and He 2010). The populist pressure on courts was especially serious and one of the main drivers of court reform. Liebman (2011) goes as far as to argue that populist pressures constituted a significant barrier to the development of courts. Courts' sensitivity to litigants' (threats to) protesting or petitioning is caused by courts' weak position in a political-legal system that prioritises social stability at a significant cost.

In conclusion, the precarious and weak position of courts in the PRC is caused by the conflicting requirements of the dual state: courts are supposed to be independent adjudicators, yet they cannot fulfil this task effectively because they are heavily circumscribed and embedded within the prerogative state. The law in and of itself wields little authority, especially when enforcing compliance among political-legal institutions of equal rank (He 2007, 2013). As a result, China's courts lack legitimacy due to its weak position in the broader political-legal system and its ineffectiveness in guaranteeing justice. In the next section, I examine how China's judiciary has tried to change this in the past decade of judicial reform.

2.3 Judicial Reform Under Xi Jinping (2013-2022)

This section briefly overviews relevant themes in the judicial reform agenda to help structure and guide the study of SCR later. SCR has been happening in parallel with other judicial reforms to enhance them and break through organisation and structural barriers in the judicial system because of its dual nature.

In 2014, the CCP Central Committee launched a significant reform at the Fourth Plenum of the Eighteenth Party Congress (CCPCC 2014). The 2014 Decision made the rule of law the central theme of reform. It indicated a strengthening of party leadership *through* the conduit of law, i.e.,

'governing the nation according to law' (*yifa zhiguo* 依法治国) (Creemers and Trevaskes 2020a: 1-3). The *yifa zhiguo* reform platform's primary aim was to centralise control to monitor the state through party-state constructions, with the law as its glue (Trevaskes 2018: 3). Therefore, law (and, by extension, the judicial system) came to stand at the centre of the past decade of reforms.

The 2014 Decision includes important judicial reforms to ensure the fair administration of justice and improve the judiciary's credibility. The reforms aim to address courts' independence, workload, strictness, people's participation, human rights, and oversight of judicial activities (Daum 2015). In what follows, I give a brief overview of three key themes of judicial reform: transparency, consistency, and accountability. I review the main documents published by the SPC and other political-legal institutions and secondary literature examining these reforms. Because of its experimental nature, it is difficult to categorise reform initiatives under a single theme, as they overlap at times. Nonetheless, I structure the rest of this section according to three themes, but categorising an initiative under one theme does not exclude it from other themes. These three themes will recur in future chapters where I discuss their relation with digitisation and automation.

2.3.1 Transparency and Credibility

A year before the 2014 Decision, the SPC already issued two core documents on increasing transparency and improving courts' credibility, i.e., the *Opinion on Several Issues Relating to Advancing the Establishment of Three Platforms for Judicial Openness* (SPC 2013c) and the *Opinion on the Actual Practice of Justice for the People, Vigorously Strengthening a Fair Judiciary and Continuously Increasing Judicial Credibility* (SPC 2013d). Here I briefly discuss the latter, while chapter 3 discusses the former.

The SPC Opinion (2013d) on Increasing Judicial Credibility was the first of many documents on judicial reform over the ensuing years, illustrating how the judiciary was aware of their acute deficit in legitimacy among the population, stating that "the people ardently desire improvements in the rule of law and a just judiciary" (article 2), It mentions the complex and challenging situation that they are facing, including greater demands for the rule of law and a just judiciary by the people. The preamble explains that the proposed reforms in the document are meant to enhance the implementation of the reform platform. It is an important document because it provides a long series of reform initiatives that are all meant to improve the credibility of courts, not only pertaining to transparency but also to consistency, efficiency, accountability, fairness, and so forth.

The Opinion conveys the primary motivation of court reform, i.e., making a "judiciary for the people". It also underscores the historic opportunity for the "development of people's courts". The focus on the rule of law by the party leadership meant that perhaps courts could also profit from the political weight given to law to improve their position and status. The document focuses on improving courts' independence and correct implementation of the law, improving the quality of judicial services and trial hearings, increasing judicial transparency and efficiency, strengthening oversight over court work, and strengthening fairness. Together, these initiatives aim to improve the judiciary's credibility.

The most important reform related to judicial transparency was making court decisions publicly available in a national database, China Judgment Online (CJO) (Ahl and Sprick 2018). It has significantly increased the insight in the operations and decision-making of China's judiciary (Ahl et al. 2019; Xi 2022). However, Ahl and Sprick (2018) argues that it does little to improve transparency among the public since laypeople are not versed or necessarily interested in how courts draft decisions. Moreover, the ubiquity of public information might impede better understanding, a common strategy among Chinese bureaucratic institutions (Gueorguiev 2021). Rather, it is an effort to improve internal and hierarchical transparency and a communication device between judges to improve professionalisation. In addition, Chen, Liu, et al. (2021) argues that this effort is part of increasing centralisation of the judiciary, meant to control and improve the information asymmetry between different hierarchical levels of courts.

Despite this scepticism, Chinese courts have become more transparent about the basic information of court personnel. They also have a bigger media presence and websites and social media accounts that host and share information such as press releases, new regulations, information about the litigation process, contact information, including judges' names, biographies, as well as education and work history (Finder 2018: 148-151).

The judiciary also publishes white papers, research reports, and statistics on their work regularly. They are useful for academic research and public scrutiny but are only sometimes published online by courts, mainly because courts are anxious about the possible consequences. This is the same reason why judicial corruption cases or criminal decisions related to judicial misbehaviour are not published online in the court database because they have negative implications for the social stability and credibility of the courts themselves (Finder 2018: 155-158).

In short, the goal of judicial transparency to improve adjudication and legal certainty is achieved by centralising oversight and control (Liebman et al. 2019). Although some scholars argue this fails to benefit participants in the administration of justice (Daum 2014; Yu 2021: 38-41), others argue this has improved legal certainty and adjudication (Wang 2020d).

2.3.2 Consistency and Standardisation

Another main goal of judicial reform was to improve consistency in adjudication outcomes, i.e., treating like cases alike (*tong'an tong pan* 同案同判) and procedural compliance. Compliance with due process was especially relevant for criminal justice, where wrongful convictions and miscarriages of justice were common occurrences, primarily caused by the excessive focus on one type of evidence, i.e., confessions (Biddulph et al. 2017: 69) as well as the undermining effect of "strike hard" campaigns on due process (Trevaskes 2007b; Wang 2020c). Individuals were found guilty based on erroneous facts or despite insufficient evidence, and judicial authorities purposefully made mistakes in basic procedures, often to meet political objectives, such as quota targets during "strike hard" campaigns (Trevaskes 2007a). Another reason is the institutional culture and triangular relationship among judicial agencies (i.e., procuratorate, courts, and police). A guilty verdict is often reached due to coordination and cooperation in anti-crime campaigns, not due to a trial that follows due process (Xiong and Miao 2018). These practices revealed the malfunctioning of China's justice system, threatening the legitimacy of courts and undermining people's trust in it, potentially leading to unrest (Nesossi 2016; Daum 2017). Therefore, judicial reform under the *yifa zhiguo* platform aimed to improve the criminal judicial process and trial hearing conditions and standardise case outcomes in similar cases by providing more top-down guidance and re-establishing vertical control.

An important judicial document on this matter is the *Opinion on Establishing and Completing Work Mechanisms for Preventing Unjust, False and Wrongly-Decided Criminal Cases* (SPC 2013b). The document recognises the many pain points in the judiciary's criminal process. It gives special attention to enabling courts to resist undue outside influence from other judicial actors (police and prosecution) and public pressures, such as petitioning and street protests (Liebman 2011). Empowerment addresses the primary cause of judicial inconsistency: the tight relationship between the judiciary and politics. By calling for more distance between itself, public security forces, and local governments, the judiciary signalled it wanted more autonomy *vis à vis* other

actors. The document also calls to make the trial hearing the centre of the judicial process (Long 2015); improve rules around evidence collection (Zhang 2021); cross-examination and exclusion of evidence (Guo 2014, 2019b, 2020); plea bargaining (He 2022; Li 2022), and so forth. These initiatives signalled a shift towards more procedural justice to strengthen adjudication based on facts and evidence that can be examined and determined in the trial hearing (see also: Daum 2013; Ahl 2021).

Although the judicial process has become more standardised, procedural compliance has increased, and undue influence has subsided (He 2021b), achieving consistency in judicial outcomes is still difficult. Issues remain, such as the weak position of defence lawyers, difficulties in excluding evidence collected through torture, and the prevailing dominance of police power in the criminal justice process (Biddulph et al. 2017; Nesossi and Trevaskes 2017). In addition, inconsistencies in sentencing outcomes also persist, especially in petitioning and corruption cases (Gong et al. 2019; Zeng and Feng 2022), but also in other crimes (Qi 2020; Lin et al. 2022).

Likely, the primary cause of persistent issues regarding due process and judicial outcomes lies with the dual nature and purpose of law and courts. Therefore, reforms in consistency and standardisation only go so far and are more aimed at achieving an efficient judiciary, rather than a fair and just one (Nesossi and Trevaskes 2017: 2-5).

2.3.3 Accountability and Professionalisation

A third theme of judicial reform is to professionalise the judiciary further. The judiciary launched two plans to achieve this after the 2014 Decision: the judge quota reform and the judicial accountability reform. The judge quota reform aimed to downsize the judiciary. The accountability reform, also called responsibility reform, aimed to give judges more autonomous decision-making power while holding them responsible for their decisions for life.

The judge quota reform aimed to select better-qualified judges and give them resources, power, and autonomy to do their work. The long term was to limit adjudicating powers to those who judged (Sun and Fu 2022: 7). Previously, a 'judge' (*faguan* 法官) included management, administration, and enforcement positions. A *faguan* that adjudicates is referred to as a 'front-line judge' (*yixian faguan* 一线法官) and enjoys little prestige because the title carries little administrative power (Ng and He 2017: 1-30).

According to Sun and Fu (2022: 1-2), judge quota reform goals were contradictory: it aimed to disentangle judging from its bureaucratic and political controls while simultaneously increasing political control. Improving judicial professionalism is also defined in a limited way: it only refers to the quality of judges, the level of institutionalisation, and the rule-based adjudication. It does not necessarily include political neutrality or institutional autonomy that allows courts to adjudicate impartially (Sun and Fu 2022: 3).

Nonetheless, according to empirical research, the judge quota reform has improved the situation of judges: career advancement has become easier, and remuneration has increased marginally. In contrast, the workload has become much worse since the number of court personnel now mandated to handle cases has been significantly reduced (He 2021b: 54-60). Combined with budgetary and accountability reforms, it positively affected Chinese judges' autonomy according to Wang (2020d, 2021a).

The second reform is the judicial accountability reform: it pertains to issues of corruption, factual mistakes, and inappropriate legal applications, but also procedural and paperwork flaws that "cause serious consequences" (SPC 2015a). This reform included a) the deprivation of power from court leaders to review and sign off on decisions drafted by frontline judges, effectively ending the case-approval system; b) therefore reducing the power of adjudication committees[2]; c) replacing it with "professional judge meetings"[3] to provide the adjudicating judge or collegiate panel non-binding advice for a case; d) making the recording of intervention mandatory; e) keeping judges accountable for life for the quality of the cases they adjudicated (Wang 2020d: 748; He 2021b: 53-61). The next section goes into more detail.

Although counterintuitive at first glance, empirical research has found that this reform has strengthened individual judges' autonomy and accountability, significantly eliminating opportunities for corruption and judges' means to shirk responsibility. The main reason is that individual judges are now responsible for life, making them more resistant to court leaders' intervention. In addition, the requirement to record interventions has made court leaders think twice about intervening because it is difficult to know how this will reflect on their performance

[2] A committee comprised of court leadership that meets to review case materials.
[3] A meeting with the adjudication judge or collegiate panel and the court leadership, e.g., their division chief and the court president.

evaluation. Leaving a record of intervention could potentially destroy their career prospects, as the unpredictable nature of future political climates could cast their past interventions in a negative light (He 2021b: 61-65). Another reason for this reform's success, i.e. improving accountability and autonomy, is the increased consolidation of political power under Xi Jinping, incentivising local institutions to follow central directives better and implement reforms more diligently. Without it, these reforms would probably not have been as successful (Wang 2020d: 764-765).

In sum, judicial reform since 2013 has tried to improve the status and operation of courts, improving its judicial services by being more transparent, consistent, and professional. Through these reforms, it has also tried to improve its position in the political-legal system. Based on the above literature and documentary review, these reforms were successful, but only to a certain extent. Much like Sun and Fu (2022: 2-5) argues, the paradox of judicial reform emerges upon examining the actual content: the political nature of China's legal system limits the extent to which the judiciary can be transparent, consistent, and accountable. Even though courts have a dual nature, they cannot serve two masters. The socio-legal scholarship also calls this the autocrat's legal dilemma: autocratic systems like China's need an efficient and effective legal system to secure compliance and regulation. However, they cannot empower courts and other institutions too much lest they challenge the regime's power (Jee 2022: 4-7). For this reason, during judicial reform, courts have had to reconcile tensions between transparency and public scandals, consistency and stability, and professional autonomy and political loyalty. These opposing tensions prevent courts from becoming too empowered.

In the next and last section of this chapter, I discuss one of the key procedural mechanisms courts use to maintain their dual nature and reconcile these tensions. I argue that the "trial oversight and management mechanism" (*shenpan jiandu guanli jizhi*, 审判监督管理机制) functions as a procedural entry-point that allows the party-state to penetrate the normative system and exercise its prerogative without undermining it. This internal judicial mechanism does not necessarily involve any interaction between political and judicial actors. The next section will first detail the ideology behind political oversight of the judiciary, how the mechanism works, and how the judicial responsibility reform changed it. In chapter 7, I discuss the role of technology in enhancing this mechanism.

2.4 Maintaining Duality: The Role of Oversight in Justice and Its Reform

2.4.1 The Ideology and Functioning of Oversight in Justice

Many systems and procedures exist to supervise the judiciary and control judicial decisions. Appeal and retrial procedures, a fundamental aspect of any judicial system, are also considered a way to "supervise" trial work in China.[4] Before the judicial accountability reforms, court leaders primarily supervised through the vertical hierarchy of the case-approval system. Chinese courts operate highly similar to a bureaucracy, with a clear hierarchy of command through a three-tiered vertical hierarchy: the collegiate panel at the lowest level, which functions as the basic adjudication unit.[5] A frontline judge, often a junior in rank, is expected to adjudicate routine cases independently but report more complex issues to the presiding judge. The presiding judge will report the case to the next tier for potentially more serious cases, namely the divisional meeting. At the meeting, the division chief, deputy chief, and more experienced judges may give their input on deciding the case. These meetings also play an important role in determining whether cases will be reported to the higher decision-making body within a court, namely the adjudication committee. Especially when senior staff anticipates a social controversy surrounding the case, the decision might become more political than purely legal (Ng and He 2017: 85-87). This explanation is not exhaustive but gives a basic understanding of how supervision worked in courts under the case-approval system. The above-described hierarchy also exists between a lower-ranked and higher-ranked court, which can guide and coordinate with the lower-ranked court to decide a case (Jiang 2018: 137-138).

The notion of political oversight as crucial to the administration of justice is born out of China's Marxist-Leninist-Maoist approach to justice, which advocates the "mass line" approach. This approach is characterised by informality and particularism, favouring mediation and settlement over litigation (Woo 1999). The party-state must be able to intervene and "correct errors" in judicial decisions when citizens petition to challenge final judgments. According to this approach, a

[4] See, e.g., Administrative Procedure Law of the People's Republic of China (2014), article 85 to 93; Criminal Procedure Law of the People's Republic of China (2012), article 216 to 234 and 241 to 247. This is one of the judiciary's methods to guarantee uniformity and quality of justice and central control over court work.

[5] Collegiate panels are not permanent bodies but organised to adjudicate individual cases. A collegiate panel is composed of three to seven judges, the number of which must be odd. Simple civil cases, economic cases, minor criminal cases and cases that are otherwise provided for in law can be tried by a single judge. The presiding judge of the panel is appointed by the president of the court or the division chief. When a president or a division chief participates in a trial, they shall be the presiding judge of the panel. See: Organic Law of the People's Courts of the People's Republic of China (2018), article 29 to 34.

judgment's political correctness is more important than preserving its finality (Woo 1991). Especially in the early stages of China's legal development, it was a "pragmatic response to the problem of how to overcome shortcomings in the judiciary at an early stage of institutional development" (Peerenboom 2006: 69).

From this ideological perspective, supervision is a so-called "last line of defence" to ensure social fairness and justice, guarantee trial efficacy, standardise judicial behaviour, prevent judicial corruption, and overcome judicial unfairness. Even though appealing serves a similar function, supervision is deemed more trustworthy because of the Marxist-Leninist nature of the political-legal system (Shen 2001: 16; Jiang 2011: 4). Additionally, it serves as an institutional check on individual judges and offers the required flexibility to bring decisions in line with the external policies of the central government. The idea is that court leaders (i.e., the court (vice-) president, division (vice-) chief), being senior court members with political responsibilities, have a better idea of how to decide sensitive cases.

However, this approach to justice also means that party officials within and outside courts could involve themselves in cases by giving (oral) instructions to their subordinates. Party leaders refer to party members who hold positions in decision-making bodies. They often hold multiple key positions in government. They enjoy full entitlement and legitimacy to participate in the judicial process whenever they deem the issue concerns the party's interests, which is defined extremely broadly. A party leader's subordinate includes court leaders, who would relay the instructions further down the hierarchy until they reached the judge directly handling the case (Li 2012: 854-855). This practice was especially prevalent under Hu Jintao, where party-state officials would pressure courts to change decisions to appease the public (Liebman 2011: 272). However, the reforms under the Xi Jinping administration have reduced this (Finder 2015).

Therefore, supervision in China's judicial system refers to internal administrative mechanisms in a legal court that allows court leaders to monitor and guide trial activities when necessary *and* supervision by higher-ranked courts. It does not necessarily involve interaction between party officials and judges. However, court leaders are also party members and consider political concerns when supervising sensitive cases because they bear political responsibilities (Finder 2015). Much like Clarke (2022: 9-10) has argued, judicial officers consider the prerogative

of the party-state while operating the normative system. In this sense, courts are firmly embedded within the prerogative state (Ng and He 2017: 121-141).

It bears reminding that the type of influence exercised through this mechanism is "allowed, preferred, and even urged by the regime" (He 2021b: 51). It implies that an individual judge should decide cases without interference from government agencies, social groups and other individuals, but not necessarily from their collegiate panel or adjudication committee (Jiang 2011: 138). However, it also bears repeating that "a great majority of the cases handled by the Chinese courts are routine and straightforward". A single judge tries these cases, and the decision is final (Ng and He 2017: 87).

Due to its highly opaque and discretionary character, the case-approval system was extremely vulnerable to abuse, leading to widespread corruption, unaccountability, and unlawful interference in adjudication (Gong 2004; Li 2012). As discussed before, this significantly undermined the legitimacy and credibility of courts. The previous section discussed how accountability reforms have been generally successful in curbing judicial corruption and undue interference. In the next subsection, I examine how this has affected the "trial oversight and management mechanism".

2.4.1 Changes to Oversight Since the Judicial Responsibility Reform

Despite its success in improving the autonomy of individual judges, the judicial responsibility reform also generated several issues regarding supervision. The ensuing tensions are unsurprising, as the aims of judicial responsibility reform and supervision fundamentally contradict each other. The initial document launching this reform captures this contradiction. On the one hand, it gives adjudicating judges the authority to issue judgments independently without needing the approval of their superiors. It prohibits court leaders from reviewing and issuing judgments on cases they did not hear themselves (SPC 2015a: article 6).

On the other hand, it asks court leaders to fulfil their "trial oversight and management" duties diligently. It gives court leaders "the right to request the individual judge or collegiate panel to report the progress of a case and the results of the review" in the following circumstances:

1. cases that involve group disputes that may affect social stability;
2. cases that are difficult and complicated, and have a significant impact on society;
3. cases that may conflict with a decision of the court or a higher-ranked court; and

4. cases that involve reports of violations by the adjudicating judge.

These cases are called the "Four Types of Cases" (*silei anjian,* 四类案件) (hereinafter "Four Types"). Where a case gets identified as one of the four types above, court leaders may ask the adjudicating judge to report on this case. Where court leaders disagree on the trial process with the adjudicating judge, they must submit the case to a professional judge meeting or adjudication committee for discussion. Any advice is non-binding and must be recorded and included in the case file (SPC 2015a: article 24).

In summary, the previous case-approval system gave court leaders substantial discretion in deciding the outcome of a case because the judgment was only valid once they signed off on it. With the accountability reforms, court leaders lost this power. Additionally, they can no longer give oral instructions individually. However, where a case is deemed sensitive, court leaders can still get involved in the process and keep up to date with the case's progress. Court leaders can now only issue non-binding advice via a professional judge meeting or the adjudication meeting. Moreover, it is mandatory to record this advice. This mechanism is "trial oversight and management", i.e., the responsibility to supervise the full process of sensitive cases (Li and Chai 2020: 53-54).

This new situation created tensions: "A contradiction emerged between the independent operation of judicial power and the oversight and management of trials" (Long and Sun 2019: 38). This contradiction lies in the fact that the responsibility reforms gave frontline judges more autonomy in performing their trial responsibilities, while one of the primary responsibilities of Chinese court leaders is ensuring the political correctness of their subordinates' work.[6] The most important goal of the entire judicial reform in the past decade has been to strengthen party leadership (see, e.g., Finder 2020b; Daum 2021). These goals naturally clash with the new autonomy judges are supposed to enjoy. It has led to inertia among court leaders, who became unwilling or afraid to fulfil their oversight duties and responsibilities. According to Chinese empirical scholarship, court leaders thought exercising their oversight powers might be considered undue interference by their superiors (Long and Sun 2019: 38-39; Wang 2020a: 130).[7] As a result, court leaders were

[6] PRC Organic Law of People's Courts (2018), article 41.

[7] Courts are responsible to the People's Congress of the corresponding level and are also supervised by higher courts. See: PRC Organic Law of People's Courts (2018), article 9. In China's judicial system, a court leader (i.e., division

concerned that adjudicating judges enjoyed too much power, that this was exacerbating inconsistencies in decisions, and that they were losing control over sensitive cases (Zheng 2019: 59; Wang 2020d: 759-760; He 2021b: 66).

The primary cause of this contradiction lay with the ambiguity and vagueness of court leaders' new oversight responsibilities and duties (Zhao and Zhou 2020: 11). This ambiguity and vagueness manifest the deeper-seated tension between the opposing requirements of courts, as explained in section 2.2. The Judicial Responsibility Opinion (SPC 2015a) remained vague about the exact content and scope of the above sensitive cases. The document did not specify the measures court leaders could take as part of their oversight duties and responsibilities. Therefore, the challenge of further reforming judicial responsibility and the "trial oversight and management" mechanism boiled down to "correctly dealing with the relationship between the delegation of [adjudication] power and oversight" (Zhou 2019: 8).

To address this problem, the SPC issued a series of subsequent documents to refine and clarify the different responsibilities and duties for all court staff (SPC 2017b, 2018a, 2020b). They also provided lists of powers and responsibilities for court leaders, specifically stating that performing these duties when following procedures and within the scope of the list would not constitute undue interference (SPC 2018a: article 13). It was supposed to reassure court leaders that their intervention was not illegal and, therefore, punishable if they followed the correct procedures. These central documents also tasked local courts with formulating detailed rules further to demarcate court leaders' exact powers and responsibilities.

In response, different courts issued various implementation measures, regulations, and checklists to flesh out court leaders' oversight duties and responsibilities. For example, in 2019, the Shenzhen Intermediate People's Court issued a series of "trial oversight and management checklists" that detail the exact boundaries and scope of court leaders' oversight responsibilities to ensure that they "accurately grasp the boundaries and content of oversight and management, and eliminate the worry of court leaders that oversight is exercised without legal authority […]" (Peng 2019).[8]

chief or court (vice-) president) is an administrator and political official who is firmly embedded in an administrative and political hierarchy. Therefore, they are also responsible to a higher-ranked official who supervises their work.

[8] See also: Shenzhen Intermediate People's Court Research Group (2019) "Research on the Construction of New Trial Oversight and Management Mechanism," pp. 27-32. Document on file with the author. These documents carry titles

In 2018, the Hunan Provincial High Court issued the *Measures to Implement Further Court Leaders' Trial Oversight and Management Duties (Provisional)* (Han 2018), refining the exact content and scope of the "Four Types of Cases" as well as the measures a court leader may take. Similarly, in 2019, the Jilin Provincial High Court issued the *Measures to Regulate the Trial Oversight and Management Duties of Court Leaders (Provisional)*, stipulating oversight measures and prohibiting other actions for court leaders (Wang and Chang 2019; Quan 2021). Likewise, in 2018, the Ningxia Autonomous Region High Court issued the *Measures to Implement Further Court Leaders' Trial Oversight and Management Duties (Provisional)* to do the same (NHC 2018).

Finally, in November 2021, the SPC issued national clarifications, taking steps towards institutionalising and codifying the mechanism of "trial oversight and management".[9] The SPC claimed that some courts neglected oversight duties, some inappropriately expanded the "Four Types" scope, and others had reinstated the case-approval system in all but name. They also mention the above-described concerns that court leaders had, such as fear of being seen as illegally interfering with a case (Liu et al. 2021).

Article 10 of the *Guiding Opinion on the Oversight and Management of "Four Types of Cases"* shows the options available. Among others, a court leader may:

- request the judge or collegiate panel to report on the progress of the case;
- review the case material;
- attend and observe court hearings;
- request the individual judge or collegiate panel to reconsider their judgment and report on it;
- decide to submit the case to a professional judges meeting or adjudication committee for discussion;
- decide to report a higher-ranked court, and

such as *List of Court Leaders' Oversight Powers of Single Cases* and *List of Approved Items for the Court Leaders*. Unfortunately, these documents are not publicly available.

[9] The development of this Guiding Opinion followed the typical trajectory of judicial reform in China: the SPC issues Opinions to initiate reforms, leaving it up to the local courts to fill in many of the details. After a few years of trial and error, it centralises the experience and issues its own Guiding Opinion to consolidate the developed practices and procedures.

- any other necessary oversight and management measure appropriate to the court leader's position.

The court leaders must exercise the above measures within the scope of their authority, "which does not constitute interference or prying into cases in violation of provisions" (SPC 2021a: article 10).

It is the first time a central document has stipulated the measures that constitute "trial oversight and management" under the new accountability system. Therefore, although the Guiding Opinion (SPC 2021a) makes substantial progress in improving the "trial oversight and management" mechanism, some questions remain unanswered. For example, the Guiding Opinion does not incorporate a list of prohibited actions in the Jilin High Court Measures. In addition, it does not explicitly prohibit court leaders from giving oral instructions to adjudicating judges, which previously was the primary way to exercise influence over cases. Neither does the Guiding Opinion (SPC 2021a) specify the procedures for recording the oversight. Article 7 also allows court leaders to apply "trial oversight and management" measures to specific cases outside the scope of the "Four Types", even including the phrase "or where it is otherwise necessary to apply [these measures]".

Additionally, the document changed the meaning and scope of the "Four Types", elaborating on each type of case (articles 2 to 6). Other courts now have to amend their implementation measures to comply with this central Guiding Opinion but do get a certain margin to adjust to local conditions (article 15). The Guiding Opinion stays silent on what cases trigger specific measures, so in reality, a court leader is likely free to choose whichever measure they prefer to fulfil their oversight duties. The last measure also leaves some discretion to court leaders in deciding how to exercise their oversight powers exactly. Therefore, the Guiding Opinion leaves some crucial issues unaddressed, and court leaders maintain a certain degree of discretion. As one observer commented, as long as there is no complete set of procedures for the entire system of oversight, guidance, and review of cases, it remains unstable (Liu 2021). However, from the party-state's perspective, this vagueness and discretion are required to allow courts to fulfil their political tasks. Although incomplete, these developments emphasise institutionalising and codifying the "trial oversight and management" mechanism. In addition, the Guiding Opinion consolidates and unifies the new procedures: lower-ranked courts have to amend these procedures to fit with national directives.

Chinese scholars claim that these reforms have turned the oversight mechanism, previously highly opaque and discretionary, into a transparent and rule-bound process with clear delineation between adjudication powers on the one hand and oversight powers on the other hand (Li and Chai 2020: 51; Zhao and Zhou 2020: 10).[10] Other researchers remain sceptical. For example, the rules for "trial oversight and management" obligate court leaders to record their intervention and include it in the case file when performing their oversight duties (SPC 2017b: article 5; 2021a: article 11). However, He (2021b: 61) finds that, lawful or not, court leaders in their surveyed courts avoid registering the intervention. This is because court leaders and political leaders remain powerful and have large discretion over the career trajectory of judges, so they have the leverage to dissuade an adjudicating judge from recording the intervention. Moreover, the recording of intervention may trigger a formal investigation and jeopardise the careers of everyone involved. Despite this legitimate scepticism, this obligation alone has made a difference, according to Wang (2020d: 753), compelling court leaders to think twice about intervening.

In sum, it is safe to argue that institutionalising and codifying the "trial oversight and management" mechanism was necessary to maintain the dual character of courts, given the rampant abuse in the pre-2014 reform era. Courts needed to improve independent adjudication while at the same time guaranteeing they were still able to fulfil their political tasks. The key to doing this is to identify cases that require intervention, which is very difficult. Therefore, courts needed to carefully insulate individual judges from "unwanted" interference, i.e., illegitimate and illegal, while also keeping open a window, albeit tightly circumcised and controlled, to allow the Chinese party-state, represented by court leaders, to intervene whenever they deem the party's bottom line is affected.

2.5 Conclusion

This chapter is a first step in understanding how normative and ideological ideas in China shape SCR. It provided a theoretical explanation for the nature of law and courts in China and contextualised the past decade of judicial reform in this framework. It has helped us understand why courts find themselves between a rock and a hard place: ironically, the tension between, on the one hand, fulfilling their political tasks and, on the other hand, using the law undermines their

[10] These claims do not relate to the 2021 Guiding Opinion, which came after the publication of this research.

governance capacity to ensure compliance and regulate and popular confidence in and support of courts.

This tension stems from their dual function in authoritarian regimes. On the one hand, they are political institutions that need to maintain stability. On the other hand, they are also supposed to adjudicate private disputes based on law. This tension has undermined their capacity to deliver justice, causing popular distrust in the legal system as a genuine dispute resolution channel. Judicial reform has tried to improve this situation of low efficiency and trust through a series of initiatives relating to transparency, consistency, and accountability.

Nonetheless, judicial reform in an authoritarian regime has its limits: it cannot progress far enough to the point that courts become fully independent institutions that can pose legitimate constraints on the prerogative of the party-state. Therefore, the normative system is always bound by the party-state, and it is the prerogative of the party-state to determine these boundaries. This constitutes the tension that exists in the judiciary's dual function, as well as the paradox of judicial reform.

Through a deeper examination of a specific internal mechanism, I show the limitations of these reforms. The "trial oversight and management mechanism" can be considered a procedural entry point through which the prerogative state can enter the normative system without undermining it. However, this mechanism was a double-edged sword because it undermined courts' legitimacy and proper functioning as adjudicators of legal disputes. Therefore, judicial accountability reforms aimed to improve this mechanism by institutionalising and codifying it.

However, as discussed, Chinese courts still have difficulties distinguishing this "red line", and the reforms have not yet fully erased all opportunities for "unwanted interference". In this sense, judicial reforms are always incomplete. Therefore, maintaining duality in China's political-legal system is as hard as balancing a tightrope. These balancing issues also persist in other judicial reforms relating to transparency, consistency, and fairness. In the coming chapters, I explore how this shapes the goals of SCR. I argue that SCR is seen as a pathway to break through these structural barriers that the dual nature of courts poses to reform.

However, first, I turn to SCR itself. Before I analyse how ideological and normative ideas shape SCR, it is important to understand what SCR entails. Therefore, the next chapter provides a comprehensive review of this reform.